



May 18, 2015

TO: Members, Subcommittee on Communications and Technology

FROM: Committee Majority Staff

RE: Subcommittee Markup

I. INTRODUCTION

The Subcommittee on Communications and Technology will meet in open markup session on Wednesday, May 20, 2015, in 2123 Rayburn House Office Building. The Subcommittee will convene at 2:00 p.m. to consider the following:

- H.R. ____, **The FCC Process Reform Act of 2015;**
- H.R. ____, **A bill to amend the Communications Act of 1934 to require the Federal Communications Commission to publish on its Internet website changes to the rules of the Commission not later than 24 hours after adoption;**
- H.R. ____, **A bill to amend the Communications Act of 1934 to require the Federal Communications Commission to publish on the website of the Commission documents to be voted on by the Commission;**
- H.R. ____, **A bill to amend the Communications Act of 1934 to require identification and description on the website of the Federal Communications Commission of items to be decided on authority delegated by the Commission;**
- H.R. ____, **A bill to direct the Federal Communications Commission to submit to Congress a report on improving the participation of small businesses in the proceedings of the Commission;**
- H.R. ____, **A bill to amend the Communications Act of 1934 to provide for a quarterly report on pending requests for action by the Federal Communications Commission and pending congressional investigations of the Commission; and,**
- H.R. ____, **A bill to amend the Communications Act of 1934 to provide for publication on the Internet website of the Federal Communications Commission of certain policies and procedures established by the chairman of the Commission.**

In keeping with Chairman Upton's announced policy, Members must submit any amendments they may have two hours before they are offered during this markup. Members may submit amendments by email to peter.kielty@mail.house.gov. Any information with

respect to an amendment's parliamentary standing (e.g., its germaneness) should be submitted at this time as well.

II. Background

The Subcommittee has long examined/considered reform of the rulemaking process at the Federal Communications Commission (FCC). Members on both sides of the aisle have questioned lapses in process, such as unexplained delays in disposition of matters, unequal access to information, unusual procedures, and the exercise of discretion on the part of FCC Chairmen. While the FCC has sought to reform itself, Congressional action is the appropriate solution for establishing reasonable parameters to ensure a transparent process. As a result, several members of the Subcommittee have offered separate bills to address a variety of process failures at the FCC. Additionally, Chairman Walden and Ranking Member Eshoo plan to re-introduce the FCC Process Reform Act, which would require the FCC to engage in reform of its rulemaking procedures.

III. Current Law

The FCC derives its process from two primary legal sources: the authorities granted in Communications Act of 1934,¹ which dictates the structure, composition, and responsibilities of the Commission, and the dictates of the Administrative Procedure Act of 1946 (APA), which generally governs how agencies issue regulations.² The APA ensures that agencies inform the public about the existing rules and rules in development (transparency) and that the public has the opportunity to participate or comment in the agency's rulemaking process (due process). Agencies generally are granted substantial flexibility to implement their regulatory mandates.

The FCC largely tracks the APA requirements for informal rulemaking, but as an independent agency, it is often exempt from additional Executive Orders and other portions of administrative law that apply only to the executive branch. Additionally, the Communications Act of 1934 provides some requirements that may depart from the specific requirements of the APA. For example, the FCC is not subject to the Executive Order that requires cost-benefit analyses, nor is it required to comply with the Unfunded Mandates Act.

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

¹ See Title 47 of the U.S. Code.

² See 5 USC § 551, *et seq.*

The Chairman of the Commission is considered the “CEO” of the Commission and may dictate procedures for carrying out Commission business.³ As a result, the Chairman manages the staff of the entire agency (other than those in the offices of the other Commissioners) including the General Counsel and the Inspector General, determines which policy matters will be considered and when they will be considered, and controls the availability of information to the public and to other Commissioners. In most circumstances, the public may not review Orders or other documents that the Commission will vote upon at the next Open Meeting unless the Chairman elects to make them available. In many circumstances, the public also will not have access to the newly voted rules until Commission staff has finished post-vote editing of the document.

