

FCC: PROCESS AND TRANSPARENCY

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

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FCC: PROCESS AND TRANSPARENCY

Tuesday, March 17, 2015,

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
WASHINGTON, DC.

The committee met, pursuant to notice, at 10 a.m., in room 2154, Rayburn House Office Building, the Honorable Jason Chaffetz (chairman of the committee) presiding.

Present: Representatives Chaffetz, Mica, Jordan, Walberg, Amash, DesJarlais, Farenthold, Massie, Meadows, DeSantis, Buck, Walker, Blum, Hice, Russell, Carter, Grothman, Palmer, Cummings, Maloney, Norton, Connolly, Kelly, Lawrence, Lieu, Watson Coleman, Plaskett, DeSaulnier, Welch, and Lujan Grisham.

Chairman CHAFFETZ. Good morning. The Committee on Oversight and Government Reform will come to order. Without objection, the chair is authorized to declare a recess at any time.

We are here today to examine the FCC's rulemaking process and the agency's commitment to transparency. Three weeks ago, the FCC approved new rules that will dramatically increase the regulation of the Internet. The problem is Americans only got a chance to read them last week.

Last month, Chairman Wheeler told Members of Congress that releasing the preliminary discussion draft ran contrary to "decades of precedent" at the Commission. In reality, the current process for making changes to Internet rules is far less transparent than what occurred with the equally controversial media ownership rule changes in 2007.

In 2007, then-Senator Obama's "strongly requested" the FCC "put out any changes that they intend to vote on in a new notice of proposed rulemaking." Senator Obama believed to do otherwise would be "irresponsible." Then-Chairman Kevin Martin responded to these concerns by releasing the draft text of the rule changes and inviting a 4-week public comment period.

In making the text public, Chairman Martin explained, "Because of the intensely controversial nature of the . . . proceeding and my desire for an open and transparent process, I want to ensure that Members of Congress and the public had the opportunity to review my proposal prior to any Commission action." That didn't happen in this case so to suggest that there is no precedent for this, that is just not true.

Chairman Martin went even further and, in December 2007, testified before Congress, more than once, about the rule changes. And yet we invited Commissioner Wheeler to come before us and he re-

fused. Didn't have any problem meeting at the White House, but did have a problem coming before Congress.

In today's case, Chairman Wheeler did quite the opposite and failed to provide this type of transparency. Chairman Wheeler did not make the rule public, did not invite public comment, and declined to appear before this committee. We find that wholly unacceptable.

Further, it appears the FCC has been concealing certain communications from the public without legal basis.

I want to put up a slide. We will refer to this later. But there are several reactions to requests that were made for Freedom of Information Act experiences.

Do we have that slide? I guess not. I am going to keep going.

Organizations that hold our Government accountable depend on the FOIA process to gain insight into agency decisionmaking. The FCC's track record in responding to FOIA requests is weak, at best.

At the outset, the FCC denies more than 40 percent of all FOIA requests. The documents FCC does produce contain a number of redactions, including some that black out entire pages of text.

This committee has received 1,600 pages of unredacted email traffic previously provided in a highly redacted form through FOIA requests to various organizations, including vice.com. Today we will compare these communications to understand what legal justification Mr. Wheeler's agency used to prevent this information from becoming public. In addition, we will examine the series of events resulting in the highly controversial vote to use Title II to regulate the Internet like a public utility.

In May 2014, the FCC issued a Notice of Proposed Rulemaking concerning Internet regulation that indicated broadband and mobile services would remain classified under Title I. Public Statements made by Chairman Wheeler and communications received by this committee demonstrate that this was the chairman's intent during this time period.

In October 2014, and after the FCC's public comment period ended, media reports indicate that Chairman Wheeler intended to finalize a hybrid approach that continued to classify broadband and mobile Internet services under Title I. Just days later, President Obama appeared in a YouTube video calling for a radically different proposal: full Title II reclassification, similar to a utility or telephone company. Emails provided to the committee by the FCC suggest that this came as a major surprise to the FCC staff, including Mr. Wheeler.

On January 7th, Chairman Wheeler announced the FCC would radically alter course and reclassify broadband and mobile services under Title II. I am sure much will be made about the 4 million comments that were made, but they were not made in the context of fully changing this to Title II. The FCC adopted the rule change on February 26th in a three to two vote.

The lack of transparency surrounding the open Internet rule-making process leaves us with a lot of questions. This is a fact-finding hearing. This committee remains committed to ensuring full transparency across Government, and I look forward to hearing more from Chairman Wheeler today.

With that, I will now recognize the ranking member from Maryland, Mr. Cummings, for 5 minutes.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

We are here today to discuss net neutrality, the rule that was adopted last month by the FCC.

There are strong opinions on all sides of this issue. No doubt about it. On the one hand, Internet service providers, including Comcast, AT&T, Verizon and Time Warner, oppose the rule and lobbied against it. They argued that additional regulation would increase fees, reduce investment, slow network upgrades, and reduce competition and innovation.

On the other hand, supporters of this new rule contend that ISPs should not be allowed to discriminate based on content. They believe ISPs should be required to act like phone companies, controlling the pipes that make up the Internet, but not what flows through them. Consumers, social media entities and companies like Facebook, Netflix, and Google favor open Internet policy because they do not want to be charged higher prices to provide their services.

The question before the committee is not which policy we may prefer, but whether the process used by the FCC to adopt the rule was appropriate. Republicans who oppose the new rule allege that President Obama exerted undue influence on the process. But we have seen no evidence to support this allegation.

Instead, the evidence before the committee indicates that the process was thorough, followed the appropriate guidelines, and benefited from a record number of public comments.

I welcome Chairman Wheeler here today to discuss the process used by the FCC, and I would like to make several points for the record. First, the FCC received more comments on this rule than any other rule in its history. That is indeed very significant. As I understand it, the FCC received about 4 million comments. This grassroots movement was highlighted when John Oliver, a popular late night talk show host, encouraged his viewers to go on the FCC website to comment on the proposed rule. The number of comments was also extremely high because the FCC established a 60-day comment period twice, twice as long as required by the Administrative Procedures Act.

In addition, the President has a right to express his position on proposed rules, and he did so forcefully in this case. In November he made remarks in support of an open Internet rule, arguing that it is "essential to the American economy." He said the FCC "should create a new set of rules protecting net neutrality and ensuring that neither the cable company nor the phone company will be able to act as a gatekeeper, restricting what you can do or see online."

When he gave this speech, the President also ensured that his office submitted the appropriate ex parte filing. He did this through the National Telecommunications and Information Agency, which is tasked with providing the FCC with information about the Administration's position on policy matters.

Presidents routinely make their positions known to independent agencies regarding pending rules. Presidents Reagan, George H.W. Bush, Clinton, and George W. Bush all expressed opinions on FCC regulations during their presidencies. In fact, for this neutrality

rule there were more than 750 ex parte filings from individuals, public interest groups, lobbyists, corporations, and elected officials, all of whom had an opportunity to make their views known.

Finally, if the committee is going to examine the actions of Chairman Wheeler and his communications with supporters of the rule, then we must also examine the actions of Republican Commissioners Pai, O'Reilly, and others who oppose the rule. Multiple press accounts indicate that they have been working closely with Republicans on and off, on and off Capitol Hill to affect the FCC's work, and we should review their actions with the same level of scrutiny.

Chairman Wheeler, I want to thank you again for appearing before our committee today, and I look forward to your testimony.

With that, Mr. Chairman, I yield back.

Chairman CHAFFETZ. I thank the gentleman.

I will hold the record open for five legislative days for any member who would like to submit a written Statement.

We will now recognize our witness, the Honorable Thomas Wheeler, Chairman of the Federal Communications Commission. We welcome you here today and glad that you could join us.

Pursuant to committee rules, all witnesses will be sworn before they testify, so if you will please rise and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

[Witness responds in the affirmative.]

Chairman CHAFFETZ. Thank you. We appreciate it.

In order to allow time for discussion, we normally ask for your testimony to be limited to 5 minutes, but we are very forgiving on this. We would appreciate your verbal comments. Your entire written Statement will be made part of the record.

Mr. WHEELER

**STATEMENT OF THE HONORABLE THOMAS WHEELER,
CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION**

Mr. WHEELER. Thank you very much, Mr. Chairman, ranking member, members of the committee. I will take that hint, as well as your forgiveness, and try to skip through some early paragraphs here.

I am proud of the process that the Commission ran to develop the Open Internet Order. It was one of the most open and most transparent in Commission history, and the public's participation was unprecedented.

Last April I circulated a draft Notice of Proposed Rulemaking that included a set of open Internet protections and also asked questions about the best way to achieve an open Internet. The Open Internet NPRM adopted in May proposed a solution based on Section 706 of the Telecommunications Act of 1996. It also specifically asked extensive questions as to whether Title II of the Communications Act of 1934 would be a better solution.

A quick point on our procedures. While, historically, some NPRMs just ask questions, during my chairmanship, I have made it a policy to present draft NPRMs to my colleague that contain specific proposals as a means to flag key concepts for commenters'

attention. I believe this is an important part of an open and transparent rulemaking process. But let's be clear. The proposal is tentative, not a final conclusion, and the purpose of the comment period is to full test that concept. In this instance, as in others, it worked in the desired way to focus the debate.

The process of the Open Internet rulemaking was one of the most open and expansive processes the FCC has ever run. We heard from startups; we heard from ISP; we heard from a series of public roundtables; as Mr. Cummings mentioned, we heard from 750 different ex partes; we heard from over 140 Members of Congress; we heard from the Administration both in the form of President Obama's very public Statement on November the 10th and in the form of the MTIA's formal submission.

But here I would like to be really clear. There were no secret instructions from the White House. I did not, as CEO of an independent agency, feel obligated to follow the President's recommendations. But I did feel obligated to treat it with the respect that it deserves, just as I have treated with similar respect the input, both pro and con, from 140 Senators and Representatives. And most significantly, as has been pointed out, we heard from 4 million Americans.

We listened and learned throughout this entire process, and we made our decision based on a tremendous public record.

My initial proposal was to reinstate the 2010 rules. The tentative conclusion put forth in the NPRM suggested that the FCC could assure Internet openness by applying a "commercial reasonableness" test under Section 706 to determine appropriate behavior of ISPs. As the process continued, I listened to countless consumers, innovators, and investors around the Country.

I also reviewed the submissions in the record and became concerned that the relatively untested "commercially reasonable" standard might be subsequently interpreted to mean that what was reasonable for ISP's commercial arrangements, not what was reasonable for consumers. That, of course, would be the wrong conclusion, and it was an outcome that was unacceptable.

So that is why, over the summer, I began exploring how to utilize Title II and its well-established "just and reasonable" standard. As previously indicated, this was an approach on which we had sought comment in the NPRM and about which I had specifically spoken, saying that all approaches, including Title II, were "very much on the table" for consideration.

You have asked whether there were secret instructions from the White House. Again, I repeat the answer is no.

Now, the question becomes whether the President's announcement on November 10th had an impact on the Open Internet debate, including at the FCC. Of course it did.

The push for Title II had been hard and continuous from Democratic Members of Congress. The President's weighing in to support their position gave the whole Title II issue new prominence. Of course, we had been working on approaches to Title II, including a combined Title II/Section 706 solution, for some time. The President's focus on Title II put wind in the sails of everyone looking for strong open Internet protection. It also encouraged those who

had been opposing any Government involvement to, for the first time, support legislation with bright line rules.

And as I considered Title II, it became apparent that, rather than being a monolith, it was a very fluid concept. The record contained multiple approaches to the use of Title II. One of those was the Title II/Section 706 “hybrid” approach that bifurcated, some would say artificially, Internet service. Another, the approach we ultimately chose, used Title II and Section 706, but without bifurcation. And still another, the one the President supported, was only Title II without Section 706. All of these were on the table prior to the President’s Statement.

But let me be specific. We were exploring the viability of a bifurcated approach. I was also considering using Title II in a manner patterned after its application in the wireless voice industry, and I had, from the outset, indicated a straight Title II was being considered.

A key consideration throughout this deliberation was the potential impact of any regulation on the capital formation necessary for the construction of broadband infrastructure. An interesting result of the President’s Statement was the absence of a reaction from the capital markets. When you talk about the impact of the President’s Statement, this was an important data point, resulting, I believe, from the President’s position against rate regulation. It was, of course, the same goal that I had been looking to achieve from the outset.

As we moved to a conclusion, I was reminded how it was not necessary to invoke all 48 sections of Title II. In this regard, I had been considering the substantial success of the wireless voice industry after it was deemed a Title II carrier pursuant to Section 332 of the Communications Act. In applying Title II, but limiting its applicable provisions, the Congress and the Commission in that Act enabled a wireless voice business with hundreds of billions of dollars of investment and a record of innovation that makes it the best in the world. This is the model for the ultimate recommendation that I put forward to my colleagues.

There were other industry data points that informed my thinking and the Commission’s analysis. One was the recognition of interconnection as an important issue, a topic not addressed by the President. Another was my letter to Verizon Wireless about its announcement to limit “unlimited” data customers if the subscriber went over a certain amount of data, a policy it ultimately reversed.

Of particular note was the active bidding, and ultimately overwhelming success, of the AWS-3 spectrum auction at the end of 2014 and the beginning of 2015, which showed that investment in networks, even in the face of the potential classification of mobile Internet access under Title II, continued to flourish. Other industry data points included the work of Wall Street analysts and the Statements of the ISPs themselves. Sprint, T-Mobile, Frontier, and hundreds of small rural carriers said that they would continue to invest under this Title II framework that we were developing.

Ultimately, the collective findings of the public record influenced the evolution of my thinking and the final conclusion that modern, light-touch Title II reclassification, accompanied by Section 706, provides the strongest foundation for Open Internet rules. Using

this authority, we adopted strong and balanced protections that assure the rights of Internet users to go where they want, when they want, protect the open Internet as a level playing field for innovators and entrepreneurs, and preserve the economic incentives for ISPs to invest in fast and competitive broadband networks.

I stand ready to answer your questions.

[Prepared Statement of Mr. Wheeler follows:]

**Statement of
Tom Wheeler
Chairman
Federal Communications Commission
Before the
Committee on Oversight and Government Reform
United States House of Representatives
Hearing on
“FCC: Process and Transparency”
March 17, 2015**

Chairman Chaffetz, Ranking Member Cummings, Members of the Committee, thank you for inviting me to testify today about the Open Internet Order that the Federal Communications Commission (FCC) adopted at our February meeting. I am proud of the process the Commission ran to develop this Order. It was one of the most open and transparent in Commission history, and the public’s participation was unprecedented.

The roadmap we followed to develop this order was a process that Congress established close to 70 years ago in the Administrative Procedure Act. We made a public proposal, we invited interested parties to comment on our proposal – which they did in record numbers – and then we adopted a final rule based on this record. The final result of this year-long process is rules that protect and preserve the open Internet, while promoting continued investment in broadband networks.

Our rulemaking process started last January, after most of the 2010 Open Internet rules were remanded to us by the court. At that point, we were faced with a significant challenge: putting in place Open Internet protections that are legally sustainable and ensure the Internet remains an open platform for innovation, expression, and economic growth.

Last April I circulated a draft Notice of Proposed Rulemaking (NPRM) that included a set of Open Internet protections and also asked questions about the best way to achieve an Open Internet. The Open Internet NPRM adopted in May proposed a solution based on Section 706 of the Telecommunications Act of 1996. It also specifically asked an extensive series of questions as to whether Title II of the Communications Act of 1934 would be a better solution.

A quick point on our procedures. While historically, some NPRMs just asked questions, during my chairmanship I have made it a policy to present draft NPRMs to my colleagues that contain specific proposals as a means to flag key concepts for commenters' attention. I believe this is an important part of an open and transparent rulemaking process. But let's be clear, the proposal is tentative, not a final conclusion, and the purpose of the comment period is to fully test the concept. In this instance, as in others, it worked as desired to focus the debate.

The process of the Open Internet rulemaking was one of the most open and expansive processes the FCC has ever run. Stakeholders – like start-ups, public interest groups, tech companies, think-tanks, and Internet service providers (ISPs) – weighed in like never before. Moreover, the Commission held a series of six public roundtables to explore the legal, technical, and economic facets of Open Internet protections.

We heard from over 140 Members of Congress. We heard from the Administration, both in the form of President Obama's very public statement of November 10 and in the form of the National Telecommunications and Information Administration's formal submission. Here I would like to be clear. There were no secret instructions from the White House. I did not, as CEO of an independent agency, feel obligated to follow the President's recommendation. But I did feel obligated to treat it with respect just as I have with the input I received – both pro and con - from 140 Senators and Representatives.

Most significantly of all, we heard from nearly four million Americans, who overwhelmingly spoke in favor of preserving a free and open Internet.

We listened, and we learned. And on the basis of this tremendous public record, I'm proud to say we did just what Congress envisioned in the APA: we adjusted our proposal along the way.

My initial proposal sought to reinstate the 2010 rules. The tentative conclusion put forth in the NPRM suggested the FCC could assure Internet openness by applying a "commercial reasonableness" test under Section 706 to determine appropriate behavior of ISPs. As the process continued, I listened to countless consumers, innovators, and investors around the country. I also reviewed many of the submissions in the record and became concerned that the relatively untested "commercially reasonable" standard might be subsequently interpreted to mean what was reasonable for ISPs' commercial arrangements, not what was reasonable for consumers. That, of course, would be the wrong conclusion. It was an outcome that was unacceptable.

That's why, over the summer, I began exploring how to utilize Title II and its well-established "just and reasonable" standard. As previously indicated, this was an approach on which we had sought comment in the NPRM and about which I had specifically spoken, saying that all approaches, including Title II, were "very much on the table" for consideration.

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amount of data used in a month, a policy it ultimately reversed. Of particular note was the active bidding (and ultimately overwhelming success) of the AWS-3 spectrum auction at the end of 2014 and the beginning of 2015, which showed that investment in networks – even in the face of the potential classification of mobile Internet access under Title II – continued to flourish. Other industry data points included the work of Wall Street analysts, and the statements of ISPs themselves, including Sprint, T-Mobile, Frontier, and hundreds of small rural carriers, that they would continue to invest under a Title II framework.

Ultimately, the collective findings of the public record influenced the evolution of my thinking and the final conclusion that modern, light-touch Title II reclassification, accompanied by Section 706, provides the strongest foundation for the Open Internet rules. Using this authority, we adopted strong and balanced protections that assure the rights of Internet users to go where they want, when they want, protect the open Internet as a level playing field for innovators and entrepreneurs, and preserve the economic incentives for ISPs to invest in fast and competitive broadband networks.

I stand ready to answer your questions.

Chairman CHAFFETZ. Thank you. I will recognize myself for 5 minutes.

Chairman, did you or the FCC ever provide the White House the proposed rule prior to the final vote?

Mr. WHEELER. No, sir.

Chairman CHAFFETZ. The comment period was open May 15th. How many times did you meet either at the White House or did the White House officials come meet with you during that time?

Mr. WHEELER. In total? I mean, about any issue?

Chairman CHAFFETZ. Yes.

Mr. WHEELER. I think that we have shown you my calendar that has something like 10.

Chairman CHAFFETZ. June 11th with Jason Furman, correct?

Mr. WHEELER. You have the list, sir.

Chairman CHAFFETZ. June 18th with Jeffrey Zients; Caroline Atkinson, July 17th; September 11th, Jeffrey Zients; September 30th, Megan Smith; October 15th, Jason Furman; October 28th, Jeffrey Zients; and then Mr. Zients visiting with you on November 9th at the FCC. Does that sound accurate?

Mr. WHEELER. If that is the list that we provided, sir.

Chairman CHAFFETZ. And yet you only provided an ex parte for one of those meetings. Why is that?

Mr. WHEELER. First of all, the rules are quite clear on what constitutes an ex parte, and that is an attempt to file specifically in a specific docket and to influence the outcome of that docket.

Chairman CHAFFETZ. Did you discuss this matter during those meetings?

Mr. WHEELER. And there are provisions long established, going back to, I think, the Bush Administration Office of Legislative Council.

Chairman CHAFFETZ. Sir, I have 5 minutes. I need to ask very specific questions.

Mr. WHEELER. But I need to answer your question. There is no requirement. You are asking about ex partes, and there is no requirement that there be an ex parte filed. There was no need for an ex parte to be filed, either. I just wanted to make sure that we have both explained.

Chairman CHAFFETZ. I don't understand that. You met with them. Are you telling me that this proposed rule did not come up in any of those meetings but one?

Mr. WHEELER. I don't know the details of those meetings. I can't recall the details of those meetings. I can assure you that there were no, nothing that would trigger an ex parte.

Chairman CHAFFETZ. So you were meeting with the White House multiple times during the open comment period, after the comment period closes, and we are supposed to believe that one of the most important things the FCC has ever done, that this didn't come up and you didn't have any discussions, that they didn't comment back to you about what you were doing? Is that what we are supposed to believe?

Mr. WHEELER. The Administration was very scrupulous in making it clear that I was an independent agency.

Chairman CHAFFETZ. I guess the point is, chairman, you met with them multiple times. They came to visit you, you went to visit

them. But we invite you to come and you refuse. We ask you to send us some documents. You didn't send us a single one. And that double standard is very troubling for us.

I need to move on.

Mr. WHEELER. Mr. Chairman, one thing here. I did agree to come. I am here.

Chairman CHAFFETZ. No, but before the rule. You met with the White House before the rule but you didn't meet here.

Mr. WHEELER. You gave me a week's notice. You asked for the production of documents.

Chairman CHAFFETZ. That is usually what we give people.

Mr. WHEELER. There were other committees that I am also trying to respond to. I said in the response I would look forward to coming to you and I look forward to being here today.

Chairman CHAFFETZ. And I didn't believe you then and I don't believe you now. You said that you would not come to visit with us. You didn't send us a single document that we asked for before that rule. That is just not right.

Mr. WHEELER. I think we sent you 1,800 documents.

Chairman CHAFFETZ. After the rule. My complaint is that beforehand you didn't. And you met with multiple times with the White House. I am moving on. Hold on.

Mr. WHEELER. OK.

Chairman CHAFFETZ. Our time is short. This is the way it works.

On September 23d, multiple people met at the White House. I am going to enter into the record, ask unanimous consent this Daily Callar article of February 23d, 2015, White House log showing that a number of people met at the White House that are activists on this topic.

Chairman CHAFFETZ. I want to play a video clip. This is 6:55 in the morning of the day that the President is going to issue his Statement. This is you, right, at your home?

Mr. WHEELER. Yes, sir.

