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RPTS THOMAS

DCMN HERZFELD

FCC PROCESS REFORM

FRIDAY, MAY 13, 2011

House of Representatives,

Subcommittee on Communications

and Technology,

Committee on Energy and Commerce,

Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in Room 2123, Rayburn House Office Building, Hon. Greg Walden [chairman of the subcommittee] presiding.

Present: Representatives Walden, Terry, Stearns, Shimkus, Blackburn, Bilbray, Bass, Gingrey, Scalise, Latta, Kinzinger, Barton, Eshoo, Markey, Doyle, Matsui, Christensen, Dingell (ex officio), and Waxman (ex officio).

Staff Present: Gary Andres, Staff Director; Ray Baum, Senior

Policy Advisor/Director of Coalitions; Allison Busbee, Legislative Clerk; Stacy Cline, Counsel, Oversight; Neil Fried, Chief Counsel, C&T; Debbee Keller, Press Secretary; David Redl, Counsel, Telecom; Roger Sherman, Minority Chief Counsel; Phil Barnett, Minority Staff Director; Shawn Chang, Minority Counsel; Jeff Cohen, Minority Counsel; and Sarah Fisher, Minority Policy Analyst.

Mr. Walden. I welcome the FCC Chairman and Commissioners to our hearing today, and thank you for your thoughtful testimony and the time you each took to meet individually with me to discuss process reform ideas that could improve the transparency and accountability of the FCC. As I told the chairman and each Commissioner, and as Ms. Eshoo and I discussed and agreed yesterday, a discussion about reforming process is not, and should not become, an exercise in partisanship, or serve as a cloak to attack past or present commissions or chairmen.

As I am sure all will notice, only four witness chairs are occupied in light of Commissioner Baker's announcement Wednesday. I would like to thank her for her many years of public service not only as a Commissioner, but also in helping us complete the DTV transition while she was heading up the NTIA. I wish her well in her new endeavor.

Turning to today's topic, it is our responsibility to review how independent agencies to whom we have delegated authority and over which we have jurisdiction conduct the public's business. At times the FCC succumbed to practices under both Democratic and Republican Chairmen that weaken decisionmaking and jeopardize public confidence. While Chairman Genachowski and some of his predecessors have taken steps to improve process, we have all witnessed how process and procedures of one Chairman can change dramatically under another. One FCC is open and transparent, and the next is closed and dysfunctional. The time is ripe to codify best practices to ensure consistency from issue to issue and Commission to Commission.

Many of my colleagues on this subcommittee have worked on reform

ideas in the past, and some have proposed changes in bill form. We will consider those as well. To kick things off, here are seven items to think about:

First, the FCC could be required to start new rulemaking proceedings with a notice of inquiry rather than a notice of proposed rulemaking. An NPRM presumes regulation is needed. The FCC should first examine the state of the relevant markets, services and technologies. Even when regulation may be appropriate, the FCC is unlikely to craft as useful a proposal without first gathering preliminary information.

Second, the FCC does not always publish the text of proposed rules for public comment before adopting final rules. Providing specific text will allow for more constructive input and a better end product. Crafting proposed rules should not be difficult if there is a genuine need and the FCC has started with an NOI.

Third, finite timelines for resolution of matters would be helpful. Parties and the public should have some sense of when resolution will come.

Fourth, the FCC now makes information available about which draft items are circulating before the Commissioners. The FCC could be required to provide additional information, such as a list of all unfinished items at the Commission, the date the items were initiated, their current status, and expected date of completion.

Fifth, a bipartisan majority of Commissioners other than the Chairman could be allowed to initiate items to prevent a Chairman from

stopping consensus items.

Sixth, the President's Memorandum for the Heads of Executive Departments and Agencies, "Regulatory Flexibility, Small Business, and Job Creation," requires executive agencies to conduct cost-benefit analyses before adopting regulations. The memorandum does not apply, however, to independent agencies like the FCC. We could remedy that by requiring the FCC to identify actual consumer harm and conduct economic, market and cost-benefit analyses before adopting any regulation.

Seventh, the FCC's transaction review standards are vague and susceptible to abuse. Parties with a pending transaction should not feel pressure to accept "voluntary" conditions on the deal or to curtail their advocacy in other proceedings. These concerns are neither new nor of concern to only one party. Indeed, my good friend from Michigan, Chairman Emeritus Dingell, observed in a March 2000 hearing that there is "great need to address and to reform the way the FCC handles its merger reviews. These are a remarkable exercise in arrogance, and the behavior of the Commission, oft-times by reason of delay and other matters, approaches what might well be defined as not just arrogance, but extortion. The concerns Mr. Dingell raised then have been borne out with increasing frequency over the last decade.

To address this, the FCC could be prohibited from adopting any conditions unless they are narrowly tailored to any transaction's specific harm. To prevent the FCC from using transactions to commence industrywide changes it could not otherwise adopt, the FCC could be

required to show statutory authority for the conditions outside the transaction review provisions of the act.

These suggestions are simply meant as conversation starters. I look forward to additional suggestions from my colleagues or the Commissioners themselves.

[The prepared statement of Mr. Walden follows:]

******** INSERT 1-1 ********

Mr. Walden. And on that note, I yield back the balance of my time and would recognize the ranking member on the subcommittee, Ms. Eshoo from California.

Ms. Eshoo. Thank you, Mr. Chairman, and good morning to you. And welcome to Chairman Genachowski and the members of the Federal Communications Commission. It is good to see you. Today's hearing is an important opportunity to hear from the FCC Chairman and the Commissioners on what is already working well, because there are things that are working well, and where there are opportunities to improve the Federal Communications Commission. We should work together as a committee to subject ideas and suggestions to healthy scrutiny and determine what reforms can be embraced to better serve the public good. That is why we are all here, and I think sometimes that gets lost in the complexity and the layers of things. We are here to serve the public good.

Under Chairman Genachowski's tenure, the Commission has taken several key steps to increase openness, transparency, and greater interaction with the public. The Spectrum Dashboard, the new ex parte rules, the growing use of social media like Twitter and Facebook are just a few ways that the FCC has become more responsive to the needs of consumers and businesses. But there is always much more that can be done, and I welcome steps that will ensure that the Commission can operate as a modern, 21st-century Federal agency.

Earlier this year I introduced the FCC Collaboration Act with our colleagues Representatives Shimkus and Doyle. This is a simple

bipartisan reform measure which would modify the current rules which prohibit more than two Commissioners from talking to each other outside of an official public meeting. Now, why is this important? In an agency that deals with the highly technical issues like spectrum and universal service, FCC Commissioners should be able to collaborate and benefit from the years of experience that each one brings to the table. We should move this bill forward in a timely manner and get it done.

I welcome examining other ideas as well, like the FCC Commissioners' Technical Resource Enhancement Act, a bill introduced in the last Congress that would allow each Commissioner to appoint an electrical engineer or a computer scientist to their staff. Similar to the Collaboration Act, I am open to looking at other ways to ensure that each Commissioner is equipped to evaluate the complex technology and telecommunications issues that the FCC is faced with today.

What would concern me would be proposals which diminish the Commission's ability to protect the public interest and to preserve competition in the telecommunications marketplace. The FCC has a critical role to play in evaluating proposed mergers, ensuring that broadband is universally deployed, and that the market for voice and data service is actually competitive.

To stay in touch with a rapidly changing industry, the FCC, I think, should make it part of its core mission to visit companies both small and large. Last month Commissioner Copps joined me in my congressional district, and we visited several companies headquartered in Silicon Valley. We learned a great deal. I extend a similar

invitation to each Commissioner because I believe these types of meetings with entrepreneurs, engineers, and other technology experts are central to understanding the issues you work on every day.

So thank you again for being here today. I really look forward to this hearing, and I also look forward to hearing your testimony and your fresh thinking.

I yield back the balance of my time.

[The prepared statement of Ms. Eshoo follows:]

******** INSERT 1-2 ********

Mr. Walden. Now we are going to recess for about an hour. We think it could take upwards of an hour, so why don't we plan to just reconvene at 10:40. And with that, we stand in recess.

[Recess.]

Mr. Walden. I want to thank my colleague from Illinois for his courtesy in yielding to Mr. Waxman, who has another engagement at 11:30. So we will go out of our normal sequence.

Mr. Waxman. Thank you, Mr. Chairman. I particularly want to thank Mr. Shimkus for his courtesy.

I would like to welcome Chairman Genachowski as well as Commissioners Copps, McDowell, and Clyburn back to the Subcommittee on Communications and Technology. We understand how much effort goes into preparing to testify before Congress, and we greatly appreciate your participation.

The topic of FCC reform is not new to this committee. As one reporter's account of an October 28, 1999, hearing recalls, quote, "The FCC was criticized for its slow pace of institutional reform, its handling of the e-rate and universal service, its exercise of antitrust merger review authority, its delay in completing antitrust merger reviews, and its imposition of conditions on mergers," end quote. Well, today's hearing will take us back to the future as we revisit many of these same issues.

At the outset, let me say Chairman Genachowski should be commended for his significant efforts and commitment to improving agency operations and boosting employee morale. Since he became Chairman,

the agency has increased transparency, expanded opportunities for public input, and improved information sharing with other Commissioners and the public.

The agency now includes more details on proposed rules in notices of proposed rulemaking, makes adopted rules available to the public more quickly, and has revamped its ex parte rules to enhance openness and transparency. These efforts have been made better by the thoughtful bipartisan suggestion of his fellow Commissioners.

And it is clear that today the FCC is a much better place to work. According to the 2010 OPM employee survey, the FCC was the most improved agency in the Federal Government.

I also want to commend subcommittee Chairman Walden for looking at this issue in a nonpartisan manner. He has sought input from all of the Commissioners and Republican and Democratic committee members, and he is committed to explore proposed process reforms in detail before we proceed toward possible legislation.

If the committee does develop legislation regarding FCC reform. We should be guided by a few basic questions about each proposed change to ensure that we are promoting smart regulation.

First, does a proposed change create an undue burden on the FCC? When we impose statutory requirements of any kind, we need to be wary of burdening the agency with compliance requirements.

Second, are we undermining agency flexibility to act quickly and efficiently in the public interest? If we put prescriptive process requirements in statute, we could end up promoting slower, not faster,

decisionmaking.

And third, are we requiring additional process for valid reasons? We must not impose procedural hurdles for their own sake.

Fourth, are we making procedural changes in an attempt to address outcomes with which we don't agree? For example, if we limit the ability of the agency to negotiate voluntary commitments related to mergers, are we also willing to accept that certain mergers may then be rejected outright? Some might view conditions as unfair, while others might see them as critical tradeoffs that allow transactions that might otherwise fail to go forward.

And finally, why the FCC? Are we imposing process reforms on the FCC that should apply to all Federal agencies? If not, what is our basis for treating the FCC differently?

