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RPTR ZAMORA

EDTR SECKMAN

FCC REAUTHORIZATION: IMPROVING COMMISSION

TRANSPARENCY, PART II

FRIDAY, MAY 15, 2015

House of Representatives,

Subcommittee on Communications

and Technology,

Committee on Energy and Commerce,

Washington, D.C.

The subcommittee met, pursuant to notice, at 9:17 a.m., in Room 2322, Rayburn House Office Building, Hon. Greg Walden [chairman of the subcommittee] presiding.

Present: Representatives Walden, Latta, Lance, Olson, Pompeo, Kinzinger, Bilirakis, Johnson, Collins, Eshoo, Welch, Loeb sack,

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Matsui, and Pallone (ex officio).

Staff Present: Ray Baum, Senior Policy Advisor for Communications and Technology; Leighton Brown, Press Assistant; Andy Duberstein, Deputy Press Secretary; Gene Fullano, Detailee, Telecom; Kelsey Guyselman, Counsel, Telecom; Grace Koh, Counsel, Telecom; David Redl, Counsel, Telecom, Charlotte Savercool, Legislative Clerk; Jeff Carroll, Minority Staff Director; David Goldman, Minority Chief Counsel, Communications and Technology; Lori Maarbjerg, Minority FCC Detailee; Margaret McCarthy, Minority Senior Professional Staff Member; and Ryan Skukowski, Minority Policy Analyst.

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Mr. Walden. I will call to order the Subcommittee on Communications and Technology for our legislative hearing on the "FCC Reauthorization: Improving Commission Transparency, Part II."

And certainly welcome our expert witnesses here today. Good morning, and thank you for joining us here today to discuss a topic that I have long championed, and I am not the only one on the subcommittee that has done so, FCC process reform. I am pleased to announce that my colleague and friend, Ranking Member Eshoo, and I will reintroduce the FCC Process Reform Act.

[The information follows:]

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Mr. Walden. This is a bill that passed the House in the 112th Congress and the 113th Congress had passed unanimously.

We are dedicated to improving the way that government does its business. We are introducing this bill again with the hope and expectation that the third time will indeed be the charm.

We all agree that things could be better at the FCC. The Commission regulates an incredibly dynamic and innovative sector in the American economy. It ought to serve the public in a transparent and predictable manner. This is the best way to protect consumers and to provide stability for industry and for investors.

Our bill would set procedural guardrails to protect against the potential for lapses in process. Specifically, our legislation would set goals for Commission process and would allow the FCC to determine for itself the best way to meet those goals. The objective is to grant the FCC significant latitude in setting its own deadlines in developing performance measures for program activities.

The public will be able to measure the Commission's progress by means of annual reports detailing its performance in meeting the deadlines. And provided that the Commission threatens the required rulemaking and inquiry process, the bill will also provide for nonpublic collaborative discussions among the Commissioners, which currently are prohibited by the Sunshine in Government Act.

I am also pleased to bring several bills offered by my colleagues

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across the aisle before the subcommittee for discussion. I applaud their willingness to work with the majority on improving the FCC process, and I believe there is significant merit to the draft bill as offered. We are looking forward to working together on these bills.

Representative Clarke's draft bill requires the FCC to publish a quarterly dashboard marking progress on petitions and complaints at the FCC, allowing the public to determine for themselves how efficiently the FCC is operating.

[The information follows:]

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Mr. Walden. Representative Loeb'sack's bill would require the chairman to publish the internal procedures at the FCC which would, for the first time, allow the public to actually understand how decisions are made when the Commission goes behind closed doors to amend the proposed rules.

[The information follows:]

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Mr. Walden. And Representative Matsui's bill would encourage the FCC to improve access to government for small businesses. These are all fine ideas that can gain bipartisan support and improve the state of the FCC significantly.

[The information follows:]

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Mr. Walden. Together with the draft bills we discussed at our last legislative hearing and the consolidated reporting bill that was passed unanimously by the House in February, these are real steps toward a higher standard for transparency of decisionmaking at the FCC. And it is high time. The industry deserves an efficient and effective regulator we can truly call expert just as the public deserves a transparent and accountable Federal Government.

I would like to thank our guests for being with us today. Mr. May and Professor Benjamin are both recognized experts in administrative law. And former Commissioner McDowell has the invaluable experience of having been part of the Commission. So your combined experience and expertise for the FCC make you invaluable advisers to us on how our proposals may impact the agency and industries governed by the FCC. So we thank you in advance for your insights, and we appreciate the testimony that you have provided.

And now I would like to ask unanimous consent to enter into the record the letter that the Chairman of the FCC, Tom Wheeler sent to both Congresswoman Eshoo and myself, memorializing his statements made before the subcommittee last month, and how he intends to address process reform with the task force. Without objection.



