

FEDERAL COMMUNICATIONS COMMISSION PROCESS
 REFORM ACT OF 2012

MARCH 19, 2012.—Committed to the Committee of the Whole House on the State
 of the Union and ordered to be printed

Mr. UPTON, from the Committee on Energy and Commerce,
 submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3309]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 3309) to amend the Communications Act of 1934 to provide for greater transparency and efficiency in the procedures followed by the Federal Communications Commission, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

CONTENTS

	Page
Purpose and Summary	7
Background and Need for Legislation	7
Hearings	10
Committee Consideration	10
Committee Votes	11
Committee Oversight Findings	15
Statement of General Performance Goals and Objectives	15
New Budget Authority, Entitlement Authority, and Tax Expenditures	15
Earmarks	15
Committee Cost Estimate	15
Congressional Budget Office Estimate	15
Federal Mandates Statement	16
Advisory Committee Statement	16
Applicability to Legislative Branch	17
Section-by-Section Analysis of Legislation	17
Changes in Existing Law Made by the Bill, as Reported	34
Dissenting Views	42

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Federal Communications Commission Process Reform Act of 2012”.

SEC. 2. FCC PROCESS REFORM.

(a) IN GENERAL.—Title I of the Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended by inserting after section 12 the following new section:

“SEC. 13. TRANSPARENCY AND EFFICIENCY.

“(a) RULEMAKING REQUIREMENTS.—

“(1) REQUIREMENTS FOR NOTICES OF PROPOSED RULEMAKING.—The Commission may not issue a notice of proposed rulemaking unless the Commission provides for a period of not less than 30 days for the submission of comments and an additional period of not less than 30 days for the submission of reply comments on such notice and the Commission includes in such notice the following:

“(A) Either—

“(i) an identification of—

“(I) a notice of inquiry, a prior notice of proposed rulemaking, or a notice on a petition for rulemaking issued by the Commission during the 3-year period preceding the issuance of the notice of proposed rulemaking concerned and of which such notice is a logical outgrowth; or

“(II) an order of a court reviewing action by the Commission or otherwise directing the Commission to act that was issued by the court during the 3-year period preceding the issuance of the notice of proposed rulemaking concerned and in response to which such notice is being issued; or

“(ii) a finding (together with a brief statement of reasons therefor)—

“(I) that the proposed rule or the proposed amendment of an existing rule will not impose additional burdens on industry or consumers; or

“(II) for good cause, that a notice of inquiry is impracticable, unnecessary, or contrary to the public interest.

“(B) The specific language of the proposed rule or the proposed amendment of an existing rule.

“(C) In the case of a proposal to create a program activity, proposed performance measures for evaluating the effectiveness of the program activity.

“(D) In the case of a proposal to substantially change a program activity—

“(i) proposed performance measures for evaluating the effectiveness of the program activity as proposed to be changed; or

“(ii) a proposed finding that existing performance measures will effectively evaluate the program activity as proposed to be changed.

“(2) REQUIREMENTS FOR RULES.—Except as provided in the 3rd sentence of section 553(b) of title 5, United States Code, the Commission may not adopt or amend a rule unless—

“(A) the specific language of the adopted rule or the amendment of an existing rule is a logical outgrowth of the specific language of a proposed rule or a proposed amendment of an existing rule included in a notice of proposed rulemaking, as described in subparagraph (B) of paragraph (1);

“(B) such notice of proposed rulemaking—

“(i) was issued in compliance with such paragraph and during the 3-year period preceding the adoption of the rule or the amendment of an existing rule; and

“(ii) is identified in the order making the adoption or amendment;

“(C) in the case of the adoption of a rule or the amendment of an existing rule that may have an economically significant impact, the order contains—

“(i) an identification and analysis of the specific market failure, actual consumer harm, burden of existing regulation, or failure of public institutions that warrants the adoption or amendment; and

“(ii) a reasoned determination that the benefits of the adopted rule or the amendment of an existing rule justify its costs (recognizing that some benefits and costs are difficult to quantify), taking into account alternative forms of regulation and the need to tailor regulation to impose the least burden on society, consistent with obtaining regulatory objectives;

“(D) in the case of the adoption of a rule or the amendment of an existing rule that creates a program activity, the order contains performance measures for evaluating the effectiveness of the program activity; and

“(E) in the case of the adoption of a rule or the amendment of an existing rule that substantially changes a program activity, the order contains—

“(i) performance measures for evaluating the effectiveness of the program activity as changed; or

“(ii) a finding that existing performance measures will effectively evaluate the program activity as changed.

“(3) DATA FOR PERFORMANCE MEASURES.—The Commission shall develop a performance measure or proposed performance measure required by this subsection to rely, where possible, on data already collected by the Commission.

“(b) ADEQUATE DELIBERATION BY COMMISSIONERS.—The Commission shall by rule establish procedures for—

“(1) informing all Commissioners of a reasonable number of options available to the Commission for resolving a petition, complaint, application, rulemaking, or other proceeding;

“(2) ensuring that all Commissioners have adequate time, prior to being required to decide a petition, complaint, application, rulemaking, or other proceeding (including at a meeting held pursuant to section 5(d)), to review the proposed Commission decision document, including the specific language of any proposed rule or any proposed amendment of an existing rule; and

“(3) publishing the text of agenda items to be voted on at an open meeting in advance of such meeting so that the public has the opportunity to read the text before a vote is taken.

“(c) NONPUBLIC COLLABORATIVE DISCUSSIONS.—

“(1) IN GENERAL.—Notwithstanding section 552b of title 5, United States Code, a bipartisan majority of Commissioners may hold a meeting that is closed to the public to discuss official business if—

“(A) a vote or any other agency action is not taken at such meeting;

“(B) each person present at such meeting is a Commissioner, an employee of the Commission, a member of a joint board established under section 410, or a person on the staff of such a joint board; and

“(C) an attorney from the Office of General Counsel of the Commission is present at such meeting.

“(2) DISCLOSURE OF NONPUBLIC COLLABORATIVE DISCUSSIONS.—Not later than 2 business days after the conclusion of a meeting held under paragraph (1), the Commission shall publish a disclosure of such meeting, including—

“(A) a list of the persons who attended such meeting; and

“(B) a summary of the matters discussed at such meeting, except for such matters as the Commission determines may be withheld under section 552b(c) of title 5, United States Code.

“(3) PRESERVATION OF OPEN MEETINGS REQUIREMENTS FOR AGENCY ACTION.—Nothing in this subsection shall limit the applicability of section 552b of title 5, United States Code, with respect to a meeting of Commissioners other than that described in paragraph (1).

“(d) INITIATION OF ITEMS BY BIPARTISAN MAJORITY.—The Commission shall by rule establish procedures for allowing a bipartisan majority of Commissioners to—

“(1) direct Commission staff to draft an order, decision, report, or action for review by the Commission;

“(2) require Commission approval of an order, decision, report, or action with respect to a function of the Commission delegated under section 5(c)(1); and

“(3) place an order, decision, report, or action on the agenda of an open meeting.

“(e) PUBLIC REVIEW OF CERTAIN REPORTS AND EX PARTE COMMUNICATIONS.—

“(1) IN GENERAL.—Except as provided in paragraph (2), the Commission may not rely, in any order, decision, report, or action, on—

“(A) a statistical report or report to Congress, unless the Commission has published and made such report available for comment for not less than a 30-day period prior to the adoption of such order, decision, report, or action; or

“(B) an ex parte communication or any filing with the Commission, unless the public has been afforded adequate notice of and opportunity to respond to such communication or filing, in accordance with procedures to be established by the Commission by rule.

“(2) EXCEPTION.—Paragraph (1) does not apply when the Commission for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the order, decision, report, or action) that publication or availability of a report under subparagraph (A) of such paragraph or notice of and opportunity

to respond to an ex parte communication under subparagraph (B) of such paragraph are impracticable, unnecessary, or contrary to the public interest.

“(f) PUBLICATION OF STATUS OF CERTAIN PROCEEDINGS AND ITEMS.—The Commission shall by rule establish procedures for publishing the status of all open rule-making proceedings and all proposed orders, decisions, reports, or actions on circulation for review by the Commissioners, including which Commissioners have not cast a vote on an order, decision, report, or action that has been on circulation for more than 60 days.

“(g) DEADLINES FOR ACTION.—The Commission shall by rule establish deadlines for any Commission order, decision, report, or action for each of the various categories of petitions, applications, complaints, and other filings seeking Commission action, including filings seeking action through authority delegated under section 5(c)(1).

“(h) PROMPT RELEASE OF CERTAIN REPORTS AND DECISION DOCUMENTS.—

“(1) STATISTICAL REPORTS AND REPORTS TO CONGRESS.—

“(A) RELEASE SCHEDULE.—Not later than January 15th of each year, the Commission shall identify, catalog, and publish an anticipated release schedule for all statistical reports and reports to Congress that are regularly or intermittently released by the Commission and will be released during such year.

“(B) PUBLICATION DEADLINES.—The Commission shall publish each report identified in a schedule published under subparagraph (A) not later than the date indicated in such schedule for the anticipated release of such report.

“(2) DECISION DOCUMENTS.—The Commission shall publish each order, decision, report, or action not later than 7 days after the date of the adoption of such order, decision, report, or action.

“(3) EFFECT IF DEADLINES NOT MET.—

“(A) NOTIFICATION OF CONGRESS.—If the Commission fails to publish an order, decision, report, or action by a deadline described in paragraph (1)(B) or (2), the Commission shall, not later than 7 days after such deadline and every 14 days thereafter until the publication of the order, decision, report, or action, notify by letter the chairpersons and ranking members of the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate. Such letter shall identify such order, decision, report, or action, specify the deadline, and describe the reason for the delay. The Commission shall publish such letter.

“(B) NO IMPACT ON EFFECTIVENESS.—The failure of the Commission to publish an order, decision, report, or action by a deadline described in paragraph (1)(B) or (2) shall not render such order, decision, report, or action ineffective when published.

“(i) BIENNIAL SCORECARD REPORTS.—

“(1) IN GENERAL.—For the 6-month period beginning on January 1st of each year and the 6-month period beginning on July 1st of each year, the Commission shall prepare a report on the performance of the Commission in conducting its proceedings and meeting the deadlines established under subsections (g), (h)(1)(B), and (h)(2).

“(2) CONTENTS.—Each report required by paragraph (1) shall contain detailed statistics on such performance, including, with respect to each Bureau of the Commission—

“(A) in the case of performance in meeting the deadlines established under subsection (g), with respect to each category established under such subsection—

“(i) the number of petitions, applications, complaints, and other filings seeking Commission action that were pending on the last day of the period covered by such report;

“(ii) the number of filings described in clause (i) that were not resolved by the deadlines established under such subsection and the average length of time such filings have been pending; and

“(iii) for petitions, applications, complaints, and other filings seeking Commission action that were resolved during such period, the average time between initiation and resolution and the percentage resolved by the deadlines established under such subsection;

“(B) in the case of proceedings before an administrative law judge—

“(i) the number of such proceedings completed during such period; and

“(ii) the number of such proceedings pending on the last day of such period; and

“(C) the number of independent studies or analyses published by the Commission during such period.

“(3) PUBLICATION AND SUBMISSION.—The Commission shall publish and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate each report required by paragraph (1) not later than the date that is 30 days after the last day of the period covered by such report.

“(j) TRANSACTION REVIEW STANDARDS.—

“(1) IN GENERAL.—The Commission shall condition its approval of a transfer of lines, a transfer of licenses, or any other transaction under section 214, 309, or 310 or any other provision of this Act only if—

“(A) the imposed condition is narrowly tailored to remedy a harm that arises as a direct result of the specific transfer or specific transaction that this Act empowers the Commission to review; and

“(B) the Commission could impose a similar requirement under the authority of a specific provision of law other than a provision empowering the Commission to review a transfer of lines, a transfer of licenses, or other transaction.

“(2) EXCLUSIONS.—In reviewing a transfer of lines, a transfer of licenses, or any other transaction under section 214, 309, or 310 or any other provision of this Act, the Commission may not consider a voluntary commitment of a party to such transfer or transaction unless the Commission could adopt that voluntary commitment as a condition under paragraph (1).

“(k) ACCESS TO CERTAIN INFORMATION ON COMMISSION’S WEBSITE.—The Commission shall provide direct access from the homepage of its website to—

“(1) detailed information regarding—

“(A) the budget of the Commission for the current fiscal year;

“(B) the appropriations for the Commission for such fiscal year; and

“(C) the total number of full-time equivalent employees of the Commission; and

“(2) the performance plan most recently made available by the Commission under section 1115(b) of title 31, United States Code.

“(l) FEDERAL REGISTER PUBLICATION.—

“(1) IN GENERAL.—In the case of any document adopted by the Commission that the Commission is required, under any provision of law, to publish in the Federal Register, the Commission shall, not later than the date described in paragraph (2), complete all Commission actions necessary for such document to be so published.

“(2) DATE DESCRIBED.—The date described in this paragraph is the earlier of—

“(A) the day that is 45 days after the date of the release of the document;

or

“(B) the day by which such actions must be completed to comply with any deadline under any other provision of law.

“(3) NO EFFECT ON DEADLINES FOR PUBLICATION IN OTHER FORM.—In the case of a deadline that does not specify that the form of publication is publication in the Federal Register, the Commission may comply with such deadline by publishing the document in another form. Such other form of publication does not relieve the Commission of any Federal Register publication requirement applicable to such document, including the requirement of paragraph (1).

“(m) CONSUMER COMPLAINT DATABASE.—

“(1) IN GENERAL.—In evaluating and processing consumer complaints, the Commission shall present information about such complaints in a publicly available, searchable database on its website that—

“(A) facilitates easy use by consumers; and

“(B) to the extent practicable, is sortable and accessible by—

“(i) the date of the filing of the complaint;

“(ii) the topic of the complaint;

“(iii) the party complained of; and

“(iv) other elements that the Commission considers in the public interest.

“(2) DUPLICATIVE COMPLAINTS.—In the case of multiple complaints arising from the same alleged misconduct, the Commission shall be required to include only information concerning one such complaint in the database described in paragraph (1).

“(n) FORM OF PUBLICATION.—

“(1) IN GENERAL.—In complying with a requirement of this section to publish a document, the Commission shall publish such document on its website, in ad-

dition to publishing such document in any other form that the Commission is required to use or is permitted to and chooses to use.

“(2) EXCEPTION.—The Commission shall by rule establish procedures for redacting documents required to be published by this section so that the published versions of such documents do not contain—

“(A) information the publication of which would be detrimental to national security, homeland security, law enforcement, or public safety; or

“(B) information that is proprietary or confidential.