I look forward to hearing our panel address these issues and to receiving their advice about how to improve the FCC. I look forward to working with you, Mr. Chairman, and I yield back. Any other Members wish me to yield to them? If not, I yield back the balance of my time.

[The information follows:]

******** COMMITTEE INSERT ********

Mr. Walden. I thank the gentleman for his kind comments and look forward to continuing our discussion on these matters, and I appreciate your comments on the principles.

I am now going to yield. We have 5 minutes on our side. We have several speakers, so if we could kind of work a minute apiece or not much over that. So at this time I would start with Mr. Stearns and recognize him.

Mr. Stearns. Thank you, Mr. Chairman. I thank you for this hearing. I think the ranking member Mr. Waxman has pointed out that it is -- the agency has come a long way. I think it has, but in this area of Internet technology, I think there is still a long way to go forward. And I think there is a litany of necessary improvements, and I think this hearing will show that.

For example, the merger review process, I think, needs to be examined. Although the FCC internal shot clock to act on mergers is 6 months, XM/Sirius took over 16 months, Mr. Chairman, and Comcast/NBCU took nearly 11. So I think in a rapidly evolving market here, uncertainty can sometimes create havoc for markets, and deadlines for FCC action coupled with ensuring merger reviews are handled in a transparent way is important without endless strands of nonmerger-specific conditions attached, I think, would provide future certainty.

So the bottom line, I think the agency could improve, and I hope we can move forward.

Thank you.

[The information follows:]

******** COMMITTEE INSERT ********

Mr. Walden. I now recognize the gentleman from Illinois Mr. Shimkus.

Mr. Shimkus. Thank you, Mr. Chairman.

First of all, we want to thank Commissioner Baker for her time, and hopefully we can expeditiously get her replaced in the Commission. I know that is everyone's desire.

Chairman, we appreciate the movement on reform. It is something that with the new technology, new age that is important, and we know there are steps being made in that direction.

And I have enjoyed my time working with Commissioner Copps and, of course, Anna Eshoo. And on the sunshine bill, it just doesn't make sense. Maybe three can't speak together, but to have two not be able to speak of the Commissioners -- Chairman Walden and I spoke on the floor. I think it is something that we can move expeditiously. Of course, I am not the chairman, so I will defer to his wisdom and guidance, but based upon the last election, even in the cycle I said, I think the public is tired of comprehensive, big bills. We ought to move things that we can move clearly, concisely and defend, and maybe we will be there at the end if other things can't be agreed upon. But I have been -- the chairman has agreed to take a look at what we are doing and hopefully merge those with the other things that are not also in agreement and produce a good bill.

So with that I thank him, and I will probably ask some questions on that if I am not on a plane. And I yield back.

[The information follows:]

******** COMMITTEE INSERT ********

Mr. Walden. I recognize the gentlelady from Tennessee Mrs. Blackburn.

Mrs. Blackburn. Thank you, Mr. Chairman, and welcome to all of you.

Procedurally I do have some questions about license transfers, indecency complaints and FCC voting procedures. But I think the biggest problem that I have and what I want to discuss with you today is what I see is your overreach, going beyond your statutory authority, and you do it without consequence.

And the chairman and I have discussed our disagreement on net neutrality and regulation of the Internet, but I think there is also overreach to other things like data roaming and agencies scheming, which I think is a clever scheme, to socialize our mobile networks. And I think that as you look at privacy, and we will talk about this a little bit today, that the FCC is moving into areas where it should not be with issues like privacy.

So I am one of those that think it is time to maybe rein the agency in a little bit and have a discussion about what your structure should look like. So thank you for being here to participate.

I yield back.

[The information follows:]

******** COMMITTEE INSERT ********

Mr. Walden. Mr. Bass or Mr. Gingrey, do you have any comments?

Mr. Bass. If I could make a brief comment.

I want to thank all four of you for being here today. And I am not sure whether I am going to be able to stay long enough to ask the question, but I was hoping that the chairman would comment on this GPS, slash -- you know, the spectrum issue, as to whether or not it would be appropriate for that decision to be one that the Commission itself makes rather than be done through rule. There are significant potential issues associated with this which need to be aired, and I am hopeful that the Commission will have a process that will allow for both sides in this debate to have their views considered and assure that a proper decision is made by the Commission.

Thank you, Mr. Chairman.

[The information follows:]

******** COMMITTEE INSERT ********

Mr. Walden. The gentleman yields back the time. All time on our side of the aisle has been yielded back. Same on the other.

So with that, I would like to welcome the Chairman of the Federal Communications Commission Mr. Genachowski. We appreciate your testimony and your work at reform, and we welcome your comments this morning, sir. Thank you.

STATEMENT OF JULIUS GENACHOWSKI, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; ROBERT MCDOWELL, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; MICHAEL COPPS, PH.D., COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION; AND MIGNON CLYBURN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF JULIUS GENACHOWSKI

Mr. Genachowski. Thank you, Chairman Walden, Ranking Member Eshoo, members of the committee. Thank you for holding this hearing on FCC process reform.

At the FCC we are focused on harnessing the power of communications technology to benefit all Americans, grow our economy, create jobs, enhance our competitiveness, and unleash innovation.

On my first day as Chairman, I told the FCC staff that whether we can achieve these goals depends on how our agency works. That is why the FCC's processes and operations are important, as Chairman Walden has said, and that is why I have made it a priority to improve the way the FCC does business.

Our approach to reform rests on a number of core principles: efficiency and fiscal responsibility; accountability and transparency; reliance on facts and data, on the power of technology to improve agency operations, and on the benefits of collaboration.

To drive our reform efforts, I appointed a Special Counsel on FCC

Reform immediately after my confirmation, and I hired a new Managing Director with experience running a multibillion-dollar private-sector PNL to help lead our reform efforts.

My fellow Commissioners have been vital partners in this effort. Commissioner Copps made FCC reform a priority when he was Acting Chairman. Commissioner McDowell has raised issues with me on which we have taken positive action, and Commissioner Clyburn has taken a lead and has helped us make real progress on our process and relationships with the States.

In the past 2 years working together we have increased efficiency, increased transparency, increased collaboration, and increased the effectiveness of the FCC. I am proud of our progress, and I am pleased that in the past 2 years, 95 percent of the Commission's actions have been unanimous and bipartisan.

My written testimony includes many examples of the reforms implemented in the last 2 years. As John Wooden said, We shouldn't confuse activity with accomplishment, so I would like to use my limited time to highlight some of the real results of our reform efforts.

In the last 2 years, we have reduced the time between the vote on a Commission decision and its public release from an average of 14 days to 3 days, and to 1 day in most cases. We have increased the number of notices of proposed rulemakings that publish the text of proposed rules from 38 percent to 85 percent. We have eliminated many outdated regulations. Two months ago we identified 20 sets of unnecessary data-collection requirements to be eliminated, and just

yesterday the Commission identified and eliminated an additional 5 data requirements.

We have acted on over 95 percent of transactions within the 180-day shot clock period. With respect to major transactions, we have cut down the review time by more than 100 days. We have reduced our broadcast application backlog by 30 percent and our satellite application backlog by 89 percent. We have broken down internal silos at the FCC and increased internal communications. We have reformed our video relay service, a reform that has already saved taxpayers about $250 million. We are saving millions of dollars by harnessing technology to improve the agency's operations including by consolidating multiple licensing systems and reducing data centers.

A leading commentator said the Commission has gone from one of the worst to one of the best in its use of on-line tools to serve the public and all stakeholders. Just yesterday we relaunched FCC.GOV after receiving and responding to broad input on our beta launch. We have launched a public Spectrum Dashboard. A few weeks ago we had the first joint blog post in FCC history with all FCC Commissioners focusing on the importance of reforming the Universal Service Fund.

We have held more than 85 public forums with active participation from Commissioners, and for the first time have made staff-led public workshops a routine part of Commission work. We have adopted reforms of our ex parte process to increase transparency, reforms of our voting process to increase efficiency, and reforms of our filing process to increase effectiveness.

Our national broadband plan has been lauded as "a model for other nations" and has been praised for its process and its substance.

OPM's governmentwide survey of Federal employees identified the FCC as the most improved place to work in the Federal Government. I thank Mr. Waxman for mentioning that. And just last week the FCC team that worked on the national broadband plan was nominated for a Service to America Medal, the most prestigious independent award for America's civil servants.

I am proud of what we have achieved. The Commission is working effectively. We are moving in the right direction. And I thank my fellow Commissioners, as well as the FCC's employees, who have been instrumental in making this possible, as well as the many members of this committee who have over the years and in my time offered very constructive suggestions to improve our processes.

Of course, there is more we can do to improve performance, and I am committed to continuing our efforts at reform. Making the FCC work is important because the FCC's mission is important. It matters to our economy, to our global competitiveness, and to the quality of life of all Americans.

I look forward to working with the subcommittee on these important issues. I thank you, and I look forward to your questions.

Mr. Walden. Thank you, Chairman, we appreciate it.

[The prepared statement of Mr. Genachowski follows:]

******** INSERT 1-3 ********

Mr. Walden. And we will get that high-technology ringing device off over there in the corner. We are also streaming -- if you notice on the video screens here, all of your data is streaming over your faces, too. It is part of what happens in repacking if you don't get it right. So great to be the technology.

Anyway, we want to go now to the senior member of the Federal Communications Commission by length of service, I will only approach it that way. We appreciate your service to the country and on the Federal Communications Commission, Mr. Copps, and we welcome your testimony and comments.

STATEMENT OF MICHAEL COPPS

Mr. Copps. Thank you very much. Good morning, Chairman Walden, Ranking Member Eshoo, members of the subcommittee. Thank you for holding this important meeting on FCC reform and for inviting me to share some thoughts with you.

As Chairman Genachowski has explained, and many of you have already noted, we have had real and measurable accomplishments toward FCC reform under this current Commission, and I am proud of those.

I know there are many other ideas and proposals you will want to discuss this morning, and I am happy to comment on any of them, but in my brief time now, I want to mention just three ideas that I find especially important.

First and foremost, please allow the Commissioners to talk to one another. That seems a strange request in a town fueled by dialogue and debate when in FCC world, when three or more of us are ever together outside of a public meeting, we must get lockjaw. We cannot mention one iota of policy or substance, float one idea for resolving a crisis, or suggest any alternative path for addressing a problem. This has not only irked me for years, but troubled me greatly, because it is like sending a football team into a huddle and prohibiting the players from talking to one another. That is the FCC under the closed-meeting rule: the silent huddle.

So the first thing I want to do this morning is to applaud

Congressman Anna Eshoo and Congressman John Shimkus and Congressman Mike Doyle for the introduction of their FCC Collaboration Act. This proposed legislation is a modest, commonsense, and much-needed reform to modify the closed-meeting rule that prohibits more than two Commissioners from ever talking to one another unless it is in a public meeting. I have spoken about the need for this reform for many years before the subcommittee. I am hopeful this will be the year when legislation is finally enacted.

