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FCC AUTHORIZATION:

IMPROVING COMMISSION TRANSPARENCY

THURSDAY, APRIL 30, 2015

House of Representatives,

Subcommittee on Communications

and Technology,

Committee on Energy and Commerce,

Washington, D.C.

The subcommittee met, pursuant to notice, at 2:07 p.m., in Room 2123, Rayburn House Office Building, Hon. Greg Walden [chairman of the subcommittee] presiding.

Present: Representatives Walden, Latta, Barton, Shimkus, Blackburn, Scalise, Lance, Guthrie, Olson, Pompeo, Kinzinger, Bilirakis, Johnson, Long, Ellmers, Collins, Cramer, Eshoo, Welch,

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Yarmuth, Clarke, Loeb sack, Matsui, McNerney, and Pallone (ex officio).

Staff Present: Ray Baum, Senior Policy Advisor for Communications and Technology; Sean Bonyun, Communications Director; Karen Christian, General Counsel; Andy Duberstein, Deputy Press Secretary; Gene Fullano, Detailee, Telecom; Kelsey Guyselman, Counsel, Telecom; Charles Ingebretson, Chief Counsel, O&I; Grace Koh, Counsel, Telecom; David Redl, Counsel, Telecom; Charlotte Savercool, Legislative Clerk; Macey Sevcik, Press Assistant; Christine Brennan, Minority Press Secretary; David Goldman, Minority Chief Counsel, Communications and Technology; Lori Maarbjerg, Minority FCC Detailee; Margaret McCarthy, Minority Senior Professional Staff Member; Tim Robinson, Minority Chief Counsel; and Ryan Skukowski, Minority Policy Analyst.

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Mr. Walden. We will call to order the Subcommittee on Communications and Technology for our legislative hearing on "FCC Reauthorization: Improving Commission Transparency." I want to welcome our witnesses today. Appreciate your being here.

Our subcommittee, often on a bipartisan basis, has worked to make the Federal Communications Commission a more transparent and accountable public body for many years and under various FCC chairmen. These bills sponsored by my colleagues continue those well-meaning efforts to make even powerful bureaucrats realize that this is the public's business that is being conducted. The FCC is not some venture capital firm. The FCC is an independent agency that reports to Congress.

Commissioner O'Rielly, thank you for your well-reasoned and helpful testimony. I appreciate your insights, tone, and suggestions. You seem to understand the proper role of the FCC and welcome the opportunity to improve how it functions so that it can better serve the public. I commend you for your views and your willingness to work with this subcommittee. You have pointed out material problems at the FCC, and you have offered constructive solutions, and I thank you for that.

Now, I wish I could say the same thing about Chairman Wheeler's testimony. If you really think that drafting, amending, and adopting rules without giving the public more opportunity to see them before they are crammed down their throats is good process, then maybe it is

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no wonder the public has little faith in the agencies of government.

Under the current power structure at the FCC, the Chairman has incredible authority that none of the other commissioners has because the Chairman alone controls access to FCC information. He or she can call in their own validators to get the inside track and become a well-tuned chorus of support for their pet policies. Friends of the Chairman get special perks to weigh in and access information that the rest of the public just doesn't get to see and that other commissioners can't even discuss. Commissioner O'Rielly exposes this charade for what it is in his testimony. None of us on this committee would tolerate that insult to our First Amendment rights that the commissioners at the FCC must suffer at the hands of a Chairman.

Chairman Wheeler urges us to not make the FCC subject to its own special set of rules. This is a refrain I have heard from some of my colleagues who want to expand the Commission's private discussions, a special rule that would only apply to the FCC, but oppose making the Commission's actions more public.

If the Chairman would like to subject the FCC to the same rules as the other agencies of the Federal Government, why, we can certainly make that happen. Of course, that would mean the Chairman could no longer hand pick the agency's inspector general or have the IG report to the Chairman. We would have real independence in the IG's office, and under the rules that other agencies follow, we wouldn't have this silly argument over producing cost-benefit analyses for rulemakings.

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The FCC would simply have to follow the law and produce them like other agencies.

Trying to behind hide the skirt of the APA and then pretend the FCC is just another Federal agency actually insults this committee. And I cannot help but respond to the nonsense that my colleagues' legislation would somehow unduly burden the FCC by requiring it to link a document that already exists to its Web site. Such a requirement wasn't considered a burden when the FCC forced broadcasters to scan their political files and make them available on the Internet. But now we are supposed to believe that a similar requirement for an agency with 1,700 employees is just too much of a burden. Really?

The FCC loves to come up to Capitol Hill and tell us how they are special because they have a public interest mandate. That mandate is a double-edged sword, which means you are stuck with both the rights and the attendant obligations. So I can't for the life of me come up with a legitimate rationale for how it is in the public interest to operate in secret, specifically excluding the public from the rules you are considering.

My colleagues who wrote these measures and I are on the side of reforming the Washington bureaucracy. It is disappointing to see that you don't share our commitment to better government. We believe the public deserves more access to the process. We believe the public is best served by an open, transparent, and accountable government. And we will not stop in our cause and quest even if that means taking on

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the entrenched and powerful. We have only just begun.

I yield the remainder of my time to the vice chair of the committee, Mr. Latta, for any comments he would like to make.

[The prepared statement of Mr. Walden follows:]

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Mr. Latta. Well, thank you, Mr. Chairman, and thank you for holding today's hearing.

As the subcommittee continues to examine the reauthorization of the FCC, I remain firm in my belief that the given the Commission's integral role in our marketplace, it is critical that the agency is accountable, efficient, and transparent. Therefore, I am pleased that we have the opportunity to openly discuss the three transparency draft bills in front of us today, one of which I am the sponsor.

My discussion draft would require the FCC to identify and describe all items to be adopted by the Commission staff on delegated authority prior to action being taken. This is necessary to prevent abuse of delegated authority and to increase public awareness of the agency's day-to-day decisions.

The remaining drafts are also vital to promote effective and transparent processes at the FCC. And I look forward to hearing the Commission's view on these bills and how Congress can work with the agency to ensure a level of transparency the American people deserve.

[The information follows:]

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Mr. Latta. And, Mr. Chairman, I yield back the balance of my time.

[The prepared statement of Mr. Latta follows:]

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Mr. Walden. The gentleman yields back the time.

Before I recognize the gentlelady from California, I would like to enter into the record a letter from a coalition of public interest groups, including Center for Democracy and Technology, Center For Media Justice/MAGNet, Color of Change, Common Cause, Consumers Union, Demand Progress, Engine, Fight for the Future, Free Press Action Fund, National Hispanic Media Coalition, Open Technology Institute of New America, Public Knowledge, United Church of Christ, OC, Inc., Writers Guild of America, West, opposing the three bills offered by Representatives Latta, Kinzinger, and Ellmers.

[The information follows:]

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Mr. Walden. Ironically, it seems that Public Knowledge is opposed to making knowledge public.

To give you an idea what opponents of these bills are supporting, I would like to read an excerpt. This group opposes Rep. Ellmers' bill because it would, and I quote, "essentially require finalized text at the time of a vote," close quote, apparently supporting the idea that the commissioners of the FCC shouldn't have access to a final version of the item before they vote. Entered without objection.

I now recognize the gentlelady from California, my friend Ms. Eshoo, for opening remarks.

Ms. Eshoo. Thank you, Mr. Chairman.

And welcome to the distinguished Chairman of the FCC and to Commissioner O'Rielly. It is wonderful to see you.

Mr. Chairman, I just want to depart for a moment from what I have here to say in my opening statement. I always think of you as a gentleman. I mean, we are friends. We agree on some things. We disagree on other things. But I hope that we can just stay away from using terms like "the Chairman's charade."

These are people that have entered public service to serve the people of our country. I know that your side is adamantly opposed to what the FCC on a majority vote placed before the American people and us on net neutrality. It is a fair fight. I want to win. You want to win. We have our very specific reasons around this, and we fight hard, but we need to fight fair.

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I don't agree with Commissioner Pai. He is a friend of mine. Commissioner O'Rielly, I don't know all that well, but I look forward to every time I see him and building a professional relationship. In so many ways we are all in this together.

So to say that we are welcoming the Chairman and using him as a pinata, I think I would rather be on the welcoming side. And I think that you at heart would too. So let's just take a deep breath and be very respectful of one another. We can disagree. It is okay. It is all right. We are going to fight like hell for our own view.

I know today's hearing is about process reform. I don't agree with the bills that you are putting forward. I think that they are going to tie the agency in knots by undermining established Administrative Procedure Act precedents, and I think that it will jeopardize regulatory certainty, and I think it is going to open the door to just a mess of legal challenges. So that is what I think.

I think if our overall goal is reform, and I can tell you that the members on my side are sincerely prepared to offer constructive reform ideas, not retribution for net neutrality and what someone's position is on it, if we are going to work on reforms, let's work on reforms.

We have, I think, two solid ones. One of them is to upgrade the FCC's multiline phone systems to provide the direct dialing to 911. This is something that Commissioner Pai has spoken to. And I think the FCC should lead on this, that the agency that regulates others,

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that this would set a great example, and I think that that should be done.

The other FCC process reform are the efficiencies and collaboration amongst the commissioners themselves. We have done it before. It has been bipartisan. It has been bicameral. And that is the Collaboration Act. And we will have some more ideas, Mr. Chairman, and we look forward to offering them.

Now, I have a minute and 21 seconds. I want to yield, split that between Congresswoman Matsui, so we will go women first, and then to Mr. Yarmuth.

Thank you.

[The prepared statement of Ms. Eshoo follows:]

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Ms. Matsui. I thank the ranking member for yielding time.

I would like to welcome both of you here today.

The issue of FCC process reform is an important one. It should also be bipartisan in nature. We can all agree that transparency and efficiency at the FCC is a good thing.

I have put forth a draft bill to make it easier for small businesses in Sacramento and across the country to engage with the FCC on policies that may impact them. The FCC oversees industries that account for one-sixth of the economy, which includes countless small businesses.

Whether it is a family business or a startup, small business can't spend scarce resources on lawyers or lobbyists to have impact on FCC reforms. We should make it as simple as possible for the small businesses to have their voices heard at the FCC.

This is a commonsense bill, and I hope my colleagues will support it. And I yield the rest of the time to my colleague.

[The prepared statement of Ms. Matsui follows:]

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Mr. Yarmuth. Thank you. I will elaborate on this later in the hearing if I have time. But I am very concerned about transparency at the FCC, but I am also very concerned about transparency with the ads that fill our airways every election season and even now after election season.

So I introduced today the Keeping Our Campaigns Honest Act, legislation requiring the FCC to revise their sponsorship identification rules to take in super-PACs and 501(c)(4) organizations. We need to make sure that there is sunlight on these donors until the IRS issues a clearer ruling.

So I appreciate the opportunity to just mention that that is something I want to talk about in the future with the FCC and the committee. I yield back.

[The prepared statement of Mr. Yarmuth follows:]

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Mr. Walden. The gentleman yields back. The gentlelady's time has expired. I recognize the vice chair of the full committee, Ms. Blackburn.

Mrs. Blackburn. Thank you, Mr. Chairman.

And I do want to welcome our witnesses. We appreciate that you are here and that we have the opportunity to begin to look at FCC reform.

And I am also hopeful that we are going to see participation in this on a bipartisan basis. I do believe that it is time for us to look at some reforms, transparency, accountability. You have heard it from everyone who has spoken. And it is something that we think the FCC is struggling with. And therefore we want to put it on the table and have a discussion with you as we look at how we reform the way that business is done at the FCC.

Taxpayers are telling us they don't want this to be a struggle. They want you all to act in a more transparent and accountable method. And we have to realize that the rules you make do impact them. They impact the economy. They impact participation by the private sector. They also impact the tax burden that our constituents feel when they go to write that check every April.

So, yes, we are going to continue to look at these, and we are hopeful that you are going to be proactive in working with us as we bring forward some proposals that will bring about a bit more accountability and transparency.

One of the reasons that we are going about this is because of the

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opaque process which I think surrounded the net neutrality rules and really damaged the credibility of the Commission. That is something that is regrettable. And we should not have to see things passed in order to find out what is in them, and we want to work with you on making certain things are more transparent.

At this time, Mr. Chairman, I yield 30 seconds to you.

[The prepared statement of Mrs. Blackburn follows:]

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Mr. Walden. I thank the gentlelady.

And I want to just go back and read what I actually said in my statement, because this was not aimed at any particular Chairman, and I will read it again: "Under the current power structure at the FCC, the Chairman has incredible authority that none of the other commissioners has" -- that is a fact -- "because the chairman alone controls access to information" -- that is a fact -- "he or she can call in their own validators to get the inside track and become a well-tuned chorus of support" for their pet projects. That is a fact. Friends of the chairman do get special perks to weigh in and access information that the rest of the public doesn't get to see and that other commissioners can't even discuss. And it goes on from there. This was not aimed at any specific chairman, just to set the record straight.

And I do appreciate my colleagues on the other side of the aisle who are interested in working on reform efforts. As you know, our legislation from my colleagues has been posted online and available, and we are open to these discussions. I read the press release today and saw the bills that you all have filed today. We are open to this discussion and look forward to working with you.

And just as a final point, we have actually been on this effort since I began as chairman here to try and reform the FCC, irrespective of any policy before the FCC at the time or who the chairman is. I think we can do better in Washington to bring about transparency,

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openness, and accountability in every agency. This is the one over which we have jurisdiction.

With that, I will yield back to the gentlelady from Tennessee.

Mrs. Blackburn. Thank you, Mr. Chairman, and I appreciate the clarity that you brought to that and the repetition of your statement. And at this time I yield the remainder of the time to Ms. Ellmers.

Mrs. Ellmers. Thank you to my colleague.

And I would just like to say that, absolutely, this is about transparency. This is about an open process. I think we all on both sides of the aisle are trying to see the way to that goal. And so we do have questions about the way the process is being put forward. We do have good questions about the plan of action.

And I am just thankful to the chairman that we have the opportunity today to discuss these things and get them out on the table so that we can move forward on an open and transparent process, as I think all Americans believe.

