

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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February 23, 2015

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Mr. Chairman:

I am disappointed by your decision not to participate in a hearing before the Committee prior to a vote by the Federal Communications Commission on unprecedented changes to how the Internet is regulated.¹ Throughout this process, the FCC has failed to establish the appearance this rulemaking is independent, fair, and transparent. Although arguably one of the most sweeping new rules in the Commission's history, the process was conducted without using many of the tools at the Chairman's disposal to ensure transparency and public review. Your testimony may help allay concerns that the draft rules are the product of an insufficiently transparent and accountable rulemaking process; I urge you to reconsider your decision.

The Communications Act of 1934 grants the Chairman of the FCC authority to act as the Commission's Chief Executive Officer. As such, it is at the Chairman's discretion that votes are scheduled and delayed, draft rules made public, and the comment periods provided.² Yet, with regard to this 332-page order, there were no public hearings,³ the document remains secret, no comment period existed, and you declined to testify in an open hearing before the Committee. In addition to these concerns, questions exist as to whether the White House had an improper influence on the Commission's drafting of these rule changes. These concerns were heightened by reports over the weekend that the emails exchanged between you and the White House

¹ Letter from Tom Wheeler, Chairman, Federal Communications Commission, to Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov't Reform, Feb. 20, 2015.

² See, e.g., Communications Act of 1934, 47 U.S.C. 155(a).

³ While the Commission did sponsor six staff-led "roundtable discussions" in its Washington, DC headquarters regarding the May 2014 Notice of Proposed Rulemaking, these discussions did not concern the February 2015 draft order. Furthermore, such informal events are distinguished from public field hearings held before the full Commission. Compare Open Internet Roundtables, Federal Communications Commission, available at <http://www.fcc.gov/open-internet-roundtables>, with Public Hearings on Media Ownership Issues, Federal Communications Commission, available at <http://transition.fcc.gov/ownership/hearings.html>.

represent “unprecedented coordination.”⁴ On February 6, 2015, the Committee requested documents in pursuit of this investigation, yet Friday’s deadline passed without the documents being produced.

The American people deserve – and have requested – an open and transparent FCC process. Recent polls show that 73 percent of Americans want greater disclosure of the details of the FCC’s proposal to regulate the Internet, and nearly eight in ten favor public disclosure of the exact wording and details of the proposal before the FCC votes on it.⁵ Indeed, Commissioners Ajit Pai and Michael O’Rielly just today called for exactly this – the public release of the 332-page order and a temporary delay of the vote.⁶ Nonetheless, citing past Commission practice, you refused to publicly release the text of the 332-page draft order.⁷ In a past rulemaking of similar magnitude, however, the Chairman did publicly release the rule prior to a vote. This was done in response to congressional requests, including calls from then-Senator Barack Obama. In fact, the rulemaking process demonstrated in the drafting and consideration of media ownership rules in 2003 and 2007 illustrated far greater transparency in pursuit of public interest than the process being carried out today.

In 2003, pursuant to a biennial review of the FCC’s media ownership rules, Chairman Michael Powell ordered consideration of major revisions to media ownership regulations. Commissioners Michael Copps and Jonathan Adelstein requested a postponement of the vote, arguing that additional time was needed to examine the impact of the changes on the public interest.⁸ They further called for a “public airing” of the proposed changes before the vote.⁹ Chairman Powell declined these requests, and on June 2, 2003, the Commission adopted a Report and Order and Notice of Proposed Rulemaking.¹⁰ Stakeholders immediately sued, and a year later, the U.S. Court of Appeals for the Third Circuit remanded the Order.¹¹ The Court found the Order was insufficiently justified and inadequately supported by the record.¹²

Following remand, the Commission initiated another review of its media ownership rules. At the direction of then-Chairman Kevin Martin, the FCC labored to make this process more transparent and allow for greater public input. Chairman Martin issued a notice of proposed rulemaking in July 2006, and opened a 167-day public comment period. Over the next 18

⁴ Lynn Stanton, *Chaffetz Seeks Unredacted Emails With White House on Net Neutrality*, TRDAILY, Feb. 20, 2015.

⁵ Press Release, Progressive Policy Institute, *New Survey Finds Americans Skeptical that FCC Regulation of the Internet Will Be Helpful; Favor More Disclosure* (Feb. 19, 2015).

⁶ Press Release, Statement of FCC Commissioners Ajit Pai and Mike O’Rielly Requesting Public Release of Internet Regulation Plan and Temporary Delay of Vote (Feb. 23, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-332168A1.pdf.

⁷ Letter from Tom Wheeler, Chairman, Federal Communications Commission, to Sen. John Thune, Rep. Fred Upton, and Rep. Greg Walden, Feb. 2, 2015, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0212/DOC-332047A1.pdf.

