

October 2, 2014

Dear Chairman Wheeler:

We write to express our concern that **the FCC is losing what should be one of the greatest assets of any independent agency: its perceived objectivity**. As an independent, expert agency, the FCC has an obligation to weigh arguments and evidence evenly before making decisions. Increasingly, however, FCC staff appear to be disregarding arguments that do not fit a preconceived agenda; and worse, they may be actively manipulating media coverage around controversial issues. As a bipartisan, collegial body, the FCC is supposed to reach decisions through the active participation of all five Commissioners, even when they do not all agree. Instead, **the FCC appears to be engaging in the worst aspects of partisan politics**, embracing the very sort of bias and prejudgment in agency decisionmaking that Congress sought to prevent in enacting the Administrative Procedure Act

Among the most troubling examples of the FCC's lack of objectivity was last week's *The Washington Post* report that FCC staff worked exclusively with activists urging the FCC to "reclassify" broadband as a Title II common carrier in an "unusual collaboration" to distort media coverage of the comments filed on the FCC's proposed net neutrality rules.<sup>1</sup> We do not object to the FCC staff helping ensure that petition drive comments were processed quickly after the failure of the FCC's antiquated Electronic Comment Filing System. FCC staff were even-handed and helpful in advising some of our own organizations on alternative ways to submit comments (e.g., by email). But certain FCC staffers crossed a line if, as the *Post*'s report implies, they helped spin media coverage in favor of those pushing the FCC to invoke Title II.

Specifically, the *Post* reports that advocates and FCC staff worked together to "correct the record" for the media. Initial reports from the FCC's struggling ECFS database showed "underwhelming" comment turnout from pro-Title II activists, which would have dampened the political impact of their highly effective media campaign to push Title II.<sup>2</sup> The *Post* reports that, "To ease minds and soothe tensions, the advocates and bureaucrats worked together to correct the record." (Of course, "advocates" here means only those supporting Title II.) While the story doesn't clarify exactly what that involved, it notes that Title II advocates "asked the agency to pass along any press inquiries to the advocacy groups so that they could relay their unofficial but accurate count." What, exactly, did this involve?<sup>3</sup>

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<sup>1</sup> <http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/24/inside-the-collapse-of-the-fccs-digital-infrastructure-and-the-rush-to-save-it/>

<sup>2</sup> As explained in the coalition letter filed as comments by many of the signatories to this letter, Title II will not allow the FCC to do what those advocating it claim — banning "pay for prioritization" deals — and may, in fact, *require* the FCC set prices that edge providers must pay broadband providers for carrying their traffic. It is not clear that the FCC could impose Title II on broadband without opening the door to Title II regulation of other Internet services, or that the FCC could effectively, timely forbear from the most burdensome provisions of Title II. [http://docs.techfreedom.org/Reply\\_Comments\\_Coalition\\_Letter.pdf](http://docs.techfreedom.org/Reply_Comments_Coalition_Letter.pdf).

<sup>3</sup> Ammori tweeted publicly about opening a private Direct Message Twitter conversation with FCC Press Secretary Kim Hart, suggesting additional discussion may have taken place between the two. <https://twitter.com/ammori/status/510104560107806720>

Objectively “correcting” the record would have meant ensuring that media reported that over 900,000 reply comments were filed *against* Title II — more than the principal pro-regulation reply comment effort, “Battle For the Net,” filed in support of it (777,364). American Commitment, Americans for Prosperity, the Center for Individual Freedom, and TechFreedom all ran campaign websites, but none received any assistance from FCC staff in managing media relations for their respective efforts. Nor, apparently, did the FCC refer journalists to other major organizations that have opposed Title II, including the NAACP, the Minority Media Telecommunications Council, and the Communications Workers of America. In the days immediately before the FCC’s comment deadline, at least one senior FCC staffer tweeted about the pro-Title II #InternetSlowdown campaign,<sup>4</sup> but made no such mention of the anti-Title II #DontBreakTheNet and #StopInternetRegulation campaigns.