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[The information follows:]

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Mr. Walden. I applaud the chairman for his stated commitment to process reform. I do acknowledge it sounds a little familiar because we heard before our subcommittee in December of 2013 about this effort, and again, in 2011, prior Chairman Genachowski, 4 years ago this week basically said the same thing.

Unfortunately, in the intervening years, while we have seen some reform at the FCC, I don't think it has gone far enough, as evidenced as by our bipartisan legislation that is moving.

I appreciate our colleagues working with us to bring about lasting reforms that transcend any chairman of either party at the Commission. We must not buy into the idea that an FCC Chairman will diminish his or her power and work against their own interests there. The FCC is structured to give the Chairman the ability to operate in secret outside the watchful eye of the public it was created to serve. So I entered that into the record.

With the remaining 26 seconds, recognize the vice chairman, Mr. Latta.

[The prepared statement of Mr. Walden follows:]

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Mr. Latta. Well, thank you very much, Mr. Chairman.

And thanks very much to our witnesses for being with us today, really appreciate it, and look forward to your testimony.

The telecommunications industry derives a significant portion of economic growth in our country. Therefore, Congress needs to make sure that this sector is not burdened or hampered by inefficiency or lack of accountability at the FCC. I appreciate the chairman and the subcommittee for keeping FCC transparency, efficiency, and accountability a top priority for continuing an open discussion on agency reform.

I believe the draft bills before us today aimed to improve FCC process, and I thank our Democratic colleagues for bringing them forward.

With bipartisan cooperation, this subcommittee can offer reform that will greatly improve agency procedures, which begin with Chairman Walden's and Ms. Eshoo's FCC process reform discussion draft.

I look forward to today's witnesses' testimony and their perspectives on the issues.

And, Mr. Chairman, I yield back.

[The prepared statement of Mr. Latta follows:]

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Mr. Walden. Gentleman yields back the balance of his time.

The chair recognizes the gentlelady from California, Ms. Eshoo.

Ms. Eshoo. Good morning, Mr. Chairman, and thank you for convening today's hearing to consider three of the bills put forward by Democrats at our April 30 subcommittee meeting.

And to the witnesses, welcome back to the witness table. It is wonderful to see you. And we look forward to hearing you share your expertise with us, and we thank you for it.

Improving FCC transparency is supported by Members on both sides of the aisle, as well as Chairman Wheeler. In a letter to the subcommittee yesterday, as the chairman just said, the FCC Chairman articulated the agency's planned review of transparency, rulemaking, and delegated authority all of which can be done with passing new legislation.

At the same time, your consideration of bills offered by Democrats demonstrates that we can work together to modernize the FCC without jeopardizing regulatory certainty, which is really very, very important, for all that deal with the FCC are opening the door to legal challenges on every Commission action. That is not what we are here for, and I believe that we are staying away from that.

Today, we are also considering the FCC Process Reform Act, a discussion draft I offered with Chairman Walden and Representative Kinzinger, and which passed the House by voice vote in the last

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Congress. Importantly, this compromise bill gives the FCC flexibility to evaluate and adopt procedural changes to its rules rather than putting rigid requirements in statute.

I also welcome the inclusion of the FCC Collaboration Act. Obviously, I do. It is a bipartisan bill I introduced earlier this year with Representatives Shimkus and Doyle. But an artificial delay of this particular provision as the discussion draft establishes, I think, is an unnecessary delay, and I think it is an odd one. If we are taking it up, let's get it done, because it is a much needed reform. All the Commissioners of the FCC have testified on this, and I think that we need to address this prior to passage of any package.

Finally, it is disappointing to me that the majority has chosen not to consider H.R. 2125, the Keeping Our Campaigns Honest Act. This was part of the package of bills offered by Democrats at the subcommittee's April 30 hearing. Recent election cycles and waves of spending by secret donors have made it painfully clear that our electoral system and our campaign finance laws are in the drastic need of reform.

In the long term, it will take Supreme Court decisions or a constitutional amendment to rid our political system of endless sums of money. But, in the short term, we can and should start by requiring that all political ads spending be fully transparent and clearly disclosed. Now, I think the operative word in this is "transparency."

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At our last hearing, many members spoke so eloquently about transparency.

Mr. Chairman, you have emphasized transparency, and yet, when it comes to this, no transparency.

So full disclosure is an idea that once enjoyed bipartisan support. Justice Anthony Kennedy in the Citizens United case wrote for the majority, quote, "The First Amendment protects political speech, and disclosure permits citizens and shareholders to react to the speech of cooperate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages," unquote.

Even Senator Mitch McConnell agreed, asking in 2000, why would a little disclosure be better than a lot of disclosure? Consistent with the FCC's existing authority, I think it's time for the agency to bring greater transparency to America's electoral system by requiring sponsors of political ads very simply to disclose their true identity, not just their ambiguously named Super PAC.

The public has a right to know who is attempting to persuade them over the public airwaves -- public airwaves -- and Representative Yarmuth's bill would achieve that goal by casting light and transparency on election advertising.

