

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

February 18, 2015

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Wheeler:

As you know, we have had longstanding concerns with the fairness, openness, and transparency of several of the Federal Communications Commission's (FCC) administrative and rulemaking processes under your leadership. We have raised these concerns in hearings and various other venues, but without any apparent effect. The recently published story in *The Wall Street Journal* entitled "Net Neutrality: How White House Thwarted FCC Chief"¹ raises additional concerns about whether the Commission is managing its affairs with the independence and openness required by its mandate. Therefore, we are writing to seek additional information to ascertain whether the Commission is fulfilling its statutory responsibilities.

One area of ongoing concern is your office's use of so-called "delegated authority." Under this practice, the Commission often delegates to the Commission's bureaus and offices the authority to address routine, non-controversial matters. For example, delegated authority allows the Wireless Telecommunications Bureau to conduct routine licensing matters without a full Commission vote. It is not appropriate for use with regard to new or novel questions of law or policy.

In March 2014, the Media Bureau, using delegated authority, changed longstanding FCC policy with regard to the approval of broadcast television transactions involving sharing agreements. This policy change was neither routine nor non-controversial. Yet this change in Commission policy was neither debated among your colleagues, nor was it subject to a vote of any kind. Rather, it was announced by the Chief of the Media Bureau in a Public Notice. We alerted you at that time of our concerns.²

¹ Gautham Nagesh & Brody Mullins WALL ST.J., Feb. 4, 2015

² Upton, Walden Respond to FCC's End Run of Process on Broadcast Sharing Announcement March 13, 2014, <http://energycommerce.house.gov/press-release/upton-walden-respond-fcc%E2%80%99s-end-run-process-broadcast-sharing-announcement>.

In July 2014, an analogous concern arose. We became aware that a Public Notice related to the then upcoming AWS-3 auction was placed on circulation, beginning the process by which commissioners and their staffs may request edits and ultimately vote on the item. However, subsequent action by your office removed the item from circulation and directed the Wireless Telecommunications Bureau to issue the Public Notice on delegated authority – again, depriving the public of essential process and the members of the Commission an opportunity to vote on the matter. According to the media reports, one of the Commissioners sought information related to the substance of the Public Notice and was told he would be briefed *after* the item was adopted.

In yet another matter, we have been concerned with the process by which the Commission granted a waiver of its rules to permit Grain Management, LLC to qualify as a small business and receive bidding credits. It appears your office sought to employ delegated authority to circumvent a vote by the Commission on a controversial matter. Documents provided to the Committee indicate that it was only after two commissioners challenged the release of this item by the Wireless Telecommunications Bureau on delegated authority that the matter was placed on circulation for vote by the full Commission.

Finally, we witnessed a series of actions that call into question the openness and fairness of the Commission's rulemaking processes. In May 2014, press reports indicated that your office withheld the final version of the Open Internet Notice of Proposed Rulemaking from two commissioners for as long as 24 hours after providing the material to the two other commissioners and to the press during the run up to the May 15th FCC Open Meeting. We voiced our concerns when you testified before the Subcommittee on Communications and Technology on May 20, 2014. Our concerns were compounded when we learned that a substantially revised draft of another item scheduled for vote at the Open Meeting was not provided to other commissioners' offices until the closing minutes of the evening before the public vote.

Not surprisingly, Commissioner Rosenworcel said of the Open Internet Notice of Proposed Rulemaking that “the process that got us to this rulemaking today is flawed” and signaled that the effective execution of the Commission's core functions were at risk. As we cautioned you then,³ withholding information from other members of the Commission until the eleventh hour precludes the scrutiny and analysis necessary for deliberation and reasoned decision-making.

Despite your commitment to reform FCC process, just this past December your office resorted again to a questionable use of delegated authority. In this case, the Wireless Telecommunications Bureau released two items at the direction of your office. The first granted a petition asking the Commission to regulate cellular data roaming rates by providing – for the

³ Opening Statement of the Honorable Greg Walden, Subcommittee on Communications and Technology Hearing on “Oversight of the Federal Communications Commission” May 20, 2014 (As Prepared for Delivery), <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/Hearings/CT/20140520/HHR-G-113-IF16-MState-W000791-20140520.pdf>

first time – an interpretation of the Commission’s 2011 data roaming order. The second was a report assessing the state of competition in the wireless industry, which is a responsibility expressly assigned by Congress to the Commission, not to the Wireless Telecommunications Bureau. According to their Joint Statement regarding the release of these items, two of your colleagues requested that these items be brought before the Commission for a vote only to have the request flatly rejected.

Most recently, the Commission’s January open agenda meeting affirmed these concerns. As described by one of your colleagues in a public statement, information requested was withheld until the day before the Commission was to meet and vote – nearly two weeks after the request for the information was made and only days before the expiration of the Commission’s authority to act on the matter.