“(o) DEFINITIONS.—In this section:

“(1) AMENDMENT.—The term ‘amendment’ includes, when used with respect to an existing rule, the deletion of such rule.

“(2) BIPARTISAN MAJORITY.—The term ‘bipartisan majority’ means, when used with respect to a group of Commissioners, that such group—

“(A) is a group of 3 or more Commissioners; and

“(B) includes, for each political party of which any Commissioner is a member, at least 1 Commissioner who is a member of such political party, and, if any Commissioner has no political party affiliation, at least 1 unaffiliated Commissioner.

“(3) ECONOMICALLY SIGNIFICANT IMPACT.—The term ‘economically significant impact’ means an effect on the economy of \$100,000,000 or more annually or a material adverse effect on the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

“(4) PERFORMANCE MEASURE.—The term ‘performance measure’ means an objective and quantifiable outcome measure or output measure (as such terms are defined in section 1115 of title 31, United States Code).

“(5) PROGRAM ACTIVITY.—The term ‘program activity’ has the meaning given such term in section 1115 of title 31, United States Code, except that such term also includes any annual collection or distribution or related series of collections or distributions by the Commission of an amount that is greater than or equal to \$100,000,000.

“(6) OTHER DEFINITIONS.—The terms ‘agency action’, ‘ex parte communication’, and ‘rule’ have the meanings given such terms in section 551 of title 5, United States Code.”.

(b) EFFECTIVE DATE AND IMPLEMENTING RULES.—

(1) EFFECTIVE DATE.—

(A) IN GENERAL.—The requirements of section 13 of the Communications Act of 1934, as added by subsection (a), shall apply beginning on the date that is 6 months after the date of the enactment of this Act.

(B) PRIOR NOTICES OF PROPOSED RULEMAKING.—If the Federal Communications Commission identifies under paragraph (2)(B)(ii) of subsection (a) of such section 13 a notice of proposed rulemaking issued prior to the date of the enactment of this Act—

(i) such notice shall be deemed to have complied with paragraph (1) of such subsection; and

(ii) if such notice did not contain the specific language of a proposed rule or a proposed amendment of an existing rule, paragraph (2)(A) of such subsection shall be satisfied if the adopted rule or the amendment of an existing rule is a logical outgrowth of such notice.

(C) SCHEDULES AND REPORTS.—Notwithstanding subparagraph (A), subsections (h)(1) and (i) of such section shall apply with respect to 2013 and any year thereafter.

(2) RULES.—The Federal Communications Commission shall promulgate the rules necessary to carry out such section not later than 1 year after the date of the enactment of this Act.

(3) PROCEDURES FOR ADOPTING RULES.—Notwithstanding paragraph (1)(A), in promulgating rules to carry out such section, the Federal Communications Commission shall comply with the requirements of subsections (a) and (h)(2) of such section.

SEC. 3. CATEGORIZATION OF TCPA INQUIRIES AND COMPLAINTS IN QUARTERLY REPORT.

In compiling its quarterly report with respect to informal consumer inquiries and complaints, the Federal Communications Commission may not categorize an inquiry or complaint with respect to section 227 of the Communications Act of 1934 (47 U.S.C. 227) as being a wireline inquiry or complaint or a wireless inquiry or complaint unless the party whose conduct is the subject of the inquiry or complaint is a wireline carrier or a wireless carrier, respectively.

SEC. 4. EFFECT ON OTHER LAWS.

Nothing in this Act or the amendment made by this Act shall relieve the Federal Communications Commission from any obligations under title 5, United States Code, except where otherwise expressly provided.

PURPOSE AND SUMMARY

H.R. 3309, the “Federal Communications Commission Process Reform Act of 2012,” requires the Federal Communications Commission (FCC) to be more transparent and methodical in determining whether to intervene in the communications marketplace, in dealing with consumers and regulated parties, and in reviewing transactions. Specifically, the legislation requires the FCC:

- to survey the marketplace through a notice of inquiry before proposing new rules that would increase costs for businesses and consumers;
- to conduct another notice of inquiry before proposing rules if three years have elapsed since the last inquiry, to make sure the FCC does not act on a stale record;
- to publish the specific text of proposed rules, so the public and industry know what is being considered and have adequate information to provide input;
- to allow the public and industry adequate time both to review proposed rules, ex parte filings and reports, as well as to provide comment;
- to identify a market failure or consumer harm and conduct a cost benefit analysis before adopting economically significant rules that cost more than \$100 million;
- to create performance measures to evaluate the effectiveness of large programs that cost more than \$100 million, such as the Universal Service Fund; and
- to set shot clocks and schedules for issuing decisions and to report to Congress on how well it is abiding by them, so the public and industry know when issues will be resolved.

The bill has received widespread support, including from the U.S. Chamber of Commerce, the US Telecom Association, the National Telecommunications Cooperative Association, the National Cable and Telecommunications Association, CTIA—The Wireless Association, the National Association of Broadcasters, AT&T, Verizon, and the National Association of Regulatory Utility Commissioners. As the rest of this report shows, it also borrows ideas from a number of academics and public interest groups.

BACKGROUND AND NEED FOR LEGISLATION

The communications and technology sector is among the most competitive and innovative of our economy. From fiber optics to 4G wireless service, from the smartphone to the tablet to the connected TV, this sector has been creating new services and new devices—and the high-quality jobs that come with high-tech innovation and investment—despite the economic doldrums our country is caught in. In 2010, the industry invested \$66 billion to deploy broadband infrastructure, \$3 billion more than in 2009, totaling more than half a trillion dollars invested to upgrade their networks over the past 8 years. See US Telecom, Broadband Industry Stats, Broadband Investment, <http://www.ustelecom.org/broadband-industry/broadband-industry-stats/investment>. America is now the

world leader in wireless LTE network deployment. To ensure it doesn't stall that economic engine, the FCC should not only strive to be the most open and transparent agency in the Federal government, but should also engage in rigorous analyses demonstrating the need for regulation before intervening in the marketplace.

It does not always do so, and the Committee on Energy and Commerce has long concerned itself with shortcomings in the processes and procedures of the agency under both Republican and Democrat-led commissions. For example, in the 110th Congress, the Committee and its Subcommittee on Oversight and Investigations investigated the FCC's procedures, and the Committee ultimately released a report documenting abuses at the agency. See House Committee on Energy and Commerce, *Deception and Distrust: The Federal Communications Commission under Chairman Kevin J. Martin*, 110th Cong. (2008). In the 111th Congress, Rep. Joe Barton introduced H.R. 2183, a bill to improve public participation and overall decisionmaking at the FCC, which was the origin of many of the ideas in H.R. 3309.

Criticism of the FCC's processes has not been isolated to Capitol Hill. In 2008, the National Association of Regulatory Utility Commissioners wrote an open letter to President Obama's transition team, highlighting the need for structural and procedural reforms at the FCC and suggesting 13 separate reforms to consider. See Letter from Frederick Butler, President, NARUC, to Susan Crawford, Visiting Professor, Yale Law School, Obama-Biden Transition Team on the FCC (Dec. 12, 2008), available at <http://www.naruc.org/Testimony/08%201212%20RV%20FCC%20Transition%20letter.pdf>. In 2009, then-Professor Philip Weiser wrote that "the great weight of opinion is that the FCC has always operated in a suboptimal fashion and is in dire need of institutional reform." Philip J. Weiser, *FCC Reform and the Future of Telecommunications Policy* at 2 (Jan. 5, 2009), available at <http://fcc-reform.org/paper/fcc-reform-and-future-telecommunications-policy>. And in 2010, Public Knowledge called for a "shock to the system" and "a surrender of discretion by FCC leadership and a move away from unpredictable and ad hoc decisionmaking." Michael Weinberg and Gigi B. Sohn, *An FCC for the Internet Age: Recommendations for Reforming the Federal Communications Commission* (Mar. 5, 2010), available at <http://go.usa.gov/PyH>.

Some opponents of the bill argue the FCC process can be improved non-legislatively with congressional oversight. Yet in 1991, then-Chairman John Dingell raised many of the same process concerns H.R. 3309 seeks to address. See Letter from John D. Dingell, Chairman, Committee on Energy and Commerce, to the Honorable Alfred C. Sikes, Chairman, Federal Communications Commission (May 21, 1991), quoted in *FCC Process Reform: Hearing before the Subcommittee on Communications and Technology*, 112th Cong., at 79–81 (May 13, 2011). It would appear that two decades of Congressional oversight alone has not succeeded in remediating the problems.

We do note that FCC Chairman Julius Genachowski has improved many of the processes of the FCC, but only legislation can ensure that these reforms remain intact from one administration to the next. H.R. 3309 is the fruits of the Subcommittee on Communications and Technology's own ten-month, open and transparent

legislative process to secure these improvements and build upon them.

Throughout this process, we sought to reach common ground by accommodating any legitimate concerns by the bill's critics. To avoid micromanaging the Commission, in many cases the legislation asks the FCC to adopt its own rules implementing the bill's provisions. In response to arguments that the bill creates procedural hurdles in small matters that do not warrant them and in emergencies where time is of the essence, we note that the legislation incorporates the existing process waiver standard in the Administrative Procedures Act (APA). It even adds a waiver standard where the APA provision would not apply, creates exceptions when proposed rules would not burden consumers or industry, and takes a page out of executive orders from Presidents Clinton and Obama by limiting some applications to economically significant rules that would cost more than \$100 million.

To address concerns about litigation risk, we added definitions to provide clarity and incorporated standards from existing case law, executive orders, and the Government Performance Results Act of 1993. Better process is also likely to reduce process-based appeals, not increase them. It should also lead to better analyses, making decisions less susceptible to substantive challenges. If potential litigation risk were reason not to pass a law, no new law would ever be passed. Every legislative improvement must start somewhere. Moreover, much of what the FCC does is litigated because of what's at stake; this bill is not likely to cause litigation where there would not already be lawsuits.

Opponents of the bill say we should simply ask the FCC to conduct its own inquiry into whether to reform itself. Such an approach would likely only be productive during a commission that was already raising the bar on process, where it would be needed least and, unlike a statutory change, could not bind future commissions. Opponents also suggest we drop most of the changes, leaving little more than the "sunshine" reform. Although sunshine reform plays a role in this bill in conjunction with other reforms, allowing private meetings among FCC Commissioners and doing nothing else would be a strange way to bring transparency to the FCC.

Some opponents of the bill also argue any process reform should apply to all agencies, not just one. Waiting for reform of the entire APA is neither practical nor necessary. While the APA sets the floor for good practice, there is no reason not to ask this agency to do more, especially since it impacts so much of the economy, and the APA has not prevented recent bad practices. We note that the Communications Act also already contains FCC-specific process requirements and that even opponents of the bill support an FCC sunshine reform bill, which would be agency specific.

The communications industry is one of the few sectors still firing on all cylinders in this economy; the market is more competitive than it has ever been before, and the underlying technologies and business models are evolving at a rapid and accelerating pace. The FCC cannot know if intervention is appropriate unless it has rigorously examined the marketplace and afforded the public and affected parties adequate opportunity to review proposals and provide input. Consumers, small businesses, and outside-the-beltway stakeholders in particular do not have the regulatory lawyers need-

ed for rushed review of proceedings; the only way to get their input is to give them time to provide feedback on well delineated proposals. Before it starts intervening, the FCC should make sure it has a full understanding of the state of competition and current technologies.

HEARINGS

The Energy and Commerce Committee has long been concerned about the processes of the FCC and has had a number of oversight hearings in recent Congresses. In the 110th Congress, the Subcommittee on Telecommunications and the Internet held two oversight hearings of the FCC, one on March 14, 2007 and a second on July 24, 2007. At each hearing, the Subcommittee received testimony from Chairman Kevin J. Martin, Commissioner Michael J. Copps, Commissioner Robert M. McDowell, Commissioner Jonathan S. Adelstein, and Commissioner Deborah Taylor Tate.

During the 111th Congress, the Subcommittee on Telecommunications and the Internet held an oversight hearing on September 17, 2009, entitled "Oversight of the Federal Communications Commission." The Subcommittee received testimony from Chairman Julius Genachowski, Commissioner Michael J. Copps, Commissioner Robert M. McDowell, Commissioner Mignon Clyburn, and Commissioner Meredith Attwell Baker.

The Subcommittee on Communications and Technology held an oversight hearing on May 13, 2011, entitled "FCC Process Reform." The Subcommittee received testimony from FCC Chairman Julius Genachowski, Commissioner Michael J. Copps, Commissioner Robert M. McDowell, and Commissioner Mignon Clyburn.

The Subcommittee on Communications and Technology held a legislative hearing on June 22, 2011, entitled "Reforming FCC Process." The Subcommittee examined a staff discussion draft of legislation to reform the FCC's processes. The Subcommittee received testimony from the Honorable John Sununu, Honorary Co-Chair of Broadband for America; Kathleen Abernathy, Chief Legal Officer and Executive Vice President of Frontier Communications; Mark Cooper, Research Director of the Consumer Federation of America; Randolph J. May, President of the Free State Foundation; Brad Ramsay, General Counsel of the National Association of Regulatory Utility Commissioners; and Ronald Levin, William R. Orthwein Distinguished Professor of Law at Washington University School of Law.

COMMITTEE CONSIDERATION

Representative Greg Walden, together with Rep. Adam Kinzinger, introduced H.R. 3309 on November 2, 2011.

On November 16, 2011, the Subcommittee on Communications and Technology met in open markup session and favorably reported the bill, as amended, to the full committee by a record vote of 14 yeas and 9 nays.

On March 6, 2012, the Committee on Energy and Commerce met in open markup session and favorably reported the bill, as amended, to the House by a record vote of 31 yeas and 16 nays.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto.

At the November 16, 2011, open markup session of the Subcommittee on Communications and Technology, a motion by Ms. Eshoo to amend H.R. 3309 regarding a substitute amendment was defeated by a record vote of 10 yeas and 14 nays. A motion by Mr. Walden to order H.R. 3309 reported to the Committee, as amended, was agreed to by a record vote of 14 yeas and 9 nays.

At the March 6, 2012, open markup session of the Committee on Energy and Commerce, a motion by Ms. Eshoo to amend H.R. 3309 regarding a FCC rulemaking to consider procedural changes to its rules, reporting requirements, and nonpublic collaborative discussions was defeated by a record vote of 18 yeas to 32 nays. A second motion by Ms. Eshoo to amend H.R. 3309 regarding certifications identifying certain donors of sponsors of political programming placed in public inspection files was defeated by a record vote of 16 yeas to 30 nays. A motion by Mr. Upton to order H.R. 3309 reported to the House, as amended, was agreed to by a record vote of 31 yeas and 16 nays.