I have seen first-hand for the pernicious and unintended consequences of this prohibition, stifling collaborative discussions among colleagues, delaying timely decisionmaking, discouraging collegiality, and shortchanging consumers and the public interest.

Elected representatives, Cabinet officials, judges, even the cardinals of my Catholic Church have the opportunity for face-to-face discussion before making important issues. I see no reason why the FCC Commissioners should not have the same opportunity to reason together, especially when balanced, as this legislation is, with specific safeguards designed to preserve transparency. If it is good enough for Congress, the courts, and Holy Mother Catholic Church, it ought to be good enough for the FCC.

Reaching agreement on the complex issues pending before us is difficult enough in the best of circumstances, but it is infinitely more so when we cannot even talk about them among ourselves. Each of the five Commissioners brings to the FCC special experiences and unique talents that we cannot fully leverage without communicating directly

with one another.

This act is a prudent, balanced proposal that recognizes the benefits of permitting the Commission to do its business collectively, while maintaining full transparency of the process. Enactment of this legislation would, in my mind, constitute as major a reform of Commission procedures as any that I can contemplate. It doesn't just protect the public interest, it advances the public interest. And it is number one on my list.

My second suggestion is let us get the FCC out of Washington and on the road more frequently; I mean the full Commission, all of the Commissioners. We live too much in an isolated, inside-the-Beltway culture. We see the usual players, make the same speeches every year, and attend the same functions and events. And that is fine up to a point, but if it comes at the expense of letting America see the FCC and letting the FCC see America, it is not so good. Our deliberations would surely and greatly benefit from taking the FCC outside Washington, D.C., and put it on the road so it could directly hear from average Americans.

The Commission holds an open meeting each month, and I see no reason why for at least few months out of a year we couldn't conduct our meetings in places like Bend, or Benton Harbor, or Boston, or Austin, or Mountain View. In communications, every American is a stakeholder, and each of us is affected in so many important ways by our media policies, spectrum allocations and universal service, just to name a few big-ticket items on our agenda.

The idea here is not just that people would see the Commission, but that the Commission would see the people and gain a greater understanding of the impact of our decisions on American consumers. It is just better communications, and, after all, Communications is our middle name.

Third, and this is related to what I just suggested, we need to encourage more input into our deliberations by what I have called our nontraditional stakeholders. Although we hear often, sometimes every day, from the big interests with their armies of lawyers and lobbyists, we hear much less from everyone else, all of those consumers and citizens who don't have a lobbyist or lawyer in town to represent them, but who nevertheless have to live with the consequences of what we do in Washington.

I have devoted considerable time during my years at the Commission to open our doors to the full panoply of American stakeholders, including minorities, rural Americans, the various disabilities communities, Native Americans, consumer and advocacy organizations, and also educational institutions. We were designed to be a consumer protection agency. Let us get the skinny from those who consume what you and I do in Washington, D.C.

Another area where we need to see more progress and partnering is in the Federal, State, local governmental relationship. I believe more of this kind of interaction was envisioned and encouraged by the Telecommunications Act of 1996. As we embark upon the formidable challenge of revamping universal service and intercarrier

compensation, it is vitally important that we are sharing data, sharing ideas and sharing responsibilities with our colleagues at all levels of government.

I commend the Chairman for moving us forward in this regard and also my colleague Commissioner Clyburn for the excellent work she has done to reinvigorate our partnerships with the States as Chair of the Federal-State Joint Boards. We need always to be thinking about how to build upon the experiences and knowledge that exist in such abundance at all levels of government.

Let me say that this present Commission has made many and impressive, important strides to increase transparency, to work collaboratively with all stakeholders, and to hold workshops both inside and outside the Nation's Capital. The Chairman's statement recounts many of these, and I commend him for the progress that has been made.

My point is this work is never done, and there is much more that we can still do. There are years, decades of "inside-the-Beltway-itis" to make up for, and this demands some fundamental reorientation of the Commission. We can talk about deadlines, shot clocks, what is an NOI versus an NPRM, and those are all relevant matters to discuss. But above them all is giving consumers and citizens confidence that their voices are being heard, their suggestions given credence, and knowing that their Commission exists to serve the public interest, a term that, by my rough count, appears some 112 times in the Telecommunications Act. That is our

lodestar, and we need to keep our fix on that lodestar every minute of every day.

Thank you for convening this conversation, and I look forward to your comments and suggestions for the betterment of the Good Ship FCC.

Mr. Walden. Mr. Copps, thank you, as always, for your comments and suggestions.

[The prepared statement of Mr. Copps follows:]

******** INSERT 1-4 ********

Mr. Walden. I go now to Commissioner McDowell. We welcome you. We appreciate your thoughtful addition to this discussion, and we welcome your testimony.

STATEMENT OF ROBERT MCDOWELL

Mr. McDowell. Thank you, Chairman Walden, and Ranking Member Eshoo, all members of the committee. And I also see a familiar face sitting behind Mr. Stearns over there, Brooke Ericson, my former law clerk. And now that you are my overseer, I really am hoping I was a nice boss.

But as you know, Congress created the FCC in 1934, almost 77 years ago. In that year Babe Ruth signed a contract for an eye-popping $35,000 a year. Donald Duck made his movie debut, the average new house cost less than $6,000, the entire Federal budget was only $6.5 billion, and a gallon of gas cost 10 cents. And, my, how times have changed.

Although a few amendments have been made to the laws of the Commission -- the laws the Commission operates under since then, many of the regulatory legacies from 1934 remain in place. The technologies we take for granted in today's communication's marketplace were unimaginable to even the most creative of science fiction writers when existing mandates were written.

Against this backdrop it is fitting for this committee to examine ways to reform the FCC to make it more efficient and relevant to modern realities. I operate under the philosophy that Congress should tell

us what to do and not the other way around, but given your solicitation of suggestions, I will start by raising several possible statutory changes to improve the FCC before moving on to possible procedural reforms that we could effectuate.

Twenty-first-century consumers want to have the freedom to enjoy their favorite applications and content when and where they choose. Whether such material arrives over coaxial cable, copper wires, fiber or radio waves is of little consequence to most consumers so long as the market's supply of products and services satisfies demand. Legacy statutory constructs, however, have created market-distorting legal stovepipes based on the regulatory history of particular delivery platforms. While consumers demand that functionalities and technologies converge, regulators and business people alike are forced to make decisions based on whether a business model fits into Titles 1, 2, 3, 6, or none of the above. As Congress contemplates FCC reform, it may want to consider adopting an approach that is more focused on preventing concentrations and abuses of market power that result in consumer harm.

Furthermore, ideas from outside the Commission also deserve serious consideration. For instance, Randy May, the president of the Free State Foundation, has called for building on the deregulatory bent of sections 10 and 11 of the Telecom Act of 1996 by adding an evidentiary presumption during periodic regulatory reviews that would enhance the likelihood of the Commission reaching a deregulatory decision.

With respect to procedural ideas, almost 2-1/2 years ago, I said

to my colleague, then-Acting Chairman Mike Copps, a public letter detailing some ideas to improve our agency's effectiveness. He and I agree on many reform ideas, such as modernization of the cumbersome and outdated sunshine rules that prevent more than two of us from discussing Commission business outside of a public meeting. Later, in July of 2009, after Julius Genachowski became a Commission colleague as well, I sent him an updated letter with additional ideas and suggestions within existing statutory constructs. Time does not allow me to enumerate all of them, so I have attached these letters as part of my testimony and respectfully request to be included in the record.

I am delighted to report that some reforms have already been implemented. For example, many stale or ill-advised Commission action items awaiting votes contained on what we call the circulation list have been weeded out. A portion of the backlog of the 1.4 million broadcast indecency complaints that were defective on their face have been dismissed. And the FCC now relies more on electronic internal communications rather than paper deliveries.

Going forward, I am hopeful that other FCC reform suggestions will be carried out as well. I have long called for a full and public operational, financial, and ethics audit of everything connected to the FCC, including the Universal Service Administrative Company, also known as USAC. The erroneous payment rate in the High Cost Fund alone has been far too high, and we may need to make fundamental changes to fix the problem.

Chairman Genachowski has made good progress in ensuring that

notices of proposed rulemaking contain actual proposed rules. I applaud his efforts. I would encourage improving the process further by codifying this requirement in our rules.

The Commission should include proper market power analyses to justify new rules in notices of proposed rulemaking. If a market power analysis is not appropriate, the FCC should explain why.

When regulated entities are under scrutiny for alleged violations of our rules, such as broadcasters being investigated for airing indecent material, often they are not notified in a timely manner of the investigation or its effects on other matters before the Commission, such as license renewals. Similarly, entities are not always informed of when they have been cleared of wrongdoing. More transparency and better communication in this area would not only be a matter of appropriate due process, but simple good government as well.

To promote collegiality and efficiency we could improve the productivity of all Commissioners' offices by routinely sharing options memoranda prepared by our talented career public servants. All Commissioners should be able to benefit from the same advice and analysis enjoyed by our many Chairmen over the years. And perhaps we could call this our "No Commissioner Left Behind" program.

Many, many, many more ideas abound, and I look forward to discussing all suggestions and ideas with you, and thank you again for the opportunity to appear before you today, and I look forward to your questions.

Mr. Walden. Commissioner McDowell, thank you for your

suggestions.

[The prepared statement of Mr. McDowell follows:]

******** INSERT 1-5 ********

Mr. Walden. Now we, for our final witness, turn to Commissioner Clyburn. We appreciate the time you have taken to engage in this matter with me and others on this committee, and we look forward to your testimony.

STATEMENT OF MIGNON CLYBURN

Ms. Clyburn. Thank you, Mr. Chairman for that and for inviting me to participate in today's hearing. It is my pleasure to see you, Ranking Member Eshoo and the other members of the subcommittee. I respectfully request at this time that my full statement be included in the record.

My colleagues and I work in an environment with many moving parts. As with any Federal agency, there are checks and balances in place, and the regulations and decisions we consider and adopt receive thorough consideration and incredible scrutiny. The Commission staff works diligently on each item with the objective of delivering a finished product that is cogent, precise, and effective. Such complexity often does not lend itself to rocket dockets and express reviews, yet the Commission has worked hard to streamline its processing of many items.

Other proceedings, however, require significant examination that takes time and an incredible amount of staff resources. Thus, our consideration of many rulemakings and adjudications can endure over weeks, months, and in some instances years. Part of the reason why

many of our deliberations take so much time is because of our robust and all-inclusive public comment mechanism.

