

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1 {York Stenographic Services, Inc.}

2 RPTS BURDETTE

3 HIF192.160

4 ``IMPROVING FCC PROCESS''

5 THURSDAY, JULY 11, 2013

6 House of Representatives,

7 Subcommittee on Communications and Technology

8 Committee on Energy and Commerce

9 Washington, D.C.

10 The Subcommittee met, pursuant to call, at 10:35 a.m.,
11 in Room 2123 of the Rayburn House Office Building, Hon. Greg
12 Walden [Chairman of the Subcommittee] presiding.

13 Present: Representatives Walden, Latta, Blackburn,
14 Scalise, Lance, Kinzinger, Long, Ellmers, Barton, Eshoo,
15 Dingell and Waxman (ex officio).

16 Staff present: Ray Baum, Senior Policy Advisor/Director

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee’s website as soon as it is available.

17 of Coalitions; Sean Bonyun, Communications Director; Matt
18 Bravo, Professional Staff Member; Andy Duberstein, Deputy
19 Press Secretary; Neil Fried, Chief Counsel, Communications
20 and Technology; Kelsey Guyselman, Counsel, Telecom; Gib
21 Mullan, Chief Counsel, Commerce, Manufacturing and Trade;
22 David Redl, Counsel, Telecom; Charlotte Savercool, Executive
23 Assistant, Legislative Clerk; Phil Barnett, Democratic Staff
24 Director; Roger Sherman, Democratic Chief Counsel; Shawn
25 Chang, Democratic Senior Counsel; Margaret McCarthy, Democrat
26 Staff; Kara van Stralen, Democratic Policy Analyst; and
27 Patrick Donovan, FCC Detailee.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
28 Mr. {Walden.} I will call to order the Subcommittee on
29 Communications and Technology and open our hearing on
30 ``Improving FCC Process Reform.''

31 The communications industry is one of the few sectors
32 still firing on all cylinders in this economy, averaging \$80
33 billion a year in investment since 1996. It cannot continue
34 to do so, however, if faced with poor FCC process. As Blair
35 Levin, a previous FCC chief of staff and architect of the
36 National Broadband Plan, has lamented, and I quote, ``The FCC
37 is becoming more of a political institution and less an
38 expert agency.''

39 Former Chairman Genachowski did make progress in
40 reforming the Commission but there is more to do. The agency
41 has fallen short in the past under both Democratic and
42 Republican administrations. Without codification of certain
43 protections, it will undoubtedly do so again. Only statute
44 can ensure good process from the commission to the next
45 commission. That is why we are discussing two draft bills
46 today designed to minimize the potential for procedural
47 failings, to curb abuse, and to improve agency decision

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

48 making.

49 The FCC Process Reform Act passed the House as H.R. 3309
50 in the last Congress on a 247-174 bipartisan vote. Contrary
51 to the assertions of some, it does not change the public
52 interest test nor strip the FCC's authority to protect
53 consumers and competition. It merely asks the agency to do
54 what we ask of most grade-school students: show your work,
55 to publish the specific language of proposed rules, to
56 identify a market failure or actual consumer harm, and
57 conduct a cost-benefit analysis before regulating; to give
58 commissioners, parties, and the public an adequate
59 opportunity to review proposed rules; to publish the text of
60 decisions promptly and examine whether adopted rules are
61 meeting their purpose; to set ``shot clocks'' to ``give the
62 parties and the public more confidence that the agency is
63 acting with dispatch,'' as Commissioner Pai put it in his
64 recent statement on the Softbank-Sprint-Clearwire
65 transaction.

66 Many of these ideas can be found in President Obama's
67 2011 Executive Order on Improving Regulation and Regulatory
68 Review, which binds executive branch agencies but,

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

69 unfortunately, not to the FCC. And remember that in my
70 States, public utility commissions already operate under much
71 of what is proposed in this legislation. This is not unusual
72 in America but it is in Washington. The draft bill also
73 requires any transaction conditions to be narrowly tailored
74 to transaction specific harms and otherwise within the FCC's
75 jurisdiction. This was in the bill before Mr. Wheeler was
76 nominated as FCC Chairman, but his blog about the AT&T and T-
77 Mobile merger reinforces the need. In it he notes that the
78 Communications Act does not currently prohibit the FCC from,
79 and I quote, ``imposing merger terms and spectrum auction
80 rules that might seem to be regulation in another guise.''
81 This is precisely what the transaction review process should
82 not be used for: back-door rulemaking.

83 Despite what you may hear, the bill does not dictate the
84 outcome of a transaction review or alter the public-interest
85 standard. The FCC can still find a proposed merger to be
86 inconsistent and against the public interest and it can deny
87 that transaction or adopt tailored conditions to remedy the
88 specific condition.

89 Now, some opponents argue implementing this bill would

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

90 be difficult and will lead to litigation. Well, that is not
91 true either. Most of the provisions rely on established
92 definitions and accepted concepts under the Communications
93 Act, the APA, and other law. And rather than micromanage the
94 agency, the bill largely establishes principles and gives the
95 FCC flexibility on how to implement them. I would
96 nonetheless be happy to work with anyone who has a good-faith
97 interest in improving the language as we did leading up to
98 the final version of the bill that passed the House.

99 Others say it would be unwise to apply these types of
100 reforms except government wide in the context of the
101 Administrative Procedure Act. Well, that would be fine with
102 me, but this committee doesn't have that jurisdiction over
103 the whole APA, and we need to start somewhere in Washington
104 to reform government. Since the FCC oversees a huge and
105 growing part of the economy, it seems a worthy candidate to
106 commence the discussion.

107 Now, the second draft bill, the FCC Consolidated
108 Reporting Act, passed the House as H.R. 3310 last Congress by
109 voice vote--by voice vote. The legislation looks to relieve
110 burdens on the agency and make its reports more meaningful.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

111 It does so by consolidating eight statutorily mandated
112 reports into one biennial review and eliminates 12 outdated
113 studies, like one on the telegraph industry. The existing
114 reports are cumbersome and often unnecessary. A recent
115 Government Accountability Office study on the video
116 competition report, for example, concluded that the reports
117 may not be needed on an annual basis, ``especially given
118 demand on FCC staff's time for other monitoring and
119 regulatory duties.'' The proposed consolidated report will
120 help break down siloed thinking and present a more useful
121 picture of the marketplace upon which to base policy
122 judgments.

123 Now, I know there are some that have said there is no
124 reason for this committee to spend its time on these efforts,
125 and why would we take up these issues again when the Senate
126 probably won't agree. We are here to reform government. We
127 are here to make changes. We are not here to defend the
128 status quo. And if the United States Senate wants to
129 continue to have the Federal Communications Commission do its
130 telegraph report, well, fine with them, but that is not what
131 we are about. The last thing that we want to do is stifle an

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee’s website as soon as it is available.

132 industry that is continually growing and innovating. Yet
133 that is exactly what could happen if the FCC is not held to
134 certain standards of decision-making. The industry deserves
135 an efficient and effective regulator we can truly call
136 expert, just as the public deserves a transparent and
137 accountable federal government, and these reforms are a good
138 place to start.

139 [The prepared statement of Mr. Walden follows:]

140 ***** COMMITTEE INSERT *****

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
141 Mr. {Walden.} With that, I would yield back the balance
142 of my overused time and recognize my friend from California,
143 Ms. Eshoo for an opening statement.

144 Ms. {Eshoo.} Thank you, Mr. Chairman, and good morning
145 to you, and welcome to all of the witnesses. Former
146 Commissioner McDowell, it is always a pleasure to see you and
147 have you with us.

148 Just 2 weeks ago, Mr. Chairman, we had bipartisan
149 consensus on the need to focus on how federal agencies use
150 spectrum. Today, we are returning to legislation that this
151 subcommittee has debated for 3 straight years. It hasn't nor
152 in my opinion will it go anywhere. Administrative law
153 experts tell us it would tie the FCC up in years of
154 litigation, and I think it really contains some policies that
155 are not good policies. This proposed process reform, in my
156 view, is a back-door way of gutting some of the FCC's very
157 important authorities.

158 Congress created the FCC to safeguard the public
159 interest. Big corporations, as we know, are well equipped to
160 advance their private interests, and they have every right to

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

161 do so, but consumers need advocates and competitors and
162 innovators need a referee to level the playing field.

163 As we all know, the FCC faces an enormous set of
164 challenges in the coming years including the upcoming
165 voluntary spectrum auction, the transition to IP and the
166 modernization of the e-rate program in our Nation's schools
167 and libraries. Our role as a subcommittee, I think, should
168 be to ensure that the agency is equipped with the tools to
169 meet these challenges while ensuring that the FCC can
170 continue to protect the public interest and preserve
171 competition. I am going to repeat that: preserve
172 competition in the communications marketplace. If we really
173 want to accomplish meaningful reform, I think we should start
174 with a proposal that enjoys nearly universal support
175 including that of the acting chairwoman of the FCC,
176 Commissioners Pai and Rosenworcel, and former FCC
177 Commissioners Abernathy, Copps and McDowell.

178 The FCC Collaboration Act of 2013, H.R. 539, is
179 bipartisan, it is bicameral, and it will allow FCC
180 commissioners to more easily collaborate with one another
181 outside of public meetings. As the FCC increasingly responds

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

182 to complex, highly technical issues, I think now is the time
183 to get this legislation passed and signed into law. We just
184 shouldn't delay anymore. It is really a source of
185 embarrassment. Everyone is for it. We can get it done.

186 Secondly, I support allowing commissioners to appoint
187 the electrical engineer or computer scientist to their staff
188 that some of them have asked for. This is a bipartisan
189 proposal offered in the last Congress by former
190 Representative Stearns.

191 Third, I support the creation of an online searchable
192 database of consumer complaints, an idea advanced by the
193 ranking member of the full committee, Mr. Waxman, in the
194 previous Congress, and finally, I agree that there could be
195 opportunities to streamline many of the reporting
196 requirements that Congress has placed on the FCC. We are now
197 in the seventh month of the 113th Congress, but only one bill
198 has moved through our subcommittee. Instead of working on
199 legislation that creates billable hours for Washington
200 telecom lawyers, I think that we need to work together to
201 craft policies that are actually going to move, that will
202 create jobs for innovators, promote investment in

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

203 infrastructure across our country, and technological advances
204 that will help American families.

205 So I thank each of our witnesses that are here today. I
206 know that we tried to get some of the opposite sex to show
207 up. I know that they are alive and well out there, but for
208 one reason or another, they couldn't, but I want, if the
209 public is listening in, not to think that we have overlooked
210 that, and again, I want to thank you for working with our
211 subcommittee to help drive competition, promote innovation
212 and protect consumers.

213 And with that, I will yield back the balance of my time,
214 Mr. Chairman.

215 [The prepared statement of Ms. Eshoo follows:]

216 ***** COMMITTEE INSERT *****

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
217 Mr. {Walden.} I thank the gentlelady, and I am going to
218 ask for a moment of personal privilege now to acknowledge the
219 service of our committee chief counsel, Neil Fried, who will
220 be leaving the subcommittee soon to work for the Motion
221 Picture Association of America. Neil has rendered
222 outstanding service to this subcommittee for 10 years. He
223 served as subcommittee counsel under full committee Chairmen
224 Townsend, Barton and Upton, and subcommittee Chairmen Upton,
225 Stearns and myself. He has been part of rewriting the
226 Satellite Home Viewer Act so many times that well, he is
227 going to avoid it this time, I think. Three times he has
228 been there to help rewrite the Home Viewer Act. As a
229 legislative rock star for the committee, his knowledge and
230 expertise will be missed, but I know he will become a legal
231 movie star for the MPAA. Neil, thank you for your service to
232 this committee and to this country. I would have hoped on
233 his final day here we would have him actually at the witness
234 stand so we could have him under oath.

235 I thank the committee for that indulgence, and now I
236 would recognize the vice chair of the committee, Mr. Latta,

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

237 for 5 minutes.

238 Mr. {Latta.} Well, thank you, Mr. Chairman, and I will
239 not take my 5 minutes, but I want to thank you for holding
240 this hearing on ``Improving the FCC Process'', and I
241 appreciate our witnesses for being here today. I really
242 appreciate that.

243 The cost of regulation to American businesses and hence
244 our economy is too great to ignore. Regulatory burden is the
245 number one issue I hear from everyone that I visit in my
246 district, and it is amazing when you have all the different
247 issues out there, the number one issue from everyone, and I
248 have done 250 visits in my district of factories and
249 businesses since the last August work period, it is
250 regulations.