The following reflects the recorded votes taken during the Committee consideration, including the names of those Members voting for and against.

**COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS
ROLL CALL VOTE # 86**

BILL: H.R. 3309, the "Federal Communications Commission Process Reform Act"

AMENDMENT: An amendment offered by Ms. Eshoo, No. 4, to strike the provisions of the bill and substitute a rulemaking, periodic review, reports on compliance with Executive Order 13579 and certain procedural targets, and nonpublic collaborative discussions.

DISPOSITION: NOT AGREED TO, by a roll call vote of 18 yeas and 32 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Waxman	X		
Mr. Barton		X		Mr. Dingell	X		
Mr. Stearns		X		Mr. Markey			
Mr. Whitfield		X		Mr. Towns	X		
Mr. Shimkus		X		Mr. Pallone	X		
Mr. Pitts		X		Mr. Rush			
Mrs. Bono Mack		X		Ms. Eshoo	X		
Mr. Walden		X		Mr. Engel	X		
Mr. Terry		X		Mr. Green	X		
Mr. Rogers		X		Ms. DeGette	X		
Mrs. Myrick		X		Mrs. Capps	X		
Mr. Sullivan		X		Mr. Doyle	X		
Mr. Murphy		X		Ms. Schakowsky	X		
Mr. Burgess		X		Mr. Gonzalez	X		
Mrs. Blackburn		X		Mr. Inslee	X		
Mr. Bilbray		X		Ms. Baldwin			
Mr. Bass		X		Mr. Ross			
Mr. Gingrey		X		Mr. Matheson		X	
Mr. Scalise		X		Mr. Butterfield	X		
Mr. Latta		X		Mr. Barrow	X		
Mrs. McMorris Rodgers		X		Ms. Matsui	X		
Mr. Harper		X		Mrs. Christensen	X		
Mr. Lance		X		Ms. Castor	X		
Mr. Cassidy		X					
Mr. Guthrie		X					
Mr. Olson		X					
Mr. McKinley		X					
Mr. Gardner		X					
Mr. Pompeo		X					
Mr. Kinzinger		X					
Mr. Griffith		X					

03/06/2012

**COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS
ROLL CALL VOTE # 87**

BILL: H.R. 3309, the "Federal Communications Commission Process Reform Act"

AMENDMENT: An amendment offered by Ms. Eshoo, No. 7, to require broadcasters, cable operators, and satellite providers to include certifications listing donors of more than \$10,000 from sponsors of political programming.

DISPOSITION: NOT AGREED TO, by a roll call vote of 16 yeas and 30 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Waxman	X		
Mr. Barton		X		Mr. Dingell	X		
Mr. Stearns		X		Mr. Markey			
Mr. Whitfield		X		Mr. Towns			
Mr. Shimkus		X		Mr. Pallone			
Mr. Pitts		X		Mr. Rush			
Mrs. Bono Mack		X		Ms. Eshoo	X		
Mr. Walden		X		Mr. Engel	X		
Mr. Terry		X		Mr. Green	X		
Mr. Rogers		X		Ms. DeGette	X		
Mrs. Myrick		X		Mrs. Capps	X		
Mr. Sullivan				Mr. Doyle	X		
Mr. Murphy		X		Ms. Schakowsky	X		
Mr. Burgess		X		Mr. Gonzalez	X		
Mrs. Blackburn		X		Mr. Inslee	X		
Mr. Bilbray		X		Ms. Baldwin			
Mr. Bass		X		Mr. Ross			
Mr. Gingrey		X		Mr. Matheson	X		
Mr. Scalise		X		Mr. Butterfield	X		
Mr. Latta		X		Mr. Barrow		X	
Mrs. McMorris Rodgers				Ms. Matsui	X		
Mr. Harper		X		Mrs. Christensen	X		
Mr. Lance		X		Ms. Castor	X		
Mr. Cassidy		X					
Mr. Guthrie		X					
Mr. Olson		X					
Mr. McKinley		X					
Mr. Gardner		X					
Mr. Pompeo		X					
Mr. Kinzinger		X					
Mr. Griffith		X					

03/06/2012

**COMMITTEE ON ENERGY AND COMMERCE -- 112TH CONGRESS
ROLL CALL VOTE # 88**

BILL: H.R. 3309, the "Federal Communications Commission Process Reform Act"

AMENDMENT: A motion by Mr. Upton to order H.R. 3309 favorably reported to the House, as amended.
(Final Passage)

DISPOSITION: AGREED TO, as amended, by a roll call vote of 31 yeas and 16 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton	X			Mr. Waxman		X	
Mr. Barton	X			Mr. Dingell		X	
Mr. Stearns	X			Mr. Markey			
Mr. Whitfield	X			Mr. Towns		X	
Mr. Shimkus	X			Mr. Pallone			
Mr. Pitts	X			Mr. Rush		X	
Mrs. Bono Mack	X			Ms. Eshoo		X	
Mr. Walden	X			Mr. Engel		X	
Mr. Terry	X			Mr. Green		X	
Mr. Rogers	X			Ms. DeGette		X	
Mrs. Myrick	X			Mrs. Capps		X	
Mr. Sullivan	X			Mr. Doyle		X	
Mr. Murphy	X			Ms. Schakowsky		X	
Mr. Burgess	X			Mr. Gonzalez		X	
Mrs. Blackburn	X			Mr. Inslee		X	
Mr. Bilbray	X			Ms. Baldwin			
Mr. Bass	X			Mr. Ross			
Mr. Gingrey				Mr. Matheson	X		
Mr. Scalise	X			Mr. Butterfield			
Mr. Latta	X			Mr. Barrow	X		
Mrs. McMorris Rodgers				Ms. Matsui		X	
Mr. Harper	X			Mrs. Christensen		X	
Mr. Lance	X			Ms. Castor		X	
Mr. Cassidy	X						
Mr. Guthrie	X						
Mr. Olson	X						
Mr. McKinley	X						
Mr. Gardner	X						
Mr. Pompeo	X						
Mr. Kinzinger	X						
Mr. Griffith	X						

03/06/2012

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held oversight and legislative hearings and made findings that are reflected in this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

The goals and objectives of H.R. 3309, the “Federal Communications Commission Process Reform Act of 2012,” are to require the Commission to be more transparent and methodical in determining whether to intervene in the communications marketplace, in dealing with consumers and regulated parties, and in reviewing transactions. Among other things, H.R. 3309 would require the FCC to establish performance measures for its largest programs, like the Universal Service Fund and the Interstate Telecommunications Relay Service Fund, and report on a biannual basis on its own performance in resolving petitions, applications, and complaints and conducting rulemakings.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY AND
TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 3309, the “Federal Communications Commission Process Reform Act of 2012,” would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

EARMARKS

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives, the Committee finds that H.R. 3309, the “Federal Communications Commission Process Reform Act of 2012,” contains no earmarks, limited tax benefits, or limited tariff benefits.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate provided by the Congressional Budget Office. Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

MARCH 19, 2012.

Hon. FRED UPTON,
*Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3309, the Federal Communications Commission Process Reform Act of 2012.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 3309—Federal Communications Commission Process Reform Act of 2012

H.R. 3309 would make a number of changes to procedures that the Federal Communications Commission (FCC) follows in its rule-making process. The bill also would require the FCC to create a database, made available to the public, that contains information about complaints made by consumers.

The bill would require all notices of proposed rulemakings (NPRMs) to be preceded by a notice of inquiry and would require the agency to allow 60 days for public comment prior to issuing an NPRM. Currently, about one-third of the agency's NPRMs follow a notice of inquiry and the length of time allotted for public comment varies. H.R. 3309 also would require a broader review of any rules expected to have an economic impact greater than \$100 million and a determination that the benefits of such a rule justify its cost. Further, the bill would make changes to the timing and availability of certain reports proposed by the FCC.

Based on information from the FCC, CBO estimates that the agency would require 20 additional staff positions to handle the new rulemaking, reporting, and analysis activities required under the bill. CBO estimates that implementing the provisions of H.R. 3309 would cost \$26 million over the 2013–2017 period, assuming appropriation of the necessary amounts, for additional personnel and information technology expenses. Under current law, the FCC is authorized to collect fees sufficient to offset the cost of its regulatory activities each year; therefore, CBO estimates that the net cost to implement the provisions of H.R. 3309 would not be significant, assuming annual appropriation actions consistent with the agency's authorities. Enacting H.R. 3309 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 3309 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

To the extent that the FCC would increase annual fee collections to offset the costs of its additional regulatory activities, the bill could impose a private-sector mandate on some commercial entities regulated by the FCC. Based on information from the FCC, CBO estimates that the cost of the mandate would be small, and fall well below the annual threshold established in UMRA for private-sector mandates (\$146 million in 2012, adjusted annually for inflation).

The CBO staff contact for this estimate is Susan Willie. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF LEGISLATION

Section 1

Section 1 defines the short title as “Federal Communications Commission Process Reform Act of 2012.”

Section 2(a)

Section 2(a) adds section 13 to the Communications Act.

New Subsection 13(a).—Rulemaking Reforms. This subsection reforms the Commission’s rulemaking processes, applying the rulemaking reforms U.S. presidents have applied to the executive agencies as well as other best practices.

First, this subsection seeks to ensure that the Commission has fresh information about the communications marketplace before it prescribes new rules that would burden consumers or the industry. This subsection accomplishes this goal by requiring the Commission to survey the marketplace before initiating a new rulemaking; to take action, if any, on that information within three years; and to take any action on information gathered in response to Notices of Proposed Rulemaking within three years, as well. The requirement to survey the marketplace parallels the requirement President Obama has imposed on executive agencies. Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011) (“Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.”). It is a requirement endorsed by President Obama’s Jobs Council. President’s Council on Jobs and Competitiveness, Road Map to Renewal: 2011 Year-End Report at 43, *available at* http://files.jobs-council.com/files/2012/01/Jobscouncil_2011YearEndReport1.pdf. And at the Subcommittee on Communications and Technology’s May 13, 2011, hearing, then-Commissioner Michael Copps and Commissioner Robert McDowell both endorsed a Notice-of-Inquiry requirement, noting the need for flexibility to handle “crises and emergencies, terror attacks and things that demand expeditious action.” *FCC Process Reform: Hearing before the Subcommittee on Communications and Technology*, 112th Cong., at 87 (May 13, 2011). Following the suggestion of these Commissioners, this subsection incorporates exceptions from the Notice-of-Inquiry requirement in cases where the Commission finds that the proposed rules would not impose additional burdens on consumers or industry or where the Commission finds good cause (such as a national emergency) making compliance impossible or impractical. This subsection’s exception for good cause is intended to parallel the good cause exception contained in the APA, specifically the exception in the third sentence of section 553(b) of title 5, United States Code. This subsection provides additional flexibility to the FCC by allowing it to avoid issuing a Notice of Inquiry in certain other circumstances, such as when it does so in

direct response to a court remand or as a Further Notice of Proposed Rulemaking building upon an earlier Notice of Proposed Rulemaking (NPRM) on the same subject-matter.

Second, this subsection seeks to require that the public have a full and fair opportunity to review and comment on rules proposed by the Commission. In the past decade, the Commission has fallen into the habit of delineating only the broad brushstrokes of potential action in Notices of Proposed Rulemaking, without including the specific language of proposed rules. According to the Commission, NPRMs issued in the years before Chairman Genachowski's tenure included the text of proposed rules only 38 percent of the time. See House Energy and Commerce Committee, *Staff Report on the Workload of the Federal Communications Commission*, at 4 (Nov. 15, 2011), available at <http://go.usa.gov/PmJ>. As NARUC has put it: "The FCC frequently releases vague Notices of Proposed Rulemaking that fail to articulate proposed rules and read more like Notices of Inquiry by posing countless open-ended questions." Letter from Frederick Butler, President, NARUC, to Susan Crawford, Visiting Professor, Yale Law School, Obama-Biden Transition Team on the FCC (Dec. 12, 2008), available at <http://www.naruc.org/Testimony/08%201212%20RV%20FCC%20Transition%20letter.pdf>.

The inclusion of the specific text of proposed rules is "a critical step in facilitating meaningful discussion." Michael Weinberg and Gigi B. Sohn, *An FCC for the Internet Age: Recommendations for Reforming the Federal Communications Commission*, at 4 (Mar. 5, 2010), available at <http://go.usa.gov/PyH>. Without the text of the proposed rules, the public is left "with the challenge of guessing what issues are really important," which "undermines the opportunity for meaningful participation and effective deliberation." Philip J. Weiser, *FCC Reform and the Future of Telecommunications Policy* at 16–17 (Jan. 5, 2009), available at <http://fcc-reform.org/paper/fcc-reform-and-future-telecommunications-policy>.

Although Chairman Genachowski has shown substantial progress in this area—85 percent of NPRMs have contained the text of proposed rules during his tenure, see House Energy and Commerce Committee, *Staff Report on the Workload of the Federal Communications Commission*, at 3 (Nov. 15, 2011), available at <http://go.usa.gov/PmJ>—good government practices should not vary from administration to administration. The public deserves a Commission that can commit to "publishing the text of proposed rules sufficiently in advance of Commission meetings for both (i) the public to have a meaningful opportunity to comment and (ii) the Commissioners to have a meaningful opportunity to review such comments." See Letter from Rep. John D. Dingell, Chairman, Committee on Energy and Commerce, to the Honorable Kevin J. Martin, Chairman, Federal Communications Commission (Dec. 3, 2007). This subsection cements that commitment in law, requiring the FCC to include the text of proposed rules in NPRMs and requiring that any rules adopted by the Commission be the logical outgrowth of the rules proposed. This latter requirement is an adaptation of the logical-outgrowth test used by circuit courts to determine when an NPRM has not given parties fair notice of an agency's proposal. See, e.g., *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1221 (D.C. Circuit 1980),

cert. denied sub nom. Lead Industries Ass'n, Inc. v. Donovan, 453 U.S. 913 (1981). This subsection's codification of the logical-out-growth test complements the court precedent to create an administrable test to ensure that the specific text of the rules proposed by the FCC give adequate notice to the public for meaningful participation in the comment process.

