TO: Chair, Ranking Members of the House Energy and Commerce Committee and its Subcommittee on Communications and Technology
FROM: TechFreedom & ICLE
DATE: May 20, 2015
RE: FCC Process Reform Bill Markup

We commend those members of the House Energy and Commerce Committee from both parties who have proposed bills to increase transparency and accountability at the Federal Communications Commission (FCC). Such reforms are badly needed, and the proposed changes would help to greatly improve the current situation.

But welcome as they are, none of the proposed reforms goes to the real problem: the FCC's increasingly unconstrained discretion. While the reforms may help to raise the *political* costs of agency actions that are unwise or push the boundaries of its legal authority, vague threats of oversight and censure are too unreliable to offer the certainty and humility that regulated industries require for investment and innovation to flourish.

We urge Congress to require the FCC to undertake the same cost-benefit analysis currently required for proposed regulations promulgated by Executive Branch agencies subject to Executive Orders 12044, 12291, and 12866. A bill (S.1173) introduced in the last Congress by Sen. Portman, entitled "Independent Regulatory Agency Analysis Act of 2013," would have done just that, providing authority to the Office of Information and Regulatory Affairs — an executive branch agency within the Office of Management and Budget — to hold the FCC and other independent regulatory bodies to the same standard as other agencies: requiring them to undertake a cost-benefit analysis prior to adopting any rule that will have a significant economic impact.[1]

But unfortunately, even mandatory cost-benefit analysis for all rulemakings would be insufficient to solve the FCC's most significant problem. Increasingly, the greatest process problem at the FCC is not a defect of the traditional rulemaking process, but rather the agency's ability to circumvent notice-and-comment rulemaking altogether.

To date, such circumvention has been done chiefly through the FCC's transaction review process, through which the FCC wields enormous power to block mergers it asserts are not in the "public

[1] https://www.congress.gov/113/bills/s1173/BILLS-113s1173is.pdf

interest." With the power to block comes the power to regulate *sub rosa*. The FCC routinely uses this power to effectively extort nominally "voluntary" conditions that could not legally be imposed by regulation,[2] and may not even be constitutional.[3]

Ideally, Congress would limit the FCC's transaction review to telecom-specific issues (*e.g.*, compliance with FCC rules and the assessment of an entity's fitness to hold a license), leaving analysis of the larger competitive effects of a merger to the expert agencies: the Department of Justice and the Federal Trade Commission. The FCC would assist with these agencies' reviews, but not duplicate them.[4]

Short of that, Congress should resurrect the key reforms proposed by H.R. 3309, the FCC Process Reform Act of 2012:

1. Barring the FCC from conditioning transaction approval—
    a. on any condition that is not "narrowly tailored to remedy a harm that arises as a direct result of the specific transfer or specific transaction that this Act empowers the Commission to review"; and
    b. unless "the Commission could impose a similar requirement [through some grant of regulatory authority]."
2. Barring the FCC from "consider[ing] a voluntary commitment of a party to such transfer or transaction unless the Commission could adopt that voluntary commitment as a condition."[5]

This common-sense reform would ensure that the FCC does not use its transaction review authority to sidestep other limits on its powers, or the procedural safeguards of normal rulemaking. Without it, many of the reforms proposed by the bills currently before the Committee will be easily evaded by the Commission. Unfortunately, the draft FCC Process Reform Act of 2015 contains no such reforms.

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[2] While examples are too numerous to cite, one particularly clear example of the FCC leveraging policy statements into de facto regulations through the transaction review process is the FCC's 2006 approval of the AT&T-BellSouth merger conditioned upon the companies' "voluntary" compliance with the FCC's 2005 Open Internet Policy Statement, *Memorandum Opinion and Order*, WC Docket No. 06-74 (rel. Mar. 26, 2007), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-06-189A1.pdf, which the D.C. Circuit found, in 2010, to be unenforceable because it was issued outside the rulemaking process (and without statutory basis). Comcast Corp. v. FCC, 600 F.3d 642 (2010).

[3] *See, e.g.*, Sirius-XM Merger, *Memorandum Opinion and Order and Report and Order*, MB Docket No. 07-57 (rel. Aug. 5, 2008), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-178A1.pdf. The fact that the FCC later amended this merger condition merely illustrates the political nature of the process. *See* Sirius-XM Merger, *Memorandum Opinion and Order*, MB Docket No. 07-57 (rel. Oct. 19, 2010), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-184A1.pdf.

[4] Geoffrey A. Manne, et al., *The Law and Economics of the FCC's Transaction Review Process*, TPRC 41: The 41st Research Conference on Communication, Information and Internet Policy (Aug. 23, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242681.

[5] https://www.congress.gov/112/bills/hr3309/BILLS-112hr3309rfs.pdf.

