Testimony on behalf of the
National Association of Regulatory Utility Commissioners (NARUC)

by

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before the

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Reforming Federal Communications Commission Process

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Chairman Walden, Ranking Member Eshoo, and members of the Committee, thank you for the opportunity to testify today on Federal Communications Commission (FCC) Process Reform.

I am Brad Ramsay, the General Counsel of the National Association of Regulatory Utility Commissioners (NARUC). It is – like Congress – a bipartisan organization. NARUC's members include public utility commissions in all your States, the District of Columbia and U.S. territories with jurisdiction over telecommunications, electricity, natural gas, water and other utilities. The people I represent are the in-State experts on the impact of FCC regulation in your State and on your constituents. They, like you, worry about the impact of FCC initiatives on your constituents. I have spent the last 20 plus years representing NARUC on, among other things, telecommunications issues. I spend a great deal of time at the FCC. I am staff to every joint board and conference and support several NARUC commissioners serving on several FCC federal advisory committees.

Let me began by sincerely thanking you for circulating the discussion draft and holding this hearing. There is no question that reform is needed.

During my 23 years at NARUC, I've had the privilege of working with nine FCC chairs spanning both Republican and Democratic Administrations.[1] From Al Sikes up to the current chair Mignon Clyburn, without exception, they have all been dedicated public servants doing their best to act in the best interest of the country. I also genuinely believe,

[1] Mignon Clyburn (D) (May 2013 – present), Julius Genachowski (D) (June, 2009 - May, 2013), Michael J. Copps (D) (January 20, 2009 - June, 2009), Kevin J. Martin (R) (March 18, 2005 - January 19, 2009), Michael K. Powell (R) (January 22, 2001 - March 17, 2005), William (Bill) E. Kennard (D) (November 3, 1997 - January 19, 2001), Reed E. Hundt (D) (November 29, 1993 - November 3, 1997), James (Jim) H. Quello (D) (February 5, 1993 - November 28, 1993, and Alfred C. Sikes (R) (August 8, 1989 - January 19, 1993).

that staff of the FCC is among the hardest working and most professional group of federal employees in the country.

Still procedural lapses unquestionably occur.[2] Unfortunately, when that happens, those with limited resources, e.g., small businesses, State commissions, consumers, and consumer advocates, are disproportionately disadvantaged.

Process issues at the FCC are not specific to one party or administration. Both Republican and Democratic FCC Chairs have instituted positive reforms that improved the transparency and fairness of FCC procedures. But both have also, at times, proceeded in a way that undermined both the fairness and transparency of those same procedures. For example, Chairman Genachowski started the practice of publicly announcing draft orders that would be considered at FCC open meeting two weeks before Sunshine restrictions cut off advocacy.[3] On the other side of the aisle, Chairman Martin started publishing a list of pending items "on circulation" among the Commissioners for approval outside of public meetings.[4] Both of these are useful reforms.

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[2] *See Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (finding FCC ex parte contacts violated basic fairness which requires rulemakings to be carried on in the open and ordering the proceeding reopened); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) (extending the doctrine of *Sangamon Valley*, *id*. at 51-59, while recognizing that "informal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate *so long as they do not frustrate judicial review or raise serious concerns of fairness*," *id*. at 57 (emphasis added)).

[3] Chairman Genachowski also, among other things, moved through a well-intentioned revision to improve the FCC *ex parte* rules. However, it is far from clear that those changes have fixed the process. The Consumer Federation of America's Mark Cooper, who testified before this Committee on FCC reform in 2011, was not far from the mark when he characterized the process as "an abomination" that has "become an unofficial and abusive backdoor process of negotiation."

[4] FCC Press Release (December 4, 2007) FCC PUBLISHES LIST OF ITEMS ON CIRCULATION Washington, DC – The [FCC] announced that beginning today, it would publish on its public website a list of FCC Items on Circulation. On Friday, November 30, FCC Chairman Kevin Martin informed Congress of his intent to take steps to ensure equal access to

NARUC has not taken a position on all aspects of the draft legislation. However, there is no question many of the process reforms suggested in this bill will help level the playing field by significantly increasing transparency and guarantee the FCC compiles a better record for decisions. NARUC has generally endorsed several of the improvements suggested in the draft. In fact, we believe the bill should offer a few more simple reforms. Nonetheless, this draft provides a good starting point for a bipartisan bill that could pass in this Congress. NARUC will help any way we can.