The FCC maintains a number of materials that provide guidance on compliance with the APA and other statutes related to administrative process, but they are not generally available to the public. Also, it does not appear that the FCC maintains standard operating manuals for basic Commission decision-making functions, such as procedures for providing information to the offices of other Commissioners for agenda items, as recommended by the GAO.⁴ This stands in contrast to other independent agencies, some of which have posted their rules and procedures on the Internet for review by the public.⁵ The limited information available on the FCC’s procedures impedes the public’s ability to determine whether the agency is functioning effectively.

IV. Summary of Legislations

A. H.R. ____, The FCC Process Reform Act of 2015

Section 1. Provides for the short title of the bill to be “The FCC Process Reform Act of 2015.”

Section 2(a). Section 2(a) inserts after section 12 of the Communications Act of 1934 a new section, section 13, Transparency and Efficiency.

Section 13(a) Initial Rulemaking and Inquiry.

This subsection requires the FCC to conduct a notice and comment rulemaking and adopt rules to (1) set minimum comment and reply comment periods for rulemaking proceedings; (2) establish policies concerning extensive comments toward the end of a comment period; (3) establish policies to ensure that the public has time to review material submitted in a proceeding after the comment cycle has closed; (4) publish the status of open rulemakings as well as list the draft items the commissioners are currently considering; (5) establish deadlines for action on

³ See 47 U.S.C. § 155(a) (stating “The member of the Commission designated by the President as chairman shall be the chief executive officer of the Commission”).

⁴ See GAO Report 10-79, p. 2.

⁵ See, e.g., NRC Procedures <http://www.nrc.gov/about-nrc/policy-making/internal.html>; FTC Procedures <https://www.ftc.gov/about-ftc/foia/foia-resources/ftc-administrative-staff-manuals>

certain filings to the Commission and its bureaus; (6) establish guidelines for the disposition of petitions for declaratory ruling; (7) establish procedures for including the specific text of proposed rules in Commission Notice of Proposed Rule Makings (NPRM); and (8) to require the development of performance measures for FCC program activities, defined as each FCC program listed in the Federal budget or each program through which the FCC collects or distributes \$100 million or more.

Section 13(a) also requires the Commission to seek public comment on a notice of inquiry into whether and how the Commission should (1) allow a bipartisan majority of Commissioners to add an item to the Commission's agenda; (2) inform Commissioners of all options available on a given Commission item; (3) ensure that Commissioners have adequate time to review the text of Commission items; publish the text of items for Commission consideration prior to Commission vote; (4) establish deadlines for the processing of applications for licenses; (5) generate additional resources for the processing of applications; and (6) publish Commission decisions within 30 days of adoption.

Section 13(b) Periodic Review.

This subsection requires the FCC to conduct a rulemaking to review the rules established in subsection 13(a) every five years.

Section 13(c) Nonpublic Collaborative Discussions.

This subsection allows a bipartisan majority of Commissioners to meet for collaborative discussions if they disclose such meetings within two business days and comply with Office of General Counsel oversight. This subsection also applies to meetings of Federal-State Joint Boards.

Section 13(d) Access to Certain Information on the Commission's Website.

This subsection requires the FCC to provide links on the Commission's home page to the current budget, appropriations, number of full-time equivalent employees, and the Commission's performance plan.

Section 13(e) Federal Register Publication.

This subsection requires the FCC to publish the documents specified in the Federal Register no later than 45 days after release of the document or the day specified under any other provision of law.

Section 13(f) Consumer Complaint Database.

This subsection requires the FCC to put consumer complaint information in a publicly available, searchable database on its website.

Section 13(g) Form of Publication.

This subsection requires the FCC to publish documents specified in this section on its website.

Section 13(h) Transparency Relating to Performance in Meeting FOIA Requirements.

This subsection requires the FCC to take additional steps to inform the public about its performance in meeting the disclosure requirements of the Freedom of Information Act.

Section 13(i) Prompt Release of Statistical Reports and Reports to Congress.

This subsection requires the FCC to establish a schedule for the release of its required reports.

Section 13(j) Annual Scorecard.

