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4 HEARING ON ``REFORMING FCC PROCESS''

5 WEDNESDAY, JUNE 22, 2011

6 House of Representatives,

7 Subcommittee on Communications and Technology

8 Committee on Energy and Commerce

9 Washington, D.C.

10 The subcommittee met, pursuant to call, at 10:32 a.m.,
11 in Room 2123 of the Rayburn House Office Building, Hon. Greg
12 Walden [Chairman of the Subcommittee] presiding.

13 Members present: Representatives Walden, Terry, Shimkus,
14 Bono Mack, Bilbray, Bass, Blackburn, Scalise, Latta, Guthrie,
15 Kinzinger, Barton, Upton (ex officio), Eshoo, Doyle, Barrow,
16 Christensen, Dingell, and Waxman (ex officio).

17 Staff present: Gary Andres, Staff Director; Ray Baum,
18 Senior Policy Advisor/Director of Coalitions; Michael

19 Beckerman, Deputy Staff Director; Paul Cancienne, Policy
20 Coordinator, CMT; Nicholas Degani, Detailee, FCC; Andy
21 Duberstein, Special Assistant to Chairman Upton; Neil Fried,
22 Chief Counsel, C&T; Debbie Keller, Press Secretary; Carly
23 McWilliams, Legislative Clerk; Jeff Mortier, Professional
24 Staff Member; David Redl, Counsel, Telecom; Shawn Chang,
25 Democratic Counsel; Jeff Cohen, FCC Detailee; Sarah Fisher,
26 Democratic Policy Analyst; and Roger Sherman, Democratic
27 Chief Counsel, Communications and Technology.

|
28 Mr. {Walden.} Good morning and welcome. Before I begin
29 my opening statement regarding FCC process reform that brings
30 us together here today, I just wanted to update our members
31 of the committee on the ongoing efforts on our top issue,
32 which is related to spectrum auctions and public safety
33 networks. Key staff on both sides of the aisle, along with
34 Ms. Eshoo and myself, have been meeting regularly for several
35 weeks to see if we can come together on a bipartisan
36 agreement on spectrum legislation. These talks continue to
37 make progress, and I appreciate the good faith effort on both
38 sides and especially where the real work gets done--at the
39 staff level.

40 And I think we all know and are keenly aware that time
41 is of the essence and we need to move to a conclusion at an
42 appropriate time given the needs of public safety and the
43 anniversary of 9/11. Meanwhile, though, our subcommittee can
44 walk and chew gum at the same time so we have many other
45 issues before us, including FCC process reform, which is the
46 subject of today's hearing.

47 We have before us a diverse panel of experts
48 representing industry, think tanks, consumer groups,
49 academia, and the States to testify on ways to improve the
50 transparency and accountability of the FCC. To keep our

51 discussion grounded, I have also circulated to my colleagues
52 on the subcommittee and these experts a discussion draft of
53 legislation. Again, I point out it is a discussion draft.
54 That is what we are going to have today.

55 I view that legislative language as a starting point for
56 today's conversation, and I thank all of you for your
57 thoughtful analysis of the draft legislation and your
58 testimony. I have heard from many who track these issues
59 that they appreciate actually having a ``draft'' document to
60 review from which to make more informed comments, perhaps a
61 process we could institute in certain independent agencies.
62 This is the kind of process I would like to see used more
63 often at the FCC. I look forward to you sharing your
64 thoughts and ideas about best practices for this Agency.

65 Now, at our last hearing, we heard from the FCC Chairman
66 and his fellow commissioners. They testified on what was
67 working at the FCC, recent improvements in the FCC's
68 processes, and what could still be improved. The hearing has
69 made me an optimist. Chairman Genachowski explained the
70 Agency has already improved the transparency of the
71 Commission in several regards--by publishing the specific
72 text of proposed rules, by releasing orders shortly after
73 adoption, and by proposing to eliminate unnecessary and
74 outdated regulations. But all of this is discretionary.

75 Congress has the authority and I believe the
76 responsibility to ensure that the Agency--which is conducting
77 the public's business--does so with transparency and
78 accountability, regardless of who is currently the chairman.
79 It is not asking too much to have the FCC actually codify a
80 set of best practices and then operate by them.

81 One idea in this mold is to ask the FCC to establish
82 shot clocks so that parties know how quickly they can expect
83 action in certain proceedings. Another is to ask the FCC to
84 establish a means for the public to know the status of the
85 rulemakings and other proceedings pending before the
86 Commission. And another is to ask the FCC to establish
87 procedures for a bipartisan majority of commissioners to
88 actually be able to initiate a proceeding. By asking the FCC
89 to regulate itself, we can give the Agency the flexibility it
90 needs to act while guarding against a lapse in the
91 Commission's practices. It is not my intent to micromanage
92 every decision and this legislation does not do that.

93 In considering other reforms, we must balance the need
94 for congressional and public oversight of the Commission with
95 the flexibility the Commission needs to promote competition
96 in the marketplace. For example, the Administrative
97 Conference of the United States recently recommended 60-day
98 comment periods for ``significant regulatory actions,' ' as

99 well as reply comment periods ``where appropriate.'' One idea
100 is to strike a middle ground, requiring comment and reply
101 comment periods of 30 days apiece but only when the APA
102 already requires the Commission to issue a NPRM.

103 Another idea is to extend to the FCC the cost-benefit
104 analyses currently required of executive agencies and
105 endorsed just this year in President Obama's Executive Order
106 on regulatory reform. Cost-benefit analyses are valuable
107 because they require an agency to squarely address the cost
108 of regulation, determine whether other methods may be less
109 costly, and make a reasoned determination that the benefits
110 outweigh the costs. If the President's requirement is good
111 enough for the Department of Education and the Environmental
112 Protection Agency, why not the FCC?

113 And trust me, the old argument that such a requirement
114 will bog down the agency just doesn't cut it. I have never
115 met an agency that didn't use this argument, yet they always
116 seem to find money to buy new vehicles and buildings.

117 Finally, it may be possible to tighten the FCC's
118 transaction review standards to harms that directly arise
119 from the transaction before it. Such a requirement is not
120 meant to displace the standard of review but to focus the
121 Commission's enquiry. If the Commissions Act empowers the
122 FCC to review a transfer of broadcast licenses but not other

123 aspects of a transaction, the FCC should review that transfer
124 of broadcast licenses and not other aspects of the
125 transaction. That is what their underlying statute says.

126 These ideas are not the end of the discussion but the
127 beginning, and I look forward to the thoughts of my
128 colleagues and the panelists on moving forward.

129 As I said at the outset, this is a discussion draft, and
130 I am open to the input of our panelists--that is why you are
131 here--and to the input of the public and my colleagues. When
132 it comes to improving the transparency, accountability, and
133 efficiency of the FCC, I am convinced we can find common
134 ground.

135 With that, I would yield to Ms. Blackburn for the
136 remainder of time she may consume.

137 [The prepared statement of Mr. Walden follows:]

138 ***** COMMITTEE INSERT *****

|

139 [H.R. ____ follows:]

140 ***** INSERT 1 *****

|
141 Mrs. {Blackburn.} Thank you, Mr. Chairman. I
142 appreciate the legislation that you are bringing forward. I
143 do believe it is a starting point for us to address the
144 crisis of confidence that many now have with the FCC. But we
145 need to move the Agency away from being an institution driven
146 by activists pursuing social outcomes to one grounded in
147 regulatory humility and statutory obedience.

148 Congress should slam the FCC's regulatory backdoor shut,
149 lock it, and return the keys to the free market. And any new
150 regulations must require concrete examples of market failure
151 and true consumer harm, because there is no room for
152 additional burdens on American industries and consumers
153 without showing just cause.

154 We need stronger accountability and transparency of the
155 Agency to ensure that it operates within its legal
156 boundaries. I thank you for the time, and I yield back.

157 [The prepared statement of Mrs. Blackburn follows:]

158 ***** COMMITTEE INSERT *****

|
159 Mr. {Shimkus.} Will the gentleman yield for just one
160 second?

161 Mr. {Walden.} Yes.

162 Mr. {Shimkus.} I would like the time to welcome my
163 former classmate, former Senator John Sununu. He is at the
164 panel and it is good to see him on that side.

165 Mr. {Sununu.} Thank you very much, Congressman Shimkus.
166 It is very nice to be here. You know, I could never get on a
167 Commerce Committee when I was in the House. That is part of
168 the reason I ran for the Senate. But I did notice that I am
169 at the kids' table here, a little sweet, but I am grateful to
170 be here nonetheless.

171 Mr. {Shimkus.} Thank you, Mr. Chairman.

172 Mr. {Walden.} That is fine. And we have always wanted
173 to have you before us and John has a lot of questions for
174 you, Senator.

175 I now turn to the ranking member of the subcommittee, my
176 friend and colleague from California who is nursed back to
177 health after her surgery, Ms. Eshoo.

178 Ms. {Eshoo.} Thank you, Mr. Chairman. And good morning
179 to you, to all of the members and thank you to all the
180 witnesses that are here today.

181 Today's hearing continues our discussion of FCC process

182 reform, and I think that it is important for us to keep
183 pressing ahead on this, examine the suggestions that have
184 been made, and hear from a variety of witnesses about their
185 ideas and their comments on what we are considering.

186 Last month's subcommittee hearing highlighted that the
187 Commission has really taken some proactive steps to increase
188 openness, transparency, and accountability. And these
189 efforts should be applauded as we examine legislative
190 measures that might help to enhance the FCC's effectiveness.

191 I want to thank Chairman Walden for incorporating the
192 FCC Collaboration Act into the draft legislation under
193 discussion today. This is bipartisan reform which was
194 introduced with Representative Shimkus and Doyle earlier this
195 year and it would promote greater collaboration by allowing
196 three or more commissioners to talk to each other outside of
197 an official public meeting.

198 As part of this Sunshine reform, I am very pleased that
199 the discussion draft also incorporates federal/state joint
200 boards. During last month's hearing, Commissioner Clyburn
201 described how commissioners have to rotate in and out of
202 these meetings and how a modification of the Sunshine Act
203 would enhance joint board recommended decisions. Allowing
204 FCC commissioners to collaborate more freely as part of their
205 participation on federal/state joint boards makes sense. And

206 I think it serves to strengthen our original legislation.

207 As I noted in last month's hearing, though, I think that
208 we need to be cautious of legislative proposals which might
209 or could diminish the Commission's ability to protect the
210 public interest and preserve competition. I think those are
211 two very, very important values that need to be retained. I
212 fully support reforms that will better serve the public good,
213 but they shouldn't be done at the expense of overly
214 prescriptive rules that limit the FCC's flexibility and
215 decision-making process.

216 Our witnesses today come from many backgrounds,
217 including industry, the public interest, and academia. You
218 bring years of experience working with the FCC both inside
219 and outside the Agency. And so I especially look forward to
220 hearing your thoughts on the draft legislation. So we have a
221 lot of work to do. We have the spectrum legislation that
222 really needs to move forward that will usher in a new era of
223 telecommunications, its applications in the 21st century, and
224 we have reforms to make. And I look forward to hearing from
225 our witnesses today. And thank you, Mr. Chairman, for
226 holding this.

227 I would like to yield the remainder of my time to
228 Congressman Doyle.

229 [The prepared statement of Ms. Eshoo follows:]

230 ***** COMMITTEE INSERT *****

|
231 Mr. {Doyle.} Thank you very much.

232 Mr. Chairman, thank you for holding this hearing. And
233 we want to thank the distinguished panel of witnesses and our
234 former colleague, John Sununu, for being here this morning to
235 educate us about the important issue of FCC process reform.
236 Mr. Chairman, while I appreciate your hard work to examine
237 ways to update FCC process, I am somewhat concerned about
238 certain aspects of the draft bill before us and look forward
239 to working with you on that.

240 The most troubling part is two things that concern me is
241 one that we would limit the power of the Commission to impose
242 conditions or voluntary commitments on the transactions it
243 reviews. While conditions shouldn't serve as excuses for the
244 FCC to permit a transaction if it fails to serve the public
245 interest, if a merger is approved, the FCC should impose
246 conditions it deems necessary to meet its public interest
247 standard.

248 It also concerns me that we would require a Notice of
249 Inquiry before every single NPRM. I think that this can be
250 burdensome and I think this is something that is better left
251 to the FCC.

252 I do want to thank you for including the language of the
253 Sunshine Reform bill that Congressman Shimkus and

254 Congresswoman Eshoo and I have put forward. We think that
255 would increase transparency and improve communication within
256 the Agency. I look forward to hearing the testimony of all
257 the witnesses today. Mr. Chairman, I look forward to working
258 with you.

259 And I yield back.

260 [The prepared statement of Mr. Doyle follows:]

261 ***** COMMITTEE INSERT *****

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262 Mr. {Walden.} The gentleman yields back his time. I
263 now recognize the chairman of the full committee, the
264 gentleman from Michigan, Mr. Upton, for 5 minutes.

265 The {Chairman.} Well, thank you, Mr. Chairman. And I
266 certainly want to welcome our great friend Mr. Sununu as
267 well.

268 The communications and tech sector is one of the largest
269 drivers of our economy. And at a time when overall job
270 creation remains weak and burdensome rules and red tape are
271 keeping job creators on the sidelines, we should be doing
272 everything that we can to unleash the creativity and
273 innovative potential of this sector. Eliminating outmoded
274 rules, removing regulatory barriers, and refraining from
275 imposing new ones on this segment of our economy could do a
276 lot to help spur jobs and help pull us out of our fiscal
277 doldrums.