As one respected law professor put it in 2009:

> For years, the agency tolerated a level of mystery and secrecy over what proposals would be submitted for consideration, an extraordinary reliance on the *ex parte* process at the expense of the formal notice-and-comment procedure, and a limited degree of collegial discussion among the Commissioners and the public. Of late, however, concerns about how the agency operates have become more pronounced and Congress has finally taken an interest in the question of … how to reform the FCC's institutional processes.[5]

Most would concede that the agency has made considerable progress since that time, but several of the organic changes the draft proposes to the FCC's enabling statute will assure there is no backsliding and others further improve the agencies procedures.

If Congress is only able to pass the provisions NARUC has endorsed, that alone will result in a more transparent and efficient process, and ultimately better and more informed decisions more likely to be upheld on review. That, in turn, can only result in

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information, particularly in regard to the disclosure of information about proposed rules that are scheduled to be considered by the Commission. . . .[the change] is intended to make the FCC's rulemaking process as fair and transparent as possible.

[5] See, Weiser, Philip J., *FCC Reform and the Future of Telecommunications Policy*, at 1, (January 5, 2009), ("*FCC Reform*") available at: http://fcc-reform.org/f/fccref/weiser-20090105.pdf. Professor Weiser was tapped by the Obama Administration to work on, *inter alia*, smart grid policy issues for the White House. Earlier this month, he left the White House to return to the University of Colorado at Boulder as its dean.

better oversight, more competition, and new and improved services and service quality for consumers.

NARUC has well-established positions on several of the proposals. This testimony attempts to take them in the order they appear in the draft.

PROPOSED RULE MAKING REQUIREMENTS[6]

Many agency observers, including NARUC,[7] have long recognized the problems with the FCC's rulemakings. Professor Weiser, in the earlier cited *FCC Reform* article, at 16-17, explained the problem this way:

> In terms of the use of rulemaking proceedings, the FCC has gotten into the habit of commencing wide-open rulemakings that do not propose specific rules and leave parties with the challenge of guessing what issues are really important—or reserving their energies and resources until the *ex parte* process when that might become clear. Technically speaking, this practice does not violate the Administrative Procedure Act, as that law only specifies that NPRMs must include "a description of the subjects or issues involved."[] Practically speaking, however, this practice undermines the opportunity for meaningful participation and effective deliberation. {footnote omitted}

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[6] Congress may wish to consider, in this context, that the FCC often issues orders in non-rulemaking proceedings that have broad applicability. The agency's rules recognize the fairness issues – and the opportunities for creating a better record for decisions in a note to 47 C.F.R. § 1.1208 stating: in such cases "the Commission or its staff may determine that a restricted proceeding not designated for hearing involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties and specify that the proceeding will be conducted in accordance with the provisions of § 1.1206 governing permit-but-disclose proceedings."

[7] See *December 12, 2008 Letter from NARUC President Butler to Professor Susan Crawford, Obama-Biden Transition Team,* Appendix A, at page 5-6, available online at: http://www.naruc.org/Testimony/08%200916%20NARUC%20House%20ltr%20Prepaid%20Calling%20Card%20fin.pdf. ("Publish the specific language of proposed regulations with a proposed rationale and facts to support the action taken, seek public comment on the proposal and provide AT LEAST 30 days for agency consideration. This ***revives*** an earlier FCC practice of publishing a "Tentative Decision" prior to the adoption of final rules. The benefits are obvious. *The FCC frequently releases vague Notices of Proposed Rulemaking that fail to articulate proposed rules and read more like Notices of Inquiry by posing countless open-ended questions*.")

Section 13(a) (1) (B) suggests the correct solution – one specifically endorsed by NARUC as early as 2008: the FCC must include the specific language of the proposed rule or modification.