The result has been a completely lopsided media narrative describing a groundswell of public support for Title II, with little, if any, mention of widespread support for maintaining the bipartisan consensus against regulating the Internet under Title II. Tellingly, the *Post* report makes no mention of the nearly one million comments filed against Title II — and the pattern is similar in other news stories.

We do not expect FCC staff to do media outreach on behalf of *any* commenter, but **if FCC staff are going to attempt to “correct the record,” they must do so objectively.** Taking sides on a controversial debate like this would send precisely the wrong signal: that the FCC has already reached a conclusion and that the notice-and-comment rulemaking process is merely political theater. It is particularly ironic that the FCC should play favorites regarding a rulemaking that is justified as ensuring a level playing field among web companies.

More fundamentally, attempting to spin comment counts in *any* direction — or even seeming to do so — contributes to a **growing and troubling perception that the FCC’s notice-and-comment rulemakings are becoming informal plebiscites and trite popularity contests rather than expert-driven attempts to strike the right balance on highly complex issues.** Marvin Ammori, apparent leader of the pro-Title II campaign, put it best when he told *The Post*, “It’s a political question, how you count these numbers.”<sup>5</sup> Of *course* it is. But Congress created the FCC precisely to rise above such machinations.

Unfortunately, this is far from an isolated incident; it seems to confirm a larger pattern of increasing politicization in the FCC’s operations, including, in this proceeding alone:

- Republican Commissioner Ajit Pai’s office reports that, ahead of the initial vote on the Open Internet NPRM in May, your office refused to return phone calls from his office and shared a new draft of the proposal only with the Democratic commissioners.
- You ignored calls by Pai and Democratic Commissioner Jessica Rosenworcel to delay issuing that NPRM by a month to allow time for more careful consideration, resulting in a

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<sup>4</sup> <https://twitter.com/GigiBSohnFCC/status/509697920505888768>

<sup>5</sup> <http://www.washingtonpost.com/blogs/the-switch/wp/2014/09/24/inside-the-collapse-of-the-fccs-digital-infrastructure-and-the-rush-to-save-it/>

breakneck series of deadlines this summer on related issues, including the Comcast/Time Warner Cable merger; the AT&T/DirecTV merger; preemption petitions regarding municipal broadband, to which the Commission responded with unprecedented speed, allowing an unusually short window for consideration; and the FCC's Section 706(b) report. In the end, the FCC's comment system could not even handle the volume of comments filed.

An appendix to this letter details other similar recent process failures that prompted objections from both Republican and Democratic commissioners. These, among other actions, have contributed to a growing perception outside the agency regarding your management that was best summarized by Arthur Esch, your former colleague, in a September 29 *New York Times* profile of you: "He's not a democracy guy. You do not have a vote. He's a decision maker."<sup>6</sup> Only by making impartial decisions in light of the best available evidence, and refraining from giving special treatment to certain interests, can you restore public confidence in the office of FCC Chairman — especially after the highly politicized chairmanship of former Chairman Kevin Martin.<sup>7</sup>

With respect, we would remind you that Congress and the President appointed you to be chairman of a collegial, bipartisan commission whose decisions are supposed to be grounded in special expertise, not politics. We can separate our disagreements over policy outcomes from the processes by which key decisions about the future of the Internet and telecommunications are made. We hope you, and your staff, will attempt to do the same throughout the remainder of your chairmanship.