During our consideration of a rulemaking item, the Commission listens to any and all comers, petitioners, adverse parties, interested participants, the public, and so on. So criticisms about the FCC being sealed off from the public are inaccurate, I believe, and I am proud of our process and the number of public comments that stem from it.

We have made huge strides in putting an enhanced public face on the Commission under Chairman Genachowski's leadership. Through Reboot.FCC.gov, our external advisory committees, public forums, and the FCC's numerous workshops, we welcome, expect and, quite frankly, need voices and opinions from outside of our walls to provide feedback, criticism, and counsel. This is definitely not your grandfather's FCC.

Regarding our much-maligned sunshine rules, I have a particular interest and potential tailor-made revisions to the way in which we interact. The introduction of H.R. 1009 would be a significant improvement in our deliberative process, and I thank Ms. Eshoo, Mr. Shimkus and Mr. Doyle for this bill. Recently, NARUC, the national body representing State commissioners, praised the introduction of this legislation and offered its support for it.

Allow me to bring me to your attention the fact that NARUC did note the need for one minor change to the legislation in order to improve its effectiveness with respect to the Federal Commissioners' participation on the Joint Boards and Conference. The Joint Boards

and Joint Conference have Federal and State representation, and each is involved in the Commission's policymaking process with respect to their subject-matter focus in the areas of universal service, jurisdictional separations, and advanced services. Under current law, three or more Commissioners may not participate in a Joint Board or Conference meeting unless the meeting is open to the public and has been properly noticed.

Currently Federal Commissioners must take turns participating in our in-person meetings and conference calls. This has made it extremely difficult for a constructive, and effective and efficient deliberations when it comes to Joint Board-recommended decisions. NARUC's letter makes the same observation, and I join support of its request that H.R. 1009 include language to extend the proposed Sunshine Act's exemption to cover FCC Commissioners who participate on the Joint Boards and Conference.

I believe that it is critical that the FCC collaborate with the States on telecommunications and broadband policy. It is my belief that the understanding of local issues must be fully considered, and State commissioners know these needs best.

When I came to the FCC, my primary goal was to improve the communications and collaboration between our agency and the States. Fortunately, Chairman Genachowski offered me the position of Chair of all of the Joint Boards and Joint Conference. With his support I believe we have revitalized and strengthened the relationships with the States through these bodies.

Thank you again, Mr. Chairman, for another opportunity to appear before the committee. I hope that today's discussions will highlight any areas of concern that the members of this committee may have, be they process systems, agency rules, or any other methods of practice we use.

Mr. Walden. Thank you, Commissioner Clyburn. We appreciate your testimony and that of our colleagues on the FCC.

[The prepared statement of Ms. Clyburn follows:]

******** INSERT 1-6 ********

Mr. Walden. I want to start with a question regarding the Commission's agenda. I understand the Chairman is agency CEO, controls the Commission's agenda. I have a question, though, that a Chairman could prevent the FCC from addressing important issues even when a bipartisan majority of the Commissioners believes that moving forward is necessary.

So I would like each of you to answer, do you believe that a bipartisan majority of the Commissioners other than the Chairman should be allowed to work with the agency staff to move an item?

Commissioner -- we will start with the Chairman.

Mr. Genachowski. Well, having a collaborative process has been important to me from the start, as I mentioned, and I appreciate the collaborative way that all of us have worked together. I can't imagine a situation --

Mr. Walden. I am going to keep you kind of short here because I have got a series of questions. But again, this isn't about you, and it is not about this Commission, because things have changed. They can change again.

So the question is should you be able to be allowed to work with the agency staff to move an item? Should the other Commissioners?

Mr. Genachowski. I think the statute now is correct on this. I think any organization needs a chief executive responsible for the prompt --

Mr. Walden. So it is a no.

Commissioner Copps.

Mr. Copps. Yes, I do. I believe the three Commissioners should have the power to call up an item, to delete an item from an agenda, and to edit any and all documents.

Mr. Walden. Commissioner McDowell.

Mr. McDowell. This is another boring chapter in the long, multivolume set known as the Copps-McDowell alliance. I agree with my colleague to the right of me, ironically.

And so, yes, we actually, in all seriousness, in the fall of 2008 could have resolved a lot of thorny questions on universal service reform, intercarrier compensation because there were four Commissioners, two Republicans, two Democrats, in agreement, but the Chairman at the time did not move the item.

Mr. Walden. Thank you.

Commissioner Clyburn.

Ms. Clyburn. We are the sum total of our experiences, so in that regard, I have healthy engagement, and at this time I don't see any need for any revisions in that manner.

Mr. Walden. Okay.

Mr. Genachowski. Could I add just one other thing? Ninety-five percent of what we do is unanimous. Historically this hasn't been a problem except for, as far as I can tell, one anomaly. And so I personally think that changing the statute to address one anomaly when it hasn't been a problem, I can't imagine an incidence when it wouldn't be three Commissioners for a step that we couldn't work out together.

Mr. Walden. Commissioner Copps?

Mr. Copps. This reminds me of the old story from history when Abraham Lincoln was meeting with his Cabinet to discuss a very serious issue, and he took a vote, and there were three noes from the Cabinet. And then he voted, and he said, the ayes have it.

Mr. Walden. That is why I thought I would ask the Commissioners, not the Chairman, and those who had been there during other times. Appreciate it.

Commissioner McDowell, you mentioned in your written testimony that the FCC should include proper market power analyses to justify new rules or else explain why such analyses are inappropriate. Could you elaborate on your views, and would you agree that performance measures for regulators should be built into the process for adopting new regulations so that the public can monitor whether the purported benefits for regulation actually play out?

Mr. McDowell. Sure. One assumes that if a new rule is going to go in place, it is because something is not working in the market. So why is there not something working in a market? So a market power analysis, I think -- and a proper market power analysis, I think, is warranted. Now, there may be good reason why a market power analysis is not needed, but the Commission should then be required to explain why it is not doing a market power analysis.

Mr. Walden. Commissioner Copps, do you care to comment on that?

Mr. Copps. Well, I think that is one argument. I suppose the other side of the argument is that that is why we have notice and comment and the ability of all parties to explain the advantages and

disadvantages of a situation.

I think we should be doing basic economic analysis. I think in all the cases that I have seen under this Commission, we have probably done more of that than we have done in any of the other Commissions that I have been a part of. Whether you put that in a package and call it market power analysis and differentiate it from all of that other stuff, I don't know. I would vote to have a little more flexibility than that.

Mr. Walden. Commissioner Clyburn?

Ms. Clyburn. I would be open to this type of engagement and conversations, but to my knowledge, a lot of this, whether it is labeled so or not, is happening within the bureaus. So I think we are having the benefit of some of the engagement even if it is not called that.

Mr. Walden. Chairman Genachowski.

Mr. Genachowski. As a general matter this is what we do. The APA requires us to consider all arguments presented to us, and we certainly get arguments about market issues. Affirmatively it is something we can and should do. There are cases when the reasons stacked are different. If it is public safety regulations, disabilities, rules, et cetera, it doesn't make sense. But in any situation where what we are doing is designed -- where it would make sense, we do it; we do it as a matter of practice, and the APA would require us to do it.

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DCMN NORMAN

[12:05 p.m.]

Mr. Walden. My time has expired, and I turn to my colleague from California, Ms. Eshoo, for 5 minutes.

Ms. Eshoo. Thank you, Mr. Chairman.

I thank the chairman of the Commission, and the Commissioners, for your testimony and your ideas. I want to congratulate you for what you have already done. It really should not be skipped over. I took a look at your new Web site last night. I think it is hot. I really do. I recommend it to others as well.

First of all, is there anyone on the panel here today that does not support the legislation for improving the decision-making process at the agency, the legislation that myself and Mr. Shimkus and Mr. Doyle have introduced?

Mr. Genachowski. I would just emphasize two things if I could. One is the importance of making sure --

Ms. Eshoo. First, tell me yes or no.

Mr. Genachowski. No, I am supportive of it as long as it preserves the transparency goals underlying the sunshine act originally. And I think the joint board issue is one where I would certainly support a measure that would take care of that issue. It is really a conflict between two statutes that doesn't make sense.

Ms. Eshoo. In California we have had the Brown Act for years and

years that has, I think, really served the public interest very well. So I appreciate that. But it is good to know that there is across-the-board support.

To Chairman Genachowski, in response to my posthearing questions from our February 16 meeting, you indicated that a proceeding is underway to determine whether the FCC's special access rules are ensuring that the rates, the terms, and the conditions for special access are just and reasonable. Are there procedural changes in the way that the FCC operates that could speed up this process?

Mr. Genachowski. I am not sure there are. We have heard many complaints about the special access area. When we started looking into it in my time there, we realized that the data that the Commission had was really -- provided no real basis to actually make a judgment or support actions.

But we are in the middle of a process now to collect the data we need. I think that is proceeding on schedule. I will go back and look at whether there are procedural changes that would be helpful, but I think we have the procedural flexibility to do what we need to do.

Ms. Eshoo. Again to the Chairman, I understand that there is often resistance from industry to provide the data necessary to fulfill the Commission's goal of serving the public interest. What are the roadblocks to obtaining this data and how can we assist you in ensuring that you have the data needed to preserve competition and consumer choice?

Mr. Genachowski. It is an important topic because we are all

committed to having the FCC be an agency that is about facts and data. You can't be an agency about facts and data without data.

What we have tried to do over the last 2 years, with the help of the committee, is look both at old data collection requirements that are outdated, that can be eliminated, and also making sure that we are getting the data that we need in this new world. So by removing data, we are showing, I hope, establishing credibility that we are focused only on what we really need to do.

Ms. Eshoo. Do you need us to help you do that?

Mr. Genachowski. I am not sure if we need rules changes, but I think your interest in making sure that we have the data that we need and supporting us in this effort is helpful.

Ms. Eshoo. Good. Does the Commission collect statistics on wireless network quality and reliability? For instance, do you have data relative to dropped calls?

Mr. Genachowski. On dropped calls, we actually built and distributed an app to begin to get information from consumers.

Ms. Eshoo. So you are just starting that?

Mr. Genachowski. So we are just starting that. It is a new thing. I agree, it is an area we should look at.

Ms. Eshoo. Good. Commissioner Copps mentioned in his testimony the value of holding field hearings, and I know that there were to examine the Comcast-NBC merger. Do you plan to hold similar field hearings on AT&T and T-Mobile?

Mr. Genachowski. In general, we have done a number of field

hearings. We will continue to do them. We will be in Nebraska next week on universal service reform. We have been in many States.

Ms. Eshoo. Do you plan to do them on this gigantic merger?

Mr. Genachowski. We haven't announced the hearing schedule, so if I can get back to you once we do that.