This, in turn, logically requires there also be "certain prior" proceedings.[8]

Some praise former Chairman Genachowski for increasing the instances in which the text of a proposed rule was put out for comment before adoption to 85%, as compared to 38% in prior administrations. That praise is deserved. The question that naturally arises is – why would it not be better to make that number 100% as this section of the draft legislation effectively requires. Currently, NARUC, the National Association of State Consumer Advocates and others, as well as the FCC, are wasting taxpayer and scarce staff resources in the 10th Circuit Court of Appeals arguing over process issues associated with the FCC's November 2011 Universal Service Reform decision – some that could not have occurred if this requirement and the draft's minimum 30 day comment cycles had been in effect.[9] There are, of course, also many substantive policy issues involved in the appeal, but there is a good chance that a remand could occur on process issues. This is not an effective use of anyone's resources. Disagreements should be focused on substance – not on whether the process provided a fair opportunity to

[8] NARUC has not taken a position on whether performance measures should be included in any final rulemaking that imposes a burden on consumers or industry – but, on its face, such a proposal would require the agency to focus on the actual impact of any proposed rule and determine if it is likely to have a beneficial impact.

[9] In the same proceeding, the FCC set truncated comment cycles (of 21 and 14 days) on a broad notice shortly before the final order was adopted. Routinely, on complex items, the agency sets 30 and 45-day comment cycles at least to provide commenters adequate time to digest and respond on the complex issues involved. Despite the volume and complexity of issues involved in the Universal Service/Intercarrier Compensation Reform docket, the FCC set a shorter comment cycle. Such shorter time periods are more prejudicial to those with fewer resources than industry, such as States, consumer groups and others.

assure the record reflects all information needed for FCC Commissioners to make an informed decision.

Significantly, the draft also requires a minimum of 30 days for stakeholder to comment on a proposal and 30 days to reply to others comments. Though it will require the FCC to manage its proceedings more carefully, this is a crucial improvement over the current process. Under the current rules, NARUC's State member commissions – *who often are among the best positioned to provide useful and relevant input* - cannot get comments drafted and approved in time to make shorter deadlines. By establishing a minimum 30 day comment time frame, Congress would be tilting the FCC process in favor of better and more complete records. Shortchanging the development of the record can only lead to less informed decisions.

Statutory deadlines make it easier – not more difficult - to plan comment cycles. The only time problems might arise is when the FCC wishes to base its decision on some late filed submission or report – which because of a looming statutory deadline has not been subject to in-depth critiques by other interested stakeholders.

This is not a hypothetical concern. In several forbearance proceedings, petitioners filed data that purportedly supports their petitions very close to the statutory deadline. Such action effectively eliminated the opportunity for any opposition or real analysis. Indeed, NARUC passed a resolution in 2008 seeking revisions to the FCC's existing forbearance procedures to assure that States have a realistic opportunity to participate and

comment on data provided in such circumstances.[10] The FCC has taken steps to "fix" the forbearance comment cycle, but that has not fixed the problem in other contexts.

For example, in the proceedings that lead to the FCC's November 2011 Universal Service and Intercarrier compensation reform order, the record was inundated the record with *ex parte* submissions up to, and on, the Sunshine blackout date of October 21.[11] Indeed, the FCC inserted over 100 items into the record shortly before that date.[12] The agency adopted the order just seven days later on October 27th. It was impossible for stakeholders to provide any meaningful response to these last minute submissions. The provision in 13(f) directly addresses this problem. It states that the FCC cannot "rely, in

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[10] To address this problem, NARUC asked the FCC to require forbearance petitioners to file "complete" petitions before the statutory shot clock starts. This will help ensure that all parties have a fair opportunity to thoroughly review and present their views to the Commission.

[11] The FCC's Electronic Comment Filing System (ECFS) includes no less than 775 substantive ex parte contact disclosures from July 29 to October 21, 2011 alone. A number of these "permit but disclose" ex parte contacts and submissions involved the discussion of quantitative data and analyses. Some of these were submitted on a confidential basis with only redacted versions of the filings available in the public domain.