Third, this subsection seeks to ensure that the public has adequate time to review proposed rules of the Commission. The need for adequate opportunity for public comment has been widely recognized in administrative law. The Administrative Conference of the United States has recommended that Congress require agencies offer comment periods of "no fewer than 30 days." ACUS, *Improving the Environment for Agency Rulemaking*, Recommendation No. 93-4. President Obama's executive order on regulatory reform ordered agencies to "afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days." Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011). More recently, the Administrative Conference has recommended that agencies offer commenters at least 60 days for significant regulatory actions and at least 30 days for all other rulemakings as well as a period for reply comments. ACUS, *Rulemaking Comments*, Recommendation No. 2011-2. This subsection responds to these concerns by requiring the Commission to provide parties at least 30 days each to comment and reply on proposed rules of the Commission. Compliance with this requirement should be feasible as 84 percent of NPRMs issued under Chairman Genachowski already provide a full 30 days for public comment, *see* House Energy and Commerce Committee, *Staff Report on the Workload of the Federal Communications Commission*, at 3-4 (Nov. 15, 2011), available at <http://go.usa.gov/PmJ>, and the Commission has rarely if ever adopted rules within 60 days of issuing a Notice of Proposed Rulemaking.

Fourth, this subsection seeks to apply some of the regulatory reforms that Presidents Ronald Reagan, William J. Clinton, George W. Bush, and Barack Obama directed for executive agencies to the FCC. President Obama's executive order, among other things, required that every executive agency "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)" and "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations." Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011). President Bush's executive order required each executive agency to "identify in writing the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions) that warrant new agency action." Exec. Order No. 13422, 72 Fed. Reg. 2763 (Jan. 18, 2007). And both of these executive orders built upon the two-level framework of President Clinton's executive order. For every agency rulemaking, that order required executive agencies to "identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action)" and "assess both the costs and

the benefits of the intended regulation and recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993). For significant regulatory actions, meaning in large part rules that would have “an annual effect on the economy of \$100 million or more,” that order required executive agencies to clear an independent review process administered by the Office of Information and Regulatory Affairs. *Id.* That independent review process requires the agency to conduct a regulatory impact analysis and go through a “demanding and sophisticated set of principles for policy analysis.” Response to Questions of Ronald M. Levin, William R. Orthwein Distinguished Professor of Law, *Reforming FCC Process: Hearing before the Subcommittee on Communications and Technology*, 112th Cong. (July 22, 2011).

President Obama has suggested that the regulatory principles applied to executive agencies should apply to independent agencies as well. Exec. Order No. 13579, 76 Fed. Reg. 41587 (July 11, 2011). Similarly, President Obama’s Jobs Council has recommended that “Congress should require [independent regulatory commissions] to conduct cost-benefit analysis for economically significant regulations,” including “regulatory impact analyses, coupled with some form of third-party regulatory review.” President’s Council on Jobs and Competitiveness, Road Map to Renewal: 2011 Year-End Report at 45, available at http://files.jobs-council.com/files/2012/01/Jobscouncil_2011YearEndReport1.pdf. Although full compliance with the executive orders may be desirable, this subsection takes a more moderate approach tailored to the specific circumstances of the Commission as an independent agency. Unlike the executive orders, this subsection does not impose any requirements on the FCC for rules that do not create an economically significant impact (although it would not preclude the FCC from following best practices in those cases). For rules with an economically significant impact, this subsection does not require the full regulatory impact analysis coupled with pre-approval by the Office of Information and Regulatory Affairs imposed on executive affairs. Instead, this subsection imposes on the FCC a problem-identification requirement drawn from the language of Executive Order 13422 and a cost-benefit assessment requirement drawn from the language of Executive Order 13563, accompanied with the potential for judicial review. Meaningful independent review by the courts rather than the executive branch is more appropriate for an independent agency like the FCC, and such review should reduce the burden on the FCC since it will only occur after the FCC adopts a new rule and if a stakeholder chooses to challenge that rule in court. This lighter-touch approach is furthermore intended to give the FCC flexibility to carry out the Communications Act, including prescribing rules to guard against classic market failures that may cause actual consumer harms, to protect public safety, and to guard against unwarranted interference among spectrum holders. This approach should encourage the FCC to engage in as rigorous an analysis of the costs of its proposed regulations and viable alternatives to it as its resources will allow, without constricting it to one particular approach or another. This lighter-touch approach is also more appropriate given independent review by the courts, which are not as

steeped in economically rigorous analysis as the Office of Information and Regulatory Affairs.

Fifth and finally, this subsection seeks to increase the transparency of the Commission's largest programs, such as the Universal Service Fund and the Interstate Telecommunications Relay Service Fund. The Government Performance Results Act of 1993 already requires the FCC and other agencies to identify yearly performance goals for all items on the Federal budget. *See* 5 U.S.C. § 1115 *et al.* But despite this requirement, the Government Accountability Office has repeatedly cited the FCC for failing to establish objective, quantifiable performance measures for the various programs within the Universal Service Fund. *See, e.g.,* GAO, Improved Management Can Enhance FCC Decision Making for the Universal Service Fund Low-Income Program, GAO-11-11 (Oct. 2010); GAO, Long-Term Strategic Vision Would Help Ensure Targeting of E-Rate Funds to Highest-Priority Uses, GAO-09-253 (Mar. 2009); GAO, FCC Needs To Improve Performance Management and Strengthen Oversight of the High-Cost Program, GAO-08-633 (June 2008); GAO, Greater Involvement Needed by FCC in the Management and Oversight of the E-Rate Program, GAO-5-151 (Feb. 2005). Although the Commission has recently adopted some performance measures for the Universal Service Fund's high-cost program, *Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17679-83, paras. 46-59 (2011), much more work is needed to give consumers, Congress, and industry stakeholders insight into how well the FCC is spending federal funds.

To remedy this situation, this subsection requires the Commission to develop performance measures for its program activities, defined as each program listed in the Federal budget as well as each program through which the Commission collects or distributes \$100 million or more, relying when possible, on data it already collects. To reduce the administrative burden, this subsection does not require the FCC to adopt performance measures immediately but instead to adopt them as it moves forward with reforms of the Universal Service Fund, the Interstate Telecommunications Relay Service Fund, and its other program activities. The Committee expects that the Commission will include performance measures that address both the collection and distribution of funds. In addition to the efficacy of the Commission's spending, for example, the public deserves to know how well the Commission's regulatory-fee system is working, such as how much it costs to administer, the dead-weight losses and competitive harms associated with the Commission's current system, and its efficiency in assessing regulatory fees in proportion to regulatory benefits. Similar metrics would be appropriate for the contribution systems funding universal service and telecommunications relay service. Given that the FCC already has 421 separate information collections approved by the Office of Information and Regulatory Affairs, *see* OIRA, Inventory of Currently Approved Information Collections, <http://www.reginfo.gov/public/do/PRAMain> (search for "Federal Communications Commission"), and given the FCC's own recognition that it needs to improve its own information practices, *see* GAO, Information Collection and Management at the Federal Communications Commission,

GAO-10-249 (Jan. 2010), the Committee does not expect the FCC will need to create new information collections in order to establish meaningful performance measures. If the FCC determines otherwise, it is the expectation of the Committee that it will first look to consolidating and reducing the burden of existing collections before imposing new burdens.

In all, these rulemaking reforms build upon the foundation of the APA, the Government Performance Results Act of 1993, and executive orders since President Reagan to improve the processes of the FCC and establish best practices there. Compliance with these process improvements is certainly feasible: Chairman Genachowski himself has “made regulatory reform a top priority” at the Commission, adopted many of the reforms outlined in this subsection including the incorporation of “cost-benefit analysis into [agency] decision-making,” and said that the FCC would “follow the spirit” of Executive Order 13563. Statement from FCC Chairman Julius Genachowski on the Executive Order on Regulatory Reform and Independent Agencies (July 11, 2011), *available at* <http://go.usa.gov/P6k>. Because this subsection builds on these efforts and is incorporated into the Communications Act (so courts should defer to reasonable interpretations of this subsection, *see Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)), the Committee expects that implementation of these rulemaking reforms should be relatively straightforward for the Commission with a minimum of litigation over the meaning of the terms employed.

New Subsection 13(b).—Ensuring Deliberation by Commissioners. This subsection requires the Commission to establish internal procedures to inform Commissioners of a reasonable number of options available for resolving a proceeding, to provide adequate time for Commissioners to deliberate pending orders, and to ensure time for the public to read orders before open meetings.

This subsection is intended to work in coordination with subsections (c) and (d) of section 13 of the Communications Act to improve deliberations and encourage bipartisan, collaborative interaction among the Commissioners. This subsection is designed to ensure that Commissioners are informed of their options and have sufficient time to review an order before being asked to cast a vote. The requirements of this subsection might be met, at least in part, by circulating an “options memo” that is sometimes prepared by staff identifying a number of ways an issue might be resolved, the benefits and detriments of each option, and how stakeholders and the public might view those options based on comments received.

This subsection also requires the Commission to prescribe rules for releasing the text of an order before votes are cast at an open meeting. This requirement mirrors the layover requirement of the House of Representatives that requires bills be available and open to the public three days prior to a vote. *See* Rule XII, clause 4(a)(1) of the Rules of the House of Representatives, 112th Cong. (Jan. 5, 2011). Notably, publishing the text of an item in advance of an open meeting should have the salutary effects of allowing stakeholders and the public to know exactly what the Commission is voting on, and it would also give Commissioners a period of repose to reflect on the negotiated product and draft their statements in preparation for the open meeting. *See* Letter from Rep. John D.

Dingell, Chairman of the Committee on Energy and Commerce, to the Honorable Kevin J. Martin, Chairman of the Federal Communications Commission (Dec. 3, 2007) (suggesting the Commission should provide additional information and time to Commissioners so they could properly review orders and rules before a vote). Rather than prescribe a deadline, however, this subsection requires the FCC to establish its own layover period for items on an open meeting agenda. Notably, this subsection is not intended to preclude the Commissioners from negotiating a different final product at an open meeting nor to prevent agency staff from making technical edits to the released item before a final version is released after adoption. Nor is this subsection intended to trigger another round of public comment. The FCC could, for example, prescribe a layover period within the seven-day “sunshine period” so that the public would have the opportunity to read the document without requiring the agency to respond to an additional round of comments.

Once rules for a layover period have been established, the agency would simply need to account for them in the run up to adoption of an item. If necessary, it could start its proceedings and consideration of draft items sooner to ensure it has enough time to complete its work in advance of a public meeting. Establishing a layover period would have the added benefit of avoiding delays in open meetings as the Commissioners try to complete negotiations in the waning hours before, or sometimes even after, the scheduled start of an open meeting. Indeed, in recent years there have been delays of as much as 12 hours. This not only plays havoc with the open meeting process, it very likely leads to rushed decisions as Commissioners try to “ink” a deal under the pressure of waiting public in the FCC’s meeting room.

At the November 16, 2011, open markup session of the Subcommittee on Communications and Technology, a motion by Mr. Barton to amend H.R. 3309 to amend this subsection to include the phrase “a reasonable number” was adopted by voice vote. The purpose of the Barton amendment was to clarify that the options memorandum created by Commission staff need not cover every conceivable option available to the Commission nor even every option proposed by stakeholders, but only a reasonable number of options that address the question before the Commission and could be viably implemented.

New Subsection 13(c).—Nonpublic Collaborative Discussions. This subsection allows a bipartisan majority of Commissioners to meet for collaborative discussions if they disclose such meetings within two business days and comply with Office of General Counsel oversight. This subsection also applies to meetings of Federal-State Joint Boards convened under section 410 of the Communications Act.

Stakeholders have been calling on Congress to reform the Government in the Sunshine Act since at least 1997, when the Administrative Conference of the United States and a special committee led by Randolph May drafted recommendations to Congress to allow agency officials to conduct private meetings so long as there were safeguards in place. See Randolph May, *Reforming the Sunshine Act*, 49 Admin. L. Rev. 415 (1997). This subsection is intended to do just that. Three or more Commissioners may meet in a closed meeting and with members of a Federal-State Joint Board

so long as the meeting is bipartisan, no official action is taken, no outside parties are present, and an attorney from the FCC's Office of General Counsel is present to monitor the deliberations and disclose a summary of those discussions within 2 business days of such a meeting.

New Subsection 13(d).—Initiation of Orders by Bipartisan Majority. This subsection requires the Commission to establish procedures to allow a bipartisan majority of Commissioners to direct staff to draft an order, to put such an order on the Commission's agenda, and to require that the Commission vote on any order.

In one sense, the Chairman of the FCC is the agency's Chief Executive Officer, but in another the Chairman is but one of five Commissioners charged with executing the laws of Congress and responding to the mandates of the courts. Over the past decade, the Commission has seen clashes between these two roles of the Chairman. In 2003, for example, Chairman Michael Powell allowed a bipartisan majority of fellow Commissioners to direct agency staff to draft the *Triennial Review Order* even though he dissented with many of the findings of that order. See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16,978 (2003). Conversely, many believe that in 2008 there were four votes to move an item reforming the high-cost program of the Universal Service Fund, but that such an order was not adopted because the then-Chairman was not among them. Commissioner McDowell has noted that a bipartisan majority of Commissioners should have the right to initiate items, see *FCC Process Reform: Hearing before the Subcommittee on Communications and Technology*, 112th Cong., at 89 (May 13, 2011), and former Commissioner Copps has stated that, based on his decade of experience at the Commission, "three Commissioners ought to have the ability to put an item on the agenda, take an item off the agenda, and edit the agenda," *id.*

This subsection is intended to protect the rights of a bipartisan majority of Commissioners and to ensure that the rules of the road are established by the Commission before another conflict arises. As the General Counsel of NARUC testified at the Subcommittee on Communications and Technology's June 22, 2011, hearing, "Having rules in place for exactly how this process will work in the future will not only streamline the drafting process the next time it occurs, it also should be welcomed by FCC staff as a clear guide for their fiduciary responsibilities in such circumstances." Testimony of James Bradford Ramsay on behalf of the National Association of Regulatory Utility Commissioners, *Reforming FCC Process: Hearing before the Subcommittee on Communications and Technology*, 112th Cong. (June 22, 2011), available at <http://go.usa.gov/Pfj>.

New Subsection 13(e).—Public Review of Reports and Ex Partes. This subsection requires the Commission to seek public comment on reports and to establish procedures that provide the public an opportunity to evaluate ex parte filings before the Commission may rely on them in their decisionmaking.

