Consumer Federation of America
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TESTIMONY OF DR. MARK N. COOPER
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ON

REFORMING FCC PROCESS
SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
COMMITTEE ON ENERGY AND COMMERCE
UNITED STATED HOUSE OF REPRESENTATIVES

JUNE 22, 2011

Mr. Chairman and Members of the Committee,

My name is Dr. Mark Cooper. I am Director of Research at the Consumer Federation of America (CFA) is a federation of approximately 300 state and local organizations formed to represent the consumer interest in national policymaking. In its role as an educational and advocacy group, CFA has participated in thousands of regulatory proceedings in its 40 year history. In the past 30 years I have testified on behalf of public interest groups over 300 times in fifty jurisdictions in the U.S. and Canada. I have responsibility for telecommunications policy at CFA and about two-thirds of my testimony has dealt with telecommunications policy. I have seen the good and bad of regulation up close and personal.

The record will show that I have supported regulatory reform for decades and that I believe the Federal Communications Commission (FCC) is in desperate need of reform. However, I believe that, if adopted, the Discussion Draft would do severe harm to the ability of the Commission to protect consumers and promote the public interest, while it does little to improve the regulatory process at the FCC.

- On substance, it undermines the core public interest principles of the Communications Act that govern rulemaking and merger review, superimposing a narrow "harm" based standard that would limit the ability of the FCC to protect consumers and promote the public interest.

- On process, it fails to address the fundamental flaws that have allowed industry to dominate the Commission, while it heaps reporting requirements on the Commission that will do little to improve the administrative process.

AGENCY ACTION TO IMPROVE REGULATION

There are many steps the FCC can take on its own to improve the regulatory process and, presumably, the outcomes. Most of the reforms needed do not require legislation; they are well within the administrative authority of the agency to clean up its act. After the FCC has done all that it can to improve its regulatory process, internally, if the agency or the

Congress can point to meaningful and necessary process changes that are beyond the power of the agency, narrowly targeted process changes could be considered.

***Ex parte* Communications:** The *ex parte* process at the FCC is an abomination. It has become an unofficial and abusive backdoor process of negotiation in which access to the offices of the Commissioners is the most prized asset. The FCC should reform the process in two ways. First, all *ex parte* meetings should be transcribed by third parties. Second, any rules that rely significantly on *ex parte* information should be published for Further Notice to afford a more equitable opportunity to participate. The FCC needs to dramatically reduce its reliance on *ex parte* communications by relying more on independent research. However, it must reform the process by which the research topics are selected and the resources awarded. The selection of topics and researchers needs to be more transparent, perhaps through the better use of advisory committees and joint boards. Formal RFP procedures should be followed and the FCC should adhere strictly to the Data Quality Act procedures on peer review of important scientific information. Once the Commission establishes new norms, it will be difficult for future Commissions to revert to past bad practices.

Notice and Comment: I share the concern expressed in the Discussion Draft with the failure of the FCC to afford the public the opportunity to comment on real proposed rules. Too often a notice of proposed rulemaking presents vague ideas and tentative conclusions without any rules actually proposed. The public should be afforded a full opportunity to comment on specific rules. This is especially true if the proposed rule relies on *ex parte* communications. It should also apply to merger conditions. However, Congress will have difficulty legislating the specificity necessary to meet a new standard, which will trigger a round of litigation specific to the FCC. The underlying problem lies in the Administrative Procedure Act, rather than the Communications Act. The FCC can correct the problem voluntarily by putting fully formed proposed rules out for comment and establishing the norm that this is the expected behavior.

Setting the Agenda: The Discussion Draft seeks to check the power of the Chairman by prescribing periods for the circulation of internal documents and empowering members of the Commission to force issues onto the agenda. A more effective way to reform the agenda setting process is to encourage input from stakeholders in a transparent manner. If the agency needs greater input from the stakeholders in the regulatory process, the agency should encourage regulatory negotiations as an alternative to *ex parte* communications. If the statute does not allow, it should be amended to do so.

I arrive at these conclusions based on the following regulatory and historical analysis.