[The prepared statement of Mrs. Ellmers follows:]

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Mrs. Blackburn. And the gentlelady yields back.

And I, Mr. Chairman, will yield back the balance of my time to you. Again, I thank the commissioners for submitting their testimony, and I look forward to bipartisan participation on reforming the FCC. Yield.

Mr. Walden. And I thank the gentlelady. And I just want to point out this has nothing to do with either net neutrality or the fact that Ohio State demolished my Ducks.

Now, with that I turn to the gentleman from New Jersey, Mr. Pallone.

Mr. Pallone. Thank you, Mr. Chairman. I want to thank the chairman and welcome Chairman Wheeler and Commissioner O'Rielly.

I know you were sitting in these same seats just a few weeks ago, and we appreciate you coming back.

I just want to associate myself with the remarks that Ms. Eshoo made about let's be careful. I think things have calmed down a little here. But I think she was right in saying let's be careful that we don't pick apart or insult the Chairman or the FCC or any agency really, because everybody is trying to do the best they can. And I don't necessarily think agencies are better than Congress or worse than Congress or better than the President or whatever.

I appreciate your comment, Mr. Chairman, about this not being a backhanded slap at the FCC for adopting the strong network neutrality protections. A lot of us obviously are concerned that that not be the

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case. So it is good that you set that forth.

I am obviously supportive of having a debate about whether we should modify procedures across all agencies, but I am worried that these kinds of agency-specific procedural changes have several drawbacks.

First, they can give the public the impression that these are simply backdoor efforts to undermine popular decisions with which some Members of Congress disagree.

Secondly, legal experts have repeatedly told us that agency-specific requirements invite lawsuits. They have explained that even small changes create large conflicts with longstanding legal precedent, and these conflicts will no doubt lead to drawn-out battles in court. And as we have heard over and over in this subcommittee, litigation unsettles the market and deters investment.

But despite Democratic concerns with the Republican-specific bills, Democrats are not the party of no. And that is why, as the chairman mentioned, the Democratic members of this subcommittee have put together our own plan, one that builds on the good work Chairman Wheeler has already done to improve the FCC's processes and will keep future FCC administrations fast, efficient, and transparent. Our commonsense proposals would keep the FCC as agile as the industries it regulates without sparking years of legal uncertainty.

And our plan goes beyond the bureaucratic inner workings of the FCC. We believe that transparency should extend to the political

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process as well. And that is why the Democratic plan includes a way to ensure that the public knows who is paying for expensive political adds on TV. For too long megadonors have been hiding behind the innocuous and misleading titles of their super-PACs. Americans deserve to know who is using the public airwaves to influence political debate, and transparency should not stop at the doors of the FCC.

So I am hopeful that we don't see any more political tactics against the FCC and that they end today.

I have two minutes. I would like to yield 1 minute to Ms. Clarke and 1 minute to Mr. Loeb sack, in that order.

[The prepared statement of Mr. Pallone follows:]

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Ms. Clarke. Chairman Walden and Ranking Member Eshoo, thanks for convening this hearing.

And to Chairman Wheeler and Commissioner O'Rielly, thank you for appearing here today.

I would like to also thank Ranking Member Pallone for yielding time.

The FCC oversees many dynamic industry sectors that make up one-sixth of our national economy. Consequently, it is important for government to understand and act quickly to keep up with the rapid innovation and shifts affecting these industries. Whether it is application for a license or a request for new rules, the public deserves timely responses from the FCC.

There are some issues and tasks at the agency that have simply taken more priority over others, years to complete, and we must avoid these time hogs, if you will, that prohibit other business from getting done. Essentially, we need the FCC to effectively multitask while maintaining clear transparency around time lines to keep up with its broad portfolio of work. The agency's delay, for example, on the rulemaking or petition can have a negative impact on the commenter whose next step or survival is intricately tied to the timeliness of the agency's response.

I know the Commission is working hard to speed its decisionmaking, but the best way to ensure that future administrations live up to this standard is to hold them accountable to the public they serve.

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I will be introducing a draft bill that will make data regarding the timeliness of the business before the FCC available to the public. It would also include information about the impact of congressional investigations on the agency's ability to manage its workload. I look forward to working with my colleagues and the FCC on these issues. And I yield to Mr. Loeb sack.

[The prepared statement of Ms. Clarke follows:]

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Mr. Loebsack. Thank you. And thank you, Ranking Member Pallone, for allowing me to speak briefly.

And thanks to both of you for being here today as well.

I have just joined this committee this Congress, but I know that this issue of FCC reform, namely transparency, is something that the committee has been examining for several Congresses. Unfortunately, we all know it has become a very partisan issue.

The FCC and all our Federal agencies need to be transparent. I think we can all agree on that. They need to be responsive to the American people. This really should be something that is easy for Democrats and Republicans to agree on, and I think we have seen that today already demonstrated by the comments of my colleagues.

That is why I am offering a discussion draft today to shine some light at least on the way the FCC makes decisions. My bill simply would require the FCC Chairman to post online the guidelines and procedures the commissioners use when considering items. Fairly simple.

Commissioner O'Rielly, you have raised this issue at the FCC, and I agree with you on this commonsense reform. Public participation, I think we all know, has never been higher when it comes to engaging the FCC. Millions of Americans reach out to the FCC, and they deserve to know how decisions are made by the agency.

So I look forward to working with my fellow colleagues here on the Energy and Commerce Committee to bring the clarity I think that we all want when it comes to what the FCC rules and regulations are



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and making sure that the public knows what they are as well.

So thanks again for letting me speak to all the folks here who are in leadership positions on this committee and the subcommittee. And thanks to both of you as well. And I yield back. Thank you.

[The prepared statement of Mr. Loeb sack follows:]

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Mr. Walden. The gentleman yields back the balance of his negative time there, but we are happy to have that.

And I would just comment -- they have called votes, so we may wait -- I assume that is votes, right? -- I would just tell Ms. Clarke, Loeb sack, and Matsui, I have just seen these bills for the first time today, and I think your ideas make a lot of sense. And so we are open to having that discussion and incorporating them in or see what we can come together with. And I hope you will join me that when we do do that, bringing commissioners back, the Chairman back to give us the input once we get a draft put together. So I would like to work with you on that. It is great.

With that, I think we will recess and then hear from the Chairman and the commissioner when we return from votes. So if members could go vote and come right back.

[Recess.]

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[3:21 p.m.]

Mr. Walden. We will call back to order the Subcommittee on Communications and Technology. And thank our witnesses again for being here and for sharing with us their expertise on these issues and their suggestions and concerns.

And with that, I now welcome the Chairman of the Federal Communications Commission.

Chairman Wheeler, thanks for being here, and we look forward to your testimony.

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**STATEMENTS OF THE HONORABLE TOM WHEELER, CHAIRMAN, FEDERAL  
COMMUNICATIONS COMMISSION; AND THE HONORABLE MICHAEL O'RIELLY,  
COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION**

**STATEMENT OF TOM WHEELER**

Mr. Wheeler. Thank you, Mr. Chairman.

Mr. Walden. Will you make sure that Mike is on too, Tom.

Mr. Wheeler. Yeah. Thank you.

Mr. Walden. There we go.

Mr. Wheeler. Unaccustomed as I am to speaking quietly, I guess.

It has been a while, but I do want you to know that I listened carefully to your opening statement and that I took the message you were delivering onboard. And I also feel very strongly that impugning the First Amendment or this committee was in no way, shape, or form any goal, and I don't believe that I did. And so I just want to state that for the record.

Mr. Walden. I appreciate that.

Mr. Wheeler. Long before I ever came to the Commission, I had heard of how the FCC must become more efficient and make decisions faster. It was a topic, Mr. Chairman, of our first meeting, you may recall. You prompted me to task a senior member of the Chairman's office to lead an intra-agency team to attack the problem. The result

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of this has been the resolution of thousands upon thousands of pending matters, the most items ever resolved in the shortest period ever. We aren't done by a long stretch.

But in regard to the issues raised by the three proposals noticed for this hearing, we should consider the following. Publishing our decisions quickly has been a priority of mine. During no other chairmanship in this century have we reported items as quickly as we have during my chairmanship, 73 percent in one business day or less; 86 percent in 2 days. But you ask: What about the other 14 percent? Well, those are 41 decisions that were typically the result of last-minute negotiation, and the staff had to work with the commissioners to bring them into shape.

But let's let the facts speak for themselves. During my chairmanship, the average time to release an order was 1.8 days. Just for comparison's sake, during the Powell Commission, the average was 8.7 days. During the Martin Commission, the average was 10.7 days.

On another topic, delegated authority, delegated authority on items for the FCC record is at a 15-year low during my chairmanship, and that is both in absolute numbers and in the ratio to overall decisions.

Now, the interesting thing is that delegated authority can be confusing as a term. Last year, there were over 950,000 items that were decided on delegated authority. That may seem like a large number, but it has actually stayed pretty constant over the years. The

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vast majority of delegated authority decisions are routine, although they are of great importance to the companies affected. About 0.2 of 1 percent of those delegated authority decisions are substantive enough to make it into the FCC record, which is the compendium of Commission policy matters.

Again, the facts speak for themselves. If the goal is to reduce delegated authority decisions, in order that commissioners vote on as many items as possible, the record during my chairmanship surpasses the record of Republican administrations, affording that opportunity to minority commissioners.

And, finally, the Commission has never been more open and the public more informed of our activities. While publishing the specific language being considered and debated by the commissioners may seem to facilitate matters, it actually achieves the opposite. Doing this would turn an open, yet highly structured administrative process into something akin to the funhouse hall of mirrors where it just goes on and on and on and on. And this is because in *Sprint Corporation v. FCC*, the D.C. Circuit held that the Commission must respond in its decisions to every argument raised on the record. Now, there have been a lot of guffaws about a 300-page open Internet order accompanying 8 pages of rules, but that is why. By law, every issue raised in an extremely fulsome record had to be addressed.

We can virtually guarantee that publishing a predecisional draft will trigger an influx of new comments, raising new issues. Every

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imaginative lawyer on every side of an issue will dream up new interpretations, new contexts, and new issues that they will file with the Commission, to which the Commission must respond. This means there would not be a decision, but a rewrite to reflect the new record. Then it would be published again, and the whole process would begin again as we dive down the administrative rabbit hole.

But let's look for a moment at some examples. The Connect America Fund payments for rural rate of return carriers needs to be resolved. This is basically a debate among carriers who receive benefits over the best formula to calculate those payments. Some carriers will benefit from the change. Others won't. And those who feel disadvantaged will seize upon this as an opportunity to keep us from getting funds into the hands of those who can deliver broadband in rural areas.

The designated entities competitive bidding issue is a hot item on which we have heard a great deal from this committee. But if we don't have rules in place in advance of the incentive auction in Q1 of next year, the old rules will stick. Neither of us want that. Likewise, however, if we get into this kind of a constant delay situation, then the alternative becomes do we delay the auction, and neither one of us want to do that either. And there are multiple other examples like this, including STELAR, where you asked us to do things in 12 months that would be impossible to do in this kind of situation.

So all I would say, Mr. Chairman, is from our first meeting you

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and I shared the same goal about improving the Commission's processes. Commissioner O'Rielly, my friend and colleague Michael O'Rielly, is also a champion of these efforts. He has made a number of very good and substantive suggestions that prompted me to create an all-offices task force to review just how the agency operates. I believe in making the FCC more efficient and nimble, and I look forward to working with you in that goal.

[The prepared statement of Mr. Wheeler follows:]

\*\*\*\*\* INSERT 2-1 \*\*\*\*\*



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Mr. Walden. I appreciate that. And I thank you for your testimony and your comments and your leadership at the FCC.

Let's go now to Commissioner O'Rielly. We appreciate you being here and your testimony and comments, sir. And please go ahead.

#### **STATEMENT OF MICHAEL O'RIELLY**

Mr. O'Rielly. Thank you, Mr. Chairman, Ranking Member Eshoo, and members of the subcommittee. Thank you for the opportunity to discuss this important topic before you today.

Having served at the FCC for nearly 18 months, I have experienced FCC procedures and assessed their effects firsthand. Over the years, I have also had the opportunity to speak with stakeholders about areas for improvement. Consequently, I believe that a number of FCC practices are in need of review and reform.

My pursuit of greater Commission transparency is not related to any particular issue, such as net neutrality. My interest in improving our overall processes far preceded that specific order, and the areas I have highlighted are reoccurring problems that have been developing over some time, not to this particular Commission.

Some people have interest in comparing the procedures of other independent Federal agencies. I am not sure that process will be very enlightening because each agency comes with its own operating statute, and it can differ tremendously for numerous reasons. The standard for

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considering any proposed change should be, in my mind, what is in the best interest of the American people and the communications marketplace.

I also disagree that the APA requires practices to be the same across all agencies. That is not the case today and cannot justify inaction. Likewise, it is no excuse that new procedures may take time to implement. The agency routinely reviews and updates its rules for regulatees, and we can do the same for our own processes.

Since you invited me to testify before you, I will say that I am in favor of the legislative efforts underlying the three draft bills that are under discussion. Vice Chairman Latta's bill would ensure that commissioners and the public know when items are being decided under delegated authority. Today, I am given up to 48-hour notices in some cases, but in most instances no notice at all, which is harmful for purposes of following and acting on related issues.

This fix is not something to be feared. And the argument made by some opposing the bill that such a list would prevent the Commission from slipping out items not unnoticed is problematic from my viewpoint.

I also disagree with the notion that parties aggrieved by a bureau decision can simply seek Commission review. There is no timing required for the Commission to act on an application for review. A number of them have been pending for years, meaning I get no involvement.

In regards to Congresswoman Ellmers' bill, posting the adopted

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rules within 24 hours would allow the public and stakeholders access to the bottom lines, instead of having to wait, in some cases weeks, for the item to be completed. Such delay hinders their preparation either to comply or challenge the item in court, meaning additional time for market uncertainty.

Congressman Kinzinger's bill would greatly improve the ex parte meetings at the Commission by allowing outside parties to know what is actually being contemplated so they can target their areas of concern. It is frustrating, so frustrating to sit in a meeting unable to actually engage with parties or talk about what changes I am seeking to an item or how best to fix a particular problem.