278 Chairman Genachowski appears to recognize this. While
279 the proof will be in the pudding, he is at least saying he
280 plans to abide by the President's Executive Order on
281 regulatory reform even though independent agencies are not
282 required to do so. And my hope is that he will submit to us
283 and the administration the formal plan requesting OIRA to
284 implement the Executive Order.

285 If we want to improve the regulatory environment,
286 process reform is an obvious place to start. The FCC's
287 decisions can only be as good as its process. And while the
288 FCC has taken steps to improve the way that it conducts its
289 business, more can be done. Today, we will examine a draft
290 proposal, a good one, to set statutory baselines to ensure
291 this and all future commissions address all the issues with
292 the same minimum sound practices.

293 Consistency and transparency not only produce better
294 decisions, they help create confidence and certainty that
295 will promote investment, innovation, and jobs. An expert,
296 independent agency should also be engaging in objective
297 analyses. And if it looks like the FCC is prejudging an
298 issue and justifying predetermined outcomes after the fact,
299 the Agency looks political and the public loses faith in its
300 objectivity and expertise.

301 It is important to recognize that this staff draft
302 preserves much of the Agency's flexibility. Indeed, in most
303 cases, it simply directs the FCC to set its own rules on
304 these matters. My sense is that it does strike the right
305 balance, but I of course welcome input from my colleagues and
306 witnesses. Our hope is that we can produce strong bipartisan
307 legislation.

308 And I yield the balance of my time to Mr. Terry.

309 [The prepared statement of Mr. Upton follows:]

310 ***** COMMITTEE INSERT *****

|
311 Mr. {Terry.} Thank you, Mr. Chairman.

312 And during our last hearing on this subject on May 25,
313 we heard from the current FCC chairman and commissioners
314 themselves, many of whom spoke in favor of the concepts
315 contained in our draft before us today. Chairman Genachowski
316 recognized that shot clocks could be an ``effective tool''
317 going forward. Commissioners Copps and McDowell agreed there
318 should be a mechanism for a bipartisan majority of
319 commissioners to put items on the agenda meetings. And
320 Commissioners Copps and Clyburn spoke of the need to reform
321 the Sunshine rules to allow the commissioners to deliberate
322 more efficiently.

323 Now, as we work through here today, we are going to get
324 our witnesses' input to see how we can improve, continue
325 working with our friends on the other side to make this
326 bipartisan. Frankly, these are issues that the
327 commissioners, past and present, have brought forward needing
328 change. Some they can do on their own; some need our
329 assistance. And we want to continue to work with everybody.

330 So I welcome the testimony from our witnesses and look
331 forward to moving this legislation.

332 Do any other members on the Republican side seek time?
333 There is a minute and a half left.

334 Then I yield back.

335 [The prepared statement of Mr. Terry follows:]

336 ***** COMMITTEE INSERT *****

|
337 Mr. {Walden.} The gentleman yields back his time. I
338 now recognize the ranking member of the full committee, Mr.
339 Waxman, for 5 minutes.

340 Mr. {Waxman.} Thank you, Mr. Chairman.

341 Today, the subcommittee will return to the topic of FCC
342 reform and I commend Chairman Walden for working with us to
343 put together a balanced panel of expert witnesses. We need
344 to hear from diverse voices, and Chairman Walden has worked
345 with us Democrats and Republicans together to assemble
346 balanced witness panels.

347 I also wish to commend the chairman for the draft
348 legislation we will be considering today. Unfortunately, it
349 has serious defects. It would make the FCC less efficient
350 and more bureaucratic in my opinion, the exact opposite of
351 what we should be doing.

352 I am a proponent of strong congressional oversight over
353 the agencies within our jurisdiction. An engaged Congress
354 can help agencies perform at a higher level and serve the
355 American public better. In some instances, it is appropriate
356 for Congress to legislatively modify the authority or
357 practices of an agency to enhance agency operations and the
358 public interest. At our first hearing on this topic, I asked
359 basic questions that will guide me in determining whether we

360 are promoting smart regulation and this bill does not provide
361 reassuring answers.

362 The first problem is that this legislation will create
363 an undue burden on the FCC. It requires that the Commission
364 perform a cost-benefit analysis for every rule that might
365 impose a burden on industry. This will be costly and time
366 consuming. Cost-benefit analyses might be appropriate for a
367 limited set of major rules, but in no circumstances should
368 they become a basis for years of litigation in court.

369 Second, the legislation undermines the flexibility of
370 the Agency to act quickly and efficiently in the public
371 interest. If we put new prescriptive process requirements in
372 statute, we can end up promoting slower, not faster,
373 decision-making. For example, the requirement that the FCC
374 conduct a Notice of Inquiry prior to moving to rulemaking
375 could restrict the Agency's ability to move more
376 expeditiously in the public interest.

377 Third, some of the requirements in the draft legislation
378 appear to be about process for the sake of process.
379 Provisions in the rulemaking reform section and the
380 transparency reform section impose practices that the
381 Commission already follows. Chairman Genachowski's tenure
382 has been marked by greater transparency, expanded
383 opportunities for public input, and improved information-

384 sharing with other commissioners and the public. He has
385 shown that the FCC can reform itself without the need for
386 action by Congress.

387 And finally, I am concerned that we are making
388 procedural changes in an attempt to address outcomes with
389 which we don't agree. Chairman Walden and others have
390 criticized the voluntary commitments Comcast agreed to during
391 review of its combination with NBC Universal. That appears
392 to be why the current draft legislation radically alters the
393 FCC's authority under the Communications Act and could
394 eviscerate the public interest standard. Before we take
395 steps that could prevent combinations like Comcast/NBC, we
396 need to examine whether they are in the interest of promoting
397 public benefits or even in the interest of the companies they
398 are intended to protect.

399 There are some promising aspects of the legislation in
400 particular I want to join my colleagues in support of the
401 provisions that allow commissioners to collaborate more
402 directly, but overall, I cannot support the draft in its
403 current form. The chairman has said he wants to work
404 together in a bipartisan way to improve this bill. I hope we
405 do that and produce a bill that earns broad bipartisan
406 support.

407 I look forward to hearing from our panel to address

408 these issues into receiving their advice about how to improve
409 the FCC. Thank you, Mr. Chairman, and yield back the balance
410 of my time, unless, Ms. Christensen, would you like any of my
411 time? I yield back.

412 [The prepared statement of Mr. Waxman follows:]

413 ***** COMMITTEE INSERT *****

|
414 Mr. {Walden.} Thank you. The gentleman yields back his
415 time, and now we will proceed with the hearing. And we would
416 like to welcome all of our witnesses. And we will start with
417 the Honorable John E. Sununu, Honorary Co-Chair, Broadband
418 for America. And I would just advise the witnesses, these
419 microphones, you have to get pretty close to and the button
420 turns them on and off. And then we have the red light
421 buttons there that control the time.

422 And with that we welcome our friend and colleague, Mr.
423 Sununu.

|
424 ^STATEMENTS OF JOHN SUNUNU, HONORARY CO-CHAIR, BROADBAND FOR
425 AMERICA; KATHLEEN ABERNATHY, CHIEF LEGAL OFFICER AND
426 EXECUTIVE VICE PRESIDENT, FRONTIER COMMUNICATIONS; BRAD
427 RAMSAY, NATIONAL ASSOCIATION OF REGULATORY UTILITY
428 COMMISSIONERS; MARK COOPER, RESEARCH DIRECTOR, CONSUMER
429 FEDERATION OF AMERICA; RONALD M. LEVIN, WILLIAM R. ORTHWEIN
430 DISTINGUISHED PROFESSOR OF LAW, WASHINGTON UNIVERSITY SCHOOL
431 OF LAW; AND RANDOLPH J. MAY, PRESIDENT, FREE STATE FOUNDATION

|
432 ^STATEMENT OF JOHN SUNUNU

433 } Mr. {Sununu.} Thank you very much, Chairman Walden,
434 Ranking Member Eshoo. It really is a pleasure to be here.

435 As you indicated, I am, along with Harold Ford, a co-
436 chair of Broadband for America, an organization of 300
437 members, equipment manufacturers, broadband providers,
438 applications providers, consumer advocate groups, economic
439 development groups. And the focus is really on deployment
440 and investment in the broadband industry and identifying
441 public policy that can really ensure that it continues to be
442 a driver of growth and prosperity in America.

443 I certainly commend you for looking at the topic and
444 your pursuit of improving the way the FCC operates. Without

445 question, the focus of the discussion draft is on process and
446 process matters. Process is the mechanism by which we ensure
447 better transparency, fairness, certainty, clearer timelines,
448 and all of those help to allow investors to make investments
449 with a greater certainty of return and that is what promotes
450 economic development and job creation.

451 I do also, however, want to take the opportunity to talk
452 in a little bit more broad terms about changes that we would
453 like to see the committee look at within the statutory
454 framework because in many regards, the obsolete premises of
455 the existing statutory framework doesn't match the structure
456 and the competition that we see in the marketplace today.
457 And that is, I think, a view that is shared on a bipartisan
458 basis. Chairman Genachowski recently acknowledged that the
459 statute isn't perfect and said ``it would make sense to
460 update it.'' The President's State of the Union address
461 talked about the fact that, you know, we live in a business
462 and information age, but the last major reorganization of
463 government happened in the age of black-and-white TV. So
464 these issues--and I think the comments of the committee
465 recognize--aren't directed at any commission, any chair, or
466 any administration. It is a matter of making sure that the
467 policies reflect the modern age in which we live.

468 We do have a very vibrant, competitive communications

469 base that is more vibrant and competitive than ever. There
470 are always going to be aspects that we want to see operate
471 better or even more competitive that would bring down prices
472 even faster, but it is more vibrant and competitive than ever
473 before, across the entire spectrum of voice, video, data, and
474 other emerging internet-based services.

475 Over the last 3 years within the broadband industry, we
476 have seen \$250 billion in capital investment. This is during
477 a period of a very sharp and significant economic downturn.
478 I don't think we can find many areas of the economy that have
479 made that level of capital investment. And again, there are
480 always going to be areas where we want to see access improved
481 or accelerated even more, but \$250 billion is real money even
482 to the United States Congress.

483 The Communications Act of 1934 is built on the
484 assumption of a natural monopoly. And I think if there is
485 one point that I want to make it is that that is the default
486 presumption. And unfortunately, that is not the world in
487 which we live right now. I think legislative reform should
488 dispense with antiquated presumptions about natural
489 monopolies in the communications marketplace, and we should
490 move away from industry-specific anticipatory regulation and
491 instead treat communications companies like other businesses
492 throughout the economy that are disciplined in the first

493 instance by competition, not regulation.

494 Second, Congress should affirmatively require that the
495 FCC account for actual competition among emergent
496 substitutable offerings in a consistent way. The statute
497 can't work properly without acknowledging that all the
498 constituent parts of the broadband space, including web-based
499 services and their implications for competition and
500 consumers.

501 Third, Congress should consider structural
502 inefficiencies that sometimes bring an already sluggish
503 regulatory process to a screeching halt. In particular, we
504 need to recognize that the multi-commissioner structure
505 itself can breed interagency conflict and belabor decision-
506 making.

507 Second, the FCC rarely produces timely decisions when
508 measured against the pressing decisional demands of the
509 internet era.

510 Third, the FCC asserts authorities that duplicate the
511 work of other agencies, most notable in the context of
512 reviewing mergers. Given the role played by expert antitrust
513 agencies, there is no legitimate reason for the FCC to also
514 assume responsibility for reviewing the competitive effects
515 of a merger because the transaction happens to require a
516 license transfer.

517 And finally, the well-intended Sunshine laws have the
518 perverse effect of slowing the deliberative process by
519 requiring things like open meetings any time more than two
520 commissioners wish to discuss official business. Some of
521 these are addressed in the discussion draft, and I think that
522 is important.

523 But again, I come back to the premise that we need to
524 reconsider the presumption of a monopoly that is written into
525 both the '34 act and even the 1996 amendments that carried
526 the same premise. Again, this isn't about any one
527 commissioner or any one administration. I think we really do
528 need to reconsider the FCC's purpose and their role in a
529 competitive, 21st Century environment so that we can be
530 mindful and accomplish reform.

531 I certainly appreciate the opportunity to testify and
532 look forward to answering your questions.

533 [The prepared statement of Mr. Sununu follows:]

534 ***** INSERT 2 *****

|
535 Mr. {Walden.} Thank you, Senator. We appreciate your
536 being here as well. We thank you for your testimony. We
537 will now turn to Ms. Kathleen Q. Abernathy, former Federal
538 Communications Commissioner and now with Frontier
539 Communications as chief legal officer and executive vice
540 president for governmental affairs. You have worn many hats.
541 We look forward to your testimony here, and thank you for
542 participating.

|
543 ^STATEMENT OF KATHLEEN ABERNATHY

544 } Ms. {Abernathy.} Thank you very much. Good morning
545 Chairman Walden, Ranking Member Eshoo, and members of the
546 subcommittee. It is truly a privilege and an honor to appear
547 before you this morning to talk about what is very, very
548 important--process reform at the FCC.

