



April 28, 2015

TO: Members, Subcommittee on Communications and Technology

FROM: Committee Majority Staff

RE: Legislative Hearing on “FCC Authorization: Improving Commission Transparency”

I. INTRODUCTION

On Thursday, April 30, 2015, at 2:00 p.m. in 2123 Rayburn House Office Building, the Subcommittee on Communications and Technology will hold a hearing entitled “FCC Authorization: Improving Commission Transparency.”

II. WITNESSES

- The Honorable Tom Wheeler, Chairman, Federal Communications Commission and
- The Honorable Michael O’Rielly, Commissioner, Federal Communications Commission

III. BACKGROUND

The Federal Communications Commission (“FCC”) adopts rules in three ways. First, and most formal, the Commission adopts new rules – and modifies existing rules – once a month at public meetings. Second, during the times in between Commission meetings, the Commission may adopt rules “on circulation.” Items adopted on circulation are voted on by the Commissioners via a computer system rather than at a public meeting. Finally, for routine and ministerial matters, the Chairman of the Commission may delegate authority to employees of the Commission to take action without a Commission vote. By custom, Commissioners are given 48-hours notice on some actions to be taken on delegated authority and may request that the item be voted by the Commission.

Generally, the public is not permitted to see the text of the rules that are being adopted until they are voted and the Commission decides to publish the text.

The FCC derives its process from two primary legal sources – the authorities granted in Communications Act of 1934,¹ which dictates the structure, composition, and responsibilities of the Commission, and the dictates of the Administrative Procedure Act of 1946 (APA), which generally governs how agencies issue regulations.² The FCC largely tracks the APA requirements for informal rulemaking, but the Communications Act of 1934 provides some

¹ See Title 47 of the U.S. Code.

² 5 USC § 551, *et seq.*

requirements that may depart from the specific requirements of the APA. The APA ensures that agencies inform the public about the existing rules and rules in development (transparency) and that the public has the opportunity to participate or comment in the agency's rulemaking process (due process). Agencies generally are granted substantial flexibility to implement their regulatory mandates.

Over the past three Congresses, the Subcommittee on Communications and Technology has been concerned with the lack of logical, predictable process and consistent transparency at the Federal Communications Commission. During the 112th and 113th congresses, the House unanimously approved a number of bipartisan bills designed to minimize the potential for procedural failings and abuse of process, and to improve agency transparency, efficiency, and accountability.³

Since Chairman Wheeler was confirmed by the Senate, a number of process failings and procedural irregularities have come to light that not only prevent the public from meaningfully interacting with the Commission, but have prevented the Commissioners themselves from making informed decisions:

- In March 2014, the Media Bureau, using delegated authority, changed longstanding FCC policy with regard to the approval of broadcast television transactions involving sharing agreements. This policy change was neither routine nor non-controversial. Yet this change in Commission policy was neither debated among the Commissioners, nor was it subject to a vote of any kind. Rather, it was announced by the Chief of the Media Bureau in a Public Notice.⁴
- In July 2014, a Public Notice related to the then upcoming AWS-3 auction was placed on circulation, beginning the process by which Commissioners and their staffs may request edits and ultimately vote on the item. However, subsequent action by the Chairman's office removed the item from circulation and directed the Wireless Telecommunications Bureau to issue the Public Notice on delegated authority – depriving the public of essential process and the members of the Commission an opportunity to vote on the matter. According to the media reports, one of the Commissioners sought information related to the substance of the Public Notice and was told he would be briefed *after* the item was adopted.⁵

³ See Federal Communications Commission Process Reform Act of 2014, H.R. 3675, 113th Cong. (2014); Federal Communications Commission Consolidated Reporting Act of 2013, H.R. 2844, 113th Cong. (2013); Federal Communications Process Reform Act of 2012, H.R. 3309, 112th Cong. (2012); and Federal Communications Commission Consolidated Reporting Act of 2012, H.R. 3310, 112th Cong. (2012). The House of Representatives passed the Federal Communications Commission Consolidated Reporting Act, H.R. 734, for the third time with unanimous approval on Feb. 24, 2015.