So there you have it, the good and the not-so-good. I welcome, again, our witnesses back to the subcommittee. And your expertise on

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how to ensure FCC flexibility while promoting openness, transparency, and accountability is very important for us. Thank you.

And I yield back, Mr. Chairman.

[The prepared statement of Ms. Eshoo follows:]

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Mr. Walden. Gentlelady yields back the balance of her time.

I don't believe anyone is claiming the time for the chairman of the committee, so I will recognize the ranking member on the committee, Mr. Pallone.

Mr. Pallone. Thank you, Chairman Walden and Ranking Member Eshoo.

And welcome to our witnesses. I know all of you have been here before to help us with these issues, and I appreciate your coming back.

This is the second time in the past few years that this subcommittee has focused on perceived shortcomings at the FCC. At our hearing a couple weeks ago, we heard testimony from FCC Chairman Wheeler about the extensive work he has already done to update the FCC's internal processes, but more could always be done. And that is why Chairman Wheeler committed to us that he would continue to work with his fellow Commissioners to comprehensively review all of the internal procedures at the agency.

We also heard at the last hearing that the Democratic members of this subcommittee have a number of concerns with the FCC process reform proposals the Republicans put forward. The most serious concern was that these proposals run counter to the repeated warnings from legal experts that creating agency-specific reforms invite lawsuits which create uncertainty and deter investment.

But rather than simply throw our hands up in opposition, we



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offered an alternative approach to keep the FCC fast, efficient, and transparent. And our commonsense proposals would keep the FCC as agile as the industries it regulates, without sparking years of legal uncertainty.

I hope the Republicans understand our concern, and I am grateful that Chairman Walden is willing to give some of our proposals a fair hearing. But I do want to join with Ms. Eshoo and express disappointment that this hearing does not include all of our proposals, including the one presented by Mr. Yarmuth, and that is because transparency should extend to the political process as well as the FCC's internal process.

That is why our alternative package includes a way to ensure that the public knows who is paying for expensive political ads on TV. Americans deserve to know who is using the public airwaves to influence political debates, and transparency should not stop at the doors of the FCC.

But I want to thank both of my colleagues again.

I would like now to yield the remainder of my time to the gentlewoman from California, Ms. Matsui.

[The prepared statement of Mr. Pallone follows:]

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Ms. Matsui. I thank the ranking member for yielding me time. I would like to thank the witnesses for being with us today.

We all agree here that transparency and efficiency at the FCC is a good thing, and I am pleased that my draft bill is being considered today to make it easier for small businesses in Sacramento and across the country to engage with the FCC on policies that may impact them. Whether it is a family business or a startup, small businesses can't spend scarce resources on lawyers or lobbyists to have an impact on FCC decision. But, in most cases, their companies will be affected by FCC decisions just as much as larger corporations. We should make it as simple as possible for the small businesses to have their voices heard at the FCC. My draft bill would have the FCC coordinate with the Small Business Administration to improve small business participation at the FCC.

Mr. Chairman, I would like to submit for the record a letter of support from the Small Business Coalition comprised of rural and travel carriers for this legislation.

Mr. Walden. Without objection.

[The information follows:]

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Ms. Matsui. This is a commonsense bill that I hope my colleagues will support.

And I yield to anyone who -- I yield back the balance of my time.

[The prepared statement of Ms. Matsui follows:]

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Mr. Walden. Gentlelady yields back the balance of her time.

Mr. Pallone, goes back to you, I think.

Mr. Pallone. I yield back.

Mr. Walden. He yields back.

And so, with that, we will move onto our witnesses. And I appreciate my colleagues' testimony or opening statements. Three out of four minority party bills up for consideration is not a bad ratio when you are in the minority.

Let me move on now to Mr. Randy. Just making a note here. I wish we had gotten three-quarters of our bills when we were in minority, but oh well.

Randy May, president, Free State Foundation. Take it away.  
Good morning.

Mr. May. Mr. Chairman --

Mr. Walden. But we do need you to turn that mike on. Just once.

Mr. May. Mr. Chairman. Well, that doesn't work either.

Mr. Walden. Can we get somebody over there who actually knows how to -- no, I don't think it is on.

With that, Mr. May, please, go ahead and start your testimony.

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STATEMENTS OF RANDOLPH J. MAY, PRESIDENT, FREE STATE FOUNDATION; STUART M. BENJAMIN, DOUGLAS B. MAGGS CHAIR IN LAW AND ASSOCIATE DEAN FOR RESEARCH, DUKE LAW; AND ROBERT M. MCDOWELL, FORMER FCC COMMISSIONER, SENIOR FELLOW, HUDSON INSTITUTE

STATEMENT OF RANDOLPH J. MAY

Mr. May. Mr. Chairman, Ranking Member Eshoo, and members of the committee, thank you for inviting me to testify. I am president of the Free State Foundation, a nonpartisan think tank, that, among other things, focuses its research in the communications law and policy and administrative law areas. As my written testimony details, I have longstanding experience in these areas. So today's hearing on process reform is at the core of my expertise.