Chairman CHAFFETZ. And you woke up that morning to protesters out in front of your house; they laid down or sat down in front of your car, wouldn't let you get out of your driveway. They were there trying to make quite a Statement. And there is a long 5-minute video of this.

At 7:35 that morning you sent out an email to your fellow commissioners calling it an interesting development, and then later that afternoon—I want to put up a slide.

[Slide.]

Chairman CHAFFETZ. Now, when this was provided to vice.com, you redacted this. This was all redacted. Hard to see up on the screen, but we don't understand why this was redacted. This is what you wrote. In fact, if you want to read it, go ahead.

This is the same day; 6:55 in the morning, protesters show up; 7:35 you are sending out a concern. Then, all of a sudden, the President's Statement comes out in a very coordinated fashion. He has the right to weigh in on this, that is fine.

But later that afternoon you send out this email, it says, FYI isn't it interesting? The day of the demonstration just happens to be the day folks take action at my house. The video POTUS just happens to end up the same message as the message for POTUS.

The White House sends an email to the supporters list asking "Please pass this on to anyone who cares about saving the Internet." And then you write, hmm. Why did you write that?

Mr. WHEELER. Does this suggest a secret plan, secret set of instructions?

Chairman CHAFFETZ. I am asking you why. You wrote it. It is your language.

Mr. WHEELER. I think that this clearly is showing that there was no kind of coordination.

Chairman CHAFFETZ. There was no coordination? The protesters show up, just happen to show up the morning before the announcement comes? Nobody knows that the President is going to make this announcement except the protesters, who show up at your home, and you are saying that, you are the one that wrote that you thought, hmm, isn't it interesting.

Mr. WHEELER. Excuse me, I wasn't speaking clearly, clearly. No, I am talking about coordination with us at the Commission. I don't know who else they were coordinating with, and this suggests that maybe they were coordinating with others.

Chairman CHAFFETZ. So you had multiple meetings with the White House, they came to visit you, and we are supposed to believe that there was only one discussion about this? Is that still your testimony?

Mr. WHEELER. Let me be really clear. They came once to meet with me and filed an ex parte——

Chairman CHAFFETZ. Yes, that is true.

Mr. WHEELER [continuing]. At which time I was told, as the ex parte says, the President is going to make an announcement a couple days later, and he is going to endorse Title II. That is all I knew. The other meetings at the White House, I was there on trade, I was there on national security issues, I was there on Spectrum, I was there on auctions, I was there on E-Rate.

There were numerous issues. Caroline Atkinson was one of the names that you named when you were going through the list. I can assure you I didn't talk to her about Open Internet because she knows nothing about Open Internet. That entire conversation, and several that I have had with her, have been about trade issues and the process for reviewing agreements that relate to national security items.

Chairman CHAFFETZ. So you only spoke one time with Jeffrey Zients about this, one time?

Mr. WHEELER. The only time that Jeffrey Zients said to me this is what the President's position is was when he came and filed an ex parte saying that. I have been repeatedly saying I know the President has a strong position in favor of it the open Internet, as do I, and keeping them informed that I was fighting for a strong open Internet position.

Chairman CHAFFETZ. So you informed them and you are telling me they had no reaction, no comments?

Mr. WHEELER. I informed them that I had a strong position in favor of. As a matter of fact, I believe you have emails that show that I have emails with them saying, hey, these press reports that I am watering this down aren't true.

Chairman CHAFFETZ. I have lots more questions, but my time is far exceeded.

We will now recognize the ranking member, Mr. Cummings, for 5 minutes.

Oh, sorry, Mr. Welch. Mr. Welch of Vermont, you are recognized for 5 minutes.

Mr. WELCH. Thank you very much.

Let's get right to this. Mr. Wheeler, this was probably one of the most contentious questions, public policy questions that we have faced in the time I have served in Congress, 4 million comments. All of us, as Members of Congress, received comments. The two things that I understood were of concern to you and your fellow commissioners, Republican and Democrat, were how would whatever decision you made affect innovation and capital formation, the build-out, is that correct?

Mr. WHEELER. That was the balance, sir.

Mr. WELCH. And was that something that, over time, you all debated to try to figure out what would be the impact of whatever direction you took?

Mr. WHEELER. Yes, sir. The whole rulemaking process is an evolutionary process, and, as I said in my Statement, the whole concept of what Title II is is a fluid and evolutionary process.

Mr. WELCH. All right. And the premise of this hearing seems to be almost like a Watergate type of deal, what did you know and when did you know it. But in public policy, when you are trying to figure out what you can know and get to a good public policy decision, it is a back and forth discussion; it is listening to the 4 million comments, it is listening to Members of Congress, oh, and, incidentally, the President of the United States, elected by everybody is a relevant commentator, is that correct?

Mr. WHEELER. I can tell you I was constantly learning through this process.

Mr. WELCH. All right. Now, there was, in The New York Times, a report about a previous matter at the FCC where President Reagan had the commissioner in for 45 minutes. Did President Obama ever summon you to the White House for the purpose of a 45 minute discussion about the way it is going to be with this order that you were considering?

Mr. WHEELER. No, sir. President Obama has never summoned me to the White House to discuss anything the FCC is doing.

Mr. WELCH. All right. And you indicated on this capital formation issue, after the President, who, by the way, was obviously aware of the enormous grassroots concern about the outcome, that when he made his comment, you observed what was the impact on the markets, correct?

Mr. WHEELER. Yes, sir.

Mr. WELCH. And what was that impact?

Mr. WHEELER. There was zero impact on the market. And one of the concerns that all of the ISP's had been making is understand what the consequences of an action in Title II may be on the markets and, lo and behold, there wasn't.

Mr. WELCH. In fact, in the case of another country that has done this, Denmark, I believe, have they continued to have open access

and capital formation with respect to the build-out of their Internet?

Mr. WHEELER. You are better informed than I am, sir, on Denmark.

Mr. WELCH. OK. Now, just on this capital formation issue, you mentioned the Spectrum auction. Did that exceed what was expected to be revenues from that auction?

Mr. WHEELER. Significantly. We raised about \$41 billion, which was triple what some of the estimates were.

Mr. WELCH. And with respect to the market since then, has there been any major disruption that can be attributed to the decision that you made?

Mr. WHEELER. The market has continued to advance northward on the valuations of these stocks.

Mr. WELCH. All right. And my understanding, as well, is one of your enormous concerns when you initially proposed possibly using Section 706 was the wariness about having too heavy-handed a regulatory regime. And you have some history in the industry. Were there factors that you took into consideration in the decision on Title II about what type of regulatory framework that would be applicable?

Mr. WHEELER. Yes, sir. The model that was built for the wireless industry, which the wireless industry sought, by the way, was to use Title II and to have them declared a common carrier, but then to forebear, to not enforce those parts of Title II that are no longer relevant.

Mr. WELCH. And is it your intention to work with your fellow commissioners, both Republican and Democrat, in order to achieve that light touch approach?

Mr. WHEELER. Yes, sir, and I believe this rule has. As a matter of fact, there are 48 sections to Title II, and we have forborne from 27 of those, and that just compares with the 19 that were forborne from in the wireless environment.

Mr. WELCH. OK. I want to go back basically to the money question here, the suggestion that somehow, some way, President Obama, who has a right to express an opinion, muscled you and the Commission into doing something that you did not want to do, and as suggestions that that was the case, the Chairman has indicated a number of meetings you had with folks from the White House. I just want to give you an opportunity to say whether the President gave you directions, explicit or implicit, as to how you should do your job or left it to you to exercise your judgment and your persuasive ability with your fellow commissioners.

Mr. WHEELER. No, the President did not. And I interpreted what the President's Statement was was that he was joining with the 64 Democratic Members of Congress and the millions of people, and that he was identifying with them.

Mr. WELCH. Thank you, Mr. Wheeler.

I yield back.

Chairman CHAFFETZ. I thank the gentleman.

We will now recognize the gentleman from Ohio, Mr. Jordan.

Mr. JORDAN. Thank you, Mr. Chairman.

Mr. Wheeler, in your testimony you said that the Notice of Proposed Rulemaking adopted in May proposed a solution based on

Section 706 of the Telecommunications Act. In fact, that seems to be your position throughout most of 2014, a 706-based approach. In fact, you testified on May 20th of last year, in front of Energy and Commerce Committee, that Section 706 approach is sufficient to give the FCC what it needs for an open Internet. And as late as October 30th of last year, The Wall Street Journal wrote, "Chairman Wheeler will move forward with a 706-based approach."

Now, back to where the chairman was. All that seems to change on November 10th, where you State publicly that now Title II is definitely in the mix, and that is ultimately the direction that the Commission took. So my question is real simple: What changed between October 30th and November 10th?

Mr. WHEELER. Mr. Jordan, I think that is an incorrect assumption.

Mr. JORDAN. I am using your Statements, Mr. Wheeler. I am using what The Wall Street Journal, did they get it right or were they wrong?

Mr. WHEELER. So on February 19th I said that we keep Title II authority on the table. The Commission has authority to keep Title II if warranted.

Mr. JORDAN. I am not disputing that.

Mr. WHEELER. There is a laundry list, sir, where I said that.

Mr. JORDAN. Hang on. Hang on. But your testimony, I am quoting from today's testimony you just read. The proposed rule was a 706-based approach, and The Wall Street Journal, as late as October 30th, said a 706 approach was what Chairman Wheeler was going to move forward with. It changes on the 10th. What happened between the 30th and the 10th seems to me two events: one, the President made his YouTube video and commented and moved toward a Title II approach and he issued a Statement, and, two, you had an important meeting with Mr. Zients on November 6th.

Mr. WHEELER. I think that is an incorrect assumption, sir.

Mr. JORDAN. I am going by the time line, the stuff you provided.

Mr. WHEELER. Let me quote from The New York Times the day after The Wall Street Journal, saying there are four options on the table.

Mr. JORDAN. No, no, no. You can respond when I ask you a question. That is how it works.

Mr. WHEELER. OK.

Mr. JORDAN. All right. So now let me just go through where the chairman was earlier, your interactions with the White House. March 6th, FCC Chairman Tom Wheeler meets with Jeff Zients. Now, here is where you can answer something. Who is Jeff Zients, by the way?

Mr. WHEELER. He is the head of the National Economic Council.

Mr. JORDAN. OK, at the White House, right? And assistant to the President for economic policies, got this long title, right?

Mr. WHEELER. Correct.

Mr. JORDAN. OK. So you met with him on March 6th. March 7th, FCC Chairman Tom Wheeler meets with the White House economic advisor, Jeff Zients; May 7th, meeting with Jeff Zients at the White House; May 21st, Tom Wheeler meets with Jeff Zients at the White House; June 11th, Tom Wheeler meets with the Economic Council advisors at the White House; June 18th, Wheeler meets

with Jeff Zients at the White House; September 11th, Tom Wheeler meets with Jeff Zients at the White House; October 15th, Tom Wheeler meets again with White House economic advisors; and October 28th, Tom Wheeler meets with Jeff Zients at the White House.

So, again, leading up to October 30th, you met with the White House nine different times, all at the White House with Mr. Zients, who is the assistant to the President for economic policy. And up through October the position of the Commission, according to The Wall Street Journal and according to your testimony in front of Congress is a 706-based approach. That changes just a few days later. And I would argue it changes on November 6th, when again you met with Mr. Zients.

But the one difference here, Mr. Wheeler, the one difference here is nine times you went to the White House; on November 6th Jeff Zients comes to you. As I look at the record, this is the only time he came to you, and my contention is, and I think where the chairman is and, frankly, where a lot of Americans would be as they look at this record is Jeff Zients came to you and said, hey, things have changed; we want the Title II approach to this rule.

Now, am I wrong?

Mr. WHEELER. Yes. First of all, there may have been nine meetings, but I tell you, I listed them a moment ago and I won't go through them again.

Mr. JORDAN. No, there were nine meetings at the White House where you went to the White House. There is one meeting when Jeff Zients comes to you. And the meeting when he comes to you is right before everything changes.

Mr. WHEELER. The long list dealing with trade, dealing with cyber, dealing with auctions, and as I said in my testimony, before there was any input there were multiple issues on the table, including a Title II and 706 approach and a hybrid—

Mr. JORDAN. I have 29 seconds. Hang on 1 second, Mr. Wheeler.

Mr. WHEELER. But it is a mistake to say that the only thing that was on the table was Section 706.

Mr. JORDAN. I didn't say that.

Mr. WHEELER. I thought you had.

Mr. JORDAN. No, I said nine times you met with him and you testified in front of Congress 706 and The Wall Street Journal report that is what you were going to do, and then it changes a couple days later. I have 11 seconds.

Mr. WHEELER. And The Wall Street Journal report was wrong.

Mr. JORDAN. I have 11 seconds. In your testimony you say, I want to be clear, there were no instructions from the White House. I did not, as CEO of an independent agency, feel obligated to follow the President's recommendations.

One last question, if I could, Mr. Chairman.

Mr. Wheeler, who is Philip Verveer?

Mr. WHEELER. He is a special counsel in my office, senior counsel in my office.

Mr. JORDAN. Your top lawyer. Your top advisor. Senior counsel.

Mr. WHEELER. He is an advisor, yes.

Mr. JORDAN. OK. Well, this is an email our staff got with Mr. Verveer and a lobbyist from AT&T on the 10th, the day this all

changes, 4 days after Mr. Zients came to you. After you went nine times to the White House in the course of a year, Mr. Zients comes to you, everything changes, and this is what the AT&T representative said to your senior counselor: This is awful and bad for any semblance of agency independence. Too many people saw Zients going in to meet with Tom last week.

So I am not the only one who thinks everything changed on November 6th. This individual talked to your senior counselor and said things changed on November 6th when, again, the White House came to you and said, Mr. Wheeler, new sheriff in town, things are different, it is Title II from this point forward. And that is ultimately what you all adopted. Even though you had a 706 plan all this time, you ultimately adopted a Title II approach.

Mr. WHEELER. We did not adopt a Title II approach. We adopted a Title II and Section 706, which I believe, I can't read it all, but I think it is referenced in the first line of that email.

Chairman CHAFFETZ. The gentleman's time has expired.

Mr. CUMMINGS. Mr. Chairman, with all due respect, the gentleman just went over a minute and a half. At least I would ask that he be allowed to answer that question.

Chairman CHAFFETZ. Sure. Go ahead.

Mr. WHEELER. Thank you. There were, and as I was pointing out, The New York Times actually wrote the day after this Wall Street Journal article, that hybrid "is one of the four possibilities the FCC is considering as it seeks to draw up a net neutrality framework that unlike the last two attempts will hold up in court." The Title II and 706 usage, as I said in my testimony, was on the table along with a Title II and 706 non-hybrid, along with 706, along with Title II by itself.

Chairman CHAFFETZ. Now recognize the gentlewoman from New York, Mrs. Maloney, for 5 minutes.

Mrs. MALONEY. Thank you.

Chairman Wheeler, it has been reported that the proposed open net neutrality rule received 4 million comments, and I am curious, compared to other rules before the FCC, did any other rule get anywhere near this number of comments?

Mr. WHEELER. No, ma'am, and it broke our IT system.

Mrs. MALONEY. I heard that. Do you have a sense of what percentage of the comments were in favor of net neutrality? I know that thousands of comments came in to my office, and all of them were in favor of an open Internet and net neutrality. What about your comments?

Mr. WHEELER. I think they ran about three to one in favor.

Mrs. MALONEY. Three to one in favor. There were also several online petitions. I know of one, Free Press, but there were several others. Are you aware of these online petitions?

Mr. WHEELER. Yes, ma'am.

Mrs. MALONEY. And I also know that there were demonstrations, even in your house, and open meetings and forums and all kinds of comment periods that you participated in. And I assume you are familiar with the popular late night host, John Oliver. He had a piece about net neutrality this summer that went viral, and he was highly critical of you and your time as a lobbyist. Are you aware of his program?

Mr. WHEELER. Yes, ma'am. I had new research that had to do with what a dingo was.

Mrs. MALONEY. OK. Well, he encouraged his viewers in this program to go to the FCC site and to register their position, and I understand that after his piece aired that you had to extend the comment period, that it even broke down there were so many comments coming in in favor of net neutrality and an open Internet. Is that true?

Mr. WHEELER. Yes, ma'am.

Mrs. MALONEY. So do you have any idea how many comments were submitted after John Oliver's show? Did you break that down? How many came in?

Mr. WHEELER. I don't know that off the top of my head; I can get that for you.

Mrs. MALONEY. Would you get that for the committee?

Mr. WHEELER. Yes, ma'am.

Mrs. MALONEY. And all that attention on you and the efforts of the individuals that commented, the grassroots organizations, and the John Oliver piece, is it fair to say that they had some impact on your decisionmaking process, is that correct?

Mr. WHEELER. Well, they all went in to the record, No. 1, and the decision was made on the record, and obviously there was a high level of concern. I also met around the Country.

Mrs. MALONEY. I know, you went all around the Country holding public forums and listening to comments.

Mr. WHEELER. And those had great impact.

Mrs. MALONEY. So I would like to ask you, I am very curious. In your opinion, who had the greater impact on the FCC's rule, President Obama's comment or John Oliver's show?

Mr. WHEELER. Well, you know, I tend to view that what was going on was the President was signing on to the 64 Members of Congress and the millions of people who had told they want Title II.

Mrs. MALONEY. I sincerely want to thank you, Chairman Wheeler. It appears that the voices of the American people were listened to and that you made the proper choice. I commend you for keeping an open mind during this process and for doing what is right for the American people and, I believe, the economy.

So I would just say, with all due respect, I believe that my Republican colleagues are looking at this issue in the wrong way. They should be thanking President Obama for coming out strongly in favor of an open Internet rule, clearly where the American public is and clearly where the economists are, and they shouldn't be criticizing him.

What I am hearing here today is similar to the hearings we have had on the auto industry, where the restructuring that President Obama did, with the support of Congress, to the auto industry, it was highly critical, they were very critical of it. But now it is reported it saved 500 jobs; we are now exporting autos; we had the biggest sales of American autos in the history of our Country. It was the right decision and I believe this is the right decision for the American people, and I want to thank you.

Mr. WHEELER. Thank you, ma'am.

Mr. CUMMINGS. Would the gentlelady yield?

Mrs. MALONEY. I most certainly will.

Mr. CUMMINGS. Chairman Wheeler, much has been made about these emails between some of the FCC staff on November 10th, 2014, the day of the President's announcement. Up until the President's announcement, were a majority of the public comments in favor of an open net policy?

Mr. WHEELER. Yes, sir.

Mr. CUMMINGS. In light of all of these public comments, was Title II being explored by your staff?

Mr. WHEELER. We were deep into Title II and a Title II 706 combination.

Mrs. MALONEY. Mr. Ranking Member, may I reclaim my time?

Mr. CUMMINGS. Of course.

Mrs. MALONEY. I just want to end by saying that President Obama saved the auto industry. He saved the auto industry and he saved the Internet, and I believe very strongly that Republicans are on the wrong side of this issue for the economy and for the American people.

Chairman CHAFFETZ. Thank the gentlewoman.

We will now recognize the gentleman from Florida, Mr. Mica, for 5 minutes.

Mr. MICA. Thank you, Mr. Chairman.

Welcome. I think this boils down to people are trying to figure out why you were against the President's policy on net neutrality before you became for the President's policy and in a very abrupt turn, and some of it evolves around circumstances. The Zients meeting with you appears to be very influential. It appears, too, from some of the communications I have seen, May 15th, is that when you were releasing the NPRM?

Mr. WHEELER. Yes, sir.

Mr. MICA. I have a copy of an email from Senate Chief of Staff, this is Mr. Reid's chief of staff at the time, David Krone. Do you know him?

Mr. WHEELER. Yes, sir.

Mr. MICA. It appears like there was enlistment to try to keep your previous position intact. He said, good luck today. Not sure how things have landed, but trust to make it work. Please shout out if you need anything. Spoke again last night with the White House and told them to back off Title II. Went through, once again, the problems it creates for us.

Do you remember this email?

Mr. WHEELER. Yes, sir.

Mr. MICA. OK. Well, it appears that, in defense of your trying to come up with a certain position, that people were trying to back you. It looks like Senator Reid was backing you at that time, right? Or at least this is the indication we have. And he was trying to get the White House to back off pressuring you. Is that correct?

Mr. WHEELER. So I am really grateful for this question, Mr. Mica, because there is, I think, a couple of things that are important to respond to. One is that the President was clear he was for a strong open Internet during the campaign—

Mr. MICA. But before his position, you were against his position, and you had allies that were trying to help you. I mean, Reid was

a big cheese at that time, and this was his chief of staff. I was a chief of staff on the Senate; I know the power that they wield.

Mr. WHEELER. Yes, sir. And what I was saying is the against it before you were for it, the answer in that is no.

Mr. MICA. Well, no. I mean, everything we have, every public document, and some of it has been cited here, you were taking a different course. You took a different course, too, in even rolling this out. You offered a proposal, is that correct?

Mr. WHEELER. I have testified, sir, that this is an evolutionary process.

Mr. MICA. The proposal was very scant on mention of Title II.

Mr. WHEELER. No, it was very rich in the mentioning of Title II and specifically said is it better.

Mr. MICA. OK.

Mr. WHEELER. But be that as it may, as I said, this was a evolutionary process, and the job of a regulator is to put forth a proposal to see what it attracts in terms of concerns, and to learn from that experience and to evolve; and that is what I did through this entire process.

Mr. MICA. But, see, everything we have indicates that you were headed in a different direction. You were trying to stem the tide of the White House. I mean, you were in an awkward position. And even Commissioner Pai, is it, he said in his dissenting Statement, President Obama's endorsement of Title II forced a change in the FCC's approach. So maybe everyone else who has been observing this process, your comments up to date, and even one of the commissioners is in conflict with what you believe.

Mr. WHEELER. Mr. Mica, before the President made his comment, we were working on a Title II and 706 solution. After he made his comment, he delivered a Title II and Section 706.

Mr. MICA. And I think Mr. Zients, on November 6th, strong-armed you. I mean, it is pretty evident and everyone saw it.

Mr. Chairman, let me yield to you.

Chairman CHAFFETZ. Could we put up the slide, please?

[Slide.]

Chairman CHAFFETZ. I want to know why you felt compelled to communicate with the White House about what The New York Times was writing. This was back in April. You started with this: The New York Times is moving a story that the FCC is gutting the open Internet rule. It is flat out wrong. Unfortunately, it has been picked up by various outlets. You go through and explain it. Then you send that to Jeffrey Zients. Then you also send one to John Podesta, sorry, I should have had you on the first email. Podesta writes back to you, brutal story. Is somebody going to go on the record to push back? You write back to him, Yes. I did with a Statement similar to what I emailed you.