The FCC has fallen into the practice of relying on materials introduced into the docket at the eleventh hour. In the days before

the record closed on the Commission's October 2011 reform of the high-cost program of the Universal Service Fund, the FCC added to the record 114 new documents as well as a statistical analysis of its own. See Filing of the Wireline Competition Bureau, WC Docket No. 10-90 *et al.* (Oct. 19, 2011), <http://go.usa.gov/Ppz>; Filing of the Wireline Competition Bureau, WC Docket No. 10-90 *et al.* (Oct. 17, 2011), <http://go.usa.gov/Ppu>; Filing of the Wireline Competition Bureau, WC Docket No. 10-90 *et al.* (Oct. 7, 2011), <http://go.usa.gov/PpJ>. Just four days prior to the close of the record in the net neutrality proceeding, the FCC filed nearly 2,000 pages of articles and analysis into the docket. See Filings of the Wireline Competition Bureau, GN Docket No. 09-191 (Dec. 13, 2010), <http://go.usa.gov/Ppy>, <http://go.usa.gov/Ppp>; Filings of the Wireline Competition Bureau, GN Docket No. 09-191 (Dec. 10, 2010), <http://go.usa.gov/Ppf>, <http://go.usa.gov/PpG>, <http://go.usa.gov/Pp7>, <http://go.usa.gov/PpA>, <http://go.usa.gov/Ppo>, <http://go.usa.gov/PpH>, <http://go.usa.gov/Pp6>, <http://go.usa.gov/PpF>, <http://go.usa.gov/PpL>, <http://go.usa.gov/PpM>. And in approving the Comcast-NBC Universal transfer of broadcast licenses, the FCC relied on an *ex parte* filing that Comcast had made but one day earlier. See *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4275, para. 92 & n.211 (adopted Jan. 18, 2011) (citing Letter from Kathy A. Zachem, Vice President, Regulatory and State Legislative Affairs for Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Jan. 17, 2011)). This practice shields the agency from transparency and denies the public the opportunity to review and comment on all materials in the record of a proceeding.

The FCC has argued that the records in question in a particular instance are public, that the agency adds them to the record as a convenience to interested parties, and that relying on such late submissions is not a violation of the APA. Even if this is true, there would be little to no opportunity for anyone to confirm that the documents were public, let alone respond to them. Whether such practices violate the APA is also not dispositive as to whether they produce good policy, nor does it address the problem that they create appearance problems and weaken public confidence in the agency.

Similarly problematic has been the FCC's reliance on its own statistical reports to make policy without public input. The Commission sometimes relies on its own reports, like the *Broadband Deployment Report* and the *Wireless Competition Report*, see *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket Nos. 10-159, Seventh Broadband Progress Report and Order on Reconsideration, 26 FCC Rcd 8008 (2011); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133, Fifteenth Report, 26 FCC Rcd 9664 (2011), but does not sub-

ject those reports to a robust notice-and-comment process before relying on them in rulemakings and adjudications.

Although Chairman Genachowski has introduced some reforms at the agency to improve the *ex parte* process, see *Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, GC Docket No. 10–43, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4517 (2011), those reforms do not ensure that the public will be able to review and comment on all materials the agency intends to rely on in adopting rules or adjudicating a petition or complaint. As stated in President Obama's executive order on regulatory reform, regulations should include "to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings." Exec. Order No. 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011). This subsection is intended to end the FCC's practice of relying on materials, whether those materials are generated or added to the docket by the FCC or by outside parties, that have not been subject to public scrutiny, with exceptions for emergencies. This subsection requires the Commission to draft rules to cover such filings, including rules that would allow reliance on such filings in the case of an emergency, such as a major hurricane or earthquake.

New Subsection 13(f).—Pending Item Publication. This subsection requires the Commission to establish rules regarding the publication of the status of open rulemaking proceedings as well as a list of the draft items the Commissioners are currently considering.

The Commission currently maintains a list of items on circulation as a matter of practice. See FCC, FCC Items on Circulation, <http://go.usa.gov/PyZ>. Stakeholders and other members of the public rely on that list to monitor when the Commission may act on the rulemaking and other proceedings. But that list's utility is limited because it provides no information on the status of pending rulemakings until shortly before the Commission is set to vote on them. Moreover, no rule requires the Commission to maintain that list, meaning that the maintenance of the list is wholly within the discretion of the Chairman. This subsection is intended to correct these flaws by requiring the FCC to conduct an open and transparent rulemaking to codify its items on circulation list with additions to shed more light on the workings of the FCC.

New Subsection 13(g).—Shot Clocks. This subsection requires the Commission to establish "shot clocks" that set time frames for Commission action in each type of proceeding it oversees.

The backlog of petitions, applications, and complaints has become a major problem at the FCC. As of July 5, 2011, the Commission had pending before it 3,472 open proceedings, 26,335 petitions and requests, 1,385 petitions for reconsideration, and 33,233 license applications, not to mention 1,531,893 unaddressed consumer complaints. See House Energy and Commerce Committee, *Staff Report on the Workload of the Federal Communications Commission*, at 1 (Nov. 15, 2011), available at <http://go.usa.gov/PmJ>. Twenty percent, or 5,328, of the 26,335 petitions and requests pending at the Commission had been there for more than two years and, of those, 3,122 have been pending for more than five years. Sixty-two percent, or 852, of the 1,385 pending petitions for reconsideration had been pending at the Commission for more than two years, and of

these 476 had languished for more than five years. Thirteen percent, or 4,185, of the 33,233 license applications had been pending at the Commission for more than two years, and of these 2,246 had been there for more than five years. *Id.* at 1–2.

Nevertheless, the Commission has made substantial headway on its backlog under Chairman Genachowski. This past year, the Commission created streamlined procedures for the closing of dormant proceedings and closed 999 dockets, about one third of the total. Since July 2011, the agency has reduced its two-year backlog of petitions by 7 percent to 4,984, its two-year backlog of petitions for reconsideration by 28 percent to 617, and its two-year backlog of license applications by 9 percent to 3,950.

The American public deserves more transparency, and consumers and other stakeholders deserve to know that the agency will resolve their complaints and petitions in a timely manner no matter the administration. At the Subcommittee on Communication and Technology’s May 13, 2011, hearing, Chairman Genachowski noted that “shot clocks may be an effective tool” for giving parties and the public a sense of when resolution would come on an issue. *FCC Process Reform: Hearing before the Subcommittee on Communications and Technology*, 112th Cong., at 88 (May 13, 2011). Then-Commissioner Capps and Commissioner McDowell supported the adoption of additional shot clocks. *See id.* What is more, shot clocks have been effective at the Commission. The Commission has resolved 78 percent of petitions for reconsideration subject to a 90-day deadline under section 405 of the Communications Act and received during Chairman Genachowski’s tenure. *See* House Energy and Commerce Committee, *Staff Report on the Workload of the Federal Communications Commission*, at 1 (Nov. 15, 2011), available at <http://go.usa.gov/PmJ>. Similarly, the FCC has an 83-percent success rate in meeting the Freedom of Information Act’s 20-day deadline, a 97-percent success rate in timely responding to Telecommunications Relay Service informal complaints, and a 76-percent success rate in meeting its own 180-day deadline for resolving non-streamlined transactions. *See id.* at 2–3.

This subsection is intended to build on these successes and provide additional transparency to the public by requiring the agency to adopt its own shot clocks for resolving the various categories of petitions, applications, and complaints before it. The Committee expects that the shot clocks adopted by the Commission would be in line with both the statutory and regulatory shot clocks the agency already has for resolving petitions, applications, and complaints, ranging from 45 days, *see, e.g.*, 47 C.F.R. § 1.767(i), to 90 days, *see, e.g.*, 47 U.S.C. § 405(b)(1); 47 C.F.R. § 54.724(a), to 9 months, *see, e.g.*, 47 C.F.R. § 20.13(a)(6), to a year or more, *see, e.g.*, 47 U.S.C. § 160(c); 47 C.F.R. § 64.604(c)(5)(iii)(L)(5); *see also* House Energy and Commerce Committee, *Staff Report on the Workload of the Federal Communications Commission*, Att. Q7 (Nov. 15, 2011) (listing various deadlines for action), available at <http://go.usa.gov/PmJ>. The Committee expects that the Commission will establish shot clocks for all categories of petitions, applications, complaints, and other filings, including, for example, petitions for rulemakings, petitions for reconsideration, applications for equipment authorization, and filings seeking action through authority delegated under section 5(c)(1) of the Communications Act.

New Subsection 13(h).—Release of Documents and Reports. This subsection requires the Commission to establish a schedule for the release of its required reports and to release all orders within seven days of adoption. The Commission must report to Congress whenever it misses its own deadlines.

The Committee on Energy and Commerce has long been concerned with the practice of the FCC of releasing documents days if not weeks after the Commission has formally adopted them. In addition to denying the public the ability to promptly review commission action, it raises the specter of post-adoption, pre-release revisions, either on the Commission's own motion or at the request of parties. In 1991, then-Chairman of the Committee Dingell exchanged letters with the Commission revealing that the FCC had delayed the release of an order after adoption by 30 days or more 157 times between 1986 and 1991. See Letter from John D. Dingell, Chairman, Committee on Energy and Commerce, to the Honorable Alfred C. Sikes, Chairman, Federal Communications Commission (May 21, 1991), *quoted in FCC Process Reform: Hearing before the Subcommittee on Communications and Technology, 112th Cong.*, at 79–81 (May 13, 2011). As Chairman Emeritus Dingell has more recently put it, this practice “enables the staff to make revisions to the order in the dark of the night,” “enables petitioners to seek and obtain tweaks in the agency’s language,” and “afford[s] a marvelous opportunity for rascality.” *Id.* at 74.

Chairman Genachowski has improved this process; the average time between the adoption and release of an item has been 2.2 days during his tenure. See House Energy and Commerce Committee, *Staff Report on the Workload of the Federal Communications Commission*, at 3 (Nov. 15, 2011), available at <http://go.usa.gov/PmJ>. But problems remain. The Commission purportedly adopted its *Universal Service Fund Reform Order* on October 27, but without the layover requirement included in Section 13(b) of this bill, there is no way to verify that an actual document was before the Commissioners for adoption, and the agency did not release a final order until three weeks later. Press reports suggest that the size of the order ballooned from 400 to 752 pages during that time. See Letter from Fred Upton, Chairman, Committee on Energy and Commerce, and Greg Walden, Chairman, Subcommittee on Communications and Technology, to the Honorable Julius Genachowski, Chairman, Federal Communications Commission (Nov. 28, 2011), available at <http://go.usa.gov/Pv4>; *Connect America Fund et al.*, WC Docket No. 10–90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011). Even if no shenanigans actually occurred, the potential creates appearance issues that weaken confidence in the agency.

This subsection is intended to remedy these issues by setting a 7-day deadline for the release of orders after adoption. This deadline would not affect the validity of any decision released after the deadline; instead, the FCC would be required to notify its congressional oversight committees about the cause for the delay.

In the same vein, this subsection requires the FCC to publish a schedule of regular reports each year and notify its congressional oversight committees if it fails to comply with that schedule. The timely filing of reports, and especially reports to Congress, has been a perpetual problem with the Commission in recent years. For

example, the Commission released its second annual Satellite Competition Report in 2008, but did not submit its third report (covering 2008, 2009, and 2010) until December 2011. See *Third Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services; Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services*, IB Docket Nos. 09–16, 10–99, Third Report, FCC 11–183 (rel. Dec. 13, 2011); see also House Energy and Commerce Committee, *Staff Report on the Workload of the Federal Communications Commission*, at 3 (Nov. 15, 2011), available at <http://go.usa.gov/PmJ>. This requirement is intended to provide guidance to the public and Congress about the timing of the FCC’s release of reports and hold the FCC accountable when it fails to keep to that schedule.

New Subsection 13(i).—Biannual Scorecard. This subsection requires the Commission to report every six months regarding its progress in meeting its shot clocks and releasing documents and reports as well as how it has used administrative law judges and independent studies.

This subsection is intended to keep Congress and the public apprised of the Commission’s work in complying with the requirements of subsections (g) and (h) of section 13 of the Communications Act. This subsection is also intended to encourage the agency to conduct more independent fact-finding. See Philip J. Weiser, *FCC Reform and the Future of Telecommunications Policy* at 18–19 (Jan. 5, 2009), available at <http://fcc-reform.org/paper/fcc-reform-and-future-telecommunications-policy>.

New Subsection 13(j).—Transaction Review Standards. This subsection preserves the Commission’s ability to review transactions but requires conditions to be (a) narrowly tailored to remedy harms that arise as a direct result of the transaction and (b) within the Commission’s general authority. This subsection applies the same requirements to voluntary commitments.

The FCC has fallen into the practice of leveraging its legitimate authority to review transfers of lines under section 214 of the Communications Act and transfers of licenses under sections 309 and 310 of the Communications Act to extract a particular commission’s wish-list of concessions from transfer applicants in exchange for approval, often precisely because the commission lacks the record or legal authority to adopt an industrywide rule. In the 2008 *Sprint/Clearwire Transaction Order*, for example, the FCC accepted a “voluntary” commitment from Sprint to forfeit universal service support in high-cost areas over a five-year period; the Commission did so not because the transaction raised any concern about such support, but instead because “it would be beneficial to control the growth of the high-cost fund.” *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08–94, File Nos. 0003462540 *et al.*, Memorandum Opinion and Order, 23 FCC Rcd 17570, 17612, para. 108 (2008). Similarly, the Commission has leveraged its authority to impose conditions that may lie outside the Commission’s jurisdiction. In the 2011 *Comcast/NBC Universal Transaction Order*, for example, the Commission accepted a “voluntary” commitment from Comcast to comply with the net neutrality rules even if a court overturns those rules as beyond the

Commission's statutory authority. *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4275, para. 94 (2011).

Open and transparent rulemakings—not adjudications of line and license transfers—should be the primary venue for the Commission to effect federal policy. Imposing policy through transaction review shields the actions of the FCC from public scrutiny—as proposed conditions often are unknown to any party other than applicants until shortly before the FCC's approval order is announced—and from judicial review as well. As Philip Weiser, former Senior Adviser for Technology and Innovation to President Obama's National Economic Council, has written, this practice “facilitates the agency's tendency to make decisions in an *ad hoc* manner,” and lets the FCC “use[] such proceedings to decide issues that are otherwise pending in industry rulemakings—leading to one set of rules for those who have merged and another set of rules for similarly situated parties who have not.” Philip J. Weiser, *FCC Reform and the Future of Telecommunications Policy* at 24 (Jan. 5, 2009), available at <http://fcc-reform.org/paper/fcc-reform-and-future-telecommunications-policy>. Chairman Emeritus Dingell has also criticized the FCC's practice of “identifying some potential competitive harm to the public and then on that basis proceeding to extract concessions from the parties, usually concessions which have absolutely nothing to do with the transaction itself.” *The Telecommunications Act of 2000: Hearing before the Subcommittee on Telecommunications, Trade, and Consumer Protection*, 106th Cong., at 7 (Mar. 14, 2000). As he put it, transaction reviews at the FCC have become a “remarkable exercise in arrogance, and the behavior of the Commission, oftentimes by reason of delay and other matters, approaches what might well be defined as not just arrogance but extortion.” *Id.* at 6.

