

April 30, 2015

The Honorable Greg Walden  
Chairman, Communications and Technology Subcommittee  
Energy and Commerce Committee  
U.S. House of Representatives  
2185 Rayburn House Office Building  
Washington, DC 20515

The Honorable Anna Eshoo  
Ranking Member, Communications and Technology Subcommittee  
Energy and Commerce Committee  
U.S. House of Representatives  
241 Cannon House Office Building  
Washington, DC 20515

Dear Chairman Walden and Ranking Member Eshoo:

The undersigned organizations write to express our strong concerns about the discussion drafts proposed by Representatives Adam Kinzinger, Renee Ellmers, and Bob Latta that would change internal processes at the Federal Communications Commission (FCC). While the undersigned organizations believe that transparency is imperative for sound public policymaking, and many have expressed interest in reforms to the FCC's rulemaking process, we all share concerns about the negative impact that these bills could have on the Commission's ability to effectively implement needed policy reforms.

FCC procedures largely flow from two statutes: the Administrative Procedure Act (APA) and the Communications Act (the Act). While the APA broadly requires basic transparency and fact-based findings, the Act directs the FCC to follow explicit procedures for rulemaking. Unlike some other agencies that follow APA procedures, the FCC has specific jurisdiction over our communications networks, and is governed by a five-person commission instead of a single administrator. The unique importance of communications networks to commerce, public safety, free expression, employment, education, and civic engagement, demands that the FCC make expert decisions with relative expediency on behalf of the public interest. At the same time, a five-member commission also requires a degree of negotiation and dialogue among commissioners in order to arrive at a final decision. There has been bipartisan support for the importance of negotiation and dialogue for years, through bills such as the FCC Collaboration Act (H.R. 1396), led by Representatives Anna Eshoo and John Shimkus.

The record of the FCC is dominated by unanimous 5-0 decisions. According to Chairman Wheeler's recent testimony, the full Commission acts by unanimous decision about 90 percent of the time. Given the diverse views and political backgrounds of commissioners, these unanimous decisions are often attributed by commissioners to the willingness of their colleagues to work together and bring insightful comments and revisions to circulated decisions. This month's FCC Open Meeting provides a notable example. In that meeting's vote on rules for commercial operations in the 3.5 MHz spectrum band, Commissioner Ajit Pai thanked his colleagues for their "willingness to accommodate" his suggestions, which

helped lead to a unanimous vote. Such comments are a sign of healthy deliberation, which should be valued alongside transparency.

The FCC's rulemaking authority is one of its strengths. While this authority has been criticized in the context of the FCC's 2015 Open Internet proceeding, the FCC's rulemaking process, as it was used in the proceeding, is an example of unprecedented public engagement with over 4 million people submitting comments to the FCC. Although some in Congress may disagree with the substance of the Open Internet decision, the FCC should not be singled out for process changes based on one decision that was a model of public engagement.

Rep. Kinzinger's draft bill is the most harmful of the proposed bills. It creates the potential for an endless cycle of edits and public postings due to substantive changes to circulated, proposed decisions. Moreover, it adds the vague standard of "good faith" to the editing process, which could open up FCC decisions to greater litigation based solely on process concerns. The Kinzinger bill also assumes that a system of white copy circulation three weeks prior to a vote is required in all decisions. While this is a practice that has been followed by the FCC for years, there may be scenarios where the Chair must call a vote to meet a deadline dictated by statute or a court. The inflexible timeline in the proposal could create insurmountable hurdles if a single commissioner attempts to override the will of the majority of the commission through a stalling tactic.

Rep. Ellmers' draft bill also fails to balance the needs for transparency with the need for negotiation and deliberation among commissioners. The bill would limit negotiation and essentially require finalized text at the time of a vote. Most FCC decision text is available within one week of a vote, complete with full dissents. Rep. Ellmers' bill would only marginally improve transparency, at the expense of a significant reduction in negotiation and deliberation among commissioners. It would also artificially reduce the time that both the majority and dissenters have to explain fully the legal and policy arguments behind their decisions.

While Rep. Latta's draft bill provides greater transparency around decisions made on delegated authority, it is not clear for what additional benefit. The FCC process already allows for such decisions to be appealed to the full commission. Publication of descriptions of actions taken by delegated authority 48 hours prior to their becoming official does not allow for adequate comment by the public whose right of appeal remains intact once any final decision is published.

The concerns posed by these discussion drafts demonstrate the importance of considering Communications Act reforms in a comprehensive manner rather than in small legislative bites. These draft bills as proposed could harm the FCC's ability to work efficiently. We support the goal of maximizing transparency and openness at the FCC, but not at the expense of the Commission's ability to function effectively and efficiently in the public interest. For these reasons we encourage members of the Committee to set these bills aside and work towards reforms that form a better balance between the FCC's role as an expert agency and the flexibility needed by commissioners to reach maximum consensus in their decisions.

Sincerely,

Center for Democracy and Technology  
Center for Media Justice/MAG-Net  
Color of Change  
Common Cause  
Consumers Union  
Demand Progress  
Engine  
Fight for the Future  
Free Press Action Fund  
National Hispanic Media Coalition  
Open Technology Institute at New America  
Public Knowledge  
United Church of Christ, OC Inc.  
Writers Guild of America-West