The Free State Foundation

[redacted]

June 12, 2015

The Honorable Greg Walden
Chairman
Subcommittee on Communications and Technology
2125 Rayburn House Office Building
Washington, DC 20515-6115

Dear Chairman Walden:

Enclosed pleased find my Responses to the Questions for the Record in connection with the hearing on May 15, 2015, entitled, "FCC Authorization: Improving Commission Transparency Part II."

Thanks again for inviting me to testify at this important hearing. Of course, if you or other Members should have any other questions, please do not hesitate to contact me.

Sincerely,

Randolph J. May
President
The Free State Foundation

cc: The Honorable Anna Eshoo
Charlotte Savercool

RESPONSES OF RANDOLPH MAY TO QUESTIONS FOR THE RECORD

Hearing on "FCC AUTHORIZATION: IMNPROVING COMMISSION TRANSPARENCY PART II" – May 15, 2015

The Honorable Greg Walden

1. My May, you mention in your written testimony Recommendations of the Administrative Conference of the U.S. that you suggest are relevant. Would you please elaborate on the Recommendation?

Response: At the top of the home page of the ACUS website is a quote from President Barack Obama: "ACUS is a public-private partnership designed to make government work better." As a Public Member of the Administrative Conference of the United States, I can say that this is an accurate statement of ACUS's mission.

ACUS Recommendation 2014-2, entitled "Government in the Sunshine Act," was adopted June 5, 2014, by the full Assembly of the Administrative Conference of the U.S.[1] The Recommendation is intended to highlight a number of "best practices" undertaken by agencies, like the Federal Communications Commission, that are subject to the Sunshine Act and to encourage others to consider and implement these best practices as appropriate. Recommendation 2014-2 is especially relevant to the Subcommittee's transparency reform efforts:

> For open meetings, covered agencies should post a meeting agenda on their websites as far in advance of the meeting as possible. **Except for documents that may be exempt from disclosure under the Freedom of Information Act, agencies should also post in advance all documents to be considered during the meeting.** When an agency cannot post non-exempt meeting documents in advance, it should do so not later than the start of the meeting or in a timely manner after the meeting has occurred. (Emphasis added.)

While the Recommendation does not suggest how far in advance the documents to be considered at the meeting should be publicly posted, it does indicate, as a best practice, that they should be posted in advance.

The Research Report accompanying the Recommendation found, upon the basis of a survey of the ACUS-coordinated Council of Independent Regulatory Agencies (CIRA), that many independent agency officials pointed to the electronic posting of agency documents relevant to open meetings as worthwhile, in the same way that all documents, including drafts, working papers, and agenda items, which are prepared for consideration by Federal Advisory Committees, must be made available for public inspection. With respect to matters to be considered at a Sunshine meeting, the Research Report states:

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[1] ACUS Recommendation 2014-2 may be accessed at: https://www.acus.gov/recommendation/government-sunshine-act

> Documents that agencies post in connection with open meetings include the following: meeting notices (including Federal Register notices announcing upcoming meetings), press releases, meeting agendas, **staff memoranda to be considered at meetings**, meeting transcripts and/or minutes, public comments received by the agency, and background documents needed to comprehend the meeting discussions (e.g., briefs and copies of relevant past decisions for an adjudication undertaken by a multi-member agency).

Thus, consistent with the ACUS Recommendation 2014-2, staff memoranda, public comments, and other background documents to be addressed at the meeting, including the draft agenda item to be considered by the Commissioners at FCC Sunshine meetings, should be released in advance of the meeting, preferably providing interested parties sufficient time to review the materials and analyze the issues to be addressed at the meeting.[2]

The Honorable Brett Guthrie

1. You referred to the FCC's practice of granting the staff "editorial privileges" in your prepared testimony. How does that longstanding practice affect transparency and decision-making?

Response: To the extent that the granting of "editorial privileges" to the staff results only in what generally would be understood to be correcting typos, syntax or other grammatical errors, and the like, the practice would not raise questions implicating transparency and decision-making. But to the extent the grant of editorial privileges actually results in what generally would be understood to be substantive changes (ie., changes that possibly could be construed in one way or the other to impact legal rights and obligations of parties affected by the Commission's decision), then questions concerning transparency and decision-making are implicated.

First, if the exercise of editorial privileges results in substantive changes that could be construed in a way that might affect legal rights and obligations of persons impacted by the Commission's decision, then the agency's decision was not actually determined at the Sunshine Act meeting as required by the Act. Rather, it fact, the determination was reached outside of the confines of a Sunshine meeting. Indeed, if the Commission's staff actually makes substantive changes, then the decision ultimately released to the public is not necessarily the decision of the Commissioners that are empowered to vote on agency matters.

Second, under these circumstances, with the staff making changes to a decision supposedly adopted at a Sunshine meeting, the Commission's decision-making process suffers from a lack of transparency.

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[2] The Research Report may be accessed at: https://www.acus.gov/sites/default/files/documents/Government%20in%20the%20Sunshine%20Act%20Draft%20Report%20REVISED%205-7-14.pdf.

Again, the use of "editorial privileges" to make changes that generally would be understood to be non-substantive is not especially problematical. But in light of legitimate concerns regarding the occasional abuse of the FCC's ubiquitous grant of "editorial privileges" to the staff at the time of adoption of every agenda item, there should be some action-forcing publication requirement to help ensure that the item before the Commission at the time of a vote, in all material substantive respects, is the order or rule that, per the vote, will become the official final agency action. If this is not the case, than the very purpose of the Sunshine Act is vitiated – if not violated – for the public is not actually witnessing a vote on the actual agency item. Requiring that all items voted on by the Commission be released to the public promptly, say, within two days, would diminish (but not necessarily eliminate) the likelihood that editorial privileges were used to alter the substantive meaning of an item.[3]

[3] I have been a long-standing proponent of revising the Sunshine Act to allow some form of collaborative discussions among agency decision-makers outside of the context of a formal Sunshine meeting, and I chaired a Special Committee of the Administrative Conference of the U.S. that made such a recommendation in 1995. See Randolph J. May, *Reforming the Sunshine Act*, Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act, 49 ADMIN. L. REV. 415 (1997). Nothing in my support for revising the Sunshine Act to allow pre-Sunshine meeting collaborative discussions among agency Commissioners is inconsistent with the transparency reforms discussed herein. Indeed, implementation of transparency requirements associated with the actual conduct of the Sunshine meeting, such as advance disclosure of the draft item to be considered and a prompt publication requirement for the item adopted, are likely to broaden support for allowing pre-meeting collaborative discussions along the lines proposed in the House Commerce Committee's "FCC Process Reform Act."

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