More transparency would not reopen the comment period or interfere with the deliberative process. Parties already file ex parte during the circulation period. This simply ensures that their comments are on point and that our deliberations are informed by their views.

In rare instances it may take some additional time, while still under the sunshine period, to finalize an item, but that would not create an undue delay and may ultimately save time by avoiding the need to reconsider or litigate decisions that were not fully baked.

I know discussion of reform has generated some concern that minority commissioners might grind the Commission to a halt. Not only is that not my intent, I do not believe it is any way accurate. Additionally, these changes would not undermine the discussions or

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interfere with negotiations between commissioners' offices.

In addition to the three bills under discussion, my written testimony provides additional areas that I hope will be considered by the subcommittee. These include selectively elevating delegated authority items to the full Commission upon request, the editorial privileges process, the pre-adoption process, testimony provided by outside witnesses at Commission open meetings, the role of advisory committees, compliance with the Paperwork Reduction Act and Regulatory Flexibility Act, accounting for Enforcement Bureau-assessed penalties, and codifying all FCC procedures.

In sum, I believe the changes should be made to the Commission's proceedings in order to improve its efficiency, transparency, and accountability. And I thank you very much.

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[The prepared statement of Mr. O'Rielly follows:]

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Mr. Walden. Commissioner O'Rielly, thank you for your testimony as well.

I want to follow up with you on the part of your written testimony discussing the delegated authority piece, because it seems sort of shocking to me when you say: Even those who regularly follow FCC proceedings can find it difficult to keep track of all the items that the FCC releases at the bureau or office level. Imagine my surprise when I discovered you can do it as a commissioner.

I mean, obviously, nobody is saying every item should come up to a vote in the Commission. The Chairman has eloquently said there are too many, basically.

Mr. O'Rielly. Yeah.

Mr. Walden. And I got that. That is ministerial and management and all that.

Tell me what you are trying to get at here. What is the issue?

Mr. O'Rielly. So what I, in my written testimony, I highlighted a couple of categories. I don't want to get into equipment authorization or routine licensing. I think that would do the vast number of the 950,000 I think the Chairman mentioned.

Mr. Walden. Right.

Mr. O'Rielly. There are some instances, though, where it becomes an issue where it would help the Commission, in my opinion, to have the Commission itself vote on an item versus delegated authority.

Today delegated authority, though the good-meaning staff -- and

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I mean no disrespect to them, I have great colleagues that I work with -- they make decisions and I actually don't know what is being decided. It is late in the game by the time that I know what is actually being decided. It might be out the door before I know what just happened.

My staff will say: Did you know we just released this?

And it is like: Oh, goodness gracious. Okay. What does that mean for these five other things we have been working on?

Well, we have got to go back and try and piece those together.

When is delegation going to be notified for us?

So there are problems with how it works today. And what I have sought is a couple of different things. One is some kind of notification of timing, and I think that Congressman Latta is trying to get to that, how soon we would notify when delegation is going to be used. But then I have also been advocating a mechanism where, on important matters, the Commission itself has an opportunity to pull it up to the commissioner level.

And no disrespect to the Chairman, my Chairman, not to you, but no disrespect to my Chairman, in his testimony he highlighted, and I think it just might have been misinterpreted on my part, but he highlighted that I was looking for some type of veto over the delegated authority, that somehow I was pulling the item up and I would be able to veto it. I am fully aware that I am in the minority and I will lose almost 100 percent of the time when it comes to it. I have looked at

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the former votes and I don't win that often, and that is okay, I respect the process, and that is completely understandable.

So when I ask to pull it up, I want to be able to vote on the issue myself. I am comfortable voting. I am comfortable voting quickly. I have not been a delay. I do not believe I have been a delay at the Commission. So I think it is something so important to do.

Mr. Walden. All right.

So, Chairman Wheeler, maybe you can help us understand this then. If the bills are drafted in order to be adopted on delegated authority, what role do the other commissioners' offices have? And, again, take the personalities out of this.

Mr. Wheeler. Sure.

Mr. Walden. I have been dealing with this for multiple chairs. What role? Do they get to weigh in with the bureau on the order? Do they get drafts and get to comment through that drafting process? Do some drafts, others, have to wait until the order is released by the bureau? How does this --

Mr. Wheeler. Well, thank you, Congressman. These matters are typically the carrying out of a previous decision that the Commission has made. So the Commission says: We are going to decide thus and so and we leave the details to the bureau of whomever to work it out.

Mr. Walden. To the staff.

Mr. Wheeler. And the bureau does that and moves ahead and releases it.



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On controversial items -- controversial is not the right way -- on items of specific note, because we can tell the difference between housekeeping and big deals --

Mr. Walden. Sure.

Mr. Wheeler. -- we try to do 48 hours notice, as Commissioner O'Rielly indicated, so that the commissioners can engage in: Okay, this is what is going on.

Mr. Walden. So, I guess, that is my question. I sense from Commissioner O'Rielly that there is not some formal notice process, and so they may not know until it is over. Is that what you are getting at?

Mr. O'Rielly. Right. And I said this before. Some items are given 48 hours, some 24 hours, and many none at all. And as I said this in my testimony in the Senate recently, I have actually been given an email and said: As a courtesy, we are letting you know this is happening. And I was kind of insulted. It was like: Thanks for letting me know what is happening at the Commission I work at.

So there is no uniform structure in terms of how much time we are allowed.

Mr. Wheeler. But as I said, in response, I mean, Mike has raised a lot of very good procedural issues.

Mr. O'Rielly. I got some more coming too.

Mr. Walden. We are all ears.

Mr. Wheeler. Why does that not surprise me?

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But as you know, we put together this group, and we are going to all roll up our sleeves and we are going to make decisions as a Commission on, okay, what should the rules be. Because you are right, Mike and I walked into the door the same day, And we both got handed the same book of Commission procedures.

Mr. Walden. One got a gavel.

Mr. Wheeler. There was dust on that book.

Mr. Walden. Yeah. No, I get that.

Mr. Wheeler. Mike has got a really good point, we are going to roll up our sleeves and deal with it as a commission.

Mr. Walden. And I told a predecessor of yours once removed, Chairman Genachowski, we have seen different chairs operate different ways, different times, some better than others, some very reform minded. You have put reforms in, Chairman.

What I am trying to do is from the legislative body, say, let's get in statute clear transparency and reform so it is irrespective of a chairman that comes along that doesn't want to participate.

Mr. Wheeler. And, I guess, Mr. Chairman, my only comment on that is that we are in violent agreement on some basic concepts. The question is: How do you accomplish them? And I think that using our process we can present a series of reforms that you will be impressed with. You may not agree with all of them.

Mr. Walden. Yeah. Sure.

Mr. Wheeler. Mike won't agree with all of them. I probably

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won't agree with all of them. But I said to you in our first meeting I was serious about process reform.

Mr. Walden. No, I know. I know. And I think I concurred that we are too. And we actually get to legislate too.

So Mr. O'Rielly, then I have used up my time.

Mr. O'Rielly. I will make one last point. And I am completing participating in the chairman's new task force and look forward to that going forward. But I don't want that to supplement or supplant the work that you may do. We take our direction from the subcommittee. If you legislate, then we will follow that direction.

Mr. Walden. Thank you.

Mr. O'Rielly. In any event, at the end, even if we are able to do everything and I win every day in our task force, there is still a role, as you highlighted, to codify those rule changes because we don't want to see them change over time.

Mr. Walden. Yeah. There should be clear, understandable, available procedures internally at the Commission, so regardless who is in charge, which party, there is a process that everybody has great confidence in.

With that, I will recognize my colleague and friend from California, Ms. Eshoo, for questions.

Ms. Eshoo. Thank you, Mr. Chairman.

Thank you, again, to both of you for being here, and it is good to listen to the answers of the questions that have already been posed.

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Let me ask this, because I think there is a lot of attention being given to this whole issue of delegated authority. Do the FCC rules today already explicitly outline what types of items can be delegated? Or is it just at the call of the chair?

Mr. Wheeler. So there are multiple. They are based on Commission policy. So there are, as I said, in those 950,000 --

Ms. Eshoo. So those are the number that fall under that can be dealt with that way.

Mr. Wheeler. Every decision under those 950,000 has to be based on a decision previously made by the Commission. Now, on some experimental licenses, it was a decision made 20 years ago, but those move through in a process.

Ms. Eshoo. So --

Mr. Wheeler. Under 0.2 of 1 percent. Yeah. Excuse me.

Ms. Eshoo. No, that is all right.

In thinking about this issue, it sounded as if delegated authority -- well, the term means that it has been given over to someone, someone else is carrying it out -- and the implication is, is that the Commission -- and Commissioner O'Rielly just kind of fortified that thought -- that as a commissioner, he doesn't know.

You are saying it starts with the Commission to delegate and then that authority takes place and is carried out by whatever bureau.

Mr. Wheeler. Yes, ma'am. Let me read you what delegated authority --

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Ms. Eshoo. So, yeah, but let me just ask Commissioner O'Rielly something.

Since you are able to vote on whether something is delegated or not -- I don't know how else to put this, but I mean it respectfully -- what is the beef? You don't like the decision that the delegated authority then comes up with?

Mr. O'Rielly. So to be fair, and the Chairman is right, we have a whole host of items that have already been delegated long before I got here. I actually don't know the scope.

Ms. Eshoo. Oh, so it is the previous one.

Mr. O'Rielly. I don't know the scope of what has all been delegated. We have no inventory.

Ms. Eshoo. But can't you go back and read about those?

Ms. Eshoo. We have no inventory to know what all has been delegated.

Ms. Eshoo. I see.

Mr. O'Rielly. Like, there are whole host of things that go out the door that I don't even know, they were decisions long before. And the Chairman and I have had some good success. He has sometimes proposed delegation, and I have struck it in some of the proposals, and sometimes I win and sometimes I lose. But I have tried to take it out of --

Ms. Eshoo. Well, let me ask you this.

Mr. Wheeler. No, but that is a really important point. I mean,

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Commissioner O'Rielly has been very forthcoming and very involved in saying: In this item, I don't want you to give delegated authority, I want to strike that. So it is only in instances where the Commission has, in a majority, voted for that delegated authority to exist.

Ms. Eshoo. So there are two beefs here, legitimate ones. And I completely identify with your description of being in the minority. Number one, you weren't there when the Commission decided to delegate the authority, because that is the original starting point. Correct?

Mr. O'Rielly. That is definitely part of it, yes. That is a part of it.

Ms. Eshoo. That is where it starts.

Mr. Wheeler. Issue one.

Ms. Eshoo. And you don't have the opportunity to go back at that?

Mr. O'Rielly. That is right.

Ms. Eshoo. So of the ones over 18 months, give us an idea of how many of those delegated authorities that previous Commissions delegated would you have bumped back up to the Commission level?

Mr. O'Rielly. There are so many that I wouldn't know the scope of how many we are talking about. But in general --

Ms. Eshoo. Of the ones that you don't like or agree with.

Mr. O'Rielly. I think I understand your question. If I don't, please correct me.

But I would say that I win probably three-quarters of the times when I want it struck from items. There have been a number of big items

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that have gone out during my 18 months where I have lost because I have been in the minority.

Mr. Wheeler. You win three-quarters of the time? I am too soft.

Mr. O'Rielly. I mean, on delegated authority.

Ms. Eshoo. I have got 33 seconds left now.

I don't really we know how we get at this, and I am not sure what is broken. If, in fact, that snapshot of very powerful people in a given area, section of the FCC just go off and make decisions on their own and there isn't any accountability, there isn't any transparency, I think we all would take issue with that. But it is my understanding that it originates with the Commission.

Now, I know how you feel about decisions that have been made before you arrived. There are over 200 years of decisions that were made by the time I arrived. So I either have to work to change it or I may not get my way. But I don't think it is as broken as I originally thought this is.

I know what I wanted to ask you, Mr. Chairman. When are you going to finish your examination together and then give us ideas?

Mr. Wheeler. I would hope that by the time you all get back from your August recess that we would have results to share with you.

Ms. Eshoo. Good. If you could get it done before that, it would be -- well, you know what, we won't take action because we will be getting ready to go away in August.

So I look forward to receiving them. But I think you have got

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a good flavor of what members really care about. And I am not so sure whether the legislation that is being proposed really addresses, after you both have explained, how delegated authority works.

So I don't have any time to yield back. I appreciate the additional time I was given.

What?

Oh. Oh. That is right. My staff is reminding me.

Mr. Chairman, I would like to ask for unanimous consent to place in the record a letter to myself, Mr. Walden, Mr. Pallone, and Chairman Upton from Reed hunt, former FCC commissioner, dated April 30, 2015.

Mr. Latta. [Presiding.] Without objection.

[The information follows:]

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Ms. Eshoo. Thank you very much.

Mr. Latta. The chair now recognizes the gentlelady from Tennessee, the vice chair of the full committee, for 5 minutes.

Mrs. Blackburn. Thank you, Mr. Chairman.

Commissioner O'Rielly, I want to start with you, if I may. And I have got your blog post from August 7, 2014. It is titled: "Post text of meeting items in advance." And you discuss the need to post on the FCC's Web site the actual text of items to be considered at open meetings at the same time they are provided to commissioners.

And describing the current system, you say this, and I am quoting you: "...understand the need to protect internal deliberations, there has to be a better way." End quote. And I would love for you to elaborate on that and how exactly it would improve the rulemaking process at the FCC. Walk me through this.

Mr. O'Rielly. Sure. So I started to do this in my opening statement. It is so frustrating. When an item is circulated for an open meeting it is called white copy, 3 weeks before the open meeting. We have items that are recirculated today for our next meeting. At that time period, I get more requests from outside parties to meet. They will file ex partes on what happened during that discussion.

The difficulty is, when you meet with them, they have no idea what is in the item itself. So you have a combination of different people that come in. So some people know a lot what is in the item because maybe they have a friend at the Commission or they are a pretty decent

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lobbyist and they know what --

Mrs. Blackburn. So they are relying on somebody to feed them that information, not on what is publicly available.