This subsection is intended to end this practice by requiring the FCC to narrowly tailor any conditions it imposes or voluntary commitments it accepts to address the particular harm caused by a transfer of lines or licenses. Such a requirement follows the recommendation of Chairman Emeritus Dingell that the FCC should establish “a clear nexus between the conditions placed on the merger and the predicted detrimental effects of the transaction.” *Id.* at 7. Furthermore, this subsection requires that any conditions imposed and voluntary commitments accepted must be within the Commission's non-transaction-related jurisdiction. For example, if a court holds that the Commission has no authority to impose broadcast flag rules, see *Am. Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Circuit 2005), the Commission should not be able to skirt that ruling through transaction review. So, too, for conditions and voluntary commitments involving the FCC's authority over the Internet.

Contrary to the criticisms by opponents to the bill, this subsection does not alter the public-interest standard that the Commission ultimately uses to decide whether a transfer of lines or licenses merits approval. The Commission may continue to adopt conditions and accept voluntary commitments that directly address harms presented by a transfer of lines or licenses in a narrowly tai-

lored fashion. And the Commission may deny a transfer of lines or licenses if it determines that the public interest would not be served by approving the proposed transfer.

New Subsection 13(k).—Access to Budget Information. This subsection requires the Commission to provide direct access from the homepage of its website to budget, appropriations, and performance information.

At the November 16, 2011, open markup session of the Subcommittee on Communications and Technology, a motion by Rep. Stearns to amend H.R. 3309 to incorporate this subsection was adopted by voice vote. The amendment is intended to increase the transparency of the budgetary process as applied to the Commission each year.

New Subsection 13(l).—Federal Register Publication. This subsection requires the Commission to complete all actions necessary to publish in the Federal Register documents required to be so published within 45 days of adoption.

At the March 6, 2012, open markup session of the Committee on Energy and Commerce, a motion by Rep. Kinzinger to amend H.R. 3309 to incorporate this subsection was adopted by voice vote. The amendment seeks to ensure expeditious review of FCC decisions by the courts and Congress. Judicial review of rulemakings is tied to the date of publication of a regulation in the Federal Register. *See* 47 U.S.C. § 402; 47 C.F.R. § 1.4(b)(1). So, too, is congressional review under the Congressional Review Act. *See* 5 U.S.C. § 801–802.

Normally, the Commission publishes rulemaking orders in the Federal Register relatively quickly. During Chairman Genachowski’s tenure, for example, the average time between the adoption of an item and its publication in the Federal Register was 37.3 days as of mid-2011. *See* House Energy and Commerce Committee, *Staff Report on the Workload of the Federal Communications Commission*, at 3 (Nov. 15, 2011), available at <http://go.usa.gov/PmJ>.

But the Commission has not always been so prompt. Although the FCC adopted its *Third CableCARD Order* on October 14, 2010, it did not publish that order in the Federal Register until July 8, 2011—267 days later. *See* Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment, 76 Fed. Reg. 40263 (July 8, 2011) (publishing *Implementation of Section 304 of the Telecommunications Act of 1996, et al.*, CS Docket No. 97–80, PP Docket No. 00–67, File Nos. EB–07–SE–351, EB–07–SE–352, NAL/Acct. Nos. 832100074, 200932100001, 200932100002, 200932100003, 200932100008, 200932100022, and 200932100023, FRN Nos. 0018049841, 0016034050, CSR–8080–Z, Third Report and Order and Order on Reconsideration, 25 FCC Rcd 14657 (2010)). Similarly, the FCC adopted its net neutrality rules on December 21, 2010, but it did not publish that order in the Federal Register until September 23, 2011—276 days later. *See* Preserving the Open Internet, 76 Fed. Reg. 59192 (Sept. 23, 2011) (publishing *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09–191, WC Docket No. 07–52, Report and Order, 25 FCC Rcd 17905 (2010)). Nothing in law prevents the Commission from submitting orders to the Federal Register for publication imme-

diately after they are adopted, but in both of these cases the FCC chose to delay publication until it completed the Paperwork Reduction Act process, which requires action by the Office of Management and Budget. See 44 U.S.C. § 3501 *et al.* As a result of these decisions, review of Commission action in the courts and in the Congress was delayed by the better part of a year. Subsection 13(l) prevents such delays going forward by requiring the FCC to submit rulemaking documents for Federal Register publication within 45 days of releasing the document to the public.

New Subsection 13(m).—Consumer Complaint Database. This subsection requires the Commission to publish an online database of information about consumer complaints.

At the March 6, 2012, open markup session of the Committee on Energy and Commerce, a motion by Rep. Waxman to amend H.R. 3309 to incorporate this subsection was adopted by voice vote. The amendment seeks to improve the transparency of the FCC’s consumer complaint process by requiring the Commission, as it processes consumer complaints, to enter metadata about such complaints into an online, searchable database. Metadata should include, for example, the date of the filing of the complaint, the general topic of the complaint, and the name of the party complained of. The subsection is not intended to require the FCC to place the text of consumer complaints online, nor the name of the complainant, nor any interim determinations as to the validity of the complaint in the database; although, the FCC retains the discretion to place any additional information in the database if it makes a public-interest finding. The subsection also allows the FCC to consolidate duplicative complaints arising from the same alleged misconduct (such as complaints arising from the same broadcast against a single broadcaster).

New Subsection 13(n).—Online Publication. This subsection requires the Commission to publish the documents and reports specified in this section on the Commission’s website. This subsection also requires the Commission to issue rules establishing procedures to redact documents for safety, law enforcement, and security purposes and to protect proprietary or confidential information.

New Subsection 13(o).—Definitions. This subsection defines several terms used in the Act. This subsection is intended to provide precedent-based guidance for the FCC’s interpretation of these and other terms in the Act. To the extent that the meaning of any term defined in this subsection or used in new section 13 is ambiguous after exhausting the traditional canons of statutory construction, it is expected that courts will defer to reasonable interpretations of the FCC of such terms. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The definition of “bipartisan majority” includes specific protections for Commissioners that are not members of the majority party within the FCC, including Commissioners with no political party affiliation.

The term “economically significant impact” is drawn from section 3(f)(1) of Executive Order 12866, which defined economically significant regulatory action for purposes of the centralized review of regulations conducted by the Office of Information and Regulatory Affairs. See Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993).

The term “performance measure” includes either “outcome measures” or “output measures,” both of which are defined in the Government Performance and Results Act of 1993. Performance measures must be both objective, meaning a third party with access to the same data as the Commission should be able to replicate the calculations used by the Commission to arrive at the same measure of performance, and quantifiable, meaning capable of being expressed numerically.

The term “program activity” includes all program activities of the FCC as defined in the Government Performance and Results Act of 1993. The subsection expands the definition of program activity in order to include large FCC programs, like the Universal Service Fund and the Interstate Telecommunications Relay Service Fund, that collect or distribute more than \$100 million annually. For program activities that both collect and distribute more than \$100 million each year, the Commission should create one set of performance measures for the collection mechanism and another set for the distribution mechanism.

Section 2(b)

Section 2(b) establishes the effective date of new reporting obligations to be 2013 and the effective date of the remainder of new section 13 to be six months after enactment. The section grandfathers NPRMs issued prior to enactment, treating them as if they were issued in compliance with paragraph (1) of section 13(a) of the Communications Act and modifying the logical-outgrowth test of paragraph 2(A) of section 13(a) to apply to the entire Notice, not just the text of the proposed rules. This grandfathering, however, does not relieve the Commission of any other rulemaking obligations, such as the requirement that the order adopting rules come within three years of the NPRM.

This section also requires the Commission to conduct a rulemaking to implement new section 13—and specifically subsections (b), (d), (e)(1)(B), (f), (g), and (n)(2)—within one year of enactment. The section requires that the Commission comply with the rulemaking reforms of section 13 of the Communications Act, including the requirement of publishing the text of proposed rules and the minimum comment period requirement.

Section 3

Section 3 prohibits the Commission from categorizing a complaint or inquiry about the Telephone Consumer Protection Act of 1991, as amended (TCPA), as a wireless or wireline complaint in its quarterly reports unless a wireless or wireline provider was the subject of the inquiry or complaint. The Commission could comply with this section by, for example, setting forth all TCPA complaints and inquiries as a separate section in all quarterly reports issued after the enactment of H.R. 3309.

At the March 6, 2012, open markup session of the Committee on Energy and Commerce, a motion by Rep. Pompeo to amend H.R. 3309 to incorporate this section was adopted by voice vote. The amendment seeks to correct the Commission’s long-standing practice of categorizing consumer complaints and inquiries associated with the TCPA under the headings of “Wireline Telecommunications” and “Wireless Telecommunications.” Consumer complaints

and inquiries that do not involve the TCPA typically target an action by the consumer's service provider, like an issue with wireless coverage. In contrast, TCPA complaints and inquiries very rarely target the service provider; instead, the vast majority of TCPA complaints and inquiries involve third parties outside the control of the service provider, such as telemarketers, that use the telephone system to place unwanted calls to consumers. The FCC's practice of attributing TCPA complaints to "Wireline Telecommunications" and "Wireless Telecommunications" based on the type of telephone used by a consumer misleads the public and other governmental agencies into believing that complaints and inquiries about the conduct of wireless and wireline service providers is much larger than it actually is. For example, in its compilation of consumer inquiries from the second quarter of 2011, the FCC states that there were 5,908 consumer inquiries regarding "Wireline Telecommunications," even though 3,759 inquiries—64 percent—were inquiries regarding the TCPA. *See* FCC, Quarterly Report of Informal Consumer Inquiries and Complaints for the Second Quarter of Calendar Year 2011 Released (Jan. 18, 2012), *available at* <http://go.usa.gov/PyD>. The wireline and wireless industries have attempted to bring this matter to the attention of the Commission on multiple occasions, under several Chairmen, and yet the Commission has failed to correct the problem, necessitating congressional direction to do so.

Section 4

Section 4 specifies that the Act does not relieve the FCC of the obligations established by the APA and related laws except where it does so explicitly (*i.e.*, with regard to allowing deliberative collaboration among Commissioners and on the Federal-State Joint Boards). The APA provides a foundation for agency action; H.R. 3309 builds upon that foundation to guide the agency toward greater openness and transparency.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

TITLE I—GENERAL PROVISIONS

* * * * *

SEC. 13. TRANSPARENCY AND EFFICIENCY.

(a) RULEMAKING REQUIREMENTS.—

(1) REQUIREMENTS FOR NOTICES OF PROPOSED RULEMAKING.—The Commission may not issue a notice of proposed rulemaking unless the Commission provides for a period of not less than 30 days for the submission of comments and an additional period of not less than 30 days for the submission of

reply comments on such notice and the Commission includes in such notice the following:

(A) *Either—*

(i) *an identification of—*

(I) *a notice of inquiry, a prior notice of proposed rulemaking, or a notice on a petition for rulemaking issued by the Commission during the 3-year period preceding the issuance of the notice of proposed rulemaking concerned and of which such notice is a logical outgrowth; or*

(II) *an order of a court reviewing action by the Commission or otherwise directing the Commission to act that was issued by the court during the 3-year period preceding the issuance of the notice of proposed rulemaking concerned and in response to which such notice is being issued; or*

(ii) *a finding (together with a brief statement of reasons therefor)—*

(I) *that the proposed rule or the proposed amendment of an existing rule will not impose additional burdens on industry or consumers; or*

(II) *for good cause, that a notice of inquiry is impracticable, unnecessary, or contrary to the public interest.*

(B) *The specific language of the proposed rule or the proposed amendment of an existing rule.*

(C) *In the case of a proposal to create a program activity, proposed performance measures for evaluating the effectiveness of the program activity.*

(D) *In the case of a proposal to substantially change a program activity—*

(i) *proposed performance measures for evaluating the effectiveness of the program activity as proposed to be changed; or*

(ii) *a proposed finding that existing performance measures will effectively evaluate the program activity as proposed to be changed.*

(2) *REQUIREMENTS FOR RULES.—Except as provided in the 3rd sentence of section 553(b) of title 5, United States Code, the Commission may not adopt or amend a rule unless—*

(A) *the specific language of the adopted rule or the amendment of an existing rule is a logical outgrowth of the specific language of a proposed rule or a proposed amendment of an existing rule included in a notice of proposed rulemaking, as described in subparagraph (B) of paragraph (1);*

(B) *such notice of proposed rulemaking—*

(i) *was issued in compliance with such paragraph and during the 3-year period preceding the adoption of the rule or the amendment of an existing rule; and*

(ii) *is identified in the order making the adoption or amendment;*

(C) *in the case of the adoption of a rule or the amendment of an existing rule that may have an economically significant impact, the order contains—*

(i) an identification and analysis of the specific market failure, actual consumer harm, burden of existing regulation, or failure of public institutions that warrants the adoption or amendment; and

(ii) a reasoned determination that the benefits of the adopted rule or the amendment of an existing rule justify its costs (recognizing that some benefits and costs are difficult to quantify), taking into account alternative forms of regulation and the need to tailor regulation to impose the least burden on society, consistent with obtaining regulatory objectives;

(D) in the case of the adoption of a rule or the amendment of an existing rule that creates a program activity, the order contains performance measures for evaluating the effectiveness of the program activity; and

(E) in the case of the adoption of a rule or the amendment of an existing rule that substantially changes a program activity, the order contains—

(i) performance measures for evaluating the effectiveness of the program activity as changed; or

(ii) a finding that existing performance measures will effectively evaluate the program activity as changed.

(3) **DATA FOR PERFORMANCE MEASURES.**—The Commission shall develop a performance measure or proposed performance measure required by this subsection to rely, where possible, on data already collected by the Commission.

(b) **ADEQUATE DELIBERATION BY COMMISSIONERS.**—The Commission shall by rule establish procedures for—

(1) informing all Commissioners of a reasonable number of options available to the Commission for resolving a petition, complaint, application, rulemaking, or other proceeding;

(2) ensuring that all Commissioners have adequate time, prior to being required to decide a petition, complaint, application, rulemaking, or other proceeding (including at a meeting held pursuant to section 5(d)), to review the proposed Commission decision document, including the specific language of any proposed rule or any proposed amendment of an existing rule; and

(3) publishing the text of agenda items to be voted on at an open meeting in advance of such meeting so that the public has the opportunity to read the text before a vote is taken.