Ms. Eshoo. I would urge you to do it because the public needs to come to these hearings and understand what is at stake for them and ask you questions about what is going into this decision. They are the ones that are going to be affected by it. Here inside the Beltway, it is like gossip city, who said what and how fast it is going and how slow and why and all of that. And it is sexy inside the Beltway. But for people out there, they want to know how is this going to affect my rates.

Mr. Genachowski. I agree.

Ms. Eshoo. These are becoming expensive utility bills. It is important for you to hit the road.

Thank you, Mr. Chairman.

Mr. Walden. Thank you, Ms. Eshoo.

Just one quick question. There is nothing in statute that precludes you from doing the public hearings you've talked about; right? You don't need that from us?

Mr. Genachowski. I don't think so.

Mr. Walden. I turn now to Mr. Shimkus.

Mr. Shimkus. Thank you, Mr. Chairman.

Thank you for coming. I am bouncing between two committee

hearings, one with the EPA on rules and regs. I want to make sure, this is on process reform, and sometimes we will get jumbled in on what is going on and think a process reform may solve it, but we really want to stay on what can we do to transparency and the like.

Commissioner Clyburn, I appreciated the example, and we get e-mail, too, from NARUC on extending that, and I think that is a good idea and something that should be included. But it gave me a question for the Commissioners, and Chairman, you can weigh in too, if you would like; the Commissioners specifically highlighted our piece of legislation as being beneficial.

Can you give me an example how that would be helpful? Especially Commissioner Copps, you have been around a long time. You probably have a few stories, like we did just prior. Give us some real-world application why you think this would be helpful.

Mr. Copps. Well, a joint board example like Commissioner Clyburn was talking about, we will have a conference call and Commissioner Clyburn and Commissioner Baker and myself are each members of that board, but we cannot be on at the same time. So, say Commissioner Baker is on for the first 10 minutes. Then we say, well, Commissioner Baker, you have to get off; Commissioner Copps is getting on, and then it goes back and forth. So you really interfere with and retard the discussion.

But even going beyond that, I think there is something to be gained by the synergies of having five individual people chosen with five different skill sets, vetted by the White House, confirmed by the

Senate, to come to the Commission and to just have them sit down in a room together. I think some of the personality conflicts that we have had in previous Commissions, and I don't want to overdramatize them or anything like that, but I think things would have gone better and been more easily resolved and more of the spirit of compromise and collegiality would have attended those issues had we been able to do that. I don't understand why we are not able to do that.

Mr. Shimkus. Mr. McDowell.

Mr. McDowell. Yes, I agree. So to go back to that fall of 2008 example with the universal service intercarrier compensation where four Commissioners -- again, two Republicans, two Democrats -- agreed on some fundamental reforms, it would have been nice if all five of us could have gotten into a room, or three of us, to try to figure out why that wasn't moving. So I think it would speed the process.

I think it would be more efficient, as Commissioner Copps said, it would breed more collegiality. And keep in mind, our work product ultimately is public and appealable to the courts if someone doesn't like it, so transparency is still there.

Mr. Shimkus. Commissioner Clyburn?

Ms. Clyburn. Coming from a joint board perspective, you have already heard how inefficient the process, the current process is. To give the public some assurances or some more comfort in this, when we talk about the joint board and joint conference, joint boards and joint conference experience, the recommended decisions from these bodies are not final. They are recommended decisions, and they are presented to

the FCC, and then at that point there is a notice, the process of noticing goes into place. Then and only then, after that is exhausted, that comes to the FCC for a decision. So these are not final. Recommended decisions are not final decisions. They go through processes, so the public should feel some comfort. But this disconnect that we have is something that does not lend itself for a good exchange.

Mr. Shimkus. Mr. Chairman, do you want to weigh in?

Mr. Genachowski. I agree that the joint board situation is a problem that should be fixed.

Mr. Shimkus. Another process reform, and it is kind of the age-old argument that people raise capital, assume risk, and need some certainty whether to either produce or to withdraw from the market. Some people have proposed issues like shot clocks as far as time lines, minimum review periods after the close of a comment cycle. Does anyone have to talk about that? And I only have 34 seconds, so do it quickly.

Mr. Genachowski. I think in general, shot clocks can be an effective management tool. They are one of the tools that we use. I think preserving flexibility is important; but I think it can be an effective management tool.

Mr. Copps. I would agree. I think sometimes shot clocks, such as accompanied the Comm Act that we are looking at now, do mandate that we take action. Again I think this Commission is doing a good job generally on this score, so I don't know that we would have to mandate it unless the problems got a lot worse. I do agree that business needs certainty, but I think that comes more from the substance of the rules

than the process, and having a clear idea of the rules that they are going to operate under.

Mr. Shimkus. Commissioner McDowell?

Mr. McDowell. I think shot clocks can be very helpful. I have long advocated them. I do agree with the Chairman that we need to preserve some flexibility. Things can go wrong. Sometimes we get a shot clock from Congress, with the Comm Act or the Telecommunications Act of 1996; but internally, we probably could use more.

Ms. Clyburn. In principle I am not in disagreement with shot clocks; but I think they should be treated as guidelines and not be allowed to rule the process.

Mr. Shimkus. I thank you all. I yield back the balance of my time.

Mr. Walden. We now go to Dr. Christensen for the next 5-minute round.

Dr. Christensen. Thank you, Mr. Chairman, and welcome to you, Mr. Chairman, and the other Commissioners. From the outset, I want to make it clear that I know my question regarding FCC's review of mergers and transactions is an issue of authority and not one of process. It is clear that Congress created a strong public interest mandate for the FCC. As Commissioner Copps noted, the words "public interest" appear 112 times in the Communications Act. The FCC has clear statutory authority under the act to conduct its public interest evaluations of mergers and transactions, and the courts have conferred great leeway for the agency to fulfill these public interest duties.

Commissioner McDowell, I wanted to ask you whether you agree with the statement made by Commissioner Baker in March that the FCC has "clear statutory obligation to closely scrutinize transactions and reject those that violate the Communications Act, FCC rules, or fail to serve the public interest"?

Mr. McDowell. Yes, I agree with that.

Dr. Christensen. Does everyone agree with that statement?

Mr. Genachowski. Yes.

Dr. Christensen. Chairman Genachowski, why do you believe that the FCC should have jurisdiction over transactions? Why wouldn't DOJ or FTC review be sufficient?

Mr. Genachowski. Well, the Communications Act makes it clear that the FCC must approve transfers of communications license and find that they are in the public interest in order to do so. Communications is something of importance to every American. It is a sixth of our economy. They involve complex technical issues where an expert agency is important, other goals and values that are enshrined in the Communications Act, and that has been our system for many, many years and it is important to make it work effectively.

Dr. Christensen. Some have complained that in reviewing some of the mergers, the FCC has imposed conditions that are not transaction-specific. For example, during the review of the Comcast-NBC Universal transaction, conditions involving broadband adoption and diversity were imposed. Do all of you believe that those conditions are merger-specific? Mr. Chairman?

Mr. Genachowski. Yes. If I can add one word, the statute requires the FCC to make a determination that a transaction is in the public interest. So it is not surprising that companies, as they come to the FCC and file for approval, make the case for why a transaction is in the public interest and point to specific public interest benefits. With respect to some of the benefits, given the potential harm of some transactions, it becomes important to make sure those commitments are binding.

Dr. Christensen. Commissioner Copps?

Mr. Copps. Yes, I agree very much that conditions on transactions are perfectly within the purview of the Commission. I know there is an argument whether they should be company-specific or products of industrywide rulemaking. But that is a hard line to draw. Some of these transactions, like Comcast and NBC, are paradigm shifting. They change the whole industry, so it is very difficult to make a clear division, like some people would have us make.

Dr. Christensen. Commissioner McDowell?

Mr. McDowell. I do not believe conditions should be imposed that are not merger-specific. I think in that particular transaction, there were a number of conditions or voluntary commitments that were not merger-specific. They might be evidence of good corporate citizenship, or evidence that they wanted to try to sweeten the deal for FCC's approval, but some of them had nothing to do with the merger itself.

Dr. Christensen. Commissioner Clyburn?

Ms. Clyburn. I agree in terms of the public interest standard that the FCC is basically mandated to do that. We are the experts in this space. We not only are required to look at competition, which is solely DOJ's purview, but we have to look at the public benefits, and that includes a number of benefits as well as harms, and we have to weigh those, and conditions are sometimes warranted to answer those.

Dr. Christensen. Let me just ask a question of Chairman Genachowski in my last few minutes.

You talked about holding a public forum on reducing barriers to broadband and band buildout, and we really commend all of you for the forums that you have held. These events are important to the successful implementation of States and territories, for example like the U.S. Virgin Islands.

Are there some barriers that you have identified to broadband buildout and is there technical assistance that FCC would provide to overcome any of those barriers?

Mr. Genachowski. There are barriers. Some of the barriers that we see are barriers that slow down infrastructure companies, wired and wireless, from building out quickly or that add costs. We took some steps in this area around tower siting; shot clock, to come back to the shot clock concept, we adopted one. We took steps in this area also with respect to pole attachments which will help reduce costs and lower the cost of broadband buildout.

We are very interested in hearing from industry and stakeholders on other barriers that would be appropriate to address. One that has

been brought to our attention are challenges around co-locating antennas on existing towers and unnecessary delays in that process. So that is something we are looking into now

Dr. Christensen. Thank you.

Mr. Walden. I turn to the gentlelady from Tennessee, Mrs. Blackburn, for 5 minutes.

Mrs. Blackburn. Thank you, Mr. Chairman.

Commissioner McDowell mentioned an article by Randolph May, and, Mr. Chairman, I would like to submit that article for the record. I agree with the Commissioner. I read it and I thought it was very insightful.

Mr. Walden. Without objection.

[The information follows:]

******** COMMITTEE INSERT ********

Mrs. Blackburn. Chairman Genachowski, I want to ask you, looking at the process you followed on net neutrality, I want to ask you about a Fortune magazine article, and you have affirmed in that article two different times that net neutrality rules were already in effect; so are these rules in effect?

Mr. Genachowski. I think I may have been making the point that on a bipartisan basis, before I got to the Commission, the Commission had enforced net neutrality rules against companies. Rules were just part of the problem.

Mrs. Blackburn. I hate to interrupt you, but I think what the reporter said, that means they are law. These are rules that have been written and are in effect. And your response was "yes."

What is interesting to me is that the FCC hasn't published the order in the Federal Register yet. So my question would be: What justification could there be for a 6-month wait or a delay unless the FCC is seeking further delay and legitimate rules by the courts or by Congress?

Mr. Genachowski. I understand your question now. The rules are not in effect yet. They require publication in the Federal Register, and they have to go through an OMB process and a Paperwork Reduction Act process. These are not our processes. We are complying with the processes as quickly as we can.