⁴ See Public Notice, "Process of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests," DA 14-330 (rel. Mar. 12, 2014) at https://apps.fcc.gov/edocs_public/attachmatch/DA-14-330A1.pdf.

⁵ See John Eggerton, "Pai Pans FCC Process," *Broadcasting & Cable*, Jul. 18, 2014 at <http://www.broadcastingcable.com/news/washington/pai-pans-fcc-process/132557>. See also Press Release,

- In the process by which the Commission granted a waiver of its rules to permit Grain Management, LLC to qualify as a small business and receive bidding credits, it appears the Chairman's office sought to employ delegated authority to circumvent a vote by the Commission on a controversial matter.⁶ Documents provided to the Committee indicate that it was only after two Commissioners challenged the release of this item by the Wireless Telecommunications Bureau on delegated authority that the matter was placed on circulation for vote by the full Commission.
- In May 2014, press reports indicated that the Chairman's office withheld the final version of the Open Internet Notice of Proposed Rulemaking from two Commissioners for as long as 24 hours after providing the material to the two other Commissioners and to the press during the run up to the May 15 FCC Open Meeting.⁷ Commissioner Rosenworcel said of the Open Internet Notice of Proposed Rulemaking that "the process that got us to this rulemaking today is flawed" and signaled that the effective execution of the Commission's core functions were at risk.⁸
- In December 2014, the Chairman's office resorted to a questionable use of delegated authority to circumvent both Commission precedent and Federal law. In this case, the Wireless Telecommunications Bureau released two items at the direction of the Chairman's office. The first granted a petition asking the Commission to regulate cellular data roaming rates by providing – for the first time – an interpretation of the Commission's 2011 data roaming order.⁹ The second was a report assessing the state of competition in the wireless industry, which is a responsibility expressly assigned by Congress to the Commission, not to the Wireless Telecommunications Bureau. According to their Joint Statement regarding the release of these items, two Commissioners requested that these items be brought before the Commission for a vote only for the request to be rejected by the Chairman.¹⁰
- At the Commission's January open agenda meeting one Commissioner stated that information requested from the Chairman's office was withheld until the day before the Commission was to meet and vote – nearly two weeks after the request for the

Statement of Commissioner Ajit Pai on the Pulling of the AWS-3 Coordination Item From Commission Consideration, Jul. 18, 2014, at https://apps.fcc.gov/edocs_public/attachmatch/DOC-328339A1.pdf.

⁶ Howard Buskirk, Wireless Notebook, *Communications Daily*, Jul. 21, 2014.

⁷ Kate Tummarello, FCC Republicans Were Last to See 'Fast Lane' Plan, *The Hill*, (May 13, 2014) at <http://thehill.com/policy/technology/205964-fcc-republicans-in-the-dark-on-newest-fast-lane-proposal>.

⁸ Statement of Commissioner Jessica Rosenworcel, *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014).

⁹ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Services Providers and Other Providers of Mobile Data Services*, Declaratory Ruling, 29 FCC Rcd 15483 (2014) at https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1865A1.pdf.

¹⁰ See *Fourth Annual Report to Congress on Status of Competition in the Satellite Services Industry*, Order, 29 FCC Rcd 16307 (2014) at https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1906A1.pdf; Press Release, "Joint Statement of Commissioners Ajit Pai and Michael O'Rielly on the Abandonment of Consensus-Based Decision-Making at the FCC," Dec. 18, 2014, at https://apps.fcc.gov/edocs_public/attachmatch/DOC-331140A1.pdf.

information was made and only days before the expiration of the Commission's authority to act on the matter.¹¹

The bills to be reviewed by the Subcommittee offer targeted reforms to the FCC processes to improve access to information throughout the rulemaking process.