REGULATION AND REGULATORY REFORM

Regulation should be evaluated at both the level of substance and process and regulatory reform is about making regulation work better. Regulation involves three very

different actions – goal setting, rule writing and day-to-day implementation. Good regulation has clarity of purpose, transparency of process and certainty of enforcement.

- Regulation is effective when it accomplishes the goals for which it was adopted.
- Regulation is equitable when the process by which the rules are adopted and the substance of the rules treat the people who are governed by the rules – both the producers and the consumers – fairly.
- Regulation is efficient when it consumes the minimum amount of resources necessary to ensure that rules are effective.

Most discussions of regulatory reform these days focus on ways to make regulation more business-friendly by giving producers more influence and flexibility. I have nothing against making regulation more business-friendly, as long as it does not undermine the effectiveness, equity or efficiency of regulation. More importantly, I believe regulatory reform should give equal attention to finding ways to make regulation work better for consumers – enhancing the role of public participation in all aspects of the regulatory process. The reform agenda at the FCC should include steps to increase public participation in enforcement, expand reliance on multi-stakeholder processes that provide greater transparency for public input, and even introduce formal regulatory negotiations (reg-negs).

Regulation of Communications and Media

Regulation at the FCC and its reforms are particularly challenging because economic considerations, which are frequently the primary concern, are not the only or even primary focus of the FCC's attention. The FCC oversees key parts of the nation's media and communications systems, which are vital parts of the democratic public sphere. The FCC is charged with ensuring access to the means of communications, and ensuring that the communications network achieves the democratic/political and social/equity values that our society has expressed in the Communications Act.

There are no other agencies that have this express purpose. At the start of the 21st century's digital information age, with the convergence of communications and commerce, the importance of the political and social goals of the Communications Act is greater than ever.

Last week marked the 101st anniversary of the Mann-Elkins Act, which placed all forms of electronic communications – telephone, telegraph and wireless – under the Interstate Commerce Act. Congress realized that the interstate telecommunications network needed public interest oversight. Without it, communications would not flow seamlessly across the interstate network, consumers would be the targets of brutal discrimination and competition would be snuffed out by powerful incumbent network operators. Three quarters of a century ago, with the importance of telecommunications growing, Congress embraced the goal of universal service and created a separate agency

(the Federal Communications Commission) to take on the task of overseeing the telecommunications network.

While there have been peaks and valleys in the performance of the FCC, one area where it has performed quite well is discharging the foundational function of ensuring nondiscrimination and seamless interconnection of the interstate communications network. In a series of landmark decisions the FCC helped to create the remarkably rich communications environment in which we live today.

Forty years ago the FCC issued two pro consumer, pro-competitive decisions that laid the groundwork for the growth of the open Internet. The 1968 Carterfone decision required the network operators to allow anyone to design communications equipment and attach it to the network as long as it did not harm the network. In the First Computer Inquiry the FCC ensured that data transmitted over the network would be treated in the same nondiscriminatory manner that voice traffic was. For 30 years data traffic flowed freely over a network that was kept open by regulation to devices that were allowed on the network by regulatory mandate.

A quarter of century ago the FCC made another landmark, proconsumer, precompetitive decision to enhance access to communications, when it decided that bands in the spectrum in which incumbent users had expressed no interest, would be made available to the public on an unlicensed basis. Subject to simple rules of sharing a common pool resource, junk bands came to support hundreds of millions of WiFi users and created a space where holders of spectrum licenses can offload traffic. The nondiscriminatory interconnection and carriage mandated by the FCC are squarely in line with the original decision of Congress to place interstate telecommunications under the Interstate Commerce Act.

The Contemporary Challenge of the Digital Information Age

Some people look back on this history and see antiquated regulation. I view it as fundamental, traditional values that have served the nation well. In fact, in an economy that is increasingly driven by integrated flows of information and knowledge communications networks are more important than ever and access to the platforms (bottlenecks and choke points) these industries provide is critical to competition in services and economic development.