251 Unfortunately, these job creators, many of them small
252 businesses, are holding back from doing what they do best,
253 and that is driving the economy and actually creating jobs,
254 in part because of the burdensome regulations that are
255 imposed.

256 I have reintroduced my FCC ABCs Act from last Congress
257 requiring the FCC to perform cost-benefit analysis on

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

258 economically significant rules, and I appreciate the chairman
259 including this idea in his discussion draft. Additionally,
260 my bill would also reform the Commission's forbearance
261 authority and biennial review of regulations by adding an
262 evidentiary presumption in order to empower the FCC to arrive
263 at more deregulatory decisions.

264 With the telecommunications industry driving a
265 significant portion of the economic growth in our country, as
266 Members of Congress, we should make sure that the FCC does
267 not produce regulations that will hamper this sector of the
268 economy, and again, Mr. Chairman, I thank you and I yield
269 back the balance of my time.

270 [The prepared statement of Mr. Latta follows:]

271 ***** COMMITTEE INSERT *****

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
272 Mr. {Walden.} The gentleman, I think, wants to actually
273 yield to the gentleman from Texas, Mr. Barton--

274 Mr. {Latta.} I am sorry, and I yield to Mr. Barton.

275 Mr. {Walden.} --for such time as he may consume.

276 Mr. {Barton.} I thank the gentleman from Ohio.

277 I think it is about time that Neil got a real job. We
278 wish him well. Honestly, he is a great guy.

279 Mr. Chairman, I have introduced FCC reform legislation
280 in the last three Congresses, two Congresses ago, as the
281 ranking member in the minority and last Congress with a
282 subcommittee Chairman Stearns, and of course, I am happy to
283 be on these two bills today.

284 I seldom disagree very strongly with the ranking
285 minority subcommittee leader, Ms. Eshoo, on too many issues,
286 but I do disagree with her on this. I fail to see how more
287 openness and transparency, which is primarily what these two
288 bills do--I mean, there are other things in the bills--but it
289 is basically an attempt to get more certainty in the
290 rulemaking process and more openness and transparency so that
291 the stakeholders can understand what the commissioner at the

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

292 FCC are doing. I don't see that as a negative. I see that
293 as a positive.

294 So as you pointed out in your opening statement, Mr.
295 Chairman, one of these bills passed the House and maybe both
296 of them in the last Congress, so maybe this is the year of
297 the Congress that we actually get it through the Senate and
298 the President signs it. If you look at what has happened at
299 NSA and you look at what is happening with the IRS and you
300 look at what has happened at the Justice Department, I would
301 think those that are interacting with the FCC would want
302 bills like these two because I think they are much better for
303 the American people if we modernize and make more transparent
304 their actions.

305 With that, I will yield to somebody else or yield back
306 my time.

307 Mr. {Walden.} I think Ms. Blackburn had requested--

308 Mr. {Barton.} I will yield to the gentlelady from
309 Tennessee.

310 [The prepared statement of Mr. Barton follows:]

311 ***** COMMITTEE INSERT *****

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
312 Mrs. {Blackburn.} Thank you so much, and I want to
313 welcome our panel because we are appreciative that you would
314 take your time and be with us.

315 And Mr. Chairman, I want to thank you for so diligently
316 pursuing FCC reforms. It is needed. I will tell you, only
317 in Washington, D.C., does it seem to be acceptable for
318 federal agencies to be careless or reckless or unaccountable
319 for taxpayer dollars or to oppose reforms or efficiencies or
320 ways that are going to allow the customers, the end users to
321 be better served. So I do look forward to this.

322 We have all heard and have grown weary, it seems like
323 there is a scandal and misuse of taxpayer funds every week,
324 whether it is the IRS or Department of Labor or Department of
325 Justice. The list goes on and on--EPA. So putting this
326 issue forward is appropriate, it is timely, and we appreciate
327 that you all would be here to give us your best thoughts and
328 recommendations, and I yield back.

329 [The prepared statement of Mrs. Blackburn follows:]

330 ***** COMMITTEE INSERT *****

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
331 Mr. {Walden.} The gentlelady yields back. All time is
332 expired on our side. We will turn now to the gentleman from
333 California, Mr. Waxman, for an opening statement.

334 Mr. {Waxman.} Thank you, Mr. Chairman. I want to begin
335 by also thanking Neil Fried for his service on this
336 committee, and I wish him well in his new position. I hope
337 at the MPAA he will have occasion to visit my district more
338 often and understand the problems of real people.

339 Mr. {Walden.} You two can travel together.

340 Mr. {Waxman.} Today the subcommittee revisits a topic
341 that deeply divided our committee last Congress: the so-
342 called FCC process reform. Supporters of this legislation
343 assert that this bill will make the Federal Communications
344 Commission more transparent and efficient. From our
345 perspective, it is transparent that this legislation is an
346 effort to undermine the agency's ability to adopt new rules,
347 protect consumers, and promote competition, and the only
348 efficiency gained is the speed with which communications
349 lawyers could find new ways to take the FCC to court.

350 The bill circulated by Chairman Walden earlier this week

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

351 includes the same defects as the legislation from last
352 Congress. It still undermines the ability of the FCC to act
353 quickly and efficiently by putting in statute a dozen new
354 mandatory process requirements, with each one subjecting the
355 FCC to new court challenges. And it still alters
356 fundamentally the agency's authority to impose conditions
357 during its transaction review process, effectively
358 eviscerating the public-interest standard that has guided the
359 FCC for nearly 80 years.

360 The red tape created by this legislation is astounding.
361 The Congressional Budget Office estimated that implementing
362 the legislation from last Congress would require 20
363 additional staff positions at the FCC and cost the agency
364 millions of dollars every year. I don't see that there is an
365 abundance of extra funds to devote to this purpose. And the
366 updated draft is even worse than last year's bill. It
367 contains new provisions that would further incapacitate the
368 agency.

369 Ranking Member Eshoo and I asked committee staff to
370 consult with administrative and communications law experts to
371 understand the impacts of the legislation. The overwhelming

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

372 consensus from the independent experts we spoke with was that
373 adoption of this legislation would be a serious mistake that
374 would slow the FCC to a crawl. They told us that the FCC-
375 specific mandates in this bill would remove the Commission
376 from the well-established precedents of the Administrative
377 Procedure Act, which could lead to decades of litigation and
378 breed uncertainty and confusion. The agency would be tied up
379 in knots and unable to do much of anything except report to
380 Congress on its adherence to deadlines.

381 I am pleased we will be able to hear from two of these
382 experts today: Professor Richard Pierce of the G.W. Law
383 School and Professor Stuart Benjamin from Duke Law School.
384 Professor Pierce is one of the leading authorities on
385 administrative law in the nation. He literally wrote the
386 textbook on this topic. Professor Benjamin brings to us a
387 unique perspective as an expert in both telecommunications
388 law and administrative law who has spent time working at the
389 FCC as a Distinguished Scholar. I also welcome back to the
390 Committee Mr. McDowell, Mr. May and Mr. Ramsay.

391 Let me reiterate what I hope is obvious. Democrats are
392 open to improving federal agency operations and efficiency,

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

393 and the FCC is no exception. We proposed several reforms
394 last Congress and will do so again this Congress. If there
395 are sensible ways to make the agency more efficient and
396 nimble, we should join together to do so. But we seriously
397 disagree about the wisdom of the current effort, and I hope
398 the majority will reconsider its plans to push this through
399 the House. We do far too many message bills that go nowhere
400 in the Senate.

401 We have a real opportunity to enact meaningful
402 bipartisan legislation that modernizes our communications and
403 technology laws but every day we spend arguing over this
404 bill, which is going nowhere fast, is another missed
405 opportunity.

406 Thank you, Mr. Chairman.

407 Mr. {Walden.} Will the gentleman yield for just a
408 second on the APA issue?

409 Mr. {Waxman.} Yes.

410 Mr. {Walden.} Because if you look at the last section
411 of the draft bill, we don't change anything on APA except for
412 the Sunshine Act, that you all support. Just as a matter of
413 clarification, nowhere else in the Act do we change the APA

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

414 directly. It is only the Sunshine Act.

415 Mr. {Waxman.} Well, Mr. Chairman, I will be pleased to
416 listen to what the witnesses, who are suggests in this area,
417 have to think about what changes there are in the APA. This
418 would be a serious matter, and I seem to sense that you think
419 it is serious as well.

420 Mr. {Walden.} I would just direct you to line 5, page
421 25, section 6, effect on other laws: ``Nothing in the Act or
422 the amendment made by this Act shall relieve the FCC from any
423 obligations under Title V, U.S.C. Code, except where
424 otherwise expressly provided,'' and that is the Sunshine Act.

425 Mr. {Waxman.} Mr. Chairman, reclaiming my time, as I
426 understand it, it removes the Administrative Procedure Act
427 from the FCC and creates another set of laws under which it
428 would operate that is similar to the Administrative
429 Procedures Act but is different, and I want to get that point
430 clarified in this hearing. I think this is why we have
431 hearings.

432 [The prepared statement of Mr. Waxman follows:]

433 ***** COMMITTEE INSERT *****

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
434 Mr. {Walden.} That is exactly why we have hearings, and
435 even for bills that go forward.

436 Let me suggest that we have 11 minutes left in the vote,
437 so rather than start with one person's testimony, I would
438 recommend that we recess the committee now until after votes.
439 So I know you are all poised and ready to go, and we
440 appreciate it, but I think it is probably best for the flow
441 of the testimony that we recess until we return from votes
442 immediately. Thank you.

443 [Recess.]

444 Mr. {Walden.} If we could have everybody take their
445 seats, we are going to restart the hearing and hear from our
446 witnesses. I apologize for the delay, and they do expect
447 votes again right around noon, so hopefully we can at least
448 get through the statements of our distinguished panel
449 members, and we will start off with Mr. Downes, who is an
450 Internet industry analyst and author, and we welcome you to
451 the Subcommittee on Communications and Technology, and go
452 ahead and turn that mic on, pull it up close, and we look
453 forward to your testimony on this matter. Thank you, sir.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
454 ^STATEMENTS OF LARRY DOWNES, INTERNET INDUSTRY ANALYST AND
455 AUTHOR; RICHARD J. PIERCE, JR., LYLE T. ALVERSON PROFESSOR OF
456 LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL; RANDOLPH J.
457 MAY, PRESIDENT, FREE STATE FOUNDATION; JAMES BRADFORD RAMSAY,
458 GENERAL COUNSEL, NATIONAL ASSOCIATION OF REGULATORY UTILITY
459 COMMISSIONERS; STUART M. BENJAMIN, DOUGLAS B. MAGGS CHAIR IN
460 LAW AND ASSOCIATE DEAN FOR RESEARCH, DUKE UNIVERSITY SCHOOL
461 OF LAW; AND ROBERT M. MCDOWELL, FORMER FCC COMMISSIONER AND
462 VISITING FELLOW, HUDSON INSTITUTE

|
463 ^STATEMENT OF LARRY DOWNES

464 } Mr. {Downes.} Well, thank you, Mr. Chairman and Ranking
465 Member Eshoo and members of the subcommittee. I appreciate
466 the opportunity to testify today on the importance of
467 reforming processes at the FCC. My name is Larry Downes. I
468 am based in Silicon Valley. I am an Internet industry
469 analyst and the author of several books on the information
470 economy, innovation and the impact of regulation. I have
471 also written extensively on the impact of communication

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

472 policy on the dynamic broadband ecosystem and in particular
473 the role played by the FCC.

474 As the nature technological innovation has both
475 accelerated and mutated in the last decade in particular, the
476 FCC's inability to eliminate needless roadblocks for
477 consumers, entrepreneurs and incumbents alike has reached a
478 breaking point. The agency continues to tinker with a 21st
479 century communications ecosystem using a 19th century
480 toolkit. Many of the FCC's processes are badly in need of
481 reform and structure. They lack economic rigor,
482 transparency, expediency and consistency.