You are supposed to be an independent agency, and you are interacting regularly with the White House on how to communicate on the PR of a New York Times story?

Mr. WHEELER. So, Mr. Chairman, I had said that we were going to reinstate the 2010 rules, which the President had endorsed. The report in The New York Times was saying he is not doing that. I was, therefore, responding and saying you should know that that report is not true.

At the same point in time I have furnished you also emails to Members of Congress, Democratic Members of Congress, saying the same point, and that was what this was. This was, look, the 2010 rules I stand behind and I am not out in a campaign to gut them, which is what was being reported in the press. And one of the subsequent emails I sent, as you will recall, was an article that said, oh, wait a minute, this was mischaracterized; and that is what that exchange was about.

Chairman CHAFFETZ. Then why are you redacting all of this in a FOIA request? How does that meet the standard of FOIA? Why is this redacted?

Mr. WHEELER. I have to tell you the FOIA, how we respond to FOIA is done by career staff, not in my supervision, based on long-standing procedures. I can't answer why certain things are blacked out.

Chairman CHAFFETZ. This Administration might want to take some lessons about FOIA and how to respond to it, because I am tired of having the heads of the agencies saying, oh, I don't know anything about it. This is the public's right to know. This is how the public understands what is happening and not happening, and your organization is redacting this information, and it is wrong. I need a further explanation. When can you give us a further explanation as to why these types of material is redacted? What is a reasonable time to respond?

Mr. WHEELER. I would be happy to have the staffs work and provide that to you.

Chairman CHAFFETZ. By when?

Mr. WHEELER. With expedition.

Chairman CHAFFETZ. Can you give me a date? By the end of the month, is that fine?

Mr. WHEELER. Sure.

Chairman CHAFFETZ. Thank you.

We will now recognize the gentlewoman from the District of Columbia, Ms. Norton, for 5 minutes.

Ms. NORTON. Thank you, Mr. Chairman.

Chairman Wheeler, you know, it is very hard to make a case against net neutrality, and these members don't want to go home and make that case, so they are trying to make a case, for example, against hearing the opinion of the President of the United States on neutrality. This is a very important policy issue. It is inconceivable in our Republic that the President would be silenced on it.

I ran an independent agency. I looked to see what the rules were in this case. The fact of an administration weighing in on such a notion is not new, is it?

Mr. WHEELER. No, ma'am.

Ms. NORTON. In fact, I was able to discover that Presidents Reagan, H.W. Bush, Clinton, George W. Bush have all weighed in specifically on FCC policies in the past, is that not correct?

Mr. WHEELER. Yes, ma'am.

Ms. NORTON. I can understand that in such a case where there might be some appearance, after all, you are an independent agency and you must abide by that independence, that you would go to your office of legal counsel. And as it turns out, there is an office of legal counsel's opinion advising the then-President George H.W.

Bush on whether it was indeed permissible for that president to contact the FCC to advocate for a specific position on rulemaking. Is that not correct?

Mr. WHEELER. Yes, ma'am.

Ms. NORTON. Now, because this is the President of the United States, and not one of our constituents, it is interesting to note that there are rules about how this should be done. That needs to be laid out here, since the President is being criticized, you are being criticized, the Commission is being criticized; and that has to do with disclosure. The legal opinion stated whether or not these matters must be disclosed in rulemaking on the record if they are of substantial significance, is that not the case?

Mr. WHEELER. Yes, ma'am.

Ms. NORTON. The opinion also addressed whether it is permissible for the FCC to solicit the views of White House officials, solicit the views of White House officials, and whether these would be subject to public disclosure. Is that not correct?

Mr. WHEELER. Yes, ma'am.

Ms. NORTON. So here we have rules saying, yes, Mr. President, we are not going to silence you on important issue, but we are going to make clear that your views are absolutely transparent. So there is no law prohibiting the FCC from soliciting the opinion of the White House, there are no rules, and it is in the discretion of whether the FCC would have to disclose that communication, is that not correct?

Mr. WHEELER. Yes, ma'am.

Ms. NORTON. The White House would be required to submit an ex parte filing only if its response was of substantial significance and clearly intended to affect the ultimate decision, is that not the case?

Mr. WHEELER. Yes, ma'am.

Ms. NORTON. Did not the White House submit an ex parte filing on November the 10th, 2014?

Mr. WHEELER. Yes, ma'am.

Ms. NORTON. Mr. Chairman, I submit that the rules have been followed to the letter. This has been an openly transparent matter. The President was not and should not have been silenced. If there were more Americans wanting to submit their opinions, you could imagine that those Americans would also want to know where the President of the United States stood on this matter.

I thank you very much and yield back my time.

Mr. CUMMINGS. Would the gentlelady yield, please?

Ms. NORTON. I would be glad to yield.

Mr. CUMMINGS. Thank you.

Mr. Wheeler, when you come into office, you are sworn in, is that right?

Mr. WHEELER. Yes, sir.

Mr. CUMMINGS. And you have an oath that you have to adhere to, is that right?

Mr. WHEELER. Yes, sir.

Mr. CUMMINGS. And during this process, this entire process, just tell us whether you believe that you have upheld your oath.

Mr. WHEELER. Yes, sir.

Mr. CUMMINGS. Every syllable?

Mr. WHEELER. Yes, sir.

Mr. CUMMINGS. Thank you very much.

Ms. NORTON. Could I enter into the record the opinions of some who have submitted them, civil rights and other organizations of various kinds, to the record, Mr. Chairman?

Chairman CHAFFETZ. Without objection, so ordered.

Chairman CHAFFETZ. We will now recognize the gentleman from Michigan, Mr. Walberg, for 5 minutes.

Mr. WALBERG. Thank you from Mr. Chairman.

Coming from the auto capital of the world, let me, for the record, also make a Statement that I will back up the reason why I did. The President was involved, but it was not the President that saved the auto industry; it was the American auto worker that saved the auto industry, and is doing that to this day.

And I think it is also with the Internet. The President has his right to make Statements. Many people have a right to make Statements. Congress has a right to make Statements. The question is whose Internet is it. I contend it is the American people's. It is wide open, it is broad, and it has worked pretty well. This is not opening up, in my opinion, the Internet; it is closing it down.

Mr. Wheeler, on November 7th, going back to some earlier questions, the day after Zients visited you, The Wall Street Journal reported that the FCC was likely to delay net neutrality rules until the next year. Was there ever a point in time when the open Internet issue was intended to be on the agenda for December 11th public meeting of the Commission?

Mr. WHEELER. Yes, sir. I was trying to push for that, but it was not possible.

Mr. WALBERG. What happened to push it off the agenda?

Mr. WHEELER. It was just a bridge too far.

Mr. WALBERG. Bridge too far? In whose mind?

Mr. WHEELER. You can whip the horse, but you can't make it go faster sometimes.

Mr. WALBERG. But in whose mind was it a bridge too far?

Mr. WHEELER. The staff, those of us who were trying to put it together. We just couldn't get the work done.

Mr. WALBERG. In your Statement announcing the new rules, you called the new rules historic and also "a shining example of American democracy at work." If that is so, why did you not let Americans see the rule before voting on it?

Mr. WHEELER. Oh, golly, sir, we followed the process that has been in place at the Commission for both Republican and Democratic chairmen for recent memory.

Mr. WALBERG. But the people never saw the rule.

Mr. WHEELER. We were very specific in putting out a fact sheet and saying this is what we are looking at. Then we went into an editing process, which is not unlike a judicial kind of situation back and forth.

Mr. WALBERG. But you went through that. You went through that in your opening Statement, all of the process, giving them drafts, and that is great, a little idea of where you are going; and that developed over time. But ultimately the language of the rule was not submitted to the American eyesight to view and ultimately comment on it, and why was that?

Mr. WHEELER. That is the typical process at the agency, as it has been forever, is that a draft rule is put out by the chairman's office and then the commissioners go into editorial negotiation, if you will.

Mr. WALBERG. Sure.

Mr. WHEELER. Over what the final rule would say, and that is normally a 3-week process. That does not involve putting out the rule.

Mr. WALBERG. But in light of the monumental process this was, this is the most monumental change to the rules of the Internet in the history of the Internet, wouldn't you say?

Mr. WHEELER. It is a letting down, setting down.

Mr. WALBERG. It is huge.

Mr. WHEELER. Yes.

Mr. WALBERG. It is huge. And in light of that, and the emotion that I feel back in my district, and I am sure everyone on this dais feels it in their district, people commented on it; you had 140 Members of Congress, you had over 4 million comments from people and entities concerned with this issue. I just don't understand why, at the very last, when you are going to have the rule as written, that it wasn't released to the public for comment. If you did it over again, would you have done it differently and let them see it?

Mr. WHEELER. No, sir.

Mr. WALBERG. Why not?

Mr. WHEELER. First of all, it wasn't a final rule; there were changes that were being made in the process. Second of all, it is against the Commission's procedures to do that, and always has been.

Mr. WALBERG. I don't know that to be true. In fact, I would regard that as not true. With Commissioner Pai, he called, "a monumental shift toward government control of the Internet." In light of this monumental shift, what harm would come from letting the American public see the text of the draft rule before the FCC—

Mr. WHEELER. We didn't hide the pea, sir. We put out specifics; this is what it does. We then engaged, as we always do, in private, in camera, editorial negotiations amongst the commissioners. We never put out a draft before those edits.

Mr. WALBERG. That is not true.

Mr. WHEELER. I am sorry?

Mr. WALBERG. And the American public deserved the opportunity at this level, at this time period, to have comments and opportunity to push back. This was a shift, a monumental shift that should have had that oversight.

Mr. Chairman, I yield.

Chairman CHAFFETZ. If the gentleman would yield.

Mr. WALBERG. I yield.

Chairman CHAFFETZ. You have the discretion to make it public, and you chose not to, correct?

Mr. WHEELER. I have the discretion. It is not the practice of the Commission to do that.

Chairman CHAFFETZ. You have the discretion to make it public, correct?

Mr. WHEELER. The answer is yes.

Chairman CHAFFETZ. OK.

Mr. WHEELER. Can I refine my answer?

Chairman CHAFFETZ. No, you can't. Hold on 1 second. Chairman Martin, at the request of Members of Congress, including Senator Obama, who insisted on the openness when he was the Senator, and they did it. They came and testified to Congress, they made the rule open and they went through a second comment period; and you chose not to.

Mr. WHEELER. I am glad you raise that, sir, because I think that that is more urban legend than fact. My understanding of the Chairman Martin situation is as follows: one, that he wrote an op-ed in The New York Times in which he released two paragraphs of an order. He followed that with a press release in which he released one and a half pages of a 41-page section of 124-page item. That is a difference between releasing an entire item.

Chairman CHAFFETZ. He made himself available to Congress; they went through a second. And what is startling to me and what is telling to me is that Senator Obama's position on this is totally different than President Obama's position on this.

Time has expired. We are now going to recognize the gentleman from Virginia, Mr. Connolly, for a very generous 5 minutes.

Mr. CONNOLLY. Thank you, Mr. Chairman.

Chairman Wheeler, is it unusual for an independent agency such as yours to communicate with the executive branch?

Mr. WHEELER. No, sir.

Mr. CONNOLLY. Is it routine?

Mr. WHEELER. Yes, sir.

Mr. CONNOLLY. Does it compromise independence, as you understand the word?

Mr. WHEELER. No, sir.

Mr. CONNOLLY. The Chairman began his questioning by reading off a list of meetings that apparently we are supposed to see as sinister, you or your colleagues meeting with various White House officials. Would that be unique to your tenure as chairman? Previous chairmen never did that, is that correct?

Mr. WHEELER. I haven't seen the logs, but I believe that every chairman has these kinds of meetings.

Mr. CONNOLLY. Is there something sinister, though, in the timing of these meetings? Because I think the insinuation from my friends on the other side is meant to suggest that there is something really deliberately sinister here; you are meeting with them either to tailor the rule or to get your instructions or to have some kind of quiet subversive conversation that obviously the public isn't aware of. Is that what occurred?

Mr. WHEELER. No, sir.

Mr. CONNOLLY. Did the White House ever direct you in the wording, framing, or content of the rule?

Mr. WHEELER. No, sir.

Mr. CONNOLLY. Ever?

Mr. WHEELER. Even when they filed, it was not a direction; it was a here is our opinion, which, as I say, is the same opinion as 64 Members of Congress had been writing me to express and millions of Americans had been writing to express.

Mr. CONNOLLY. Right. And as we just saw with a letter to the ayatollah in Iran, one doesn't always want to put too much cre-

dence in letters from Members of Congress; it has to be put on into context.

Mr. WHEELER. Can I pass on that one, sir?

Mr. CONNOLLY. Yes, I know. I thought I would just sneak that in in my 5 minutes.

OK, the chairman was just suggesting in his overtime that you could have waived the rule and, by extension, should have waived the rule to bring the public in at an earlier date in the draft or the drafting of the rule. Your answer to that was a little bit derivical: yes, I had that power, but it is not our practice. Going beyond that, though, following up on the chairman's question, why, in looking at that ability to waive, did you not avail yourself of it?

Mr. WHEELER. There are many reasons why negotiations amongst commissioners ought to be in camera. So, for instance, you put out the draft. What do you do, then, 2 days later when paragraph 345 gets changed? Do you put it out again and say, oh, hey, look at this? How do you deal with the back and forth between various offices? How do you deal with ongoing research?

Is it right to have this kind of an activity that can be very much affecting of capital markets out there, people misinterpreting what this is or that, markets crashing or inflating, whatever the case may be? And it is for that reason, those kinds of reasons that FOIA, in specific, says these kinds of editorial negotiations are specifically not FOIA-able, because they are works in progress. And that was why I made that decision, sir, and that is why that precedent exists, I believe.

Mr. CONNOLLY. And do you regret that decision?

Mr. WHEELER. No, sir.

Mr. CONNOLLY. From your point of view, by making that decision, you protected the integrity of the process and the content of the rule?

Mr. WHEELER. Yes, sir.

Mr. CONNOLLY. OK. Did you feel, when President Obama issued his Statement with respect to net neutrality—there were press reports at the time that you and your colleagues were surprised or taken a little bit off-guard. You may want to comment on that, but did you view his issuance of such a Statement as undue interference in your process, which was still underway?

Mr. WHEELER. No. As we have discussed, all presidents have had input to the process, in multiple administrations and multiple proceedings; it is not undue at all.

Mr. CONNOLLY. Not any different than Congress weighing in with letters or resolutions or hearings such as this?

Mr. WHEELER. Correct, sir.

Mr. CONNOLLY. Thank you. I have no further questions.

Thank you, Mr. Chairman.

Chairman CHAFFETZ. If the gentleman would yield, I would like to actually—I don't know if we can put up this slide. I am going to need a copy of that back.

But your communications person, in November, a couple days afterwards, in response to your question about were they surprised, did it have an impact, Sharon Gilson. Who is Sharon Gilson?

Mr. WHEELER. She runs our media operation.

Chairman CHAFFETZ. She wrote, "This question rankles me. Do you take this as twisting the knife? I don't want to overreact, but I am ready to log a call." So to suggest that there was no rankling internally there at the FCC I think would, certainly they are emailing back and forth. And, again, this gets redacted. I don't see this as part of the public process here that warrants any sort of redaction, but just thought I would bring that up.

I appreciate the gentleman.

Mr. CUMMINGS. Would the gentleman yield?

Mr. CONNOLLY. Since it is my time, I just want to remind the chairman that is an interesting point, but we had a virtually identical situation with J. Russell George, where his media person issued a Statement contradicting his sworn testimony, and he disavowed her Statement saying she was misinformed. So if you are going to cite a media person as corroborating your point, I am happy to do so.

Now I yield to my friend, Mr. Cummings.

Mr. CUMMINGS. Mr. Wheeler, do you have a comment with regard to what the chairman just said?

Mr. WHEELER. Actually, this is the first I have seen this. This QA rankles me, I am not even sure what it is referencing.

Mr. CUMMINGS. And who is the person writing that and what level are they on?

Mr. WHEELER. Shannon Gilson, and she is the head of the media office.

Mr. CUMMINGS. All right. Thank you very much.

Chairman CHAFFETZ. Now recognize the gentleman from Texas, Mr. Farenthold, for 5 minutes.

Mr. FARENTHOLD. Thank you, Mr. Chairman.

I tell you, I am sitting here shaking my head at how some of this stuff has happened. I remember back in the 1980's and 1990's the Internet grassroots, Internet activists were fighting to keep Internet service, remaining classified as an information service and not as a telecommunication service, and the marketing job to completely flip that is just staggering to me.

But I also want to address something my friend from across the aisle just brought up, and that is—wait, I completely lost my train of thought. I will get back to it.

Mr. CONNOLLY. I think you were agreeing that I had a brilliant point that needed to be reinforced because it is St. Patrick's Day.

Mr. FARENTHOLD. On the public comment section, I remember where I was going now, what happens is we are seeking public comments on things that we don't know what we are seeking comments on. Open government is about the people knowing the thought process that goes into creating rules and regulations. It is why we have C-SPAN, it is why anybody can turn on and see the debates going on in Congress and reach out to his or her Congressman or woman and give comment.

I am really troubled by—and I think this isn't just the FCC; this is the executive branch agencies creating laws by regulation behind closed doors. You are defending doing it behind closed doors and not letting the public, and I just have to say I personally have a problem with that. The more light of day we have on that, the better off we are.

Let me go back to my public comments question in particular. I have a hierarchy kind of comments that come into my office. You know, something that is originally written by a constituent, thoughtful piece is the most important, then something from a non-constituent, then a form letter, and then one of these things that you clip. So is there a breakdown you would be willing to share with us of the public comments, how they fall within some sort of similar hierarchy? You are nodding your head like you all think the same way.

Mr. WHEELER. I know exactly what you mean, Congressman, and I get all kinds of notes that range from——

Mr. FARENTHOLD. I am running out of time. Can you provide——

Mr. WHEELER [continuing]. To the handwritten. I will try. I don't know if we can break out 4 million comments that way, but I will try.

Mr. FARENTHOLD. I mean, if it is done, it is done. Whatever information you could get on me.

All right, so you have moved and what you all have done, and I think we will cover more of this in a Judiciary Committee hearing, but I have two questions that are really kind of burning on me. One is, as you move Internet service from an information service to a telecommunications service under Title II, are we opening the door to applying universal service fund taxes to Internet services, to your broadband service? Does this open the door to that?

Mr. WHEELER. We specifically said that we would not do that in this proceeding. As you know, there is an ongoing joint Federal-State board addressing that question. Even if it were to happen, in a hypothetical, that doesn't mean that the total number gets changed.

Mr. FARENTHOLD. And do you feel like these regulations of subjecting the retail Internet service providers to more government regulation is going to encourage or discourage more competition in the field?

Mr. WHEELER. One of the reasons why we were really focused on making sure that there was no impact on investment capital is because we want to incentivize investment.

Mr. FARENTHOLD. It seems like you are having to go through a tangle of government regulations and be a heavily regulated industry, as opposed to just hanging out your shingle and stringing some wires or putting up a radio transmitter to do fixed broadband.

Mr. WHEELER. So there are four regulatory issues in this rule: no blocking, no throttling, no paid prioritization, and that you must be transparent with consumers. Those four seem to be pretty well adopted; they are in the Republican bill that has been proposed.

Mr. FARENTHOLD. I guess my issue is my mom, before she passed away, only used Internet, but I was her tech support, so I wanted her to have an always on broadband connection, so any time her modem didn't connect, I didn't get a phone call. But it seems like under this scenario there would be no ability to buy just like an email only type broadband service.

Mr. WHEELER. That is absolutely incorrect. There is nothing that we do with retail rate regulation or the way in which——

Mr. FARENTHOLD. But her service provider, I couldn't go out and buy something so I get my email always on and fast, but I am

never going to stream a Netflix video. Why shouldn't I have that alternative to buy that?

Mr. WHEELER. There is nothing that prohibits a service provider from having that option. You can have email only; you can say I want 5 megabits, I want 10 megabits, I want 25 megabits, and you can charge all at different prices.

Mr. FARENTHOLD. But it is speed only.

Mr. WHEELER. There is nothing in this order that regulates consumer rates, and that was by design. To go to your core question of investment, consumer revenues, the day after this order goes into effect, should be exactly the same as consumer revenues the day before because we do nothing to regulate consumer revenues.

Mr. FARENTHOLD. I disagree that you are going to see limited in product offering. I don't like the fact that AT&T throttled my unlimited access after X number of gigabytes. I could buy more gigabytes for more money and do that, so I want that choice.

Chairman CHAFFETZ. I thank the gentleman.

Now recognize the ranking member, Mr. Cummings, for 5 minutes.

Mr. CUMMINGS. Thank you very much.

Chairman Wheeler, I want to thank you for your testimony. You, over the years, have earned a reputation for high integrity and excellence, and when I asked you a little earlier about having taken an oath and whether you believe you adhered to that oath, your answer was yes, and I am just here to tell you I believe you.

Mr. WHEELER. Thank you, sir.

Mr. CUMMINGS. I want to ask you about the actions of the Republican Commission members. We have heard outrage about the President this morning. Let's go to Commissioner O'Reilly, Mike O'Reilly. He is a former Republican Senate staffer who has been an active opponent of the Open Internet rule. Is that a fair Statement? Do you know that to be the case?

Mr. WHEELER. Yes, sir.

Mr. CUMMINGS. OK. Chairman Wheeler, when the committee requested documents from you, we also requested documents from the other commissioners, including Commissioner O'Reilly, and we received them. For example, we have now obtained an email exchange between Republican Commissioner Mr. O'Reilly and three individuals outside the FCC. They are Robert McDowell, a partner in the communications practice of a large lobbying firm that represents a variety of telecommunications clients; Harold Furchtgott-Roth, an economic consultant in the communications sector; and Baron Soca, the President of Tech Freedom, a libertarian think tank focused on tech policy issues.

In this exchange, Commissioner O'Reilly sought edits, sought edits on a draft op-ed he was working on opposing the Open Internet rule.

Chairman Wheeler, were you aware, at the time, that Commissioner O'Reilly was having these private communications with these individuals? Were you aware of that?

Mr. WHEELER. No, sir.

Mr. CUMMINGS. All three of these individuals have professional interests that could be affected by the passage of this rule, is that right?

Mr. WHEELER. Yes, sir.

Mr. CUMMINGS. In response to Commissioner O'Reilly's request, several of the individuals provided substantive edits. In fact, one response had so many edits that he apologized, writing, "I know it looks like a lot of red ink, but I really just tried to finesse, clarify, etc."

According to this email chain, Commissioner O'Reilly then forwarded these edits onto his staff, writing, this is what he sent his staff: "OK, took a bunch and left out some stuff."