549 I am chief legal officer and executive VP of regulatory
550 and government affairs for Frontier. We are the largest
551 provider of broadband, voice, and video services to rural
552 America. And as a wireline provider, Frontier is subject to
553 regulatory oversight by the FCC and, just over this past
554 year, we have engaged in a number of proceedings in front of
555 the FCC, so we have current experience working with the
556 current regulatory processes.

557 I am pleased to be here today to discuss your proposed
558 reforms and some of the ways it might impact the FCC. My
559 testimony is informed by my career in the telecommunications
560 industry, and as you mentioned, that has included stints at
561 the FCC, both as a commissioner, as well as legal advisor,
562 as well as working in the general counsel's office. And with
563 every position, I gained further insight into the processes
564 that go on there.

565 In addition to this work in the public sector and, of
566 course, my current position at Frontier, I have worked at law
567 firms and in-house wireless, wireline, CLECs. This
568 collective experience provides me with a unique perspective
569 on how the FCC serves the public. I have experienced both
570 the privilege and challenge of serving as a regulator, as
571 well as the opportunity to work in the private sector. And
572 the draft legislation proposes many reform actions that I
573 think could make a major and significant improvement on the
574 processes and I am pleased to talk about them today.

575 I made public statements during my tenure as an FCC
576 commissioner and thereafter that relate to some of the
577 proposed. For example, I have stated and I continue to
578 believe that the Sunshine Act is overly restrictive in
579 prohibiting communication among three or more commissioners
580 outside of a public meeting. It is perverse, but it actually
581 works contrary to the notion of an improved collaborative
582 spirit, it discourages creative problem-solving, and it
583 creates hurdles to timely and effective decision-making
584 process. And I think if you do nothing else, if you reform
585 that one rule, then these other concerns that you have would
586 be immediately addressed because you would have an actual
587 dialogue between the parties who are running the agency.

588 When it comes to transaction review and approval,

589 Congress has conferred on the FCC a statutory obligation to
590 review license transfers and to either reject, approve, or if
591 necessary approve it with conditions. And these conditions
592 should be designed to ensure that the transaction at issue
593 complies with the Commission's rules, as well as being
594 consistent with the public interest. As a commissioner, I
595 always believed that the Commission owed it to the parties to
596 act promptly on license transfers--there is a lot of cost
597 associated with the delays in transfers--and to impose
598 conditions when necessary to address merger-specific harm
599 that impact the public interest.

600 Merger reviews shouldn't be seen by third parties as an
601 opportunity to impose obligations unrelated to the mergers,
602 especially if it has the unintended consequence of
603 advantaging or disadvantaging a company as compared to its
604 competitors. My belief is that general obligations not
605 designed to address merger-specific harm, there is a vehicle
606 for that. You should consider and review them in the context
607 of rulemaking process, and that is subject to notice and
608 comment.

609 I have also noted before that I think there is a time
610 and place for timelines and shot clocks. It is difficult to
611 implement a uniform timeline for all proceedings. For
612 example, with a particularly complex process, the FCC has to

613 do a complex balancing between moving expeditiously to adopt
614 a timely decision, as well as gathering the data necessary.
615 But shot clocks are very, very beneficial because it is an
616 action-forcing event. And the challenge with the numerous
617 issues in front of the FCC and with the statute that many
618 would agree is somewhat outdated is that these issues are
619 very, very difficult. There is many times no good answer.
620 And when there is no good answer, you sometimes don't work
621 ahead to a resolution. You kind of kick the can down the
622 road because you are very frustrated. A shot clock would
623 force you to just sort of address that issue and try and
624 resolve it.

625 I applaud Chairman Walden and the subcommittee for
626 focusing on FCC process reform. Process and procedure--just
627 as much as substance itself--have a direct impact on industry
628 participants and consumers. And given the critical role of
629 telecommunications in our daily lives and our global
630 competitiveness, it is appropriate for Congress to consider
631 updating and improving the framework for the FCC's
632 deliberative process.

633 Thank you for having this important discussion and I
634 look forward to your comments and questions.

635 [The prepared statement of Ms. Abernathy follows:]

636 ***** INSERT 3 *****

|
637 Mr. {Walden.} Ms. Abernathy, thank you. We appreciate
638 your counsel.

639 Now, we are going to hear from Brad Ramsey, who is the
640 general counsel for the National Association of Regulatory
641 Utility Commissioners. And thank you for being here. We
642 look forward to your testimony as well.

|
643 ^STATEMENT OF BRAD RAMSAY

644 } Mr. {Ramsay.} Thank you, sir. And Chairman Walden and
645 Ranking Member Eshoo and other members of the panel, I really
646 appreciate the opportunity to testify today, and I commend
647 Mr. Walden and the rest of you for holding this hearing.

648 I represent NARUC, as Mr. Walden pointed out. I have
649 been there 20 years. NARUC, for those of you that don't
650 know, is the group that represents all of the state public
651 service commissions that oversee telecommunications, energy,
652 and other utilities in your jurisdictions. If you want to
653 know what the potential impact of these process reforms are
654 for state commissions, you know, protecting your constituents
655 in state-specific preemption, pleadings that get filed at the
656 FCC, and in the broader universal service and inter-
657 compensation reform items that they consider from year to
658 year, you want to talk to your state commission. They will
659 tell you what the impact is in terms of their opportunity to
660 protect the citizens of your individual States. And I am
661 happy for those of you--and I don't see very many in this
662 room that I don't think I already know their state
663 commissioners. But if you don't know your state
664 commissioners, I am happy to provide a gateway for you.

665 What is the hearing about today from my perspective?
666 Well, I don't think there is any question that reform is
667 needed, and I also don't think that there is any question
668 that a number of the proposals included in this discussion
669 draft will definitively improve transparency at the FCC and
670 will definitely improve the ability to create a better record
671 for decision-making at the FCC.

672 NARUC has a technical position on every section, but we
673 have been pushing some of these reforms for over 10 years.
674 The draft that came out, I think it is an excellent starting
675 point for a bipartisan bill that could pass in this Congress.
676 So for me, this hearing, this draft is all about opportunity.
677 You have an opportunity to finally correct the stilted
678 application of Sunshine laws that does nothing but shed
679 additional light on agency procedures. And all it does--and
680 I know this from personal experience--is muck things up and
681 slow things down. You have an opportunity. There are
682 actually two or three provisions that make sure that
683 everybody gets a realistic opportunity to comment on what the
684 Agency is actually going to do, not just the people that have
685 the most money, not just the people that have the most staff
686 resources.

687 You have an opportunity here to formally adopt some of
688 the highly lauded--Ms. Eshoo mentioned the fact that the

689 Commission deserves a lot of credit for a lot of the
690 transparency measures that they have put into place. There
691 were a couple measures that came in the last administration.
692 I agree. You have an opportunity here to lock those into law
693 and make sure that future commissions do not discard them.

694 You also have an opportunity to normalize expectations.
695 This is a shot clock idea that is in the bill. I actually
696 think that that is wonderful idea. The Agency gets to set
697 the approximate time frame that they want to shoot for. And
698 this is much better than an item languishing there for 10
699 years, or, in my case, and I end up languishing there for 5
700 or 6 years, and the next time I hear about it from the Agency
701 is they are putting a notice out that says, you know, we
702 would like to terminate your proceeding because the record is
703 stale. A shot clock gives them something to shoot at. It is
704 a good idea.

705 But perhaps the most important opportunity that is
706 presented in this item are the pieces that help the Agency
707 build a better record upon which to base its decision. The
708 decision can only be as good as the record that they are
709 basing their decision upon. If you shortchange the decision,
710 if you shortchange the process, you are shortchanging the
711 American people. It is one of the reasons why when we are
712 talking about, great, we are finally going to have some

713 definitive deadlines or a minimum deadline that allows the
714 state commissions who have this complicated process of
715 perusing comments to actually file comments. But another
716 good part of this bill is it says you are going to put the
717 text of the dadgum rule out so that I actually know what to
718 write my comments about. NARUC has endorsed that for some
719 time. I commend the current chairman for doing it 85 percent
720 of the time. I don't understand why it can't be done 100
721 percent of the time.

722 You have ensured an opportunity here to make a real
723 difference in the FCC decision-making process. It is long
724 overdue. It is an opportunity that can only make better
725 decisions come out of the--it is not going to make the
726 process perfect, but it is going to make the decisions
727 better, which can only benefit your constituents. The
728 consumers across the country and the industry as a whole, it
729 is an opportunity I hope you take.

730 Thank you, and I look forward to your questions.

731 [The prepared statement of Mr. Ramsay follows:]

732 ***** INSERT 4 *****

|
733 Mr. {Walden.} Thank you, Mr. Ramsay. We appreciate
734 your testimony and we look forward to offering up some
735 questions.

736 We go now to Dr. Mark Cooper, Research Director at
737 Consumer Federation of America. Dr. Cooper, we are delighted
738 you are with us today and we look forward to your comments.

|
739 ^STATEMENT OF MARK COOPER

740 } Mr. {Cooper.} Thank you, Mr. Chairman, members of the
741 committee.

742 In the past 30 years, I have seen the good and bad of
743 regulation up close and personal. In 300 appearances as an
744 expert witness on behalf of public interest groups in 50
745 jurisdictions in the United States and Canada, Brad
746 represents NARUC. I have testified before 95 percent of the
747 NARUC members.

748 In my testimony, I outline areas where the regulatory
749 process at the Federal Communications Commission should be
750 improved. We need reform of the ex parte communications. We
751 need greater reliance on independent and peer reviewed
752 research. We need to provide notice on the specific details
753 of rules to afford the public the opportunity to comment on
754 those rules. We should enhance public participation in
755 rulemaking process by use of multi-stakeholder groups,
756 regulatory negotiations, and participatory enforcement.
757 Other agencies do it. The FCC should get with that kind of
758 program to expand input from the public and the industry in a
759 formal way rather than the backdoor way of the current ex
760 parte process.

761 The discussion draft, however, causes me great concern.
762 I look at the center of the Communications Act as the public
763 interest standard, which is a principle on which it stands.
764 And the language that imposes a harm-based standard I believe
765 will undermine the ability of the FCC to protect the consumer
766 and promote the public interest.

767 The word ``harm'' occurs exactly twice in the statute,
768 both times in a section that worries about incumbent local
769 exchange carriers who could abuse information service
770 providers. The words ``public interest'' occur 103 times.
771 That is the standard at the center of the act.

772 Now, others will tell you why the Agency does not have
773 to adhere to the executive branch order on cost-benefit
774 analysis. Let me explain to you why it should not. A harm-
775 based standard is inadequate to protect the public interest
776 in the communications sector for several reasons. First, a
777 substantial part of the Communication Act involves
778 noneconomic democratic values of access to communication and
779 freedom of speech, which are virtually impossible to evaluate
780 in now-economic terms. The antitrust laws do not do
781 democracy.

782 Second, universal service is a critical goal of the
783 Communications Act that is non-amenable to a narrow cost-
784 benefit analysis. The value of connecting households to a

785 network is an externality that is difficult to measure but
786 extremely important as a political, social, and economic
787 accomplishment. No other agency does universal service.

788 Third, consumer privacy, over which the FCC has a
789 significant authority in proprietary network information, is
790 not readily amenable to a harms standard.

791 Fourth, in a dynamic network industry, a public interest
792 approach is much more appropriate for interconnection and
793 nondiscriminatory carriage. Under a harms standard, it would
794 have been impossible to value the Carterphone decision, the
795 Computer Inquiries, or the 802.11 WiFi rules, which were
796 forward-looking and are key elements of creating the rich
797 communication environment we have today. This is an industry
798 with massive positive externalities.

799 I believe this criticism also applies with equal force
800 to the merger review. Mergers create unique challenges to
801 the public interest that are best dealt with during the
802 merger review process. The problem in contemporary markets
803 like telecommunications is not too much regulation but too
804 little competition. However, the lack of competition is not
805 the result of nefarious business practices or lacks antitrust
806 enforcement.

807 These industries, so strong economies of scale and
808 scope, which mean that very few competitors can achieve

809 minimum efficient scale, they show strong economies of demand
810 side known at network effects, which make them winner-take-
811 most industries. The challenge in these industries is small
812 numbers providing critical infrastructure and platforms that
813 support massive amounts of other activity. The challenge is
814 to make sure that they are profitable and innovative but
815 check their tendency to use vertical leverage or market power
816 to undermine competition. That is a very, very difficult
817 proposition to evaluate with a narrow harm-based standard.
818 That is a proposition that is easy to address in a merger,
819 which creates the very problem of vertical leverage. That is
820 what we have suffered in this industry.

821 As always, I look forward to working with the committee
822 to develop any legislation that is needed. I urge you to
823 take the attack on the public interest standard out and focus
824 on those areas where the Commission does not have the ability
825 to act on its own. Most of the changes that we need in
826 process can be done internally. Establish the norms for
827 transparent, swift-enforced regulation, and once those norms
828 are established, it will be difficult for future commissions
829 to abandon them. The Commission should do what it can. This
830 committee should help it where it can.

831 [The prepared statement of Mr. Cooper follows:]

832 ***** INSERT 5 *****

|
833 Mr. {Walden.} Dr. Cooper, thank you for your testimony.

834 We will now go to Professor Ronald M. Levin with the

835 William R. Orthwein Distinguished Professor of Law,

836 Washington University School of Law. We welcome you today

837 and look forward to your testimony, sir.

|
838 ^STATEMENT OF RONALD M. LEVIN

839 } Mr. {Levin.} Thank you, Mr. Chairman and members of the
840 committee.

