

Statement of the Honorable Greg Walden
Chairman, Subcommittee on Communications and Technology
Mark-up of H.R. 452, H.R. 3309, and H.R. 3310
March 6, 2012

(As Submitted for the Record)

Thank you, Chairman Upton, for scheduling this markup on two products of the Communications and Technology Subcommittee: the FCC Process Reform Act, which Mr. Kinzinger and I introduced back in November, and Mr. Scalise's FCC Consolidated Reporting Act.

The communications and technology sector is the most competitive, innovative, and open sector of our economy. From fiber optics to 4G wireless service, from the smartphone to the tablet to the connected TV, this sector has been creating new services and new devices—and the high-quality jobs that come with high-tech innovation and investment—despite the economic doldrums our country is caught in. Communications and technology companies and the public deserve the most transparent and responsive government agency, and that's exactly what these bills are about: Bringing transparency and accountability to the Federal Communications Commission.

These bills are the fruits of the Subcommittee's own ten-month, open and transparent legislative process. Last May, we invited the Commissioners to testify about improving the FCC's processes, and we heard from them about the process problems that have occurred at the agency under both parties. In June, Subcommittee staff released a discussion draft, and we held a legislative hearing with a diverse panel of experts—representing industry, think tanks, consumer groups, academia, and the states. In response to the views presented at the hearing, as well as additional input from stakeholders and colleagues on both sides of the aisle, we refined the draft legislation. And in November, the Subcommittee marked up the legislation with full consideration of amendments from both sides of the aisle.

In large part, the FCC Process Reform Act asks the FCC to go through a process similar to what we've gone through in crafting it, and to implement some of the reforms that the House itself adopted just last year.

Now some argue that the FCC doesn't merit special attention. Hogwash. This is the agency that filed more than a hundred documents, spanning thousands of pages, in the weeks before the record closed in its Universal Service Fund proceeding—some submitted just two days before that record closed. This is the agency that had a backlog of 4,984 petitions, 3,950 license applications, and more than a million consumer complaints at the end of last year. This is the agency that hasn't produced an annual satellite competition report or an annual video competition report in years, but claims that it doesn't need to survey the industry before adopting new regulations for these providers. This is the agency that still hasn't wrapped up its 2010 quadrennial review on media ownership.

I ask my colleagues on both sides of the aisle: Is this how you think a federal agency should be run? Should small businesses simply wait years for the agency to make a decision with no guidance on when it is coming? Should taxpayers just trust the agency to spend billions of federal funds on programs without any performance measures to assure accountability?

Some argued at the Subcommittee that the FCC is already subject to the Administrative Procedure Act and fixing its processes through legislation will invite litigation. I don't see why that's the case. The legislation draws its terms from Executive Orders going back to President Reagan, the Government Performance Results Act, and well established judicial precedent. And we've primarily asked the FCC to implement the legislation through its own rulemaking process, making the courts more likely to defer to the FCC's interpretation. I'm not worried about litigation.

There's another argument I've heard that particularly confuses me—that we're fundamentally changing the way the Commission reviews transactions. This legislation does not change the public interest standard that the FCC uses to approve or deny a merger. Period. If the FCC determines that a merger of two media companies is against the public interest, it can deny it. If that merger threatens competition, the FCC can adopt conditions to protect smaller competitors. If that merger threatens localism or a diversity of voices, the FCC can accept commitments tailored to protect these First Amendment values.

But I don't understand why anyone thinks the last-minute side deals the agency makes today are a good idea. The agency calls these side deals "voluntary commitments." In my mind, they are anything-but-voluntary commitments. And I'm not alone: Former White Advisor Philip Weiser has called them a recipe for ad hoc decisionmaking.

I was glad to hear at the Subcommittee that Mr. Waxman does not object to the FCC complying with President Obama's Executive Order. I was glad to hear Mr. Waxman agree that, like every executive agency that is subject to President Obama's Executive Order, the FCC should survey the industry before initiating rulemakings, should analyze costs and benefits before issuing new regulations, and should be subject to independent review of their cost-benefit analyses when issuing new major rules. But nothing binds the FCC to these good practices today, and nothing will bind them under the next administration unless we change the law. And the President's own Job Council recognized the wisdom of our approach—their 2011 "Road Map to Renewal" Report specifically recommended that Congress require independent agencies to perform cost-benefit analyses for economically significant regulatory actions.

Finally, I was glad to hear at the Subcommittee that our colleagues want to be our partners, not our opponents, on bringing transparency to the FCC. But partnership is a two-way street. We incorporated Ms. Eshoo's sunshine reforms. We incorporated the deliberative reforms advocated by Commissioner Capps. We incorporated the request of FCC officials for flexibility by largely requiring the FCC to write its own rules to implement the reforms. When Professor Ronald Levin raised concerns about the phrase "cost-benefit analysis," we copied the language from President Obama's own executive order. When the FCC raised concerns about undefined terms, we defined them. And when Democratic staff raised concerns about handcuffing the agency with our initial draft, we added safety valves and limited the scope of rulemaking reforms

to parallel the executive orders and GAO recommendations. We have solicited feedback and tried time and again to make this legislation bipartisan.

These bills are supported by the overwhelming majority of the industry including sectors that are sometimes at odds. It is a rare day that the National Association of Regulatory Utility Commissioners joins hands with CTIA, NAB, NCTA, NTCA, and USTA in support of legislation. But they have done so today.

Chairman Genachowski has shown that a good chairman can improve a broken institution. But the American public expects and deserves a transparent and accountable federal government no matter the administration. I say, let's start with the agency overseeing our most open and innovative companies; let's start with the FCC.