Chairman Wheeler, Commissioner O'Reilly's op-ed was published in The Hill on May 5th, 2014. That was just 10 days before the Notice of Proposed Rulemaking was published, isn't that right?

Mr. WHEELER. Yes, sir.

Mr. CUMMINGS. So these edits provided by outside parties seem clearly designed to affect the ultimately decision of the FCC. Are you aware of any ex parte filing regarding this email exchange or these communications?

Mr. WHEELER. Golly, Congressman, no.

Mr. CUMMINGS. Are you aware?

Mr. WHEELER. No, sir, I am not aware.

Mr. CUMMINGS. Would it be normal for you to be aware?

Mr. WHEELER. No.

Mr. CUMMINGS. Now, my staff went through all the ex parte filings regarding this rule, all 750 of them, and they could not find one, not one filed by any of these three individuals for these communications. Do you know why that might be?

Mr. WHEELER. No, sir.

Mr. CUMMINGS. And you just sat here and testified about how you need to go by the rules and you need to file the ex parte under certain circumstances. Would you tell us how you feel about that, what you just learned, assuming it to be accurate, what I just told you? Is that consistent with the way it is supposed to be, the way you are supposed to operate?

Mr. WHEELER. I think that it is fair to say, Congressman, that there is often a free and fluid back and forth between practitioners in the bar and members of the Commission.

Mr. CUMMINGS. But do you think an ex parte should have been filed?

Mr. WHEELER. I don't know in this specific one. I don't want to sit here and hip-shoot on that; I would leave that to the ex parte experts.

Mr. CUMMINGS. I understand. Well, let me be clear. I am not suggesting that anyone engaged in inappropriate activity here, but if the Republicans want to accuse the President of undue influence in this process, even when he submitted, he did it the right way, an ex parte filing, they can't just conveniently ignore similar actions on the Republican side. There is something wrong with that picture: fairness, balance; and I am concerned about that.

With that, I yield back.

Chairman CHAFFETZ. Now recognize the gentleman from Florida, Mr. DeSantis, for 5 minutes.

Mr. DESANTIS. Thank you, Mr. Chairman.

Chairman Wheeler, I want to go back to this Wall Street Journal report, October 30th, 2014, which reported that you and the Com-

mission were prepared to move forward on a hybrid 706 type approach; and I think that was consistent with a lot of the public reporting at the time. So is it your testimony that that was not in fact the case, that you were not at that time leaning toward a 706 hybrid type approach?

Mr. WHEELER. No, we had gone through an evolutionary process, and at that point in time we were focusing on a hybrid approach. That is a correct Statement.

Mr. DESANTIS. OK. Very good. So obviously something changed between October 30th and when you eventually submitted this rule. I think it has been pointed out how the President was very forceful in making his ideas known. Did you know that when the Commission adopted the rule, 400 pages, February 26th, 2015, the Democratic National Committee tweeted, congratulations for adopting President Obama's plan?

Mr. WHEELER. I found it out afterwards.

Mr. DESANTIS. OK. So you know this is being reported as something that is actually the President's plan, adopted by the Commission, and it is less that this is something that the Commission came up with on its own.

Now, you had talked about the release of the report. The report could have been released in early February. The vote happened several weeks after that. Why not just release the proposed rule to the public, given that this is something that, one, has a lot of interest, but, two, all the comment, all the period and input was done really before you had the movement to a Title II framework? So why not just let the people see it?

Mr. WHEELER. So I think there are a couple of things here. First of all, let me be clear that your comment about a hybrid being on the table is correct, as were the other approaches that, as I said to Mr. Jordan, the day following that Journal article, The New York Times reported that there were four on the table.

Mr. DESANTIS. No, I understand that, but just with the transparency, can you address the transparency?

Mr. WHEELER. Mr. Connolly and I engaged in this. I did not release the draft order because it was the draft, underlined, order. I did take pains to have fact sheets and other outreach so the people understood what was in it.

Mr. DESANTIS. So you are saying——

Mr. WHEELER. But the exact words——

Mr. DESANTIS. Let me clarify this, though. You are saying it is a draft order until the Commission approved it, and that is why you didn't release it?

Mr. WHEELER. Yes, sir, that is the way things work, yes.

Mr. DESANTIS. Well, actually, you could have released it, and that has been made clear; and I think that, particularly in this town, this idea that we are just passing things to find out what is in things, without the public having access to that, I don't think that that works.

Let me ask you this. Can you guarantee to the American taxpayer, people who use broadband service, that if this goes into effect, that they will not see taxes show up as contributions to the Universal Service Fund?

Mr. WHEELER. We have carefully drafted this with two specific things in mind.

Mr. DESANTIS. You can explain, but can you guarantee them they will not pay more?

Mr. WHEELER. We have said that this does not trigger universal service, as I said to a previous question.

Mr. DESANTIS. But that has been disputed. I know that one of your members dissented and said that he believes Title II imposes a statutory obligation—

Mr. WHEELER. We are talking past each other. Let me just be clear, because this is a specific point, that the provision we have forborne from the provision that would authorize us today, in this rulemaking, to do that, to have universal service. There is a joint Federal-State board addressing that very question today. How they resolve things in the future, I do not know, but this rulemaking was very clear to say that we do not trigger that which you are concerned.

Mr. DESANTIS. But it does not foreclose it, and the fact that we are in Title II framework, that opens the door for this to happen, depending on what was decided with that commission.

Look, I want open, robust Internet. When I see 400 pages of red tape, this, to me, does not seem what openness is going to be. And the experience when the government gets involved in these things, the 400 pages, it is never going to be less than 400; it is going to be more. It is going to metastasize and government is going to be able to get involved in other aspects of this. I wish the public would have had more input. I know that this is going to be contested, obviously, in the courts and here in the Congress.

I am out of time and I yield back.

Mr. WHEELER. Can I clarify one thing, sir? There is actually eight pages of rules in there. The rest is establishing the predicates and the background for, for instance, the court challenge.

Chairman CHAFFETZ. I thank the gentleman from Florida.

We now recognize the gentleman from California, Mr. Lieu, for 5 minutes.

Mr. LIEU. Thank you, Mr. Chairman.

Thank you, Mr. Wheeler, for your public service. I know you will be testifying in many committees on Capitol Hill. I have heard a lot of back and forth today, and I just want to get on the record the answer to the following question, which is essentially was the process followed by FCC in this case essentially the same process that the FCC has followed in other prior rulemakings?

Mr. WHEELER. Yes, sir.

Mr. LIEU. In fact, in this case there was a lot of public comment, and there is nothing wrong with a commissioner being influenced by public comment, correct?

Mr. WHEELER. Absolutely.

Mr. LIEU. There is nothing wrong with a commissioner, if a Member of Congress wrote a particularly compelling letter, to be influenced by such a letter, correct?

Mr. WHEELER. I hope that we learn from the whole process, from the record being built.

Mr. LIEU. And there is nothing wrong with any commissioner being influenced by a president of the United States, provided that that contact is reported in an ex parte filing, correct?

Mr. WHEELER. We should make our decision independently on the record that has been established by those who have commented.

Mr. LIEU. And in this case the Administration did file an ex parte record.

Mr. WHEELER. Correct.

Mr. LIEU. And members of the public can go on your website and look at everyone who has filed ex parte, correct?

Mr. WHEELER. Yes.

Mr. LIEU. And the President of the United States cannot fire you as a commissioner, correct?

Mr. WHEELER. Correct.

Mr. LIEU. Wouldn't we want different folks to weigh in on issues of this magnitude, including not just the President, but Members of Congress and public? Wouldn't we want everybody to be able to weigh in and you all make your decision? Isn't that the way democracy works?

Mr. WHEELER. I think it is the way democracy works and it is the way the Administrative Procedure Act was structured, to make sure that there was an open opportunity for notice and comment, and then make a decision based on what that record was.

Mr. LIEU. Thank you.

I yield back the balance of my time.

Chairman CHAFFETZ. I thank the gentleman. If the gentleman would yield for a second.

Similar to what you are saying, I do think there is room for everybody to weigh in, whether it be the President, a Member of Congress. But it is about openness and transparency; it is about filing those things, and I think that is what the gentleman is saying. I would hope that we could find other people on both sides of the aisle.

I really do believe, certainly at the FCC and other agencies, that maybe we should require by law that there be a 30-day notice. Take the final rule, give it the light of day and let it be out there for 30 days. What harm would there be in doing that?

And I would appreciate if the gentleman would consider that. He is a very thoughtful member and I appreciate the time.

Mr. CUMMINGS. Would the gentleman yield further?

You have heard all of this, Mr. Chairman, and I am just curious. When you hear the complaints back and forth, and here you are sitting here, what I consider to be a hot seat, are there things that you would like to see us do either as the Congress to bring more clarity or do you feel like the process is fine just the way it is? I mean, because we want to be effective and efficient. We can't just keep going on these merry-go-rounds over and over again. There will be controversial decisions in the future.

And going to Mr. Lieu's comments, if there is guidance that we can provide that will get rid of any kind of ambiguity with regard to people wondering whether folks have crossed this line or that line, I mean, I am sure you have thought about this a lot, and I know you want to act in the best interest of the United States and

our citizens and certainly your agency. Is there anything that you can think of?

Mr. WHEELER. I appreciate that question, Mr. Cummings. My goal has been to make sure that I follow the rules. I don't make the rules or the regulations that interpret the statute; I try to follow them. You know, the Administrative Conference of the United States is kind of the expert agency when it comes to processes, and they and you, I think, have a significant challenge in that the rules have to apply across all agencies, not just the FCC, so far be it from me to get specific and say you ought to change Section 2(b)(iii). But I see my job as trying to adhere to the statute and the rules that have been put in place to deliver on those concepts.

Chairman CHAFFETZ. I thank the gentleman. And as I recognize Mr. Walker here, I want to respond to what you just said and highlight, again, under the rules you did have the discretion to make it public, and you elected not to. I think what Congress should consider is compelling you to make that open and transparent, rather than just simply making it discretionary.

Now recognize the gentleman from North Carolina, Mr. Walker, for 5 minutes.

Mr. WALKER. Thank you, Mr. Chairman.

Being a relatively new member in Congress, I am learning things every day. In fact, I had already known that Al Gore had invented the Internet, but today I found out, according to Mrs. Maloney, that the President has saved the Internet.

Just curious. Do you think is a Statement that is fair? Do you think his involvement has saved the Internet for the future?

Mr. WHEELER. Oh, I think that this is a much bigger issue, Congressman. I think that the Internet is the most powerful and pervasive platform that has ever existed in the history of the planet, and that it has an impact on every aspect of our economy and every aspect of how we act as individuals; and for that to exist without rules and without a referee is unthinkable.

Mr. WALKER. Well, let me get back to what you said earlier. You testified, in fact, today that you did not feel obligated to follow the President's suggest. So my question is what exactly was the President's suggestion.

Mr. WHEELER. The President filed an ex parte saying that we should have Title II, and we did not follow that suggestion; we did Title II plus 706. He did not say that we should do interconnection; we did interconnection. He did not suggest that we should have the scope of forbearance that we had.

Mr. WALKER. Sure. I am actually getting to the place as far as your action with him, when you say he suggested. There were, what, 9 or 10 trips to the White House? Do you remember which time it was suggested as far as where there was disagreement, where there was agreement?

Mr. WHEELER. I am sorry, sir. My comment about suggestion was specifically referencing the ex parte that he filed.

Mr. WALKER. OK. So you are saying there was no one-on-one suggestion with you and the President whatsoever when it came to net neutrality discussion?

Mr. WHEELER. That is correct.

Mr. WALKER. OK. Let's go back to the pictures, obviously, of the protesters that were there that morning. Did you have any word or any idea that those protesters would be showing up that morning, or were you as surprised as the look that you had on your face?

Mr. WHEELER. I was surprised. And if I had spent less time brushing my teeth, they would have missed me, because they just barely caught me.

Mr. WALKER. So you had no idea that those guys, you weren't tipped off they were showing up that morning?

Mr. WHEELER. No.

Mr. WALKER. OK. Your posture has been called, by some of the outlets, apologetic since this decision was made. Why do you think that assumption is being made?

Mr. WHEELER. Apologetic?

Mr. WALKER. Yes. Since the decision has been made, there have been some outlets that have said maybe not backing up on the decision, but it seems like it was not as firm as it was when the decision was made. Why do you think that would be characterized like that?

Mr. WHEELER. Oh, my goodness, Congressman. I hope that this is not apologetic. I said, in the press conference after this, this was my proudest day being involved in public policy for the last 40 years as I have. There is no way that I am apologetic. I am fiercely proud of this decision and believe that it is the right decision and believe that it is an important decision not only for today, but for tomorrow.

Mr. WALKER. You talked about, a little earlier, and I think Congressman DeSantis mentioned this a little bit earlier, you talked about The Wall Street article was wrong. You may have addressed this just a minute ago. Can you tell me specifically, I believe that what was your comment, that The Wall Street Journal had it wrong? Specifically, what did they have wrong?

Mr. WHEELER. Well, what I was referencing was The New York Times article the following day where, as I understood in The Wall Street Journal article, and I obviously don't have it, but as has been represented here that it said there was one solution on the table; and The New York Times the following day said there were four solutions on the table.

Mr. WALKER. So which one is accurate?

Mr. WHEELER. The Times is correct.

Mr. WALKER. The Times is correct.

Mr. WHEELER. Let me be really specific. And I have constantly said throughout this entire process that Title II has always been on the table. And I said in my testimony that we were looking at 706, Title II and 706 in a hybrid, Title II and 706 in not a hybrid, and Title II by itself.

Mr. WALKER. The appearance of being an independent agency, which you have claimed probably 12 to 15 times today, can you understand why people would have some questions when there are meeting after meeting with the White House? Is there anything that the American people or Congress can see there is a balance, where there is also input from the other side, as opposed to just one particular partisan perspective?

Mr. WHEELER. So you know, Congressman, during that period, I believe that I met more than three times as often with Members of Congress. You know, my job is to take input. My job is to provide expertise on issues that are being considered. And that kind of an ongoing relationship with all aspects of government is an important role, I believe.

Mr. WALKER. Thank you, Mr. Wheeler. My time has expired.

I will yield back to the Chairman.

Chairman CHAFFETZ. I thank the gentleman.

We will now recognize Mrs. Watson Coleman from New Jersey.

Mrs. WATSON COLEMAN. Thank you very much, Mr. Chairman.

Mr. Wheeler, thank you very much for your testimony. Thank you for your forbearance and thank you for the fact that it seems that you responded to the enormous interest and concern with net neutrality. I am a newbie also, but I became aware of net neutrality on social media. So thank you so much for that.

I wanted to just clarify a couple things. First of all, with respect to the comment about perhaps we ought to have a 60-day comment period after the final rule, that would then make that final rule possibly not a final rule, and I don't know how we would then determine it to ever become a final rule.

It has been stated that you have met with the White House on several occasions during what is supposedly a controversial period of time. Was the issue of net neutrality the only thing you were doing during the period of time when you were considering net neutrality? Were there a variety of other issues you may have been meeting with members of the White House or at the White House? And, if so, just for the record, might you just want to share some of those?

Mr. WHEELER. Thank you, Congresswoman. Yes. So I met on national security issues; we met on trade related issues; cybersecurity; the E-Rate, what was happening there; spectrum policy. The White House was obviously very, very much involved in implementing the instructions of the Congress to re-purpose spectrum, and we had to work very closely with all the agencies and the White House on that. And the spectrum auctions, obviously, as well.

Mrs. WATSON COLEMAN. Thank you, Mr. Wheeler. That gives us an illustration of the variety of issues that you had been addressing. We would love to have the opportunity to work on one thing at a time. We know you don't, we know the President doesn't, and you know we can't.

So, I mean, to suggest that that is the only thing that you were doing is certainly misleading and is, I believe, a mischaracterization of your continued statements that you were not meeting on these issues, and I have no reason not to believe you. And given that this is such a huge issue, that everyone wants access and net neutrality, it just seems to me that you were quite willing to listen to more than 4 million people, what they had to say, to all of the motions that were filed for consideration, including the President of the United States. I listen to him; I think he is really quite brilliant and has great ideas for this Country.

So I just wanted to thank you for the opportunity to hear your testimony and to be able to give you an opportunity to answer

questions as to the kinds of things that are on your plate that you might have been discussing with the White House.

Mr. WHEELER. Thank you.

Mrs. WATSON COLEMAN. Thank you very much.

Thank you, Mr. Chairman. I yield back my time.

Chairman CHAFFETZ. I thank the gentlewoman.

We will now recognize the gentleman from Georgia, Mr. Hice, for 5 minutes.

Mr. HICE. Thank you, Mr. Chairman.

And thank you, Mr. Wheeler, for being here with us. It has been pretty well established that there were not, and with many excuses, but the FCC did not report various meetings with the White House and White House officials, even though you did report to various lobbyists and activists and companies and so forth. That is well established here today, but this does not seem at all as though transparency has taken place. When there is a specific area that is deliberately not reported, the appearance is that it is secretive, that there is something to hide. And you are denying that today, is that true?

Mr. WHEELER. Yes, sir, there was no secret. I am not sure I understood. Reporting to lobbyists? I am not sure what—

Mr. HICE. The ex parte type thing. I mean, we have 755 entries.

Mr. WHEELER. Oh, when they would file.

Mr. HICE. Yes.

Mr. WHEELER. I am sorry.

Mr. HICE. And there is no filing with the White House except one. So, I mean, it gives every appearance of secrecy rather than transparency. Would you agree with that?

Mr. WHEELER. And I think that it has to do with the fact that the language of ex parte is when it is intended to affect a decision and to provide information of substantial significance.

Mr. HICE. And you don't believe this is substantial significance?

Mr. WHEELER. There was when Jeff Zients came to see me and said this is what the President is going to do. That was substantial significance.

Mr. HICE. As a general rule, if someone is offering you an opinion, you would not object to an opinion being offered to you, I am assuming. Just a general rule. We all respect the First Amendment. If someone has an opinion, you would feel free to let them have an opinion.

Mr. WHEELER. Yes, sir.

Mr. HICE. On the other hand, if someone or some group, whatever, was trying to give directives to you or the FCC or whatever, you would probably be outspoken against that action. I mean, if someone is giving an opinion, that is no problem; but if someone wants to be intrusive and give orders, that may be a different scenario and you would be outspoken toward it.

Mr. WHEELER. And I think, boy, did we get opinions on this.

Mr. HICE. OK. You mentioned a while ago that the White House offered their opinion on this whole thing, and I would like to put up a slide that we had a little bit earlier, emails from the chief of staff to the Senate majority leader to you. The top line up there that is in red, the comment is: spoke again last night with the White House and told them to back off Title II. That sounds like

a whole lot more than an opinion. Typically, you would not tell someone who is offering an opinion to back off. Would you agree with that?

Mr. WHEELER. I don't understand the parsing of the words, sir.

Mr. HICE. All right. You said you don't have any problem, there is no problem, typically, with someone just giving an opinion. But this is more than an opinion because the comment here is tell the White House to back off. So there is more than just an opinion coming from the White House, it would appear.

Mr. WHEELER. You know, the other part about that is that I had, at the same point in time, 90 letters from Republican Members of Congress saying that I should not do Title II.

Mr. HICE. I am not talking about Members of Congress. This Statement right here is the White House.

Mr. WHEELER. But the point is that suggested Title II is very much in the mix. This, if I can read right, is—

Mr. HICE. It says, spoke again last night with the White House and told them to back off Title II. Went through once again the problems it creates with us. This is more than an opinion.

Mr. WHEELER. This is May, and as I indicated, in May I was proposing that Section 706 was the solution, and I learned through the process of this, long before the White House ever had their filing, that Section 706 was not the answer.

Mr. HICE. But the White House was not providing an opinion, they were putting some sort of directive to do something; otherwise, there wouldn't have been comments to tell the White House to back off. It was more than an opinion coming from the White House.

Mr. WHEELER. You know, I think that you are reading into this.

Mr. HICE. Why else would the comment be to back off if it is just an opinion? If the White House was offering an opinion, no one would be saying back off. There was more than an opinion that was being presented.

Mr. WHEELER. With all due respect, that is your opinion.

Mr. HICE. Well, it is your email. It is your email, and the words back off are pretty strong.

Mr. WHEELER. I don't think that it is conclusive that there is more than clearly just what is Stated there.

Mr. HICE. It says back off because this is creating problems for us. That is more than just my opinion; it is an email.

Mr. WHEELER. That is his opinion.

Mr. HICE. I yield my time.

Mr. WHEELER. That is his opinion.

Chairman CHAFFETZ. Thank the gentleman.

We will now recognize the gentlewoman from the Virgin Islands, Ms. Plaskett, for 5 minutes.

Ms. PLASKETT. Thank you, Mr. Chairman.

And thank you, Mr. Wheeler, for being here this morning. I think that it is so important to understand the significant attention that this Open Internet order has generated, and that that interest is primarily in the process as opposed to the content of what the Open Internet is.

And having these hearings regarding this process and whether or not you have used discretionary, your discretionary ability, as op-

posed to a rule, is something that I think is also very interesting. And I thought it would be important for us to understand the steps the FCC takes in that rulemaking process.

Now, the official FCC blog contains a post from the general counsel, John Solet, entitled The Process of Governance: The FCC and the Open Internet Order.

Mr. Chairman, I ask unanimous consent to enter that post into this hearing record at this time.

Mr. HICE [presiding]. Without objection. Thank you.

Ms. PLASKETT. Thank you.

Ms. PLASKETT. The general counsel begins by explaining that the FCC seeks to “create an enforceable rule that reflects public input, permits internal deliberation, and is built to withstand judicial review.”

Chairman Wheeler, is it an accurate Statement that that is the objectives in the FCC and its rulemaking?

Mr. WHEELER. Yes, ma’am.

Ms. PLASKETT. And after the public comment period, the FCC staff reviewed proposals in light of that public record, so we know the public comment period was actually even longer than normally is done; 60 days as opposed to the 30 days that you were required, because of the volume and the interest of this. When was that done, the review beginning in light of the public record?

Mr. WHEELER. Well, the traditional way that we do it is that the comment period closes and you have an opportunity to review those comments, and then you have a period where you can comment on the comments, and then you review those.

Ms. PLASKETT. OK. And do you remember at what time that that was closed to begin the review process?

Mr. WHEELER. I don’t know those exact dates, ma’am; I can get them for you.

Ms. PLASKETT. OK. And then the proposed order is distributed to the other FCC commissioners for internal review and deliberation again, is that correct?

Mr. WHEELER. Yes, ma’am.

Ms. PLASKETT. And what is that timeframe, do you recall how long?