This subsection requires the FCC to report annually regarding its performance in meeting the deadlines and guideline established in subsection (a), as well as how the Commission has used administrative law judges and independent studies.

Section 13(k) Definitions.

This subsection defines several terms used in the Act, including “performance measure” and “program activity.”

Section 2(b). Section 2(b) requires the Commission to adopt rules implementing new section 13 no later than one year after the date of enactment and delays the implementation of the non-public collaborative discussion provisions until all rules required by section 13 have taken effect.

Section 3. Section 3 prohibits the FCC from categorizing inquiries or complaints under the Telephone Consumer Protection Act as wireline or wireless inquiries or complaints unless the complaint or inquiry originated from the conduct of a wireline or wireless carrier.

Section 4. Section 4 specifies that the Act does not alter the general framework established by the Administrative Procedures Act and related laws, except where it does so explicitly (i.e., allowing deliberative collaboration among Commissioners and on the Federal-State Joint Boards).

Section 5. Section 5 creates a waiver of the Antideficiency Act for the Federal Universal Service Fund through December 31, 2020. The Universal Service Fund has been subject to a series of temporary waivers since 2004.

B. H.R. ____, A bill to amend the Communications Act of 1934 to require the Federal Communications Commission to publish on its Internet website changes to the rules of the Commission not later than 24 hours after adoption

This draft bill requires the FCC to make available on its website any changes made to its rules, as codified in the Code of Federal Regulations within 24 hours of adoption. Current law does not set a time by which the Commission must make text publicly available. Under the terms of the draft bill staff may continue to revise the explanatory text of the item as necessary and permitted by law to accommodate arguments as raised by any dissenting commissioners. The bill provides the Commission with 30 days after its enactment to implement this new procedure.

C. H.R. ____, A bill to amend the Communications Act of 1934 to require the Federal Communications Commission to publish on the website of the Commission documents to be voted on by the Commission

This draft bill requires the Chairman to publish the draft items the circulated to Commissioners for vote within 24 hours of circulation. Current Commission rules require the Chairman to provide draft copies of items the Chairman intends to bring up for a vote at an open Commission meeting 21 days before the meet. The draft bill mirrors that 21-day period in its provision that prohibits the Commission from voting to adopt an item for 21 days in the event of a failure to post the document within the 24 hours allowed. The draft bill also permits edits to the draft over the course of the Commissions' deliberations between circulation and the open meeting. The provision also draws on Sunshine in Government and FOIA jurisprudence to exempt certain material from publication.

D. H.R. ____, A bill to amend the Communications Act of 1934 to require identification and description on the website of the Federal Communications Commission of items to be decided on authority delegated by the Commission

Under the terms of the Communications Act of 1934, the Chairman of the FCC may delegate authority for the routine actions of the Commission to be taken by the staff of the Commission without a Commission vote. This draft bill requires the Chairman to publish a list of items being adopted on delegated authority 48 hours before the items are adopted.

E. H.R. ____, A bill to direct the Federal Communications Commission to submit to Congress a report on improving the participation of small businesses in the proceedings of the Commission

This draft bill requires the FCC to consult with the Small Business Administration and to produce a report that details actions the Commission and Congress can take to improve the participation of small businesses in the Commission's proceedings.

F. H.R. ____, A bill to amend the Communications Act of 1934 to provide for a quarterly report on pending requests for action by the Federal Communications Commission and pending congressional investigations of the Commission

This draft bill requires the FCC to report quarterly to Congress on the number of requests for action (petitions, applications, complaints, etc.) pending at the FCC at the close of the quarter. Currently, absent a congressional request for such information, the Commission does not routinely compile and publish this data. The report would also contain a list of congressional oversight requests and the costs associated with compliance with the requests.

G. H.R. _____, A bill to amend the Communications Act of 1934 to provide for publication on the Internet website of the Federal Communications Commission of certain policies and procedures established by the chairman of the Commission

This draft bill would require the Chairman of the FCC to post the rules for the functioning of the Commission and the FCC agenda process on the Commission's website. Currently, the rules that govern the functioning of the Commission, including the agenda process, are not available to the public.

V. STAFF CONTACTS

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