841 I hope to provide a little different perspective on this
842 bill from those of the other panelists because my
843 specialization is not in communications law. It is in
844 administrative law--in other words, the manner in which the
845 legal system deals with regulatory cases in general,
846 regardless of the agency. Now, I don't think that
847 perspective gives you all the answers you need for this bill,
848 but I think it will provide some helpful insights on some of
849 its provisions.

850 For example, as the Sunshine Act reform, I think that
851 perspective will tend to support the thrust of what you are
852 doing. I know you have heard from the FCC veterans that the
853 Sunshine Act often interferes with collaborative decision-
854 making, forces agency heads to rely on staff intermediaries
855 rather than talk to each other. But I think it is worth
856 pointing out here that that critique is shared by numerous
857 agency officials and practitioners and scholars who
858 specialize in other fields of regulation. So I think if you
859 go forward with the experiment in this bill, you would get

860 strong support from much of the administrative law community.

861 On the other hand, I want to raise some warning flags
862 about parts of the bill that would reshape FCC rulemaking
863 procedures. Many students of the administrative process will
864 tell you that agency rulemaking has become progressively more
865 complicated over the past few decades, and this happens
866 largely because Congress and presidents keep adding
867 refinements to the process. Each of those refinements, they
868 look appealing when considered in isolation, but in the
869 aggregate, they make it progressively more difficult for
870 agencies to carry out the tasks that Congress has told them
871 to perform. So you really ought to think twice about
872 provisions in the bill that would make it even harder for the
873 FCC to complete a rulemaking proceeding. My statement goes
874 into this in some depth, but I will just focus on three areas
875 of concern in these remarks.

876 First, some of the new duties are ones you probably
877 shouldn't impose at all. I really doubt that in every
878 rulemaking proceeding that might be perceived as putting
879 forward a burdensome rule, you should require the Commission
880 to speculate about what performance measures to use to
881 evaluate that rule sometime in the future. And I don't think
882 the FCC should routinely have to specify what market failure,
883 a new rule would resolve because market failure is not the

884 only valid reason the FCC may have for issuing a rule.

885 Secondly, the bill provides some practices that the
886 Commission should want to do much of the time but not
887 necessarily all the time. And so you need to build in some
888 flexibility. For instance, should the FCC have to solicit
889 public comments twice during every rulemaking proceeding?
890 Well, often that is very useful, especially when they didn't
891 exactly tell you what they were planning to do the first
892 time. But at other times, a single round satisfies all the
893 purposes of notice and comment and it should be enough.

894 Likewise, should they always provide a reply comment
895 period after the traditional comment period? Well, sometimes
896 they should, especially when some group that dumps these
897 lengthy and controversial comments on the last day of the
898 comment period, there should be a chance to reply. But that
899 is not always the situation, and so you need to build in some
900 room for the Commission to say, here, we don't need a reply
901 and we should avoid the delay and move forward.

902 Finally, I think the committee should take another look
903 at and rewrite the section that provides for the Commission
904 to prepare a cost-benefit analysis to accompany any rule that
905 would be burdensome. The intent here, as I understand it, is
906 to put the FCC on par with executive agencies which now
907 prepare cost-benefit analyses under the President Executive

908 Order, and the FCC isn't subject to that order. But the
909 problem is that the scope of the Executive Order is much more
910 limited than your provision because that order provides for
911 cost-benefit analysis in only a small fraction of law
912 rulemaking and it provides the agency compliance with that
913 order is not judicially reviewable.

914 If you were to allow broad judicial review under this
915 bill, you would be inviting strenuous opposition to the bill.
916 That was one of the main worries that led to the demise of
917 APA reform in the mid-'90s. So if you want the bill to
918 remain relatively noncontroversial, you need to avoid or
919 limit judicial review and also narrow the scope of the cost-
920 benefit requirement.

921 And with that, I will conclude my oral presentation. I
922 hope it is helpful and I will be happy to respond to any
923 questions.

924 [The prepared statement of Mr. Levin follows:]

925 ***** INSERT 6 *****

|
926 Mr. {Walden.} Professor, it is very helpful and we
927 thank you for your testimony and your counsel.

928 We will go now to our final witness on the panel, Mr.
929 Randolph J. May, President of the Free State Foundation. Mr.
930 May, we are delighted to have you with us and we look forward
931 to your testimony.

|
932 ^STATEMENT OF RANDOLPH J. MAY

933 } Mr. {May.} Thank you, Mr. Chairman and members of the
934 committee. Thank you for inviting me to testify. I am
935 president of the Free State Foundation, a nonpartisan
936 research and educational foundation. The Free State
937 Foundation is a free market-oriented think tank that focuses
938 its research in the communications law and policy area. By
939 way of background, I should note that I am a past chair of
940 the ABA's Section of Administrative Law, and I am currently a
941 member of the Administrative Conference of the United States
942 and a Fellow at the National Academy of Public
943 Administration. So today's hearing on FCC process reform is
944 at the core of my expertise in communications law and policy,
945 as well as administrative law.

946 As a frame of reference for my testimony, I want to
947 recite statements made over a decade ago by two different FCC
948 commissioners, one Democrat and one Republican. FCC Chairman
949 William Kennard in August 1999 released a strategic plan
950 entitled, ``A New FCC for the 21st Century.'' The plan
951 begins, ``In 5 years, we expect communications markets to be
952 characterized predominately by vigorous competition that will
953 greatly reduce the need for direct regulation. As a result,

954 over the next 5 years, the FCC must wisely manage the
955 transition from an industry regulator to a market
956 facilitator. The FCC as we know it today will be very
957 different in both structure and mission.'' That was in 1999.

958 In December 2000, then-FCC Commissioner--soon-to-be
959 Chairman--Michael Powell said, ``Our bureaucratic process is
960 too slow to respond to the challenges of internet time. One
961 way to do so is to clear away the regulatory underbrush to
962 bring greater certainty and greater simplicity to the
963 market.'' These statements provide a useful frame of
964 reference for considering FCC reform.

965 I support many of the reforms proposed in the draft
966 bill, and I do discuss them at greater length in the
967 testimony. Right now I just want to highlight a few of the
968 provisions and then talk briefly about one additional
969 provision.

970 I endorse the provision that would require the Agency
971 with respect to the adoption of any new rule that may impose
972 additional burdens, to analyze the market failure and actual
973 consumer harm the rule addresses, to perform cost-benefit
974 analysis, and to include measures for evaluating the
975 effectiveness of the rules.

976 The FCC has had a pronounced tendency over the years--
977 and certainly this tendency was evident with respect to the

978 adoption late last year of new net neutrality regulations--to
979 adopt rules without engaging in meaningful analysis that
980 would be required by the proposal. The requirement to
981 analyze any claimed market failure and consumer harm before
982 adopting new rules should force the FCC to engage in more
983 rigorous economic analysis than it often does when it relies
984 on the indeterminate public interest standard for authority.

985 I am not going to probably agree with much that Mark
986 Cooper said here today possibly, but he is correct that the
987 public interest standard that is found in over 100 provisions
988 in the Communications Act. I wholeheartedly endorse the
989 proposed changes to the Sunshine Act. They have been noted
990 and I won't dwell on those here, but I support those.

991 The provision reforming the Commission's transaction
992 review process is as important as any other provision in the
993 draft bill. In light of the continued abuses--and I think
994 they have increased over the past decade--in the merger
995 review process. The Agency often imposes extraneous
996 conditions after they are ``volunteered at the last minute by
997 transaction applicants anxious to get their deal done.'' And
998 this is after the transactions have been subject to reviews
999 already lasting a year or more.

1000 The requirement that any condition imposed be narrowly
1001 tailored to remedy a transaction-specific harm coupled with

1002 the provision that the Commission may not consider a
1003 voluntary commitment offered by a transaction applicant
1004 unless the Agency can adopt a rule to the same effect will go
1005 a long way to reforming the review process.

1006 My own preference would be to go even further and reduce
1007 the substantial overlap that now occurs between the
1008 Department of Justice and the FCC and have the Department of
1009 Justice primarily responsible for assessing the competitive
1010 impact of a transaction.

1011 As I said early in my testimony, the reality is that
1012 most segments of the communications marketplace are not
1013 effectively competitive. When Congress passed the Telecom
1014 Act of 1996, it anticipated the development of a competitive
1015 marketplace stating in the statute's preamble that it
1016 intended for the FCC to ``promote competition and reduce
1017 regulation.'' The FCC has not done nearly enough in the 15
1018 years since the passage of the '96 act to reduce regulation.

1019 Whatever the reason, the point is that a fix is needed
1020 and the draft bill, while commendable in many respects, does
1021 not directly address the problem of reducing existing
1022 regulations. I don't have time to address it at any length
1023 now, but I hope you will consider adopting a proposal that I
1024 have made that would amend the forbearance provision of the
1025 act and the regulatory review provision in the act that were

1026 both included in the 1996 act to be used as clearly the
1027 regulatory tools that have been used only sparingly. And
1028 they could be amended very simply to allow those provisions
1029 to be much more effective in achieving less regulation and
1030 getting rid of unnecessary regulations that are on the books
1031 now.

1032 Thank you very much for inviting me here today, and I
1033 look forward to your questions. Thank you.

1034 [The prepared statement of Mr. May follows:]

1035 ***** INSERT 7 *****

|
1036 Mr. {Walden.} Thank you very much, Mr. May, and thank
1037 you to all of our panelists who have given us great counsel
1038 here today. We appreciate it. Some I appreciate more than
1039 others. No, I am just kidding. That is why we had you here.
1040 We needed the honest assessment of what works and what
1041 doesn't work in this bill.

1042 Mr. May, I think when we get into this discussion of
1043 what is in the public interest, it really is what any three
1044 commissioners decide at the time as they are reaching some
1045 agreement. It is pretty broadly determined, is that not
1046 correct?

1047 Mr. {May.} It is about as indeterminate, I think, as
1048 any other phrase could be. And I have to confess I have used
1049 that, whatever three commissioners say it is on any given day
1050 many times myself. But it absolutely is and, in fact, I
1051 wrote a law review article about 10 years ago in which I
1052 counted up those provisions. That is why I know Mr. Cooper
1053 is correct. But the point is that it provides no guidance to
1054 the Commission and it does need changing.

1055 Mr. {Walden.} I seek unanimous consent to enter into
1056 the record an article by Phil Weiser, who just left the White
1057 House as National Economic Council to return to the
1058 University of Boulder. Without objection, we will put this

1059 in the record.

1060 [The information follows:]

1061 ***** COMMITTEE INSERT *****

|
1062 Mr. {Walden.} In the article, he notes that frequently
1063 the FCC seeks to leverage its authority to approve mergers,
1064 to obtain concessions that often have little or nothing to do
1065 with the competitive issues raised in the transaction. And I
1066 think that is at the heart of the matter of what I, at least,
1067 and I think many members on this committee are trying to get
1068 at. It is not that you ignore or eviscerate the public
1069 interest standard; it is when it is used as an excuse to go
1070 do something you don't have the authority to do through your
1071 own organic statute.

1072 Commissioner Abernathy, do you agree the Commission
1073 should not leverage merger reviews to obtain concessions that
1074 have little or nothing to do with the transaction's specific
1075 harms?

1076 Ms. {Abernathy.} I have said that previously in
1077 speeches and I do agree. Now, just to be clear, in
1078 transactions where I was involved with other commissioners,
1079 you do have disagreements about a public interest issue
1080 associated with the transaction, so I may think a particular
1081 condition isn't required. But this still leaves, I think, a
1082 tremendous amount of ability for the commissioners to address
1083 the issues that are raised by the transaction. You may have
1084 disagreements about whether it is really a problem or not,

1085 but I think it does leave a tremendous amount of discretion
1086 to the commissioners.

1087 Mr. {Walden.} As I listened to your testimony and read
1088 it in advance, it seems like there is concurrence, that
1089 having the text proposed rules available to the public and to
1090 other commissioners is something you all agree on. Does
1091 anybody disagree with that?

1092 Mr. {May.} Could I just respond?

1093 No, I don't disagree. You know, in theory--

1094 Mr. {Walden.} Let me get an answer. Does anybody
1095 disagree with having the text made available prior to the
1096 votes in the Commission? Mr. Levin?

1097 Mr. {Levin.} Only to the extent that as a non-
1098 specialist in this area, it occurred to me there might be a
1099 wide range of situations where that wouldn't work because it
1100 is urgent, because it is a very minor matter where you are
1101 just talking about a factual dispute and in an adjudication,
1102 the public has nothing to say about it. There might be
1103 feasibility limitations. I do agree with it as a general
1104 proposition.

1105 Mr. {Cooper.} I would go one step further and I would
1106 like that kind of provision to apply to merger reviews as
1107 well so that at the end of the process when--so we have that
1108 under the antitrust laws. The public should be allowed to

1109 comment on the conditions that were adopted. Now, that may
1110 or may not address some of the concern about extraneous
1111 issues--

1112 Mr. {Walden.} Right.

1113 Mr. {Cooper.} --but in that further review, if things
1114 were truly extraneous, people would have a chance to comment
1115 on that and the Agency could, in fact, be informed by that
1116 process. But full comment on an actual rule is the essence
1117 of democracy.