The problem in many markets, like telecommunications, is not too much regulation, but rather it is too little competition. The lack of competition is not the result of nefarious business practices or lax antitrust enforcement. The problem is that strong economies of scale and scope on the supply side mean very few competitors can achieve minimum efficient scale, while strong economies of scale on the demand side (known as network effects) create "winner-take-most" markets. The challenge for regulatory reform is to find ways to allow these key infrastructural industries to be profitable and innovative, while preventing the abuse of market power that inevitably flows from small numbers of firms

controlling essential platforms from undermining competitive applications and services that ride on the platform.

EVALUATION OF THE DISCUSSION DRAFT

Repeal of the Public Interest Standard

The Discussion Draft undermines the ability of the FCC to protect and promote the public interest. Section 2 (a) undermines the core principles of the Communications Act. It removes the broad public interest standard for rulemaking and puts a narrow harm standard in its place. A close reading of the Act leaves no doubt about this.

The word harm occurs only two times in the Communications Act and is not the standard by which the FCC is told to regulate by any stretch of the imagination. Concern is expressed about the "financial harm" the incumbent telephone companies could do to information service providers who are dependent on the telecommunications network. In contrast, the words "public interest" occur 103 times in the act, and this is the current standard for regulation and merger review. The harm standard is alien to the Communications Act and wholly inappropriate to accomplish the tasks that the Act gives to the FCC.

The harm standard is inadequate to protect the public interest in the communications sector for several reasons.

- First, as noted above, a substantial part of the Communications Act involves non-economic values of access to communications and speech, which are not amenable to narrow economic tests.
- Universal service is a second critical goal of the Communications Act that is not amenable to a narrow cost benefit harm based standard. The value of connecting households to the network is an externality that is difficult to measure but extremely important as a political, social and economic accomplishment.
- Consumer privacy, over which the FCC has significant authority in regard to CPNI is another area where a harm standard is difficult to implement.
- In a dynamic network industry, a public interest approach is much more appropriate for interconnection and nondiscrimination. It would have been impossible to value the Carterphone, Computer Inquiy, or the 802.11 (WiFi) rules in a harm-based context, but there is no doubt they delivered massive gains to the public.

This criticism applies to Section 2(j) which seeks to replace the public interest standard in merger review with a "narrowly tailored harm" standard. This would undermine the ability of the Commission to deal with the emerging characteristics of the industry at the precise moment and in the specific context of the merger. Mergers create unique challenges to the public interest that are best dealt with in the merger review. To

the extent that they reveal emerging trends in the industry, they provide a generally time-bound, real-world effort to deal with emerging characteristic.

These changes in the statute are unnecessary and undermine the ability of the FCC to protect and promote the public interest.

Failure to Deal with Agency Capture and Impotence

The most critical problem with the process of FCC regulation is the abuse of the *ex parte* process in which the most powerful and wealthiest parties run through the halls of the agency with little transparency and no restraint. The draft bill does nothing to address this problem.

The importance of the *ex parte* process is magnified by the failure of the agency to develop objective and independent sources of information on which to build its regulations. The agency has become dependent on industry sources for information, much of it slipped into the record through the *ex parte* process, without the opportunity for the public to comment on the data in a meaningful way. The Administrative Procedures Act should prevent this abuse, but it has failed to do so.

While the agency has begun to generate a small number of independent studies, the use of third party "scientifically important information," has failed to correct the problem because the guidelines of the Data Quality Act for peer review have not been followed.

The Discussion Draft will compound the problem by allowing Commissioners to meet in secret, subject to the same weak reporting requirement that afflicts the *ex parte* process today. To the extent that conversations take place between commissioners or between commissioners and outside parties, full transcripts of all such conversations should be made available in a timely manner.

Instead of dealing with the underlying problem, the Discussion Draft imposes a series of reporting requirements on the FCC to explain why self-imposed deadlines have been met and to draw up reports on developments in the industry. These will consume substantial resources, but have no direct relationship to improving the regulatory process as outlined above.

As always, I look forward to working with the Committee to develop any legislation that is needed to improve FCC regulation, although in this case I am not convinced legislation is needed. I am convinced that the discussion draft misses the mark and, if enacted, will not help the Commission do its job of protecting consumers and promoting the public interest.