

TESTIMONY OF  
**STUART MINOR BENJAMIN**  
DOUGLAS M. MAGGS PROFESSOR OF LAW  
DUKE LAW SCHOOL

Before the  
**COMMITTEE ON ENERGY AND COMMERCE**  
**SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY**  
of the  
**UNITED STATES HOUSE OF REPRESENTATIVES**

on the  
*FEDERAL COMMUNICATIONS COMMISSION PROCESS REFORM ACT OF 2013*  
July 11, 2013

Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee, thank you for the opportunity to testify before you today on the Federal Communications Commission Process Reform Act of 2013.

My academic career has in many ways revolved around the Commission and its processes. My core research and teaching areas are telecommunications law, administrative law, and the First Amendment. I have written many law review articles on these topics and am the coauthor of *Telecommunications Law and Policy*, a legal casebook now in its third edition. From 2009 to 2011 I was the inaugural Distinguished Scholar at the Commission. I should add that I am not being compensated for my testimony in any way, either directly or indirectly. I have no clients (paid or unpaid), nor have I had any clients or consulting relationships since I became an academic in 1997.

Let me begin with the big picture. I share many of the concerns that appear to underlie these bills. I favor changes to agencies' processes in line with some of the provisions in the bills. With respect to the FCC specifically, I am particularly sympathetic to the streamlining of reports

contained in the companion bill, the Federal Communications Commission Consolidated Reporting Act of 2013. That said, I have some reservations about the Process Reform Act (“bill”) as currently drafted, which I discuss below.

### **Specificity to the FCC**

Perhaps the most obvious question that the bill raises is why, if the reforms are good ones, they are limited to the FCC. One of the great advantages of the Administrative Procedure Act (“APA”) is that it applies the same rules to all agencies, allowing agencies to learn from each other and leading to the development of a jurisprudence that applies to all agencies. The goals underlying many provisions of the bill would seem to apply with equal force to all agencies, and there is no obvious reason why these provisions should be limited to the FCC. Applying them only to the FCC moves away from the APA’s valuable unification of agency procedures and standards.

In this regard, let me highlight the provision in the bill that I most strongly support. Section 13(c), allowing nonpublic collaborative discussions, is a great idea. This is something on which I think virtually every administrative lawyer and law professor would agree. It is inefficient that Commissioners cannot have meaningful substantive discussions among themselves outside of public Commission meetings and so must send their staffs to consult and coordinate. My main suggestion is that this proposal not be limited to the FCC, as the arguments for it apply to all multimember agencies. This is not a criticism so much as an encouragement. I do not see any reason why new rules on nonpublic collaborative discussions should be limited to the FCC.

## **Litigation and Uncertainty**

The bill will create many new standards that are subject to judicial review and that lack either agency or judicial precedents. Each of the new requirements in § 13(a), for example, creates a basis for a legal challenge beyond the existing ability to challenge the rule itself. This will likely open the door to years of litigation and uncertainty. And limiting the new standards to the FCC will increase this period of uncertainty. With new standards applicable to only one agency, establishing a set of agency practices and set of judicial standards will take many years.

Particularly unfortunate, in my view, is the invitation to litigation and unpredictability where other options are available. Section 13(a)(2)(C)(ii) is a notable example. I support cost-benefit analysis of all proposed regulations, including FCC regulations. The Office of Information and Regulatory Affairs (“OIRA”) currently performs such analysis for executive agencies’ proposed regulations, using standards similar to those in the bill. OIRA thus specializes in cost-benefit review and engages in it routinely. Because it is part of the Executive Office of the President (and thus outside the purview of the APA) and because the executive orders governing OIRA’s cost-benefit analysis state that they do not grant judicial review, OIRA has been able to develop its analysis without the unpredictability entailed in judicial review. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992); Exec. Order No. 12,866, § 10, 58 Fed. Reg. 51,735 (Sept. 30, 1993). Rather than build on these practices, the bill directs the FCC itself to undertake the cost-benefit analysis, and it opens the door to judicial review of such analysis. This greatly reduces predictability and confers little benefit. In my view, an approach like that in the Independent Agency Regulatory Analysis Act from the 112<sup>th</sup> Congress (S. 3468), authorizing OIRA review of independent agencies’ proposed regulations, makes much more sense.

## **Merger Review**

The provisions on merger review raise a different concern. The provisions impose such rigorous burdens on the Commission that they will likely leave the Commission with little if any role. The language of § 13(k)(1)(A) is particularly striking. No existing federal statute has language like this (indeed, only three federal statutes use the term “narrowly tailored” or its variants, and one of those iterations is in the findings). “[N]arrowly tailored” is the language of strict judicial scrutiny – the most rigorous scrutiny courts apply. It is of course unclear how courts will interpret “narrowly tailored to remedy a harm that would likely arise as a direct result of the specific transfer or specific transaction” (another example of uncertainty). But in light of the particularity of the “narrowly tailored” formulation to strict judicial scrutiny and the many other ways the bill could have articulated the nexus between merger conditions and the harms from the merger, presumably the narrow tailoring language is in fact intended to invoke strict scrutiny jurisprudence. I would expect judges interpreting this provision to so conclude.