1118 Mr. {Walden.} Mr. May?

1119 Mr. {May.} I think the provision you are referring to
1120 here is the one that would require that the text that the
1121 Commission is considering at a meeting be made available to
1122 the public, and in response to Professor Levin's concern, I
1123 don't think your draft specifies the time before the meeting
1124 that it has to be available, so my understanding is it could
1125 be very shortly before.

1126 But in other agencies, this might not be deemed perhaps
1127 as necessary, but as I point out in my testimony, what
1128 happens at the FCC in a public meeting, as you may know, is
1129 that at the presentation of an item, the staff before every
1130 item says, ``Mr. Chairman, we request editorial privileges.''
1131 And the chairman says ``granted.''. And then no one has the
1132 text and sometimes it is weeks before the item is ultimately

1133 released to the public. And you really don't know what is
1134 going on. Because of the delay in the release of the item,
1135 you don't know whether that was--

1136 Mr. {Walden.} Right.

1137 Mr. {May.} --editorial or not. And that is why it is
1138 useful.

1139 Mr. {Walden.} And my time has run out.

1140 Ms. Abernathy, did you want to make a quick comment?

1141 Ms. {Abernathy.} Well, the way the actual process works
1142 is that you have the text of the item that you are voting on
1143 that day and then you are writing separate statements. Many
1144 of the commissioners are writing separate statements. And so
1145 I had never seen a situation where editorial privilege
1146 changed anything of significance in the item. But there are
1147 procedures that still need to be recognized, and I think that
1148 is part of the reasons for today's hearing is to understand
1149 that it is not as simple as just kicking the order out the
1150 door. You still need to review it one last time, get
1151 separate statements from the commissioners. It shouldn't
1152 take a long time but there is that process.

1153 Mr. {Walden.} Thank you. I now recognize the
1154 gentlewoman from California, Ms. Eshoo, for 5 minutes.

1155 Ms. {Eshoo.} Thank you, Mr. Chairman, and thank you
1156 again to all the witnesses. I think that you have been

1157 highly instructive to us.

1158 First off, I don't think I heard anyone say that they
1159 were opposed to the FCC Collaboration Act, is that correct?
1160 Anyone opposed? No. I think there was a consensus on that,
1161 which pleases me.

1162 To Commissioner Abernathy, thank you again for your
1163 testimony. As you know as part of the Verizon/Frontier
1164 transaction, Frontier offered voluntary commitments to build
1165 out broadband deployment and meeting broadband needs of
1166 anchor institutions which I salute you for. I wish
1167 Congresswoman Matsui were here because she has worked very
1168 hard on the whole issue of serving anchor institutions.

1169 At any rate, those anchor institutions are within the
1170 areas to be served by Frontier. Now, none of these voluntary
1171 conditions directly address merger-specific harms, yet they
1172 confer, I think, important public interest benefits. So
1173 first, would you comment on whether Frontier would be able to
1174 offer these voluntary commitments if this draft legislation
1175 were in place as law?

1176 Ms. {Abernathy.} I think if you spoke with Commissioner
1177 Copps, for example, with regard to these commitments, he
1178 would argue they were merger-specific. I might say maybe not
1179 but the way the analysis would go is that the whole reason
1180 for the acquisition from a Frontier perspective was for

1181 greater scale and scope. The public interest benefit was for
1182 greater broadband deployment throughout rural America.

1183 Ms. {Eshoo.} Um-hum.

1184 Ms. {Abernathy.} And so some of the commissioners, even
1185 though we said that is what we are going to do, they wanted
1186 more specific commitments associated with that broadband
1187 deployment, which we had said from day one was part of our
1188 reason for engaging in the acquisition.

1189 Ms. {Eshoo.} Well, I support what you did. I think it
1190 is terrific. I just was trying to compare and contrast what
1191 you did with what is being proposed. Did what is being
1192 proposed get in the way of what you did or was it--

1193 Ms. {Abernathy.} I am sorry to interrupt, but I don't
1194 think in the context of our specific merger that it would
1195 have changed any of the conditions.

1196 Ms. {Eshoo.} Do you believe in that instance that the
1197 public interest standard is preferable to a harms standard?

1198 Ms. {Abernathy.} As opposed to does not create harm to
1199 the public?

1200 Ms. {Eshoo.} Um-hum.

1201 Ms. {Abernathy.} Versus benefits the public?

1202 Ms. {Eshoo.} Um-hum.

1203 Ms. {Abernathy.} I think it is not a huge difference.

1204 Ms. {Eshoo.} Okay. For all of the witnesses, I

1205 generally agree that publishing the specific language of
1206 proposed rules is a good idea, and as you know, Chairman
1207 Genachowski is making this a best practice at the FCC. This
1208 now occurs in 83 percent of rulemakings, which is a very
1209 significant increase over a previous chairman.

1210 But I am concerned that requiring this in all instances
1211 could inadvertently undermine the goals of transparency and
1212 efficiency underlying the draft bill. So to all of the
1213 witnesses, does this requirement make sense when the
1214 Commission places a proposal from outside parties out for
1215 comment in a Notice of Proposed Rulemaking?

1216 Mr. {Sununu.} I really think it would depend on the
1217 circumstance and the scope of the proposal. Any time you,
1218 you know, require a publication or even establish a shot
1219 clock, by definition you are requiring another step, you are
1220 extending the time frame, and someone is always going to be
1221 able to argue that that is making the process more
1222 cumbersome.

1223 Ms. {Eshoo.} Um-hum.

1224 Mr. {Sununu.} But you have got to balance the need and
1225 the desire for transparency with the need or the desire for
1226 expediency.

1227 I would also make the observation that any process
1228 burden that you establish, whether it is in the name of

1229 transparency or fairness or certainty, which are all good
1230 things, is going to be as much of a burden for a deregulatory
1231 effort as it is for a regulatory effort, at least as far as
1232 it is constructed here.

1233 Ms. {Eshoo.} Thank you. Ms. Abernathy? I don't have
1234 very much time left so I do have to speed through the
1235 witnesses. Yes, Dr. Cooper?

1236 Mr. {Cooper.} Well, I want to offer an observation
1237 about this question of the opportunity to comment on the
1238 actual rules, because I believe that is--in fact, one of the
1239 really good definitions of democracy is the opportunity to
1240 write the rules under which you live. And in a
1241 representative democracy, participation in the process is
1242 really important.

1243 The thing that strikes me--and I have said this before
1244 in public--is that the problem here is not with the
1245 Communications Act or the FCC. It is with the Administrative
1246 Procedure Act. This is such a fundamental part of democracy
1247 that the implementation of the Administrative Procedure Act
1248 has deteriorated to the point where we let agencies deny
1249 people the right to speak. And so I would like this problem
1250 to be solved. And I said this in my testimony in two ways.
1251 One, I think we ought to look at the Administrative
1252 Procedures Act and figure out how to make sure that the

1253 citizenry gets a chance to participate in the rulemaking.

1254 Second of all, if we want more participation, if we want
1255 more flexible and quicker rules--I believe as a veteran of
1256 some reg-negs and other multi-stakeholder groups--that the
1257 agency needs to reach out and create formal transparent
1258 processes where industry and public interest come together to
1259 help it. Other people do it. EPA does it, DOE does it, OSHA
1260 does it. There is no reason why the FCC can't do it.

1261 Ms. {Eshoo.} Thank you. Thank you very much.

1262 Mr. {Terry.} [Presiding] Mr. Shimkus, you are
1263 recognized for 5 minutes.

1264 Mr. {Shimkus.} Thank you, Mr. Chairman. My mic is
1265 really loud so I apologize. I don't usually need it this
1266 loud.

1267 For Mr. Sununu, just aside, you mentioned that
1268 Congressman Harold Ford was with you. Is that senior or
1269 junior? It may dictate how we feel about your testimony.
1270 Junior.

1271 Mr. {Sununu.} Junior, another classmate.

1272 Mr. {Shimkus.} Send him our regards, will you?

1273 Mr. {Sununu.} Will do.

1274 Mr. {Shimkus.} I pulled up the organizational chart of
1275 the FCC because I always believe that a lot of times
1276 structure dictates process. And that even though the

1277 structure is determined by the commissioner--in a lot of your
1278 opening statements, I don't think you were asked to look at
1279 structure--but I would ask you after this hearing if you have
1280 comments on structure to get back to us because I do believe
1281 that some of these bureaus are established as the Senator
1282 said, you know, when there was a quasi-monopoly, 1934, and
1283 then we have kind of--like building a home you take out
1284 walls, you put a different roof on, you extend. And I have
1285 always been amazed at how, with the convergence of
1286 technology, that we don't have a convergence of regulation.

1287 And I will give you an example, I think, hopefully. We
1288 have no internet bureau. There is no internet bureau so if
1289 you are overseas and you are going to call on Skype on a WiFi
1290 system, you have no Universal Service Fund, you have no
1291 inter-carrier compensation, you have no local taxes, you have
1292 last mile issues that aren't compensated for. It just seems
1293 to me that if someone doesn't talk about structure, then the
1294 policy applications of the regulations--and I don't want to
1295 get into big detail because a lot of you didn't talk about
1296 structure, and I want to lay that out if you would be some
1297 structure--but Mr. May, you have signaled?

1298 Mr. {May.} Well, I would just say briefly I appreciate
1299 your concerns. I actually recommended several years ago that
1300 the Commission create a broadband bureau, even if it would

1301 have subdivisions that still dealt as it would with wireline
1302 and so forth. Now, that might be useful. But I just would
1303 take the opportunity to say quickly that ultimately to
1304 address the issue that you are talking about, Senator Sununu-
1305 -

1306 Mr. {Shimkus.} Quickly. I am running out of time.

1307 Mr. {May.} --you need to actually change the act to get
1308 rid of the silos that are presently--

1309 Mr. {Shimkus.} I have always been concerned about the
1310 silos.

1311 Let me go to Dr. Cooper. I want to confirm that when my
1312 colleague, Ms. Eshoo, asked about on the Sunshine
1313 applications that you agree that the Sunshine applications in
1314 the draft you would support?

1315 Mr. {Cooper.} I am okay with the Sunshine application
1316 as a general proposition. I have two caveats. One, the
1317 reporting of those partial meetings, I want transcripts, not
1318 summaries. And I want transcripts of ex parte
1319 communications, too, because those ought to be fully part of
1320 that--

1321 Mr. {Shimkus.} Okay. I read your written statement--

1322 Mr. {Cooper.} Yeah.

1323 Mr. {Shimkus.} --and so when she asked that and you
1324 didn't object, I wanted to get--

1325 Mr. {Cooper.} And I also--

1326 Mr. {Shimkus.} That is fine. I need to go to the next-
1327 -I have a lot of my friends in--I have been really involved
1328 in the presidential Executive Order on jobs, which he did in
1329 January 2011 and I really would focus this on the EPA, that
1330 there should be a cost-benefit analysis and a job on new
1331 rules and regulations. The Blue Dog Coalition sent a letter
1332 to Chairman Genachowski asking him to at least voluntarily
1333 comply with the President's Executive Order.

1334 Mr. May, what are your comments on the Blue Dog letter?
1335 Have you seen this and do you think that the FCC should do a
1336 cost-benefit analysis and a projection of possible job
1337 creation activities in the rules and regs?

1338 Mr. {May.} I think it is useful that it does those
1339 things, and I think the recent Executive Order and President
1340 Obama's op-ed suggested as much generally. But I appreciate
1341 there may be some exceptions for minor rules and so forth,
1342 but in general, it is a useful thing. And here is why just
1343 in sum. Because the FCC for most of its history has been
1344 oriented around this public interest standard, which is, as
1345 we discussed earlier, completely indeterminate, means
1346 whatever three commissioners say on any given day. This type
1347 of requirement, Congressman, would get the FCC oriented in
1348 today's competitive environment to doing the type of more

1349 rigorous economic analysis it just hasn't had a history to do
1350 or the inclination to do. So it is a useful thing.

1351 Mr. {Shimkus.} Mr. Chairman, my time has expired.

1352 Mr. {Terry.} The gentleman from California, Ranking
1353 Member Waxman, you are recognized for 5 minutes.

1354 Mr. {Waxman.} Thank you, Mr. Chairman.

1355 Mr. Levin, I wanted to ask you some questions. I think
1356 it was very helpful to have you hear because you are in a
1357 unique position looking at these issues from an
1358 administrative procedures point of view. You don't come here
1359 with any biases about how the FCC has performed and you don't
1360 have an agenda before the FCC, so your position is unique and
1361 it is, I think, very helpful.

1362 You raise a number of concerns and caution about the
1363 potential inflexibility, burdens, and unintended consequences
1364 of this bill, and I want to ask you to elaborate a bit on
1365 those concerns. What are the risks of moving forward with
1366 the approach outlined in the bill?

1367 Mr. {Levin.} With what?

1368 Mr. {Waxman.} The risks. What are the risks of moving
1369 forward with the approach outlined in the bill itself?

1370 Mr. {Levin.} Well, I think on particular provisions, it
1371 could be too confining to say you have to have an advanced
1372 Notice of Inquiry before every proposed rule or Notice of

1373 Proposed Rule. You need two of something because sometimes
1374 the agency has a pretty good idea of what it is going to do.
1375 Rather than have two rounds of discussion with the delay that
1376 that would cause, you give the public at least one shot to
1377 comment on what the Commission wants to do and that may well
1378 be enough. You don't need to build in an automatic second
1379 round.