Mr. WHEELER. It is 3 weeks before the vote.

Ms. PLASKETT. All right.

Mr. WHEELER. That is by our own internal record.

Ms. PLASKETT. And that is a critical portion of it, right, the commissioners’ internal deliberations?

Mr. WHEELER. Yes, ma’am.

Ms. PLASKETT. And then before the vote to adopt the Open Internet order on February 6th, there were calls to disclose that order, right?

Mr. WHEELER. That is correct.

Ms. PLASKETT. And is it a general FCC policy to publicly release an order before the Commission votes on it?

Mr. WHEELER. No, ma’am.

Ms. PLASKETT. And what could possibly be that, the issue of undue influence after that deliberation? What would be the reasoning behind that, the rationale?

Mr. WHEELER. Well, the rationale is that, first of all, there has been this extended period of comment and public debate, and then you get to a point in time when the rubber meets the road and you are drafting, and you are going back and forth and editing a document that changes frequently as a result; and that is something that is dynamic and not public. One reason, you want to make sure you have the full participation of all of the commissioners; second, as I mentioned before, the opportunity to cause mischief in financial markets by misinterpretations of changing glad to happy is an issue. So these have always been in camera kinds of editorial activities.

Ms. PLASKETT. So then even after the vote, there are then additional steps that are taken before the order is final and ready for release, correct?

Mr. WHEELER. Yes, ma'am.

Ms. PLASKETT. And you followed those.

Mr. WHEELER. Yes, ma'am.

Ms. PLASKETT. And that includes commissioners' individual Statements with their opinions, further discussion and clarification of any significant arguments made from the dissenting Statements, and then the final cleanup edits, correct?

Mr. WHEELER. Yes, ma'am. And when those final cleanup edits were made by the dissenters, that was about midday, and on the following morning, at 9:30, we released the item.

Ms. PLASKETT. And that final order was released on March 12th, correct?

Mr. WHEELER. Yes, ma'am.

Ms. PLASKETT. So it appears to be that you did not depart in any way from your rulemaking process in this respect, in regard to the open Internet. It really has been a question to many people's mind, and our good chairman and other individuals, whether you used your discretionary outside of what is the general rulemaking, right?

Mr. WHEELER. That is correct.

Ms. PLASKETT. And if you had used your discretion, then we would be in a hearing about something else as to whether that discretion was appropriate or not appropriate based on the President weighing in on something that had huge importance to the people of the United States.

Mr. WHEELER. I can't comment on that hypothetical, but the point of the matter is that we followed precedents and procedures that has been followed for years and years by both Republican and Democratic Commissions.

Ms. PLASKETT. Thank you very much.

I yield the balance of my time and thank you.

Chairman CHAFFETZ. I thank the gentlewoman.

Now recognize the gentleman from Oklahoma, Mr. Russell, for 5 minutes.

Mr. RUSSELL. Thank you, Mr. Chairman.

Thank you, Chairman Wheeler, for your long and dedicated public service to our Country. I know it is often thankless. And while opinions may differ, your dedication to it is appreciated.

Mr. WHEELER. Sir, I recognize your badge. Thank you for your service.

Mr. RUSSELL. Well, thank you, sir.

You had Stated in earlier testimony today that you came to an evolutionary decision because you determined it was reasonable for ISPs, but not reasonable for consumers with this ruling. Is it not true that with this ruling that Federal taxes could now be applied to consumers, where they were once prohibited?

Mr. WHEELER. I think that that is in the hands of Congress. You all will get to decide that. Right now the Internet Tax Freedom Act specifically prohibits that, and whether that is changed is outside of my jurisdiction.

Mr. RUSSELL. But from an informational service to a communications service, by moving it to Title II, does it not lay the foundation for consumers being taxed?

Mr. WHEELER. Again, that is going to end up being your decision, not mine.

Mr. RUSSELL. Was it possible when it was just an information service outside of Title II?

Mr. WHEELER. Information services, some are taxed at State levels, I believe. Some could be taxed at State levels. I want to make sure it is could because we have the Internet Tax Freedom Act sitting on top of everything. So it cuts both ways, I guess.

Mr. RUSSELL. OK, Article I, Section 8 of the Constitution States that it is Congress that has the power to regulate commerce. Do you believe this?

Mr. WHEELER. Yes, sir.

Mr. RUSSELL. Do you believe that the public would have been better served by giving Congress a chance to review the rules prior to their release, especially in light of your testimony today where you said that rules have to apply across all agencies and be considered?

Mr. WHEELER. This has been, as you know, Congressman, a 10-year process where there has been multiple input by multiple congresses along the way. There is legislation now, which is entirely appropriate. I think what our job is is to take the instructions of Congress as stipulated in statute and interpret them in terms of the realities of the day, and that is what we did.

Mr. RUSSELL. The quote that I would like to read to you by a senior vice president of a communications company says, "The FCC today chose to change the way commercial Internet has operated since its creation. Changing a platform that has been so successful should be done, if at all, only after careful policy analysis, full transparency, and the Congress, which is constitutionally charged with determining policy."

Now, you and your agency have established a clear belief that adopting these Title II rules would create problems, as we have seen in some of the email traffic that we have reviewed today. You also have Stated in other emails produced to the committee that you did not intend to be a wallflower in your tenure at the Commission. But given the coordinated efforts in the pressure of the White House, the coincidentally timed protest, and other White House Statements, would it be unreasonable, then, for Americans to somehow feel betrayed that this decision was a cave against your earlier judgment and damaged the reputation of the FCC as an independent agency?

Mr. WHEELER. No. And I also think that it is important to go to your key assumption there, quoting this senior vice president. The interesting thing in all of this is that there are four bright line rules. There are only four lines in this order: no blocking, no throttling, no paid prioritization, and transparency; and all of the ISPs have been saying publicly, buying newspaper ads, running TV commercials, you have been subject to it, saying, oh, we would never think of not doing that.

So when this person says it is going to change the basic operation of the Internet, there is some kind of a discord there, some kind of a disconnect, because they are saying, oh, we are not going to do that, and then they say, oh, but when they require that we don't do that, that is changing the operation of the Internet; and I think that is kind of an underlying tension that has been going through this whole thing.

Mr. RUSSELL. Well, I would hope, as we move forward in the future, there is clearly going to be lawsuits in this process; there is going to be continued discussion about it; that we would make sure that Congress regulates commerce. I personally believe that what we will see follow will be a taxation of consumers. I think had they known that, they wouldn't have been so quick to click the Internet like to get these 4 million comments. And I think we have set back free information and access to all Americans. Thank you.

I yield back the balance of my time.

Chairman CHAFFETZ. I thank the gentleman.

We will now recognize the gentlewoman from Michigan, Mrs. Lawrence, for 5 minutes.

Mrs. LAWRENCE. Thank you, Mr. Chairman and ranking member.

Welcome, Chairman Wheeler.

Mr. WHEELER. Thank you.

Mrs. LAWRENCE. I appreciate you being here today. My friend, my colleague Stated that there was a Statement that you did not intend to be a wallflower. I find that refreshing. Those who take an oath to serve the people and to be part of our regulatory process should not be a wallflower; they should be actively engaged. And I appreciate the passion you have distributed today.

I want you to know when I came to Congress I too had heard a lot about this net neutrality. I have done my homework and I came to Congress with an open mind and willingness to see both sides of this issue. I also am aware that over 4 million people filed public comments with the FCC. Four million. Most of them average people voting yes. And I also saw the President's comments on this issue.

So one of the things I want to ask of you today, Mr. Wheeler, is to really solidify you in this position. Chairman Wheeler, you were supported by telecom companies when President Obama selected you to this position, is that correct?

Mr. WHEELER. I believe so, yes, ma'am.

Mrs. LAWRENCE. And you were unanimously, meaning both sides of the House, confirmed, by the Senate as well.

Mr. WHEELER. Yes, ma'am.

Mrs. LAWRENCE. So it was not just one side of the House, of the Senate, it was both sides.

Mr. WHEELER. No, ma'am. Yes, ma'am.

Mrs. LAWRENCE. And then from 1976 to 1984, you worked for the National Cable Television Association, which is clearly representing these agencies that would be affected, and eventually became the president and CEO, is that correct?

Mr. WHEELER. Yes, ma'am.

Mrs. LAWRENCE. And from 1992 to 2004, Chairman Wheeler, you served as the president and the CEO of the Cellular Telecommunications and Internet Association, is that correct?

Mr. WHEELER. Yes, ma'am.

Mrs. LAWRENCE. Clearly, you would not be a wallflower. So you know this telecom industry very well, because if there ever was such a thing as the Internet or ISP, you would know that, correct?

Mr. WHEELER. I have spent my professional life in this space, ma'am.

Mrs. LAWRENCE. So, knowing this, would you push for regulations that you knowingly were aware that would damage the industry that you represented for so many years?

Mr. WHEELER. [No audible response.]

Mrs. LAWRENCE. So the decision and the regulation that you advocated for, your position was this would not damage, but enhance.

Mr. WHEELER. Thank you, Mrs. Lawrence, that is a really good question. I think there are two answers to it. No. 1 is that, yes, I was the chief advocate, chief lobbyist for those two industries when they were growth industries, not the behemoths that they are now, but a different time.

Mrs. LAWRENCE. Right.

Mr. WHEELER. And I hope I was a pretty good advocate. They were my client. My client today is the American consumer.

Mrs. LAWRENCE. Yes.

Mr. WHEELER. And that is who I want to make sure that I am representing.

Mrs. LAWRENCE. Yes.

Mr. WHEELER. Now, doing that, we do not help the American consumer by cutting off the nose of those who provide competitive broadband service to spite your face. So what we were doing in this was balancing the consumer protection with the investment necessary to provide competitive broadband services. And I went back to my roots as the president of CTIA, when the wireless industry sent me to Congress and said we need to be regulated as a Title II common carrier with forbearance, and Congress agreed with that, and that is the rules under which the wireless voice industry since then has had \$300 billion in investment and become the marvel of the world.

So the answer is yes on both fronts. You can't help consumers if you are not stimulating broadband growth. But my job today is representing American consumers.

Mrs. LAWRENCE. And just for the record, because the questioning today is inferring that, would you support regulations, and you eloquently stated that there is a balancing of this and information and your experience bring you to this point, would you support regulations that would hurt ISPs just because the White House thought it was a good idea?

Mr. WHEELER. Throughout this process I have been trying to be very independent and very thoughtful.

Mrs. LAWRENCE. And, last, do you honestly believe that net neutrality will stifle innovation, hurt access, or hinder the growth and development of the telecom industry, given your 40 years of experience?

Mr. WHEELER. No, ma'am. And it is not just my opinion that counts, however. But when major Internet service providers like Sprint, like T-Mobile, like Frontier Communications, like Google Fiber, like hundreds of rural providers say that they too believe they will be investing and continuing to grow competitive broadband, I believe that is reinforcement of this point.

Mrs. LAWRENCE. Thank you for your service, and I yield back my time.

Chairman CHAFFETZ. Thank you.

We will now recognize the gentleman from Alabama, Mr. Palmer, for 5 minutes.

Mr. PALMER. Thank you, Mr. Chairman.

Thank you, Mr. Wheeler, for testifying.

Mr. WHEELER. Mr. Palmer.

Mr. PALMER. You claimed in your opening Statement that this was the most open and transparent rulemaking in FCC history, is that correct?

Mr. WHEELER. Yes, sir.

Mr. PALMER. You have claimed in your testimony that all of your communications with the White House were properly accounted for with ex parte filings, is that correct?

Mr. WHEELER. Yes, sir.

Mr. PALMER. Would you put up the slide, please?

While they are working on that slide, I have here a copy of your ex parte filing for the President's Statement on net neutrality. Mr. Wheeler, it is two paragraphs long, three sentences total. Are we left to believe that the entirety of the White House's involvement in this process can be captured in just three sentences?

Mr. WHEELER. I am now being passed—this is the letter, November 10, Dear Ms. Dorsch?

Mr. PALMER. Yes, that is correct.

Mr. WHEELER. I believe that it has, then, a two-page attachment with it that gets quite specific and says what bright line rules should be and things such as that, that wireless should be covered and things like that.

Mr. PALMER. Do we have that?

Chairman CHAFFETZ. They are working on getting it, but I believe the portion that deals with this topic is, as the gentleman says, three sentences.

Mr. PALMER. Three sentences, yes.

Mr. WHEELER. I disagree, respectfully, sir. They put in here the entire Statement of the President in which he was saying this is what I think we ought to stand for.

Chairman CHAFFETZ. If the gentleman would yield.

Are you telling us that Jeffrey Zients came over to meet with you and just read the President's Statement?

I will yield back to Mr. Palmer.

Mr. WHEELER. I don't think that was the question. Maybe I am confused here, Mr. Palmer.

Mr. PALMER. Well, let me be a little more specific. Your calendar shows on February 2014 you had two phone calls the same afternoon with a counselor to the President, John Podesta, and with the White House Office of Science & Technology Policy, is that correct?

Mr. WHEELER. If the calendar says that, I don't recall talking to Mr. Podesta, but if the calendar says that.

Mr. PALMER. You don't recall talking with Mr. Podesta? Do you have any recollection of a phone call with Mr. Podesta on that day?

Mr. WHEELER. If the calendar says, sir, I will stipulate to it.

Mr. PALMER. Do you recall talking to the White House Office of Science & Technology Policy?

Mr. WHEELER. I have talked to them, yes, multiple times.

Mr. PALMER. Can you give us an idea of what was discussed in either of those calls?

Mr. WHEELER. I don't recall the specific—what was the date that you were specifying?

Mr. PALMER. February of last year, 2014.

Mr. WHEELER. I don't know what the specifics of that call were, I don't recall it.

Mr. PALMER. Do you have a recollection of having those calls?

Mr. WHEELER. If my calendar says, then I must have. I don't have a recollection of it. And the other thing is there is a whole bunch of things that are going on that are relevant, but I don't know what we were talking about.

Mr. PALMER. Well, it shows up on your calendar, and if you are having a difficult time remembering the calls and certainly the content of those calls, should either of those calls have been recorded as ex parte contacts?

Mr. WHEELER. I think there are two answers to the question. One, I don't recall the content; second, as we have discussed previously, there are specific guidelines rules as far as what ex parte is; and, third, that there is, and has been since the first Bush Administration, a ruling that contacts with the Administration and with the Congress are not ex parte.

Mr. PALMER. Last question here. What other contacts do you recall that you have had with the White House staff prior to the April 2014 emails that have been publicly released?

Mr. WHEELER. You have my calendar and you have my emails.

Mr. PALMER. Mr. Chairman, I yield the balance of my time.

Chairman CHAFFETZ. Now recognize the gentleman from California, Mr. DeSaulnier, for 5 minutes.

Mr. DESAULNIER. Thank you, Mr. Chairman.

Mr. Chairman, I just want to thank you for your service. I am tremendously proud of not just your decision, but also your testimony today, and how you have handled yourself, particularly considering, as one of my colleagues pointed out, your background.

Mr. WHEELER. Thank you.

Mr. DESAULNIER. And coming from the San Francisco Bay Area, obviously the importance to innovation for us and having many constituents and friends who work at companies like Facebook and Google and Apple, we want to make sure we get it right; and also

having a presence in my district of AT&T and Comcast, I understand the balance you had to go through.

I also understand the importance of the balance of your independence and expertise of independent commissions and their relationship with the Administration and Congress, and I actually think there is obviously a very strong argument to be made that someone like yourself and your staff are more appropriately situated to avoid some of the politics and make these decisions.

Having said that, I was particularly taken by your comments to one of the questions about whether you were, by appearance, looking like you were sort of second-guessing your decision and your vote, and your response to that, I thought, was very forthright and very determined and clear. So that was to the decision. Knowing that the process is probably as important and the perspective of the process is as important as the actual decisionmaking, how would you respond to the question of are you equivocating about your concerns about the questions you are being asked and the process?

Mr. WHEELER. So I believe that we handled this, Congressman, just as any other issue that comes before us, whether it is exciting and headline grabbing like this or much more mundane things we normally deal with; that we used the established procedures and precedents very religiously.

Mr. DESAULNIER. So would you say that your comments about your pride in the actual decisionmaking you feel equally as proud as the process?

Mr. WHEELER. I think the process worked, sir.

Mr. DESAULNIER. OK. So your comment about the number of the input from the public, the 4 million comments, would you ascribe a reason for that? I have gotten lots of input, I know we all have, from average, everyday citizens. Could you ascribe the motivation?

Mr. WHEELER. I think that the Internet touches people's lives more than any other network probably in the history of mankind, and everybody, believe me, everybody has an opinion about the Internet and everybody wants to talk about the Internet. So when you begin addressing issues such as will the Internet continue to be fair, fast, and open, those are things that it doesn't take an engineering degree or a computer science degree to be able to understand. Those are things you can understand that affect people individually, and I think that is why we had this kind of response.

Mr. DESAULNIER. I appreciate that. It is interesting sitting in this room and seeing behind you a picture of the connection of the Transcontinental Railway. When you look from a historical perspective of how the Federal Government has handled what would be considered assets of the commonwealth, but also wanted to be fair to the people who were investing from the private sector, whether it was railroads or television or the media, from your perspective, one of the concerns is who benefits and who does not, and usually the poorest Americans have benefited the least, at least in the short-term.

Do you have any comments about this rulemaking and the digital divide? Will it help eliminate that or by not doing this rulemaking and having sort of an opposite rulemaking, how it would affect the poorest of Americans?

Mr. WHEELER. If you do not have access, free, fair, open access, then you, per se, have a divide; and so when we come out and talk about how there needs to be, no matter where you are, no matter what legal content it is, that there should be open access to it, that the predicate to not having a divide. Not to say that there aren't challenges that we will continue to face, but that the baseline is there has to be openness.

Mr. DESAULNIER. Thank you, Mr. Chairman.

Chairman CHAFFETZ. Thank you. I thank the gentleman.

Now recognize the gentleman from Iowa, Mr. Blum, for 5 minutes.

Mr. BLUM. Thank you, Mr. Chairman.

Thank you, Chairman Wheeler, for being here today and sharing your insights with us. I must admire your green tie. Obviously, I did not get the memo.

Mr. WHEELER. It is that day.

Mr. BLUM. Yes.

I have a general question.

Mr. WHEELER. When you grow up with an Iowa woman who is big into Irish, you make sure that you wear a green tie, sir.

Mr. BLUM. Well said.

I have a general question for you and then a more specific question. In your opening Statement this morning, you mentioned that one of the FCC's goals, let me make sure I get this correct, is to protect the open Internet as a level playing field for innovators and entrepreneurs.

Mr. Wheeler, I am one of those innovators and I am one of those entrepreneurs. My concern, as a small businessman, Mr. Wheeler, is I have seen firsthand what happens to private and free marketplaces when the heavy hand of the Federal Government gets involved; and typically what happens, we see less innovation, we see lower qualities, we see higher prices, higher taxes. An example of that recently is the Affordable Care Act, which was supposed to help level the playing field for small businesses, and we have seen there higher prices, less innovation, higher taxes.

My question to you, and a question I get asked in Iowa often, Mr. Wheeler, is what steps is the FCC going to take to ensure, to ensure that the Internet remains vibrant, innovative, and open, when history, once again, has shown us when the heavy hand of the Federal Government gets involved in a free and vibrant market, bad things happen?

Mr. WHEELER. Thank you, Mr. Blum. First of all, I would like to identify with you as one entrepreneur to another. I too have been a small businessman; I have started a half a dozen companies. Some worked, some didn't.

Mr. BLUM. That happens.

Mr. WHEELER. You understand that experience as well, I am sure.

Mr. BLUM. Yes.

Mr. WHEELER. And for the decade before I took this job, I was a venture capitalist who was investing in early stage Internet protocol-based companies. So I know both personally, from my own entrepreneurial experience, as well as from my investing experience, that openness is key. If the companies that I had invested in did

not have open access to the distribution network, it would have been an entirely different story.

Mr. BLUM. What will you do to guarantee it?

Mr. WHEELER. What you can tell your constituents is that it is openness that is the core of creativity, because there should be nobody acting as a gateway and saying, hmm, you are only going to get on my network if you do it on my terms. And the key, then, as we go to the previous discussion that what you want to do is make sure you have that gateway not blocking the openness of entrepreneurs and at the same point in time that gateway not being retail price regulated so that it can continue to invest. And that is the kind of balance that we were trying to do. But I would urge you to tell your constituents the opportunity for innovation and the opportunity for the scaling that is required of innovation has never been greater because the networks are open.

Mr. BLUM. With all due respect, many people back in Iowa would say you are trying to solve a problem that doesn't exist today.

I have a specific question for you. During an interview with the Consumer Electronics Show in January, you said that you had an aha moment in the summer of that year when you realized the Telecommunications Act of 1996 applied Title II classification to wireless phone providers, but exempted them from many of its provisions.

Later in the year, House Communications Subcommittee Chair Greg Walden said that he met with you in November 2014 to reiterate congressional Republicans' concern with Title II regulation of the Internet. In that meeting, Chairman Walden said you assured him that you were committed to net neutrality without classification of broadband under Title II. Sounds to me like a flip flop. Can you explain that difference?

Mr. WHEELER. I respect Mr. Walden greatly, and I am going to be testifying before him on Thursday. I saw that he made that Statement. I went back to the contemporaneous notes from that meeting and we have a completely different set of recollections and, in fact, the notes because my notes say that I said that we would use light touch Title II and Section 706. I don't know what is going on; all I am saying is those are what my notes are, sir.

Mr. BLUM. Thank you.

I yield my time.

Chairman CHAFFETZ. Thank you.

Now recognize the gentleman from Georgia, Mr. Carter, for 5 minutes.

Mr. CARTER. Thank you, Mr. Chairman.

Thank you, Mr. Wheeler, for being here today. We appreciate it very much. In the short 5 minutes that I have, I want to try to get a better understanding of two things. First of all, throughout the process today and through my reading and through listening, it just appears that the whole process, there was more attention paid to the White House than there was to Congress, and I just don't understand why that would be the case in an independent body like yours. Did you serve on the transition team for the Obama Administration?

Mr. WHEELER. Yes, sir.

Mr. CARTER. You did. That is correct. So it is safe to say and true to say that you have a very close relationship with the President, is that right?

Mr. WHEELER. I am not sure that I have a close relationship with the President. I know the President.

Mr. CARTER. Well, you served on his transition team. I don't think he would have somebody who wasn't close to him on his transition team. Agreed?

Mr. WHEELER. I am not going to make representations for the President.

Mr. CARTER. OK. Fair enough. Fair enough. OK, well, he didn't ask me to be on his transition team. Let's put it that way, OK?