IV. LEGISLATION

H.R. _____, to be introduced by Rep. Kinzinger

This draft bill requires the FCC to publish on its Internet website the text of any action that the Commission wishes to take by Commission vote within 24 hours of circulation or 21 days before the actual vote.

Currently, when the Chairman of the FCC intends to offer an item for Commission vote – whether at an open meeting or not – the first step of the consideration process is called “circulation” or, in the case of an open meeting item, “white copying.” When the Chairman circulates an item, the text of the proposed rules changes and the accompanying administrative vehicle (Order, Declaratory Ruling, Notice of Proposed Rulemaking, etc.) are sent to the other four Commissioner offices for review. Rep. Kinzinger's proposed bill would require the FCC to post this document on its website for public inspection within 24 hours of circulation, or should the FCC fail to do so, wait 21 days before it can be adopted – the same as the current white copy rules.

The proposed legislation would remedy an information imbalance that prevents the public from engaging in an informed discussion with policymakers. Moreover, because the FCC's rules prohibit disclosure of the content of items that will be voted on by the full Commission at a meeting or by circulation, the current rules prevent Commissioners from fully engaging with potentially impacted parties before they are forced to vote.¹² This lack of transparency can preclude full discussion of the impact of the Commission's proposed action. Often, stakeholders are uncertain as to whether their concerns are addressed, how the changed or new rules will modify their obligations, or whether the Commission's actions will produce the results desired, among other things. Inevitably, some stakeholders have greater knowledge of the Commission's actions, which, as the Government Accountability Office has found, gives those stakeholders an advantage in lobbying the FCC.¹³

¹¹ *AT&T Inc., Parent Company of New Cingular Wireless PCS, LLC and AT&T Mobility Puerto Rico, Inc.*, Notice of Apparent Liability for Forfeiture, 30 FCC Rcd 856 (2015) at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-12A1.pdf.

¹² 47 C.F.R. § 19.735-203.

¹³ See Government Accountability Office Report 07-1046, “FCC Should Take Steps to Ensure Equal Access to Rulemaking Information,” Sept. 2007 at <http://www.gao.gov/products/GAO-07-1046>.

Importantly, the draft does not prevent the Commission from developing its decision further,¹⁴ as is the current practice, and permits the Commission to maintain a level of confidentiality for sensitive material consistent with the APA.

H.R. _____, to be introduced by Rep. Ellmers

This draft bill requires the FCC to post the text of its rules, *i.e.*, the actual modifications to the Code of Federal Regulations on its Internet website within 24 hours of adoption.

Once the Commissioners have voted to adopt an item, the document often remains unreleased to the public, preventing the public from fully understanding the Commission's action. Part of the reason for this delay is the routine practice of granting the Commission staff "editorial privileges,"¹⁵ which can vary from proofreading and cleaning up the document,¹⁶ to making changes to the text of the item to address arguments raised by dissenting Commissioners. In fact, one expert, in his review of the FCC timeline, posits that the lag between the vote and the publication of the Order becomes more likely when the Commissioners are divided and the item is controversial.¹⁷ The FCC's general counsel reinforces that notion, stating that opposition to an order must be addressed to ensure that the document withstands judicial scrutiny,¹⁸ although Commissioner O'Rielly points out that dissenting views and arguments are generally expressed well in advance of the vote.¹⁹

Some have put forward that the lag between the vote and the publication of the Order suggests that the Commission is making substantive changes to the document after the vote.²⁰ Indeed, the FCC has maintained the secrecy of the as-voted document as exempt from disclosure under FOIA's "deliberative process privilege," despite the fact that the vote had already occurred and deliberation has ended.²¹ Substantive post-decision revisions could undermine the legitimacy of the Commission's decision and the integrity of the rulemaking.

¹⁴ It is not expected, however, that the staff simply submit an ersatz document that does not meaningfully resemble the intended item. *See also* Commissioner Michael O'Rielly, "FCC's Pre-Adoption Process Also Needs Work," FCC Blog, Apr. 1, 2015 at <http://www.fcc.gov/blog/fcc-s-pre-adoption-process-also-needs-work>.