483 As Nobel Prize-winning Ronald Coase famously wrote, ``If
484 you torture the data long enough, nature will always
485 confess.'' That, in a nutshell, has become the FCC's
486 unintended modus operandi. The agency collects the data it
487 needs to make wise and efficient decisions, but in the
488 absence of clear guidelines and the most basic economic
489 tools, the Commission cannot resist the urge to abandon the
490 logical conclusions compelled by their own data in the
491 service of vague, idiosyncratic, transient and, often,
492 unarticulated policy goals.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

493 These problems devalue much of the good work of the
494 agency's staff and subvert the often admirable goals of the
495 FCC's Chairmen and Commissioners. They have created an
496 epidemic of side effects, including reports that fail to
497 reach obvious conclusions supported by the thorough data
498 collection the staff performs, limiting their usefulness as
499 policy tools to advance the FCC's longstanding charter to
500 promote communications to all Americans; rulemakings that
501 torture their analysis and data to justify what appear at
502 least to be ex ante conclusions to regulate regardless of the
503 need or cost; painfully slow reviews of license transfers
504 aimed at avoiding an imminent spectrum crisis which when
505 approved are rendered incoherent by laundry lists of
506 unrelated conditions, many of which become counterproductive
507 or mooted by technological advances years before they expire.
508 In approving the Comcast-NBC University merger, for example,
509 which took the FCC nearly a year, the agency imposed 30 pages
510 of conditions including a requirement to run certain
511 commercials on certain channels at certain times for a period
512 of 5 years; and finally, past and now future spectrum
513 auctions poisoned by similar interventions weighed down with

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

514 so many strings attached, they either fail to achieve minimum
515 bids or leave billions of dollars on the table.

516 Given rapid changes in the broadband ecosystem, the FCC
517 needs some measure of flexibility to complete its statutory
518 mission. But applying that flexibility ungrounded by neutral
519 principles, guidelines and analytic processes invariably does
520 more harm than good. Worse, the lack of structure has left
521 the FCC with the mistaken impression that the agency can
522 predict an increasingly unpredictable future and design what
523 it calls prophylactic remedies for consumer harms that have
524 yet to occur.

525 In effect, the Commission's decision-making process is
526 at war with the agency's own data. Congress can easily
527 ameliorate the worst symptoms of this breakdown. The two
528 discussion draft bills before you provide many commonsense,
529 modest, apolitical repairs imposing needed structure on the
530 FCC's processes.

531 As those of us in the technology industry have learned
532 the hard way, the pace of change has long since outrun our
533 ability to predict the future even in the short term. The
534 FCC must be cured of its addiction to micromanaging markets

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

535 that are evolving even as the Commission's deliberations
536 meander along, and it must focus its remedial and regulatory
537 efforts on relevant consumer harms that are tangible and
538 solvable with both precision and measurable efficacy. That
539 minimal level of regulatory process has been mandatory for
540 executive agencies since President Clinton ordered it in
541 1993, an order amplified by President Obama in 2011.
542 President Obama also made clear he expected though he could
543 not require the same basic tools be applied as a matter of
544 course by independent regulatory agencies including the FCC.
545 Indeed, most independent regulatory agencies, according to a
546 recent longitudinal survey by the Administrative Conference
547 of the United States are already required by law to conduct
548 some level of cost-benefit analysis. The FCC is one of the
549 very few who do not have such mandates in their implementing
550 statutes, and perhaps the only agency that doesn't do it
551 anyway.

552 There is also nothing novel or difficult about the added
553 requirement the FCC consider as an alternative to specific
554 interventions the possibility that high-tech markets will
555 cure their own ills more quickly and efficiently and with

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

556 fewer unintended side effects. That was, for example,
557 precisely the approach taken by the Department of Justice in
558 its separate review of the Sirius-XM satellite radio merger.
559 In a 4-page statement closing its review, the Antitrust
560 Division sensibly found that new forms of competition driven
561 by emerging Internet technologies would be more than adequate
562 to discipline the combined entity, and they have been proven
563 abundantly correct. By contrast, it took the FCC 17 months
564 and a 100-plus-page order laden with conditions to reach the
565 same conclusion.

566 Thank you for the invitation to appear today. I look
567 forward to your questions.

568 [The prepared statement of Mr. Downes follows:]

569 ***** INSERT 1 *****

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
570 Mr. {Walden.} Mr. Downes, we appreciate your testimony.

571 We will go now to Mr. Richard J. Pierce, Jr., Lyle T.

572 Alverson Professor of Law at the George Washington University

573 Law School. Mr. Pierce, thank you for being here today, and

574 we look forward to your testimony, sir.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
575 ^STATEMENT OF RICHARD J. PIERCE, JR.

576 } Mr. {Pierce.} Thank you, Chairman Walden, Ranking
577 Member Eshoo and members of the subcommittee. It is a
578 privilege for me to be able to appear before you today to
579 discuss the proposed Federal Communications Commission Reform
580 Act of 2013.

581 I have taught administrative law for 36 years. I have
582 written over a dozen books and 120 scholarly articles on
583 administrative law. My books and articles have been cited in
584 hundreds of judicial opinions including over a dozen opinions
585 of the United States Supreme Court. I am also a member of
586 the Administrative Conference of the United States.

587 I will discuss the provisions of the proposed Act that
588 relate to the procedures the Federal Communications
589 Commission is required to use to issue rules. I will not
590 discuss the provisions that relate to the substantive
591 principles the FCC is required to apply in its decision-
592 making. I am not an expert on communications law, so I lack
593 an adequate basis to discuss proposed changes in the

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee’s website as soon as it is available.

594 substance of communications law.

595 The proposed FCC Process Reform Act would add 12
596 judicially enforced mandatory steps to the notice and comment
597 rulemaking procedure required by Section 553 of the
598 Administrative Procedure Act. Those new mandatory,
599 judicially enforced steps are: a minimum 30-day period for
600 submitting comments; a minimum 30-day period for submitting
601 reply comments; a mandatory notice of inquiry issued within 3
602 years of the issuance of the notice of proposed rulemaking;
603 mandatory inclusion of the language of the proposed rule in
604 the notice of proposed rulemaking; an identification of the
605 specific market failure the proposed rule addresses; a
606 determination that the benefits of the proposed rule exceed
607 its costs; a determination that market forces or changes in
608 technology are unlikely to address the specific market
609 failure addressed by the rule; advanced provision of a list
610 of the available alternative options to all Commissioners,
611 provision of the language of the proposed rule to all
612 Commissioners well in advance of any meeting scheduled to
613 consider a proposed rule; publication of the text of the
614 proposed rule in advance of the meeting; adoption of

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

615 performance measures for any program activity created or
616 amended by the rule, and a finding that such performance
617 measures will be effective to evaluate the activity created
618 or amended by the rule.

619 None of these procedures are in the Administrative
620 Procedure Act. Every one of them is an add-on to the
621 procedures in the APA. In my opinion, the proposed Act would
622 not improve the FCC decision-making procedure. As I explain
623 in greater detail in my written testimony, the proposed Act
624 would have two serious adverse effects. First, it would be a
625 significant departure from the wise decision Congress made in
626 1946. After 15 years of debate and an unprecedented amount
627 of empirical research, Congress unanimously enacted Section
628 553 of the Administrative Procedure Act. That statutory
629 provision creates a uniform set of procedures that all
630 agencies are required to use when they issue rules.

631 The APA was one of the most thoroughly debated and
632 carefully researched statutes ever enacted. It was premised
633 on the belief that creation of a uniform set of procedures
634 applicable to all agency rulemaking was critically important
635 to the Nation. The Supreme Court has spent the last 67 years

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

636 resisting the periodic attempts to return to the confusing,
637 uncertain and ad hoc world that preceded the passage of the
638 Administrative Procedure Act, yet that is exactly what this
639 bill would do. It would move us back in that direction.

640 Second, it is a bad idea to add 12 mandatory, judicially
641 enforced procedures to a process that is already long and
642 resource intensive. The proposed Act would add many
643 additional procedures to the FCC rulemaking process, so many
644 mandatory procedures that the agency would be able to issue,
645 amend or rescind few, if any, rules. It would slow down the
646 decision-making process dramatically. That is exactly the
647 opposite of what you want to happen in a highly volatile
648 market like telecommunications. As I discuss in detail in my
649 written testimony, great jurists like Chief Justice Rehnquist
650 and D.C. Circuit Judge Cavanaugh have urged rejection of
651 similar efforts to impose such burdens on the rulemaking
652 process.

653 That concludes my testimony. I would be glad to answer
654 any questions you might have.

655 [The prepared statement of Mr. Pierce follows:]

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee’s website as soon as it is available.

656 ***** INSERT 2 *****

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee’s website as soon as it is available.

|

657 Mr. {Walden.} I appreciate your testimony, Mr. Pierce,
658 and we will now move to Randolph J. May, who is the President
659 of the Free State Foundation.

660 Mr. May, thanks for being here today. We look forward
661 to your comments.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|

662 ^STATEMENT OF RANDOLPH J. MAY

663 } Mr. {May.} Thank you, Mr. Chairman. I would like to
664 borrow Professor Pierce's booming voice for my testimony.

665 Chairman Walden, Ranking Member Eshoo and members of the
666 committee, again, thank you for inviting me to testify today.

667 I am President of the Free State Foundation, a nonprofit
668 research and educational foundation. FSF is a think tank
669 that focuses its work primarily in the communications law and
670 policy and administrative law areas. I have been involved
671 for 35 years in communications policy in various capacities
672 including having served as Associate General Counsel at the
673 FCC. I am a past chair of the American Bar Association's
674 section of administrative law, and I am a public member of
675 the Administrative Conference of the United States. So
676 today's hearing on FCC process reform is at the core of my
677 longstanding experience and expertise in communications law
678 and policy and administrative law.

679 I appreciated the opportunity to testify before this
680 committee a bit more than 2 years ago. Though H.R. 3309 and

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

681 3310 both passed the House, unfortunately they died in the
682 Senate. Reform measures such as those embodied in the
683 present discussion drafts are needed now more than ever. In
684 my June 2011 testimony, I generally supposed the proposed
685 reforms, and I do so again today because the FCC's decision-
686 making needs to change so that in today's generally dynamic
687 competitive telecommunications marketplace, the agency will
688 be less prone to continue on its course of too often
689 defaulting to regulatory solutions even when there is no
690 convincing evidence of market failure or consumer harm.

691 The FCC still operates today with a pro-regulatory
692 proclivity pretty much as it did in 1999 when the Clinton
693 Administration's FCC Chairman Kennard called for the
694 reorientation of the agency's mission to account for the
695 increasingly competitive environment evident even then.
696 After having served at the FCC from 1978 through 1981, when
697 President Carter's FCC chairman was initiating efforts to
698 reduce regulation in light of the new forms of competition
699 already emerging then, I believe that regulatory reform
700 measures like those embodied in the discussion drafts and the
701 few additional ones that I advocate in my testimony deserve

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

702 bipartisan support.

703 In the time that I have, without taking anything away
704 from the significance of some of the other proposed reforms,
705 I want to highlight the rulemaking requirements and
706 transaction review proposals because they are especially
707 important. It is true, of course, that as some of the bill's
708 opponents charge, new Section 13(a) would require the FCC to
709 make additional findings and undertake additional analysis
710 beyond that presently required before it imposes new rules.
711 For example, the FCC would be required to analyze whether
712 there is a market failure, and it would be required to
713 perform a cost-benefit analysis, and the Commission would be
714 required to provide a reasoned explanation as to why market
715 forces and technology changes will not within a reasonable
716 time period resolve the agency's concerns. Frankly, in
717 today's communications environment, you would hope the FCC
718 would be doing these things anyway, but the reality is, that
719 it often doesn't. There is nothing inherent in sound
720 principles of administrative law that suggests Congress
721 should not impose particular sector-specific analytical
722 decision-making requirements when circumstances warrant.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

723 While general theories of administrative law are nice and can
724 be relevant, in general they are not necessarily applicable
725 to a specific marketplace sector or regulator, and this is
726 especially true in this particular marketplace sector, which
727 due largely to rapid changes in technology is generally
728 competitive.

729 Indeed, I urge the committee to go a step further by
730 specifying that the reasoned determination required
731 concerning whether market forces or changes in technology are
732 unlikely to resolve the Commission's concern must be based on
733 clear and convincing evidence. This change will not prevent
734 the Commission from adopting new regulations, and it is not
735 intended to do so. It simply requires the agency to meet an
736 evidentiary burden before adopting or revising regulations.

737 The transaction review provisions contained in Section
738 13(k), especially the addition that allows the Commission the
739 conditional approval of a proposed transaction only if the
740 condition addresses a likely harm uniquely presented by the
741 specific transaction would go a long way towards combating
742 the FCC's abuse of the transaction review process. The
743 agency often has abused the process by delaying approval of

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

744 transactions until the applicants ``voluntarily'' agree,
745 usually at the midnight hour, to conditions that are not
746 narrowly tailored to remedy a harm arising from the
747 transaction or unique to it.