Mr. O'Rielly. Some people are very well educated. Some people are well attuned to what is happening. There is a middle crowd which knows a little bit, and a little bit is dangerous because they don't know what exactly is in play. And then you have a whole host of people that come in, they don't know nothing about what is in the item, and that includes the general public.

And so we have this mixture, and I am not allowed under the current rules to tell them anything that is in the item or any changes that I am seeking to the item. I have read it. I read all of the items.

Mrs. Blackburn. Okay. How much of your time does that type of interaction take with people?

Mr. O'Rielly. Sure. So in 2 weeks I will meet 6, 7 meetings a day, probably.

Mrs. Blackburn. Okay. So you are utilizing a lot of your time to answer questions that come from inequity of access to information.

Mr. O'Rielly. Yes. I am not an allowed to answer any questions.

Mrs. Blackburn. Okay.

Mr. O'Rielly. They come in and pitch me on what they would like to see changed based on their knowledge base.

Mrs. Blackburn. Got it.

Mr. O'Rielly. And I am saying it is inequitable in what they know

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and they want to see changed.

Mrs. Blackburn. Okay.

Mr. O'Rielly. And that is problematic for trying to have a good dialogue. There are things that I would like to do and I am not allowed to tell them, like: I was thinking about doing this to the item. What would you think of that? Is that a possibility? It is almost like you were testing out an amendment with somebody and say: What do you think with this?

I am not allowed to do that. I am not allowed to tell anybody what I am seeking in terms of changes. And I can't even tell them if they are wrong. I can't say, like: Gee, you have been spending so much time on this issue.

And this came up in a meeting I had with wireless microphones. Did 2 meetings in 1 day. In the morning meeting, I couldn't tell them that they are completely wrong. They went and met with a bunch of people on the Commission, came back later in the afternoon, and they were mostly wrong. But I couldn't tell them that they are mostly wrong, that we had moved past in some other concerns and others they were just --

Mrs. Blackburn. So to fix it, what you are saying is provide everybody the same set of information in a transparent process where the information is easily accessible?

Mr. O'Rielly. Yes. I am saying we post the one document.

Mrs. Blackburn. One. Okay.

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Mr. O'Rielly. Just the one document. Not continuing to repeat the public comment period.

Mrs. Blackburn. Got it.

Mr. O'Rielly. One document that is the one circulated with us. And then we will get more pointed comments, more particular, specific items in areas that they would like to see addressed.

Mrs. Blackburn. And it would be a fairness issue and an efficiency issue?

Mr. O'Rielly. Yes, ma'am.

Mrs. Blackburn. Okay. Very good.

I have got about a minute and a half left. Commissioner Wheeler, very quickly, if you have any response to that, and then I have got one more question for you, sir.

Mr. Wheeler. Thank you. Thank you, Congresswoman.

I mean, I think there are several things here. The first is that the last 3 weeks isn't the only time we hear from people, by the way. There is a lot of discussion that goes in. And ex partes, all kinds of ex partes.

The issue is how do we get to a position where we can pull up and shoot. And if we are in a situation where there are constantly new ideas -- I mean, somebody goes in, you publish the item, it gets fly spec'd by really sharp lawyers, who then start filing things that require us to respond, which requires us, then, to pull and rewrite in order to --

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Mrs. Blackburn. Would giving everybody the same information take care of that?

Mr. Wheeler. No. The difficulty is what they then do, because --

Mrs. Blackburn. Okay. Well, we can't address that.

Let me move on to the other question. I have got about 30 seconds now.

I was looking at your press release that came out yesterday on the Connect America Fund, and I had gone back and looked at this March 30 Wireline Bureau with the order that was there on the subsidized broadband buildout.

The question is: Did you properly notice what appears to be an arbitrary distinction, whether or not the incumbent provider had a customer in the area as opposed to whether the provider offers service to the area?

Mr. Wheeler. Thank you. I believe we have properly noticed it. And as a matter of fact, it was out to an extent that people could file and say: No, he is wrong.

Mrs. Blackburn. Okay.

Commissioner O'Rielly, do you have anything on that.

Mr. O'Rielly. So there is that challenge process the Chairman references. There is going to be disagreement on whether the challenge was properly executed by the staff. And I am sure we will some process for us to review that.

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Mrs. Blackburn. Okay. My time is up. Thank you all.

Mr. Latta. Mr. Yarmuth is recognized for 5 minutes.

Mr. Yarmuth. Thank you very much, Mr. Chairman.

I thank the witnesses for their testimony and for this discussion.

I am going to return during my time to the subject that I was talking about earlier during opening remarks and that is campaign finance disclosure. Because while transparency at the FCC is very important, as it is in every agency, I am much more concerned about the dark money that is used to flood the Nation's airwaves with anonymous ads, not just during election season, although now election season is year-round, it seems, but throughout the year.

And the Communications Act already requires the disclosure of the true identity of anyone paying for an ad, whether it is billionaires or basically anyone who can afford to run ads, shouldn't be able to hide behind innocently named front groups. That is why I introduced a bill earlier today that directs the FCC to use its existing authority to require disclosure of the actual donors behind these ads.

I don't think disclosure should be a partisan issue. According to Chief Justice Roberts in the *McCutcheon* opinion, he said: Disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech. With modern technology, disclosure now offers a particularly effective means of arming the voting public with information.

And then I would like to quote another high-ranking Republican

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official from various points in his career. 2001: What we ought to have is disclosure. In 1997: Public disclosure of campaign contributions and spending should be expedited so voters can judge for themselves what is appropriate. These are the reforms which respect the Constitution and would enhance our democracy. 1997: We could do disclosure more frequently. I think disclosure is the best disinfectant. I think it gives our constituents an opportunity to decide whether or not we are in the clutches of some particular interest group and whether or not that is a voting issue for them. I am certainly in favor of enhanced disclosure. In 1990: We would eliminate PACs altogether. It will be interesting to see whether our colleagues on the other side of the aisle would be willing to eliminate PACs altogether. We would have the money come from small individuals. And so forth.

That is Senator Mitch McConnell, the majority leader of the Senate. And while I doubt that he would say the same thing today, I think he has moved on from those positions, I think that the validity of his remarks and of Chief Justice Roberts are very, very sound and solid.

We have seen the amount of money escalate dramatically, according to the Center for Responsive Politics. In 2012 election cycle, there were about \$300 million from these anonymous organizations. Six years prior to that, it was only \$5 million. I am sure, looking ahead to 2016, that we are probably talking about a billion dollars or more in

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these types of anonymous ads.

So I think it is very critical that the FCC use the authority it has to require disclosure. Again, I think this is not a Republican or Democratic notion, and the abuses of super-PAC and the 501(c)(4) designation are not limited to one part of the philosophical spectrum. It is across the spectrum. I know that some people in the labor union movement would probably not want to do this just as much as the Koch brothers probably wouldn't to do that.

But, again, I think the American people are crying out for this, and I would hope that this bill would get attention. And if it is not successful, this legislation, then I would hope that the FCC would look carefully at what it can do within its existing authority to provide more transparency in the election cycle.

So I don't have a question. Thank you for your attention. I will yield to the ranking member.

Ms. Eshoo. I thank the gentleman for this what I think is really a very important piece of legislation, and I want to associate myself with everything that he said.

The second most often question of me by my constituents is: What are we going to do about this whole issue about campaigns, how they are financed? And now, on the heels of Citizens United and the McCutcheon decision, what are you going to do about it? We have to do something about it. They are sickened by it. They are sickened by it.



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In the California case, let me just tell you about something that is very powerful relative to the airwaves. A handful of years ago there was a measure on our ballot statewide to roll back the stringent measures that the State legislature had passed relative to clean air, and there were ads to roll it back. But at the end of that ad, as required by law in California, is there is a voiceover that said: This ad was paid for by -- and it named the oil companies that had paid for the ad, whomever they were. I don't remember. I don't want to say their names because I may not be recalling the correct ones.

You know what? Once Californians heard who paid for that ad, it sunk the effort. That is how powerful it is. So that transparency and that sunshine, I think, is something that we need to take up on.

Thank you. Thanks for yielding.

Mr. Latta. The gentlemen's time has expired. And at this time, the chair will recognize himself for 5 minutes.

Interesting enough, I am going to go back to the delegated authority, oddly enough, since it is my piece of the legislation within the discussion draft.

Commissioner O'Rielly, if I could go back to some of the questions that have been asked and some of your answers. One of the questions I would like to ask is: What is wrong with more transparency? What is wrong with the 48 hours that folks out there would get more information to them?

Mr. O'Rielly. I am very sympathetic to that, and I think that

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would be favorable, and I have written on that point exactly.

Mr. Latta. And when you have written on that, what is harmful to consumers or other businesses out there for that 48 hours in your research and your writing?

Mr. O'Rielly. It has been interesting because the critique of your bill, I have read, it is interesting because there has been a concern that if you expose these items 48 hours in advance then you will have a rush to file all these things at one time, you are putting up a flare. But we actually do that today on our items that are circulated. We do things that are either open meeting or we circulate items.

This is something I printed out today from our list. It is on our Web site, and it tells everything that is on our circulation. So these are predecision. These are predecisional items. So everyone knows what is actually being happening, and this is pretty similar to what you were seeking in your bill, if I read it correctly.

We talked about the Chairman's task force earlier, his previous task force, or his previous review effort, and one of the things he was seeking in the task force was actually take this list and expand it to tell people how actually people had voted already. So you would have, like, partial votes, like, two people might have voted and a couple people haven't voted yet. He obviously votes first. So he is actually expanding that.

So I don't understand why the list that you are proposing on

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delegation would be problematic. It seems just copacetic with things we already do.

Mr. Wheeler. I think you and I were together on that one, right, and we got outvoted.

Mr. O'Rielly. Yeah. I am comfortable with that.

Mr. Latta. Okay. Let me go on, Commissioner O'Rielly. As I understand, the advisory committees operating at the FCC must abide by the Federal Advisory Committee Act, FACA, which contemplates that such committees will furnish expert advice, ideas, and diverse opinions to the Commission.

To that end, the rules implementing FACA direct agencies to develop procedures to assure that the advice or recommendations of advisory committees will not be inappropriately influenced by the appointing authority or by any special interests, but will instead be the result of the advisory committee's independent judgment.

So the question: What steps has the FCC taken to assure that the advisory committees can exercise their own independent judgment about what issues are important and the conclusions they draw?

Mr. O'Rielly. So we do have an internal memorandum that deals with some of this, and it calls for balance in terms of makeup of an advisory committee. But I will say I do have some concerns with our advisory committees that operate today. I do worry, and I am working on a piece on this, I do worry there are a number of concerns that come to mind, including one that there is that influence issue you just

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raised. Is there too much influence coming from a bureau?

We actually have bureau chiefs sitting on advisory committees, even though there is an official designee from the Commission sitting on it, we have bureau chiefs sitting there dictating how the committee is supposed to function. And I just think that is problematic for how this independent body is supposed to operate and provide advice to us. I think that we are leading them in a direction that is problematic. There are a host of issues I am working on that I think we just need to take a second look at how we do advisory committees.

One of the problems I have on advisory committees is -- and no disrespect to the Chairman -- but all of the authority on advisory committees, everything is in the Chairman's hands. He picks everybody. He picks all the issues. I am invited to sometimes say nice, kind things, and I do, and they are nice enough to invite me and that is great. But there is a problem with that structure where everything is in his hands and I don't have any say in an advisory committee.

Mr. Latta. Let me follow up and let me ask you on some concerns that have to do with the Downloadable Security Technical Advisory Committee. Are you familiar with that one?

Mr. O'Rielly. I am. I will say only that the statute, that one actually doesn't provide me any authority. That is a statutory decision the committee made and that is all the Chairman's. So I haven't had any involvement in that one.

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Mr. Latta. You say you are not?

Mr. O'Rielly. I am not involved.

Mr. Latta. Okay.

Mr. Wheeler. Mr. Chairman, could I try something on that please?

Mr. Latta. Yeah.

Mr. Wheeler. I actually was the chairman of an advisory committee and have a little experience on this issue on both sides of the table, if you will. And the committees are carefully balanced to begin with, both with expertise and with interests. And I can assure you that they have their own mind, and they have to have a vote to make their recommendations to the Commission.

Mr. Latta. Let me just follow up. I know my time is up.

But, Commissioner O'Rielly, in your opinion, do you think that the D-S-T-A-C, the DSTAC, has operated in an independent manner?

Mr. O'Rielly. And, again, I don't know as much about that one, the downloadable security one. That is in the statute and that is the Chairman's prerogative.

On the other advisory committees, I would say that I do believe they are being led a direction by the staff that is not independent, and we need to improve the independence of the advisory committees.

Mr. Latta. Thank you. My time has expired. And moving on, the chair recognizes the gentleman from Texas, Mr. Olson, for 5 minutes.

Mr. Olson. I thank the chair.

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And welcome to Chairman Wheeler and Commissioner O'Rielly.

When Chairman Wheeler became the Chairman in November 2013, he ordered what is called an all-agency task force review. It was completed in February of 2014.

My first question is to you, Commissioner Riley. How much of that report has been acted on, percentage? What is outstanding, in your opinion?

Mr. O'Rielly. So I don't have a good number. We have been getting a number of updates. But I think a fair amount has been adopted. There are some, definitely, points that are still in the works and some that probably won't make it to see the light of day. Is that fair?

Mr. Wheeler. I think that is a fair analysis.

Mr. Olson. Chairman, do you have any idea, I mean, how much has been completed?

Mr. Wheeler. We wiped out 1,500 backlogs, 8,000 Enforcement Bureaus, 57 percent of the backlog in the Media Bureau, 2,500 that were longer than 6 months in the Wireless Bureau. I am trying to pull some others out. There has never been so much done in such a short period of time on literally thousands and thousands of items.

Mr. Olson. Good to hear.

Again, Commissioner O'Rielly, I want to talk about the Paper Reduction Act and the Regulatory Flexibility Act, the PRA and the RFA. Do you think the FCC takes their responsibility seriously with these

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two initiatives?