⁸ Press Release, FCC Commissioners Adelstein and Copps Call for Public Airing of Media Concentration Rules, (May 13, 2003).

⁹ *Id.*

¹⁰ Report and Order and Notice of Proposed Rulemaking, July 2, 2003, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-03-127A1.pdf.

¹¹ *Prometheus Radio Project v. FCC*, 373 F. 3d 372, 382 (3d Cir. 2004).

¹² *Id.*

months the Commission held eight public hearings, authorized ten independent studies, and accepted hundreds of thousands of public comments.¹³

Notwithstanding these efforts, many Members of Congress argued the Commission should be even more transparent. At a September 2007 public hearing in Chicago, Senator Obama submitted a statement that he “strongly requested” the FCC “put out any changes that they intend to vote on in a new notice of proposed rulemaking.”¹⁴ A month later, in a letter to Chairman Martin, Senator Obama argued that both the “proposed timeline and process are irresponsible.”¹⁵ He specifically noted while a certain proposal “may pass the muster of a federal court, Congress and the public have the right to review any specific proposal and decide whether or not it constitutes sound policy. And the commission has the responsibility to defend any new proposal in public discourse and debate.”¹⁶ The following month Senator Obama cosponsored bipartisan legislation to block the Commission’s vote on the rulemaking, pursuant to a 90-day comment period.¹⁷

In response to these criticisms, and less than one week later, Chairman Martin publicly released the proposed changes and opened a four-week comment period. As he would later explain it:

Although not required, I took the unusual step of sharing with the public the actual text of the one rule I thought we should amend. Because of the intensely controversial nature of the media ownership proceeding and my desire for an open and transparent process, I wanted to ensure that Members of Congress and the public had the opportunity to review my proposal prior to any Commission action.¹⁸

In a further effort to solicit input from Congress and the American public, all five FCC Commissioners testified before the House Committee on Energy and Commerce on December 5, 2007. Chairman John Dingell lamented that, “we have heard too many tales of short-circuited decision-making processes . . . [t]he victim in this breakdown is a fair, open, and transparent regulatory process.”¹⁹ Telecommunications and the Internet Subcommittee Chairman Ed

¹³ *Oversight of the Federal Communications Commission: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 110th Cong. 93 (2007) (response to written questions submitted by Sen. Byron Dorgan to FCC Chairman Kevin Martin).

¹⁴ John Eggerton, *Obama Calls for Tighter FCC Regulation of Broadcasting*, BROADCASTING & CABLE, Sept. 20, 2007.

¹⁵ Letter from Sen. Barack Obama to Kevin Martin, Chairman, Federal Communications Commission, Oct. 22, 2007.

¹⁶ *Id.*

¹⁷ S. COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, 110TH CONG., REPORT ON THE MEDIA OWNERSHIP ACT OF 2007 (COMM. PRINT 2007), available at <http://www.gpo.gov/fdsys/pkg/CRPT-110srpt461/pdf/CRPT-110srpt461.pdf>.

¹⁸ Report and Order and Order on Reconsideration, Federal Communications Commission at 100, available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-07-216A1.pdf.

¹⁹ *Oversight of the Federal Communications Commission: Media Ownership: Hearing before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 110th Cong. 7 (opening statement of Chairman John Dingell).

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Markey, while praising the FCC for only proceeding after “months of public and corporate input and several public hearings around the country,” nonetheless urged delay, so as to provide further opportunities for public participation.²⁰ A week later, all five Commissioners again testified before the Senate Commerce Committee.²¹ Chairman Daniel Inouye was concise and unequivocal: “a transparent regulatory process is essential.”²²

The Commission proceeded with the vote on the rule change as scheduled – but only after conducting many public hearings, publishing the proposed changes, offering a public comment period, and defending the changes in congressional testimony.²³

The current drafting and scheduled vote on net neutrality rules has afforded none of these opportunities for a public airing and only raised concerns regarding the process. There is a clear lesson to be drawn from the FCC’s prior experience with the media ownership rulemakings: the federal courts, Congress, and the American people deserve an independent, transparent, and accessible regulatory process. Accordingly, I urge you to immediately make the Report and Order for “Protecting and Promoting the Open Internet” publicly available. I also urge you to reconsider and accept the invitation to testify before Congress and the American people prior to the Commission’s vote on Thursday.

Sincerely,



Jason Chaffetz
Chairman

cc: The Honorable Elijah E. Cummings
Ranking Minority Member

²⁰ *Id.* at 12 (opening statement of Subcommittee Chairman Ed Markey).

²¹ *Oversight of the Federal Communications Commission: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 110th Cong. (2007).

²² *Id.* at 1 (opening statement of Chairman Daniel Inouye).

²³ Report and Order and Order on Reconsideration, Federal Communications Commission, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-07-216A1.pdf.