Testimony of Richard J. Pierce, Jr.

Lyle T. Alverson Professor of Law
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Before the
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology

Hearing on
Improving FCC Process

July 11, 2013

Summary of Testimony

In my opinion, the provisions of the proposed Federal Communications Commission Process Reform Act of 2013 that would add twelve new mandatory steps to the rulemaking process created by the Administrative Procedure Act (APA) would not improve the FCC decision making process. To the contrary, those changes would be a major step in the wrong direction.

The addition of twelve mandatory steps to the FCC rulemaking process would be a return to the uncertain, confused, ad hoc world of agency decision making that the Congress wisely and unanimously rejected when it enacted the APA in 1946. Section 553 of the APA created a uniform rulemaking procedure applicable to all agencies. For sixty-seven years, the Supreme Court has attempted to preserve and protect that sensible uniform decision making procedure from attempts to eviscerate it by returning to the uncertain, confused, and ad hoc situation that existed prior to enactment of the APA. Yet, that is exactly what the proposed Act would accomplish.

Moreover, the proposed Act would impose on the FCC mandatory rulemaking procedures that would be extremely burdensome, resource-intensive, and time-consuming. I agree with great jurists like Chief Justice Rehnquist and D.C. Circuit Judge Kavanagh that we should not add more sources of delay and cost to the rulemaking process at the FCC.

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Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee, it is a privilege for me to be able to appear before you today to discuss the proposed Federal Communications Commission Process Reform Act of 2013. My references in this testimony are to the version of the proposed Act contained in the discussion draft circulated by Chairman Walden on July 8, 2013.

I have taught administrative law for thirty six years. I have written over a dozen books and 120 scholarly articles on administrative law. I have attached a copy of my cv, including a list of my publications, to this testimony. My books and articles have been cited in hundreds of judicial opinions, including over a dozen opinions of the United States Supreme Court. I am also a member of the Administrative Conference of the United States.

I will discuss the provisions of the proposed Act that relate to the procedures the Federal Communications Commission (FCC) is required to use to issue rules. I will not discuss the provisions that relate to the substantive principles FCC is required to apply in its decision making. Thus, for instance, I will not discuss proposed section 13(j), which would narrow the FCC's power to impose conditions on some transactions that are within

the FCC's jurisdiction. I am not an expert on communications law, so I lack an adequate basis to discuss proposed changes in the substance of communications law.

Generally, the proposed changes in the procedures FCC is required to use to issue rules would move the country in the wrong direction by reversing the wise decision that Congress made in 1946 to create a uniform set of rulemaking procedures applicable to all agencies by enacting the Administrative Procedure Act (APA).[1] The proposed Act would replace the relatively simple set of decision making procedures that section 553 of the APA makes applicable to rulemakings by all agencies with an extremely detailed set of procedures uniquely applicable to FCC rulemakings. Those procedures would be far more demanding than those used by any other agency.

The APA has proven to be one of the most durable and most successful statutes ever enacted. It remains in effect today with only a few minor amendments. It continues to govern all decision making by all federal agencies. Congress should not eviscerate the APA on a piecemeal basis by returning to the disastrous legal regime that preceded the APA.

Professor George Shepherd has published a comprehensive history of the APA.[2] The process of drafting what became the APA began in the early 1930s. At that time, each federal agency used different procedures for making most decisions, including issuance of rules. There was universal agreement that the situation was intolerable. It created great uncertainty for lawyers, their clients, and the courts. Without the ability to generalize about administrative procedures, a court had no way of knowing whether and

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[1] 5 U.S.C. §§551-808.

[2] George Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges for New Deal Politics, 90 Northwestern University Law Review 1557 (1996).

to what extent a judicial decision it issued with respect to the procedures used by one agency applied to other agencies. Lawyers and their clients were also at a loss to know the law applicable to agency decision making procedures. A judicial precedent issued with respect to one agency might or might not have some application to other agencies. Thus, there was unanimous agreement that the ad hoc, uncertain, and highly variable procedures agencies were using had to be replaced by a uniform legal framework that specified the procedures all agencies were required to use to make decisions of various types.

During the 1930s, however, agreement among members of the House and Senate extended only to the need to create a uniform set of procedures applicable to all agencies. Members differed significantly with respect to the specific procedures that agencies should be required to use. As Professor Shepherd described in detail, Congress engaged in intense debate with respect to the contents of the APA throughout the 1930s.

In the 1940s, a growing body of empirical research gradually changed the nature of the debate. Walter Gellhorn, who is often referred to as the father of administrative law, chaired a committee that was assigned the task of drafting legislation that would bridge the yawning gap between the views of the participants in the congressional debate. Gellhorn oversaw the process of writing a series of monographs that described and analyzed the decision making procedures used by twenty-seven agencies. For the first time, the participants in the debate were able to appreciate the wide variety of procedures agencies used to issue rules and were able to evaluate the proposal made by Gellhorn's committee with reference to the realities of the confused and highly variable status quo.

The introduction of empirical research into the debate eventually led to a compromise Bill that was enacted unanimously by both the House and the Senate.