Well, the day after the vote for the rule, did it strike you as being interesting at all that a fellow commissioner of yours called the new rule President Obama's plan?

Mr. WHEELER. Everybody is entitled to their own opinion. I think it is appropriate to state something very clearly in response to what you are saying. Since taking this job, I met once with the President in the Oval Office; it was the first couple of days on the job. It was congratulations, welcome to the job.

Mr. CARTER. I understand that.

Mr. WHEELER. In that meeting, in that meeting, sir, he said to me you need to understand I will never call you; you are an independent agency.

Mr. CARTER. Then why do you think a fellow commissioner made the comment that this is President Obama's plan for the Internet? Why do you think that someone would make that comment?

Mr. WHEELER. He has been good to his word, sir, and I have no idea why somebody would want to make that kind of comment.

Mr. CARTER. Why do you think that the Democratic National Committee made the Statement that it was President Obama's plan?

Mr. WHEELER. I have noticed occasionally over time that both committees will engage in hyperbole.

Mr. CARTER. So you just think it is hyperbole? Do you agree with the DNC's Statement?

Mr. WHEELER. I believe that this is a plan that was put together by the FCC.

Mr. CARTER. So you do not agree with the DNC's Statement that this is President Obama's plan.

Mr. WHEELER. Well, let's get specific. One, he didn't have Section 706 in what he sent when he sent something in. Second, he didn't cover interconnection, which we cover. Third, he talked about forbearing from rate regulation, not the 26 other things that we do. I think that we produced a plan that is uniquely our plan and is a plan that is based on the record that was established before us; and that when the President joined the 64 Democratic Members of Congress and the millions of people and said he too thought this made sense, that he was piling on rather than being definitive.

Mr. CARTER. All that is fine, but let me ask you through the process of this evolution of the plan, did your thought process change at all? I mean, initially it appeared that you had in mind what was referred to as a hybrid 706 plan.

Mr. WHEELER. You actually used the right word there, my evolution on this plan. I started out with pure 706 and then I realized, as I said in my testimony, that that wouldn't work because of the commercially reasonable test, and so I started exploring Title II kinds of ideas.

Mr. CARTER. Did anyone lead you in this exploration?

Mr. WHEELER. Yes, sir, all kinds of commenters and a lot of work that was put into that.

Mr. CARTER. Do you think any of those commenters were influenced by the White House?

Mr. WHEELER. I have no idea.

Mr. CARTER. One final question. Do you feel that you paid as close attention to the White House as you paid to Congress?

Mr. WHEELER. Sir, I believe that I have, frankly, spent more time discussing this issue with Members of Congress than with the Administration.

Mr. CARTER. Then ultimately do you feel like you listened to the input of Congress more so than the White House?

Mr. WHEELER. I paid full attention to the record that was established in this proceeding, and it included Members of Congress saying no, don't do Title II, and it included Members of Congress saying do do Title II.

Mr. CARTER. Again, do you feel like you paid as close attention to Congress as you did to the White House?

Mr. WHEELER. I think my responsibility is to be responsive to all of the people who are involved.

Mr. CARTER. I can't tell whether that is a yes or no.

Mr. WHEELER. I think I was very responsive to Congress.

Mr. CARTER. Thank you very much.

Chairman CHAFFETZ. Thank the gentleman.

And I appreciate the gentleman's commitment to St. Patrick's Day as exemplified by that jacket, but the chair is prepared to rule that he has only been outdone by the gentleman from Wisconsin, who clearly is wearing his colors today, and will now recognize that gentleman from Wisconsin, Mr. Grothman, for 5 minutes.

Mr. GROTHMAN. Thanks for hanging around so long.

Last month The Wall Street Journal, you maybe saw, had an article reporting that the White House had spent months in a secretive effort to change the FCC course. Did this news come as a surprise to you? When you heard about it, what was your reaction?

Mr. WHEELER. So there is a standard process, I believe, where the White House works on developing their position. I was not a part of it.

Mr. GROTHMAN. Did it surprise you when you heard about it?

Mr. WHEELER. It is not a surprise that something like that goes on.

Mr. GROTHMAN. OK. Last spring and summer you had various meetings with White House officials. Did you become aware at that time that the White House was working on an alternative to your original proposal?

Mr. WHEELER. I had heard rumors that the White House was looking at this, as I say, like they look at all other issues to develop an administration position.

Mr. GROTHMAN. OK. The White House, apparently, in formulating this alternative, had dozens of meetings with online activists, startups, traditional telecommunication companies. We believe participants were allegedly told not to discuss the process. Were you aware of these meetings at the time?

Mr. WHEELER. I knew that there was a process, this group. I did not know who they were meeting with.

Mr. GROTHMAN. OK.

I yield the rest of my time.

Chairman CHAFFETZ. Thank you.

Now recognize the gentleman from Maryland, Mr. Cummings.

Mr. CUMMINGS. Mr. Wheeler, as we now wind down this hearing, Mr. Chairman, I want to thank you again for your testimony. When decisions are made by various bodies, commissions, quite often people are in disagreement with those decisions, and I don't think there is anything wrong with looking behind the curtain to try to figure out what the process was, because one of the things that we have been pushing very hard on in this committee is the whole idea of transparency. So your testimony has been very enlightening.

I think we need to keep in mind that these decisions are made by people who come to government, and they don't have to do that, but they come to government trying to bring their own experiences to the table, their concerns, and their hopes of bringing us more and more to that perfect union that we talk about.

So I want to thank you for all that you have done and continue to do. And I want to thank the other commissioners and your employees. I think a lot of times in these circumstances we forget that there are employees who have worked very hard on these issues and trying to do it right, so that is very important. I hope that you will take that back to your commissioners and the employees.

And I am hopeful that we can move forward here. Again, I have listened to you very carefully. There was a moment, I mentioned to my staff, that kind of touched me a bit, when you were asked whether you were backtracking on your decision; and the passion that you responded in saying that absolutely not, this is a decision that you all made and that you are proud of it, and that is something that is very important to you. You can't fake that. You can't fake it. And as a trial lawyer, I am used to watching people testify.

Another thing that you said and you were very clear is that you adhered to the rules, and I appreciate that and I believe so. So we look forward to continuing to work with you and again I want to thank you for your testimony.

Mr. WHEELER. Thank you, Mr. Cummings.

Chairman CHAFFETZ. Mr. Chairman, I appreciate your being here today. We were made aware that the inspector general has opened an investigation of this process. Are you aware of that investigation?

Mr. WHEELER. No.

Chairman CHAFFETZ. It is my understanding it is not an audit, it is not an inspection, but an actual investigation. Would you be willing to cooperate with this investigation?

Mr. WHEELER. Of course.

Chairman CHAFFETZ. I think one of the key things, and it was brought up on both sides, is the process of openness and transparency. My personal opinion, there could have been a lot more done to maximize the transparency and the openness. The rules do allow you latitude to give it more transparency than you did. I think one of the things our body should look at is compelling that openness and transparency, rather than making it simply discretionary; and that is something we will have to take back, because there are rulings that go one direction or another. Some people are happy, some aren't.

But the idea that the public could, say, have a 30-day opportunity to see the final rule I think rings true with a lot of people. This notion that, right up until the time you voted for it, nobody outside of that Commission is allowed to see the final product does not lend itself well to maximizing openness and transparency. And that is just my comment, it is not a question. But I do think a 30-day window would do that.

I also think that the interactions with those who have an opinion is fine, it is a healthy one. But the lack of disclosure about those, overly redacting emails does lead one to believe that there was a bit more of a secret type of communication going on there, and I think you can understand, at least I hope that you can appreciate why some people would come to that conclusion, particularly given the dramatic change in the policy that you took.

Nevertheless, I think this was a good and healthy hearing. We appreciate your participation. That is what this process is about. There are fact-finding things that we engage in and I appreciate your participation here today. We do have a number of outstanding requests from the FCC that we would appreciate your providing that information to this committee. Some take a little bit longer in time, some are fairly easy, but we appreciate your staff who have to do a lot of this work, and thank them for those efforts.

This committee now stands adjourned.

[Whereupon, at 12:40 p.m., the committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Question for Chairman Wheeler
Federal Communications Commission

Question from Chairman Chaffetz
Committee on Oversight and Government Reform

March 17, 2015 Full Committee Hearing on:
"FCC: Process and Transparency"

1. **Did you or any of your staff discuss the possibility of releasing the draft Open Internet rule, or testifying before Congress on this matter, with anyone in the Executive Office of the President?**

No.

2. **Did anyone in the Executive Office of the President or anyone on its behalf advise you not to speak to congressional staff or not to testify on February 25th as requested by the Committee?**

No.

3. **The May 2014 Notice of Proposed Rulemaking (NPRM) mentions Title II in only two paragraphs.**

- a. **Notwithstanding your written testimony to the Committee that you "have made it a policy to present draft NPRMs to [your] colleagues that contain specific proposals as a means to flag key concepts for commenters' attention," do you interpret two paragraphs in a 184-paragraph document as sufficient to "flag" Title II as a "key concept"?**

The statement that the NPRM "mentions Title II in only two paragraphs" is simply incorrect. The NPRM's "Legal Authority" section includes an 8-paragraph discussion of the Commission's Title II authority (paragraphs 148-155). This discussion is actually longer than the preceding discussion of Section 706 authority (paragraphs 143-147). In addition to this section, the NPRM sought comments on the use of Title II authority to protect and promote the open Internet in many other sections of the NPRM. Some examples of Title II discussions are listed below:

- Paragraph 4: "This Notice seeks comment on the benefits of both section 706 and Title II, including the benefits of one approach over the other. . . . We emphasize in this Notice that the Commission recognizes that both section 706 and Title II are viable solutions and seek comment on their potential use."
- Paragraph 10: "[W]e ask how either section 706 or Title II (or other sources of legal

authority such as Title III for mobile services) could be applied to ensure that the Internet remains open.”

- Paragraph 65: “We seek comment on whether and how—if at all—the source of the Commission’s legal authority . . . would affect the authority or authorities that provide the strongest basis for any improvements to the transparency rule or otherwise would inform how we define the goal of transparency in general.”
- Paragraph 89: “Alternatively, we seek comment on whether we should adopt a no-blocking rule that does not allow for priority agreements with edge providers and how we would do so consistent with sources of legal authority other than section 706, including Title II.”
- Paragraph 96: “Commenters should address the legal bases and theories, including Title II, that the Commission could rely on for such a no-blocking rule, and how different sources of authority might lead to different formulations of the no-blocking rule.”
- Paragraph 112: “Alternatively, we also seek comment on whether the Commission should adopt an alternative legal standard to govern broadband providers’ practices. How would the [commercially reasonable] rule we propose today change if the Commission were to rely on Title II (or other sources of legal authority) to adopt rules to protect and promote Internet openness?”
- Paragraph 121: “Should the Commission adopt a rule that prohibits unreasonable discrimination and, if so, what legal authority and theories should we rely upon to do so? If the Commission ultimately adopts a Title II approach, how should the Commission define the rule in light of the requirements under sections 201 and 202 of the Act?”
- Paragraph 138: “If the Commission were to ultimately rely on a source of authority other than section 706 to adopt a legal standard for broadband provider practices, such as Title II, we seek comment on whether and, if so, how we should prohibit all, or some, pay-for-priority arrangements, consistent with our authority, to protect and promote Internet openness.”
- Paragraph 142: “We also seek comment on the nature and the extent of the Commission’s authority to adopt open Internet rules relying on Title II, and other possible sources of authority, including Title III.”

It is also worth noting that our NPRM did not initiate the public discussion about which legal authority the Commission could use to protect Internet openness; it simply continued it. A vast public record on this issue existed before we initiated the NPRM. In 2010, the Commission issued a Notice of Inquiry asking, among other things, whether and how to apply Title II to broadband services. The January 14, 2014, *Verizon* decision vacating portions of the 2010 Open Internet Order included a lengthy discussion of the Commission’s Title II “common carrier” authority. One of the key holdings in *Verizon* was that the Commission could not subject broadband providers to “unjust and unreasonable discrimination” rules unless the Commission classified their services as Title II telecommunications services. The new Open Internet rulemaking we initiated in May was a direct response to this remand.

Commenters clearly understood that using the Commission’s Title II authority was a key issue in the NPRM. Many interested parties included discussions of Title II authority – both pro and

con – in their comments. For examples of opposition to the use of Title II, see the following comments:

- AT&T Comments at 39-72;
- Bright House Comments at 20-29;
- CenturyLink Comments at 36-51;
- Charter Comments at 13-21;
- Comcast Comments at 42-67;
- Cox Comments at 30-31;
- Frontier Communications Comments at 2-4;
- Time Warner Comments at 9-23;
- T-Mobile Comments at 18-24;
- Verizon Comments at 46-69.

For examples of support for a Title II approach, see the following:

- Ad Hoc Comments at 2-7;
- CDT Comments at 8-16;
- Cogent Comments at 9-12;
- Common Cause Comments at 13-16;
- Consumers Union Comments at 10;
- EFF Comments at 13-17;
- Etsy Comments at 9;
- Free Press Comments at 54-90;
- New America Foundation Comments at 22-27;
- Public Knowledge Comments at 60-104;
- WGAW Comments at 28-31.

The Commissioners' separate statements on the NPRM reflect the same belief that Title II was a key concept in the May proposal.

- My statement noted that in the NPRM, we were “seeking input on both Section 706 and Title II of the Communications Act. **We are specifically asking for input as to the benefits of each and why one might be preferable to another**” [bold in original]. *2014 Open Internet NPRM*, 29 FCC Rcd at 5647-48.
- Commissioner Pai's four-and-a-half page dissenting statement mentions Title II no fewer than nine times, including a long paragraph explaining why, in Commissioner Pai's view, reclassifying broadband Internet service as a telecommunications service was bad policy. *Id.* at 5655.
- In his dissenting statement, Commissioner O'Rielly wrote that in addition to discussing the Commission's Section 706 authority, “the Notice explores upending years of precedent and investment by reclassifying broadband Internet access as a Title II

service...I cannot support such a backward-looking, ends-driven approach – not in a Notice and certainly not in final rules. *Id.* at 5658.

b. Isn't it unprecedented for the Commission to give such limited notice on any rule, let alone one that is as far-reaching as this one?

As described in 3(a) above, and as I discussed in my testimony before the Committee, the NPRM clearly and repeatedly stated that using Title II authority would be considered as part of the rulemaking process. I do not agree with your statement that the Commission provided “limited notice” to interested parties. The Commission provided ample notice of the approach that we adopted in the final order, in full compliance with our legal obligations under the Administrative Procedure Act (APA), and consistent with our practice and precedent.

c. Are you aware of any previous FCC rulemaking that involved a similarly proportionate change of direction?

As described in 3(a) above, the NPRM clearly and repeatedly identified Title II as a possible alternative course of action. It provided ample notice of the approach that we adopted in the final order, in full compliance with our legal obligations under the APA, and consistent with our practice and precedent.

4. Do you agree with the United States Court of Appeals for the District of Columbia Circuit that, when differences in a final rule's terms from the NPRM are "so major that the original notice did not adequately frame the subjects for discussion," the agency is required to re-notice the rule? *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 533 (D.C. Cir. 1982).

The *Connecticut Light* decision is one of many formulations of the APA “logical outgrowth” test adopted by the D.C. Circuit. As discussed in 3(a) above, the NPRM more than adequately framed the subjects for discussion, including a vigorous discussion of whether Title II was the appropriate legal authority for the Commission to use to preserve and protect the Open Internet.

5. Assuming you agree with the D.C. Circuit, given the limited treatment of Title II in the NPRM, why did the FCC not re-notice the Open Internet rule?

As described in my response to 3(a) above, and as I discussed in my testimony before the Committee, the NPRM clearly and repeatedly stated that using Title II authority would be considered as part of the rulemaking process. I do not agree with your statement that the Commission gave “limited treatment” to the issue in the NPRM. The Commission provided ample notice of the approach that we adopted in the final order, in full compliance with our legal obligations under the APA, and consistent with our practice and precedent.

6. Commissioner Pai said in his dissenting statement, "President Obama's endorsement of Title II forced a change in the FCC's approach" between the NPRM and the final rule. Do you believe Commissioner Pai is incorrect? If so, please explain.

Yes. As I stated at the hearing, President Obama's public statement on November 10, 2014, and the *ex parte* that the National Telecommunications and Information Administration filed on his behalf on the same day, certainly had an impact on the rulemaking process. Many commenters in the rulemaking – including many Members of Congress – supported a Title II reclassification approach, but the President's public support for it gave it new momentum. The final Order, however, was the product of a rich rulemaking record and the Commission's deliberations on that record. As I discussed at the hearing, the final Order included many elements that were not part of the President's proposal, including bright-line rules based on the Commission's Section 706 authority, the application of Title II to interconnection, and extensive forbearance from Title II provisions.

7. When, specifically, did you decide to use Title II reclassification in the Open Internet rule?

As I explained in my testimony, during the summer and early fall of 2014, I began to think that Title II's "just and reasonable" standard needed to be part of our approach to protecting Internet openness, in addition to the FCC's authority under Section 706. The fact that I was looking at Title II as an additional protection was not a secret. In a number of different public venues, I made it clear that Title II was "on the table." For example, when I testified before the House Small Business Committee on September 17, 2014, I provided the following response to a question about the potential use of Title II in the Open Internet Order:

So, what the court said was that the way in which the 2010 rules were implemented was inappropriate, but that the Commission had authority to deal with anything that interfered with what they called the virtuous cycle – that new applications drive better bandwidth which drives new applications, and you have this virtuous cycle. Activities like you named – blocking, choosing one player over another, degrading service, fast lanes, this sort of thing – I believe all interfere with the virtuous cycle. A question then becomes: do we use the 706 authority that the court pointed to, or do we use Title II? And in our Notice of Proposed Rulemaking, we have specifically asked for input on the Title II question. Title II is very much on the table. And that comment period just closed this week. I look forward to moving forward on that as well, but I will assure you that Title II is very much a topic of conversation and on the table, and something that we specifically asked for comment on in the proceeding.

As I described in my testimony before your Committee, a key question in the rulemaking was how we could combine our Section 706 and Title II authorities to develop rules that would preserve the open Internet and promote network investment. The FCC staff and I spent months reviewing and considering the various proposals that stakeholders had submitted into the rulemaking record that explored this question. Reclassifying broadband internet access

service as a Title II service was one of the proposals we were carefully studying. The draft I ultimately submitted to my fellow Commissioners on February 6, 2015, for consideration was not finalized until shortly before that date.

8. You said in your testimony before the Committee that you could "assure" the Committee that, in your conversations with White House officials, there was "nothing that would trigger an *ex parte*." Would you please tell the Committee the participants, topics, and substance of your meetings with White House officials on each of the following dates:

As a general matter, Congress has authorized me to engage in conversations on behalf of the FCC with both the legislative and the executive branches. Specifically, Section 5(a) of the Communications Act of 1934 authorizes the Chairman of the FCC to represent the Commission "in all matters relating to legislation and legislative reports" and "in all matters requiring conferences or communications with other governmental officers, departments, or agencies." 47 U.S.C. 155.

As for the more particular matter of the Open Internet Order, because it was an informal rulemaking conducted under Section 553 of the Administrative Procedure Act, interested parties were allowed to make *ex parte* presentations directed to the merits or outcome of the proceeding to FCC Commissioners and staff, as long as the presentations were disclosed. The FCC's *ex parte* regulations provide special rules for Congress and executive branch agencies in such "permit-but-disclose" proceedings. These rules only require the filing of an *ex parte* presentation by a Member of Congress or his or her staff, or by other agencies or branches of the Federal Government, or their staffs, if the presentation "is of substantial significance and clearly intended to affect the ultimate decision." 47 C.F.R. 1.1203(a)(4). The Department of Justice Office of Legal Counsel found in a 1991 opinion that "it is permissible for White House officials to contact FCC Commissioners in an effort to influence the results of an FCC rulemaking," subject to the FCC's *ex parte* disclosure rules. 15 U.S. Op. Off. Legal Counsel 1, 3 (1991).

As was discussed at the hearing, the Obama Administration filed an *ex parte* in the Open Internet rulemaking on November 10, 2014, after President Obama issued a statement calling for the creation of "a new set of rules protecting net neutrality" and a White House official visited the FCC on November 6, 2014, to inform me of the President's planned statement. While I had other conversations with executive branch officials and Congress about the Open Internet proceeding, none of our conversations met the special disclosure criteria described above.

Please find below information about the specific dates you list. This information comes from my official FCC calendar, which does not generally describe the topics or my calls or meetings. It is likely that some of these meetings and calls included conversations about the Open Internet rulemaking, but they also likely included discussions about other topics of mutual interest to the FCC and the Administration, including e-Rate and other efforts to bring broadband to more Americans, spectrum management, trade, and national security issues.

Chairman Wheeler Responses to HOCR Questions for the Record – March 17, 2015 Hearing

- a. **January 27, 2014** - Meetings with Sylvia Burwell (OMB) and Kathy Ruemmler (White House Counsel);
 - b. **February 18, 2014** - Phone calls with John Holdren (OSTP) and John Podesta;
 - c. **March 5, 2014** - “Farewell for Gene Sperling” at White House;
 - d. **March 6, 2014** - Scheduled, but canceled, meeting with Jeff Zients (rescheduled meeting took place on March 7, 2014);
 - e. **March 14, 2014** - St. Patrick’s Day event at White House;
 - f. **March 18, 2014** - Phone call with Larry Strickling [*please note that Mr. Strickling is not a “White House official,” he is Assistant Secretary for Communications and Information at the Department of Commerce*];
 - g. **April 29, 2014** - Phone call with Jeff Zients and Jason Furman;
 - h. **May 1, 2014** - Phone call with Jason Furman;
 - i. **May 7, 2014** - Phone call with Jeff Zients;
 - j. **May 21, 2014** - Meeting with Jeff Zients “re:E-Rate briefing”;
 - k. **June 11, 2014** - Meeting with Jason Furman;
 - l. **June 18, 2014** - Meeting with Cecilia Muñoz (WH Domestic Policy Council) and Jeff Zients;
 - m. **July 17, 2014** - Meeting with Caroline Atkinson (Deputy National Security Advisor);
 - n. **September 11, 2014** - Meeting with Jeff Zients;
 - o. **September 30, 2014** - Meeting with Megan Smith (CTO);
 - p. **October 15, 2014** - Meeting with Jason Furman “re: E-rate Next Steps”;
 - q. **October 28, 2014** - Meeting with Cecilia Muñoz (WH Domestic Policy Council) and Jeff Zients “re: eRate Next Steps”; and
 - r. **November 6, 2014** - Meeting with Jeff Zients at the FCC concerning Open Internet policy [*this meeting was disclosed in an ex parte filing for in the Open Internet docket (14-28)*].
9. **Are there any other dates not reflected above between January 14, 2014 and February 26, 2015 in which you met or talked with White House officials about**

the Open Internet Rule? If so, please provide the same data requested in the previous question.