748 I also suggest the committee reform the forbearance and
749 periodic regulatory review process by in effect requiring a
750 higher evidentiary burden to maintain existing regulations on
751 the books. Actually, I understand from what Representative
752 Latta said that maybe he agrees with that. Absent clear and
753 convincing evidence that the regulations at issue should be
754 retained under the existing substantive statutory criteria,
755 regulatory relief should be granted. Similarly, I propose
756 adoption of a sunset requirement so that all rules will
757 automatically expire after X years absent a showing based on
758 clear and convincing evidence that it is necessary for such a
759 rule to remain in effect to accomplish its original
760 objective.

761 Again, thank you for inviting me to testify today. I
762 will be pleased to answer your questions.

763 [The prepared statement of Mr. May follows:]

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee’s website as soon as it is available.

764 ***** INSERT 3 *****

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
765 Mr. {Walden.} Thank you, Mr. May. We appreciate your
766 participation in our hearing.

767 We now turn to James Bradford Ramsay, who is General
768 Counsel for the National Association of Regulatory Utility
769 Commissioners. Mr. Ramsay, thank you for being here. We
770 look forward to hearing from NARUC.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|

771 ^STATEMENT OF JAMES BRADFORD RAMSAY

772 } Mr. {Ramsay.} Thank you so much, Chairman Walden and
773 Ranking Member Eshoo, for inviting me and giving me the
774 privilege of testifying today.

775 I am enthusiastic that there is again a focus on reform
776 at the FCC. I guess I wanted to say since I am hearing the
777 perspective, everybody is telling where they are coming from,
778 I am coming from the perspective of a 23-year practitioner
779 before the agency who actually has to deal with these
780 procedures on a daily basis, and I am representing a group of
781 people who are directly impacted by these procedures daily:
782 the State public utility commissions in all 50 States, each
783 one of your States.

784 In my 23 years at NARUC, I have had the privilege of
785 working with nine--the privilege and sometimes the
786 frustration of working with nine different FCC chairs. I
787 started with Al Sikes was chair, and of course, I am here for
788 Mignon Clyburn, my really good friend. And without
789 exception, I think they have all been dedicated public

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

790 servants, really trying to do what they thought was in the
791 best interest of the country. Mignon, when she came up here,
792 Chairman Clyburn when she came up here before her
793 confirmation as FCC chair, I was talking to her at the NARUC
794 offices, and she just looked up, and we were talking about
795 the confirmation hearing process. She said no, I don't
796 really care about all this, Brad, I just want to do the right
797 thing. And I think that is what all FCC Commissioners try to
798 do. I think the staff over at the FCC is among the most
799 professional and hardworking of all of the federal agencies
800 that I deal with here in Washington, but that doesn't mean
801 that there aren't process abuses at the FCC, and the process
802 abuses, it also doesn't mean that Congress shouldn't be
803 looking at some ways to correct the process abuses at the
804 FCC. There have been process abuses at the FCC every year
805 that I practiced before the agency before both Democratic and
806 Republican Administrations. There have been problems,
807 problems that unnecessarily increase cost to taxpayers--that
808 is your constituents--problems that increase the regulatory
809 risk unnecessarily for FCC policy pronouncements to be
810 overturned on process issues that we shouldn't even be

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

811 talking about, problems that directly undermine rationale
812 decision making. I mean, if you look at some of the
813 provisions in this bill, they are designed to make sure that
814 the other FCC Commissioners have adequate time to look at the
815 record and consider things that are put in the record later
816 in the process before they make their decision. Those
817 provisions I think are useful.

818 There are also problems I think that the discussion
819 draft will actually go a long way towards correcting, or at
820 least certain provisions in the discussion draft. Is that
821 draft perfect? There is no such thing as a perfect piece of
822 legislation coming out of Congress, but there are some pieces
823 and, you know, NARUC endorses very specifically certain
824 aspects of this legislation. It provides a good framework
825 from NARUC's perspective for bipartisan action going forward
826 at FCC that are in there that are supported by both sides.

827 I think it is worth pointing out here that like the
828 committee and Congress, NARUC is bipartisan. The people that
829 I represent, unlike the other witnesses on this panel, are
830 in-state experts whose interests align precisely with each
831 representative in this room. These are commissioners that

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

832 reside and work in your State, and there is not another
833 stakeholder in the telecommunications sector that cares more
834 about what happens to the infrastructure in your State and to
835 the services and your State and the impact that the FCC
836 decisions have on that than the people that I represent, and
837 there are also few people that have the same level of
838 appreciation of what that impact means and the expertise to
839 provide input. I think it is significant that those same
840 commissioners from your States have for years, almost a
841 decade now, supported many of the specific provisions that we
842 endorse in this discussion draft, and when I look at process
843 reform, there are so many reasons that you should be
844 considering this carefully. One of them is that if you fix
845 it so that the record is better, if you put in these
846 provisions, my belief is, you know, publishing the rule ahead
847 of time, making sure there is an opportunity to reply to late
848 ex parte filings and studies that have been in the record
849 fairly close before the deadline for advocacy drops, if you
850 give an opportunity for people to respond to these, if you
851 give the Commissioners more time to consider things that they
852 are given, then you will get a better decision and you will

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

853 get a better decision because there is a better record. If
854 you don't put in some of these requirements, and I will
855 mention just three of them, the rule to publish the text of
856 the rule in advance, to require minimum comment cycles, which
857 is crucial for State commissions because we have limited
858 resources and we can't act as fast as others can, and to
859 effectively require time for reasonable consideration of the
860 ex partes, if just those three requirements, you get a better
861 record. If you don't do those requirements, the people that
862 get disadvantaged are the people that I represent and small
863 businesses in your States and the consumer advocates in your
864 States. We are the ones that don't have the resources and
865 can't respond quickly. But no one benefits if we all end up
866 in court arguing about process instead of policy.

867 I can see my time is running down here, but I will just
868 say, if you look in my testimony, I point out, I am
869 litigating right now in the 10th Circuit over a decision that
870 came from this Administration. There are examples from all
871 the Administrations of process problems. There I think we
872 have a reasonable chance of coming back, bringing the entire
873 reformation of the federal university service regime

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

874 accomplished by the agency in 2011 back to the agency just on
875 process issues, and if those provisions that I mentioned had
876 been enacted into law at the beginning of 2011, I wouldn't be
877 litigating those issues today.

878 So I think the bill provides a useful vehicle, and I
879 encourage you to seize the opportunity to move forward with
880 reform. Thank you very much.

881 [The prepared statement of Mr. Ramsay follows:]

882 ***** INSERT 4 *****

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
883 Mr. {Walden.} Mr. Ramsay, thank you very much for your
884 helpful comments. We appreciate that.

885 We will turn now to Mr. Stuart M. Benjamin, Douglas B.
886 Maggs, Chair in Law and Associate Dean for Research at Duke
887 Law. Mr. Benjamin, thank you for being here.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
888 ^STATEMENT OF STUART BENJAMIN

889 } Mr. {Benjamin.} Thank you, Chairman Walden, Ranking
890 Member Eshoo, members of the subcommittee. Thank you for the
891 opportunity to testify today.

892 My academic career has centered around the FCC. I teach
893 telecommunications law, I coauthor telecommunications law
894 casebook and I teach and write in administrative law and the
895 First Amendment. From 2009 to 2011, I was the inaugural
896 Distinguished Scholar at the FCC, and I thank co-panelist Rob
897 McDowell for coming up with that job title for me. True
898 story.

899 So I should also say I have no clients, paid or unpaid,
900 nor have I had any clients or consulting relationships since
901 I became an academic in 1997. All right.

902 I think I understand the concerns that motivate the FCC
903 Process Reform Act, and I think there are quite legitimate
904 questions about FCC processes and standards. I do have
905 concerns about the bill as drafted, though, for several
906 reasons. First, as has already been touched on, the bill

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

907 contains many new requirements that are unique and would
908 bring the FCC into uncharted territory. So there are neither
909 agency nor judicial precedents that would provide guidance
910 and clarity, and these new requirements could be the subject
911 of litigation; that is to say, one could bring a lawsuit
912 based on them. For instance, in addition now to being able
913 to challenge a rule as arbitrary and capricious, which one is
914 already able to do, one can challenge the adequacy of any or
915 all of the new findings required. My concern is, this runs
916 the risk of the bill being a jobs program for lawyers. If I
917 were in private practice in D.C., that might be great. As a
918 citizen, I am not sure that it is so great.

919 And then this uncertainty created by new provisions is
920 exacerbated by the fact that the provisions apply only to the
921 FCC, and that brings me to the second concern which is, as
922 Dick Pierce has pointed out, the great strength of the
923 Administrative Procedure Act is that it applies the same
924 rules to all agencies allowing for consistency and fairness,
925 and this bill would undermine that consistency by creating a
926 special set of rules for the FCC. My own view is, if the
927 bill's proposals are good ideas, I think they are worth

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

928 applying across the board. If they are not worth applying
929 across the board, I am not sure why they should apply only to
930 the FCC.

931 The third concern I want to raise involves merger
932 review. As I detail in my written testimony, the requirement
933 of narrow tailoring--narrow tailoring is not found in the
934 U.S. Code, it is found only in strict judicial scrutiny--and
935 the requirement of uniqueness of harms will, I think, make it
936 difficult, if not impossible for the FCC to impose any
937 meaningful merger conditions. If Congress's goal is to
938 eliminate the FCC's merger review, my suggestion would be,
939 you should simply repeal the FCC's merger authority. That
940 would save everyone--companies, citizens, FCC staff--a huge
941 amount of time, energy and money. If, on the other hand,
942 Congress wants the FCC to play a meaningful role in merger
943 review, I think the legislation should use somewhat less
944 forbidding language than this stark language of strict
945 scrutiny.

946 My fourth reservation arises out of provisions that
947 would diminish the chairman's authority. This is something I
948 got great insight into when I was at the FCC. In my time

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

949 there, I came to recognize the great value arising out of the
950 clarity of lines of authority, of having a clear hierarchy,
951 and reducing the chairman's authority would undermine that
952 clarity, potentially creating confusion and inefficiency
953 within the FCC. I understand the arguments for allowing, for
954 instance, a majority of the Commissioners to place an item on
955 the agenda. One thing that particularly jumped out at me was
956 a proposal to empower a minority of commissioners to block
957 actions taken under dedicated authority. I think that is a
958 different matter. The Commission makes thousands of
959 decisions every year, and businesses and individuals rely on
960 the predictability and speed of the FCC's decision-making
961 process in resolving those matters. So changing that process
962 may unsettle a lot of reasonable expectations.

963 Fifth and finally, the bill creates additional
964 procedures that I fear will confer little, if any, benefit.
965 Notices of inquiry, which of course don't appear anywhere in
966 the APA and only one provision of the United States Code,
967 sometimes make sense, and the Commission sometimes uses them,
968 but requiring notices of inquiry will further ossify the
969 rulemaking process, and I think the same is true of the

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

970 requirement that proposed rules be issued with a notice of
971 proposed rulemaking. The Commission already sometimes or
972 often puts out proposed rules with its notices of proposed
973 rulemaking, but requiring them, I think, adds cost and very
974 uncertain benefit. And it will push rulemaking even more
975 into a rule-adopting process in which all the important
976 decisions are made before the APA process even starts. That
977 is to say, the danger is that the APA process becomes kabuki
978 theater and public comments arrive after all the meaningful
979 decisions have been made. So the concern is, in general
980 these provisions will not make the FCC regulation better,
981 just more laborious.

982 I see that my time is up so I will stop there.

983 [The prepared statement of Mr. Benjamin follows:]

984 ***** INSERT 5 *****

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
985 Mr. {Walden.} All right. We will get to you on
986 questions, I am sure, and you will have a chance to
987 elaborate. Thank you for your testimony and your
988 participation in the hearing, Mr. Benjamin.

989 We will now go to the Honorable--I guess we still call
990 you that even though you are out of office now--Robert M.
991 McDowell, former Federal Communications Commission member,
992 and Visiting Fellow at the Hudson Institute. Mr. McDowell,
993 we really appreciate your coming in today to give us your
994 unique perspective as a former commissioner and now outside
995 of the portals can speak freely as you did when you were
996 inside the portals. So we welcome your testimony, sir.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
997 ^STATEMENT OF ROBERT M. MCDOWELL

998 } Mr. {McDowell.} Thank you, Mr. Chairman and Ranking
999 Member Eshoo and all the members of the subcommittee. It is
1000 terrific to be back before you, my first time back since the
1001 leaving the Commission just about 7 weeks ago. And I did
1002 want to also make a special note to thank Neil Fried for his
1003 many, many years of public service. I have had the privilege
1004 and the honor of working very closely with Neil on I can't
1005 even count the number of issues over the years, and he has
1006 been a terrific colleague and a friend, and we wish you well
1007 in the movie business, so we will see at the movie theater, I
1008 guess.