Mr. O'Rielly. So I think the agency takes its responsibility seriously. I think the work that is done is insufficient to meet the statutory obligations. I think the work is pretty short. In some instances, I have had to go back to staff and be like: This doesn't actually match up exactly with the subject matter that we are talking about.

I think it is really disappointing, and I have tried to go at that and get that improved, I am actually working on something on it, because I think it is really problematic on what we do to the statute enacted by Congress.

In some instances, in Regulatory Flex, it deals with small businesses and we cursorily pass over that issue. On paperwork reduction, we actually put a significant number of burdens on reporting, and that especially applies to small providers. I mean, dealing with rate of return carriers recently and talking to them and the burdens that they have to report and how much the cost it is for them, it is pretty significant. And I think we have to go back and consider that, fix our reforms on both PRA and Regulatory Flexibility.

Mr. Olson. Thank you.

How about the biennial review of regulations, has that been taken seriously as well, the obligation of that review, in your humble opinion?

Mr. O'Rielly. So I have seen it in my past employment, not in

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this current role. I think in my past experience I would suggest that there probably could be improvements. It hasn't been operated under the current Chairman, so I am looking forward to a very aggressive opportunity to use that section.

Mr. Olson. What can the Commission do to get rid of the fat and clear it up?

Mr. O'Rielly. So the Chairman has outlined a number of things that we have already done. I am outlining a number of things that would improve the process. I think that in some regards it is maintaining aggressive attitude, I think, the Chairman and I both share. And I try to congratulate him when I can, and we have reduced the backlogs in many different areas.

So I think he is committed to that. I am too. But we have a lot of work to go. There are a lot of things. And I have been talking to a number of staff internally, and they will suggest: Gee, have you thought about this? This would make a good blog too.

There are just really good ideas that are coming forward on things that they would be happy to scrap in the rules themselves. So things like that we really have to move forward on.

Mr. Olson. What can we do in Congress to help you with your mission? Get out of the way?

Mr. O'Rielly. Well, no. I think it is being very aggressive in oversight and making sure that when we do biennial review, that you have a very fulsome look at what we are doing and making sure that we



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are looking at every corner and nook and cranny of the Commission's authority.

Mr. Olson. And that is our job per this document, the Constitution of the United States.

Mr. Wheeler. Can I follow up on that?

Mr. Olson. Yes, sir. You are up.

Mr. Wheeler. I wildly agree with what Commissioner O'Rielly has just said insofar as the oversight role. And I also agree with what he said about he and I have been working together. We don't always agree on things, but we have been making some serious progress. And this new task force that I have formed, you get to be the judge as to whether it is meaningful or not.

I also think that the oversight role actually has more flexibility than the legislative role because the difficulty with legislation is it tends to be pretty black and white and the way things seem at that moment rather than have things evolve. And I think you ought to hold our feet to the fire.

Mr. Olson. And that is our job.

So one final question about the regulation that all decisions should be made within 30 days of the adoption, at the latest, of some new rule. Has that been complied with, yes or no, Commissioner O'Rielly, as a general rule?

Mr. O'Rielly. So there have been some items during my time that have not met that. They have not been met on the day that we voted

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on them. Whether it has gone 30 days, I actually haven't matched up the timeframe.

Mr. Wheeler. I don't think there have been any 30-day.

Mr. O'Rielly. I don't know how long after we have missed some, but there have been a number of them that have not been done on the day that we --

Mr. Olson. Missed it more or missed it less? I mean, Chairman Wheeler, do you think you have hit the target more often than you have missed it?

Mr. Wheeler. Well, 86 percent of all our decisions are done and published within 2 business days.

Mr. Olson. Okay. I am out of time. I yield back the balance of my time. Thank you.

Mr. Latta. The gentleman's time has expired.

The chair recognizes the gentleman from New Jersey, Mr. Lance, for 5 minutes.

Mr. Lance. Thank you, Mr. Chairman.

First to Commissioner O'Rielly. As you mentioned in your testimony, the chief argument against publishing items in advance is that it would be harder to comply with the Administrative Procedure Act's provision that requires the Commission to respond to every comment submitted. Can you recommend changes that would offset this issue?

Mr. O'Rielly. So what I have suggested, and I think it is

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contained in Congressman Kinzinger's bill, is that there be one document that is actually published, in addition to what we already make available, and in that document we would still be able to respond during that 3-week period to any new arguments that are raised. Most of the arguments are going to be old and already worked on and already addressed. So it is really only new arguments.

So 2 weeks we have that process, and then we have a week of sunshine of the 3 where we just kind of talk amongst ourselves. No one is allowed to lobby us or to talk with us. That is plenty of time to deal with any issue.

What I have said, in rare instances, very rare instances, it may take a little bit more time in the most complicated situations where we may need to address those issues, and that means that the item may be bumped by a week or maybe a full month at most. But during that entire time, we are still under sunshine and no one can lobby us.

So the staff has 4 weeks to address any new arguments that came forth. That should be plenty. I have worked with these staff members. They are capable of addressing any new arguments that come in and that shouldn't be problematic.

Mr. Lance. Thank you very much.

And to you, Mr. Chairman, you have indicated in your testimony that there have been over 950,000 delegated items issued by the Commission. And I believe, to quote you, the vast majority included routine wireless, radio, and broadcasting licensing and transfers.

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And I certainly agree that you couldn't possibly review all of those matters.

As I understand the purpose of delegation, it is to allow the FCC to act on routine matters for the sake of expediency, and I agree with that. But I am concerned about the fact that, as I understand it, the AWS-3 geographic coordination zones adopted by the FCC back in March was done in this manner. And I would like your comments on that, if possible, Mr. Chairman.

Mr. Wheeler. Thank you, Congressman. I am glad you asked.

The reality in the issuance of the public notice on AWS-3 was we were actually in a race to meet the auction deadline, because you all told us we have to have an auction done by this point in time.

The topic was how the coordination zones work. We are sharing spectrum with the Department of Defense. How those zones work was essential to the bidders for them to know enough in advance so that they could bid.

The Republicans on the Commission wanted to see the maps. The maps were actually still being worked on by the Defense Department. But the maps were irrelevant because the issue in the PN was the coordination inside whatever those maps may be, and the geography involved was irrelevant.

We put this on circulation. And after 2 weeks of there being a majority of the Commission that had voted in favor of it and the Republicans saying that they were not going to vote, while everything

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was tick, tick, tick, ticking up in and the bidders needed to have this information, I said: Hey, look, guys, if you can vote it quickly, let's do it. If not, I am going to pull it off and put it on delegated authority, because there is delegated authority, because this is information, not policy. And that was what ended up happening.

Mr. Lance. Thank you.

Mr. O'Rielly, would you like to comment on that?

Mr. O'Rielly. I feel a need to respond only in the sense that I am defending my colleague who is not here. Commissioner Pai actually had the bigger concerns on this issue.

Mr. Lance. As I understand, yes.

Mr. O'Rielly. I think he has the right to define what is sufficient for him to make a decision. So when the Chairman says the maps are irrelevant, I think he is the one who gets to pick on what he thinks the information necessary for him to make a decision. I don't think it is appropriate for us to say: No, you don't get to look at that, you don't need to see that for purposes of making a decision, and, by the way, we want your vote at X time.

Mr. Wheeler. But the important thing is, the important thing, Mike, is that because it is on circulation it just sits there and nothing happens. If you don't like it, if there is not enough information to vote, vote no.

But the fact of the matter is that a majority of the Commission had voted. And what we could not move, the will of the majority was

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being thwarted by exploiting the procedural rules of the Commission by not voting. And that is the kind of thing that would be harmful to the auction, was harmful to those who would be bidding in the auction. And since this was information, not policy, I said: Okay, if you are not going to vote, then we will put it on delegated authority.

Mr. O'Rielly. I would only respond. Again, Commissioner Pai had stronger views on this. And I would be happy to vote no if that is the case.

But I would say the Chairman leaves out one detail only: That in that circumstance where the majority, three votes have actually been cast, it does trigger must vote. And therefore we have a time period under our rules to actually vote or it goes forward.

So if the three majority have already voted, it has already been triggered and therefore there was an end date.

Mr. Lance. Thank you. My time has expired.

Mr. Latta. The gentleman's time has expired.

The chair now recognizes for 5 minutes the gentleman from Kansas, Mr. Pompeo.

Mr. Pompeo. Thank you, Mr. Chairman.

I have a series of yes-or-no questions. But before I do, when we started this hearing today Chairman Walden made some comments that some folks on the minority side said they were concerned that they were attacking the Chairman, who is a public servant. I agree with that. They then proceeded to talk about a bill that attacks a private citizen.

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They introduced a bill called the Keeping Our Elections Clean Act, the acronym for Koch Industries. So I guess it is better to attack a private citizen who is going about his business trying to make money than to attack someone who has entered public life. I just find the hypocrisy quite remarkable.

Ms. Eshoo. If the gentleman yields?

Mr. Pompeo. No.

Ms. Eshoo. No?

Mr. Pompeo. Not now. You have had ample time.

Mr. Chairman, I have a series of questions. I would hope that you could answer each of them yes or no.

Back on March 4, I asked your managing director for a series of interim reports produced by the consultant you hired with regard to your proposal to close offices. A few days later, my staff was told by FCC personnel that they could not provide us with the final report.

Last week, on the 23rd of April, I, along with Chairman Upton, subcommittee Chairman Walden and Murphy, requested all internal and external FCC documents be provided about that decision to shutter 16 of the Commission's 24 field offices. We are now a couple of months after our initial requests. All we have received is a 2-page memo and 35 slides. Will you provide the committee those documents.

Mr. Wheeler. What we are in the process of doing right now, sir, is making sure that personally identifiable information is removed so that they will be available to the committee.

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Mr. Pompeo. Great. So once you get the PI gone, we will receive those documents? Is that a yes?

Mr. Wheeler. Yes.

Mr. Pompeo. Thank you.

Did you hold a competitive bidding process to select the consultants who analyzed the Enforcement Bureau's field offices and produced the report that recommended closing most of those offices?

Mr. Wheeler. We did it through establish procurement procedures, which include competitive bidding.

Mr. Pompeo. That would be no? My question was, yes or no, did you have a competitive bidding process?

Mr. Wheeler. I don't know whether there were competitive bids for this. I can find that answer and get it for you.

[The information follows:]

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Mr. Pompeo. So I am 0 for 2 in getting yes-or-no answers. I am going to keep plugging away.

Will the closure of 16 of 24 field offices negatively affect your commitment that a 99 percent response rate can be preserved on complaints for interference of public safety?

Mr. Wheeler. No.

Mr. Pompeo. There we go, one for three.

Mr. Wheeler. Thank you.

Mr. Pompeo. Do you believe that there are any circumstances under which a designated entity should be able to use bidding credits to win spectrum at an auction and then lease 100 percent of that spectrum to a nationwide wireless carrier?

Mr. Wheeler. It depends on what the designated entity rules are, and today they permit that.

Mr. Pompeo. So you think the answer to that question is yes?

Mr. Wheeler. What I am saying is the rules, as they exist today, that the answer is yes on the rules today. As you know, we are going through the process of reviewing those rules.

Mr. Pompeo. Have there been any instances during your chairmanship when two or more commissioners have asked that you all commissioners an opportunity to cast an up-or-down vote on an item but you chose instead to direct a bureau to release the item?

Mr. Wheeler. There is probably something that you have in your notes there that I can't recall off the top of my head. I don't know

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the answer to that, sir.

Mr. Pompeo. On March 11, 2014, there was a Public Safety and Homeland Security Bureau release. A public notice to commissioners requested a Commission-level vote on the item and you instead directed the bureau to release that. Does that ring a bell?

Mr. Wheeler. It doesn't ring a bell, but I will be happy to look into that.

[The information follows:]

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Mr. Pompeo. I would appreciate that.

It is my understanding that that is unprecedented, that that had not happened before, when one or more commissioners had asked for a Commission-level vote and yet hadn't received one.

Mr. Wheeler. Well, that I can answer no to.

Mr. Pompeo. So that has happened before?

Mr. Wheeler. But it is precedent.

Mr. Pompeo. I would appreciate you providing the examples when that has happened previously because we were unable to find them.

Mr. Wheeler. Sure. Happy to.

[The information follows:]

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Mr. Pompeo. On November 10 in 2014 did you circulate an order to your fellow commissioners regarding the Comcast-Time Warner Cable and AT&T-DirectTV merger proceedings and tell your fellow commissioners that if they did not cast their votes by the end of that day, that third parties would be provided with access to those contracts?

Mr. Wheeler. I am not sure I understand your --

Mr. Pompeo. So the question is, there were a series of contracts, it is my understanding that you told your fellow commissioners that if they did not cast their votes by the end of the day on an issue, that you would release these contracts --

Mr. Wheeler. On what issue? I am not sure --

Mr. Pompeo. I don't know the issue. I will submit it for the record.

[The information follows:]

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Mr. Wheeler. If you can get me, I will be happy to give you a yes or no --

Mr. Pompeo. I would be happy to. I don't know the substance of that issue.

Mr. Chairman, I yield back the remaining 2 seconds.

Mr. Latta. The gentleman yields back his last 2 seconds.

The Chair now recognizes and apologizes to the gentleman from Kentucky, recognized for 5 minutes.

Mr. Guthrie. No problem at all, Mr. Chairman. Thank you for the time.

Chairman Wheeler, I will ask you this question first. In your explanation of the workings of delegated authority you state that, quote: "Either the Commission has specifically delegated authority to each of the relevant bureaus and offices to decide matters that do not raise new or novel issues or the Commission in its orders has made specific delegations to the bureaus to decide certain substantive issues." That is unquote.

So it seems to me that if a matter raises issues that are new or novel, they need to be deliberated among the full Commission. Correct?

Mr. Wheeler. The answer is the Commission votes on an issue and directs the bureaus to implement that issue, not to go make policy themselves.

Mr. Guthrie. So anything that is new or novel has to be the full Commission?