My calendar indicates that I had approximately ten phone calls with White House officials that are not listed above. My calendar does not describe any of these calls as Open Internet calls, but it is possible that Open Internet was discussed during these calls.

My calendar also indicates that I had approximately four meetings at the White House that are not listed above, two of which were widely-attended events. My calendar does not describe these meetings as Open Internet meetings, but it is possible that Open Internet was discussed during these meetings.

The table below presents a comparison between the frequency of my White House calls and meetings with the frequency of my calls and meetings with Members of Congress. It shows that, according to my official calendar, I had almost three times as many contacts with Members of Congress as with White House officials during the period. Many of my contacts with Members of Congress also likely included conversations about the Open Internet Rule, but did not trigger *ex parte* filings.

	<i>Approx. # of meetings between 1/14/14 and 2/6/15</i>	<i>Approx. # of calls between 1/14/14 and 2/6/15</i>
White House	18	15
Congress	42	47

10. Do you believe that, other than the November 6, 2014 meeting with Mr. Zients for which you filed a notice of *ex parte* contact, that none of these meetings and telephone calls that followed the NPRM required the filing of an *ex parte* on the Open Internet docket?

As discussed in my answers to questions 8 and 9 above, I have frequently engaged in conversations about the Open Internet rulemaking and many other issues with Members of Congress and executive branch officials since I have been FCC chairman. The Communications Act authorizes and encourages me to engage in such conversations. FCC rules require the filing of an *ex parte* when a legislative or executive branch official makes a presentation that “is of substantial significance and clearly intended to affect the ultimate decision” in a rulemaking. It is the responsibility of all FCC personnel to follow these rules, and I believe I have followed them.

11. The Open Internet rulemaking was the subject of multiple FOIA requests. The records FCC produced to requestors were heavily -often entirely -redacted based on a claimed Section (b)(5) exemption. In order to invoke the exemption, the Supreme Court requires that the communication must be pre-decisional, and it must make recommendations or expresses opinions on legal or policy matters. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). Please look at

HOCR-OI-00278, which was discussed during your testimony before the Committee. In response to a FOIA request, the text of the top email was redacted to include only the FYI. Is it your position that this is a proper invocation of the Section (b)(5) exemption? If so, please explain the basis for invocation of the exemption. If not, what steps are you taking to ensure that the FCC FOIA office is complying with the law?

The referenced e-mail message is a proper invocation of the deliberative process privilege of Exemption 5. There are two fundamental requirements for the deliberative process privilege: first, the communication must be predecisional, and second, the communication must be deliberative. In determining whether a communication is predecisional, courts have held that it is not necessary for an agency to be able to identify a specific final decision that flowed from the communication; rather, the agency need only establish what agency decision-making process the communication involved. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975). On the issue of whether a particular communication is deliberative, the D.C. Circuit stated that a communication that “makes recommendations or express opinions on legal or policy matters” is deliberative. *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

In *Petroleum Information Corp. v. Department of the Interior*, 976 F.2d 1429 (D.C. Cir. 1992), the DC Circuit elaborated on the scope of “deliberative” communications and the policy rationale for protecting such materials:

To the extent that predecisional materials, even if “factual” in form, reflect an agency’s preliminary positions or ruminations about how to exercise discretion on some policy matter, they are protected under Exemption 5. Conversely, when material could not reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment, the deliberative process privilege is inapplicable Inquiring whether the requested materials can reasonably be said to embody an agency’s policy-informed or -informing judgmental process therefore helps us answer the “key question” in these cases: whether disclosure would tend to diminish candor within an agency.

Id. at 1435. Courts have not limited the application of the privilege to substantive policy matters that are considered as part of the agency’s rulemaking process. Rather the focus is on the “decisionmaking process,” *NLRB v. Sears*, 421 U.S. at 151-52, whether they bear on “some policy matter,” *Petroleum Info. Corp.*, 976 F.2d at 1435, and whether there is a connection to “any type of governmental policy formation or decision,” *People for the Am. Way Found v. Nat’l Park Serv.*, 503 F. Supp. 2d 284, 301-02. “The key question in Exemption 5 cases [is] whether the disclosure of materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.” *Dudman Comms. Corp. v. Dep’t of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987).

Courts have generally found that a range of documents are sufficiently connected to an agency’s “policy” for the privilege to apply. These include documents relating to public relations strategy; see *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C.

Cir. 1980), *ICM Registry, LLC v. Dep't of Commerce*, 538 F. Supp. 2d 130, 136 (D.D.C. 2008); discussion of how to address the possible public perception that would flow from agency actions, *Nielsen v. Bureau of Land Mgmt.*, 252 F.R.D. 499, 522 (D. Minn. 2008); preparation for congressional briefings, *Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1196-97 (D.C. Cir. 1991); discussion of whether to accept an invitation to an event, *Judicial Watch v. Dep't of Justice*, 306 F. Supp. 2d 58, 70 (D.D.C. 2004); and deliberations on who to include in a given meeting, *Judicial Watch v. Dep't of State*, 875 F. Supp. 2d 37, 44-46 (D.D.C. 2012). *But see Sun-Sentinel Co. v. DHS*, 431 F. Supp. 2d 1258, 1277-78 (S.D. Fla. 2006) (refusing to protect e-mail communications containing advice to agency director because these messages contained recommendations on press relations, not on matters relating to the agency's mission.)

In addition to matters of opinion and judgment, courts have also held that factual material can be withheld under Exemption 5, noting that when an author selects specific facts out of a larger group of facts, the very act is deliberative in nature. *See, e.g., Judicial Watch v. Dep't of Justice*, No. 01-639, 2006 WL 2038513, at *7 (D.D.C. July 19, 2006) (quoting favorably from the government declaration explaining “the very act of selecting those facts which are significant from those that are not, is itself a deliberative process.”). Similarly, courts have held that factual material is properly withheld as deliberative “to the extent that they reveal the mental processes of decisionmakers.” *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d at 1119 (citing *Dudman Comms. v. Dep't of the Air Force*, 815 F.2d at 1568), *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 67 (D.C. Cir. 1974).

The redacted material from the e-mail cited in HOCR-OI-00278 is both predecisional and deliberative in nature, and therefore it qualifies for withholding under the deliberative process privilege. The discussion relates to the (at the time) pending Open Internet proceeding, and is therefore predecisional. It is also deliberative, implicating a policy matter before the Commission and revealing the Chairman's judgments about the source of unprecedented public focus on the policy matter. Revealing that judgment would chill future agency deliberations and undermine the Commission's ability to perform its statutory functions, and thus protecting the material from disclosure meets what courts have described as the “key question” in Exemption 5 decisions. *Dudman Comms. Corp.*, 815 F.2d at 1568. Additionally, the Chairman is clearly bringing select facts to the attention of his close advisors and soliciting their input, further qualifying the act as deliberative. *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d at 1119 (citing *Dudman Comms.*, 815 F.2d at 1568), *Judicial Watch v. Dep't of Justice*, No. 01-639, 2006 WL 2038513, at *7. Thus, the discussion is deliberative in nature. Therefore, as the material in question is both predecisional and deliberative, the Commission properly invoked Exemption 5's deliberative process privilege to withhold it from release.

- 12. HOCR-OI-000001 is an email with you commenting on a New York Times article from April 23, 2014. The version produced in response to Vice News's FOIA request was heavily redacted, as shown on the screen during your appearance before the Committee. This email is not decisional in nature, or making a legal or policy recommendation – it is you commenting on a newspaper article. Committee staff had the chance to ask your attorneys in the General Counsel's**

office about this email. They said it was redacted because it contains your "musings" on the article. Is it the position of the FCC that "musings" represent a legally valid Section (b)(5) exemption?

The introspection and reflection of a senior agency official can be withheld under Exemption 5's deliberative process privilege. The court in *National Wildlife Federation v. U.S. Forest Service* stated that matters can be considered as deliberative under Exemption 5 "to the extent that they reveal the mental processes of decision makers." 861 F.2d at 1119 (citing *Dudman Comm. v. Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987), *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 67 (D.C. Cir. 1974)).

Press strategy has also been held as properly withholdable under Exemption 5. In *Judicial Watch v. DHS*, the court held that deliberations regarding "how to present [a previously decided] policy in the press" qualified as a decision-making process for the purposes of the deliberative process privilege. 880 F. Supp. 2d 105, 111-12 (D.D.C. 2012); *see also Competitive Enter. Inst. v. EPA*, 12 F. Supp. 3d 100, 118 (D.D.C. Jan. 29, 2014) (rejecting plaintiff's contention that "Exemption 5 protects discussion of policy, not PR" and instead holding that documents were properly withheld as they showed the agency's "ongoing decisionmaking about how the agency's activities should be described to the general public" (internal quotation omitted)). Similarly, in *Thompson v. Department of the Navy*, the court protected from release materials on the basis that "disclosure of materials reflecting the process by which [an agency] formulates its policy concerning statements and interactions with the press" could stifle frank communication within the agency. No. 97-5292, 1998 WL 202253, at *1 (D.C. Cir. Mar. 11, 1998) (per curiam).

In *Nielsen v. Bureau of Land Management*, the court held the agency properly withheld a document under facts very similar to the matter here. 252 F.R.D. 499 (D. Minn. 2008). *Nielsen* involved the forwarding of a Reno Gazette article that, according to the e-mail, falsely described agency policy. *Id.* at 519. The agency redacted portions of the e-mail describing the author's views regarding the policy in general and the actions the Bureau should take to clarify to the public the issues raised in the article. *Id.* The court concluded that:

The perceived reaction to a newspaper article regarding [agency policy] and how to deal with the implications of the article and its subject matter satisfies both the deliberative process and predecisional requirements of Exemption 5. . . . It is deliberative because it reflects the consultative process among agency employees on how to . . . deal with the media's portrayal of its policies as exemplified by the [agency policy.] Furthermore, the article is deliberative because disclosing agency communications regarding how to deal with a policy decision based on media reports would impede candid discussion and thus undermine the agency's ability to perform its functions based on a fear that the discussion could wind up in the media again. *Id.* at 520.

Applying these standards to the e-mail referenced in HOCR-OI-000001, the Commission has properly invoked Exemption 5's deliberative process privilege. The redacted material reveals the mental processes of a decisionmaker, specifically, Chairman Wheeler's frank assessment of

the merits of the Commission's open Internet strategy, and how that strategy differed from the story in the press. Pursuant to the court's holding in *National Wildlife Federation*, such material is protected from release. Furthermore, the discussion involves the Commission's strategy for responding to the media regarding the news story. Under courts' reasoning in *Judicial Watch v. DHS* and *Thompson*, such discussions may be withheld under Exemption 5's deliberative process privilege. Lastly, the material withheld from the e-mail referenced in HOCR-OI-000001 is substantially similar to the material that the court in *Nielsen* ruled was protected from disclosure under Exemption 5. For the foregoing reasons, the Commission was justified in redacting the marked material under Exemption 5's deliberative process privilege.

13. What instructions and training have you provided to your FOIA officers, or anyone else in the Commission, on the use of the (b)(5) exemption?

All attorneys with FOIA responsibilities in OGC and throughout the Commission regularly consult the Department of Justice's "Guide to The Freedom of Information Act," containing over 800 pages of legal analysis. The guide is regularly updated online and contains an extensive discussion of Exemption 5. Attorneys use the Guide as a starting point for their own independent research. OGC also provides *every* attorney in the Commission an overview guide of key legal issues relating to the Commission's work. The Overview includes a discussion FOIA and Exemption 5 and a link to the above-referenced DOJ Guide.

In addition, training of FCC staff concerning FOIA, and specifically Exemption 5, is an ongoing process that takes several forms. As the Commission's Chief FOIA Officer reported in his 2015 FCC Chief FOIA Officer report, available at <http://transition.fcc.gov/foia/Chief-FOIA-Officer-Report-2015.pdf>, "at least 45-50% of the FCC's FOIA professionals and staff with FOIA responsibilities attended a special training session offered in December 2014 specifically to implement, among other things, OIP's recent guidance for improving FOIA processing and other substantive FOIA topics. In addition, at least six FOIA staff attended substantive FOIA training offered by the Department of Justice." Both of these training sessions included discussions of FOIA Exemption 5. Staff is routinely alerted to FOIA training opportunities, primarily those offered by DOJ. In addition, the President's Memorandum on FOIA, the Attorney General's Memorandum on FOIA, and DOJ guidance on FOIA are all circulated to FCC staff processing initial FOIA requests. The legal staff of OGC who are experts in FOIA review draft decisions addressing FOIA requests and provide guidance to staff members on the requirements of Exemption 5 and how to apply it. Staff are reminded regularly also to review any records they believe are appropriate for withholding under FOIA Exemption 5 to see if they may be released as a matter of discretion.

14. Are you familiar with the selection process for the Local Number Portability Administrator (LNPA)? Is the process a rulemaking process governed by the Administrative Procedure Act or a federal procurement process governed by the Federal Acquisition Regulations?

Although this matter was not discussed at the hearing and is outside of the scope of your information requests concerning the Open Internet Order, please find a response below.

On March 26, 2015, by a 5-0 vote, the Commission approved a recommendation that Telcordia Technologies Inc. serve as the new local number portability administrator. This recommendation was the result of a multi-year, competitive process that will provide the essential “number porting” service to telephone carriers and consumers at a significantly lower cost. A variety of procedural challenges were made, and those challenges are addressed in detail in the Order. See in particular paragraphs 14-64. For more information about this Commission action, please see: <http://www.fcc.gov/document/fcc-conditionally-oks-telcordia-number-portability-administrator-0>.

- 15. The Committee has heard a number of concerns about the selection process for the LNPA. For example, a protective order was put in place which had never been done before in this context -and transcripts of certain proceedings although requested several times -were withheld until March 3, 2015, a day before you circulated an order to your fellow Commissioners for voting. Can you explain why this information was subject to a protective order and why the transcript was not released when initially requested?**

Although this matter was not discussed at the hearing and is outside of the scope of your information requests concerning the Open Internet Order, please find a response below.

As explained in paragraph 30 of the Order, the two protective orders were in place to protect competitively sensitive information, and reflect requests for confidential treatment from the filing parties. With respect to the transcript of the closed meeting, such document did not exist at the time it was allegedly requested, and was prepared later to respond to a subsequent procedural challenge. Paragraph 62 and footnote 237 of the Order provide more detail on this matter.

- 16. In December 2014, Rep. Pallone wrote to you expressing his concerns about the selection process for the LNPA. You responded to his concerns in January 2015 saying, "I am committed to a competitive, fair, and transparent process." Given your commitment to transparency in FCC proceedings, do you believe the FCC acted transparently in the LNPA proceeding?**

Although this matter was not discussed at the hearing and is outside of the scope of your information requests concerning the Open Internet Order, please find a response below.

As the Order notes, the Commission’s March 26 decision was the culmination of several years’ work and multiple opportunities for comment. Paragraphs 8-13 in particular describe the process that led to the Order.

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POLITICS AND POLICY

Net Neutrality: How White House Thwarted FCC Chief

After Secret Meetings, Obama Pushed for Tougher Stance on 'Net Neutrality'



President Barack Obama, at the White House in 2013, announces venture-capitalist Tom Wheeler as his nominee to lead the FCC. PHOTO: AGENCE FRANCE-PRESSE/GETTY IMAGES

By GAUTHAM NAGESH And BRODY MULLINS

Feb. 4, 2015 7:52 p.m. ET

WASHINGTON—In November, the White House's top economic adviser dropped by the Federal Communications Commission with a heads-up for the agency's chairman, Tom Wheeler. President Barack Obama was ready to unveil his vision for regulating high-speed Internet traffic.

<http://www.wsj.com/articles/how-white-house-thwarted-fcc-chief-on-internet-rules-1423097522>

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The specifics came four days later in an announcement that blindsided officials at the FCC. Mr. Obama said the Internet should be overseen as a public utility, with the “strongest possible rules” forcing broadband providers such as AT&T Inc. and Verizon Communications Inc. to treat all Internet traffic equally.

The president’s words swept aside more than a decade of light-touch regulation of the

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Internet and months of work by Mr. Wheeler toward a compromise. On Wednesday, Mr. Wheeler lined up behind Mr. Obama, announcing proposed rules to ensure that the Internet “remains open, now and in the future, for all Americans,” according to an op-ed by Mr. Wheeler in Wired.

The prod from Mr. Obama came after an unusual, secretive effort inside the White House, led by two aides who built a case for the principle known as “net neutrality” through dozens of meetings with online activists, Web startups and traditional telecommunications companies.

Acting like a parallel version of the FCC itself, R. David Edelman and Tom Power listened as Etsy Inc., Kickstarter Inc., Yahoo Inc.’s Tumblr and other companies insisted that utility-like rules were needed to help small companies and entrepreneurs compete online, people involved in the process say.

In an office on the fourth floor of the Old Executive Office Building, some companies claimed they would have never gotten off the ground if they had been forced to pay broadband providers. “We want to compete on product and service, not on our ability to negotiate preferable treatment with an Internet service provider,” said David Pashman, general counsel for Meetup Inc.

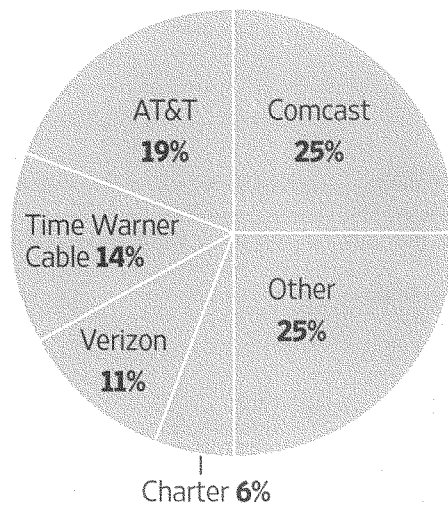
The big losers in the White House process were cable and phone companies, which spent years lobbying to gain support for their view that toughened rules would make it harder for them to offer new kinds of services. Executives who tried to go over the two aides’ heads, including by appealing directly to Valerie Jarrett, Mr. Obama’s senior

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Connected

Market share of fixed broadband service, by provider in 3Q 2014



Source: SNL Kagan The Wall Street Journal

adviser, got nowhere.

Mr. Wheeler wasn't available for comment Wednesday. Senior FCC officials say he was always open to shifting his position and became convinced that the tougher stance advocated by Mr. Obama wouldn't discourage broadband companies from upgrading their networks.

White House spokesman Josh Earnest said Wednesday that the White House was "encouraged to see that the FCC is heading in the same direction of safeguarding net neutrality with the strongest possible protections." He added: "This is consistent with the view that the president articulated back in the fall."

While Mr. Obama's position stunned officials at the FCC, he wanted to push for strong rules ensuring net neutrality right after his 2008 election

over Sen. John McCain (R., Ariz.). The FCC's chairman at the time, Julius Genachowski, supported Mr. Obama and aimed to write strong rules preventing broadband providers from making some websites work faster than others for fees.

But Larry Summers, then the Obama administration's chief economic adviser, and other officials urged the president to focus his attention on the turbulent economy, former White House officials say.

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"I've always supported net neutrality, but I have been very concerned and remain very concerned about overly heavy-handed approaches to net neutrality that I believe could choke off substantial volumes of productive investment to the detriment of American economic growth," Mr. Summers says.

Mr. Genachowski went ahead with FCC rules that were weaker than those proposed Wednesday, but they were thrown out in January 2014 by a federal appeals court. The court said the FCC couldn't impose the rules because it had explicitly decided previously not to classify broadband as a telecom service.

The ruling sent the question of how to regulate the Internet back to the FCC, where Mr. Wheeler became chairman in November 2013. The former cable- and wireless-industry lobbyist sought a compromise.

People familiar with his thinking say he didn't want to regulate broadband companies in the same way that phone companies are regulated. Mr. Wheeler also wanted to leave some room for broadband providers to explore new business models, including accepting payments from content providers. That could allow broadband companies to offer free or cheap services.

Broadband companies generally liked the FCC chairman's approach, but net-neutrality die-hards quickly started mobilizing against it. Last April, Marvin Ammori, a lawyer who advises startups and Web companies, warned in a meeting at Tumblr's headquarters in the Flatiron District of New York City that Internet regulation was a do-or-die necessity for small firms.

The FCC soon proposed rules allowing broadband providers to charge companies a premium for access to their fastest lanes, as long as such arrangements are available on "commercially reasonable" terms for all interested content companies. "Commercially reasonable" would be decided by the FCC on a case-by-case basis.

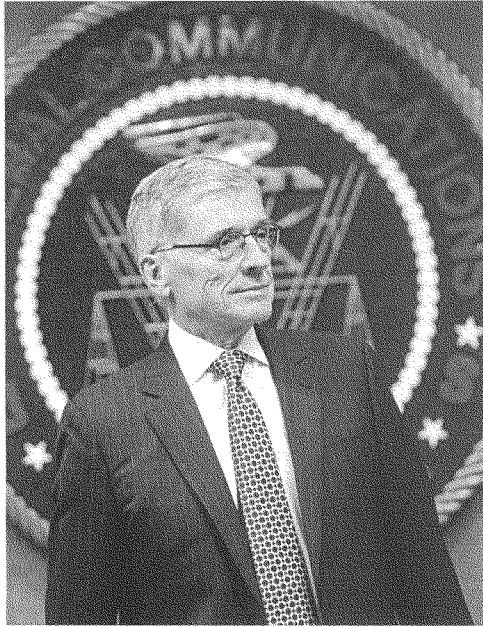
Officials at some Internet startup companies decided they had to fight the proposal but didn't know where to start. Mr. Ammori recalls that some officials asked if they needed to register as lobbyists to meet with regulators and lawmakers. They didn't. Mr. Wheeler resisted stronger rules.

At the same time, Mr. Ammori tried to build wider public support for net neutrality. Last May, he spoke with a researcher for "Last Week Tonight with John Oliver," the HBO comedy series. On June 1, Mr. Oliver unleashed a 13-minute rant in an episode of

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the show, comparing Mr. Wheeler to a dingo and encouraging viewers to bombard the FCC with comments.



FCC Chairman Tom Wheeler waits for a hearing at the FCC in December in Washington. PHOTO: AGENCE FRANCE-PRESSE/GETTY IMAGES

The deluge crashed the FCC's online comment system. Overall, the agency got more than four million comments on last year's rule proposal.