Sincerely,  
TechFreedom  
American Commitment  
Center for Boundless Innovation in Technology  
Center for Individual Freedom  
Center for Financial Privacy and Human Rights  
Competitive Enterprise Institute  
FreedomWorks  
International Center for Law & Economics  
Less Government  
MediaFreedom  
Taxpayers Protection Alliance  
Bartlett Cleland, Madery Bridge Associates

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<sup>6</sup> [http://www.nytimes.com/2014/09/29/business/with-perspective-from-both-sides-of-his-desk-fcc-chairman-ponders-net-neutrality.html?\\_r=1](http://www.nytimes.com/2014/09/29/business/with-perspective-from-both-sides-of-his-desk-fcc-chairman-ponders-net-neutrality.html?_r=1)

<sup>7</sup> FCC Chairman Abused Power, House Probe Finds, <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/09/AR2008120903132.html>

## Examples of Recent Commission Process Failures

- In both the Comcast/Time Warner Cable and AT&T/DirecTV proceedings, the FCC has taken the extraordinary (indeed, possibly unprecedented) step of waiving standard transparency rules so that opponents of the merger may lobby the Commission in secret.<sup>8</sup>
- The same senior advisor in the Chairman's office mentioned above took the extraordinary step of filing *ex parte* notices summarizing a lobbying meeting in June between the Chairman and senior FCC staff and venture capitalists advocating Title II,<sup>9</sup> and a July meeting with leading Silicon Valley CEOs and venture capitalists.<sup>10</sup> These are hardly the kinds of small, unsophisticated parties that need help from FCC staff. The fact that she summarized their views and filed the *ex parte* in her name, while permitted by FCC rules, is highly unusual and seems to indicate either that she arranged the meetings, was signaling support for their position, or both.
- In August, Democratic Commissioner Mignon Clyburn dissented from the FCC's Text-to-911 order, objecting to the inclusion, the night before the Commission's vote, of language shared with her just two hours before the Commission's vote, that opened the door to making certain state, tribal and local governments ineligible to participate in a Task Force on Public Safety Answering Points.<sup>11</sup>
- In July, Commissioners O'Rielly and Pai both dissented from the FCC's e-Rate reform order, both noting that the Commission had refused to entertain *any* of their proposals for streamlining the cumbersome process by which schools and libraries apply for e-Rate subsidies, reducing waste and fraud, and ensuring that rural schools receive equitable funding. Commissioner O'Rielly said, "No attempt was made to work out even the smallest of details. In the end, I never expected to get everything I proposed, but I don't believe it is appropriate to refuse to negotiate with me just because I am a Republican appointee."<sup>12</sup> Commissioner Pai noted that he had been given the final draft of the order just 17 minutes before the Commission's vote on it and lamented that "take-it-or-leave-it, party-line votes have become the new normal for high-profile Commission items."<sup>13</sup>
- In July, the Commission, on a 3-2 partisan vote, waived longstanding rules so that Grain Management, owned by a major Democratic donor, could buy additional spectrum at a steep discount. This prompted a sharp rebuke from House Energy and Commerce Committee Chairman Fred Upton (R-MI) and Communications and Technology Subcommittee Chairman Greg Walden (R-OR): "The process is clearly broken, and something smells rotten on the 8th floor. FCC action, especially at the behest of those with real or perceived political connections, should be done by the book and far above reproach. Process rules are in place for a reason, and there is a transparent process available if the commission wants to pursue changes to the rules. Instead, a troubling pattern of process neglect is emerging, leaving a commission that too often shrouds its work in secrecy and takes shortcuts to impose its desired policies. This action raises additional questions about the decision-making process at the FCC and underscores the need for additional transparency and process reform."<sup>14</sup>

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<sup>8</sup> <http://truthonthemarket.com/2014/09/04/double-secret-ex-parte-meetings-at-the-fcc-somethings-amiss-in-the-agencys-big-transaction-reviews/>

<sup>9</sup> <http://apps.fcc.gov/ecfs/document/view?id=7521348831>

<sup>10</sup> <http://apps.fcc.gov/ecfs/document/view?id=7521680048>

<sup>11</sup> [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-14-118A3.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-118A3.pdf)

<sup>12</sup> [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-328172A7.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-328172A7.pdf)

<sup>13</sup> [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-328172A6.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-328172A6.pdf)

<sup>14</sup> <http://energycommerce.house.gov/press-release/upton-and-walden-reports-fcc-favoritism-%E2%80%9Cprocess-clearly-broken-and-something-smells#sthash.5N132NGz.dpuf>