As Professor Shepherd has noted:

> The landmark Administrative Procedure Act (APA) was the bill of rights for the new regulatory state. Enacted in 1946, the APA established the fundamental relationship between regulatory agencies and those whom they regulate -- between government, on the one hand, and private citizens, business, and the economy, on the other hand. The balance that the APA struck between promoting individuals' rights and maintaining agencies' policy-making flexibility has continued in force, with only minor modifications, until the present.[3]

The key to the successful conclusion of the fifteen year debate about administrative procedure was the empirical research that formed the basis for the Bill that became the APA. As Republican Congressman Hancock stated at the time of the unanimous House vote to enact the APA: "I regard the report which accompanies this bill as the most complete and scholarly report that has ever accompanied any bill to come before us in my time."[4]

The durability and continued success of the APA is attributable in large measure to the efforts of the U.S. Supreme Court over the past sixty-seven years to adopt sensible interpretations of its language and to protect the APA from the potentially destructive effects of the agency-specific doctrines and precedents that have a tendency to develop over time.[5] The Court has consistently resisted efforts to establish procedures that are unique to particular agencies and has emphasized "the importance of maintaining a uniform approach to judicial review of administrative action."[6] The modern Supreme Court agrees with the unanimous view of the Members of the Congress in 1946 that it is

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[3] Id. at 1558.
[4] Administrative Procedure Act: Legislative History, 79th Cong., 1944-46 at 372 (1946).
[5] See generally Robert Glicksman & Robert Levy, Agency-Specific Precedents, 89 Texas Law Review 499 (2011).
[6] Dickinson v. Zurko, 527 U.S. 150, 154 (1999).

possible to continue to use and to improve on a set of efficient and predictable agency decision making procedures only if they are uniform among regulatory agencies. The Court has consistently rejected attempts to return to the confusing, uncertain, and ad hoc world that preceded enactment of the APA. Yet, that is exactly what the proposed FCC Process Reform Act would do.

Turning from the general to the particular, the proposed FCC Process Reform Act would add seven mandatory steps to the notice and comment rulemaking process required by the APA. Those new mandatory steps are: (1) a minimum 30-day period for submitting comments; (2) a minimum 30-day period for submitting reply comments; (3) a mandatory Notice of Inquiry issued within 3 years of the issuance of the Notice of Proposed Rulemaking; (4) mandatory inclusion of the language of the proposed rule in the Notice of Proposed Rulemaking; (5) advance provision of a list of the available alternative options to all Commissioners; (6) provision of the language of the proposed rule to all Commissioners well in advance of any meeting scheduled to consider a proposed rule; and, (7) publication of the text of the proposed rule in advance of the meeting. The Act would add three other mandatory procedures in the case of any proposed rule or amendment that would have an "economically significant impact." Those procedures are: (1) an identification of the specific market failure the proposed rule addresses; (2) a determination that the benefits of the proposed rule exceed its costs; and, (3) a determination that market forces or changes in technology are unlikely to resolve the specific market failure within a reasonable period of time. The Act would add two other mandatory procedures in the case of rulemakings that would create or amend a program activity: (1) adoption of performance measures, and (2) a finding that such

performance measures will be effective to evaluate the activity created or amended by the rule. Compliance with each of these twelve new mandates would be subject to review by a court.

There is nothing inherently wrong with any of the twelve procedures that the Act would make mandatory. In my decades of studying the rulemaking process, I have come across rulemakings in which agencies have used each of these procedures, though I have never seen any rulemaking in which an agency used all of the procedures that the FCC Process Reform Act would make mandatory. Each of the twelve additional procedures has advantages that cause it to be a potentially beneficial addition to a notice and comment rulemaking in some cases. Each also has serious disadvantages as well, however. At a minimum, each becomes a source of additional delay and commitment of agency resources in a decision making process that is already lengthy and resource-intensive. Moreover, mandating each of twelve additional procedures increases greatly the risk that a reviewing court will identify some procedural flaw in the rulemaking that requires the agency to begin the arduous process a second time.

Sometimes the benefits of adding one of the twelve procedures identified in the proposed Act are justified by the costs of the additional procedure, but sometimes they are not. The circumstances in which agencies issue, amend, or rescind rules vary far too much to make an across-the-board determination in advance that the agency should be required to add any of these procedures to the rulemaking process. That decision should be left to the agency to make in each case. Only the agency has access the facts needed to make a decision whether to add any of these twelve procedures to the notice and comment process required by the APA.

Speaking for a unanimous Supreme Court, Chief Justice (then Justice) Rehnquist made this point well in 1978:

> But this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" Indeed, our cases could hardly be more explicit in this regard. The Court has upheld this principle in a variety of applications, including that case where the District Court, instead of inquiring into the validity of the Federal Communications Commission's exercise of its rulemaking authority, devised procedures to be followed by the agency on the basis of its conception of how the public and private interest involved could best be served. Examining § 4(j) of the Communications Act of 1934, the Court unanimously held that the Court of Appeals erred in upholding that action. And the basic reason for this decision was the Court of Appeals' serious departure from the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure.[7]

D.C. Circuit Judge Kavanagh made a similar point in a 2008 opinion in which he criticized his colleagues for imposing on FCC procedural mandates that he believed to be beyond those required by the APA:

> Over time, those twin lines of decisions have gradually transformed rulemaking—whether regulatory or deregulatory rulemaking—from the simple and speedy practice contemplated by the APA into a laborious, seemingly never-ending process. The judicially created obstacle course can hinder Executive Branch agencies from rapidly and effectively responding to changing or emerging issues within their authority, such as consumer access to broadband, or effectuating policy or philosophical changes in the Executive's approach to the subject matter at hand. The trend has not been good as a jurisprudential matter, and it continues to have significant practical consequences for the operation of the Federal Government and those affected by federal regulation and deregulation.[8]

I agree completely with Chief Justice Rehnquist and Judge Kavanagh. Adding mandatory procedures to the APA notice and comment rulemaking process is a bad idea. Adding

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[7] Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543-44 (1978) (citations omitted) .
[8] American Radio Relay League v. FCC, 524 F.3d 227, 248 (D.C. Cir. 2008).

twelve such procedures to FCC rulemaking would render it nearly impossible for FCC to issue, amend, or rescind rules.

This concludes my testimony. I would be pleased to respond to any questions you might have.