[12] On October 7, 2011, two weeks before the start of the Sunshine period, and again on October 17 and 19 (two days before the deadline), the agency began inundating the record with lists of academic reports and published articles, studies, position papers, analyses, statistics, newspaper articles, white papers, publications, handbooks, state laws, state regulatory pleadings and decisions, reference works, industry surveys, treatises, congressional reports, and correspondence to the FCC. Staff described them as "publically available information it may consider as part of this proceeding." *See* http://apps.fcc.gov/ecfs/document/view?id=7021713537 (Oct. 7, 2011) (35 items and "a description of the basic statistical methods used for developing the updated corporate operations expense limitation formula that was presented in our prior Public Notice"); http://apps.fcc.gov/ecfs/document/view?id=7021714787 (Oct. 17, 2011) (63 items); and http://apps.fcc.gov/ecfs/document/view?id=7021715588 (Oct. 19, 2011) (16 items and "a summary of staff analysis of areas where mobile service is available only from a small or regional provider receiving high-cost support"). The FCC relied on these "publically available sources" to determine that the "bill and keep" ($0 rate) intercarrier compensation regime (a lynchpin of the FCC's "reform" effort) was allegedly "less burdensome" and "consistent with cost causation principles." *FCC November 18, 2011 Transformational Order at* ¶¶ 742-743 and n. 1295-1296; ¶ 744 and n. 1304, 26 FCC Rcd. 17905-06. This crucial decision is based in part on this collection of materials submitted days before the record closes – forestalling any real opportunity of a reasoned critique/response.

any order, decision, report, or action, on— (A) a statistical report or report to Congress, unless the Commission has made such report available for comment for 30-days period prior to adoption…or (B) an ex parte communication or any filing with the Commission, unless the public has been afforded adequate notice of and opportunity to respond to such communication or filing, in accordance with procedures to be established by the Commission by rule.

Emergencies do, however, arise where there is no time for either extended notice or comments. The FCC should retain some authority to act in exigent circumstances.[13]

Finally, Section 13(a) requires that for rules which may have an economically significant impact, the FCC must include three things in its order (i) "an identification and analysis of the specific market failure, actual consumer harm, burden of existing regulation, or failure of public institutions that warrants the adoption or amendment," (ii) a "reasoned determination the benefit of the rule justify the cost, taking into account alternative forms of regulation taking into consideration the need to tailor regulation to impose the least burden on society"; and (iii) include "a reasoned determination that market forces or changes in technology are unlikely to resolve within a reasonable period of time the specific market failure, actual consumer harm, burden of existing regulation, or failure of public institutions."

NARUC has not taken any position on these three interrelated analytical requirements. However, all regulations impose some costs,[14] and some type of weighing

[13] Presumably the FCC would retain the authority in 5 U.S.C. § 553(b) (3) (B) to omit notice and public procedures "when the agency for good cause finds" it is "impracticable, unnecessary, or contrary to the public interest." See 5 U.S.C. § 553(b) (3) (B), online at: http://www.archives.gov/federal-register/laws/administrative-procedure/553.html. But some clarification might be useful.

of the relative costs and consumer benefits is the *sine qua non* of both agency oversight and reasoned decision making currently. Such an approach, has been supported by all of our recent Presidents via various Executive Orders[15] – albeit focused on Executive agencies - the most recent released by the current Administration in January 2011.[16]

The focus on technology in 13(a)(iii) seems at best unnecessary. Regulators should take a technology neutral or functional approach to oversight of any market sector. Regulatory policy should not favor one technology over another. Markets should be the

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[14] On April 1, 2011, the Office of Management and Budget announced its 14th annual Report to Congress on the Benefits and Costs of Federal Regulations at 76 Federal Register 18260 (April 1, 2011) - online at: http://edocket.access.gpo.gov/2011/pdf/2011-7504.pdf. The document does a cost-benefits analysis and claims regulatory benefits between $136 and $651 billion and total costs of $44 to $62 billion. A draft of the report is available at: http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/. Other estimates of the cost side are higher. See, e.g., *The Impact of Regulatory Costs on Small Firms* by Nicole V. Crain and W. Mark Crain Lafayette College Easton, PA (September 2010) developed under a contract with the Small Business Administration, Office of Advocacy, available online at: http://archive.sba.gov/advo/research/rs371tot.pdf , which claims the annual cost of federal regulations in the United States increased to more than $1.75 trillion in 2008.

[15] See, e.g., Executive Order No. 12291, 3 C.F.R. 127 (1982) (Reagan's executive order requiring the benefits of regulation to outweigh the costs); Executive Order No. 12498, 50 C.F.R. 1036 (1985) (Reagan's executive order requiring OMB review of all new regulations); Exec. Order No. 12866, 3 C.F.R. 638 (1994) (Clinton's executive order requiring regulatory review and agency determination that regulatory benefits justify its costs). President George W. Bush issued Executive Order 13,422, 72 Federal Register 2763 (January 23, 2007) amending Executive Order 12,866, which, *inter alia*, required agencies to "identify in writing the specific market failure (such as externalities, market power, or lack of information) or other specific problem that it intends to address..to enable assessment of whether any new regulation is warranted."), available online at: http://edocket.access.gpo.gov/2007/pdf/07-293.pdf.