(c) **NONPUBLIC COLLABORATIVE DISCUSSIONS.**—

(1) **IN GENERAL.**—Notwithstanding section 552b of title 5, United States Code, a bipartisan majority of Commissioners may hold a meeting that is closed to the public to discuss official business if—

(A) a vote or any other agency action is not taken at such meeting;

(B) each person present at such meeting is a Commissioner, an employee of the Commission, a member of a joint board established under section 410, or a person on the staff of such a joint board; and

(C) an attorney from the Office of General Counsel of the Commission is present at such meeting.

(2) *DISCLOSURE OF NONPUBLIC COLLABORATIVE DISCUSSIONS.*—Not later than 2 business days after the conclusion of a meeting held under paragraph (1), the Commission shall publish a disclosure of such meeting, including—

(A) a list of the persons who attended such meeting; and

(B) a summary of the matters discussed at such meeting, except for such matters as the Commission determines may be withheld under section 552b(c) of title 5, United States Code.

(3) *PRESERVATION OF OPEN MEETINGS REQUIREMENTS FOR AGENCY ACTION.*—Nothing in this subsection shall limit the applicability of section 552b of title 5, United States Code, with respect to a meeting of Commissioners other than that described in paragraph (1).

(d) *INITIATION OF ITEMS BY BIPARTISAN MAJORITY.*—The Commission shall by rule establish procedures for allowing a bipartisan majority of Commissioners to—

(1) direct Commission staff to draft an order, decision, report, or action for review by the Commission;

(2) require Commission approval of an order, decision, report, or action with respect to a function of the Commission delegated under section 5(c)(1); and

(3) place an order, decision, report, or action on the agenda of an open meeting.

(e) *PUBLIC REVIEW OF CERTAIN REPORTS AND EX PARTE COMMUNICATIONS.*—

(1) *IN GENERAL.*—Except as provided in paragraph (2), the Commission may not rely, in any order, decision, report, or action, on—

(A) a statistical report or report to Congress, unless the Commission has published and made such report available for comment for not less than a 30-day period prior to the adoption of such order, decision, report, or action; or

(B) an *ex parte* communication or any filing with the Commission, unless the public has been afforded adequate notice of and opportunity to respond to such communication or filing, in accordance with procedures to be established by the Commission by rule.

(2) *EXCEPTION.*—Paragraph (1) does not apply when the Commission for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the order, decision, report, or action) that publication or availability of a report under subparagraph (A) of such paragraph or notice of and opportunity to respond to an *ex parte* communication under subparagraph (B) of such paragraph are impracticable, unnecessary, or contrary to the public interest.

(f) *PUBLICATION OF STATUS OF CERTAIN PROCEEDINGS AND ITEMS.*—The Commission shall by rule establish procedures for publishing the status of all open rulemaking proceedings and all proposed orders, decisions, reports, or actions on circulation for review by the Commissioners, including which Commissioners have not cast a vote on an order, decision, report, or action that has been on circulation for more than 60 days.

(g) *DEADLINES FOR ACTION.*—The Commission shall by rule establish deadlines for any Commission order, decision, report, or action

for each of the various categories of petitions, applications, complaints, and other filings seeking Commission action, including filings seeking action through authority delegated under section 5(c)(1).

(h) **PROMPT RELEASE OF CERTAIN REPORTS AND DECISION DOCUMENTS.**—

(1) **STATISTICAL REPORTS AND REPORTS TO CONGRESS.**—

(A) **RELEASE SCHEDULE.**—Not later than January 15th of each year, the Commission shall identify, catalog, and publish an anticipated release schedule for all statistical reports and reports to Congress that are regularly or intermittently released by the Commission and will be released during such year.

(B) **PUBLICATION DEADLINES.**—The Commission shall publish each report identified in a schedule published under subparagraph (A) not later than the date indicated in such schedule for the anticipated release of such report.

(2) **DECISION DOCUMENTS.**—The Commission shall publish each order, decision, report, or action not later than 7 days after the date of the adoption of such order, decision, report, or action.

(3) **EFFECT IF DEADLINES NOT MET.**—

(A) **NOTIFICATION OF CONGRESS.**—If the Commission fails to publish an order, decision, report, or action by a deadline described in paragraph (1)(B) or (2), the Commission shall, not later than 7 days after such deadline and every 14 days thereafter until the publication of the order, decision, report, or action, notify by letter the chairpersons and ranking members of the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate. Such letter shall identify such order, decision, report, or action, specify the deadline, and describe the reason for the delay. The Commission shall publish such letter.

(B) **NO IMPACT ON EFFECTIVENESS.**—The failure of the Commission to publish an order, decision, report, or action by a deadline described in paragraph (1)(B) or (2) shall not render such order, decision, report, or action ineffective when published.

(i) **BIANNUAL SCORECARD REPORTS.**—

(1) **IN GENERAL.**—For the 6-month period beginning on January 1st of each year and the 6-month period beginning on July 1st of each year, the Commission shall prepare a report on the performance of the Commission in conducting its proceedings and meeting the deadlines established under subsections (g), (h)(1)(B), and (h)(2).

(2) **CONTENTS.**—Each report required by paragraph (1) shall contain detailed statistics on such performance, including, with respect to each Bureau of the Commission—

(A) in the case of performance in meeting the deadlines established under subsection (g), with respect to each category established under such subsection—

(i) the number of petitions, applications, complaints, and other filings seeking Commission action that were

pending on the last day of the period covered by such report;

(ii) the number of filings described in clause (i) that were not resolved by the deadlines established under such subsection and the average length of time such filings have been pending; and

(iii) for petitions, applications, complaints, and other filings seeking Commission action that were resolved during such period, the average time between initiation and resolution and the percentage resolved by the deadlines established under such subsection;

(B) in the case of proceedings before an administrative law judge—

(i) the number of such proceedings completed during such period; and

(ii) the number of such proceedings pending on the last day of such period; and

(C) the number of independent studies or analyses published by the Commission during such period.

(3) PUBLICATION AND SUBMISSION.—The Commission shall publish and submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate each report required by paragraph (1) not later than the date that is 30 days after the last day of the period covered by such report.

(j) TRANSACTION REVIEW STANDARDS.—

(1) IN GENERAL.—The Commission shall condition its approval of a transfer of lines, a transfer of licenses, or any other transaction under section 214, 309, or 310 or any other provision of this Act only if—

(A) the imposed condition is narrowly tailored to remedy a harm that arises as a direct result of the specific transfer or specific transaction that this Act empowers the Commission to review; and

(B) the Commission could impose a similar requirement under the authority of a specific provision of law other than a provision empowering the Commission to review a transfer of lines, a transfer of licenses, or other transaction.

(2) EXCLUSIONS.—In reviewing a transfer of lines, a transfer of licenses, or any other transaction under section 214, 309, or 310 or any other provision of this Act, the Commission may not consider a voluntary commitment of a party to such transfer or transaction unless the Commission could adopt that voluntary commitment as a condition under paragraph (1).

(k) ACCESS TO CERTAIN INFORMATION ON COMMISSION'S WEBSITE.—The Commission shall provide direct access from the homepage of its website to—

(1) detailed information regarding—

(A) the budget of the Commission for the current fiscal year;

(B) the appropriations for the Commission for such fiscal year; and

(C) the total number of full-time equivalent employees of the Commission; and

(2) *the performance plan most recently made available by the Commission under section 1115(b) of title 31, United States Code.*

(l) *FEDERAL REGISTER PUBLICATION.—*

(1) *IN GENERAL.—In the case of any document adopted by the Commission that the Commission is required, under any provision of law, to publish in the Federal Register, the Commission shall, not later than the date described in paragraph (2), complete all Commission actions necessary for such document to be so published.*

(2) *DATE DESCRIBED.—The date described in this paragraph is the earlier of—*

(A) *the day that is 45 days after the date of the release of the document; or*

(B) *the day by which such actions must be completed to comply with any deadline under any other provision of law.*

(3) *NO EFFECT ON DEADLINES FOR PUBLICATION IN OTHER FORM.—In the case of a deadline that does not specify that the form of publication is publication in the Federal Register, the Commission may comply with such deadline by publishing the document in another form. Such other form of publication does not relieve the Commission of any Federal Register publication requirement applicable to such document, including the requirement of paragraph (1).*

(m) *CONSUMER COMPLAINT DATABASE.—*

(1) *IN GENERAL.—In evaluating and processing consumer complaints, the Commission shall present information about such complaints in a publicly available, searchable database on its website that—*

(A) *facilitates easy use by consumers; and*

(B) *to the extent practicable, is sortable and accessible by—*

(i) *the date of the filing of the complaint;*

(ii) *the topic of the complaint;*

(iii) *the party complained of; and*

(iv) *other elements that the Commission considers in the public interest.*

(2) *DUPLICATIVE COMPLAINTS.—In the case of multiple complaints arising from the same alleged misconduct, the Commission shall be required to include only information concerning one such complaint in the database described in paragraph (1).*

(n) *FORM OF PUBLICATION.—*

(1) *IN GENERAL.—In complying with a requirement of this section to publish a document, the Commission shall publish such document on its website, in addition to publishing such document in any other form that the Commission is required to use or is permitted to and chooses to use.*

(2) *EXCEPTION.—The Commission shall by rule establish procedures for redacting documents required to be published by this section so that the published versions of such documents do not contain—*

(A) *information the publication of which would be detrimental to national security, homeland security, law enforcement, or public safety; or*

(B) *information that is proprietary or confidential.*

(o) *DEFINITIONS.—In this section:*

(1) *AMENDMENT.—The term “amendment” includes, when used with respect to an existing rule, the deletion of such rule.*

(2) *BIPARTISAN MAJORITY.—The term “bipartisan majority” means, when used with respect to a group of Commissioners, that such group—*

(A) is a group of 3 or more Commissioners; and

(B) includes, for each political party of which any Commissioner is a member, at least 1 Commissioner who is a member of such political party, and, if any Commissioner has no political party affiliation, at least 1 unaffiliated Commissioner.

(3) *ECONOMICALLY SIGNIFICANT IMPACT.—The term “economically significant impact” means an effect on the economy of \$100,000,000 or more annually or a material adverse effect on the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.*

(4) *PERFORMANCE MEASURE.—The term “performance measure” means an objective and quantifiable outcome measure or output measure (as such terms are defined in section 1115 of title 31, United States Code).*

(5) *PROGRAM ACTIVITY.—The term “program activity” has the meaning given such term in section 1115 of title 31, United States Code, except that such term also includes any annual collection or distribution or related series of collections or distributions by the Commission of an amount that is greater than or equal to \$100,000,000.*

(6) *OTHER DEFINITIONS.—The terms “agency action”, “ex parte communication”, and “rule” have the meanings given such terms in section 551 of title 5, United States Code.*

* * * * *

DISSENTING VIEWS

We oppose H.R. 3309, the Federal Communications Commission (FCC) Process Reform Act of 2011, as reported. This legislation will fundamentally alter FCC authority to protect consumers and ensure a competitive marketplace, while tying the agency up with unique statutory process requirements that apply to the FCC alone. This bill represents a dramatic departure from standard administrative practice and procedure and should not be enacted into law.

The FCC should not be subject to burdensome new regulatory requirements

A key reason the Administrative Procedure Act (APA) has been an important and successful bedrock of regulatory law is that it applies uniformly across federal agencies. Uniformity in regulatory process allows the public and interested stakeholders to follow a common set of rules that apply generally to agency conduct, regardless of the area of regulation. Although rules are not identical across all agencies, the APA has encouraged the development of a standard body of case law that provides for certainty and reduces transaction costs. By moving the FCC away from existing APA precedents and future developments, H.R. 3309 could create uncertainty, confusion, and additional work for consumers, regulated entities, the FCC, and the courts.

Specifically, H.R. 3309 contains numerous new and untested terms that could take years for the FCC and reviewing courts to interpret and implement. Under this legislation the FCC would be required to figure out what constitutes a “burden on industry or consumers,” determine whether a notice of inquiry is “impracticable, unnecessary, or contrary to the public interest,” define “actual consumer harm” and “specific market failure,” and decide what it means to ensure that all Commissioners have “adequate time, prior to being required to decide a petition, complaint, application rulemaking or other proceeding.”

Notwithstanding the agency’s best efforts to apply these terms precisely and fairly, each presents a novel legal issue that will likely be challenged by industry or other interested stakeholders when they disagree with a particular Commission decision. Moreover, each of these challenges could take years of expensive litigation to clarify and resolve. With the FCC stymied by uncertainty and unique court challenges, H.R. 3309 would make the FCC less effective, agile, and transparent. According to administrative law experts interviewed by committee staff, the new procedural terms and definitions imposed by this legislation could take 15 years to be resolved.

In addition, H.R. 3309 creates a unique avenue for appeal by parties unsatisfied with FCC results. Cost-benefit reviews currently conducted pursuant to Executive Order 13579 are not reviewable in court. Under H.R. 3309, however, the FCC's cost-benefit analyses would now be subject to court challenges. The impact of this provision is particularly acute with regard to "values-based" actions, in which the cost and benefit of rules may be difficult to quantify, yet subject to court challenge. For example, regulation of indecent broadcast programming or public safety requirements such as 911 rules may be difficult to justify through a cost-benefit analysis since the benefits of such rules might be difficult to quantify. Unlike any other independent agency, the FCC's cost-benefit analysis in these areas could be basis for court reversal under H.R. 3309.

Notably, FCC Chairman Genachowski has already taken significant steps to remedy many of the process problems identified by the bill's sponsors. Under Chairman Genachowski's leadership, the FCC has closed 999 dormant dockets, removed 210 obsolete regulations, drastically reduced the number of pending applications, launched new initiatives to streamline data collection processes, and taken steps to increase transparency and stakeholder participation.¹ He has also reformed the *ex parte* rules to require more information and disclosure.² Chairman Genachowski's announcement last November detailing the agency's efforts to comply with Executive Order 13579 is another indication that the FCC is committed to operating efficiently and effectively, with due consideration of the costs and benefits of its regulations.³

H.R. 3309 fundamentally alters FCC authority to review transactions

H.R. 3309 requires any condition imposed by the FCC as part of the agency's transaction review process to be "narrowly tailored to remedy a harm that arises as a direct result of the specific transfer or specific transaction." It also requires the FCC to demonstrate that the agency could impose "a similar requirement under the authority of a specific provision of law" other than its general power to review transfers of control. The same requirements are imposed on the FCC's acceptance of any voluntary commitments.⁴

Under current law, the FCC has a broad charge under sections 214 and 310 of the Communications Act to review transactions based on a public interest standard. Indeed, under section 310(d), the FCC must find affirmatively that a transaction reviewed by the agency benefits the broader public interest. The FCC's responsibility to protect the public interest means the agency must take a

¹Federal Communications Commission, *Remarks as Prepared for Delivery by FCC Chairman Julius Genachowski at Georgetown University* (Nov. 7, 2011) (online at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1107/DOC-310876A1.pdf).