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So my next question for Commissioner O'Rielly. Last year, you and Commissioner Pai criticized the Chairman's decision to direct the Wireless Telecommunications Bureau to adopt the Commission's annual wireless competition report on delegated authority. Can you elaborate on why you disagreed with that decision?

Mr. O'Rielly. So it is my understanding that this is a report required by Congress that has been typically, in most instances, voted on by the full Commission. Here we were delegating it to the staff, which made no sense to me. And I thought I am comfortable voting on it, what is the problem with that? And it was removed from my ability to vote. So I think that is problematic.

We look at other reports that we have, and the Congress has a requirement on video competition. In there it says the Commission shall report. And there we have actually had the Commission all vote on those issues. So, to me, it seemed like it was a direction we were going on this report that I thought was problematic, and I think that we should have had the opportunity to vote on that report.

Mr. Guthrie. Do you care to comment?

Mr. Wheeler. Yes, sir.

Mr. Guthrie. Okay.

Mr. Wheeler. Thank you, Congressman.

The reality was that it was on circulation. There were three votes that had voted for it on circulation. And one commissioner demanded that we include a data roaming decision in this vote. And

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I said: Okay, we will include data roaming if you will promise not to delay the circulation. Because remember the discussion we had, you may not have been here, a minute ago.

Mr. Guthrie. Yeah. I saw it.

Mr. Wheeler. The problem is that it could just lie there. And, yes, Commissioner O'Rielly is correct that there comes a must-vote situation, but must-vote is kind of a laugh because it just triggers something that is weeks away.

And there was no assurance. I said: Look, let's vote. There is a majority that has decided. You can't just sit on this. If you will give me the assurance you will vote, I will put the other item in there as well and we will vote on everything. And he would not give me that assurance. I said: Okay, I will move it on delegated authority.

Now, the interesting thing is that this is the same thing that Chairman Martin did throughout his tenure during the Bush years.

Mr. Guthrie. I want to ask you one more question.

Mr. Wheeler. He moved it on delegated authority.

Mr. Guthrie. Okay. So I have another question I want to ask you. I understand in the open Internet proceeding the Commission granted temporary small business exemption from the order's transparency obligations. The order says that the Consumer and Governmental Affairs Bureau, the CGB, will issue an order regarding whether the exemption will be permanent by December 15.

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So my questions are: When should small providers expect to see a notice issue that will give them opportunity to comment on the need for the exemption to be made permanent?

Mr. Wheeler. Thank you, Congressman.

I can't give you an exact date. The order hasn't even gone into effect now. But clearly we have to have a notice on that that will fire people up to say: Hey, this is what is going on. And we fully intend to do that.

Mr. Guthrie. Okay. And do you intend to do this on delegated authority? Do you think it will be a Commission vote?

Mr. Wheeler. Well, the Commission delegated the authority to the CGB to do that.

Mr. Guthrie. Would you care to comment, Mr. O'Rielly?

Mr. O'Rielly. Well, I would only comment, and as everyone knows, I didn't vote for the item, but that gets to the point earlier that I now have no longer any involvement in that delegation. That issue is gone. And so my ability to weigh in on that item, whether it should be extended for small business, I don't have any say. It is problematic.

That is what we are trying to get at in terms of delegation, both the reforms in terms of the timing of what is happening, but also the ability to pull something back up so I have a chance to actually help out small business. In the current structure, that will be decided by the Consumer and Governmental Affairs Bureau.



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Mr. Wheeler. And for the purpose of something that the Commission has already voted on to say we should do it. And I think that this is just a question then how do you go forward with that, Mike.

Mr. O'Rielly. No, no, I understand how it has worked out. I just say I no longer have any say in the matter.

Mr. Guthrie. Thank you.

And I only have a few seconds. I have one more question, but I will submit it for the record.

[The information follows:]

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Mr. Guthrie. Thank you, Mr. Chairman. I yield back.

Mr. Latta. Thank you very much. The gentlemen yields back.

The chair now recognizes the gentleman from Florida,  
Mr. Bilirakis, for 5 minutes.

Mr. Bilirakis. Thank you.

I was troubled to learn about the extent to which FCC staff has editorial privilege to substantially change and modify items after they are adopted. This strikes me as fundamentally flawed and opens the door for unaccountable changes. Representative Ellmers' proposal attempts to hold this practice accountable.

Commissioner O'Rielly, can you elaborate a bit more on this practice and how the draft legislation could add more certainty and accountability to the process?

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RPTR BAKER

EDTR HUMKE

[4:31 p.m.]

Mr. O'Rielly. So sir, absolutely. In the items that are done at our open meetings there is a number of instances where staff has made changes after we voted, so we have decided some matter one way or the other; and then staff has gone forward and made substantial changes to the substance of the document, sometimes into the rules themselves, sometimes to the justification part of the equation.

And I have had a problems with that for a couple fold because they are sometimes addressing ex partes; they are addressing other issues. And even in some instances they are addressing dissents that have been filed. In a couple items that I have dealt with them on the Connect America Fund they were addressing in a pretty disparaging way critiques done by my colleagues on an issue. So they voted; they dissented. They said, I don't like this item. I don't like part of this item. And the committee -- the staff was writing out, you know, why they were wrong and actually doing it in a very negative way, and I had to pull them back and be like, wait a second here. This is not working very well where the changes are happening after we have all voted. We are making changes to the substance, and you are making disparaging comments to and about my colleagues. I just can't --

And those are instances where I have actually voted in favor of

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the item. So I have tried to pull back on some of that. And so I think that the editorial privileges process, and I have written about this, is pretty problematic. The editorial privileges itself does not exist in our rules, and that is why I now vote against it every time that we come to an open meeting because it is granting authority that doesn't exist in any of our rules; and, you know, in fairness to the Congressman's question earlier, or to her statement, most of our rules are not actually codified. We don't actually have -- you know, most of them just exist in the ether.

When I walked in the door my first day, they gave me a pamphlet on, you know, a small binder on exactly what the rules are, subject to change at any given moment. So that is extremely problematic. Editorial privilege does not exist today, and I think that what is being done in that time period by staff is just inappropriate.

Mr. Wheeler. So Congressman, can I try that because there is an important point. I mean, I think, first of all, if there were disparaging comments, Mike, I am stunned. I am shocked, and nobody should tolerate it.

Mr. Bilirakis. Okay, now let me -- I have got another question here --

Mr. Wheeler. There is an issue here --

Mr. Bilirakis. Briefly. Briefly.

Mr. Wheeler. What he was talking about was he was responding to a dissent. We are required by the D.C. Circuit to respond specifically

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to dissents that are filed. So we can't just, the Court will not allow us to say, here is a decision; here is Mike O'Rielly's dissent. We then have to incorporate what he said in his dissent into our order --

Mr. Bilirakis. Okay, thank you, Commissioner --

Mr. Wheeler. By order of the court and that is where this editorial --

Mr. Bilirakis. I appreciate that. Thank you very much. I want to move on. Commissioner O'Rielly, could you please elaborate on the flaws in the current advisory commission. I know you touched on this, on the structure of the advisory committee, but if you could elaborate a little bit. How do you believe these important opportunities for ideas and evaluation can be improved? And you mentioned a hearing-like meeting proposal to gather independent testimony. Is that the best option for improvement in your opinion?

Mr. O'Rielly. So our open meeting process, it allows -- it is not structured and it is flexible, so we are now inviting witnesses depending on the chairman's desire. So we will have witnesses come and provide testimony in favor of an item. They just basically sit there. They give their testimony, and that is the end of the discussion, but during that process I didn't know they were coming in most instances. I might get notice the night before. I don't get any testimony of what they are actually going to say, and I don't have the opportunity to question them. So I have problems with having witnesses who are going to affirm the majority's decisions; sometimes in the

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majority, sometimes in the minority, depends on the item.

But we are diluting the minority's view by letting them invite witnesses, and the minority in most instances, we are not allowed to invite any witnesses. So I think that our open meeting process needs to be fixed. If we are going to have a transparent structure at open meetings and we are going to, you know, have it as it operates today, I think that we need to seriously reconsider having any testimony from expert witnesses, or at least balance the conversation. I think it doesn't work very well today.

Mr. Bilirakis. All right, very good. Thank you very much. I yield back, Mr. Chairman. Thank you.

Mr. Latta. [Presiding.] The gentleman yields back the balance of his time. The gentleman from Illinois is recognized for 5 minutes.

Mr. Pompeo. Thank you, Mr. Chairman. And thank you all for being here and spending your afternoon with us. I know that is what you look forward to; but it is very helpful for us. And again, I appreciate your service to your country and being willing to do what you do. Even if we don't always agree on every issue, I respect you willing to step forward.

You know, we talked about reforming certain processes at the FCC, and I often hear from those opposed that we shouldn't be changing the procedures of just one agency while not looking at all the agencies. Commissioner O'Rielly, do all the agencies follow the exact same procedure in regards to issuing, circulating, and publishing the text

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of proposed orders or rules?

Mr. O'Rielly. Absolutely not. Most agencies, and I have had a great deal of experience with not only agencies that you oversee, but also in other committees in the Senate. There are vast differences in how they operate in terms of -- and I'll give you an example --

Mr. Pompeo. Yeah, give us some examples.

Mr. O'Rielly. Examples that are different not just in terms of how they dispose of items, but I will give you an example of the FTC, something this committee knows very well about. There are two procedures, very interesting. One, the Commissioners of the FTC are actually, when the item comes in they are actually assigned, including minority members. So here is the biggest issue. You are an expert in this space. Now you get this issue. That doesn't happen. All the power now goes -- everything is decided through the chairman.

Two, they have the authority, and I have talked to FTC commissioner on this -- they have the authority that if three Commissioners vote together, they can ban the staff from working on an issue. So they decide, gee, you know what? We think you are working on this, and that is completely wrong, and we don't want you working on it any more. We don't have the same kind of thing. So that just gives you two flavors of how our agencies are totally different. And so the idea that we can't change anything within our agency; we have to do it uniformly across the board, they do not operate uniform today. There is so much difference in how they operate and how their structures

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are done; and lot of it is because of their operating statutes.

Mr. Pompeo. Yeah, that has got to be frustrating and, I mean, especially, you know, with all the jurisdiction you have and everything. And, you know, again, And I like to remind people that, you know, I mean, it is definitely not going to be President Obama in a year and a half. It may be Republicans in charge in a year and a half, and I hope that we, you know, can press forward with opening up the agency as we are talking about here too.

You talked about FTC. What is a good kind of model that you would point us to when it comes to other agencies that you have seen? If you don't have a great example, that is fine.

Mr. O'Rielly. I don't know that I have a favorite. I spent a great deal of time examining, you know, problems that they have had in my past life. So I don't know that I have --

Mr. Pompeo. You have favorite practices.

Mr. O'Rielly. Yeah, there are some definitely practices that I thought, and I have highlighted two that I think would be interesting if we were to adopt at our agency. But separate from that, they are definitely, you know, as they have gone along, there are definitely some very expansive authority that I probably would disagree with.

Mr. Pompeo. Let me ask you, too, do you believe that the publication of a white copied order would prevent private deliberation and exchange of ideas among the Commission offices?

Mr. O'Rielly. No, I do not. And I appreciate your legislation,



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or draft legislation, on this issue. The question that some people have said, there is two issues that people generally raise with an idea that I originated and you also have talked about, and that is, you know, they raise the APA, which we have talked about a little bit here today, and then they raise the question of FOIA. And would FOIA be triggered and would we be releasing our internal deliberations? And the answer is no. All of that is still protected under the exemption under FOIA. None of that would change. Our deliberations between offices would still continue the same way they operate today. We would have no change to that. There would be no information that is FOIA-able, that would be more available, excuse me, for that circumstance. The only thing I am asking, and I think you said in your legislation is that one document be available, the white copy document be available --

Mr. Pompeo. Do you think that would harmfully impact the way stakeholders exchange information with the Commission?

Mr. O'Rielly. I think it would actually really improve the process. I think the stakeholders would be able to hone in on exactly what might be an issue, what may be a problem with the document itself. We had an issue in our 3.5 item just adopted recently. And in there I was trying to get more information on what is called CAF, or Contained Access Facility, I believe it was called. And I couldn't get anyone to explain to me what exactly it meant. Finally somebody came in and they could talk to me a little bit, but I couldn't tell them what was actually in play. At the end of the day I was like we need to get rid

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of this because we have no idea whether it is actually functional, whether it is violating, whether it is actually favorable to landowners or to building owners. I just didn't know what it was. I couldn't ask them questions about what I already knew. It was very problematic.

Mr. Wheeler. And did we?

Mr. O'Rielly. We did get rid of it.

Mr. Wheeler. At your request?

Mr. O'Rielly. Yeah, yeah, yeah. I am --

Mr. Pompeo. I don't want this to be a debate between you two. I haven't yielded time. I have 30 seconds left is all.

Mr. O'Rielly. I think it might be a good idea, and I just don't know, because I can't feel comfortable voting for something that I don't what it is and there is only one advocate for it, and you can't really explain exactly.

Mr. Pompeo. I only have 15 seconds left, and unfortunately I want to say this. So it is sad when members of a commission feel completely disfranchised and feel like they don't have the tools to do their job. And I think, you know, we are not here, you know, putting you, sir, on the hot seat. And I am sure you are on the hot seat. But we are not trying to be, you know, attack, attack. But it is just there is concerns we have which is, look, we are all about transparency. And when we here members of the Commission saying, you know, look, sometimes I don't feel like I have the tools to do my job, that is a concern. With that I am going to yield back, and I appreciate again you guys

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both being here. Thank you.

Mr. Latta. The gentleman's time has expired. And the chair now recognizes the gentleman from Ohio, Mr. Johnson, for 5 minutes.

Mr. Johnson. Thank you, Mr. Chairman. And, gentlemen, thank you both for being here today as well. Chairman Wheeler, in a response to one of our inquiries regarding process and delegated authority, you told us that a bureau or office may seek guidance from your office on whether an item should be voted on by the full commission even when it was within the scope of the bureau or office's delegated authority. So does the reserves ring true? When a bureau or office opines that an action should be done at a commission level, can the chairman's office direct that it be done at the bureau level anyway?