[16] See, Executive Order 13563, *Improving Regulation and Regulatory Review* (January 18, 2011) , published at 76 Federal Register 3821 (January 21, 2011), (Obama's order specifically notes "each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives. . ."). This order is also available online at: http://edocket.access.gpo.gov/2011/pdf/2011-1385.pdf.

arbiter of what technology wins industry and consumer support. Indeed, technology is only relevant to the extent it impacts market power and/or concentration. The reasons for regulation never change – either the regulator is a surrogate for absent market forces or an enforcer of (i) market facilitations – like local number portability- that enhance competition or (ii) public interest requirements that the market will not recognize or will actively oppose. Experience suggests consumers concerns about quality of service, service reliability and fair billing practices remain regardless of the technology used to provide their services.

COMMISSIONER COLLABORATION

Sections 13 (b), (c) and (d), of the draft all cover necessary pre-requisites for efficient Commissioner interactions.

Section 13(b) contains a series of measures that assure the Chairman of the agency cannot disadvantage or withhold critical information from his/her fellow commissioners. NARUC has specifically endorsed giving FCC Commissioners a minimum of 30 days to review the record of a proposed rulemaking or order. This is consistent with the Draft's twin requirements to assure all FCC Commissioners have adequate time to review a proposed rulemaking, including the actual text of a draft order, as well as knowledge of options available to resolve a particular proceeding.

No one can expect any Commissioner to do their sworn duty without adequate time to review proposed orders and the records that supports them. This *should* not be an

issue. However, whether accurately or not, the Chairs of the FCC,[17] as well as other agencies,[18] have – from time to time – been accused of using process to limit information about particular proceedings and/or otherwise prevent other commissioners from effectively fulfilling their statutory responsibilities. The Section 13(b) requirements should diminish these concerns.

Section 13(c) is a modified version of standalone bipartisan legislation sponsored by Representatives Eshoo, Shimkus and Doyle - the ***FCC Collaboration Act (H.R. 539)*** and supported by NARUC. NARUC has supported some of the concepts incorporated in this section of the draft since 2004.[19] This section of the Draft corrects systemic problems with the so-called "Sunshine laws" that induce significant inefficiencies and delay in FCC administrative process.

In a December 12, 2008 Letter to Obama's Transition Team,[20] NARUC urged the Administration to press for substantial and broad modification of the so-called Sunshine rules that are the focus of this section. Specifically, there, among a laundry list of other much needed FCC reforms, NARUC argued:

> **Efficiency – Sunshine Rules:** ***Drop the Artifice and require face-to-face Commissioner Negotiations . . .*** *lift the sunshine rules for face-to-face FCC commissioner negotiations.* The current "Sunshine rules" do not

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[17] See, e.g., *Committee on Energy and Commerce Majority Staff Report, Deception and Distrust: The Federal Communications Commission Under Chairman Martin* (December 2008).

[18] Compare, e.g., *Memorandum to NRC Chairman Jaczko from Hubert T. Bell, NRC Inspector General on the NRC Chairman's Unilateral Decision to Terminate NRC's Review of DOE Yucca Mountain Repository Lincense Application* (OIG Case No. 11-05) (June 6, 2011), addressing, *inter alia*, concerns about whether the Chairman's "control of information prevents the other commissioners from effectively fulfilling their statutory responsibility to address policy matters."

[19] See *Resolution on Federal Restrictions Affecting FCC Commissioner Participation on Joint Boards* (March 10, 2004), at: http://www.naruc.org/Resolutions/participation_jointboards04.pdf.

[20] See *December 12, 2008 Letter from NARUC President Frederick Butler to Yale Law School Professor Susan Crawford, Obama-Biden Transition Team*, Appendix A, at page 5-6.

> prevent decisions from being made out of the sunshine of public scrutiny. The Commissioners decide and usually have their dissents and concurrences prepared before the public meetings - which is more often a stylized Kabuki theatre rather than an actual decision-making session. The Sunshine rules simply put more authority in the hands of expert staff and drags out the negotiation process. This is horrifically inefficient.