Mrs. Blackburn. Yes, I agree, and I think it would be appropriate to get our policies published in the Federal Register before we start implementing new rules, especially since the impact that those rules

are going to have are, in my opinion, going to be damaging to the innovation and growth of the Internet.

Let's look at the Comcast-NBCU order. It states that the Comcast and NBCU shall comply with all relevant FCC rules adopted by the Commission in GN docket No. 09-191, and I am referring to the FCC's open Internet order and its unique application, this specific, on the merger conditions. Does the FCC believe that even if a court overturns the FCC's decision, that Comcast and Comcast alone will still be subject to these ex-judicial rules, and where does the FCC get that authority?

Mr. Genachowski. The answer is yes. The authority comes from the language obliging us to make a public interest determination in approving transactions. This was a merger-specific enforceable commitment that came out of the fact that this was a merger between the largest broadband company in the country, one of the largest content companies. We heard from many businesses saying that a specific harm from this transaction could be favoritism of some content over others.

Mrs. Blackburn. Does the FCC have a responsibility to answer to the article 3 courts that by law review the FCC decisions?

Mr. Genachowski. Of course.

Mrs. Blackburn. Okay. Let's talk about copyright protection. I support it, and I have supported voluntary cooperative efforts among the ISPs and content community to address infringement. And given the language specifically in paragraphs 107 and 111 of your open Internet order, what assurances can the FCC give to the ISPs that they can enter into voluntary agreements with copyright owners to address these

infringements online without running afoul of the net neutrality order?

Mr. Genachowski. My recollection is that the order says pretty much that. That the rules apply only to lawful content, not unlawful content like stolen intellectual property, and that voluntary agreements to make enforcement of IP laws effective is something that is not prohibited by the rule.

Mrs. Blackburn. I have to tell you, I think it would be helpful for the FCC to provide the companies assurances that they have reasonable discretion to address copyright infringement, and I hope that you will do that.

Mrs. Blackburn. I only have 19 seconds left. I had another question about broadband pricing, but I will submit that for a written response.

I yield back.

Mr. Walden. We will get an answer from each Commissioner.

[The information follows:]

******** COMMITTEE INSERT ********

Mr. Walden. Mr. Doyle has been kind enough to yield to the chairman emeritus of the Energy and Commerce Committee, Mr. Dingell.

Mr. Dingell. Mr. Chairman, I thank you for your courtesy, and I thank you for the recognition. And I want to thank my good friend from Pennsylvania. There are many, many courtesies I have had at his hand.

Commissioners, welcome to the committee. I want to express some distress at the delay in publication of the Commission's open Internet order in the Federal Register. I understand, and clearly so, that this delay is more appropriately attributed to the Office of Management and Budget than to the FCC.

Moreover, I wish to note for the record that the order was adopted on December 21, 2010, and the order's text was released to the public 2 days later on December 23. I want to commend the Commission for this display of transparency.

There is, however, another type of delay that deprives the public of a thorough understanding of the Commission's decisions, and it does I think afford a marvelous opportunity for rascality. This is the delay that can occur between the time when the Commissioner adopts the report and order, and the date on which the text of that report and order is released to the public. A delay of this sort enables the staff to make revisions to the order in the dark of the night. It enables petitioners to seek and obtain tweaks in the agency's language. It is a decision-making that is subject to the charge that it is potentially the source of perhaps dishonest decision-making that ought

not exist at the Commission.

This type of delay has been the subject of this committee's attention in the past. As the chairman and I were discussing yesterday, some 20 years ago in May of 1991, I engaged in an exchange of letters with the then-Commission Chairman Al Sikes.

Mr. Chairman, I ask unanimous consent that copies of that correspondence be entered at this point in the record.

Mr. Walden. Without objection, so ordered.

[The information follows:]

******** COMMITTEE INSERT ********

Mr. Dingell. With this history in mind, I am going to direct this question to you, Chairman Genachowski, and I am going to ask you if you would please do exactly what I asked Chairman Sikes to do in an earlier time. Would you please provide this committee with a list of the Commission's decisions where the text of the decision was released more than 30 days after the Commission announced its decision, together with the best explanation you can make for the delay beginning on January 1, 2010? Would you do that for us, please?

Mr. Genachowski. Yes, I will. I am happy to report that period, we have closed in the last 2 years, that period from an average of 14 days to 3 days. In most cases, release is 1 day after Commission adoption of the order.

Mr. Dingell. Thank you.

Now, I recognize that the 30-day period which was referred to in my questions is arbitrary and it does not respond to either statute or regulation. It does seem to me that a delay of 30 days or more does provide opportunity for impropriety, and I would urge the Commission to comment on this opinion for the record, especially in view of all of our desires to improve the transparency at the Commission and this committee's ability to conduct rigorous oversight.

Now, in the case of decisions whose release is delayed for 30 days or more, does the Commission commit at this time to providing this committee with a written explanation of the delay and projected date for the release?

Mr. Genachowski. Yes.

Mr. Dingell. Now, I want to make it clear, we have to make a selection here between two situations, the first of which is where the Commission releases the decision and there is a delay between the time that the matter is then made final. There also is the situation -- and this I know afflicts the Commission substantially, and that is, you have sent things over to the Office of Management and Budget which duly forgets that you are an independent agency of the Congress and insists that these matters be held up over whatever qualm the administration may have on the matter.

So in any event, Mr. Chairman and members of the Commission, I thank you.

Mr. Chairman, I thank you for your courtesies to me. I yield back the balance of my time.

Mr. Walden. I thank the gentleman for his questions and his willingness to work on these issues to improve the process at the FCC.

Now I turn to the gentleman from Florida, Mr. Stearns, for 5 minutes.

Mr. Stearns. Thank you, Mr. Chairman.

Chairman Genachowski, this is a question for you, if you can recollect this. I think we have already talked about the Commission's backlog. How many petitions or applications are currently pending before the Commission?

Mr. Genachowski. That is a number I don't have in my head. I will get it for you.

Mr. Stearns. Can you guess? Give an approximate range? When

we do financial disclosure, we have a range.

Mr. Genachowski. There are many small ones. The number is in the thousands, not in the tens.

Mr. Stearns. Do you have staff behind you that might know? These staff, that is what they are paid for.

Mr. Walden. They are texting somebody right now.

Mr. Genachowski. We will get an answer within 5 minutes.

Mr. Stearns. Okay. How many of these are more than 6 months old?

Mr. Genachowski. That is another question I can't answer off the top of my head.

Mr. Stearns. Okay. How many are more than 2 years old; 5 years old? Do you think any of them are older than 2 years?

Mr. Genachowski. It is possible some of them are.

Mr. Stearns. Any over 5 years?

Mr. Genachowski. I don't know, but it is possible.

Mr. Stearns. We have heard that parties with a transaction before the FCC sometimes feel pressure to curtail their advocacy in unrelated proceedings. I guess my question is: Fundamentally, do you agree that every constituency should be free to advocate before the Commission without any pressure?

Mr. Genachowski. Absolutely. Can I say one word on the previous question?

Mr. Stearns. Yes. I hear all the time that people are totally intimidated by you folks, and I can understand why, because a decision by you folks is not just a hundred dollar decision, it is billions.

So you have this much power. They come back to me, a lot of them are intimidated, so they want to be free to be an advocate before the Commission without pressure.

Mr. Genachowski. On this question, the Commission has an obligation to base each decision that it makes on the issues before it, on facts and data. We are all very committed to that.

On the previous issue, there is an area for reform here that I would like to mention briefly, which is that a lot of the backlog comes from applications for review of relatively routine bureau decisions that are made. Because of the APA, sometimes it is thought that it requires the Commission to do its work all over again in order to address it in advance of litigation.

We have been exploring some reforms here to speed this up and to help eliminate the backlog that relates to applications for review from bureau orders. That is something I look forward to working on with you and the committee.

Mr. Stearns. Commissioner McDowell, you touched on in your opening statement, and I looked at some of your letters you have written in the past, the FCC's transaction review standards I think are vague and sometimes susceptible to abuse. For example, parties with a pending transaction should not feel pressure to accept voluntary conditions on the deal. The Commission can also leverage its merger review process to adopt conditions that it could not otherwise impose through a transparent and public rulemaking.

My question for you is: How can we narrow the Commission's

authority to simply address these concerns?

Mr. McDowell. That can come through a statutory change, as has been pointed out today already. There is a large, ambiguous public interest standard by which we review mergers. But if a statutory provision were added to say any conditions or voluntary commitments extracted from the merging companies should be specifically tailored to consumer harm that arises out of the merger, and perhaps look into maybe sunsetting them once market conditions obviate the need for any further regulation.

Mr. Stearns. Mr. Chairman, do you want to add to that at all?

Mr. Genachowski. In the Communications Act, Congress has placed an important responsibility on the FCC to make a public interest determination, to find that a proposed transaction is in the public interest. That is something we take very seriously. I think all Commissioners do. It is understandable why companies would suggest the public interest reasons for a transaction. Sometimes there are specific potential harms that emerge from a transaction that in order to approve the transaction, it is necessary to impose conditions. This has happened under Democrats and Republicans at the FCC.

Mr. Stearns. My last question, Mr. Chairman, is to Commissioner McDowell. Again, I am concerned that the FCC has been regulating in areas without first clearly identifying its own authority to act. From voice obligations, net neutrality, to broadband outage reporting, the FCC has fallen into the habit of proposing rules without first tying those rules to the authority given to it by the Communications Act.

I know every bill I drop, I have to show constitutionally that that bill complies with the Constitution. What best practices would you recommend going forward based on what I just told you?

Mr. McDowell. The Commission in areas where I have dissented certainly has made legal arguments justifying its legal authorities. I can't think of an item that didn't have a legal argument. But as lawyers know, there are legal arguments that are colorable, and there are legal arguments that are winnable. This is fine grades of distinction sometimes. It is hard to say how do you keep the FCC to act within its authority other than read the statute and the plain meaning of it.

Mr. Stearns. Mr. Chairman?

Mr. Genachowski. Two points. In the last few years, the FCC record in court on statutory challenges has been overwhelmingly positive. I don't remember the number of the top of my head, but I will get it for you. But overwhelmingly successful.

[The information follows:]

******** COMMITTEE INSERT ********

Mr. Genachowski. The second thing is, when there are colorable questions of authority, we seek comment on that in the notice and comment stage. We did it yesterday in looking at updating our network outage rules to protect the safety of the public in event of emergencies. There is a colorable question about authority. We will be looking at that carefully in the record.

It is vital that we move forward on public safety issues like that, working together with the committee. If we don't think we have the authority, we will come to you and ask for the authority. But getting a public record and asking our terrific legal team to focus seriously and honestly on the authority issues is what we try to do.

Mr. Walden. I thank the gentleman from Florida.

I now turn to the gentleman from Pennsylvania, Mr. Doyle.

Mr. Doyle. Thank you, Mr. Chairman. Thank you for holding this hearing.