Mr. Chairman, as we were discussing earlier, all three of the witnesses today happen to have strong Duke connections, Duke University, but I want to point out that I am the only one of my Duke friends here that has two Duke degrees, so I hope you will consider that when you are weighing my testimony.

I commend Chairman Walden and the committee for your efforts to focus on process reform over the years, in addition to the important work undertaken as part of the Comms Act update process to reform the

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substance of our communication laws. I have supported the Commission's earlier process reform efforts, and I support the current efforts aimed at increasing FCC transparency.

Alexander Bickel, one of the 20th century's most prominent legal scholars, wrote in his 1975 book, "The Morality of Consent," that, quote, "The highest form of morality is almost always the morality of process," closed quote.

Sound process is crucial to ensuring accountability, conforming to rule-of-law norms, maintaining public confidence in the decisionmaking of our administrative agencies, and increasing administrative efficiency.

This is especially so because the FCC's decisions, which impact the public in significant ways, are made by unelected decisionmakers who are not directly accountable to the public. While I applaud the sentiments that Chairman Wheeler has expressed regarding process reform, the reality is that the Commission's own efforts have fallen short of what needs to be done.

If enacted, the draft bills that are the subject of this hearing would constitute important steps forward in reforming the Commission's processes, and I find little in them to disagree with. The FCC Process Reform Act of 2015, which requires the Commission to initiate proceedings either to adopt procedural changes or to seek public comment on whether and how to implement other changes, is commendably

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comprehensive.

That said, I believe Congress should adopt some key specific reforms now without waiting any longer for the Commission to act on its own. So I want to use my remaining time to support the proposals in the drafts produced by Representatives Latta, Kinzinger, and Ellmers. By increasing transparency, these bills promote rule-of-law norms, enhance public confidence in the integrity of the agency's decisionmaking, and increase the Commission's efficiency.

In some quarters, Representative Kinzinger's proposal requiring advance publication of items to be considered by the Commission at a Sunshine meeting provokes controversy, but it should not. Indeed, it should seem odd that in advance of a so-called Sunshine meeting, the text of the document the Commission is voting on is kept out of the public's hands, in the dark.

When Commissioners read their prepared statements, the public can only guess at the substance of what is being addressed. There is no reason why, subject to the usual exemptions regarding privilege, that the text of the document to be voted on should not be released in advance of the meeting. Inevitably, there are often leaks concerning the proposed text of items, some accurate and some not.

Some members of the public, by virtue of position, proximity, or personal relationships, may receive more or better information concerning the proposed text than others. This does not inspire public

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confidence in the integrity of the Commission's decisionmaking, and it doesn't enhance the soundness of the Commission's decisions.

As Commissioner O'Reilly has pointed out, in discussions with members of the public prior to the Sunshine cutoff quiet period, the inability to talk in specifics about the proposed item inhibits the usefulness of exchanges with the public that might produce better, more informed decisions. Aside from whatever specific time period is selected, Representative Ellmers' bill, that the text of rules adopted by the Commission be published online in a timely fashion, constitutes a useful reform.

In light of legitimate concerns regarding the abuse of the FCC's ubiquitous grant of editorial privileges to the staff at the time of adoption of agenda items, there should be some action forcing publication requirement to help ensure that the rules before the Commission at the time of the vote in all material respects are rules that will become the official agency action. If this is not the case, then the very purpose of the Sunshine Act is vitiated, for the public is not actually witnessing a vote on the actual item that is going to be adopted by the Commission.

Finally, in closing, Representative Latta's bill to require that items to be decided pursuant to delegated authority be identified on the agency's Web site at least 48 hours in advance ought to be noncontroversial. While it is appropriate for many items that do not



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present novel or significant questions to be decided by the staff, the Commissioners nominated by the President and confirmed by the Senate have the ultimate decisionmaking authority on matters within the Commission's jurisdiction. So a Commissioner should have the opportunity to vote if they wish on all matters on which official agency action is taken, and Representative Latta's bill is a means to effectuate that opportunity.

Thank you for giving me the opportunity to testify today, and I will be pleased to answer any questions.

[The prepared statement of Mr. Mayfollows:]

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Mr. Walden. Thank you, Mr. May. We appreciate that.

If you will slide that microphone over, we will go to Stuart Benjamin, the Douglas B. Maggs Chair in Law and Associate Dean for research at Duke Law.

Mr. Benjamin. They all work now, I think.

Mr. Walden. Yes, you are on.

Mr. Benjamin. Great.

Mr. Walden. Good morning.

#### **STATEMENT OF STUART M. BENJAMIN**

Mr. Benjamin. Chairman Walden, Ranking Member Eshoo, members of the subcommittee, thanks for having me. So my background in many ways revolves around the FCC.