As long as any formal vote occurs in an open meeting, the discussion draft allows negotiations among principals (the FCC Commissioners) – not just their delegates. This is a significant and much needed improvement to the current process and we support it.

But the Discussion draft also deftly handles a related problem that arises in the context of Joint Board and Joint Conference deliberations.

To take advantage of the expertise and insight of State Commissioners on certain key issues, Congress requires joint FCC-State deliberative bodies. These so-called "joint boards," charged by Congress with the responsibilities of a federal administrative law judge and tasked with making critical record-based recommendations on universal service,[21] advanced services,[22] and separations[23] issues, *also have FCC Commissioners as*

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[21] The FCC Federal State Joint Board on Universal Service was established in March 1996 as per the Congressional mandate found in 47 U.S.C. § 254 (1996) (The text of the law is available from the Government Printing Office website at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+47USC254. The FCC webpage on this Board is at: http://www.fcc.gov/wcb/tapd/universal_service/JointBoard/welcome.html.

[22] The FCC Federal State Joint Conference on Advanced Services was established in 1999 as part of the FCC's effort to promote deployment of high speed services, pursuant to 47 U.S.C. § 157 (Note incorporates § 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, as amended by Pub. L. 107-110, Title X, § 1076(GG), Jan.8, 2002, 115 Stat. 2093), available at page 32 of the 2007 House edition of Title 47 of the United States Code, online at: http://uscode.house.gov/pdf/2007/2007usc47.pdf. The FCC webpage on Joint Conference on Advanced Services activity is at: http://www.fcc.gov/jointconference/headlines.html. Congress authorized its creation in 47 U.S.C. § 410(b) (1994), found online at page 220 of Title 47 referenced *supra*.

[23] The FCC Federal State Joint Board on Separations has been in operation for over 25 years. Congress authorized its creation in the 1970s in 47 U.S.C. § 410(c) (1994), found at page 220 of the copy of Title 47 found at the web address in note 3, *supra*. The FCC webpage on the Separations Joint Boards is at: http://www.fcc.gov/wcb/tapd/sep/welcome.html.

participants. Necessarily, the incredible inefficiencies in deliberations imposed by the current law on full commission deliberations also plague the work of these Congressionally-mandated bodies. A typical joint board has four State public service Commissioners, nominated by NARUC and confirmed by the FCC, and three FCC Commissioners.

Currently, FCC Commissioners must rotate their participation during face-to-face meetings and conference calls of such Joint Boards, causing continuous inefficient repetition of prior conversations and positions. This is another area where there is bipartisan consensus that the Statute should be changed. At your FCC oversight hearing in 2011 the Draft's proposed sunshine amendments - particularly with respect to Joint Boards and Conferences, was the focus of Commissioner Clyburn's testimony, endorsed by the other FCC Commissioners and discussed at length during the question and answer period.[24] Sunshine reform – either as a standalone measure or part of a broader proposal like this discussion draft is long overdue. This section unquestionably streamlines the FCC's decisional procedures. Its requirement for party diversity for a quorum to meet is a critical and clever additional protection of process. NARUC does have one recommendation to improve this section. We respectfully request that "or conference" be added in after the two "joint board" references in (c)(1)(B) of the discussion draft This will ensure that the Joint Conference on Advanced Services is on equal footing with the Joint Boards on Universal Service and Separations. NARUC urges Congress to move quickly to reform this aspect of Commission operations with our suggested edit.

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[24] Testimony of FCC Commissioner Mignon Clyburn before the House Subcommittee on Communications and Technology, (May 13, 2011), available online at: http://republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/051311/Clyburn.pdf

Several years ago, three FCC Commissioners (bipartisan) combined to override then Chairman Powell's Triennial Review Order. In this unusual circumstance, then Chairman Powell did allow the majority to direct the staff to draft the decision for review by the full Commission. NARUC supported that process. Section 13(d) of the draft requires the FCC to establish specific procedures for how the FCC will handle this circumstance in the future. Having such rules in place should be welcomed by FCC staff as a clear guide for their fiduciary responsibilities in such circumstances and should streamline the process the next time this circumstance arises.