²House Committee on Energy and Commerce, Subcommittee on Communications and Technology, *Hearing on Reforming FCC Process*, 112th Cong. (June 22, 2011) (testimony of Julius Genachowski) (online at http://democrats.energycommerce.house.gov/sites/default/files/image_uploads/Testimony_CT_05.13.11_Genachowski.pdf).

³Federal Communications Commission, *Preliminary Plan for Retrospective Analysis of Existing Rules* (Nov. 7, 2011) (online at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1107/DOC-318074A1.pdf).

⁴See, e.g., H.R. 3309, proposed § 13(j) to the Communications Act of 1934.

broader perspective than the Department of Justice and the Federal Trade Commission, which are charged with protecting the public against competitive harm under the Clayton Act.

Conditions imposed as part of the FCC's transaction review are sometimes necessary to produce public interest benefits that offset competitive or consumer harms in order to secure Commission approval. Parties engaged in a proposed transaction often volunteer to adhere to such conditions because they recognize that the transaction may not yield sufficient public interest benefits without them or may even harm the public. Examples of such conditions include commitments regarding employment levels (*e.g.*, AT&T's 2006 acquisition of Bellsouth included a promise to repatriate 3,000 jobs) and consumer pricing (*e.g.*, FCC approval of the XM-Sirius satellite radio merger included a condition limiting price increases on the basic subscription package for three years).

H.R. 3309 fundamentally alters the FCC's role. The agency could no longer insist on conditions that protect the public interest unless it could demonstrate that it could impose such conditions under other statutory authority. This would put in jeopardy a broad range of conditions in many mergers.

H.R. 3309 could also have a paradoxical result. It could force the FCC to deny mergers and transactions that otherwise could have been granted if the parties were able to commit voluntarily to certain conditions.⁵ This is not to say that the FCC should always try to approve transactions through the use of conditions or voluntary commitments. Requiring the agency to reject transactions that might otherwise be approved through appropriate conditions, however, eliminates flexibility that could benefit companies and consumers alike.

H.R. 3309 is unnecessary

The majority commends Chairman Genachowski repeatedly for the improvements that have occurred at the agency under his watch. Indeed, Chairman Genachowski's tenure has been marked by greater transparency, increased public participation, and improved information sharing within the Commission and with the public. Simply put, these improvements have come about as a matter of leadership, not statute. Chairman Genachowski has shown he intends to make most of these changes on his own and with the input of his fellow commissioners.

Furthermore, last year the House passed H.R. 3010, the Regulatory Accountability Act⁶ (RAA), which amends the APA and creates a variety of new procedural requirements for administrative agencies. Although most House Democrats opposed the legislation because it imposed onerous requirements on all agencies, at least that measure attempted to address agency process reform uniformly by applying rules to all agencies instead of targeting just one.

⁵For example, under this test the FCC would not be able to adopt the conditions that led to the creation of the Comcast Broadband Opportunity Program as part of its review of the Comcast–NBC Universal transaction.

⁶H.R. 3010.

If the majority wishes to impose restrictive process requirements on federal agencies to limit their ability to adopt rules, it should at least be consistent and not add to regulatory confusion by creating unique process requirements for a specific agency.

Democrats support common sense reforms of the Commission

Instead of reporting legislation that does fundamental damage to the FCC, the Committee should have considered H.R. 1009, the Federal Communications Commission Collaboration Act, introduced by Ranking Member Eshoo along with Representatives Shimkus and Doyle. This bipartisan legislation, which is also cosponsored by Reps. Barton, Stearns, and Matsui, would allow a bipartisan majority of Commissioners to meet in private for collaborative discussions, subject to disclosure requirements and oversight.

According to a bipartisan group of experts, the enactment of H.R. 1009 would go a long way toward improving the efficiency of FCC operations as well as its deliberative process, yet without the unintended consequences and other pitfalls of H.R. 3309. As former Republican Commissioner Kathleen Abernathy noted at the June 22, 2011, legislative hearing, allowing face-to-face communications between commissioners as proposed in H.R. 1009 would likely allow commissioners “on their own, [to] address many of the concerns raised in the proposed bill, such as timeliness for Commission completion of pending items and adequate deliberation by commissioners.”⁷

During the subcommittee and full committee markups of H.R. 3309, Ranking Member Eshoo offered a substitute amendment that would improve transparency and process at the FCC. Specifically, the amendment incorporated H.R. 1009, the Federal Communications Commission Collaboration Act, as well as several other recommendations adopted last June by the bipartisan Administrative Conference of the United States (ACUS).⁸ After years of study, ACUS calls on all agencies to develop “best practices” designed to increase opportunities for public participation and to enhance the quality of information received by the agencies.

ACUS did not recommend imposing these practices through statutory changes as would H.R. 3309. Administrative law experts were worried about the unintended consequences of such an approach and instead recommend that agencies be encouraged to come up with internal procedures. The Eshoo substitute amendment therefore directed the FCC to initiate a rulemaking proceeding to seek public comment on whether and how the Commission should (1) establish procedures to refresh the record in a proceeding; (2) set minimum comment periods for comment and reply comment subject to good cause exceptions; and (3) adopt policies concerning submission of comments, data, or reports towards the end of the comment period. These are all issues the majority has identified as being problematic at the FCC.

⁷House Committee on Energy and Commerce, Subcommittee on Communications and Technology, *Hearing on Reforming FCC Process*, 112th Cong. (June 22, 2011) (Question for the Record Response of Kathleen Q. Abernathy).

⁸ACUS is a bipartisan organization designed to focus exclusively on administrative law procedures.

In addition, the Eshoo substitute amendment required the FCC to submit to Congress a progress report on the agency's compliance with Executive Order 13579, including its stated policy on cost-benefit analysis, promotion of public participation, and retrospective analyses of existing rules. It also required the FCC to publish every six months the percentage of orders and actions published within seven days of their adoption, as well as the percentage in which the FCC included the specific language of the proposed rule in a NPRM.

In summary, Democrats were prepared to direct the FCC to address process concerns. The substitute amendment offered by Rep. Eshoo would have freed up the Commissioners to hold collaborative discussions and required the FCC to consider innovations in the rulemaking process as recommended by ACUS—a body comprised of bipartisan administrative law experts who have specialized knowledge and interest in improvement of federal agency procedures—without unduly tying the hands of the Commission. Unfortunately, the amendment was rejected.

The majority rejected a reform proposal that would increase transparency in political advertising

In addition to Ranking Member Eshoo's substitute amendment, the majority also rejected an amendment offered by Rep. Eshoo that would have greatly enhanced transparency and disclosure in political advertising. The Eshoo amendment would have required entities sponsoring such advertising to disclose the identity of any donors that contributed \$10,000 or more to such entity over a preceding two-year period.

Current FCC rules require broadcasters, cable providers, and satellite providers to maintain and make available for public inspection a request to purchase airtime related to political advertising.⁹ There is no detailed requirement, however, regarding the disclosure of who actually paid for the advertisement. Rather, the file simply needs to contain the name of the person or entity requesting airtime for the advertisement. The public has little or no information about the entities that are actually financing the advertisements they see and hear every day during political campaign season.

Political advertisements directly impact the outcome of elections because the broadcast medium has the ability to reach vast numbers of citizens. Sponsors of campaign advertisements often hide behind confusing organizational names or names that can actually mislead the public as to who is sponsoring the message. Mild sounding names like "Taxpayers Against []" can hide the fact that an advertisement is actually being funded by a corporation or a limited group of wealthy individuals. A recent study revealed that as of January 2012, 95 percent of spending during the 2012 election cycle was backed by outside groups, as opposed to candidates and political parties.¹⁰

⁹See 47 U.S.C. 315(e)(1)(A); See also 47 C.F.R. §73.1943, 47 C.F.R. §76.1701, 47 C.F.R. §25.701(b).

¹⁰Viveca Novak, *Outside Spending Soars Over Earlier Cycles*, Open Secrets (Jan. 24, 2012) (online at <http://www.opensecrets.org/news/2012/01/outside-spending-soars-over-earlier.html>).

The Eshoo amendment sought to improve disclosure and transparency in political advertising, recognizing the incredible impact such advertising can have on the outcome of elections. The Eshoo amendment would not increase the burden on broadcasters, cable providers, and satellite providers in maintaining public inspection files related to political advertisements since they are already required to keep a record of requests to purchase airtime on file at their stations. It was also limited to the disclosure of individuals that have made a significant financial contribution to the entity over the prior two-year period. Finally, as Rep. Gonzalez noted during the debate, the amendment does not raise a constitutional issue since the Supreme Court confirmed in *Citizens United* that the government “may regulate corporate political speech through disclaimer and disclosure requirements.”¹¹

We believe that the public has every right to know how the public airwaves are being used. Requiring the disclosure of entities that actually pay for the messages will help fully inform the electorate, which in turn will allow voters to make knowledgeable decisions when they go to the polls.

It is unfortunate that in a bill meant to improve transparency, the majority was unwilling to accept a provision designed to provide much needed transparency regarding funding for political advertising.

Democrats support rigorous agency oversight

Energy and Commerce Committee Democrats are strong proponents of congressional oversight over agencies within our jurisdiction. An engaged Congress can help agencies perform at higher levels and better serve the American public.

Before we adopt legislation that affects agency operations, we need to ask if it promotes smart regulation. H.R. 3309 fails on almost every measure. Although corporate trade associations representing business interests expressed mild support for this measure, 45 public interest, labor, religious, and non-profit organizations, including Consumers Union, Public Knowledge, the National Federation of Community Broadcasters, the Communications Workers of America, the Writers Guild of America, and the United Church of Christ all weighed in against this legislation. They stated in a joint letter that the bill would “severely hinder the FCC’s ability to carry out its congressional mandate to promote competition, innovation, and the availability of communications services.”¹²

H.R. 3309 will create an undue burden on only one agency. It will undermine the FCC’s ability to act quickly, efficiently, and in the public interest. Proponents of this legislation seek procedural changes to address recent agency outcomes with which they do not agree. H.R. 3309 seeks to disable the FCC, not reform it. Accordingly, we oppose this legislation.

HENRY A. WAXMAN.
ANNA G. ESHOO.
JOHN D. DINGELL.

¹¹*Citizens United* at 886.

¹²Letter from Access Humboldt et al. to Chairman Fred Upton and Ranking Member Henry Waxman (Feb. 9, 2012).

EDWARD J. MARKEY.
EDOLPHUS TOWNS.
FRANK PALLONE, Jr.
BOBBY L. RUSH.
DIANA DEGETTE.
LOIS CAPPS.
MICHAEL F. DOYLE.
JANICE D. SCHAKOWSKY.
CHARLES A. GONZALEZ.
G.K. BUTTERFIELD.
DORIS O. MATSUI.
DONNA M. CHRISTENSEN.

DISSENTING VIEWS OF REPRESENTATIVE
JOHN D. DINGELL

In 1995, then-Congressmen W.J. “Billy” Tauzin, Rick Boucher, Bart Stupak, and I submitted “Additional Views” to the Committee on Commerce for inclusion in its Report on the Communications Act of 1995 (“the Act”). In those views, we likened the Committee’s work on the Act to English Parliamentarian Charles James Fox’s 1783 “India Resolution.” That resolution, used to force the ouster of Lord North as Prime Minister of England, read “*Resolved*, that we have seen your work, and it will not do.” H.R. 3309, the Federal Communications Commission Process Reform Act, evokes the same sorry sentiment.

H.R. 3309 seeks to reform Commission processes, particularly as they concern rulemaking and transaction reviews. Reforming such processes, which have a tremendous effect on the public good and the Nation’s economy, requires a substantial record derived from thorough oversight. Prior to the Committee’s March 6, 2012, markup of H.R. 3309, the Subcommittee on Communications and Technology held only two related oversight hearings: a May 13, 2011, hearing entitled “FCC Process Reform,” at which the four FCC Commissioners appeared; and a June 22, 2011, hearing entitled “Reforming FCC Process,” at which six additional witnesses appeared. It marked up H.R. 3309 on November 16, 2011. Ten witnesses at two hearings do not constitute thorough oversight in my view. By comparison, the Committee on Commerce heard from 49 witnesses on the Act, arguably the last major revision of the Communications Act of 1934 approved by the Congress. Fox’s resolution again here applies.

Similarly, the significant consequences of H.R. 3309’s provisions stand in stark contrast to the Committee’s failure to inquire properly into the impact the legislation will have on industry. I still have a number of unanswered questions about the bill, the most important of which are as follows:

1. What types of uncertainties will be created for stakeholders as a result of the unique procedural requirements imposed upon the Commission by H.R. 3309, which themselves are a radical departure from over 60 years of federal administrative procedure?
2. What effect will the bill’s restrictions on the Commission’s transaction review authorities have on the Commission’s ability to protect the public interest? Further, will such restrictions in fact decrease the number of transaction reviews the Commission approves?
3. To what extent will H.R. 3309’s new cost-benefit analysis requirements for economically significant rules increase the incidence of judicial reversal of Commission rulemakings?

4. What effects will the bill's provision to exempt meetings of a bipartisan majority of commissioners from provisions of the Sunshine Act have on the transparency and timeliness of Commission's work on its official business?
5. Finally, what additional resources, whether in terms of increased funds or manpower, will the Commission require to implement H.R. 3309's provisions, keeping especially in mind the increased potential for judicial reversal of Commission actions?

The Committee's record shows insufficient attention to these questions, the answers to which have significant bearing on the Commission's ability to function effectively as a federal agency. Absent clarification on these points, I cannot support the substantial change to the Commission's authorizing statute contemplated by H.R. 3309.

I wish to note that my own experience with the Commission as chairman, ranking member, and chairman emeritus of the Committee has been one characterized by great consternation at the actions of the Commission's chairmen and the body's functioning. While I applaud my Majority colleagues' intention to improve transparency and processes at the Commission, I have come to the conclusion that H.R. 3309 will rather more cripple the Commission than reform it. For this reason, I implore my colleagues to make use of the Committee's oversight authority and hold the Commission accountable to the statutory limits placed on it by the Congress. This Committee has used its oversight authority not only to inform its Members about the legislation they consider, but also to compel better behavior by the agencies subject to its jurisdiction.

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