I teach administrative law, telecommunications law, First Amendment law. I am coauthor of a telecommunications casebook. From 2009 to 2011, I served as the inaugural distinguished scholar in residence at the FCC, a title you can blame on Commissioner McDowell here who suggested it and who actually had first suggested to me in 2006: You should go work at the FCC maybe.

But any event, more recently, I have been periodically serving the Commission as a consultant, but I want to emphasize, I have not spoken to anybody in the Commission about any testimony in any of these

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bills. I have no clients. I have had no clients since I became an academic. Nobody has paid me for this testimony. I don't do any private consulting, et cetera.

Okay. So all the bills that are the focus today and the three bills that the subcommittee considered on April 30 avoid most of the most serious concerns that I raised in 2013. So I think I commend you all for -- it seems to me that they have moved in a very useful direction. I think it makes a lot of sense, for instance, to tell the FCC: Here is what we want you to do. We are making the big policy decisions. You implement them.

I also think it makes a lot of sense to focus on disclosure rules. Some disclosures can do more harm than good and actually inhibit effective decisionmaking processes, but many forms of disclosure have little or no such inhibiting effects on decisionmaking processes and may well make both members of the public and Members of the Congress understand better what is going on at the Commission.

I do have some reservations. They are pretty modest in the grand scheme of things, but I would be remiss if I didn't lay them out. The first, the same I mentioned in 2013, I know this committee's jurisdiction, but I simply have to say it because it is my view of the world. I think it is a better approach if you have reforms you think make sense to apply them across the board.

This is not just a fetish. It is that this allows for judicial

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resolution more quickly than of the issues that any particular piece of legislation creates. And so the greater the specificity, the longer it takes the courts to work out exactly how that is going to apply.

Second, as I said, I think this largely avoids the concerns I raised in 2013 about litigation risk. There are some provisions here that create some uncertainty and some litigation risk. They are not huge. I mentioned one in my written statement that there is a reference to how the FCC is going to handle extensive new comments. So the FCC is going to have to define now what are extensive new comments, and then there is going to be litigation about what constitutes extensive new comments.

Third, I think that one section of the bill is in some tension with Representative Kinzinger's draft bill, that is the section 13(a)(3)(c) of this bill says: Want to make sure that all Commissioners get a full chance to review FCC orders, et cetera. Representative Kinzinger's bill says: Within 24 hours of an order being circulated to all the Commissioners, it has to be circulated to the public, and then good-faith changes can be made after that.

So the trigger is, now we have to justify changes after it goes to the public. Why do I highlight this? Because for Commissioners, the best opportunity for them to respond is when they have actually gotten formal receipt and they can have contact. And, by the way, and if we could have changes in the Sunshine Act, they could actually even

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meet among themselves in groups greater than two and not have to switch to talking about the Nationals whenever a third walks up. But that is the best opportunity. And now we have actually raised the cost of changes because now you have to justify these as good-faith changes.

A couple other things, let me just mention quickly. One is that section 13(a)(2)(c) is the one that says if there are submissions received after the comment window, then the public gets to respond to those. There is a possibility then for an endless loop, right. So the public responds with new submissions, then those need to be responded to, et cetera.

And the way to avoid that problem, it seems to me, is for the FCC simply not to receive submissions after the comment window. But the question then is, sometimes things happen after the comment window; technology is changing all the time. Don't we want the FCC to have the latest information, the most pieces of information when it is making its decisions.

Finally, let me just mention that the requirement in 13(a)(2)(g) requiring that notices of proposed rulemaking contain the specific language of the proposed rule, let me simply note this will cement the transition of the formal rulemaking process from a rulemaking to a rule-adopting process. That is to say, what that really means is, all the relevant decisions will have been made before the comment process, before the NPRM.

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And that might be a better world in some ways; we might think public comments can only move the Commission at the margin or move any agency at the margin, but it does mean that the agency has to have fully baked its whole rule before it actually begins the public comment process.

Anyway, let me desist with that. And thank you very much for your time.

[The prepared statement of Mr. Benjamin follows:]

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Mr. Walden. Thank you very much, Mr. Benjamin. We appreciate your coming up for our hearing today.

Now, we will turn to our final witness, the Honorable Robert McDowell, former SEC Commissioner and a senior fellow at the Hudson Institute.

We welcome you back before the committee.

#### **STATEMENT OF ROBERT M. MCDOWELL**

Mr. McDowell. Mr. Chairman, thank you for having me back. It is an honor and privilege to be here.

And Ranking Member Eshoo and all the members, thank you. It is good to be back here.

First, all the disclaimers: Today, I am testifying only in my personal capacity and not on behalf of the Hudson Institute or the law firm of Wiley Rein or any of its clients, and the thoughts I express today are purely my own. And I have stapled to the back of my testimony a lot of other FCC reform ideas I wrote about as a Commissioner and have testified about with you in this room and downstairs and elsewhere.