1380 Likewise, you don't necessarily need a reply period if
1381 there was no real opposition in the first period or if all
1382 the comments came in early in the period. People will have
1383 had plenty of chances to reply during the regular comment
1384 period. To have a mandatory second period means you are
1385 building in a delay for no practical benefit.

1386 Mr. {Waxman.} Let me ask you about the cost-benefit
1387 analysis that is required under this proposal.

1388 Mr. {Levin.} Right.

1389 Mr. {Waxman.} You concluded that this kind of scrutiny
1390 prior to issuance of highly expensive or consequential
1391 regulations may be appropriate, but for routine regulations,
1392 such a requirement would not be cost-justified. Expand on
1393 that.

1394 Mr. {Levin.} Sure. So compare this with the
1395 presidential Executive Order, which is the model I think for
1396 what the committee intends to do. They say that for all

1397 rules you should make a reasoned assessment of the benefits
1398 and the costs. Now, in that sense it is just saying think
1399 about the plusses and the minuses and I think that is simple.
1400 But a true cost-benefit analysis, as we usually use that
1401 term, is a rigorous, sophisticated, and expensive analysis
1402 with a qualified policy analyst, and the Executive Orders
1403 limit that to situations where you have a very consequential
1404 rule. For a minor rule, it is an overinvestment of resources
1405 that agencies can ill afford to squander. And so to that
1406 extent I think you have a disproportion between the Executive
1407 Order model and what the bill contemplates.

1408 Mr. {Waxman.} What do you think about the ability of
1409 the Administrative Procedure Act to allow the FCC or any
1410 other agency to evaluate the plusses and the minuses, the
1411 cost and the benefits?

1412 Mr. {Levin.} Well, one thing to keep in mind--and I
1413 think this gets to the thrust of your question--is that an
1414 agency will have to analyze the plusses and minuses of the
1415 bill anyway because it has to survive a pretty hard look on
1416 judicial review. There is also oversight such as this
1417 committee provides. They will have to answer the questions.
1418 And as far as the APA itself is concerned, they have to write
1419 a statement of basis and purpose to explain what they are
1420 doing. So to that extent, there is an expectation that they

1421 have to address the merits seriously. I don't think you
1422 necessarily need to add on to that with an FCC process
1423 provision.

1424 Mr. {Waxman.} Um-hum. What are your thoughts about the
1425 idea of this legislation is just focused on one agency?
1426 Should we be taking a broader approach with reform proposals
1427 where they are needed?

1428 Mr. {Levin.} Well, I have endorsed an experiment with
1429 respect to the Sunshine Act, so I don't want to rule out
1430 categorically that you might do something agency-specific and
1431 see how it works. However, I think if you are going to think
1432 about issues of that kind, you should not do something just
1433 to improvise. At least you should be very attentive to
1434 developed understandings in the administrative law field.
1435 And if you are about to do something that departs from it,
1436 you should be very cautious and rethink what you contemplate.

1437 Mr. {Waxman.} And then lastly, how does this
1438 legislation compare with related recommendations adopted by
1439 the Administrative Conference just last week?

1440 Mr. {Levin.} I think in some ways it is parallel but it
1441 also, I think, probably is a little stricter. And the final
1442 text hasn't been released, but my general understanding of
1443 what ACUS will say is that reply comments are good where
1444 appropriate, that at least 30 days or 60 days of comments

1445 should usually be available but doesn't provide that it
1446 should be 100 percent of the time.

1447 Mr. {Waxman.} Thank you.

1448 Thank you, Mr. Chairman.

1449 Mr. {Walden.} Thank you. And I am going to exercise
1450 the prerogative of the chair with unanimous consent so we
1451 could all recognize one of our staff people, David Rettle,
1452 whose wife last week gave birth to their first child,
1453 Benjamin David Rettle. We have asked David to submit a photo
1454 for the record for this hearing.

1455 Mr. {Waxman.} Reserving the right to object.

1456 Mr. {Walden.} We would hope on at least this matter we
1457 could have--no. With that, thank you, and congratulations to
1458 David and his wife and the arrival of Benjamin David. There
1459 will be other announcements later in the year.

1460 Mr. Barton, we recognize you now for 5 minutes.

1461 Mr. {Barton.} Thank you, Mr. Chairman. We hope that
1462 was not an open and transparent process.

1463 Mr. {Walden.} No, it was streamed on video.

1464 Mr. {Barton.} Right. Right. Anyway, we want to
1465 welcome former Congressman and Senator Sununu, good
1466 colleague, good friend, and I also think an engineer before
1467 this committee.

1468 I have long been a proponent of FCC reform. I had a

1469 bill with several other members of the committee in the last
1470 Congress, I have a bill in this Congress, and I plan to be a
1471 cosponsor of the draft that Chairman Walden has circulated
1472 for comments, so I think this is a good thing, a good day.
1473 And I think it is high time. I have a few questions I am
1474 going to ask for specific witnesses, but if anybody has a
1475 specific comment, feel free to chip in.

1476 The Section 5A, Subparagraph (b), transparency reform
1477 that would require the Commission to establish internal
1478 procedures to provide adequate deliberation over and review
1479 of pending orders, publication of draft orders before open
1480 meetings, minimum public comment periods, Mr. Sununu, are you
1481 supportive of that?

1482 Mr. {Sununu.} I am.

1483 Mr. {Barton.} Is there anybody on the witness dais that
1484 is not supportive of that, the transparency issues? Let the
1485 record show that everybody seems to be supportive.

1486 What about 5A, Subsection (c), Sunshine reform that
1487 would allow three commissioners to meet for collaborative
1488 discussions if they do so in a bipartisan manner, which means
1489 that it has to be at least one member of each political party
1490 in consultations? And they also have to have the Office of
1491 the General Counsel to do oversight. Is anybody opposed to
1492 that? Mr. Cooper?

1493 Mr. {Cooper.} I would like a full transcript of any of
1494 those meetings as opposed to summary.

1495 Mr. {Barton.} Okay. I don't have a problem with that.
1496 And by the way, Mr. Cooper, it is good to have you back. You
1497 probably have enough standing to get a pension from this
1498 committee as many times as you have testified, so we are glad
1499 that you are back.

1500 Let us see. Let us look at the Section 5A, Subsection
1501 (g) refers to shot clocks, which would require the Commission
1502 to establish shot clocks for each type of proceeding. Is
1503 that generally approved by everybody? Okay. It looks like
1504 you are doing good, Mr. Chairman.

1505 Mr. {Cooper.} By shot clocks I have one concern. I
1506 want the shot clock to run when the record is complete.

1507 Mr. {Barton.} When the record is--

1508 Mr. {Cooper.} We have had a problem in merger review in
1509 which the companies aren't forthcoming into providing the
1510 data, and months and months after the shot clock starts we
1511 all of a sudden get a big data dump and we get them screaming
1512 about how, you know, it is taking too long. So I think the
1513 Commission should be allowed to build the record first and be
1514 comfortable that it has the complete record and then this
1515 shot clock should start.

1516 Mr. {Barton.} My last question, last minute is Section

1517 5A, Subparagraph (j), the transaction review reform. This
1518 would preserve the Commission's ability to review transaction
1519 but would require conditions for those transaction reviews to
1520 be narrowly tailored to remedy harms that arise as a direct
1521 result of the transaction. What is the general review of
1522 that?

1523 Mr. {Cooper.} Well, my testimony I criticized that as
1524 unnecessarily undermining the ability of the agency to deal
1525 with this dynamic market where mergers change the structure--

1526 Mr. {Barton.} So you want to tweak it, you want to
1527 eliminate it, you--

1528 Mr. {Cooper.} I don't believe the standard needs to be
1529 changed.

1530 Mr. {Barton.} You don't think it needs to be changed?

1531 Mr. {Cooper.} I don't think it needs to be changed.

1532 Mr. {Barton.} This gentleman next to you, Mr. Ramsay,
1533 what is your view on that?

1534 Mr. {Ramsay.} I just wanted to pipe in here and say I
1535 am a government lawyer. I am not allowed to take positions
1536 that disagree with my clients, and in this particular case,
1537 my clients haven't come to any consensus on that provision,
1538 so I haven't either.

1539 Mr. {Barton.} Your clients are the--

1540 Mr. {Ramsay.} State Public Utility Commissioners, yes,

1541 sir.

1542 Mr. {Barton.} Okay. Mr. Sununu? I mean Senator
1543 Sununu?

1544 Mr. {Sununu.} I answer to just about everything.

1545 I think the real issue is the one with regard to the
1546 voluntary considerations. And people are frustrated by the
1547 fact that at times the Commission seems to have sought out
1548 and imposed voluntary considerations--we all know what that
1549 means--that are outside their jurisdiction. So this is
1550 really as much a question of how to ensure that the
1551 Commission stays within its jurisdiction as it is to
1552 determine whether or not there should ever be a voluntary
1553 consideration or whether the public interest standard is or
1554 isn't being misused. It is a question of finding language
1555 and finding a process that is consistent and that ensures
1556 that the Commission stays within its jurisdictional
1557 boundaries. And I think that is what the intention is of
1558 this section.

1559 Mr. {Barton.} Mr. Cooper, before--

1560 Mr. {Cooper.} I have proposed a way to deal with that,
1561 which is that those conditions should be subject to comment
1562 and review, which would expose abuses. And I think that is
1563 the way to get at the abuses but also preserve the authority
1564 to really deal with the issues that the merger proposes.

1565 Mr. {Barton.} Okay. Mr. Chairman, I think you have got
1566 a winner here. It obviously needs to be tweaked some, but
1567 you have worked hard on this and you have listened to a lot
1568 of people. I only have a few minor technical changes I wish
1569 to suggest, but I hope we can introduce a new bill and move
1570 expeditiously to move it through subcommittee into full
1571 committee. This is something whose time has come. And I
1572 yield back.

1573 Mr. {Walden.} Thank you, Mr. Chairman. I appreciate
1574 the good work you and others in this committee have done for
1575 many years in this area, and I think we are on the cusp of
1576 having good legislation here that does need some tweaks. And
1577 we intend to work as best we can in a bipartisan way to get
1578 that done.

1579 So with that, now, I would like to recognize the
1580 gentleman from Michigan, my friend and esteemed colleague Mr.
1581 Dingell, for 5 minutes.

1582 Mr. {Dingell.} I thank my dear friend the chairman for
1583 this recognition, and I also express my thanks to my dear
1584 friend Mr. Doyle who is always kind and generous in his
1585 dealings with me. And I would like to welcome back Senator
1586 Sununu. Welcome back.

1587 Mr. {Sununu.} Thank you.

1588 Mr. {Dingell.} It is good to see you again.

1589 These questions to Professor Levin and Ms. Abernathy.

1590 They will require yes or no.

1591 The draft bill requirement says that the Commission will
1592 complete an identification and analysis of the market failure
1593 that prompted a given rulemaking seems to be a little much.

1594 Does the Commission engage in rulemakings that are not
1595 prompted by market failures? Yes or no?

1596 Ms. {Abernathy.} Yes.

1597 Mr. {Dingell.} Professor?

1598 Mr. {Levin.} Well, I am not an FCC specialist, but I
1599 would expect the answer is no--

1600 Mr. {Dingell.} Thank you.

1601 Mr. {Levin.} --that some of them should not relate to
1602 market--

1603 Mr. {Dingell.} The next question indicates to me that
1604 the draft bill's failure analysis requirement has been at
1605 least superfluous, or worse, unnecessary in many cases. Am I
1606 correct in that feeling?

1607 Mr. {Levin.} The cost-benefit analysis? You are
1608 correct.

1609 Mr. {Dingell.} Ma'am?

1610 Ms. {Abernathy.} It would be necessary in some
1611 situations.

1612 Mr. {Dingell.} All right. Now, again, to Professor

1613 Levin and Ms. Abernathy, the draft bill seems to require that
1614 the Commission perform a cost-benefit analysis on every rule
1615 that may impose additional burdens on industry or consumers,
1616 is that correct?

1617 Mr. {Levin.} I think that is what it says, yes.

1618 Ms. {Abernathy.} I believe that is what the bill says.

1619 Mr. {Dingell.} Now, again, to Professor Levin and Ms.
1620 Abernathy, I believe the requirements are, again, overbroad
1621 and would require the Commission to devote many of its finite
1622 resources to performing such analysis. Do you agree? Yes or
1623 no?

1624 Mr. {Levin.} I agree.

1625 Ms. {Abernathy.} I agree. It is overbroad.

1626 Mr. {Dingell.} Now, again, to Professor Levin and Ms.
1627 Abernathy, further, is it reasonable to assume that the
1628 Commission has neither adequate staff nor funding with which
1629 to complete the cost-benefit analysis of every rule that
1630 imposes additional burdens on industry or consumers? Yes or
1631 no?

1632 Mr. {Levin.} It is reasonable to assume the answer is
1633 yes.

1634 Ms. {Abernathy.} I don't know.

1635 Mr. {Dingell.} Okay. Now, if this be the case, it
1636 would appear, then, that the Commission would require

1637 additional funds in order to comply with the draft bill's
1638 requirements, is that correct?

1639 Mr. {Levin.} Presumably.

1640 Mr. {Dingell.} Okay. Or we might assume that the FCC
1641 will be doing more to accomplish less at greater cost, is
1642 that an unfair assumption?