Mr. Wheeler. No. What we try to do is make sure that we are following the instructions of the Commission vote, and I think the record speaks for itself since we --

Mr. Johnson. But we are not talking about a commission vote. We are talking about when a decision is to be made and the bureau or the office says that the action should be taken at the commission level, you have delegated authority, and the bureau or the office opines that it should be taken at the commission level, can you direct as the chairman that it be done at the bureau level anyway; yes or no? Do you have that authority to do that?

Mr. Wheeler. I presume, you know, under section 5 that I could, but the record is clear that we have the lowest number of delegated

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authority decisions in my tenure.

Mr. Johnson. Mr. O'Rielly, since the decision to use delegated authority is a legal one, do you have an opinion; shouldn't the bureaus and offices go directly to the general counsel's office rather than to the commissioners office for guidance on whether delegated authority should be used or not?

Mr. O'Rielly. I would think that is the most appropriate place, yes.

Mr. Wheeler. And I would assure you, sir --

Mr. Johnson. I am talking to O'Rielly right now.

Mr. Wheeler. I don't want to have --

Mr. Johnson. Mr. Chairman, this is not your opportunity to pontificate.

Mr. Wheeler. I would not do something --

Mr. Johnson. The American people have asked us to ask you the questions. I am asking Mr. O'Rielly a question right now. So, Mr. O'Rielly, you think that that would be the appropriate place to do that.

Mr. O'Rielly. Yes.

Mr. Johnson. Mr. Wheeler, in response to one of our committee's inquiries, you provided us with the information regarding the number of enforcement actions taken by the field and the number of enforcement actions overall. For example, in 2011, 88 percent of the actions were taken by the field. In 2012, 76 percent of the enforcement actions were taken by the field. In 2013, 89 percent of the actions were taken

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by the field.

So let me get this right. You want to close more than half of the field offices. Just looking at the impact in terms of bureau productivity, how do you intend to continue that level of enforcement activity from the few remaining offices? If I were to read between the lines, aren't you really talking about a wholesale retreat from the type of enforcement actions undertaken by the field like interference resolution and abandonment of the proactive enforcement work the field performs like tower inspections? And are the staff slots that are being opened by releasing the field staff from Federal service being moved to FCC headquarters? And I know you probably don't have off the top of your head the answer to all those questions, but could you update the committee and provide this type of data for fiscal year 2014 as well?

Mr. Wheeler. Thank you, Congressman, and the answer is yes and we are doing this to get --

Mr. Johnson. Yes, you will provide the data for 2014?

Mr. Wheeler. I am going to give you some data right now. And we are doing it to get better efficiency. You know, we have too many field offices where we have good people, but they are not effectively applied.

Mr. Johnson. I am just asking you if you are going to provide the data. That is all.

Mr. Wheeler. I am giving you some data. When we look at a --

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Mr. Johnson. Let me ask you another question because I have only got a minute left. You have testified as part of your claim that things are improving at the FCC, that the enforcement bureau closed nearly 8,000 cases. Now, that gives me some pause because that seems like a big number. Were they closed because the FCC took enforcement action? Were they closed because the Statute of Limitations ran out and you couldn't take action? What are the numbers for those actions closed by positive FCC actions versus the ones closed by the statute of limitations running out? Were any of them closed because the enforcement bureau just said never mind?

So can you provide us with a detailed analysis of the nearly 8,000 cases, identifying the type of alleged violation, the type of action taken, if any, and the reason that you closed the case?

Mr. Wheeler. I can tell you about them right now.

Mr. Johnson. Can you take that for the record? Can you provide us in written --

Mr. Wheeler. I can tell you, the vast majority of those 8,000 were indecency cases that Commissioner O'Rielly and I worked together to solve and worked with the various parent groups and others.

Mr. Johnson. We would like a written response for the committee.

Mr. Wheeler. I would be happy to give you, but it was thousands and thousands and thousands of cases we are holding up broadcast licenses.

Mr. Johnson. My time has expired. We would like to see that if

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you would provide it to the committee.

[The information follows:]

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Mr. Latta. The gentleman's time is expired, and the chair now recognizes the chairman emeritus of the committee, Mr. Barton from Texas.

Mr. Barton. I thank the chairman, and I apologize to Mr. Cramer and Ms. Ellmers for going ahead of them since I haven't been here all afternoon, but I think I have a pretty good feel for what we are a trying to do here. And I want to say on the record, Mr. Chairman, I support the three bills that we are having the hearing on. I think they are all reformative, and I think they are positive, and they are transparent; and I think the more of that the better.

I want to ask the chairman of the FCC what you would think if we operated the Congress like the FCC is operating. In other words, we are about to have a vote on the budget agreement with the Senate sometime this evening. That budget is on the Internet. Every Member of Congress will show up, and I am assuming there is going to be a roll call vote where we vote yes or no. We don't delegate it to staff. We don't delegate it to anybody. It is open; it is transparent, and it is immediate. How would you feel as a citizen if we didn't do that?

Mr. Wheeler. I think it is a really good point, Mr. Barton, and I recognize that you then turn around and delegate things to us, and we are talking about how do we deal with that delegation from the Congress. And I believe that we work fulsomely to try and adhere to what the statute tells us that we ought to be doing as you make your delegation, and that also includes how we make our delegation.



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Mr. Barton. Well, you are in the executive branch. You are supposed to implement the laws.

Mr. Wheeler. We are independent. Please, don't throw me in the executive branch.

Mr. Barton. Well, you are appointed by the President of the United States. You are confirmed by the Senate.

Mr. Wheeler. Confirmed by the Senate.

Mr. Barton. You are not a part of another agency, but you are an executive Federal agency. You implement the communication laws of the United States, not you personally, but the Commission that you are the chairman of. There is nothing in statute that says the FCC should operate, to put it as positively as possible, semi secretly.

Now, I have been in the offices of the chairman of the FCC under a different administration and watched that particular chairman have a discussion and then push a button voting on an order. And I was told at the time as soon as a majority of the Commission pushed the same button, it was passed. Do you still do that? I don't even know what that is called.

Mr. Wheeler. No, it doesn't. That is called voting on circulation. And there is an electronic system. You are absolutely right, and you are welcome to come visit any day, sir, and I hope you would. The difficulty with that is that when you get to three, majority does not rule, and one of the discussions we were having here previously is how the other two can sit on an item and keep the decision from being

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made and that that can extend for weeks and weeks and weeks under our processes. So but you are absolutely right as to the process, and everybody pushes a button.

Mr. Barton. My point is, and I am not as technically up to speed on the reform bill as the full committee, subcommittee chairman and some of the Members that have spoken and have these bills before us; but it would seem to me that we should operate our executive branch agencies as closely as possible to the way we operate the House and the Senate, especially the House, which is the people's body. We are instantaneously transparent on every vote in the committee if it is a roll call vote. Now, not all are roll call. Some of them are voice votes, but if it is a roll call vote, it is live over the Internet. Not everybody watches it, but we know what we are voting on. The public knows what we are voting on. The public knows how we vote as soon as we vote. And in many cases they have access to the material we are voting on almost the same time that we do.

I support these three bills. I would hope, Mr. Chairman, that you would change your mind. Transparency is a good thing. There is no harm that is going to be done by letting the public know and the stakeholders know what you guys and you men and women are thinking about and what you are going to vote on and how you vote when you vote. And with that, Mr. Chairman, I support the bills, and I yield back.

Mr. Latta. The gentleman yields back the balance of his time. The chair now recognizes the gentleman from Missouri, Mr. Long, for

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5 minutes.

Mr. Long. Thank you, Mr. Chairman. And Chairman Wheeler, do you think that your management is kind of top heavy, or do you think that you have streamlined it as far as management of the agency?

Mr. Wheeler. I am not sure what you mean by top heavy, sir.

Mr. Long. Well, back last time, I think it was the last time you were here, you said that it appeared that staff slots, if they left from the field office closings, they are not being moved to the headquarters; and now according to the Web site back in 2009, there were 8 people in the front office of the enforcement bureau, and now there is 16. And that is the type of thing that I am asking about, if there is not being people moved to the office, why do you need to double the --

Mr. Wheeler. I am not trying to double it. There is nothing in the field office that is involved in increasing the headquarters office, with the exception of we would move one field manager there, so you have overall control. The goal of --

Mr. Long. I am talking about the people assigned to the front office of the enforcement bureau.

Mr. Wheeler. Pardon me?

Mr. Long. The people that are assigned to the front office of the enforcement bureau.

Mr. Wheeler. Yes, sir.

Mr. Long. That is what I am referring to.

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Mr. Wheeler. I don't know how many there are. I can get you the answer. But the goal, what we are trying to do in the field office reorganization is to put together a structure that is much more efficient in the way in which we do our job. I mean, the difficulty is that, yes, you have got a Denver office, but the problem is in Tulsa, and, or it is in some small town, and you have to go to that.

Mr. Long. Well if you close an office in Kansas City, and the broadcasters and people now have to go to either Chicago or Dallas to have frequency questions answered or things, that doesn't seem efficient to me. I know that you haven't -- you know, you have had a lot of things going on today and a lot of things the last few times you have been here, so I wouldn't expect you to know definitely. But again, according to the Web site, the FCC Web site, in 2009 there were 8, and now there is 16 people in the front office.

Mr. Wheeler. But that is unrelated to this. Let me talk about the Kansas City office because you deserve to know.

Mr. Long. Okay. I am from Missouri. You got to show me.

Mr. Wheeler. We have four full-time execs, four FTEs, two of whom are EEs, electrical engineers. We are spending \$1,000 per person per square foot, per person, for rent on that. The average that we spend in Washington is \$272. So we have space in all of these offices that is off the chart in terms of what we are having to pay for operating expenses. And in Kansas City, we have the second least number of radio frequencies of the entire country.

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Mr. Long. How does that -- on the thousand dollar per square foot or whatever, how does that correlate to your total office expense for Kansas City compared to Washington?

Mr. Wheeler. You have \$658,000 that we spend on four people in Kansas City, and there is in the Kansas City office 0.15 RF matter handled per week.

Mr. Long. Could you be more specific on that?

Mr. Wheeler. All I am saying is that is the process that we had to go through. This is a question of where do you put your bodies, because the problems are out there, and the problems aren't solved any better because you have 24 offices. How do you reduce the cost so that you can increase and always have double Es who are on the case and restructure the offices so that you are either an hour and a half drive or less than a two hour plane flight to get to cover the United States? Because we want to keep it out there.

Mr. Long. How does the Kansas City office per square foot compare to Chicago or Dallas where people in my neck of the woods will have to go now?

Mr. Wheeler. I can tell you the Houston office is \$620 per square foot per employee. The Portland office is \$2,000 per square foot.

Mr. Long. Chicago, do you have Chicago?

Mr. Wheeler. I don't have Chicago. I can get it for you.

Mr. Long. Okay. If you will, I appreciate it. And.

[The information follows:]

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Mr. Long. Thank you, and with that, Mr. Chairman, I yield back.

Mr. Latta. Thank you very much. The gentlemen yields back, and the chair now recognizes the gentlelady from North Carolina, Ms. Ellmers, for 5 minutes.

Mrs. Ellmers. Thank you, Mr. Chairman. Hi, Mr. O'Rielly, I have a question for you, and I also have a question for Mr. Wheeler.

Commissioner O'Rielly, and I think it has been discussed already. Apparently you kind of stirred things up back in February at a meeting, and so I don't need to go into the details. You were there. You lived it. But I am interested in the claims of deliberative process privilege, and I know that has already been brought up here. Meaning that a document is privileged because it contains advisory opinions, recommendations and deliberations that would be a normal part of the process by which government decisions and policies are formulated.

I understand that the whole point is to allow policymakers to engage in open, frank discussion on policy matters. This is what needs to happen in an open, honest fashion. But isn't the Commission done with substance of policymaking by the time a vote occurs?

Mr. O'Rielly. I believe it should, and that is why I am in favor of the bill that you are contemplating and drafting. I think that it should be done, most of it should be done by the day that we vote. To go after the time period creates a number of problems that I have articulated already, and I just think that that is the way it should be done.

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Mrs. Ellmers. So you, and there again, just to reiterate your comments and your position, you believe that it should be an open process, before, after -- during and after?

Mr. O'Rielly. Yes. There are definitely going to be moments when we talk to internally that are not going to be public, and that is acceptable; but in terms of the document that we vote on, I am very comfortable making that available. I think we should vote on that, and then it should be released. Consistent with -- and your bill gets to the rules themselves, and I think that is a good idea.

Mrs. Ellmers. Because I think transparency is obviously the way to go on any of these issues. So Commissioner Wheeler, with that, I understand that after the documents have been cleaned up for publication, which is, you know, I understand, after editorial privileges have been exercised, the commissioners who voted yes are permitted to review the approved documents, but those who have voted no do not have that privilege. Is that correct?

Mr. Wheeler. That is correct.

Mrs. Ellmers. And why is this? Why do you believe that if someone has voted no, that they no longer have that privilege?

Mr. Wheeler. The majority has made the decision, those who voted no are against the concept; and so as you refine that concept, it is the majority that has ruled.

Mrs. Ellmers. But we are all adults, so if something goes forward, even if you have a no vote -- it is what we do here -- you



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still should have a say so. And I just want to point something out. A couple of times now during the subcommittee hearing, you have interjected your comments even though they weren't directed to you as a question.

So what you are doing is so incredibly hypocritical to this process. You say that someone who votes no therefore has no more say so in the issue, and yet here today when challenged on an issue, you have interjected yourself; so you obviously believe that there should be further conversation. So I find that a little curious. As we move forward, you know, we get a chance to talk about the issues, even if we aren't necessarily behind the issue. This is something that I want to see happen with the FCC as well. And I will just finish, Commissioner O'Rielly.

Mr. Wheeler. Do you want me to respond to that?

Mrs. Ellmers. No. Actually I was making an observation.

Mr. Wheeler. There is an error in your logic --

Mr. Latta. The lady has the time.

Mrs. Ellmers. Commissioner O'Rielly, in your opinion, how do you believe a dissenting opinion should be treated after the fact?