So, when I was an FCC Commissioner, we had many positive and constructive conversations with this committee and with each other about FCC reform. And one of the refreshing aspects that has already been touched upon today of this topic is the tremendous potential this

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topic offers for bipartisan cooperation to find solutions in the spirit of pursuing good government.

It can be done because it has been done. For example, former Acting Chairman of the FCC Mike Copps and I collaborated on many reform efforts back in 2009, including the modernization of the FCC's ex parte rules and proposed changes to the Sunshine in Government Act. And, similarly, Chairman Genachowski and I worked together in many other matters as well.

And I do note that with great enthusiasm, we have several bills and discussion drafts written on both sides of the aisle that are being considered by this committee, and good ideas abound. Without offering a specific endorsement, I will endorse the spirit and theme in some of the ideas here today. So I applaud the committee for its energy and good faith that you are putting behind this effort.

The bottom line on reform efforts however is that they should be based on the principles of sound due process, transparency, accountability, fairness, and efficiency. And I am going to edit out because I know we are behind schedule some of what I was going to say, but I would like to add, you know, there are a few ideas that I have talked about over the years that the Commission should be required to justify new rules with bona fide cost-benefit analyses. New rules perhaps should sunset after a defined period of time and that renewal should be justified from scratch in a new proceeding.



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And it is precisely because the communications marketplace is evolving so rapidly. Technology is coming out of Congresswoman Eshoo's office, and other districts here are really just abounding and changing by the second.

But also I think we need to look at merger reviews. When the Commission intends to deny a merger, the parties should be able to go to court for review after waving the costly and time-consuming hearing process. And also mergers, I think, should have a bona fide shot clock, obviously with some exceptions for extraordinary circumstances.

And I do agree that the Sunshine in Government Act should be modernized so that more than two Commissioners can talk about substance. That would actually help a lot of what we are talking about here. At the end of the day, Commission orders have to be well reasoned and are disclosed and are appealable, of course, to the courts. So it is not a secret as to how the Commission is arriving at a decision, but that should be fixed as well.

And, lastly, I would be remiss if I didn't reiterate my call for Congress to rewrite our country's creaky and antiquated communications laws. The 1934 act will celebrate its 81st birthday next month, and the 1996 act is almost 20-years-old, which reminds me of my 20th wedding anniversary. We were married in 1996, so it is always good to keep those in mind.

But a lot has changed in just the last few weeks, let alone the

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last 81 years. We need to modernize our communications laws to reflect current market conditions and technologies. So thank you again for having me here today. It is a tremendous honor to be here, and I look forward to answering your questions.

[The prepared statement of Mr. McDowell follows:]

\*\*\*\*\* INSERT 1-7 \*\*\*\*\*

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Mr. Walden. Well, thank you, Mr. McDowell.

We appreciate the testimony of all of our witnesses. We will go into the question phase at this point, knowing we are going to get votes here in a minute. And I appreciate -- I actually look at what we are doing here today as kind of phase one of the Comms Act update is title 1, which is how the FCC itself operates. There are many other issues to come in our efforts, but certainly the operations of the Commission itself need to be reviewed from time to time, that is our responsibility.

I know there has been a lot said about how we are just focused on one Commission, and I think Mr. Benjamin you touched on this, as others have over time, that somehow changing the rules here isn't how we should do this. We should do it across all agencies.

But, Mr. McDowell, isn't it true that the FCC actually doesn't operate fully under the APA today? It has its own -- I mean, like for example, I pointed out in the last hearing, the IG is appointed by the Chairman and reports to the Chairman. That is not the way it is in other agencies necessarily. It has its own unique carve out, doesn't it?

Mr. McDowell. Well, it can, yes, absolutely. And the example you point out is a good example of that, so --

Mr. Walden. And your cost-benefit analysis required in other agencies is not here, correct?

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Mr. McDowell. Correct.

Mr. Walden. And do you think that should change?

Mr. McDowell. Absolutely. I mean, I have called for that for years when I was a Commissioner. I think it would benefit everybody. You know, what are the costs? There are costs to new rules, and there is sometimes and almost always unintended consequences. Sometimes there are intended consequences. But we should take a look at those in a fully vetted way. And those can actually harm the most entrepreneurs and small businesses.

Mr. Walden. And what do you make of Mr. May's suggestion that rules every 2 years should be reconsidered?

Mr. McDowell. Randy and I have agreed on a lot of things over the years, and whether two is a magic number or some other period of time, the spirit of that is that they should be renewed and reviewed often, and they should be sunsetted.

Mr. Walden. Do you think that would create too much uncertainty in the marketplace if the rules get changed every 2 years or reviewed every 2 years or 3 or 4?

Mr. McDowell. Well, however many years it would be, you know, you could make that argument certainly, but a bad rule in place isn't good for the marketplace either.