¹⁵ The concept of "editorial privileges" is itself controversial as there does not appear to be any support for the practice in the laws governing the Commission's process. *See e.g.* Commissioner Michael O'Rielly, "Fixing Flawed and Non-Existent 'Editorial Privileges,'" FCC Blog, Mar. 9, 2015 at <http://www.fcc.gov/blog/fixing-flawed-and-non-existent-editorial-privileges> ("O'Rielly Blog Post").

¹⁶ *See* Jonathan Sallet, "The Process of Governance: The FCC & the Open Internet Order," FCC Blog, Mar. 2, 2015 at <http://www.fcc.gov/blog/process-governance-fcc-open-internet-order>. ("Sallet Blog Post").

¹⁷ *See* Scott Wallsten, "Administrative Procedures, Bureaucracy, and Transparency: Why does the FCC Vote on Secret Texts?" Technology Policy Institute, Feb. 10, 2015 at 3 at https://www.techpolicyinstitute.org/files/wallsten_administrativeproceduresbureaucracyandtransparency.pdf.

¹⁸ *See* Sallet Blog Post.

¹⁹ *See* O'Rielly Blog Post, *infra* at 13.

²⁰ *See* Kieran McCarthy, "Net Neutrality Secrecy: No One Knows What the FCC Approved (BUT Google has a Good Idea)," The Guardian UK, Feb. 26, 2015 at http://www.theregister.co.uk/2015/02/26/net_neutrality_rules/.

²¹ Associated Press, "Voted Items at FCC may be Secret till Final, Agency Says," Jun. 19, 2008 *available at* <http://www.firstamendmentcenter.org/voted-items-at-fcc-may-be-secret-till-final-agency-says>.

Regardless of whether such revisions are in fact occurring, actual changes to the rules, *i.e.*, the Code of Federal Regulations, do not change after voting, even if the FCC revises the various justifications and arguments in the adopting item. This draft bill would make the actual rule text available to the public almost immediately as a way of informing stakeholders of the actual rules that have been adopted.

H.R. ____, to be introduced by Rep. Latta

This bill would require the Commission to identify and describe all items to be adopted by Commission staff on delegated authority to increase the public's awareness of the FCC's day-to-day decisions.

Not all work at the FCC is done at the Commission level. The statute explicitly contemplates that the Commission will delegate certain routine matters to staff,²² in order to ensure that the FCC runs smoothly and stakeholder needs are met in a timely fashion. In fact, most decisions are made on delegated authority; a 2007 GAO report indicated that the Commissioners voted 1835 decisions, while the Bureaus and Offices issued 17,406 decisions on delegated authority during the 2002-2006.²³ The FCC's rules, however, prohibit staff from resolving new or novel questions of law or policy that cannot be resolved under outstanding Commission precedents or guidelines.²⁴ That responsibility falls to the Commission, which is tasked with interpreting policy under the statute. Without safeguards, however, there is the danger that items on delegated authority may in fact address new and novel questions of law or policy.

It is unwritten policy at the FCC to provide Commissioners with some notice – varying from 48 hours to no time at all – when an action is decided at the Bureau or Office level on delegated authority.²⁵ This bill seeks to codify a good policy already loosely in practice at the Commission to prevent abuse of the delegated authority.

V. STAFF CONTACTS

If you have any questions regarding this hearing, please contact David Redl or Grace Koh of the Committee staff at (202) 225-2927.

²² 47 U.S.C. § 155(c).

²³ 2007 GAO report p. 7.

²⁴ See 47 C.F.R. Part 0, Subpart B. It is the Subcommittee's understanding that it is general, uncodified policy that *ad hoc* delegations reserve new and novel issues to the Commission as well.

²⁵ See Commissioner Michael O'Rielly, "Delegated Authority: Serious Objections and Solutions," FCC Blog, Feb. 2, 2015 at <http://www.fcc.gov/blog/delegated-authority-serious-objections-and-solutions>.