

ONE HUNDRED TWELFTH CONGRESS
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House of Representatives
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Opening Statement of Rep. Henry A. Waxman
Ranking Member, Committee on Energy and Commerce
Markup of H.R. 3309, the “Federal Communications Commission Process Reform
Act of 2011” and H.R. 3310, the “Federal Communications Commission
Consolidated Reporting Act of 2011”
Subcommittee on Communications and Technology
November 16, 2011

Although I have many problems with H.R. 3309, I have three major concerns.

First, it creates a new set of procedures for the FCC. For 40 years, the Administrative Procedure Act has governed administrative agencies across the federal government. H.R. 3309 creates special procedural rules for the FCC alone.

I asked my staff to reach out to impartial administrative law experts, Republicans and Democrats who used to work at the FCC, and experienced communications lawyers to understand the effects of this legislation.

The most common response was “why would anyone want to tie the agency up in knots like this and subject it to endless legal challenges?” One expert told us industry lawyers would have a “field day” challenging and delaying FCC actions. Other experts told us it could take 15 years of litigation for the courts to clarify the meaning of the new requirements in the bill.

Second, this legislation alters fundamentally the FCC’s ability to review transactions to ensure that they are in the public interest.

Although DOJ and the FTC are charged with protecting competition, only the FCC is directed to protect the public interest when reviewing proposed mergers. This bill would curtail this authority significantly.

What this means is that conditions to promote broadband adoption ... to require minimum broadband speeds ... or to ensure broadband coverage or access in rural or low-income areas could no longer be required. Conditions to protect smaller companies from harm could also fall by the wayside.

Finally, H.R. 3309 requires the FCC to do the regulatory analyses contained in President Obama's executive order. I have no objection to the FCC doing these analyses. In fact, Chairman Genachowski has appropriately committed to complying with the executive order.

The problem is that this bill makes each of the analyses required by the executive order subject to judicial review.

If AT&T or Verizon object to a regulation, they could sue the agency on the grounds that the cost-benefit analysis was deficient ... the analysis of the market failure was inadequate ... or the agency failed to consider alternatives to regulation. These lawsuits – which no other agency in government would face – could effectively paralyze the FCC.

This is not “process” reform, but fundamental reform of the Communications Act.

There is one part of H.R. 3309 that I support. We have suggested to Chairman Walden that we work together to pass a reform bill based on the FCC Collaboration Act sponsored by Ms. Eshoo, Mr. Shimkus, and Mr. Doyle. This is true reform because it would allow the FCC Commissioners to reach better decisions and act more expeditiously by allowing them to discuss FCC business with each other.

I also support the thrust of the second bill we are considering, H.R. 3310, which seeks to streamline the FCC's reporting obligations. With some additional work and clarifications, it should be possible to craft a bipartisan bill that streamlines FCC reporting requirements and that could be reported unanimously out of Committee and sail through the House.

Mr. Chairman, we want to be your partners, not your opponents. But we cannot support your FCC impairment bill, and you should not ram it through the Subcommittee in a partisan vote. We should work together to develop FCC reform legislation both sides can support.