1643 Mr. {Levin.} So I would assume.

1644 Mr. {Dingell.} Okay. Now, this again to the last two
1645 witnesses. Finally, I come to the matter of personal
1646 interest. In the Congress in the past I have introduced
1647 legislation to amend Section 10 of the Federal Communications
1648 Act to require the Commission act on a forbearance petition
1649 within a year's time. Forbearance as a result of Commission
1650 inaction and action that takes place as a result of
1651 Commission inaction appears to me to be very bad policy.
1652 Now, to all of our witnesses here starting with Senator
1653 Sununu, would you support amending Section 10 of the
1654 Communications Act as I have just described to eliminate the
1655 forbearance that is practiced by the Commission leading to
1656 decisions being made by a simple inaction on the part of the
1657 Commission?

1658 Mr. {Sununu.} To eliminate the forbearance or to set a
1659 time limit of 1 year?

1660 Mr. {Dingell.} Well, tell me what you feel. Should we

1661 do it where we have to act on it within a year's time?

1662 Mr. {Sununu.} I think any time you can set a clear time
1663 frame for action, it is going to add certainty to the
1664 regulatory process. I don't know if 1 year is the right
1665 amount of time, but certainty in the regulatory process is
1666 likely to be a good thing.

1667 Mr. {Dingell.} Thank you. Ms. Abernathy, yes or no?

1668 Ms. {Abernathy.} I agree with the additional clarity
1669 around the forbearance process.

1670 Mr. {Dingell.} Mr. Ramsay?

1671 Mr. {Ramsay.} We are on record with agreeing with the
1672 concept of shot clock, so I guess the answer is yes.

1673 Mr. {Dingell.} Mr. Cooper?

1674 Mr. {Cooper.} Justice delayed is justice denied but it
1675 needs to be worked both ways. So when complaints are pending
1676 at the Commission, they languish for years. If you are going
1677 to have a shot clock, it ought to be both to the favor of the
1678 public and the--

1679 Mr. {Dingell.} Well, maybe we ought to fire the damned
1680 Commission if they can't come to a decision on these matters
1681 or give them more money.

1682 Let us see. Mr. Levin?

1683 Mr. {Levin.} Well, I don't do FCC law but
1684 administrative law authorities generally are skeptical about

1685 Congress imposing too many statutory deadlines because the
1686 upshot may be that those deadlines will drive the process
1687 more fully than--

1688 Mr. {Dingell.} Well, let us not debate that but it
1689 seems like poor sense to have the Commission just simply
1690 saying we haven't acted so it is going to become the rule or
1691 it is going to become law or it is going to become the
1692 regulation. That appears to me to be very bad. Do you
1693 agree?

1694 Mr. {Levin.} I am sorry. Could you repeat that?

1695 Mr. {Dingell.} Well, the Commission just sits around
1696 and twiddles its thumbs, nothing happens, and then all of a
1697 sudden, we have a new rule. It doesn't seem like good sense
1698 to me. Does it make sense to you?

1699 Mr. {Levin.} I think they should proceed expeditiously.
1700 I think the idea of establishing deadlines for themselves is
1701 good, but if we are talking about legally enforceable
1702 deadlines, you often have too much control by outsiders.

1703 Mr. {Dingell.} Thank you. My time is limited. Next
1704 witness?

1705 Mr. {May.} I disagree with your proposal because it
1706 shifts the whole forbearance thing around. It was included
1707 in the act to be deregulatory and that is why the provision
1708 says if--

1709 Mr. {Dingell.} Thank you very much.

1710 So Mr. Chairman, I say this with respect. If our
1711 intention here is to focus on process reform, I would urge
1712 you to be done deliberately, transparently, and with adequate
1713 participation of all affected parties. And after all, we
1714 should avoid the mistakes of the agency that we seek to
1715 reform. Mr. Chairman, your courtesy is appreciated and I
1716 thank you.

1717 Mr. {Walden.} I thank the gentleman from Michigan and
1718 now I turn to the gentleman from Ohio, Mr. Latta, for
1719 questions. I made a mistake. Ms. Blackburn.

1720 Mrs. {Blackburn.} That is quite all right. I know I am
1721 hard to see over here.

1722 I want to stay on this issue of forbearance. And Mr.
1723 May, I want to come to you because you have talked about the
1724 reforms that are needed in Section 10 and then regulatory
1725 review, the periodic reviews that are needed in Section 11.
1726 And I appreciated your comments. And so why don't you
1727 elaborate a little bit on how including evidentiary
1728 presumption to forbearance, how it would enhance the
1729 likelihood of the Commission in reaching a deregulatory
1730 decision? Because I think that as we look at reform, this is
1731 going to be a key nugget for us.

1732 Mr. {May.} Thank you, Representative Blackburn. Here

1733 is the deal in a nub. These two provisions--forbearance and
1734 regulatory review, if you look at them--were clearly put into
1735 the '96 Act to be used as deregulatory tools. That is
1736 evident on the face of those provisions. The fact is they
1737 have only been used very sparingly by the Commission. They
1738 haven't accomplished much deregulation, even as the market
1739 has become much more competitive. So I think the Congress
1740 through a pretty modest fix could address that situation in
1741 this way, not by changing the substantive criteria that are
1742 in the forbearance and regulatory review provisions. But
1743 again, when you look at them, they are addressed to the
1744 development of a competitive market. It doesn't change the
1745 substantive criteria.

1746 But I would add a sentence that essentially says that
1747 enacting on a petition or in doing the regulatory review
1748 proceeding, unless the Commission can find by clear and
1749 convincing evidence that the criteria have not been met, that
1750 it shall presume that the rules should go away. So again you
1751 are not changing the criteria but you are adding an
1752 evidentiary presumption.

1753 Because you ought to wonder why these two provisions,
1754 which are unique--I think even Professor Levin, who has
1755 looked at other agency statutes, for many years I have
1756 challenged anyone to find another forbearance provision like

1757 this in another statute and no one has done that like this.
1758 It seems me if the provision is there, you ought to make it
1759 useful. And you could do it by just that shifting an
1760 evidentiary burden.

1761 And to me this is the most important thing the committee
1762 could do. And it does fall in the realm--it is sort on the
1763 line between substance and process in a way, but it should be
1764 done, I think, if the committee wants to address the
1765 situation of existing regulations because your draft
1766 principally addresses regulations going forward.

1767 Thank you.

1768 Mrs. {Blackburn.} Thank you. Let me reclaim my time.
1769 And I have got a couple of yes or no questions that I want to
1770 give to each of you.

1771 Commissioner McDowell gave quite a hefty statement
1772 calling for a ``full and public operation financial and
1773 ethics audit'' of everything connected to the FCC. Mr.
1774 Sununu, starting with you, yes or no, do you support having
1775 that full audit, all the way down the line?

1776 Mr. {Sununu.} I think as a matter of fact it is good
1777 policy.

1778 Mrs. {Blackburn.} Okay.

1779 Ms. {Abernathy.} I agree. It is good policy.

1780 Mrs. {Blackburn.} Okay.

1781 Mr. {Ramsay.} NARUC has no position.

1782 Mrs. {Blackburn.} Pardon me?

1783 Mr. {Ramsay.} My association has not taken a position
1784 on that.

1785 Mrs. {Blackburn.} No position, okay.

1786 Mr. {Cooper.} As far as I can tell, the FCC is no
1787 better or worse than any other agency. The inspector general
1788 and the laws of the United States cover the problems, so I
1789 say no.

1790 Mrs. {Blackburn.} So you would say two wrongs make a
1791 right? Okay. Professor?

1792 Mr. {Levin.} I am not an FCC authority. If I had to
1793 stake out a guess I would probably give an answer like Mr.
1794 Cooper's.

1795 Mrs. {Blackburn.} Okay. Mr. May?

1796 Mr. {May.} I think it is a good thing to do. Not every
1797 year necessarily but it wouldn't be a bad thing to do.

1798 Mrs. {Blackburn.} Okay. One ``no'' position, two
1799 waffled and three ``yes,'' so I will take that. But
1800 remember, these are yes-and-no questions. All right. One
1801 more, yes or no. Okay.

1802 Do you think that Congress should be in the position of
1803 defining the role for the FCC and telling the FCC what to do
1804 or should the FCC continue doing what they are doing right

1805 now, which is trying to tell Congress what to do? Mr.
1806 Sununu, yes or no?

1807 Mr. {Sununu.} Well, it is absolutely a congressional
1808 prerogative--

1809 Mrs. {Blackburn.} Okay.

1810 Mr. {Sununu.} --and again, in my opening statement, I
1811 think that in addition to this draft legislation, we need to
1812 look more broadly about the underlying premise of the '34
1813 Act, the '96 amendments, and view this as a competitive world
1814 first and not as a natural monopoly.

1815 Mrs. {Blackburn.} Okay.

1816 Ms. {Abernathy.} Yes, Congress defines the scope of the
1817 FCC's authority.

1818 Mrs. {Blackburn.} Thank you.

1819 Mr. {Ramsay.} Yes, Congress defines the scope of the
1820 FCC's authority and can tell it to a justice--

1821 Mrs. {Blackburn.} Thank you.

1822 Mr. {Cooper.} Congress did that in the '96 Act.

1823 Mrs. {Blackburn.} Okay.

1824 Mr. {Levin.} Yes, Congress should set the bounds of the
1825 Commission's actions but it should give discretion to the
1826 Commission for things that require more flexibility than
1827 Congress can get around to addressing in specific terms.

1828 Mrs. {Blackburn.} Okay. Mr. May?

1829 Mr. {May.} Yes.

1830 Mrs. {Blackburn.} Okay. So we have got four that say
1831 ``yes,`` one that gives a little bit more--one I think is
1832 uncertain. So I thank you all. Remember, yes or no, you did
1833 fairly well for being here in Washington and limiting your
1834 words even though you couldn't give me a yes or a no.

1835 And I yield back.

1836 Mr. {Walden.} I thank the gentlelady for her questions.
1837 And I turn now to the gentleman from Pennsylvania, Mr. Doyle.

1838 Mr. {Doyle.} Thank you, Mr. Chairman.

1839 I am very concerned about this section of the draft that
1840 requires the Commission to issue a Notice of Inquiry for
1841 every single proceeding. I think in some cases this could
1842 cause serious harm to consumers and the public safety, and I
1843 would urge my colleagues to think back, for example, to the
1844 proceedings a few years ago when VoIP customers couldn't make
1845 9-1-1 calls, and the FCC needed to act quickly to enact E-9-
1846 1-1 rules. This is just one example. Another might be the
1847 rules required to implement the legislation we just passed to
1848 expand low power FM radio, which the Commission is currently
1849 working on.

1850 And I know that Professor Levin has already voiced his
1851 opinion on this, but I would just ask for the rest of the
1852 panelists, given these concerns, is there a strong enough

1853 reason to require NOIs for every single proposed rulemaking?
1854 Why not just leave this up to the FCC? If we could just go
1855 down the line.

1856 Mr. {Sununu.} I have to believe there is an in between.
1857 I think as a matter of policy, the Notice of Inquiry is a
1858 good idea. There certainly may be examples either in the
1859 past or hypothetical where it might not be the ideal
1860 situation, but it is important if you are going to make
1861 exceptions to define those circumstances and those exceptions
1862 as clearly as possible. I mean you defeat the whole purpose
1863 if you just say, well, the FCC can decide because you are
1864 going to have less clarity and less definition in the
1865 process.

1866 Mr. {Doyle.} Ms. Abernathy?

1867 Ms. {Abernathy.} I think an NOI as written is overly
1868 broad and so it should be circumscribed to some degree so
1869 that you don't waste resources and create delays. But I
1870 think in concept it is a good idea for many proceedings.

1871 Mr. {Doyle.} Mr. Ramsay?

1872 Mr. {Ramsay.} I agree with actually the statements of
1873 both of the people that preceded me. I believe that, you
1874 know, typically a rush to judgment means you ran too fast, so
1875 I like the concept of having a Notice of Inquiry in most
1876 instances. I would note that in emergency circumstances, the

1877 APA allows the Commission to bypass even a Notice of Proposed
1878 Rulemaking. So in those circumstances, there is already a
1879 mechanism. But the question is how to set the standard as
1880 Mr. Sununu said for when you don't have to do the NOI, which
1881 is not an easy thing to address.

1882 Mr. {Walden.} Will the gentleman yield for a second?

1883 Mr. {Doyle.} Yes, sure.

1884 Mr. {Walden.} On page 3 of the draft, we incorporate
1885 that APA emergency exemption. So I would draw your attention
1886 to that. And on the second page, if they have done an NOI,
1887 and NPRM or a Notice or Petition for Rulemaking within the
1888 last 3 years, that qualifies.

1889 Mr. {Ramsay.} But it still requires two rounds of
1890 comment?

1891 Mr. {Walden.} No, you don't require--

1892 Mr. {Cooper.} There is an ``or'' in that paragraph.
1893 The first paragraph says ``or'' as far as I can tell. And so
1894 maybe I have misread it. And it is really important that we
1895 get this right because I believe in the opportunity to
1896 comment. But I don't think it is necessary for two rounds of
1897 comment. If the agency proposes a rule and builds a record,
1898 then that meets this. And I see that ``or.'' It says ``one
1899 or the other,'' so it doesn't say a Notice of Inquiry and
1900 these others. It says ``or.'' Now, maybe there is someplace

1901 else in here where we get the impression of the ``and,' ' but
1902 it is an ``or.' '

1903 Mr. {Walden.} Um-hum. Mr. Levin?

1904 Mr. {Levin.} Well, the chairman is correct that the
1905 bill as written exempts the true emergency situations where
1906 you can proceed with no notice and comment. But that having
1907 been said, we should also think about situations where there
1908 is some urgency about getting just the basic notice and
1909 comment done and having two rounds of comment is unwarranted.
1910 So you should leave some flexibility to say we don't need
1911 advanced notice in this particular situation. The public
1912 still gets one shot at commenting and saying it is a bad
1913 idea, change it, et cetera. But you don't need the extra
1914 round and sometimes that would be imprudent.