Mr. O'Rielly. So I can only correct one thing from the chairman. We do actually see the item. We just don't have any input into it if we --

Mrs. Ellmers. You can't comment on it.

Mr. O'Rielly. I do see it. I don't want to give anyone the

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misimpression. We do see it. I believe that even dissenters would have valuable input into the process. It was something when I was in the majority when I worked here, we would always talk to the minority and say we know you voted no, but do you have a good idea? Is there something we missed here --

Mrs. Ellmers. Right. And help us to understand where you are on the issue.

Mr. O'Rielly. They would have really good ideas during the time. You know what; you didn't think of this. Even though I voted no, I want to make it a good document. And so I always thought that was helpful. We don't have that opportunity.

Mrs. Ellmers. Mr. O'Rielly, I just want to say that I, you know, certainly associate myself with your position on this, and I am very much looking forward to our bills, all three of our bills moving forward.

Ms. Eshoo. Would the gentlewoman just yield for a few seconds?

Mrs. Ellmers. That is fine. I have 15 seconds left.

Mr. Latta. Did the gentlelady yield?

Mrs. Ellmers. That is fine, yes.

Mr. Latta. Ten seconds.

Ms. Eshoo. Thank you. I appreciate it. I just want to insert maybe some pragmatism here. You know, we voted on bills today and I believe yesterday in the full committee. I don't have any opportunity to change those bills after I have voted no.

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Mrs. Ellmers. We are over time, so I am going to pull back. But we are not talking about changing votes. We are just talking about --

Ms. Eshoo. We are changing the substance of the no vote. I can't go back and change the language. There is no such thing.

Mr. Latta. The lady's time is expired.

Mrs. Ellmers. Yeah, my time has expired.

Mr. Latta. The chair now recognizes the gentleman from New York, Mr. Collins, for 5 minutes.

Mr. Collins. Thank you, Mr. Chairman. My question is directed to Commissioner O'Rielly. How are you doing?

Mr. O'Rielly. Good.

Mr. Collins. Do you watch the Buffalo Bills here to see how they are drafting?

Mr. O'Rielly. We don't have a draft pick for a little bit.

Mr. Collins. No they are working on that.

My question also deals with the transparency issue, and in the Title 2 order, the FCC delegated unprecedented authority to its enforcement bureau to investigate and fine companies, even in situations where the FCC hasn't yet decided what rules are going to apply to broadband services. So specifically, the Title 2 order applies Section 222 of the Communications Act to Broadband Services, which I imposes duties on providers to protect certain customer information. But Section 222 itself is by design not specific, and nobody knows what it is, what it is not, just by reading it.

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The order says Section 222 applies right now to broadband and at the same time forebears from the specific rules the FCC has on the books that implement Section 222. And this week the FCC held a workshop to figure out what all this means. Isn't this backwards? And how is anyone supposed to know what the FCC expects if the Commission just turns the enforcement bureau loose on them with no rules to actually enforce.

Mr. O'Rielly. So I would only caution to start by saying I don't want to get too far afield on this one issue because it obviously is a hot button issue for many people, and our reform effort is broader in my opinion. But to answer your specific questions, there are deep concerns I have regarding how the Commission has approached Section 222. We did have, separate from our Title 2 discussion, we have already done a couple items that I have dissented on in this space. We are using some of that precedent to go forward, which is problematic in my opinion. We are using some of the -- the are actually NALs versus a final decision; we are using that precedent to go forward.

But to separate it out and say I don't know exactly what is planned for in this instance. We did have a workshop. I am really worried that this provision will extend pretty extensively into the field not only on broadband providers, but it will continue to creep up the chain, up the virtuous circle that people talk about, to other providers. So I don't know where the space has gone. I was there at the time that 222 was drafted, so I can tell you it was a very narrow provision, and

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I think it is being misapplied as it currently is, and I think it will be misapplied going forward.

Mr. Wheeler. But we don't have a rule on it.

Mr. O'Rielly. That is right.

Mr. Wheeler. We are going to have a rulemaking proceeding on just what you do with Section 222; and in that rulemaking proceeding, I am sure Commissioner O'Rielly and all five commissioners will be actively involved.

Mr. Collins. So it is my understanding that last year the FCC proposed a \$12 million fine against two companies for violating Section 222. In the notice of apparent liability issued against TerraCom and YourTel, the FCC announced a duty to keep certain information confidential and to provide notices to customers under Section 222 and at the very same time enforced that duty against the companies without warning and with no rules. Again, this seems backwards. Mr. O'Rielly?

Mr. O'Rielly. Yes, I dissented on that item. The arguments you just presented were the forefront of my discussion. I think it is extremely problematic what we did, not only the process that we went through, and you highlighted it there, but also the outcome. I think they have misapplied the statute. I think that it is far beyond what Congress implied, and that is why your question is so valuable.

Mr. Collins. I would agree. Mr. Chairman, I know we are getting ready to vote, so I will yield back the balance of my time.

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Mr. Latta. The gentleman yields back, and the chair now recognizes the gentleman from North Dakota, Mr. Cramer, for 5 minutes.

Mr. Cramer. Thank you, Mr. Chairman and the ranking member for sticking around so long for me. Thanks to both of our witnesses, our distinguished public servants. Thank you both for being here.

I often start my inquiry with the reminder that I spent 10 years as a regulator in North Dakota on the elected North Dakota Public Service Commission. Our nice little three-member elected body, I have to admit that the sunshine of North Dakota and the transparency of North Dakota's Government at first seemed very clumsy to me. In fact, I kind of liked the idea of the old stories I heard about a couple commissioners get in a room, kick the door shut, decide the thing, and then come out and tell everybody what the decision is. But it did not take long for me to find the safety in the transparency.

And when I ran for this job, I said I want to do for the United States what we have been able to do for North Dakota, lest the United States do to North Dakota what they have done to the rest of the country. And this transparency issue is a big deal to me, and I think it was those years on the commission where we never, I mean no two of us talked about anything in the men's room without appropriate notice and the length of notice, at least for the opportunity to have a hearing if not the notice of a hearing. And we had a lot to do. And we had a lot to do. When you have the fastest growing economy in the world, and we are sort of at the epicenter of most of it, including a lot of

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telecom, I might add.

And never did efficiency trump transparency because transparency leads to trust. And there are many things about Congress and what I have learned here and several of the agencies where I feel good about being able to go back home and say, you know what; it is not as bad as you think. This is one situation where it is worse than people could imagine, in my view, at least by comparison to my experience as a regulator. The people in our State would never have tolerated this, and certainly the businesses wouldn't have.

So my question is -- let me just ask this. Do you ever see or think there could or should be an opportunity where at least on some issues, major issues, there could be an actual hearing where all of the members would be there and they would ask questions of witnesses much like we are doing now, or, you know, a more legal format, discovery, evidentiary hearing? Could we get to that point? Is there any reason that we could, or is there any reason why we shouldn't get to that point on more issues? And I would, you know, I would start with the chairman and --

Mr. Wheeler. Yes, and we use both. We have discovery capabilities. And in the recent Comcast decision for instance, we used our discovery. We can hold hearings. We have been of late holding workshops, though, to get more involvement so it is less of this and more of getting informed people informing us. And, you know, for instance, Commissioner O'Rielly and I were the only commissioners who

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sat through six day-long sessions discussing the open Internet rule, you know, ways that we make sure that we have, you know, a fulsome discussion and record in that. So I think your points are very well taken, Congressman.

Mr. Cramer. Mr. O'Rielly.

Mr. O'Rielly. I would only add that -- and I wrote about this recently. I do think that there can be an opportunity to have hearings with the five commissioners and explore issues. I would be open to that. It is an alternative to having people and witnesses at our open meetings where I think that is not being a very effective use of time. Actually if we want to have a hearing, I think there could be an exploratory way to go about doing so, and I think that that something that might be valuable.

Mr. Collins. You know, I would just wrap up my time by saying when I was on the commission, we were a three-member, all Republican commission. We could have passed out any rule we wanted. We had two-thirds of the majority of our party in both chambers of the legislature. I never once thought it would be a good idea to be less transparent. Because, frankly, once I got used to the concept, I found great safe harbor in transparency, really.

And so I just want to tell you, and maybe with the remaining seconds, Commissioner O'Rielly, I mean, if Republicans became the majority and you became the chairman, would your position be any different than it is today?



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Mr. O'Rielly. I should caution and say I don't plan to be chairman. I probably will never be chairman. I don't sit there and dream about it, but I will tell you and give you my word, and you can mark this down, if that were to ever happen, I believe I will support every change that I have already made and all the changes I am going to suggest going forward be implemented immediately to the process at the commission.

Mr. Collins. Thank you both for your service and your patience. And my time is expired.

Mr. Latta. Well thank you very much. The gentleman's time has expired and to the committee right now I see that the good gentleman from Vermont, Mr. Welch has come, and we have 5 minutes of allotted time.

Mr. Welch. Well, I appreciate that. I was doing committee business, Mr. Chair. I was with Mr. McKinley, and we were over at the White House getting a bill signed that this committee passed. So I gave them your regards.

Mr. Chairman, I note that our ranking member, Ms. Eshoo, has been really working on our committee to try to find things that will be helpful to the reform of the agency you are in charge of, so I want to be cooperative in that effort.

You were asked to some extent, the question in this hearing is it about trying to give the FCC the opportunity to make reforms, or is it an opportunity for us to beat up on the FCC for doing its job?

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So I hope we can make some reforms. You have been asked some specific questions, so I just want to give you a chance to answer. You were asked about the disposition of 8,000 enforcement decisions. Can you tell us what types of decisions those were.

Mr. Wheeler. The vast, vast majority, thousands and thousands of them, were indecency complaints that were actually holding up license renewals for broadcast stations. And so when we were able to deal with those, which again, Commissioner O'Rielly and I worked together on this, because this is a sticky issue. Okay. And that not only cleared off the enforcement agenda, but also then immediately let broadcast licenses go forward that were being held up if for no other reason than somebody had filed against them. Okay.

Mr. O'Rielly. If I can comment on that, and I completely agree with --

Mr. Wheeler. Sure. Go ahead.

Mr. O'Rielly. In reducing some of the backlog, cases were being dismissed because of Statute of Limitations, so we were trying to get away from that and reduce the backlog. But also in reducing the backlog, it provided us an opportunity to focus on those cases that do need to be addressed by the Commission, so it was both parts. We were actually just having this entire role being addressed, constantly going back and retooling agreements, and it was just taking forever --

Mr. Welch. Sounds sensible to me.

Mr. O'Rielly. Right. So then we were able to prosecute or move

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forward --

Mr. Wheeler. In a wildly bipartisan manner.

Mr. Welch. Great. You were asked about how the editing process works after the Commission votes on an order. Can you explain that process? By the way, an editing process is employed by courts like the Supreme Court. That is sort of standard practice, but how does it work in the FCC?

Mr. Wheeler. Thank you, Congressman. That after a vote, if there are dissents, then it is required by the Court that we conform the order with the dissents just like happens in court, as you just indicated. The interesting thing is, and the topic that has been left out entirely of the discussion today, is that our rules also provide an opportunity for reconsideration. And that a final decision really isn't the final decision because an affected party can file and say, no, here is new data that you need to have, and therefore you need to reconsider. A commissioner or commissioners can file on their own motion for reconsideration, and so that has kind of been overlooked in this process today that this so-called final still has an opportunity for review, and that is, of course, even before it goes to court. And again, you know --

Mr. Welch. Has that been a longstanding practice at the FCC?

Mr. Wheeler. Yes, sir.

Mr. Welch. The other thing, Mr. Latta and I, as you know, are working together on a rural working group. Are there any suggestions

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you have now that you have been in your job for a while that would require congressional legislation to give you some additional room, with not necessarily more money, to be more flexible in personnel that you may need?

I remember a discussion I think you had with Mr. Latta and I at the rural working group when you were explaining how it is pretty easy to hire a lawyer but pretty hard to hire an engineer. And I am a lawyer, but I think you need an engineer more than you need somebody like me.

Mr. Wheeler. Thank you, Congressman. I think you just hit the nail on the head. We need economists and engineers, and it is difficult to hire them, and the process for hiring lawyers is much easier. And the bigger question here is that our budget is constantly being cut, and we are losing, we are now and we will be next year even lower, at the lowest number of FTEs in the history of the agency, the modern history of the agency.

Mr. Welch. So in addition to the budget pressures, are there also some rule issues that are making it more difficult to hire engineers and economists versus lawyers?

Mr. Wheeler. Yes, sir.

Mr. Welch. And I would be glad to see those, and perhaps we could work together on trying to straighten that out.

Mr. O'Rielly. Could I mention just one?

Mr. Welch. Yes.

Mr. O'Rielly. Congressman. And that only to suggest that some

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of the rule issues that we are trying to deal with now, one big issue that the chairman and I are trying to work together on are rate of return carriers. And part of the problem we have had is the good bureaus and the good staff has been, for a number of different reasons, migrating to the enforcement bureau; and so we are losing people from some of the substantive bureaus where we need, and we have very few people left in some of the bureaus that actually work on these big-ticket items.

Small handfuls of people are working on certain things. You would think out of 1,500 or 1,700 people, we would have had a bunch of people working on them. We don't. We have been growing enforcement and shrinking other places. I think that is problematic.

Mr. Welch. Okay. Thank you very much. I yield back.

Mr. Latta. The gentleman's time has expired, and seeing no other Members present to ask questions, on behalf the chairman and the ranking member, I want to thank you, Mr. Chairman, and you, Mr. Commissioner, for appearing before us today and for your testimony and your answers to the questions. And seeing no further business to come before the committee, the subcommittee will stand adjourned.

Ms. Eshoo. Mr. Chairman, and do members have X number of days to submit questions to the witnesses that they were, either didn't have the time to ask or were not here to ask?

Mr. Latta. So ordered. Thank you very much.

[The information follows:]

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Ms. Eshoo. Thank you.

Mr. Latta. Thank you very much.

[Whereupon, at 5:18 p.m., the subcommittee was adjourned.]