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Rep. Fred Upton Chair Energy & Commerce Committee 2125 Rayburn House Office Bldg. Washington, DC 20510	Rep. Frank Pallone Ranking Member Energy & Commerce Committee 2322A Rayburn House Office Bldg. Washington, DC 20510
Rep. Greg Walden Chair Subcommittee on Communications & Technology 2125 Rayburn House Office Bldg. Washington, DC 20510	Rep. Anna Eshoo Ranking Member Subcommittee on Communications & Technology 2322A Rayburn House Office Bldg. Washington, DC 20510

Dear Chairmen Upton and Walden and Ranking Members Pallone and Eshoo:

The purpose of this letter is to comment on the general topic of improving the process of administrative agencies and on the specific topic of the three proposals to amend the Communications Act of 1934. I write as a former chair of the Federal Communications Commission in 1993-97. In addition, I have been CEO and board members of companies in the private sector.

As a fundamental point, although improving the operations of administrative agencies is always a worthwhile goal, I respectfully suggest that goal is best pursued at a pan-government level, across all

independent agencies. The Administrative Procedures Act provides the right framework for those reforms. A “siloe” approach to reforming an independent agency is no better than a siloe approach to rulemaking, which is a frequent (and frequently on-target) criticism from the private sector towards independent agencies. Congress should learn from this criticism and not pursue a narrow approach. A pan-government review process means that policymakers can learn what are the best practices across different agencies and ensure they are followed by all agencies. It also ensures consistency in administrative law, which helps the private sector by providing greater predictability about outcomes of administrative litigation and reducing litigation risk.

Now I turn to the three bills that are before the Committee. They would require the Commission to:

- identify publicly and in advance the thousands of delegated decisions a year made by the agency’s bureau chiefs without agency vote, even though all Commissioners and all affected parties know all about these matters, a disappointed party can appeal any Bureau decision to the full Commission, and the 48-hour disclosure requirement will necessarily delay release of a final decision;
- disclose publicly the draft of decisions to be debated and voted by Commissioners, before the Commissioners have had an opportunity to study, confer, debate and finally decide the matter; and
- publish the text of new Commission rules within a day after they are voted, without the explanatory text, although dissents may not have been finished or reviewed, or solecisms corrected.

Taken as a whole, the trio will not help the FCC act in an expeditious manner on its business, will not add to transparency, and will sow more confusion than clarity for the private sector. In addition, these bills will hamper the ability of the Chairman of the Federal Communications Commission to discharge in a collegial, expeditious and practical manner the myriad duties delegated to the agency by Congress, as explained below. Overall, this sort of blinkered legislation would contribute to the dysfunction that has caused public approval of government in general to fall to alarmingly low levels. Instead of micromanaging institutions necessary to effectuate Congressional intent, Congress would do well to hold agency heads responsible, in public, for their policy decisions, while giving them funds and discretion to manage as efficiently as any CEO of a public company should do.

Regardless of whether agencies are run by Republican or Democratic chairs, and no matter what multi-commissioner agency is under scrutiny, their ideal practices are generally followed and widely understood. The Chair sets the agenda. He or she sorts out the relative handful of major issues that all commissioners want to vote on. These votes will be either in public, at open meetings, or on circulation.

Every FCC Chairman has delegated vast numbers of matters to bureau chiefs for a decision. Thousands of official agency actions annually are taken in this way, and that has been true for many decades. That is done to meet a common complaint: government decisions takes too long. Simply put, bureau decisions take less time than Commission-level decisions. Importantly, all bureau-level decisions can be appealed by affected parties to the Commission. Congress would be hard-pressed to find members of the communications bar who find the three levels of decision-making – open meeting, vote on circulation, bureau delegation with appeal to the Commission – to be unfair, inefficient, or burdensome. Probably all

practitioners wish that agencies would make decisions more quickly, but Congress has not funded agencies adequately, by and large, and depleted staffs can only handle so much work.

At best, only unnecessary bureaucracy and delay can come from requiring the Chair to write and publish a description of bureau-level decisions before they are taken. Indeed, how can the Chair describe a decision before it is made? So if the description is written only after the decision has been made, then the only effect of the legislation would be to delay release of a final decision by 48 hours. How does that artificial delay of a settled decision benefit anyone?

If an item is to be voted by commissioners, the Chair should have staff brief everyone on the questions presented and the response to those questions. The commissioners and their staffs can decide what meetings they want to hold with private parties, who in Congress they will confer with, what private or public discussions they want to have about the matter. After ample deliberation with all stakeholders, the commissioners can give the staff their reaction. Then they will receive the Chairman's draft. This document they study and debate with the Chairman before the vote. Perhaps unintentionally, disclosure of the draft order actually disempowers the other Commissioners in relation to the Chair. While Chairmen have the ability to take as much time as they like in private, the Commissioners' decision making will be exposed to the public even before they have had a chance to read the draft. Thus, it is critical to good deliberation that this phase be confidential.

An agency is not a college debate or a cable TV show, much less a mirror of an election or a Congressional floor speech. It focuses on issues with dense details, and in my experience the details of the Commission's decisions change during this iterative process among the

Commissioners with a draft order. This decision making process requires expertise and thoughtful exchange of views for commissioners to produce, as a whole, the decision that a majority believe best serves the public interest. Everyone has ample time before a draft is presented for public discussion and of course all voting is public. But in order to create an atmosphere of sincere debate the Chairman's draft must be confidential and its discussion among commissioners should be off-the-record, just as it is, for example, on any appellate court, at the Supreme Court, or in closed door meetings on the Hill where elected officials are supposed to reach the compromises necessary to do the people's business.

Commissions sometimes make their final collective decisions in the late night hours before a vote. Sometimes votes are delayed from morning until afternoon so as to permit every commissioner to conclude deliberations. Although votes at open meetings obviously are public, on occasion commissioners may not have had adequate time to write concurring or dissenting public statements by the time of the vote. For this reason, wise Chairs allow more time after the vote for commissioners to finish their written statements. This healthy process sometimes leads to technical changes in rules; that is, amendments important to effectuate the intent of a vote but consistent with the vote. Requiring the Chair to curtail this process only a day after the vote does not contribute to better results. Perhaps unintentionally, this proposal would deny a dissenting or concurring Commissioner any possibility of changing in even minor ways the text of a new rule with a cogent point made in a draft opinion.

In general, Congress acts prudently when it enacts legislation that conveys clear direction and appropriately broad authority to the rule-writing agency with the jurisdiction suited to the particular law. If the

agency deviates from Congressional intent in its regulatory actions, Congress has various ways to pass laws that overturn regulation.

The goal of improving the work of independent agencies is sound, but it should be pursued across the government, and not focused on micromanaging one agency's procedures, especially with the effect, if unintended, of hamstringing the agency. That sort of intrusion on well-established decision-making processes, used by Republican and Democratic Chairman alike for decades, does not promote this goal. Boards of public companies eschew this kind of micro-management and this Committee should follow their lead.

Very truly yours,

/s/

Reed E. Hundt