Mr. Wheeler was open-minded about the concerns of online activists and Web startups, people close to him recall, holding meetings in Silicon Valley and New York to hear objections to his plan to allow some preferential treatment for Internet traffic.

Before one meeting, Mr. Ammori advised technology executives to share personal stories of how an open Internet helped them create their companies. They were discouraged when the FCC chairman opened the meeting with a sales pitch on his approach and why it would protect net neutrality, according to people who attended

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the meeting.

Mr. Wheeler ran into stiff resistance at a July 2014 meeting at the New York office of online crafts marketplace Etsy. Before the meeting, Mr. Ammori wrote a 10-page memo detailing the legal arguments against Mr. Wheeler's approach—and gave copies to executives set to meet with him.

In a lucky coincidence, Tumblr Chief Executive David Karp , who attended the meeting in New York, found himself seated next to Mr. Obama at a fundraiser the following day hosted by investment manager Deven Parekh.

Mr. Karp told Mr. Obama about his concerns with the net-neutrality plan backed by Mr. Wheeler, according to people familiar with the conversation. Those objections were relayed to the White House aides secretly working on an alternative.

Mr. Edelman, who turned 30 years old on Wednesday, had previously spent four years at the State Department, starting as an analyst specializing in northeast Asia, and was finishing his doctorate in international relations from Oxford University. Mr. Power is a longtime telecom lawyer and White House official who took his first job at the FCC in the 1990s.

Messrs. Edelman and Power started working on the White House plan last spring. As their work progressed, aides began summarizing the arguments for net neutrality in allegorical terms. For example, the White House aides said, imagine calling the operator for a phone number for car-rental company Avis and being asked whether you would prefer Hertz.

Officials told participants not to discuss the process openly.

A generational shift, including the departure of Mr. Summers, left behind a younger, tech-savvy staff inclined to favor Web companies over telecommunications firms. Senior White House officials like Jeffrey Zients, director of the National Economic Council, were primarily concerned about the potential economic impact of changing the rules.

As rumors swirled last fall that Mr. Obama was preparing to call for tougher Internet regulations, Comcast Corp. CEO Brian Roberts called Ms. Jarrett, pressed her for information and urged the White House not to go through with the move, people familiar with the matter say.

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She offered no help, these people say. Google Inc. Executive Chairman Eric Schmidt spoke with White House officials, urging them not to go through with utility-like rules.

Google, Facebook Inc. and other large Internet companies expressed support for net neutrality through the Internet Association, a trade group, but were largely on the sidelines during the White House process.

On Oct. 21, the White House invited chief executives of Tumblr, Etsy, Kickstarter, and IAC/InterActive Corp.'s Vimeo video platform to the West Wing for a meeting with Mr. Zients, top White House economist Jason Furman and other senior aides.

For more than an hour, White House officials questioned the CEOs gathered in the Roosevelt Room about why net neutrality was so important to them, according to people who attended the meeting.

Chad Dickerson, Etsy's chief executive, replied that nearly nine of every 10 Etsy sellers are women, many earning a living from selling on the website. Kickstarter and Tumblr executives said treating Internet traffic equally was crucial to thousands of people who built businesses on their platforms.

While Obama administration officials were warming to the idea of calling for tougher rules, it took the November elections to sway Mr. Obama into action.

After Republicans gained their Senate majority, Mr. Obama took a number of actions to go around Congress, including a unilateral move to ease immigration rules. Senior aides also began looking for issues that would help define the president's legacy. Net neutrality seemed like a good fit.

Soon, Mr. Zients paid his visit to the FCC to let Mr. Wheeler know the president would make a statement on high-speed Internet regulation. Messrs. Zients and Wheeler didn't discuss the details, according to Mr. Wheeler.

Mr. Obama made them clear in a 1,062-word statement and two-minute video. He told the FCC to regulate mobile and fixed broadband providers more strictly and enact strong rules to prevent those providers from altering download speeds for specific websites or services.

In the video, Mr. Obama said his stance was confirmation of a long-standing commitment to net neutrality. The statement boxed in Mr. Wheeler by giving the FCC's two other Democratic commissioners cover to vote against anything falling short of

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Mr. Obama's position.

That essentially killed the compromise proposed by Mr. Wheeler, leaving him no choice but to follow the path outlined by the president.

In his op-ed Wednesday, Mr. Wheeler wrote: "I am submitting to my colleagues the strongest open Internet protections ever proposed by the FCC."

Write to Gautham Nagesh at gautham.nagesh@wsj.com and Brody Mullins at brody.mullins@wsj.com

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- The Daily Caller - <http://dailycaller.com> -**Obama's Move To Regulate Internet Has Activists' 'Fingerprints All Over It'**Posted By [Kerry Pickett](#) On 12:36 PM 02/23/2015 In | [No Comments](#) [Tweet](#)

The Obama White House has worked directly with online activists to pressure the Federal Communications Commission to regulate the internet. The Commission is expected to vote on the president's "net neutrality" policy on Thursday.

According to White House visitor logs, on September 23, 2014, Obama senior internet advisor David Edelman met with 30 netroots activists and executives from Spitfire Strategies. Spitfire is a public relations firm that received over \$2 million from the Ford Foundation since 2009 to create PR and media strategy relating to net neutrality.

During the hour-long meeting, the Obama White House appears to have collaborated with the netroots activists and PR media professionals to create the notion that the public truly wants Title II regulation applied to the internet. The activists have even celebrated President Obama's loyalty to their cause in emails to their factions of supporters.

According to the White House visitors logs, participants at the meeting included representatives from the Free Press, Fight for the Future, Demand Progress, Daily Kos, Public Knowledge and several others. Individual meeting attendees also included PR, media and campaign strategists Michael Khoo, Karley Kranich and Cheryl Leanza from Spitfire Strategies and A Learned Hand, as well as Martha Allen with The Women's Institute for Freedom of the Press.

Six weeks later in November, Obama announced his Title II internet regulation proposal in a video statement. The president's video used an ample amount of the activists' messaging, including a fake "buffering" gag that showed viewers the well-known "site loading" circular animation.

Fight For The Future's Evan Greer, another participant whose organization was represented at the White House in September, lauded the president for using their messaging.

One day after the video was released, he wrote to his fellow activists: "We've been hearing for weeks from our allies in DC that the only thing that could stop FCC Chairman Tom Wheeler from moving ahead with his sham proposal to gut net neutrality was if we could get the President to step in. So we did everything in our power to make that happen. We took the gloves off and played hard, and now we get to celebrate a sweet victory."

"If you watch the Obama statement closely," Greer wrote, "you'll see many moments where he incorporates the memes and talking points we've built, together, as part of battleforthenet.com campaign, from the 'buffering' joke at the beginning to the way he talks about this as cable companies vs. the public."

Greer continued: "Obama's statement has this movement's fingerprints all over it, and it wouldn't have happened without our work together. We're proud. You should be too. I can't think of a better time to make your first donation to this movement."

Two hours before the video was released, some of the activists who were present at the White House meeting in September blocked FCC Chairman Tom Wheeler's home driveway.

Later that same day, White House official David Edelman—who hosted the activists in September—took part in an "Ask Me Anything" on Reddit. Reddit's Campaign Manager

Christopher Khosrovani was a participant at the September 23, 2014 White House meeting between netroots activists and Edelman.

Around the same time, other meeting attendees organized several protests inside and outside of the headquarters at the FCC. In one instance, they disrupted the FCC's Open Internet proceedings. They also interrupted the press conference of the Republican FCC Commissioner, Ajit Pai.

Four days after Obama released his statement, Fight for the Future organized a protest dance party outside of FCC headquarters and Free Press mounted a "Net Neutral-i-kitty vs. Cable Boss" protest outside of the FCC another five days later.

On December 2, Holmes Wilson of Fight for the Future sent an email to activists claiming that netroots activists facilitated the circumstances for the Obama announcement in November.

"We were in close contact with the White House, and it was pretty clear they were only going to move once they were sure it was something that would gain them broad public support and have minimal downside. Our coalition created the circumstances in which they could move," Wilson wrote.

He continued: "From the 'buffering gag' at the beginning to the emphasis on 'cable companies' (not telcos, or ISPs) Obama's video statement was built from our memes and framing. In the emails they sent to the Organizing For America list, they cribbed exact phrasing from FFTF emails."

Wilson wrote about the protest activities of the DC-based group Popular Resistance who protested outside Chairman Wheeler's home. "We've also been extremely impressed by the work of Popular Resistance, a DC-based group that excels at holding officials (like FCC's Tom Wheeler) accountable through cordial but uncompromising protests outside the FCC and even outside Wheeler's home."

The activists' pressure did not stop. By December 8, Free Press protested outside of the FCBA Annual Dinner honoring FCC Chairman Wheeler. The Daily Kos's Carissa Miller, an attendee at the White House meeting, wrote about and photographed the protest.

Three days later Netroots activists, led by PopularResistance.org, disrupted an FCC Open Meeting and unfurled a "Reclassify Now" banner. The most recent protest by PopularResistance.org's Kevin Zeese and Margaret Flowers occurred at a February 10 press conference hosted by Commissioner Ajit Pai. Spitfire Strategies' Karley Kranich, another attendee at the White House meeting, tweeted a picture of protestors being ejected from the press conference.

The over 300 pages of new regulations are under seal and have only been viewed by administration officials — they were never allowed to be seen by the public. However, Wheeler already confirmed the policy allows the FCC to regulate the internet under Title II of the Communications Act of 1934. This is the same legislation that the FCC used to break up Ma Bell in the 1980's. Title II lets the FCC choose what "charges" and "practices" are "just and reasonable."

Republicans, including House Oversight Chairman Jason Chaffetz and Wisconsin Sen. Ron Johnson, have sent a letter to FCC Chairman Tom Wheeler about the influence the White House may have on the agency, regarding net neutrality. The House Oversight Committee is holding a hearing on Wednesday regarding the relationship between the FCC and the White House.

Commissioner Ajit Pai told The Daily Caller earlier this month that there is "unprecedented involvement of the executive branch" in the FCC's decision making.

Johnson told reporters that Republicans want to know why Wheeler suddenly changed his mind on the net neutrality issue and now supports further regulation on the internet.

"We certainly want to find out to what extent [Wheeler's] change of heart was actually his own or whether there was influence by the White House. [The FCC] is supposed to be an independent agency and so we're trying to find the information," said Johnson. "We want to find

Obama's Net Neutrality Push Has Activists' Fingerprints All Over It [...] <http://dailycaller.com/2015/02/23/obamas-move-to-regulate-internet-h...>

the communication between himself and the White House—his agency and the White House and see whether this truly was an independent act.”

As Wednesday's Oversight hearing on the netroots activists' protests and the White House's involvement inches closer, The Wall Street Journal points out that Obama's role could raise "legal as well as political questions."

"Those harmed by the new rules could argue in court that political pressure made the agency's actions 'arbitrary and capricious.'"

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March 16, 2015

Rep. Jason Chaffetz
Chair
House Oversight & Gov't Reform
2157 Rayburn HOB
Washington, DC 20515

Rep. Elijah Cummings
Ranking Member
House Oversight & Gov't Reform
2157 Rayburn HOB
Washington, DC 20515

Dear Chairman Chaffetz and Ranking Member Cummings:

As racial justice and civil rights organizations, we write to express our support of the recent Federal Communications Commission decision to enact strong and enforceable Net Neutrality rules.

Our organizations are among the more than 100 racial justice and civil rights groups that have called on the FCC to pass strong Net Neutrality rules using its Title II authority. It is critical that the FCC have the legal authority to protect the online digital rights of communities that historically have been marginalized in our society. With such protections, our communities have been able to better participate in our democracy, tell our own stories, strive towards educational excellence and pursue economic success.

We are deeply troubled by Congressional efforts to overturn the Net Neutrality order and to strip the Commission of its legal authority to enforce its Net Neutrality protections under Title II of the Communications Act. This includes efforts to prevent the Commission from enforcing Net Neutrality by defunding the agency.

The Net Neutrality debate has centered on whether the Commission has the authority to enforce Net Neutrality rules that prevent Internet service providers (ISPs) from blocking or discriminating against online content. A federal court ruled last year that the Commission could not ban such online discrimination without reclassifying ISPs as common carriers under Title II. Therefore, the FCC cannot protect Internet users from ISP practices such as blocking, throttling and other types of discriminatory conduct that could arise as the marketplace and technology evolves, without asserting its authority under Title II.

This is why more than four million people have called on the FCC to use its Title II authority to adopt strong and enforceable Net Neutrality rules over the past year.

Accordingly, we respectfully request that you join the millions of digital equality champions and support the FCC's historic decision, and reject any efforts to overturn or weaken the decision. You will be in good company, on the right side of public opinion and history.

Sincerely,

Alliance for a Just Society
Black Alliance for Just Immigration
Black Lives Matter
Center for Community Change
Center for Media Justice

Center for Popular Democracy
 Center for Rural Strategies
 Center for Social Inclusion
 ColorOfChange.org
 Community Justice Network for Youth
 Demos
 Dream Defenders
 18 Million Rising
 Ella Baker Center
 Forward Together
 Free Press
 Hispanic Association of Colleges and Universities
 Latino Rebels
 Media Action Grassroots Network
 Mexican American Opportunity Foundation
 Million Hoodies Movement for Justice
 Movement Strategy Center
 National Domestic Workers Alliance (NDWA)
 National Association of Hispanic Journalists
 National Association of Latino Independent Producers
 National Economic & Social Rights Initiative
 National Guestworker Alliance
 National Hispanic Media Coalition
 National Institute for Latino Policy
 National Latina Institute for Reproductive Health
 National LGBTQ Task Force Action Fund
 National People's Action
 News Taco
 Nuestra Palabra: Latino Writers Having Their Say
 Our Walmart
 Philanthropic Initiative for Racial Equity
 Presente.org
 Radio Bilingüe
 Race Forward
 Right to the City Alliance
 Roosevelt Institute Campus Network
 The Librotraficante Movement
 The Praxis Project
 United Church of Christ
 United We Dream
 Voices for Internet Freedom

Encl. info record

March 17, 2015

The Honorable Tom Wheeler
 The Honorable Mignon Clyburn
 The Honorable Jessica Rosenworcel
 Federal Communications Commission
 445 12th St., SW
 Washington, DC 20554

Dear Chairman Wheeler, Commissioner Clyburn, and Commissioner Rosenworcel,

We, the undersigned organizations and companies, thank you for your vote on February 26th to protect Internet communications from discrimination by reclassifying broadband access under Title II of the Communications Act.

Over the last year, nearly seven million Americans have contacted the Federal Communications Commission on this issue, with the overwhelming majority in favor of Title II reclassification. In addition, hundreds of advocates, civil rights groups, companies, entrepreneurs, and legal experts have spoken out in favor of Net Neutrality.

The FCC followed the letter of the law by voting for reclassification, and it heeded the calls of millions of Americans. You proved that sound policy that benefits the public interest can carry the day in Washington. Your vote will help keep the Internet open for years to come, free from slow lanes and gatekeeping, which will enable future generations to enjoy the greatest platform for free expression, democracy, and innovation the world has ever known. If Congress acts, it should consider the FCC's rule the floor, and not the ceiling, when it comes to the protections afforded Americans.

Those that support Net Neutrality and Title II represent a wide range of interests and political affiliations. What we have in common is an unwavering belief in the power of the Internet and the need to keep it open for the benefit of the public. This is not a partisan idea. Independents, Republicans, and Democrats alike favor Net Neutrality by overwhelming margins.

Thank you for standing with the organizations and individuals across this country that defend and benefit from the open Internet.

Sincerely,

18MillionRising.org
 Access
 American Civil Liberties Union
 Addy
 Agile Learning Labs

AirHelp
 American Library Association
 Amicus
 AppRebates
 Appar

Aptology	General Assembly
Association of Research Libraries	GitHub
Augur	Global Accelerator Network
Authentise	Grid
Automattic	HayStack TV
Badger Maps	HelloSign
betaworks	Heyzap
Bitnami	Hire an Esquire
Blu Zone	Imgur
Boing Boing	Inside Social
BuzzFeed	Instapaper
Center for Democracy & Technology	Internet Freedom Business Alliance
The Center for Media Justice	inXile
Cheezburger	Kaltura
Codecademy	Kickstarter
CodeScience	Kongregate
ColorOfChange	LawGives
Common Cause	LendUp
Consumers Union	Linknovate
Contextly	Media Democracy Fund
CREDO Action	MediaFire
Daily Kos	Media Literacy Project
Demand Progress	Media Mobilizing Project
Digg	Medium
Duffy, Inc.	Meetup
Distinc.tt	MixRank
DuckDuckGo	Motionry
Dwolla	MoveOn.org
DynaOptics	Mozart Medical
Earbits	Mozilla
Electronic Frontier Foundation	National Hispanic Media Coalition
Embedly	New America's Open Technology
Engine	Institute
Etsy	Next Big Sound
Faithful Internet	NOTCOT
Fandor	OfficeNinjas
Fight for the Future	OpenDNS
Flytenow	OpenMedia.org
Floor64	Opera Software
Foundry Group	PadMapper
Foursquare	Pixoto
Free Press	Poll Everywhere
Future of Music Coalition	Popular Resistance
Gawker Media	Presente.org

Public Knowledge
Publitas.com
Rallyware
ReadMe.io
Recrout
reddit
ReplySend
Reylabs
RootsAction.org
Savvy System Designs
Shapeways
SketchDeck
Sonic
SpoonRocket
Statwing
Stripe
SumOfUs
Techstars
TerrAvion
The Nation
TheNextWeb.com

ThoughtWorks
Tilt
TouchCast
Tumblr
Twilio
Union Square Ventures
United Church of Christ, OC Inc.
Upworthy
VHX
Vidcaster
Vimeo
Warby Parker
Women's Institute for Freedom of the
Press
Women's Media Center
Worldly
Xola
Yanomo
Yelp
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The Process of Governance: The FCC & the Open Internet Order

by: [Jon Sallet](#) ⁽¹⁾, General Counsel

March 2, 2015 - 03:22 PM

Author: Jon Sallet
General Counsel

The Commission's recent adoption of new Open Internet rules has received unprecedented attention and, along with national debate about the outcomes, has generated significant interest in the process by which the FCC, like other independent regulatory agencies, creates rules. In particular, people want to know when the new rules will be released for public review. The answer is tied to a broader question of governance: How does the FCC best create an enforceable rule that reflects public input, permits internal deliberation, and is built to withstand judicial review? As with its substantive decisions, the answer is simple – by following Congress' blueprints. As with governance generally, the goal is obvious: To engage in effective, informed action that furthers the public interest.

That's "blueprints" in the plural. The two pillars of Congressional will are expressed in the Communications Act, the touchstone of our substantive authority, and the Administrative Procedure Act (APA), the foundation of federal administrative action.

Among the Communications Act's important provisions are two of particular importance to the Open Internet Order: Title II, which governs "telecommunications service," and Section 706, by which Congress empowered the FCC to promote broadband deployment and to remove barriers to broadband network investment while promoting competition.

But how should these statutory commands be translated into policy? The APA tells us to make rules through a process of notice-and-comment rulemaking. Why? Because as long recognized, the expertise of the FCC, like any independent agency, grows greater when it hears "the frequently clashing viewpoints of those whom its regulation will affect," in the words of a 1941 report on the Administrative Procedure Act by the Justice Department ([Attorney General's Committee, Final Report of the Attorney General Committee](#) ⁽²⁾). In the case of the Open Internet NPRM, the extended comment period resulted in nearly 4 million comments, an unprecedented number. All are available online.

Following the comment period, FCC staff reviews the proposals in light of the public record. The Chairman then presents his proposed order to the Commission for a vote – in FCC lingo, he “circulates” it to the four other commissioners. However, the order is not yet public because it is not yet final; this is the stage of internal deliberations among the Commissioners.

In the case of the Open Internet Order, the Chairman scheduled a final vote for the February 26 public meeting, circulating the order three weeks in advance as required by the Commission's internal procedures. Typically during that three-week period, Commissioners suggest changes to the Chairman's draft. As amended, the proposed order is put up for a vote. But this draft is still not public.

It is understood that independent agencies like the FCC combine attributes of legislators and judges. Like the Congress, FCC rulemakings are open for extensive (in the Open Internet proceeding, extraordinarily extensive) comment. That is what allows the Commission to be both independent and expert. Like the Judiciary, the Commissioners have the opportunity to engage with each other confidentially, and to ensure that written orders fully reflect the back-and-forth of those deliberations.

The confidentiality of the Commissioners' internal deliberations is a critical part of the process, long recognized by the law. So, for example, the Freedom of Information Act (FOIA) – an additional congressional command – contains a statutory exemption protecting the internal deliberative processes of an agency. As explained by the Department of Justice in its Guide to the Freedom of Information Act (3):

... the general purpose of [the deliberative process privilege] ... is to “prevent injury to the quality of agency decisions.” Specifically, three policy purposes consistently have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.

In other words, allowing the Commission to engage in frank, non-public discussions improves the decision-making process, just as receiving public comments boosts the Commission's expertise.

Why was the Open Internet order not released immediately after the Commission voted on it? Once the vote on a Commission order has been taken, some additional steps remain before the decision is final and ready for public release. For one, Commissioners often prepare individual statements expressing their opinions on the order, and those statements are generally first shared with the other Commissioners and staff. The statements may generate additional internal discussions, during which both the order and the statements may be clarified. In addition, the order itself must address any significant argument made in the statements – or risk being overturned in court for failing to address the issue. This is a very important point – the United States Court of Appeals for the D.C. Circuit has made clear on multiple occasions, as recently as last year, that, “[u]nder the APA, we must set aside orders that are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law, 5 U.S.C. § 706(2)(A), [and in] particular, "it most emphatically remains the duty of this court to ensure that an agency engage the arguments raised before it".... including the arguments of the agency's dissenting commissioners." [[Elec. Power Supply Ass'n v. FERC](#), citations omitted ^[4]]

At the same time, final proofreading and nonsubstantive "clean up" edits may be needed. The staff that has been responsible for writing the order is granted "editorial privileges" to prepare and circulate these necessary changes.

Ultimately, a final version is presented to the Commissioners for signoff by all of the Commissioners who voted in favor of the order. Until this is done, the Order is not public because it doesn't fully reflect the full and final views of the Commission. Once the final version has been approved, it is – as the Open Internet Order will be – released to the public on the FCC's web site.

The goal, of course, is to release the final order as soon as possible. But speed is not the only – or even the utmost – goal. The rulemaking process of the FCC was designed by Congress, and is executed by the Commission, to produce rules that will stand the test of judicial review – and of time.

Updated: March 3, 2015 - 03:13 PM

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