Mr. Walden. Mr. May, do you want to comment further on your suggestion.

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Mr. May. Thank you, Mr. Chairman.

And, you know, it took me a long time to be old enough not to question a Duke law professor, but now I think I have the years.

On the point you raised about the APA changing that Mr. Benjamin has raised and raised before versus making changes to the Communications Act, I just want to say this because this is an important point that has reoccurred: The APA sets minimum requirements for Federal agencies subject to it, which are most Federal agencies, including the FCC. But, in many agencies, there are different procedural requirements that Congress has adopted. The FTC, EPA, OSHA, they all have different procedural requirements because they do different things, and they have different subjects and issues.

And, in this particular case, aside from the differences in the FCC's jurisdiction, this committee has identified process failures over the last 2 years, 1 to 2 years that, in my view, are pretty substantial, which warrant addressing those.

And then I think the final thing I would say on this point is that I think there is a value sometimes in experimenting with different processes. I don't think all the agencies have to be the same. We may learn some things if these procedures are adopted that would be useful to apply to other agencies, or we may learn that they need to be adjusted, or we may learn possibly that they don't work and Congress is going to be back next year and the year after, and they can be either

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tweaked or eliminated.

But I don't -- the final thing I would say is, I don't think it is a reason not to make changes because there may possibly be litigation about some of the terms in the laws. I mean, if you take that view, then you guys wouldn't do anything up here if you are concerned that the law you adopted --

Ms. Eshoo. And gals.

Mr. May. And gals, yes. I meant that generically, Ms. Eshoo.

Mr. Walden. Let me go to this point, and that is, Mr. May, you referred to the FCC's practice of granting the staff editorial privileges in your prepared testimony. How does that longstanding practice affect Commission transparency and decisionmaking?

Mr. May. Well, I mean, to me, this is a pretty fundamental point. I mean, I have watched the grant of editorial privileges for basically three decades. My perception is it is difficult to prove empirically, but I think over time, it is more often than not -- not more often than not, but it is more common now that these editorial privileges may involve things we would consider substantive.

But the basic problem is --

Mr. Walden. Yeah. I want -- I have got 18 seconds left.

Mr. McDowell, from your experience there, talk just quickly, editorial privilege. What does that really mean in reality?

Mr. McDowell. Well, in the ideal, it means typos and cosmetic,

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not substantive changes, not like throwing in the word "not."

Mr. Walden. Or "shall."

Mr. McDowell. Or "shall," yeah, exactly.

Mr. Walden. And that does happen?

Mr. McDowell. Yeah, it has. Yeah, absolutely, it has.

Mr. Walden. All right. My time is expired.

Turn to the gentlelady from California, Ms. Eshoo, for 5 minutes.

Ms. Eshoo. Thank you, again, to the witnesses.

The current FCC process reform bill language provides for a delay -- and I mentioned that in my opening statement in -- the implementation of the FCC Collaboration Act. Now, given the widespread support, and it has been already touched on in your testimony, the support for the reform, do you think that such a delay is necessary? We say it is great. It is important. We should move ahead with it. We embrace it. We support it. We endorse it, but we are going to delay it. So tell me what you think.

Mr. May. Thank you, Ms. Eshoo. And I apologize for the reference to "guys."

Ms. Eshoo. That is all right.

Mr. May. I meant it generically. But, look, I would say this, I am a long-time supporter of the Sunshine Act exchange.

Ms. Eshoo. I know you are.

Mr. May. I support these changes. I, myself, might go further.

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Ms. Eshoo. But do you think it should be delayed?

Mr. May. I think this should be done together for this simple reason, that when you look at all these changes, they all relate to how the Sunshine Act works in terms of advance publication of notices, what you do afterwards. So I would do them all together. That would be my preference.

Ms. Eshoo. Thank you.

Mr. Benjamin. I personally don't see any reason for delay only because this is the only issue on which I believe every single administrative lawyer in the country -- well, 99.8 percent would agree.

Ms. Eshoo. That is pretty good, uh-huh.

Mr. Benjamin. It is hard to think of anything that has more unanimity than that. The Government Sunshine Act has had unintended consequences, producing, as far as I can tell, the only benefit of which is more discussions of the Nationals.

Ms. Eshoo. Exactly.

Commissioner McDowell.

Mr. McDowell. That can be a good thing. They were the best team in the National League last year.

Mr. Benjamin. But they didn't go anywhere.

Mr. McDowell. Playoffs will fix that.

So, in an ideal world, we would want these things to be done as



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quickly as possible. Obviously, there is, you know, other circumstances in reality that prevent that sometimes.

Ms. Eshoo. But do you think it should -- shouldn't be delayed?

Mr. McDowell. In the ideal, no.

Ms. Eshoo. Exactly, uh-huh.

Mr. Benjamin, are there any statutory changes that you think are necessary to improve efficiency at the Commission?