1009 So currently I do serve as a Visiting Fellow at the
1010 Hudson Institute's Center for Economics of the Internet.
1011 Having said that, all of the views I express today are purely
1012 my own, and they may be very lonely ideas if no one else
1013 agrees with them, but I will say them nonetheless.

1014 FCC process reform is not necessarily the most glamorous
1015 of topics but it is an important one, and I commend the

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1016 subcommittee for its ongoing work in this area. The FCC
1017 after all regulates about one-sixth of the American economy,
1018 and really indirectly affects the rest. Just as important,
1019 the Commission also serves as a regulatory template for
1020 countries across the globe. The ways in which the FCC
1021 considers proposed regulations and goes about shaping their
1022 substance has a direct effect on the U.S. economy and
1023 ultimately not just American consumers but consumers around
1024 the globe. In short, to paraphrase Chairman Emeritus
1025 Dingell, those who control the process also control the
1026 outcome. Accordingly, it is prudent for Congress to cast a
1027 bipartisan oversight eye on the processes of all
1028 administrative agencies. Chairman Walden and other members
1029 should be commended for sparking this conversation with the
1030 legislation from the last Congress as well as this year's
1031 discussion drafts.

1032 But before going further, I would be remiss if I did not
1033 mention the need for a fundamental rewrite of our Nation's
1034 laws regulating the information, communications and
1035 technology sector. Such a comprehensive rewrite has not
1036 occurred since 1996, and even that left in place legacy

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1037 stovepipes that regulate technologies rather than just market
1038 conditions. Today, consumers don't know or usually don't
1039 really care if their data is transmitted over a coaxial
1040 cable, fiber optics, copper or wireless platforms. In fact,
1041 usually data is being transmitted over hybrid networks that
1042 we are not even aware of. It is seamless to the consumer.
1043 Instead of directly focusing on whether the marketplace is
1044 experiencing a concentration of power, abuse of that power,
1045 and resulting consumer harm, today's regulations draw their
1046 authority from the nearly 80-year-old Communications Act of
1047 1934. The FCC will celebrate its 80th birthday next spring.
1048 And that Act is based on 19th-century-style monopoly
1049 regulation, which rests on an even older foundation.
1050 Therefore, having different regulations based on the type of
1051 technology used and their history rather than on current
1052 market conditions is likely distorting investment decisions.
1053 For the sake of improving America's global competitiveness, I
1054 respectfully urge Congress to move ahead as soon as possible
1055 with a comprehensive rewrite of our communications laws with
1056 the aim of promoting investment and innovation while
1057 protecting consumers.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1058 Putting some of this into tangible terms, in 1961 when
1059 consumers had a choice of one phone company and three
1060 broadcast TV networks, the FCC's portion of the Code of
1061 Federal Regulations filled just 463 pages. In 2010, the
1062 FCC's rules filled 3,695 pages, despite the bipartisan
1063 deregulatory mandates of Congress as codified in the
1064 Telecommunications Act of 1996. Today, the Commission's
1065 rules fill 3,868 pages despite President Obama's call in 2011
1066 to pare back unnecessary rules. In short, in a marketplace
1067 that is undeniably more competitive than it was in 1961, the
1068 FCC's regulations grew by more than 800 percent as just
1069 measured in the number of pages with a nearly 5 percent
1070 increase just since 2010. In contrast, the American economy
1071 has grown by a much smaller number since 1961 by about maybe
1072 370 percent.

1073 Some of these rules as necessary but are all of them?
1074 Shouldn't the Commission have the authority to weed out all
1075 outdated rules the way it can and must for rules affecting
1076 telecommunications services under Title II as mandated by
1077 Sections 10 and 11? Forbearance authority should apply to
1078 all platforms and industries, not just traditional telecom

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1079 services.

1080 Along those lines, as my fellow witness Randy May has
1081 advocated for quite some time, requiring the Commission to
1082 justify new rules with bona fide cost-benefit and market
1083 analyses would help better inform policymakers and restrain
1084 them from issuing unnecessary rules. Exercising discretion
1085 and regulatory humility while being patient with markets can
1086 create a better experience for consumers. Similarly, new
1087 rules should sunset after a definitive period, and the
1088 renewal should be justified from scratch in new proceedings
1089 with public notice and comment. The continuation of old
1090 rules may be absolutely necessary, but let us test that
1091 premise every few years.

1092 I see I am running out of time. In fact, I am way out
1093 of time. But other ideas to explore should include, just for
1094 respectful mention here, limitations on unnecessary merger
1095 conditions that have nothing to do with the attendant
1096 transactions, shot clocks with exceptions, consolidation of
1097 industry reports, and regulatory fee reform, among many
1098 others.

1099 Lastly, I would like to end with a bipartisan applause

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1100 line: Let us have Sunshine Act reform so more than two
1101 Commissioners can meet to discuss substance without having to
1102 call for a public meeting. Let the record reflect there was
1103 thunderous applaud on both sides of the aisle after that.

1104 Thank you for the opportunity to speak before you today,
1105 and I look forward to answering your questions.

1106 [The prepared statement of Mr. McDowell follows:]

1107 ***** INSERT 6 *****

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
1108 Mr. {Walden.} Mr. McDowell, as always, thank you for
1109 your testimony as entertaining as it always concludes. We
1110 appreciate all of the witnesses. I will start out with some
1111 comments and questions.

1112 First of all, picking up on your last comment, I know
1113 the desire of the agency to be able to have Commissioners,
1114 more than one, meet together without a public setting. The
1115 irony coming from the State of Oregon that pioneered meeting
1116 requirements both for its legislative assembly and its
1117 agencies is that that is the one piece of this bill that
1118 would actually allow activities to occur in private that are
1119 otherwise public today, and it is also the only provision,
1120 and correct me if I am wrong, that actually amends the APA
1121 itself. So the irony is, my friends who object to these
1122 other reforms and requirements, alleging that somehow this
1123 committee would only be affecting the APA for one agency,
1124 want to affect the APA for one agency to allow members of the
1125 Commission to meet in private without a public setting and do
1126 their business. Is that not correct, Mr. McDowell, with all
1127 due respect to the applause lines?

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1128 Mr. {McDowell.} Yes, Mr. Chairman, I agree with that.

1129 Mr. {Walden.} Thank you.

1130 Now, having put that on the record, let me go to the
1131 expenditure piece, and I would put in the record with
1132 unanimous consent the Congressional Budget Office cost
1133 estimate from March 19, 2012, which looked at the predecessor
1134 bill and I think was referenced by the distinguished
1135 gentleman from California.

1136 [The information follows:]

1137 ***** COMMITTEE INSERT *****

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

|
1138 Mr. {Walden.} The CBO also went on to say that assuming
1139 appropriations and necessary amounts for personnel and
1140 information technology, under current law, the FCC is
1141 authorized to collect fees sufficient to offset the costs of
1142 its regulatory activities its year. Therefore, CBO estimates
1143 that the net cost to implement the provisions of H.R. 3309
1144 would not be significant, assuming annual appropriation
1145 actions consistent with the agency's authorities. Yes, it
1146 does require a few more people. Guess what? Open processes
1147 do.

1148 Mr. Ramsay, I would like to go to you as representing
1149 the public utility commissions around the country. As you
1150 know, my senior policy advisor, Ray Baum, behind me, chaired
1151 the Oregon Public Utility Commission. Much of what we are
1152 proposing here is actually already accomplished by many
1153 public utility commissions in their processes, is it not?
1154 Don't they require rules to be published in advance? Don't
1155 they almost prohibit ex parte contact? Don't they require a
1156 much more transparent process, which is what we are getting
1157 at here?

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1158 Mr. {Ramsay.} Yes, sir. Generally speaking, my
1159 experience has been that the State regulatory process is more
1160 transparent and less subject to processes lapses than the FCC
1161 and other federal agencies.

1162 Mr. {Walden.} And do you think it is right that a
1163 federal agency can require as a condition of a merger quote,
1164 unquote, voluntary actions that they could not require under
1165 their statutory authority otherwise?

1166 Mr. {Ramsay.} Well, NARUC hasn't taken a position on
1167 the merger condition authority in the statute, so I--

1168 Mr. {Walden.} All right. I will go to Mr. McDowell.
1169 Do you think it is right that a federal agency can require
1170 two parties, or three or five or however many in a merger, to
1171 do certain things that it could not require them to do under
1172 their statutory authority? And in fact, there are people
1173 maybe headed to the FCC who believe that authority should be
1174 used that way to affect the marketplace, and wouldn't that
1175 have an effect on other players in the market not subject to
1176 the merger, and would that be fair to them?

1177 Mr. {McDowell.} That was a compound question so I want
1178 to make sure I hit all parts of it. So yes, I agree that it

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1179 is problematic. I have been a long-time critic of imposing
1180 merger conditions that are not related to the actual
1181 transaction. It does start to enable the Commission to
1182 impose effectively a rulemaking or other policies not
1183 envisioned by Congress so in essence, the FCC is legislating
1184 through that type of process.

1185 Mr. {Walden.} And Mr. Benjamin, I want to pick up on
1186 one point on the notice of inquiry requirement that you
1187 objected to. We should also, for the record, point out that
1188 is only a requirement if in the prior 3 years the Commission
1189 has not done work in that area. So it is not required every
1190 single time, it is just to try and get some background
1191 information ahead of time if they are going to act or they
1192 haven't acted before. Is that not accurate?

1193 Mr. {Benjamin.} Right. So I think the way it is
1194 written, you have to have either a notice of proposed
1195 rulemaking, which would have rules in it, or a notice of
1196 inquiry or a judicial order. So one way or another, before
1197 you start the new NPRM, you will have actually had a huge
1198 amount of process beforehand through a notice of inquiry or
1199 through a prior set of rules in an NPRM.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1200 Mr. {Walden.} So our goal here is--and we are open to--
1201 many of you have had very good recommendations about things
1202 you think could be done better or differently, but our goal
1203 here--and we will take those into account as we go into a
1204 markup at some point and try to get this right. We don't
1205 want to hogtie the FCC. We don't want to add to litigation.
1206 Believe me, I get a round of applause in any town when I
1207 confess I am not an attorney. And so I have no interest in
1208 adding to the legal establishment's billing hours. I am
1209 actually trying to improve public process and open this up
1210 and do what other agencies already do and do it what the
1211 President has suggested agencies not constituted the FCC do,
1212 and we will continue to work on this until we get it right
1213 but we will move forward.

1214 So with that, my time has expired, and we have--oh, yes,
1215 I have one other UC I need to do, which are statements of
1216 support from various entities, the United States Chamber of
1217 Commerce, the National Association of Regulatory Utility
1218 Commissioners, the National Association of Broadcasters,
1219 USTelecom, Americans for Tax Reform, Citizens Against
1220 Government Waste, National Cable and Telecommunications

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1221 Association, Comcast, NTCA and AT&T, statements in support of
1222 the legislation, unanimous consent to enter into the record.

1223 [The information follows:]

1224 ***** COMMITTEE INSERT *****

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1225 Mr. {Walden.} With that, my time is expired.

1226 Ms. {Eshoo.} Were they voluntary, Mr. Chairman?

1227 Mr. {Walden.} You know, I will let you read them for
1228 yourself, and yes, I think they are all voluntary.

1229 Ms. {Eshoo.} Is it my turn now?

1230 Mr. {Walden.} It is your turn. And I will turn to my
1231 friend from California, who we have a little disagreement on
1232 parts of this bill, but I would tell you, we have 12 minutes
1233 left in the vote, so when she concludes, then we recess again
1234 and then come back.

1235 Ms. {Eshoo.} Thank you, Mr. Chairman.

1236 To all of the witnesses, I just want to share the
1237 following with you. In listening very carefully to each one
1238 of you, I leaned over and I said to Mr. Waxman, isn't it so
1239 extraordinary that we have the level of expertise that is
1240 represented at this time in our country. It makes me feel
1241 very, very proud. Whether I agree with some of your views or
1242 not is not the point but it is really nothing short of
1243 remarkable, so thank you. I love hearings, and I always
1244 learn a lot, so thank you for being here and offering what

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1245 you did in your testimony.

