



November 10, 2011

MEMORANDUM

To: Members and Staff, Subcommittee on Communications and Technology

From: Majority Committee Staff

Re: Markup of H.R. 3309, the Federal Communications Commission Process Reform Act, and H.R. 3310, the Federal Communications Commission Consolidated Reporting Act

The Subcommittee will meet in open markup session November 16, 2011, at 9:00 a.m. in 2123 Rayburn House Office Building to consider H.R. 3309, the Federal Communications Commission Process Reform Act, and H.R. 3310, the Federal Communications Commission Consolidated Reporting Act.

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.

Background

The communications marketplace is one of this country's most vibrant sectors. Poor process at the Federal Communications Commission (FCC or Commission) can jeopardize that vibrancy, especially in this economy. The two bills at issue are the product of the Subcommittee's May 13, 2011, and June 22, 2011, hearings on the need to reform the processes of the Commission. Those hearings sought feedback from the FCC Chairman and Commissioners, as well as from members of industry, public interest groups, and the academic community on draft legislation. The legislation has been refined to respond to the feedback provided at the hearings as well as additional discussions with stakeholders and Members from both sides of the aisle. To avoid micromanaging the agency, many of the provisions simply require the Commission to set its own process rules and then live by them. Many of the provisions are based on principles contained in the President's January 2011 Executive Order. Because that order applies only to executive agencies, it does not bind the Commission. While Chairman Genachowski has made good progress in improving process, only statutory changes can ensure that best practices continue from one administration to the next. Moreover, even with recent progress, we have just witnessed in the Universal Service Fund proceeding further

examples of why process reform is needed. The Commission added hundreds of pages of documents into the record at the last minute, giving parties almost no time to respond. And the Commission has still not released the text of the adopted order, preventing stakeholders and the public from knowing what the Commission has done.

Section-by-Section

H.R. 3309, The Federal Communications Commission Process Reform Act

Section 1. Short Title.

Section 2. Adds section 13 to the Communications Act.

New Section 13(a)—Rulemaking Reforms. Requires the Commission to survey the marketplace before initiating a new rulemaking, with exceptions for deregulatory rulemakings and for good cause. Requires Notices of Proposed Rulemaking to follow within three years of Notices of Inquiry (to ensure that the information relied upon is current), include specific text of proposed rules, and include at least 30 days each for comments and replies. Requires adopted rules to follow within three years of Notices of Proposed Rulemaking and be a “logical outgrowth” of the proposed rules. For economically significant rules—those rules that will have an annual effect of \$100 million or more on the economy—the Commission is required to identify the problem it is trying to solve and make a reasoned determination that the benefits of the adopted rule justify its costs. Requires the Commission to develop performance measures for its program activities, defined as each program of the Commission listed in the federal budget as well as each program through which the Commission collects or distributes \$100 million or more. When possible, the Commission should adopt measures that are based on data it already collects.

New Section 13(b)—Ensuring Deliberation by Commissioners. Requires the Commission to establish internal procedures that ensure that Commissioners know the options available to the Commission, that provide Commissioners adequate time to deliberate pending orders, and that ensure time for the public to read orders before open meetings.

New Section 13(c)—Nonpublic Collaborative Discussions. 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. Also applies to meetings of Federal-State Joint Boards.

New Section 13(d)—Initiation of Orders by Bipartisan Majority. Requires the Commission to establish procedures to allow a bipartisan majority of Commissioners to direct staff to draft an order, to put such an order on the Commission’s agenda, and to require that the Commission vote on any order.

New Section 13(e)—Public Review of Reports and Ex Partes. Requires the Commission to seek public comment on reports and to establish procedures that provide the public an

opportunity to evaluate *ex parte* filings before the Commission may rely on them in its decisionmaking.

New Section 13(f)—Pending Item Publication. Requires the Commission to establish rules regarding the publication of the status of open rulemaking proceedings as well as a list of the draft items the Commissioners are currently considering.

New Section 13(g)—Shot Clocks. Requires the Commission to establish “shot clocks” that set timeframes for Commission action in each type of proceeding it oversees.

New Section 13(h)—Release of Documents and Reports. Requires the Commission to establish a schedule for the release of its required reports and to release all orders within seven days of adoption. The Commission must report to Congress whenever it misses its own deadlines.

New Section 13(i)—Biannual Scorecard. Requires the Commission to report every six months regarding its progress in meeting its shot clocks as well as how it has used administrative law judges and independent studies.

New Section 13(j)—Transaction Review Standards. Preserves the Commission’s ability to review transactions but requires conditions to be (a) narrowly tailored to remedy harms that arise as a direct result of the transaction and (b) within the Commission’s general authority. Applies same requirements to “voluntary” commitments.

New Section 13(k)—Online Publication. Requires the Commission to publish the documents and reports specified in this section on the Commission’s website.

New Section 13(l)—Definitions. Defines several terms used in the Act, including the terms “economically significant impact” and “program activity.”

Section 3. 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.*, with regard to allowing deliberative collaboration among Commissioners and on the Federal-State Joint Boards).

H.R. 3310, The Federal Communications Commission Consolidated Reporting Act

Section 1. Short Title.

Section 2. Adds section 13 to the Communications Act.

New Section 13(a)—Communications Marketplace Report. Requires the Commission to publish and submit to Congress a communications marketplace report synched to the two-year Congressional cycle.

New Section 13(b)—Contents. Requires the Commission to assess the state of competition in the communications marketplace, the state of deployment including the deployment of advanced telecommunications capability, and regulatory barriers to market entry and competitive expansion. Requires the Commission to identify the issues it plans to address over the next two years as a result of this assessment and to report on its progress on those issues previously identified.

New Section 13(c)—Special Considerations. Requires the Commission to specifically consider intermodal, facilities-based, and Internet-based competition and to compile a list of geographical areas that are not served by any provider of advanced telecommunications capability. Specifically empowers the Commission to consider international and demographic data in making its assessments.

Section 3. Eliminates the ORBIT Act Report, the Satellite Competition Report, the International Broadband Data Report, the Status of Competition in the Market for the Delivery of Video Programming Report, the Report on Cable Industry Prices, the Triennial Report Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, the Section 706 Report, and the Report on the State of Competitive Market Conditions With Respect to Commercial Mobile Radio Services, all of which are consolidated into the Communications Marketplace Report. Also strikes from the Communications Act outdated or already repealed reports, including the Report on Competition between Wire Telephone and Wire Telegraph Providers, the 1997 Report on Spectrum Auctions, and several reports repealed by the Federal Reports Elimination and Sunset Act of 1995.

Section 4. Specifies that this Act does not alter the authority of the Commission in any way.

If you need more information, please call David Redl or Nick Degani at 5-2927.