



October 21, 2013

The Honorable Greg Walden
Chairman
House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Dear Chairman Walden:

Thank you for the opportunity to testify before the Subcommittee on Communications and Technology on Thursday, July 11, 2013, at the hearing entitled "Improving FCC Process."

Attached please find my responses to the questions for the record from Ranking Member Waxman.

Please let me know if I can be of further assistance or answer any additional questions. I can be reached via email at usa.mcdowell@gmail.com and on my cell phone at (202) 251-4640.

Sincerely,

/s/

Robert M. McDowell
Visiting Fellow
Hudson Institute
Center for Economics of the Internet

Answers From

The Honorable Robert M. McDowell
Visiting Fellow
Hudson Institute
Center for Economics of the Internet

October 21, 2013

The Honorable Henry Waxman

1. Section 13(a)(1)(A) of the draft legislation effectively requires the FCC to issue a Notice of Inquiry (NOI) for every new rulemaking.

- Can you think of situations in which an NOI confers no benefit and unnecessarily leads to delay? For example, if the FCC is looking to update technical rules that would re-designate certain spectrum from voice to broadband services, would the requirement for the FCC to issue a NOI really contribute to the process?
- What happens when the FCC has to address routine matters, such as fee proceedings, or refresh the record in an already open proceeding? Would an NOI still be necessary in such instances?

A notice of inquiry (NOI) is a sensible way to begin to explore an issue of interest. Should the FCC initiate *every* proceeding with an NOI? Not necessarily. In those instances where the FCC initiates a notice of proposed rulemaking (NPRM) without first completing an NOI, the NPRM ought to include an explanation as to why the proceeding is beginning without an NOI. The draft bill contemplates providing such flexibility. That said, it is important to note that the Commission has a long bipartisan history of issuing NPRMs that contained no proposed rules. On their face, these documents were nothing more than NOIs, yet they acted as precursors to the promulgation of new rules without adequate opportunity for public comment on the proposed text of those rules. Language in the draft legislation tries to restore proper administrative procedure, allow for flexibility of action and encourage disclosure of the Commission's substantive and procedural rationales where appropriate.

With respect to the questions here, as has always been the case, the FCC is free to take additional regulatory action, including issuing an NPRM, at any time (including immediately) after the close of the comment cycle period associated with an NOI. The hypotheticals described here do not appear to change this fact. Thus, a preliminary inquiry about possible future rule or policy changes would not cause undue delay and would offer a real potential benefit to the decision-making process.

Regarding routine matters or a desire to refresh the record in an already open proceeding, the FCC staff regularly rely upon delegated authority to issue public notices. Therefore, an additional NOI would not be necessary in these circumstances.

2. Mr. McDowell, while serving as an FCC Commissioner, you eloquently explained why not printing a draft rule in an NPRM made sense in some instances. In the Text-to-911 NPRM, you expressed support for the “prudent decision” to refrain from including draft rules in the NPRM at issue and you noted it made sense for the FCC to refrain from including draft rules because “putting forth proposed rules at this delicate stage may only distort the private sector’s creative process,” and the open-ended nature of an NPRM allows the Commission to “elicit greater insight regarding the costs and technical feasibility of potential implementation.” I think your previous statement was an appropriate call for agency flexibility. Have you changed your mind? Do you now support a blanket requirement requiring the FCC to include the specific language of a proposed rule in every NPRM?

I have always maintained that the ability to be flexible is important. The Text-to-911 NPRM is a terrific illustration of an unusual circumstance where such flexibility was warranted. In the rare event that the Commission releases an NPRM without including draft rules, the NPRM ought to include a thorough explanation as to why the document does not contain draft rules. In other words, the Commission ought to omit draft rules only after careful consideration and in limited circumstances. Ideally, in these circumstances, a further notice of proposed rulemaking would be released at a later time, which would include a set of draft rules. This way, the public would have the opportunity to inform policymakers on the advantages and disadvantages associated with the draft rules. Likewise, policymakers would benefit from receiving additional, more targeted, comment. The draft bill’s language contemplates such flexibility.

3. Do you support the provision in the bill requiring the FCC to make proposed final rules public before Commissioners have a chance to vote on adoption? How do you think this provision would square with FCC rules regarding unauthorized disclosure of any FCC nonpublic information, such as the contents of agenda items?

Transparency in government should always be a high priority. Additionally, providing the public with a meaningful opportunity for substantive comment on material proposals would better inform the FCC’s judgment. As noted above, release of draft rules confer mutual benefits for the public and policymakers. In the unlikely event that policymakers find themselves heading far afield from rules originally proposed and released, I hope they would want to seek further notice and comment on a second set of proposed rules. Should Congress elect to require the FCC to release proposed final rules to the public prior to formal adoption, I would respectfully suggest that Congress consider modifying the Communications Act to permit FCC personnel to release nonpublic information in a prudent and flexible manner without penalty.