1246 I just want to get something straight off the table so
1247 it can be just yes or no. Do you all support a standalone
1248 action on the FCC Collaboration Act as a way of allowing FCC
1249 Commissioners to collaborate outside of official public
1250 meetings? Yes or no. We will start with Mr. Downes.

1251 Mr. {Downes.} I don't have an opinion on that.

1252 Ms. {Eshoo.} Okay.

1253 Mr. {Pierce.} I think it is a good idea but I would
1254 like to see it as an amendment to the government in the
1255 Sunshine Act applies to all of the agencies that are run by
1256 collegial bodies. There is no reason--again, I see nothing
1257 unique about the FCC here. It is the same as the FERC or any
1258 other agency run by a collegial body. This would be a big
1259 improvement.

1260 Ms. {Eshoo.} I appreciate that. I think what needs to
1261 be stated for the record, and I think the chairman may have
1262 thought that it was the reverse of what takes place in his
1263 home State. There is a requirement in this legislation that
1264 is bipartisan and bicameral for transparency. So it is not
1265 that Commissioners can go off in secret, the public never

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1266 knows what they have talked about and discussed and that it
1267 just remains there in a secret bubble. That is not the way
1268 the legislation is drafted.

1269 So Mr. May, yes or no?

1270 Mr. {May.} I can't answer yes or no.

1271 Ms. {Eshoo.} Okay. Mr. Ramsay?

1272 Mr. {Ramsay.} Yes.

1273 Ms. {Eshoo.} Mr. Benjamin?

1274 Mr. {Benjamin.} I agree entirely with what Dick Pierce
1275 said.

1276 Ms. {Eshoo.} Okay.

1277 Mr. {McDowell.} I don't have an opinion if it is
1278 separate or together, but it is a good idea nonetheless.

1279 Ms. {Eshoo.} Good. My sense of what really underlies
1280 more of this effort surrounds one issue, and that is the
1281 whole issue of the FCC's authority to review acquisitions and
1282 mergers, and I think that that is where there is concern. I
1283 think that is where there is disagreement. I think that is
1284 where there is agitation. I think there is aggravation. And
1285 I think that is driving this more than anything else, because
1286 there are some smaller reforms that can be made that we can

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1287 do on a bipartisan and I think bicameral basis, but I do
1288 think that this is the area that really causes the most
1289 heartburn, both pro and con.

1290 Now, Mr. Pierce and Mr. Benjamin, I think that you made
1291 references to this in your written testimony, and I want to
1292 give you the opportunity to elaborate on it. I think that
1293 the draft legislation only allows the FCC to impose
1294 conditions that are ``narrowly tailored to remedy a harm that
1295 arises as a direct result of the specific transaction,' ' but
1296 these transactions are huge in terms of their impact on the
1297 American people, on consumers, on media consolidation, which
1298 I think it really goes to the heart of democracy. So would
1299 either one of you care to comment on what I just said?

1300 Mr. {Benjamin.} Sure. What is remarkable to me about
1301 the language is that it is the language of strict judicial
1302 scrutiny, and narrow tailoring, when it is--if I were a
1303 judge, I would think Congress chose this language for a
1304 reason. They chose it because they were picking up on strict
1305 judicial scrutiny because it is a term of art.

1306 Ms. {Eshoo.} Well, it has been chosen for a reason. It
1307 didn't create itself.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1308 Mr. {Benjamin.} I understand, but just to be clear,
1309 when courts apply strict scrutiny narrow tailoring, they
1310 require that the government use the least restrictive means
1311 in order to achieve a goal, and that is a very difficult
1312 standard to meet. As Justice Breyer noted in dissent in a
1313 couple of cases, any clever or creative lawyer or judge can
1314 come up with some other less restrictive means. So I think
1315 as crafted, I think it will it difficult for the FCC to have
1316 any meaningful merger conditions. And a separate question is
1317 whether the FCC should be in the business of reviewing
1318 mergers at all. My only recommendation would be then just do
1319 it and avoid a lot of confusion.

1320 Ms. {Eshoo.} Well, I think that there are some here
1321 that believe that they just shouldn't. I don't know how many
1322 but I think there are some that hold that view, and they are
1323 entitled to it. But I think it is very clear that there is a
1324 public-interest standard that the FCC is charged with, and
1325 this has a lot to do with the interest of the public and the
1326 country. This isn't just about getting into some menacing
1327 details just to be complex and complicated. Would you like
1328 to comment, Mr. Pierce?

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1329 Mr. {Pierce.} I didn't address this in my prepared
1330 testimony because it struck me as an issue of substantive
1331 communications law, and I am not an expert in that. I will
1332 change hats, though, and tell you I am an expert in antitrust
1333 law. That is another subject I have been teaching for the
1334 last 30-some years, and I agree completely with Mr. Benjamin
1335 that it would make a lot of sense to take the FCC completely
1336 out of this. The FCC doesn't know much about antitrust law.
1337 The FTC and the Department of Justice know a lot about
1338 antitrust law. They have the power to impose conditions.
1339 They regularly impose conditions on mergers. Those
1340 conditions are specifically tailored to address the
1341 competitive issues that are raised by a proposed merger.
1342 That is something the FTC and the Department of Justice,
1343 Antitrust Division, know a lot about, and the FCC knows very
1344 little about. So I agree completely with Professor Benjamin
1345 that the far more sensible thing would be a statutory change
1346 that would probably require about 10 words that says the FCC
1347 has no power over mergers; that is exclusively the realm of
1348 the DOJ and the FTC.

1349 Mr. {Walden.} Mr. McDowell, I will go to you, but I

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1350 have to excuse our colleagues. We are down to 5 minutes.

1351 Ms. {Eshoo.} My time is expired anyway.

1352 Mr. {Walden.} Go ahead.

1353 Mr. {McDowell.} On second thought, actually there is an
1354 emerging headline right here, which is, I would agree.

1355 Mr. {Walden.} You would agree?

1356 Mr. {McDowell.} I would agree.

1357 Mr. {Walden.} With what?

1358 Mr. {McDowell.} Antitrust review is a form of public-
1359 interest review. So DOJ or FTC under the antitrust review,
1360 they are looking at harms to consumers, and the public-
1361 interest standard of the FCC is really ill defined and that
1362 is why you get these merger conditions which sometimes have
1363 nothing to do with the emerging transaction resulting in any
1364 consumer harm. So we might be on to something here.

1365 Mr. {May.} I agree as well, Mr. Chairman.

1366 Mr. {Walden.} All right. I have to cut this off right
1367 now because we have got less than 4 minutes for the vote on
1368 the Floor. They expect a few votes thereafter like 15
1369 minutes, so I am going to suggest we will try and come back
1370 here about 1 o'clock, a little after 1:30, if that works. If

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1371 there are others who have questions--

1372 Mr. {Waxman.} Mr. Chairman, I have an appointment at

1373 1:30. Otherwise, I am here and I wanted to get my--

1374 Mr. {Walden.} Okay. We will come back.

1375 Mr. {Waxman.} At 1 o'clock?

1376 Mr. {Walden.} I am just speculating that because they

1377 said votes about 12:30, 12:45. By the time we get back, it

1378 will probably be a little after 1:00. If we are back sooner,

1379 we will start sooner, but to give them--you all plan 12:45.

1380 How is that? And if we can get back here at 12:45, we will,

1381 because I want to make sure other members have their chances

1382 to ask questions of our distinguished panel.

1383 With that, we will stand in recess.

1384 [Recess.]

1385 Mr. {Walden.} We will call back to order the

1386 Subcommittee on Communications and Technology on our

1387 ``Improving FCC Process'' hearing, and we appreciate your

1388 indulgence. I hope you all had a chance to get out a get a

1389 little lunch or something while we were voting. You didn't?

1390 Uh-oh. Well, sequester strikes again.

1391 We are going to go now to the vice chair of the

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1392 subcommittee, Mr. Latta, for 5 minutes for questions.

1393 Mr. {Latta.} Well, thank you very much, Mr. Chairman.

1394 I appreciate that. And again, thanks for our witnesses. We

1395 have had a few votes this morning, and I appreciate your

1396 willingness to stick around.

1397 Mr. May, if I could ask a question in regards to

1398 forbearance reform at the FCC and get your thoughts on that?

1399 Mr. {May.} Thank you, Mr. Latta. In my view, it was

1400 pretty clear when Congress put the forbearance authority in

1401 the 1996 act that it intended it to be used when appropriate

1402 as a deregulatory measure when competition warranted, and I

1403 think the fact of the matter is--and that is also true of the

1404 regulatory review provision that follows it, the periodic

1405 regulatory review. The fact of the matter is that the

1406 forbearance authority has just been little used as a

1407 deregulatory tool. So what I have recommended, and I think

1408 you have just introduced a bill which may be somewhat along

1409 these lines is that without changing the substantive criteria

1410 in the forbearance provision that is protecting consumers and

1411 protecting the public interest, that none of that would be

1412 changed, but that the Commission in order to maintain

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1413 regulations when it has a petition to forbear that is bear
1414 the evidentiary burden, in other words, there be a
1415 presumption that the statutory requirements aren't met absent
1416 clear and convincing evidence or some type of burden. And I
1417 think by doing that, without changing, again, the substance
1418 of the criteria, just as a matter of process and procedure,
1419 it would leave the tool to be used more as I believe Congress
1420 intended when it included it in the Act back in 1996.

1421 Mr. {Latta.} Thank you.

1422 Mr. McDowell, could I get your thoughts on forbearance
1423 reform?

1424 Mr. {McDowell.} Yes, as I said in my written and oral
1425 testimony, Congressman, I think it would be a terrific idea
1426 to expand that to more than just telecommunications services,
1427 which is what Congress did in the 1996 Act. Now, having
1428 said, there is a little footnote, which is Section 336, for
1429 some reason referred to as Section 202(h). So our
1430 quadrennial media ownership review is also supposed to be a
1431 review and to deregulate as more competition comes into the
1432 media space, but beyond that, for cable, for wireless and
1433 other areas, the Commission does not have forbearance

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1434 authority. So I think it would be constructive to expand
1435 that authority to all aspects of what the Commission
1436 regulates.

1437 Mr. {Latta.} Thank you.

1438 Mr. Ramsay, if I could turn to your testimony. You
1439 state something there that I mentioned in my opening remarks.
1440 You state that ``Unquestionably, especially when there is
1441 certain lapses that occur, unfortunately, when that occurs,
1442 those with limited resources, small business, State
1443 commissions, consumers, consumer advocates, are
1444 disproportionately disadvantaged,' and that is what I hear a
1445 lot back home from all these smaller companies out there
1446 that, you know, they don't have the resources. Can you just
1447 elaborate a little bit on that, how you see that for those
1448 that would be disadvantaged that have more limited resources?

1449 Mr. {Ramsay.} Well, the problem is, if you have fewer
1450 resources and you get--and again, I can go back to the
1451 transformational order that revised the entire Universal
1452 Service program at the federal level. There were literally
1453 hundreds of items that went into the record shortly before
1454 the deadline for further advocacy dropped, and if you only

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1455 have one or two lawyers, and in my case, it is one lawyer,
1456 there is no way that you can go through and look at all of
1457 those materials and respond really at all, whereas larger,
1458 better funded people frequently can. In fact, larger and
1459 better funded people are frequently the source of a lot of
1460 the last-minute filings. So in this particular case, there
1461 are two or three provisions that I cite in my testimony that
1462 would level the playing field a little more for the consumer
1463 advocates, the State public utility commissions and the small
1464 businesses and small entities.

1465 Mr. {Latta.} Because that would also really impact
1466 those startups out there.

1467 Mr. {Ramsay.} Yes, I would think so, the people with
1468 limited resources.

1469 Mr. {Latta.} And I have met with a lot of the smaller
1470 startups and they are always concerned because, you know,
1471 they are just getting started and all of a sudden they don't
1472 have those dollars that they have to have to try to meet
1473 these regulations that are in place.

1474 And Mr. Chairman, I will yield back the balance of my
1475 time. Thank you very much.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1476 Mr. {Walden.} The gentleman yields back the balance of
1477 his time. The chair recognizes the gentleman from
1478 California, Mr. Waxman, for 5 minutes.