Mr. Benjamin. "Necessary," you know, is a tough word. I don't think much is necessary, so, you know, as a high enough hurdle, that nothing jumps out at me that I would call -- that I would think, boy, you absolutely have to do this.

Ms. Eshoo. Uh-huh. Under Representative Latta's bill, it is my understanding that a list of all the delegated items, including routine application, processing, noncontroversial public notices, would have to be publicly produced 48 hours before the bureau is allowed to act.

Now, we heard 2 weeks ago that the Commission literally makes hundreds of thousands of delegated authority decisions on a yearly basis. We had a lot of conversation about this at the last hearing. How do you think this new requirement would impact the Commission's work?

And I think, Commissioner McDowell, you probably want to lean in on this. And what do you think the cost impacts would be?

Mr. McDowell. Actually, I think the cost impacts, to start with

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that, would be minimal. You know, the staff is already working on those matters, right, so by merely kind of listing them on the Web site, you know. As the FCC's IT system improves hopefully, it should be an incremental cost, if any additional cost. And, actually, it improves transparency. I don't think it would be a burden on the staff at all. They are already working on it.

Ms. Eshoo. Thank you very much.

In the interest of time, Mr. Chairman, I am going to yield back, but just one comment. I think given what our three witnesses, how they responded to my question about the Collaboration Act and delay, that we shouldn't delay.

So I yield back. Thank you.

Mr. Walden. Appreciate that.

And I think the FCC already produces its Daily Digest of all those, doesn't it?

Mr. McDowell. The Daily Digest is about actions that have happened, and it is not about everything that goes on at the Commission necessarily.

Mr. Walden. All right. Mr. Latta, we will turn to you for 5 minutes.

Mr. Latta. Well, thank you, Mr. Chairman.

And, again, to our witnesses, thanks very much for appearing today.

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Mr. McDowell, if I may, over the past several Congresses, I have introduced legislation that would require the FCC to conduct cost-benefit analysis at the time of a notice for proposed rulemaking and again at the time of the final rule issued. I believe that a cost-benefit analysis will provide the public with a transparent monetary impact of the FCC rules. Additionally, under the APA, other agencies already determine a cost-benefit analysis of the rules.

Do you think that the FCC should be held to the same standard? And do you also believe it would be an advantage for the Commissioner to have a better understanding what cost and benefits are of an action before they even take action on a vote?

Mr. McDowell. Absolutely. And something I called for for years as a Commissioner as well. I think it is just a matter of good government to know what are the costs of the proposed rules. There are similar statutes already in place, Paperwork Reduction Act, the Regulatory Flexibility Act, but they are not quite the same as what you are proposing. And I think what you are proposing actually makes it clearer and would make the agency more accountable for its actions if it knows that the rules it is about to impose or going to impose cost.

So I think that could only be a benefit. Sometimes rules need to be put in place, but let's understand exactly what the effects and the side effects might be.

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Mr. Benjamin. Can I jump in on that?

Mr. Latta. Mr. Benjamin, go right ahead.

Mr. Benjamin. So there is a bill that Senator Portman introduced in the previous Congress, the Independent Agency Regulatory Analysis Act, that would have all independent agencies' regulations be run through OIRA or just like executive agencies. So it would be the same process. For what it is worth, I will just say, strikes me as a great idea to have everything subject to cost-benefit analysis.

Mr. Latta. Well, thank you very much.

Mr. Chairman, in the interest of time, since I think we are voting, I will yield back.

Mr. Walden. Gentleman yields back.

Recognize gentleman from Vermont.

Mr. Welch. Well, we have votes, but two things: One, I want to thank the chair and the ranking member for having this hearing. Number two, I really think this is an area where we should try to make what changes will help the organization function better. And we have got tremendous witnesses here who have given us some concrete suggestions. And I am all in on trying to implement some of these changes to make it work better.

We should be spending our times having the debate about policy and being, in my view, as accommodating to folks who have responsibility to run these institutions so that they have the equipment they need,

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they have procedures in place, and that they can do the tough job we give them as efficiently as possible.

So thanks for you and Ms. Eshoo for having this hearing.

And thank you for the witnesses coming here and really appreciate the benefit of your experience and advice.

Mr. Walden. I think that we are in the middle of votes, and we are going to be probably an hour plus. So I think we probably move to adjourn. I don't know if any members -- this is the last votes of the day, so I would be surprised if we had too many come back.

I think that is what we will do is that, rather than hold you all here with the hopes someone comes back on a go-away day and the last votes, I think what we will do is ask you to respond to written questions as submitted by our colleagues and ourselves.

We very much value your testimony, your counsel. You bring years of really important experience to the table. We have listened to your past suggestions and tried to incorporate those, and we will listen to these as well and plan to move forward.

So thank you very much.

And, with that, the subcommittee stands adjourned.

[Whereupon, at 10:06 a.m., the subcommittee was adjourned.]