Transparency and Assuring FCC Action in Pending Proceedings

The next four sections – (f), (g) (h) and (i) all are laudable procedural vehicles to (1) assure that orders do not languish at the agency and (2) allow all Stakeholders to know when matters in which they have an interest are likely to come up for decision. NARUC has again, specifically endorsed many of these suggestions.

Indeed, in the earlier referenced December 2008 letter to the Obama Transition team, NARUC specified that:

> The FCC should set deadlines on each type of filing where no statutory deadline exists - including complaints - but particularly rehearing requests and remands which have a tendency to languish at the FCC). The FCC should avoid non-decisional releases on statutory (or agency set) deadlines for action – like the requirement to "act" on USF Joint Board recommended decisions within one year.

Setting some deadlines for each type of proceeding by rule is a good idea – as the Draft specifies in Section 13(h). But the draft goes further. It also includes provisions that ratchet up pressure for the FCC to meet those deadlines in 13(i) by

requiring it to report to Congress on success with meeting deadline and the associated requirements in Section 13(f). NARUC supports this concept because it results in public reports showing the current status of all pending items in 13(g), which will allow interested parties to know--including items on circulation--whether Commissioners have taken a vote on an order, decision, report, or action that has been pending review for more than 60 days. This last requirement only puts some pressure on the FCC to act on circulated items, but it also "gives interested parties notice that some action in a particular docket is imminent."[25]

NARUC also specifically endorsed requiring the FCC to release decisions within a set time after the last Commissioner votes on the item. We did, however, suggest a slightly longer time frame – 30 days.

The draft also includes a requirement in 13(n) that the FCC to create a searchable online database of consumer complaints to help consumers choose among competing providers and services. NARUC adopted a resolution in February 2012 explicitly finding such a database will be a useful tool for consumers.[26] The resolution endorses legislation to require the FCC to create an online publicly available searchable database of consumer service complaints that allows users to compare competing companies/services as soon as possible. For competition to flourish consumers need access to information that will help them make informed decisions. A comprehensive searchable database on consumer complaints will provide just that.

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[25] *See December 12, 2008 Letter from NARUC President Frederick Butler to Yale Law School Professor Susan Crawford, Obama-Biden Transition Team,* Appendix A, at page 5-6.

[26] *See* Resolution Regarding the Federal Communications Commission's Complaint Procedures, adopted February 8, 2012 and available online at: http://www.naruc.org/Resolutions/Resolution%20on%20FCC%20Consumer%20Complain%20Procedure.pdf

I have, as requested, focused this testimony on the *Discussion Draft* and referenced NARUC's explicit support for a number of provisions and its implied support for others. There are, however, in NARUC's view, other issues Congress should address as part of any reform proposal.

One of the more obvious is embodied in the recently introduced bipartisan *FCC Commissioners' Technical Resource Enhancement Act* (H.R. 2102) from last Congress. The bill allows each FCC Commissioner to appoint to its staff an engineer or computer science professional to provide expert counsel on technical matters before the agency. NARUC passed a resolution on this precise point in February 2009, which, among other things, points out that proposed rulemakings and orders have demonstrated that the Commission needs enhanced capabilities in certain functions such as finance and engineering.

Regarding the consolidated reporting bill, NARUC hasn't taken a position but we do have some general thoughts at least on broadband-related reporting obligations. Former FCC Chairman Kennard, recognizing the crucial importance of State input, created the Federal-State Joint Conference on Advanced Services to aid the FCC in collecting and analyzing data on broadband deployment, availability and adoption. It is a tool that has been underutilized by the commission. Many States have policies and are experimenting with programs to improve broadband reach and adoption. At least four States have universal service funds that specifically support broadband infrastructure. Every State has the incentive to improve the level and quality of services offered to your constituents. States can be powerful partners in the drive for ubiquitous broadband deployment and adoption. Historically, State experimentation, both good and bad, has

guided federal policy and the Joint Conference is well positioned to provide insight on how issues can be addressed.

NARUC and its members are committed to working with this Subcommittee, Acting Chairwoman Clyburn and her successor once they are confirmed to improve process and procedure at the FCC. Again, if this subcommittee and Congress were just to enact the provisions specifically endorsed by NARUC the processes at the FCC would be vastly improved. Thank you again for inviting me to testify and I would be happy to answer any questions the committee may have.