1479 Mr. {Waxman.} Thank you very much, Mr. Chairman.
1480 Before I get to my questions, I want to make a brief comment
1481 about the subject that was raised before we broke, and that
1482 was whether the FCC jurisdiction on the public interest is
1483 something in addition to the role of the Department of
1484 Justice and the Federal Trade Commission. Under the test,
1485 the FCC will approve a transaction if considering the
1486 potential consumer benefits and harms, it determines that the
1487 transaction is in the public interest. That is a little
1488 different than just the antitrust issues. For example, the
1489 FCC looks at the diversity of voices. They look to see
1490 whether certain populations are being served, low-income
1491 people, disabled people. They will look to see what the
1492 impact is on jobs. They will look at questions of access to
1493 telecommunications services. All of these are part of what
1494 the FCC deals with when we talk about public interest.

1495 The DOJ process is entirely confidential. The FCC
1496 process is generally open with public comment and advocacy

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1497 subject to certain exceptions for proprietary information.
1498 So I don't want to leave anyone with the impression that we
1499 all agree and maybe you really don't all agree when you think
1500 about that the role is duplicative or less than critical for
1501 the FCC to maintain that power.

1502 When Chairman Walden circulated the discussion draft
1503 earlier this week that adds new provisions to the bill that
1504 was passed by the House last year, I believe these provisions
1505 further incapacitate the FCC, and I would like to ask our
1506 witnesses questions about two of these provisions.

1507 The draft legislation contains a new provision that
1508 requires the Commission when considering a rule with an
1509 economically significant impact--those are the words--to,
1510 among other things, ``make a reasoned determination that
1511 market forces and changes in technology are unlikely to
1512 resolve within a reasonable period of time'' the problems the
1513 Commission intends to address in the rule. In other words,
1514 the new language requires the FCC to determine whether
1515 technology and market changes will solve a problem and negate
1516 the need for regulation before issuing a rule.

1517 Mr. Ramsay, in your testimony, you suggest that this

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1518 provision seems, at best, unnecessary because regulators
1519 should take a technology-neutral or functional approach to
1520 oversight of any market sector. Do you think basic
1521 principles like protecting consumers and promoting
1522 competition should be linked to changes in technology and are
1523 regulators in a good position to make predictive judgments
1524 about future changes in technology?

1525 Mr. {Ramsay.} I think the part of my testimony that
1526 addresses that was focused on the fact that technology and
1527 technology changes are only relevant to the extent that they
1528 actually impact market forces. The reasons for regulations--
1529 and NARUC has been on record for years. The reasons for
1530 regulation don't change ever, and they don't change based on
1531 the technology that is being used to provide a particular
1532 service. So in the case of--

1533 Mr. {Waxman.} Excuse me. Do you think this language is
1534 important to have, or do you think--

1535 Mr. {Ramsay.} I think the reference to technology is
1536 not necessary. It is perhaps a little confusing in the
1537 context of that Section 3 and it doesn't add anything to any
1538 type of determination of the level of competition that

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1539 exists.

1540 Mr. {Waxman.} I thank you for that answer. I am going
1541 to move on to some other issues.

1542 The APA applies to all agencies, and this bill would
1543 accept that, which the chairman pointed out to me, that his
1544 bill specifically says that they are not excluding--`nothing
1545 in this Act or the amendment made by this Act shall relieve
1546 the FCC from any obligations under Title V, United States
1547 Code, except where otherwise expressly provided.'

1548 Now, Mr. Pierce, you have indicated that this adds
1549 another layer of requirements on the FCC which could be
1550 litigated, and what was once litigated under the APA may not
1551 apply when there are new provisions. Is that a correct
1552 statement of your view?

1553 Mr. {Pierce.} That is correct, and actually the
1554 provision you were just referring to is a good illustration
1555 of that. I mean, there is certainly nothing wrong with it.
1556 In fact, it would be laudable for the FCC to look at the
1557 relationship between market forces and technology and the
1558 need for regulation and look at the likelihood, but as soon
1559 as you put that in the statute, you have got more lawyers'

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1560 work, and when it is an agency-specific statute, the
1561 likelihood is that it will take 15, 20 years before we get a
1562 settled judicial interpretation of what that means, and I
1563 don't have any idea what that--and I don't know what the
1564 triggering language will be.

1565 Mr. {Waxman.} I thank you for that answer.

1566 This draft legislation also contains a new provision
1567 that would require advance notice to the Commissioners of any
1568 decision or action taken at the bureau level, known as
1569 delegated authority, and the provision empowers two or more
1570 Commissioners to block any use of such delegated authority,
1571 instead require that the issue be considered by the full
1572 Commission. So two members can, in effect, hold hostage
1573 things that are routinely done at the bureau level. Now,
1574 most of what the FCC does in 2012, there are 165 items
1575 released by the full Commission, in 2014, items released at
1576 the bureau level. That means 92 percent of all the actions
1577 the FCC took last year were pursuant to delegated authority
1578 at the bureau level. So my concern is that if two
1579 Commissioners could block the exercise of this authority and
1580 require what could have been a routine matter to be addressed

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1581 by all five Commissioners, that is going to be an extra
1582 burden. It is sort of like the Senate that can stop things
1583 from happening but putting holds on nominees or requiring a
1584 threat of a filibuster.

1585 Professor Benjamin, would you be concerned this might
1586 allow a minority of Commissioners to frustrate the will of
1587 the majority or the chairman's agenda, potentially adding
1588 weeks or months of delay to routine actions supported by the
1589 majority?

1590 Mr. {Benjamin.} Yes. The serious question would be,
1591 why would you want to empower a minority that way? Because
1592 there really are thousands of decisions that we are talking
1593 about, and right now there are fairly clear lines of
1594 authority in the Commission which makes for greater
1595 efficiency. So if I were a business before the agency with a
1596 routine matter, I would be concerned.

1597 Mr. {Waxman.} Thank you. My time is up. But Mr.
1598 McDowell wanted to respond.

1599 Mr. {Walden.} We will do that on Mr. Scalise's time, I
1600 think. Mr. Scalise?

1601 Mr. {Scalise.} If the chairman is so inclined, could I

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1602 yield to the chairman?

1603 Mr. {Walden.} I would appreciate that. Thank you.

1604 So I want to point out why we have added that provision,
1605 and Mr. McDowell, as a Commissioner, please feel free not
1606 only to weigh in on Mr. Scalise's time subsequently yielded
1607 but also on what I am about to say.

1608 So it is routine, Mr. Benjamin, that they have these
1609 delegated authority and these things go through, but there
1610 has also been a custom, I believe, of 48-hour notice for the
1611 other Commissioners so they know what is going through on
1612 delegated authority. Recently, there was a case where an
1613 item was put on up on delegated authority on a Friday night
1614 triggering the 48-hour notice over the weekend. Now, I don't
1615 think there was any mischief in that, but at some point here
1616 you could have a lot of mischief occur over a weekend. And
1617 so we are saying, you know, two Commissioners could say wait
1618 a minute, whoa, whoa, whoa, what are you doing on supposed
1619 delegated authority, because I don't think that is always
1620 clearly spelled out.

1621 But Mr. McDowell, are we hitting on something here?

1622 Mr. {McDowell.} A little bit of history here. First of

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1623 all, it is rare for Commissioners to ask for anything that is
1624 being done under delegated authority to be elevated to an
1625 8th-floor vote. It wouldn't be, with all due respect, akin
1626 to a hold in the Senate. What it is, it is asking for an
1627 8th-floor vote on these things rather than the bureau issuing
1628 the role. And, you know, before this hearing I polled some
1629 of my former staff to ask them how many times did we actually
1630 ever want something to be elevated to an 8th-floor vote, and
1631 we could count on less than one hand the number of times in
1632 my 7 years there where that would actually happen. So it
1633 wouldn't hold things up per se. What it actually might do is
1634 in a way speed things up because bureau decisions can be
1635 brought to the 8th floor through petitions for
1636 reconsideration and other administrative vehicles, and that
1637 takes time to get to the 8th floor, so you could actually be
1638 short-circuiting that sort of appeals process, and also keep
1639 in mind, it is very rare. And by the way, in the past when
1640 it happened, I mean, one of the instances had to do with a
1641 switch digital issue and set-top boxes during Chairman
1642 Martin's tenure, and the other four Commissioners, two
1643 Republicans and two Democrats, we were very concerned about

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1644 the direction that was heading in. It was an enforcement
1645 proceeding. So it was a bipartisan issue, the same with some
1646 other issues that I worked with Commissioners Copps and
1647 Adelstein on during that era. So it is very rare and also--
1648 Mr. {Walden.} Make it real quick because I am using up
1649 his time. So let us go to Mr. Scalise. Thanks for your
1650 indulgence.

1651 Mr. {Scalise.} Thank you for yielding back. Those are
1652 the exact questions I was thinking of asking myself, Mr.
1653 Chairman. I appreciate you asking them in a much more
1654 eloquent way with that great radio voice that you have.

1655 I am glad that we are having a hearing on FCC process
1656 reform. I was little surprised at the beginning of the
1657 hearing that there were some that were expressing objection
1658 or concern about us taking up FCC process reform, and
1659 obviously, Mr. Chairman, you have got two bills on this
1660 agenda that we are talking about, and both of them deal with,
1661 I think, very important reforms. But when you look--the IRS
1662 serves as a poster child for what happens when a federal
1663 agency thinks that they are no longer accountable to the
1664 America taxpayer, and you just look at the abuses that are

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1665 happening because they weren't reform, because they didn't
1666 think that they had to answer to anybody. And so when we
1667 talk about reforming processes at the FCC, it is critical
1668 that Congress play this role. And look, if the Senate
1669 doesn't think it is important to have transparency and
1670 accountability and reform, let them go out and defend it, but
1671 shame on us if we don't exercise our responsibility in making
1672 sure that these federal agencies that we oversee are
1673 accountable, because we have seen some troubling examples at
1674 the FCC, and I think, Mr. Chairman, you pointed out some real
1675 concerns, especially as we have seen with mergers in the past
1676 and then the comments by Mr. Wheeler where he in essence was
1677 tacitly condoning the practice of the FCC literally just
1678 trying to hold up a merger unless companies would accept
1679 regulations, de facto regulations that Congress didn't even
1680 pass. So Congress said we don't think that this should be a
1681 law, and somebody at the FCC who thinks they are
1682 unaccountable says I think it should be a regulation anyway
1683 and even though I can't get it approved, I will just hold up
1684 a company's merger unless they agree to something that
1685 Congress doesn't even think should be passed, and I think

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1686 that is a major concern of a lot of us. I think there is
1687 some real issues that need to be pursued on that. We need to
1688 get involved congressionally and stop them from doing this.

1689 Commissioner McDowell, you know, in my last few seconds
1690 here, I want to ask you about it. First of all, I want to
1691 ask, does anybody on the panel think it is okay for the FCC
1692 to shake down a company, to hold up a merger over requiring
1693 them to accept a regulation that Congress didn't even pass?
1694 Does anybody want to defend that practice? I am glad to see,
1695 it is sort of like the thunderous applause you had,
1696 Commissioner McDowell. Nobody wants to defend it. But did
1697 you see it when you were at the FCC? Did you see that kind
1698 of what I think is unethical activity?

1699 Mr. {McDowell.} Sure. There are reasonable differences
1700 in interpretation of what the public interest is. I have had
1701 a lot of conversations with my colleagues over the years over
1702 this, and some think that anything that benefits the public
1703 is the cost of the transaction. I disagree with that. I
1704 think it has to do with, is there a merger-specific harm to
1705 consumers that needs to be cured. Others think that it is a
1706 broader interpretation of a public-interest standard, but

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1707 that is precisely what the bill, I think, tries to address is
1708 to put a fence around that, a definition around what the
1709 public -interest standard would be.

1710 Mr. {Scalise.} I think that would be important to have,
1711 so I thank you, and I thank you, Mr. Chairman. I yield back.

1712 Mr. {Walden.} I now recognize the chairman emeritus of
1713 the committee, the gentleman from Michigan, Mr. Dingell.

1714 Mr. {Dingell.} Mr. Chairman, I thank you for your
1715 courtesy. I commend you for this hearing.

1716 Like the chairman, I am very much concerned about the
1717 somewhat curious functioning of the Federal Communications
1718 Commission, so I performed a very thoughtful analysis of the
1719 Commission Reform Act to see how it works, and one of my
1720 first concerns it, it seems to affect in a curious way 67
1721 years of administrative law and related jurisprudence. It
1722 subjects only one federal agency to unique administrative
1723 procedures that will be different than all of the others and
1724 will open the door to years of litigation and uncertainty,
1725 ultimately stymieing, I think, rather than streamlining the
1726 work of the Commission.

1727 My questions this morning are directed to Mr. Benjamin

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1728 and they concern only the draft Federal Communications
1729 Commission Process Reform Act. I hope you will oblige me,
1730 sir, with yes or no answers.