1915 Mr. {Doyle.} But I guess the trick is how do you write
1916 that into the bill? Mr. Sununu brings this up that, you
1917 know, do we just leave this at the discretion to the FCC or
1918 is there a way to create some language that would allow it to
1919 happen what you have just suggested?

1920 Mr. {Levin.} I think it needs some consideration, but
1921 one idea I suggested in my draft is that you might set up the
1922 procedure and say the agency can, for good cause, bypass it.
1923 And that term is usually read to me--and a very good cause,
1924 not because you feel like it.

1925 Mr. {Doyle.} Sure. Mr. May?

1926 Mr. {May.} Yeah, just briefly. This is a provision I
1927 am generally not in favor of in the draft for a lot of the
1928 reasons that Professor Levin talked about. But here is what
1929 should happen. The reason it is here I think is because the
1930 FCC, especially in recent years over all commissions, it
1931 started to draft Notice of Proposed Rulemakings in a much
1932 more open-ended way than it used to back when I was at the
1933 Commission a long time ago. And it is, I guess, responding
1934 to that. But it is likely to increase the time that the FCC
1935 could act on things that it does need to act on.

1936 Remember I talked about Chairman Powell saying that the
1937 Commission needs to be able to act in internet time. So this
1938 is I am not sure the right way to get at that. Maybe just if
1939 your oversight would get the FCC focused on drafting
1940 rulemaking proposals that actually propose specific things,
1941 if not precise rule language.

1942 Mr. {Doyle.} Sure. Thank you, Mr. Chairman.

1943 Mr. {Walden.} Thank you, Mr. Doyle.

1944 We go now to Mr. Scalise for 5 minutes.

1945 Mr. {Scalise.} Thank you, Mr. Chairman.

1946 It was brought up earlier that a lot of us have
1947 concerns. I want to put some real structure in place for the
1948 FCC, not just for clarity in the industry, but also to move

1949 it away from what many of us view as an agency that is
1950 starting to implement their own political agenda as opposed
1951 to an agency that should be focused on regulations as it
1952 applies to existing law.

1953 I want to ask--and I want to start with Mr. May--when we
1954 look at some of the mergers that have come through recently,
1955 and of course there are still mergers pending for the FCC,
1956 there is a provision here in Section J of this draft that
1957 says, ``The Commission may not consider voluntary commitment
1958 of a party to such transfer or transaction unless the
1959 Commission could adopt that voluntary commitment as a
1960 condition under Paragraph 1.'' Let me ask you, you know, in
1961 your experiences from what you have seen with some of these
1962 conditions that have been placed on mergers at a time where
1963 companies really are very vulnerable to some of the pressures
1964 that would be put in place to agree to something that they
1965 might not otherwise support in those preconditions place as a
1966 condition of a merger, if you can address that in general but
1967 also as it relates to what you are seeing here in the
1968 language in the draft?

1969 Mr. {May.} Well, I think the language in the draft is
1970 good and I am enthusiastic about this provision. I said in
1971 my opening statement I would actually like to see the merger
1972 review process reformed even further. But this is useful

1973 because what it does is at least try and put some constraints
1974 on the FCC from going too far afield by tying the FCC's
1975 extraction of voluntary commitments to conditions that are
1976 narrowly tailored to remedy a harm that arises as a direct
1977 result of specific transfer or specific transaction. Now,
1978 there can still be disputes about that, but you know, at
1979 least that does confine it and that is a useful thing.

1980 The problem right now--and this is why this is so
1981 important--the only constraint right now is the public
1982 interest standard. And the public interest standard, of
1983 course, is completely indeterminate. And I can think of
1984 mergers where the FCC has imposed a condition or there has
1985 been a voluntary commitment offered not to outsource jobs
1986 overseas, for example, in one merger. Well, that might be a
1987 nice thing to happen as a policy but it didn't have anything
1988 at all to do with that particular merger at all. And there
1989 had been examples like that. And it gives the process an
1990 unseemly flavor when at the last minute, 2 days before a
1991 merger, you see, you know, voluntary commitments offered up
1992 like this.

1993 Mr. {Scalise.} And how about as it relates to the
1994 entire industry, too, because there are some conditions that,
1995 you know, maybe currently or in the past that have been
1996 placed that don't just affect the entities involved in the

1997 merger but also could be impacted industry-wide?

1998 Mr. {May.} Well, that is true and it also, of course,
1999 happens the other way around sort of perversely that you can
2000 have a condition imposed extracted by the FCC--and I am using
2001 the word extracted because, again, these things generally
2002 happen at the last minute--where a condition that ought to be
2003 industry-wide, imposed on an industry-wide basis if at all if
2004 it is going to be imposed--one party, the party to the merger
2005 is now subject to it and that seems not to be really
2006 equitable.

2007 But then what happens is often that condition sometimes
2008 is then used going forward by the FCC as a proposal then to
2009 apply to the whole industry so it becomes a bit of a
2010 precedent if not a legally-binding--

2011 Mr. {Scalise.} Right. And, you know, I think again
2012 that is a good condition because it is a problem we have
2013 seen, we have heard about, but it has actually been
2014 implemented and probably still being used today in some of
2015 the others.

2016 I want to ask Ms. Abernathy a question as it relates to
2017 the annual reports. We have heard a number of complaints
2018 that the annual reports at the FCC has to comply with today,
2019 by the time they are filed, they are outdated. It takes a
2020 whole lot of work to put in and then they are filed and

2021 really not that useful. This draft and its Section K really,
2022 you know, kind of lays out a different process of putting a
2023 communications marketplace report in place that might be a
2024 little more conducive to the changing technologies. If you
2025 can maybe address both what you are seeing in the draft but
2026 also as it relates to the current practice of these annual
2027 reports and whether or not they are even useful.

2028 Ms. {Abernathy.} I think if you implement new reporting
2029 obligations and eliminate some of the old ones, then that
2030 makes a lot of sense because, again, some of the reports were
2031 built around the old silos. And so the information, it takes
2032 a lot of time and money to gather the information, and yet it
2033 probably isn't providing a great deal of beneficial
2034 competitive analysis for Congress. So I think there has got
2035 to be a better reporting way, and this is a proposal that I
2036 think would start you in the right direction.

2037 Mr. {Scalise.} Mr. Sununu?

2038 Mr. {Sununu.} I am sorry. If I could make an
2039 observation on that point, though. The language that is here
2040 in the Communications Marketplace section identifying
2041 challenges and opportunities in the marketplace, the jobs,
2042 and economy, frankly it begins to make the FCC sound like an
2043 economic development group and that is simply not what it is.
2044 I think perhaps what we are trying to get at here is that the

2045 Commission should be more focused on evaluating the
2046 competitive state of the marketplace, the number of players,
2047 price trends, new products, innovation in the space, and
2048 taking that into consideration in their regulatory and
2049 rulemaking process. So I might encourage you to look a
2050 little bit more carefully at that language in order to (a)
2051 avoid unintended consequences and avoid creating new areas
2052 for the FCC to engage in regulation and instead focus it on
2053 making sure that we have got a regulatory authority focused
2054 on the current competitive state of the marketplace.

2055 Mr. {Walden.} We appreciate that.

2056 Mr. {Scalise.} We appreciate your comments and yield
2057 back, Mr. Chairman.

2058 Mr. {Walden.} Thank you. We do have a vote on in the
2059 House floor but we should have time for Mr. Latta for 5
2060 minutes.

2061 And as he prepares, I would really appreciate as you
2062 have heard the discussion among yourselves and with us, if
2063 you have specific recommendations for improving the language
2064 in the bill that are not referenced in your own testimony, it
2065 would be most helpful to get that to us as soon as possible.
2066 Thank you.

2067 Mr. Latta?

2068 Mr. {Latta.} Well, thank you, Chairman. I really

2069 appreciate you holding the hearing today and all the
2070 panelists for being here. We really appreciate your time.
2071 And I also appreciate the chairman's discussion draft that I
2072 think is very, very important.

2073 You know, we all have lots of folks coming through our
2074 office all the time talking about what is happening out
2075 there. And you know, the FCC is no different from what I
2076 have heard from a lot of different folks in that we have to
2077 really go in and look what is happening there because it
2078 could be stifling businesses out there. And one of the
2079 things I have done--I have also got a bill out there for
2080 cost-benefit analysis for the FCC when they are promulgating
2081 rules and at the very beginning and also at the final rule.

2082 And, you know, the things that we have heard that they
2083 are looking at across--either, you know, with those cost-
2084 benefits would be that either would or should the FCC
2085 consider, you know, the costs--or largely the costs of
2086 businesses of complying with the new regulatory regime, i.e.,
2087 creating new compliance regime, training employees, changing,
2088 billing other back-office systems, the lost revenue that
2089 businesses could be--would be lost for the new prohibited--
2090 engaging in particular business models that would be
2091 prohibited under the new regulation and the cost of
2092 productivity in the businesses.

2093 And one of the things, if I may, Ms. Abernathy, if I
2094 could ask you first is in your unique role as a former FCC
2095 commissioner and also at Frontier what you would see would be
2096 able to comment on this idea from, you know, the FCC's
2097 perspective and also from Frontier if they would have to do a
2098 cost-benefit analysis.

2099 Ms. {Abernathy.} I think it is appropriate for a number
2100 of proceedings to engage in a cost-benefit analysis because
2101 at the end of the day if the costs drive up our cost to
2102 consumers and the overall incremental information that is
2103 potentially provided to the FCC is de minimis, that makes no
2104 sense. And sometimes what happens in the context of looking
2105 at various rules and regs is the commissioners have the best
2106 of intentions but they haven't really thought through the
2107 costs and the burdens on the industry. And it is backwards.
2108 And so I think it would make a big difference.

2109 Mr. {Latta.} Let me ask you this. You know, looking at
2110 what has happened in the recent past with the FCC, could you
2111 comment on any more recent rules that would have benefitted
2112 from a cost-benefit analysis?

2113 Ms. {Abernathy.} I could get back to you in writing
2114 afterwards just because I need to look back.

2115 Mr. {Latta.} I appreciate that.

2116 Mr. May, I know in your testimony that you have

2117 addressed on page 2, your last paragraph there that, you
2118 know, you said in there taking them generally in order that
2119 they appear in the bill draft, and especially those
2120 provisions that would require the agency--you go on to also
2121 state to perform a cost-benefit analysis. If could just get
2122 your read on that a little bit farther on the cost-benefit
2123 analysis.

2124 Mr. {May.} I think generally this would be a good
2125 requirement to impose on the FCC. I take Professor Levin's
2126 point that it is worth thinking about whether it should be
2127 for every rule, and the answer is it may not be. But there
2128 is a lot of economically significant rules that the FCC
2129 proposes. Now, I think of Bill Shock, Net Neutrality, you
2130 know, the Data Roaming bill it just did. All of those are
2131 the types of rules that have cost and benefits and I think
2132 the FCC--obviously it does some of this now, but as I said
2133 earlier, because historically it has tended to focus, you
2134 know, again, in 103 places it has authority to act in the
2135 public interest. And because that is so indeterminate, it
2136 has, in my view, a bit of--with respect to all past
2137 commissioners--it has got a bit of a mindset, you know, to
2138 think of things in a way that is not economically as rigorous
2139 as it should be in today's environment, which is at least
2140 increasingly competitive, fast-changing marketplace

2141 environment.

2142 Mr. {Latta.} In my remaining time, Mr. Ramsay, I know
2143 on page 7 of your testimony today that you state that
2144 ``Still, logically, an analysis of a rule's potential
2145 benefits and costs, as well as milestones for its review,
2146 could focus available resources and expertise on the efficacy
2147 of any proposed rule.'' And just any other comment on cost-
2148 benefit analysis?

2149 Mr. {Ramsay.} The only thing I said on my testimony is
2150 true is that the nature of regulation and the nature of
2151 regulatory oversight is a balance of competing interests.
2152 The APA already requires agencies to specify the basis and
2153 explain why they are doing things. We haven't taken a
2154 specific position on the application of a strict cost-benefit
2155 test, so I can't speak to that. But I think I also noted in
2156 my testimony that it is certainly consistent with Executive
2157 Orders dating back to, I think, Gerald Ford.

2158 Mr. {Latta.} Thank you very much, Mr. Chairman. I see
2159 my time has expired, and I yield back.

2160 Mr. {Walden.} Mr. Latta, thank you for your
2161 participation in the hearing. I want to thank all of our
2162 subcommittee members for their participation, especially
2163 thank our panelists. You have been most enlightening for all
2164 of us as we work to improve this draft. And as I said, I

2165 really would appreciate any specific recommendations on how
2166 to make this better and more workable.

2167 So with that, we thank you again and this hearing is
2168 adjourned.

2169 [Whereupon, at 12:30 p.m., the subcommittee was
2170 adjourned.]