If courts apply narrow tailoring to require the least restrictive form of regulation (as courts do when applying strict scrutiny in speech cases), it may well be that no pre-merger conditions will satisfy the courts. At the outset, it is possible that a court will find that conditions triggered by post-merger actions (e.g., waiting for anticompetitive harms to arise) will be more narrowly tailored than prophylactic conditions and thus doom the latter. Even if courts do not treat conditions looking to post-merger events as less restrictive alternatives, most any pre-merger conditions the Commission might impose will be imperiled by the likelihood that creative lawyers and judges will be able to come up with some narrower form of regulation that largely achieves the same goals, even if that alternative is politically unpalatable or otherwise

infeasible. *See, e.g.*, *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666-670 (2004); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816, 818-826 (2000).

The chances that the Commission could craft any significant merger condition that would satisfy the bill are further reduced by § 13(k)(1)(c), requiring that the relevant harm be “uniquely presented by the specific transfer of lines, transfer of licenses, or other transaction, such that the harm is not presented by persons not involved in the transfer or other transaction.” No existing legislation or judicially created test has such language, so its application is uncertain. But demonstrating the uniqueness of a harm is a very tall order. The Clayton and Sherman Acts have no similar requirements, for good reason: harms (and most everything else) are on a continuum, so uniqueness may not be present even in situations that most everyone would agree will raise serious concerns.

The bottom line is that it seems likely that these provisions as written will imperil the FCC’s ability to impose meaningful merger conditions beyond those that would be imposed by the FTC or the Antitrust Division of the Department of Justice, which enforce more general antitrust statutes like the Clayton Act. The FCC could not confidently play an independent role.

There has been robust debate about what FCC merger review adds to FTC/DOJ review. Congress’s view may be that the FCC’s review does more harm than good. If so, Congress should simply repeal the FCC’s independent statutory authority to engage in merger review, thereby avoiding years of litigation and uncertainty. If, on the other hand, Congress wants to preserve a meaningful role for FCC merger review, I would suggest less rigorous language than currently appears in the transaction review provisions. There are ways to accommodate very

legitimate concerns about the breadth and scope of merger conditions while still leaving a meaningful role for the FCC.

### **Actions by a Minority of Commissioners**

Some of the bill's provisions will reduce the power of the FCC Chairman. I tend not to favor such provisions for reasons of democratic accountability. My experience in the FCC gave me an additional reason, as the Chairman's authority provides the benefit of clear lines of authority for the FCC staff. That said, I understand the appeal of allowing a majority of commissioners to place items on the agenda. But § 13(e)(2) does not even involve a majority of commissioners. Empowering a minority of commissioners to block actions taken pursuant to delegated authority, all of which actions have the explicit or implicit approval of the Chairman, is a dramatic step that will diminish the Chairman's authority and blur lines of authority for the staff. It also has the potential to slow down thousands of decisions and thus create difficulties for businesses and individuals who rely on the existing FCC processes for predictable timetables on routine decisions.

### **Additions to the Rulemaking Process**

Finally, the bill adds many requirements to the FCC's rulemaking process. I want to highlight two. First, § 13(a)(1)(A), by effectively requiring a notice of inquiry for every new rulemaking unless there is a finding of good cause to avoid a notice of inquiry, will subject the FCC to a hurdle that seems unnecessary. Congress has never imposed a similar requirement for notices of inquiry (a term that appears nowhere in the APA, and only once in the United States

Code), and with reason: such a requirement lengthens a rulemaking process that is already very elaborate and takes many months, mandating additional process with no clear benefit. Second, § 13(a)(1)(B)'s requirement that a notice of proposed rulemaking contain the specific language of the proposed rule will cement the transformation of the rulemaking process into a rule adopting process. In the first decades after Congress enacted the APA, notices of proposed rulemaking were often very brief, and frequently simply outlined the issue and its possible resolution. Starting in the early 1970s, judicial opinions began to require so much information and guidance in notices of proposed rulemaking that agencies were effectively required to do most of their analysis before they issued a notice of proposed rulemaking. One result of these judicial rulings was that the public comment period under § 553 of the APA came after the agency had made the most important decisions, because those decisions were made before the notice was issued. Section 13(a)(1)(B) will largely complete this transformation, as the agency will be required to have written an entire proposed order as part of its notice before the § 553 comment period. Some might welcome this transformation, on the theory that there are advantages to disclosure at the front end and that it is fine to diminish the role of comments from the public during the rulemaking process because such comments do not make much difference, anyway. But it is a remarkable transformation from where the rulemaking process started.

I will be happy to respond to any questions that you may have.