The Commission’s disregard for openness and transparency has also manifested itself in the agency’s direct dealings with Congress. On June 4, 2014, the Committee, as part of its routine oversight of the agency, sent a letter requesting certain information related to agency management and performance, including the speed-of-disposal metrics for the FCC’s bureaus and offices. This is information that routinely appeared in the FCC’s annual reports until 2009. The agency submitted its “complete” response on June 30, 2014, which lacked information on speed-of-disposal metrics for certain bureaus and offices, including the agency’s largest, without explanation. Despite multiple requests for a full response, it was not until December 16, 2014, nearly six months after the initial request and only after a meeting between Committee staff and senior Commission staff, that the Committee was informed that such metrics were not available because they ceased being employed in the management of the agency’s largest bureau in 2009.

Considered together, these issues lead us to conclude that the Commission under your leadership is not sufficiently committed to fulfilling its obligation to operate independently, with processes that are open, fair and transparent.

In light of this, and pursuant to Rules X and XI of the U.S. House of Representatives, we seek information necessary to understand the facts and circumstances surrounding these various process issues. Accordingly, we request that you provide, by March 4, 2015, requested information and documents relating to:

- (1) Any guidelines, protocols, instructions, or directives relating to the practices and processes of bureaus, divisions, and offices within the FCC with regard to the provision of information requested by other Commissioners and their staff. This includes, but is not limited to, factual information and the legal opinions of the bureaus, divisions, and offices related to matters being decided by the bureaus or presented to the Commission for vote.
 - a. Describe any changes to practices, processes, or interpretations during your Chairmanship regarding the provision of such information to matters requested by Commissioners and their staff.

- b. Provide all documents, including email communications, relating to any such changes.
 - (2) Any guidelines, protocols, instructions, or directives relating to routine practices and processes of bureaus, divisions, and offices within the FCC including guidance or instruction concerning compliance with the Administrative Procedures Act and the FCC's rules.
 - a. Describe any changes to practices, processes, or interpretations during your Chairmanship concerning compliance with the Administrative Procedures Act and FCC's rules.
 - b. Provide all documents, including email communications, relating to any such changes.
 - (3) Any guidelines, protocols, instructions, directives, or legal opinions provided by the Office of General Counsel relating to the practices and processes of bureaus, divisions, and offices of the FCC with regard to the use of delegated authority in the agency's decision-making process.
 - a. Describe any changes to practices, processes, or interpretations during your Chairmanship concerning the use of delegated authority in the agency's decision-making process.
 - b. Provide all documents, including email communications, relating to any such changes.
 - (4) Any guidelines, protocols, instructions, directives, or legal opinions provided by the Office of General Counsel relating to the discretion of the Chairman to direct the use of delegated authority.
 - a. Describe any exercise or direction during your Chairmanship concerning the use of delegated authority in the agency's decision-making process.
 - b. Provide all documents, including email communications, relating to any such exercise or direction provide by you or on your behalf.
 - (5) The FCC's policy on the nature and scope of permissible communications between FCC personnel and outside entities, including, but not limited to, the public, industry representatives, Congress and its staff, and the executive branch.
 - (6) Any guidelines, protocols, instructions, directives, or rules relating to FCC staff use of personal email in the execution of official FCC business.
 - (7) Describe the Commission's document retention policies, including policies relating to the retention of internal or external Commission correspondence, including personal

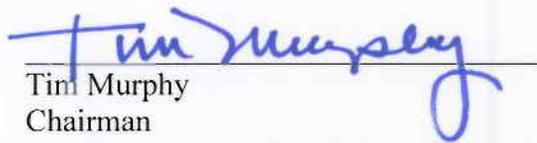
and official email. Include any guidelines, protocols, instructions or directives relating to these policies and the implementation and practice of these policies.

- a. If these policies have changed or the implementation and practice of these policies has changed since you became Chairman, please describe those changes, the date the changes were instituted, the method by which these changes were implemented, any staff education and oversight activities relating to the changes, and the rationale behind the changes.
- b. Provide all documents, including email communications, relating to any such changes to document retention policies.
- c. Please describe any changes you are contemplating to the Commission's policies regarding document retention.

Instructions for responding to the Committee's document requests are included as an attachment to this letter. In your written responses, please certify that you have fully complied with this information and document request. Should you have any questions you may contact David Redl or Charles Ingebretson of the Majority Committee staff at (202) 225-2927.

Sincerely,


Fred Upton
Chairman


Tim Murphy
Chairman
Subcommittee on Oversight and Investigations


Greg Walden
Chairman
Subcommittee on Communications and Technology

Attachment

cc: The Honorable Frank Pallone, Jr., Ranking Member

The Honorable Diana DeGette, Ranking Member
Subcommittee on Oversight and Investigations

The Honorable Anna Eshoo, Ranking Member
Subcommittee on Communications and Technology

The Honorable Mignon Clyburn, Commissioner

Federal Communications Commission

The Honorable Jessica Rosenworcel, Commissioner
Federal Communications Commission

The Honorable Ajit Pai, Commissioner
Federal Communications Commission

The Honorable Michael O'Rielly, Commissioner
Federal Communications Commission