Welcome to the members of the Commission. I have had the opportunity to work with each and every one of you, and I have appreciated your hard work and dedication. All of you are very good members of the Commission.

Commissioner Copps, I know your term is expiring this year and I just want you to know that if I were the benevolent dictator of the universe, as scary as that thought may be, your term would have no expiration date. Thank you for your service to the Commission. You have been one of the best ever.

Now, Chairman Genachowski, I can't pass up the opportunity while

I have got you all here. As you know, just recently the House and Senate passed, and the President signed into law, the Local Community Radio Act last year. And this is legislation that is going to open up the airwaves for hundreds of new low-power radio stations across the country, including community radio stations in cities like Pittsburgh and all across the United States.

Mr. Chairman, I know the Commission is working on it, but I want to make sure that the draft rules are going to come out by the end of the spring. Could you give us a sense of timing on this?

Mr. Genachowski. First of all, congratulations on the passage of the legislation. Bipartisan, very important, and we are working to implement it as quickly as possible because we think it is a real achievement and will really help the local communities. Our media bureau is working on it. I will redouble my efforts to make sure that it happens as quickly as possible.

Mr. Doyle. I want to piggyback on some questions that Ms. Eshoo talked about with special access to. I have always thought that name "special access" is a misnomer. It should be called "critical access." I note that your broadband plan agrees with that. I have real concerns about the affordability of these lines as report after report comes out, whether it is the GAO or the national broadband plan or others, that indicate that the sellers of these lines are continuing to overcharge their competitors.

Quite frankly, the FCC, it has been rather frustrating to get you to address this question. It has taken quite a long time to come to

a decision on the matter, and I am just trying to understand what is causing this delay, and when do you think that you will obtain the information that you need to finally bring a vote to the Commission? Please don't tell me "as soon as possible." Give me something more definitive than that.

Mr. Genachowski. My frustration was that when I arrived at the Commission and we started to look into this issue, the paucity of data that the FCC had was very troubling. There is no point to doing something in this area that is not based on a record, that is not based on facts and data, and that wouldn't be upheld in court. We also didn't want to put out a broad data request that, one, would be burdensome on industry; but, even more important, would not be manageable for us because it is a very complex area.

And I think our team did a fantastic job working in a focused way to identify the data that we would need to be able to make a determination on whether there is an issue that requires us to act; and if so, what an appropriate action to take would be.

We are still in that process. We have completed the first round of data coming in. The staff is analyzing that. We will continue to work with you on it. But I agree with with you on the importance of this issue, and we are working very diligently on it.

Mr. Doyle. By next year? By 2030?

Mr. Genachowski. Well before that.

Mr. Doyle. Well before 2030?

Mr. Genachowski. I agree with you. I can't say because we are

analyzing the data, and I don't want to prejudge it. I want the staff to do its job as fast as it can because it is an important issue that goes to competition and broadband deployment.

Mr. Doyle. Do any other Commissioners have a comment on special access?

Mr. Copps. I think it is important for us to get to a final resolution. When you are talking about a market that is approaching tens of billions of dollars a year, and you add in there however many years this has been pending, and you think are companies going out of business, is competition being disrupted, it instills in me the same sense of urgency that you have.

Mr. McDowell. Absolutely. I have been at the Commission almost 5 years, and it is sort of like Groundhog Day on special access. We are coming up on the fourth anniversary of Congressman Markey's letter to the Commission insisting that we have some resolution by September of 2007. It is now 2011.

Really what we need, as I have been saying for almost 5 years now, is cell site by cell site, building by building map with price, terms, and conditions of all providers of special access, competitive providers as well as incumbent providers. This isn't as hard as it seems. The DOJ gathered this data in 2005 during the Bell long distance mergers, and it is really not as daunting as it sounds.

Legally there might be an issue whether you can compel certain companies to provide that data, and that is where the problems have been. A lot of companies know that they don't have to provide the data;

it might be competitively sensitive, things of that nature. But if you go to an industry trade show, business-to-business trade show, they are buying and selling special access circuits from each other. So all of the sales guys have this data. It is not that hard to find. But that would give us, let's get a real-time snapshot of what does the market actually look like. I think where there is more competition in a market, we ought to deregulate. And if there is not enough competition, then we need to figure out what to do.

Mr. Doyle. Commissioner Clyburn?

Ms. Clyburn. I agree with my colleagues. One of the first meetings that I took as a Commissioner dealt with special access. When these same parties see me, they look at me and we don't even have to exchange words. So I agree with you about the urgency. And especially being from a rural State, I agree that this is a significant barrier for enhanced service. I am looking forward to continuing to working with the Chairman in order to get resolution here.

Mr. Doyle. Thank you.

Thank you, Mr. Chairman.

Mr. Walden. Thank you for your work on these issues, Mr. Doyle.

We are going to do a second round of questions.

There are a couple of things I would like to go through. First, the top seven best hits of our memo, some of the ideas we kicked out there, and I would draw your attention to the staff majority memo, if you have it. If not, if you can give us your feedback on these seven items.

From the outset, I am not trying to lock you into stupid restrictions, but I am trying to figure out is there a way to put in the statute good things, some of which Chairman Genachowski has already enacted as Chairman or you have codified in your rules, so regardless who is chairing this or regardless of the personality dynamics that may occur, 5, 8, or 10 years from now, the good processes are there for the public? So I throw that out.

So the notion, and I know this doesn't work well, but yes or no, the concept with flexibility built around all of these, trying to go to notices of inquiry before NPRMs; does that make sense? Does that not make sense? Commissioner Clyburn?

Ms. Clyburn. Yes or no, hmm. I think when the Commission needs more information, yes, it is warranted. But we are in the information exchange business. We have public notices and the like, and so we get a lot of information. When we need more information, then yes. But in the case where we don't, where we have sufficient information, I think it would delay the process.

Mr. Walden. Commissioner McDowell?

Mr. McDowell. Yes, with flexibility that can't be abused.

Mr. Copps. Yes, usually; but always remember there are crises and emergencies, terror attacks and things that demand expeditious action when you can't do that.

Mr. Genachowski. I would say as a general rule, we do it. There are many exceptions. It might be a statutory mandate. It might be further notice. It might be court remand. It might be that we have

enough information to proceed. I am not sure that a statutory change is required.

Mr. Walden. That is fair.

Publishing the proposed rules, you don't always publish a text for public comment before adopting the public rules. Should the proposed rules always be published ahead? Chairman Genachowski, yes or no?

Mr. Genachowski. That has been our policy. We have gone from 38 percent to 85.

Mr. Walden. Any reason not to go to 100?

Mr. Genachowski. There are some cases where it might be a form or it might be a further notice where the rules are already out, or it might be that we are seeking comment on a third party's proposals. Our practice is that we always need a good reason in order not to publish proposed rules.

Mr. Copps. You know, sometimes people don't get serious about we are doing something until you get beyond, well into the NPRM stage, and then they get serious and tell you what they like. So it is not always practical to do that. New data comes in, and again I would say flexibility for emergencies and things like that, but I would commend the Chairman on the tremendous difference we have made in making sure that we do now over 85 percent of the time.

Mr. Walden. Mr. McDowell.

Mr. McDowell. Yes, with flexibility that can't be abused.

Mr. Walden. Commissioner Clyburn.

Ms. Clyburn. Yes, flexibility that takes into account any type of public comments.

Mr. Walden. Got it. What about minimum comment periods? Statutory minimums for comment reply cycles, does that make sense? Ms. Clyburn?

Ms. Clyburn. I think if there are statutory obligations involved, they might be problematic. With our video relay, Video Accessibility Act, we had a 6-month window. So if you had certain obligations, that might impede that progress. So again, flexibility and dexterity are my two words for the day.

Mr. Walden. Commissioner McDowell?

Mr. McDowell. Yes, with flexibility that can't be abused.

Mr. Walden. Commissioner Copps?

Mr. Copps. The same response.

Mr. Genachowski. I agree as well. The real issue is making sure that the Commission pursues best practices, and we look forward to working with you on that.

Mr. Walden. What about shot clocks? Parties and the public should have some sense of when resolution would come. Hard shot clocks or shot clocks as a report card mechanism, gives you the flexibility, but you maybe report to Congress on your rates of trying to achieve those shot clock numbers?

Again I am not trying to tie your hands, but I think there are issues in the past, in some cases, where things dragged on. I talked to a group recently, they have had a rulemaking for 6 years at the

Commission. It was circulated last fall, I believe, and it is still in somebody's in-boxes.

Mr. Genachowski. I think shot clocks may be an effective tool. We are using it. It may make sense to use more shot clocks. And we are looking at that, and we look forward to looking at that with you.

Mr. Walden. Commissioner Copps.

Mr. Copps. Amen.

Mr. McDowell. Shot clocks helped break the UNC Chapel Hill monopoly on basketball; I am all for that.

Mr. Walden. Wow.

Ms. Clyburn. I always come behind him, and it is always problematic.

All transactions are not created equal; so again, guidelines but not ruling the process is, I think, wise.

Mr. Walden. Okay. What about publication of final draft for an item scheduled for an open meeting? The FCC could be required to make final draft public a certain amount of time in advance so everyone knows precisely what the Commissioners are being asked to vote upon?

Mr. Genachowski. I have always been troubled by the logical impossibility of this because there is a draft, there is more input. The draft changes. It gets put out again. And you end up in something where it is actually impossible for the agency to act effectively. The APA process is designed to do this, do a notice, put out rules, get comment, the agency deliberates, makes a decision. It is subject to further review. I think that general process works.

Mr. Copps. People should know generally and have a clear idea, but you can't keep doing this time and time again until you get the last "t" crossed and last "i" dotted. At some point we have to be, in the phrase of well-known persons, the deciders on these issues.

Mr. Walden. Mr. McDowell.

Mr. McDowell. More often than not, it is a good idea.

Ms. Clyburn. I would not want anything to stifle any type of exchange that could possibly take place in the improvement of an item.

Mr. Walden. What draws me to this one is what we did to change our House rules, require a 3-day calendar day layover so everyone has a chance to see it. And sometimes that is inconvenient if you want to cram something through. But it is the public's business and public process. That is all I am talking about. It would seem to me, you would want them to see the final product and have a little time to comment.

With the indulgence of the committee, if I can go through the remaining couple of items here.

Commissioner initiation of items. The Chairman, CEO controls the agenda, but what about having a bipartisan group of Commissioners being able to weigh in and put items on? I know we went through this earlier, but let us see if Commissioner Clyburn has been swayed by the incredible evidence that has come out during the hearing.

Ms. Clyburn. Thank you, but no.

Mr. Walden. You don't want to be able to help set the agenda?

Ms. Clyburn. I think I do that. I have that type of rapport.