We have much the same concern about the FCC's growing willingness to make policy not through notice-and-comment rulemaking, but by issuing informal policy guidance,[6] sometimes at the Bureau level rather than by the full Commission,[7] and through case-by-case adjudication, largely resolved through unadjudicated settlements.[8] The FCC's recent Open Internet Order marks a fundamental shift towards such an approach, leaving vast discretion in the hands of the Enforcement Bureau, and leaving key policy questions to be decided outside the safeguards of normal rulemaking.

We have expressed our concerns about the FTC's "common law of consent decrees,"[9] and suggested that process reforms are key to ensuring that the courts play an effective role in constraining agency policymaking. If anything, this problem may be worse at the FCC, where companies may have even less incentive to challenge enforcement actions because the underlying legal standard is so amorphous,[10] and because doing so risks incurring the hostility of the agency in any pending or future transactions before it.

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[6] 2005 Open Internet Policy Statement, CC Docket No. 02-33 (rel. Sept. 23, 2005), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf; CarrierIQ, *Declaratory Ruling*, CC Docket No. 96-115 (rel. June 27, 2013), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-89A1.pdf (applying CPNI obligations to data collection through apps conducted at the direction of wireless carriers).

[7] Joint Sales Agreements, *Report and Order and Notice of Proposed Rulemaking*, MB Docket No. 14-50 (rel. Apr. 15, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-28A1.pdf (modifying broadcast ownership rules to prohibit certain forms of joint sales agreements); Joint Statement of Commissioners Pai and O'Rielly on FCC Abuse of Delegated Authority, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-331140A1.pdf (criticizing the issuance of an order by a bureau chief that arguably had substantive effect and should thus have been voted on by the full Commission).

[8] Madison River, *Consent Decree*, File No. EB-05-IH-0110, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-05-543A2.pdf (declaring that a telephone company's blocking of VoIP content violated Section 201(b)); Memorandum Opinion and Order Resolving Comcast-BitTorrent Dispute, File No. EB-08-IH-1518, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf (holding Comcast in violation of the 2005 Open Internet Policy Statement); TerraCom Notice of Apparent Liability and Forfeiture, File No. EB-TCD-13-00009175, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A1.pdf (intrepreting, for the first time, Sections 222(a) and 201(b) a general sources of privacy an data duties beyond those created by Sections 222(b) and (c)).

[9] http://docs.techfreedom.org/FTC_Tech_Reform_Report.pdf

[10] Despite the tendency of companies to settle FTC enforcement actions, the underlying legal standards upon which the FTC bases those actions is actually quite rigorous, requiring cost-benefit analysis in the case of unfairness, Michael Pertschuk, Chairman, Fed. Trade Comm'n, et al., *FTC Policy Statement on Unfairness* (Dec. 17, 1980), *available at* https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness (codified at 15 U.S.C. § 45(n)), and analysis of "materiality" as a proxy for injury in the case of deception, The problem at the FTC is not the standards themselves, but the agency's ability to circumvent them by avoiding having to analyze them in litigation that is the problem. See, e.g., Geoffrey A. Manne, et al., *In the Matter of Nomi Technologies, Inc.: The Dark Side of the FTC's Latest Feel-Good Case*, ICLE Antitrust & Consumer Protection Research Program White Paper 2015-1 (2015), *available at* http://laweconcenter.org/images/articles/icle-nomi_white_paper.pdf.

Ideally, Congress would rewrite the Communications Act, replacing the FCC's vague "public interest" standard with standards that require real analysis of the likely costs and benefits of any regulatory action,[11] including case-by-case adjudication, settlements and informal guidance. But short of a full rewrite, the process reform issues that will likely matter most in the coming years are those regarding the investigation and complaint process, and the dynamics that compel companies to settle FCC enforcement actions, even when they are based on legal theories that stretch the FCC's authority beyond what Congress intended. No serious FCC process reform can be complete without careful examination of these issues.

We urge Congress to hold hearings on these matters and to consider additional reforms specifically aimed at preventing the FCC from building the kind of "common law of consent decrees" that the FTC has created in the areas of privacy and data security — and to ensure instead that, if the FCC chooses to regulate through case-by-case adjudication, its discretion is ultimately constrained by the courts. Otherwise, the FCC's "regulation" of the Internet will be inherently political in nature — unpredictable, arbitrary, and harmful to the very consumers it is supposed to protect.[12]

Respectfully,

/s/

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[11] *See e.g.*, S. 2113, Digital Age Communications Act of 2005, *available at* https://www.govtrack.us/congress/bills/109/s2113/text.

[12] *See* Berin Szoka & Geoffrey Manne, *The Second Century of the Federal Trade Commission*, TECHDIRT (Sept. 26th, 2013), *available at* https://www.techdirt.com/blog/innovation/articles/20130926/16542624670/second-century-federal-trade-commission.shtml.