1731 Mr. Benjamin, with respect to the Commission's
1732 rulemaking authority, I note that Section 13(a)(2) of the
1733 draft bill mandates the Commission to fulfill a number of new
1734 requirements prior to amending or adopting a new rule. Is it
1735 your understanding that a party could challenge the
1736 Commission's completion of such new requirements in court?
1737 Yes or no.

1738 Mr. {Benjamin.} Yes.

1739 Mr. {Dingell.} Now, Mr. Benjamin, the practical effect
1740 of such judicial review would be to slow or to hinder the
1741 Commission's ability to promulgate new rules, yes or no?

1742 Mr. {Benjamin.} Yes.

1743 Mr. {Dingell.} And it would be a significant change in
1744 the Administrative Procedure Act, would it not?

1745 Mr. {Benjamin.} Yes, with respect to the FCC.

1746 Mr. {Dingell.} Now, Mr. Benjamin, the new requirements
1747 in Section 13(a)(2) contain undefined terms such as
1748 ``specific market failure'', ``actual consumer harm'',

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1749 ``burden of existing regulation'' and ``reasonable period of
1750 time.'' Is it probable that interested stakeholders will
1751 challenge the Commission's application of such terms in the
1752 event stakeholders disagree with the Commission's ruling on a
1753 particular matter in court? Yes or no.

1754 Mr. {Benjamin.} Yes.

1755 Mr. {Dingell.} Now, Mr. Benjamin, again, the practical
1756 effect of such challenges would be to hinder and to slow the
1757 Commission's ability to agree on new rules or to amend or
1758 rescind existing rules. Yes or no?

1759 Mr. {Benjamin.} Yes.

1760 Mr. {Dingell.} Now, so far it would seem then that one
1761 of the draft bill's primary effects would be to sand the
1762 gears of the Commission when it comes to rulemaking. I would
1763 like to turn my attention to the draft bill's effect on the
1764 Commission's merger review authority.

1765 Now, Mr. Benjamin, Section 13(k)(1)(A) requires that the
1766 Commission impose conditions on transactions and transfers
1767 that are ``narrowly tailored to remedy a harm that would
1768 likely arise as a direct result'' of such transactions and
1769 transfers. Is it your opinion that this requirement will

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1770 invite strict scrutiny by the courts of merger conditions
1771 imposed by the Commission? Yes or no.

1772 Mr. {Benjamin.} Yes.

1773 Mr. {Dingell.} And it would be a fine opportunity for
1774 repeal and judicial review, right?

1775 Mr. {Benjamin.} Sorry, repeal?

1776 Mr. {Dingell.} The conditions and so forth would be a
1777 fine opportunity for judicial review?

1778 Mr. {Benjamin.} Yes.

1779 Mr. {Dingell.} Now, Mr. Benjamin, is it your opinion
1780 that it will be extremely difficult to craft merger
1781 conditions that would satisfy Section 13(k)(1)(C) of the
1782 draft bill, which specifies that such conditions address a
1783 harm ``uniquely presented by the specific transfer of lines,
1784 transfer of licenses or other transactions such that the harm
1785 is not presented by persons not involved in the transfer or
1786 other transaction.'' Yes or no?

1787 Mr. {Benjamin.} I think I understand your question.

1788 Yes.

1789 Mr. {Dingell.} That is a wonderfully complex sentence
1790 too, isn't it?

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1791 Now, Mr. Benjamin, additionally, I note that Section
1792 13(k)(2) of the bill prohibits the Commission from adopting
1793 voluntary merger conditions that are not consistent with the
1794 conditions I mentioned in my previous questions. Is it your
1795 opinion that such prohibition would serve as additional
1796 roadblock to merger approvals and to potentially diminish, if
1797 not eliminate, the Commission's role in merger reviews? Yes
1798 or no.

1799 Mr. {Benjamin.} Yes, in combination with the other
1800 provisions.

1801 Mr. {Dingell.} I am running out of time and I apologize
1802 to you.

1803 Now, finally, is it correct that the draft bill provides
1804 no additional authorizations of appropriations or personnel
1805 for the Commission to comply with the new requirements of the
1806 legislation which would impose a demand for new personnel,
1807 money and so forth through the agency? Yes or no.

1808 Mr. {Benjamin.} Yes.

1809 Mr. {Dingell.} So the long and short of this is that
1810 the draft bill then could conceivably hinder the Commission
1811 rulemakings but also severely restrict its ability to approve

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1812 mergers. At this point I am rather distressed to note that
1813 the bill would impose a kind of curious Magnuson-Moss
1814 rulemaking requirement on the Commission which will not
1815 streamline its processes or provide it with resources with
1816 which to comply with the draft bill's new and more onerous
1817 mandates.

1818 I say this to you, Mr. Chairman, with affection and
1819 respect, in the hope that the committee will continue to seek
1820 the views of stockholders and stakeholders about the draft
1821 bill that will enable it to work to expeditiously conduct the
1822 business of the Commission, and I would hope that the
1823 thoughtful work of the committee will enable us to solve some
1824 of the questions that appear here to stand in the way of
1825 writing good legislation. I thank you for your courtesy to
1826 me.

1827 Mr. {Latta.} [Presiding] Thank you. The gentleman's
1828 time has expired, and at this time the chair recognizes the
1829 gentleman from Illinois for 5 minutes.

1830 Mr. {Kinzinger.} Thank you, Mr. Chair, and thank you,
1831 gentlemen, and you made it to the bottom row so you are
1832 almost about to go home. Congrats.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1833 Thank you for being out here. The discussion we are
1834 having is important regarding the efficacy and efficiency of
1835 the regulatory environment. In looking through the written
1836 testimony, one statement that really caught my eye in Mr.
1837 Downes' testimony was transfers delayed are consumers
1838 underserved. That sums up a lot of this debate quite nicely.

1839 We are all trying our best to complete work that will
1840 best serve our constituents, but the problem is that overly
1841 caustic and non-standardized regulations keep delaying the
1842 possible benefits of the changes in the telecommunications
1843 industry for our constituents. With the continuing advances
1844 of technology occurring at such a rapid pace, I do believe
1845 that current FCC process needs to be reformed to deal with
1846 such a unique industry.

1847 That brings us to the topic of today's hearing, the
1848 draft legislation for FCC process reform and the FCC
1849 Consolidated Reporting Act. We discussed similar legislation
1850 in the 112th Congress, which actually passed the House in a
1851 bipartisan manner, and I am happy to see that we are back
1852 today discussing what I believe are much improved versions of
1853 those pieces of legislation.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1854 The FCC process reform draft will make great strides in
1855 improving the predictability, efficiency, and most
1856 importantly, the transparency of the FCC in its operations.
1857 Government transparency is a major key to gaining the trust
1858 of the American public, and this draft legislation includes a
1859 number of provisions that will not only standardize many of
1860 the actions of the FCC but will also make it more transparent
1861 to the general public.

1862 I would also like to add that I do appreciate the
1863 efforts of former Chairman Genachowski and Acting Chairwoman
1864 Clyburn on many of these issues. As I have said before,
1865 though, statutory authority should be what drives the
1866 decision-making process at the FCC, not the discretion of
1867 whomever may be the chair during a specific period of time.

1868 In response to some of the questions, however, that we
1869 just heard, I would like to ask Commissioner McDowell, I am
1870 going to give you a number of questions and we will do the
1871 yes-no thing if that works for you. While most agencies are
1872 subject to the APA, they don't all rely on procedures that
1873 differ to varying degrees such that no agency actually has
1874 the same processes. Is that correct?

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1875 Mr. {McDowell.} Exactly, yes.

1876 Mr. {Kinzinger.} Do the new requirements in the bill
1877 requiring the FCC to actually justify its actions prior to
1878 adopting a rule constitute good government practices that
1879 will result in better rules?

1880 Mr. {McDowell.} Yes.

1881 Mr. {Kinzinger.} Do stakeholders currently challenge
1882 most of the Commission's significant decisions in court even
1883 when the FCC is on relatively firm ground?

1884 Mr. {McDowell.} Pretty much everything the FCC does
1885 gets appealed, yes.

1886 Mr. {Kinzinger.} Understood. Has poor FCC process and
1887 weak analysis caused the litigation?

1888 Mr. {McDowell.} It has, but again, everything gets
1889 appealed, even when it is strong.

1890 Mr. {Kinzinger.} All right. A lot of lawyers in this
1891 town.

1892 Mr. {McDowell.} Yes.

1893 Mr. {Kinzinger.} So is it fair to say the bill won't
1894 really increase the amount of litigation but actually might
1895 reduce it, do you think?

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1896 Mr. {McDowell.} I don't know if it will reduce it but
1897 it could help make for better public policy.

1898 Mr. {Kinzinger.} Okay. Does the FCC itself often adopt
1899 requirements that contain undefined terms?

1900 Mr. {McDowell.} All the time.

1901 Mr. {Kinzinger.} Does leaving some terms in the bill
1902 undefined and allowing the FCC to define them provide
1903 flexibility to the agency?

1904 Mr. {McDowell.} It provides more certainty, and
1905 therefore, for future Commissions would limit the sort of
1906 arbitrary nature of whoever is in those chairs interpreting
1907 more ambiguous terms.

1908 Mr. {Kinzinger.} Thank you. Doesn't the bill leave the
1909 public-interest standard intact and still allow the FCC to
1910 deny transactions or impose tailored conditions such as
1911 divestitures of certain assets?

1912 Mr. {McDowell.} Yes, and actually real briefly, I think
1913 it is actually makes things more efficient in that regard.
1914 So if you are narrowing the scope of merger approval process
1915 and the substance of it, then you are actually, I think,
1916 speeding things up, that there are a lot of extraneous things

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1917 that could not be examined because it is not specific to the
1918 merger.

1919 Mr. {Kinzinger.} And lastly, is it your belief that
1920 there are sufficient bodies at the FCC that some could be
1921 spared to help implement this new law and that the
1922 improvement in policy would be well worth the effort?

1923 Mr. {McDowell.} I think the improvement would be well
1924 worth the effort.

1925 Mr. {Kinzinger.} Excellent. With that, I have got 50
1926 seconds left, I don't want to get into a new line of
1927 questioning, so Mr. Chairman, I will yield back. Do you
1928 want--

1929 Mr. {Walden.} If you don't mind yielding to the
1930 gentleman?

1931 Mr. {Kinzinger.} I will yield to the esteemed
1932 gentleman.

1933 Mr. {Latta.} The gentleman yields.

1934 Mr. {Walden.} So Mr. McDowell just in the final 40 or
1935 seconds here, we didn't get time to really get into chevron
1936 deference and what agencies can do, and the courts have a
1937 pattern of deferring to what agencies have done, if they have

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1938 done their work, correct?

1939 Mr. {McDowell.} If they have done what? I am sorry.

1940 Mr. {Walden.} Well, if they have followed their

1941 procedures and they have shown how they complied, haven't

1942 courts also given chevron deference to the FCC in matters?

1943 Mr. {McDowell.} On procedure but also on the

1944 substantive statutory language if they are following that and

1945 are faithful to Congress's intent, yes.

1946 Mr. {Walden.} Because again, back to the Oregon example

1947 with the public utility commission, if you do your job, the

1948 courts will generally--isn't this true, Mr. Ramsay--defer to

1949 the expert agency?

1950 Mr. {Ramsay.} Particularly on factual terms, yes, sir.

1951 Mr. {Walden.} My time, your time is expired. I will

1952 let the chairman wrap it up.

1953 Mr. {Latta.} The gentleman's time has expired, and at

1954 this time I defer to the chairman to see if there is any

1955 further business to come before the committee?

1956 Mr. {Walden.} I don't believe so. We want to thank our

1957 witnesses, though, for your expert testimony. It is very

1958 helpful. We realize we have a work product in front of us.

This is a preliminary, unedited transcript. The statements within may be inaccurate, incomplete, or misattributed to the speaker. A link to the final, official transcript will be posted on the Committee's website as soon as it is available.

1959 What you have suggested will help us refine that product and
1960 get it right, and we will continue our efforts to reform this
1961 agency in a way that makes it a leader for the other
1962 agencies, and since we don't have full jurisdiction over the
1963 APA, we can only do what we can do, but we are going to do
1964 it. So thank you all.

1965 Mr. {Latta.} Hearing no further business before the
1966 committee, the committee stands adjourned.

1967 [Whereupon, at 2:00 p.m., the subcommittee was
1968 adjourned.]