Mr. Walden. You weren't there in the old days. Commissioner McDowell?

Mr. McDowell. Yes. I have supported this kind of concept when I was in the majority on the Commission, and I support it today.

Mr. Walden. Commissioner Copps?

Mr. Copps. I would just repeat what I said. I think three Commissioners ought to have the ability to put an item on the agenda, take an item off the agenda, and edit the agenda.

Mr. Genachowski. As I said, I think nothing is broken; 95 percent of our decisions are unanimous. We work collaboratively. I can't imagine a situation where there would be a problem, and there has only been one anomaly that I am aware of historically.

Mr. Walden. I will stop with that. There are some others here. I think you all have this. The committee has been very kind to let me work through those.

We would like your feedback on them. We kicked these out as discussion points. Some make sense, and some don't from a statutory standpoint. Some you can go ahead and do, and you are. And I appreciate that.

I would turn now to the gentleman from Massachusetts, the always colorful Mr. Markey.

Mr. Markey. I will take that as a compliment.

Mr. Walden. As intended.

Mr. Markey. Welcome, all. We are at an historic juncture. There is now an announced plan by AT&T to buy T-Mobile for $39 billion

in the latest in a series of major transactions at the Commission for you to review, pursuant with your authority.

The merger would reduce the number of national wireless companies from four down to three, and then the next step would be the inevitable gobbling up of Sprint by Verizon, so we would be back down to two, which would be kind of going into the telecommunications time machine back to 1993 before this committee wisely decided that the two companies that had all of the licenses, one of them was the progeny of AT&T, all of the regional companies had one license, and other people had the other one, McCaw significantly, but it was 50 cents a minute. It was analog. It was not a particularly robust marketplace. And people did not have cell phones in their pocket.

So I thought it would be good if we looked back through the mists of mobile time so we can understand where we were, how we got here, and why we really don't want to go back at all. This isn't even an open question because we had more than enough time to learn how big companies view how fast you can move in the deployment of mobile technologies.

So back in October of 1993, on a bipartisan basis, it was a beautiful thing; the general disgust that this committee had with the lack of progress in the mobile area led us to moving over 200 megahertz of spectrum for the creation of a third, fourth, fifth and sixth license.

You two big boys, you really don't need any more unless it is in a market you are not in anymore. So that was kind of our message.

They weren't particularly happy with it. In fact, the general who ran all spectrum for the Federal Government for the Defense Department, he wasn't happy with it either. But we told them all: Figure it out; you, know, do your best, but we need that spectrum. We need a robust marketplace. We want to move and be number one.

So we had this incredible breakthrough, and we moved from 50 cents a minute. Within 4 years, it was under 10 cents a minute. All of the companies, including the two incumbents, had to go digital, which is much more versatile. It was quite a transformation.

If you can imagine, here is where we were when we passed the bill. We had this brick. Anyone remembering carrying this around in your pocket? This is the brick. And by 1996, we had moved to the BlackBerry. Brick to BlackBerry, 4 years. This committee, a lot of insight.

Those first two companies, they really didn't think that they wanted to move this fast. As a matter of fact, they told us in testimony they couldn't move this fast. It just wasn't going to be a general consumer product. They were targeting businessmen on mountaintops, I think. So that was it. Again, their message was, don't regulate.

So the question is: Do we want to turn the clock back to that duopoly? Do we want to go back to the brick in terms of how fast companies are forced to innovate? Do we want to trust those two companies again to move faster? I don't think we want to do that.

I think it would be a historic mistake for the FCC to approve this merger. I think we would go into a telecommunications time machine,

back to that point in time. We already have got Verizon and AT&T pretty much dividing the country into Bell East and Bell West, which is the plan. Letting them have a national wireless duopoly is what is at stake here.

I have seen the movie before. I know how it ends for consumers, with them being tipped upside down and having money shaken out of their pockets.

We are the ones in this committee that made sure that we ended that era. I think it is critical for the FCC to apply its own very brief history on this subject. You know, this is not something where we have to go back to Alexander Graham Bell. There are people within our own lifetime we can go back to. They are still alive. They were here in 1993. They can still be consulted about what the state of that marketplace was.

All I can tell you, it would be a historic mistake to go back to that time with the promises that come from two behemoths that they will continue to innovate. History tells us, after 100 years from Alexander Graham Bell up until 1993, they do not innovate. And that is the key. It is innovation and it is investment in new technology and it is paranoia-driven Darwinian competition that ultimately leads to the changes that help consumers and competitors.

And I hope you all keep that in mind as you are going forward, because this is going to be the biggest decision you make, and I hope you make the right one.

Thank you, Mr. Chairman.

Mr. Walden. I thank the gentleman. I would remind members of the committee that we have to be a little careful since this is a decision before them when it comes to the Pillsbury rule and all.

Mr. Markey. Are we in the Pillsbury time right now?

Mr. Walden. Back to the BlackBerry.

Mr. Markey. Excuse me? Was that a question?

Mr. Walden. No. They are going back to the BlackBerrys to find out.

Mr. Markey. Are we in the Pillsbury time? Are we constricted in our committee hearings from expressing our views on a merger?

Mr. Walden. Not your views.

Mr. Markey. Yes.

Mr. Walden. And I am not an attorney. I think there are issues. It was suggested in another hearing in another context with an issue before a Commission that we have to be careful in terms of how we convey our thoughts is all, I was told.

Mr. Markey. I am a lawyer.

Mr. Walden. I won't hold that against you.

Mr. Markey. And I think there are lawyers down there. Can the staff assist? I think the staff is packed with lawyers. Are we in the Pillsbury time frame right now?

Mr. Walden. That is what I said, they are going to their BlackBerrys.

Meanwhile, we will proceed and go to Ms. Eshoo for 5.

Ms. Eshoo. Thank you, Mr. Chairman.

While the lawyers are going back and forth, I don't know a time where Members cannot express an opinion. Mr. Markey is not asking the Commissioners for their thinking on the matter that he just raised. He expressed his opinion. And so God help us if Members of Congress can't come in as members of a committee and express an opinion. I understand that there is -- that Mr. Markey's opinion may be menacing to some, but nonetheless -- or discomforting -- but it is an opinion. I think it is an important opinion.

Whether Pillsbury or anything else gets in the way here, I am not a lawyer to make that determination, but I don't think that is the question, most frankly.

Chairman Genachowski, some have expressed concerns recently that the FCC has shied away from using a notice of inquiry to first examine a broad set of issues rather than proceeding straight with the proposed rules in a notice of proposed rulemaking. Do you think that proceeding with notices of inquiry can be an effective approach, and have you employed the NOIs more often under your chairmanship compared to previous administrations?

Mr. Genachowski. We have used NOIs frequently. I think about half of our notices of proposed rulemakings have been preceded by NOIs. And often, especially when it is a new issue or fresh issue, it is a good place to start. When we are dealing with a statutory mandate to implement something, when the Commission has vast experience coming out of prior proceedings, when there are real timeliness issues around perhaps public safety, then NOIs may not be the way to go. And I think

we try to be thoughtful about, with each proceeding, how to get the balance right between developing a full, inclusive public record and moving in an expeditious manner for the public and all stakeholders.

Ms. Eshoo. But do you believe that an NOI must precede any proposed rulemaking?

Mr. Genachowski. I don't think that it is now a requirement or should be a firm requirement.

Ms. Eshoo. I don't have any other questions, Mr. Chairman. I do think, if I might, the list of suggestions that you had today, your punch list, that we have the Commissioners all respond to them.

Mr. Walden. Yes. I actually asked them to do that. I agree.

Ms. Eshoo. I didn't hear that. I think it would be helpful, after you have had some time to give some thought to it, that we hear back from each one of you on them. Thank you.

Mr. Walden. I turn now to Mr. Doyle, if he has any further question.

Mr. Doyle. Mr. Chairman, in the interest of eating lunch, I have no further questions.

Mr. Walden. With that then, I want to thank both of our committee members who participated so well in this committee hearing, and especially the FCC Commissioners and the Chairman. Thank you for your thoughtful approach to this. We look forward to continuing to work with you on a cause that I know we share, which is to continue to improve --

Mr. Markey. Mr. Chairman, before you conclude, has the

Commission staff been able to identify whether or not a Pillsbury -- okay, not yet.

Mr. Walden. Do you want us to wait until they get an answer or can we go ahead and adjourn? I think we will go ahead and adjourn the hearing.

Mr. Markey. You raised the issue, and it was in the aftermath of my comments, and I just wanted to know if my congressional prerogatives are in any way contradicted by any prerogatives of the FCC. If they are, I want all the members of the committee to know how we are all restricted in terms of our recommendations to the Commission, and I just don't want the committee hearing to end until that is established because that is quite a statement made to me.

Mr. Walden. No, let's not overtake what I said, okay. What I said was I just would caution the committee, this is an issue before the Commission and we have to be cognizant of these rules. This was not a criticism of what you said. And we each have the opportunity to express our views. That is not about that. This was not about you or about what Ms. Eshoo said. We will probably have a hearing on this issue, and rightfully so.

I just know in a different subcommittee with an issue before the Nuclear Regulatory Commission that is before them, we were advised not to try and affect the Commission's decision in that process because it is something before them. So this was in general context. That is all it was.

Mr. Markey. If the gentleman would yield, is the intention of

the hearing which you are going to have to in any way affect the decision made by the FCC?

Mr. Walden. Not if it violates the Pillsbury rule.

Mr. Markey. No, you are saying if it does not violate the Pillsbury rule. Do you know if that hearing will violate the Pillsbury rule?

Mr. Walden. I won't hold it until I find out the answer to that question.

Mr. Markey. Okay, I think that is an important thing for you to say. So rather than saying you are going to have the hearing, you should say: I am going to have the hearing if it is not a violation of the Pillsbury rule, because I don't want any member of this committee to influence the way in which any member of the FCC thinks; okay? If that is the opposition going forward, I can live with that. In fact, if that is our committee policy, then I would like to have that established so I know that and every other member knows that.

Mr. Walden. Yeah. Slow down. Take a breath. Here is the deal.

Mr. Markey. I am not the person who made the accusation that there is a potential Pillsbury violation.

Mr. Walden. Nor did I.

Mr. Markey. Yes, you did.

Mr. Walden. No, that was not my intent. I would be happy to go back and listen.

Mr. Markey. Let me put it like this. It was the effect. If it

was not the intent, it had that effect.

Mr. Walden. All right. That was not my intent. If it was assumed that way, I take that back. That was never my intent. I am just trying to do something cautiously here and not get anybody in any trouble.

And when we have a hearing, we might not have the Commissioners before us. When they are not before us, I think we are pretty open in what we can say; right? That is all. That is all that it is.

With no other business to come before the subcommittee, we are adjourned.

[Whereupon, at 1:06 p.m., the subcommittee was adjourned.]