Testimony of Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
Washington University in St. Louis

Before the
U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Communications and Technology

Hearing on "Reforming FCC Process"

June 22, 2011

Summary

I commend the subcommittee for exploring a range of options for improvement in the operations of the Federal Communications Commission. My testimony presents a critique of the administrative law aspects of the proposed FCC Process Reform Act. If the subcommittee is going to consider procedural legislation of this nature, it should take careful account of the precedents, writings, and institutional pronouncements that specialists in administrative law have set forth in this and other regulatory contexts.

In the case of Sunshine Act reform, many administrative law authorities would strongly endorse the premises of the subcommittee's current initiative. However, several of the proposals regarding FCC rulemaking are troubling, because they pose risks of unduly burdening the Commission's rulemaking process. In the interest of efficiency, which the caption of the proposed § 5A of the Communications Act declares to be a principal objective of the draft bill, these measures should be reappraised..

For example, the bill's requirements for advance public comment opportunities prior to the notice of proposed rulemaking, for minimum thirty-day comment periods, and reply comment periods all address beneficial practices, but the Commission should be accorded greater flexibility in implementing them.

Moreover, the bill should not require the Commission to explain the "market failure" that each rule is intended to solve, because many rules are legitimately adopted for other reasons. In any event, Congress should be cautious before it prescribes new analytical requirements for broad classes of rulemaking. It has not always been sufficiently cautious in the past. For the same reason, the Commission should not be routinely required to suggest performance standards to evaluate newly adopted rules.

Finally, the bill's requirements for cost-benefit analysis are written too broadly. Their evident purpose is to bring FCC practice into line with presidential executive oversight orders. The cost-benefit analysis obligations in those orders, however, apply to only a limited class of especially significant rules, and the sufficiency of agencies' compliance with them is not judicially reviewable. The bill should be revised to bring § 5A into closer conformity with these limitations.

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Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee, it is a privilege for me to be able to appear before you today to discuss the proposed Federal Communications Commission Process Reform Act of 2011. My remarks today address the June 17 discussion draft of that bill.

By way of brief introduction, I am the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. I have taught and written about administrative law for about thirty years. I am the coauthor of a casebook on administrative law and have also written many law review articles in that field. In addition, I am a past Chair and longtime active member of the Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA), and I currently serve as a public member of the Administrative Conference of the United States (ACUS). In this statement I will refer to some of these groups' positions on certain issues raised by the bill. However, I am testifying today solely in my individual capacity and not on behalf of any organization.

The draft bill tackles a number of important issues relating to the functioning of the administrative process at the FCC. I commend the subcommittee for examining these issues, which often do not get as much attention in Congress as they deserve. At the same time, I urge the subcommittee to proceed cautiously and with ample consultation with specialists in

administrative procedure as its work on the bill unfolds. Today I will be able to address only a fraction of the potential questions the bill raises, but I hope that this preliminary assessment of the discussion draft will be helpful in identifying some areas that need further exploration.

I should add that I am not a specialist in communications law in particular. Thus, I do not intend to comment on the issues of communications policy that the draft bill raises. Instead, I will focus my remarks on the administrative law aspects of the bill, especially the provisions on rulemaking procedure in § 5A(a). Broadly speaking, many provisions in the draft bill raise questions about whether and how the operations of the FCC can be enhanced in terms of maintaining adequate transparency, accountability, and fairness to members of the public, without unduly impeding the ability of the Commission to fulfill its statutory responsibilities. Case law, scholarship, and institutional pronouncements in the administrative law field have much to say about these issues.

There is room for debate as to whether Congress should undertake to alter the FCC's procedures on an agency-specific basis, instead of leaving the Commission to apply generic administrative law principles such as those codified in the Administrative Procedure Act (APA). If the legislature is going to make such an effort, however, it should at the very least pay close attention to positions that experienced judges, practitioners, agency officials, and scholars have reached over the years with respect to those processes in this and other regulatory contexts. To the extent that the bill's proposals are out of synch with those perceptions, there is good reason for the subcommittee to tread cautiously and consider whether it might not be on the right track.

I also believe that decisions about FCC procedure should not depend on one's views about the current substantive policies of the Commission. Presumably, any process changes that

may be enacted in this bill will endure into future years when the policies of the Commission have headed in new directions. The goal should be to identify the best decisionmaking approaches for the Commission, regardless of whether, at any given time, they will be utilized in the service of new regulation or deregulation.

A principal theme of my testimony will be that a number of provisions in the bill may unduly burden the process of decisionmaking at the FCC, particularly in rulemaking matters. The subcommittee should hesitate to make the process more cumbersome than it already is. Although the caption of the proposed § 5A of the bill would be "Transparency and Efficiency," there are grounds for concern that some of the proposals would result in unjustified *inefficiency*. Also, the bill does not sufficiently distinguish significant rules from minor ones. Procedural requirements that may be well justified in relation to highly consequential regulations may turn out to be disproportionate in relation to rules that will have only limited impact.

Against the background of the above general comments, following are some comments on specific provisions of the draft bill. I will introduce each comment with a brief description of the relevant provision. Although these descriptions may slightly oversimplify the actual bill language, my intention is to improve the readability of this testimony, so I hope any small lack of precision will be forgiven.

<u>§ 5A(a)(1)(A):</u> This subsection essentially provides that the Commission may not issue a notice of proposed rulemaking (NPRM) unless it has, within the past three years, sought public comment on a notice of inquiry, a prior NPRM, or a petition for rulemaking on the same or a substantially similar subject matter. In effect, this provision means that no rulemaking may be completed without two rounds of public comment. I am concerned that an inflexible requirement

of this nature would sometimes add unnecessary delay to the rulemaking process.

To be sure, I believe that notices of inquiry (also known as advance notices of proposed rulemaking) can frequently be quite helpful to an agency such as the FCC, especially where the agency has only a general idea of what it wants to accomplish and uses the preliminary comment period to refine its thinking. At other times, however, the agency has a fairly clear idea of what it wants to accomplish, perhaps because the rule deals with a very narrow subject. In that circumstance, it may be more efficient to proceed directly to the NPRM. After all, the traditional post-NPRM comment period would still provide an opportunity for members of the public to try to persuade the agency to revise its position or abandon the proposed rule altogether. The choice between these alternatives in a particular situation seems essentially a managerial question, and no single solution is necessarily right for all rulemaking proceedings.

§ 5A(a)(1)(B): This subsection requires that every NPRM should set forth the specific language of a proposed rule. I believe that inclusion of specific language is normally a very good idea, especially when one bears in mind that the Commission has the option of using an advance notice of proposed rulemaking if its thinking has not progressed to the point of being able to propose a specific rule. I am not sure whether there are circumstances in which the Commission cannot reasonably be expected to comply with this expectation. Perhaps specialists in FCC practice or officials at the Commission could identify some. If so, a possible middle ground for the subcommittee to explore would be that the Commission should be required to offer a second round of public comments if, but only if, its initial NPRM does not propose specific rule language.

I am more skeptical, however, about the subsection's further requirement that an NPRM

must contain "proposed performance measures to evaluate" a proposal that "may impose additional burdens on industry or consumers." Given that numerous, perhaps most, rules could be described as imposing "burdens," the requirement seems too confining. We are all familiar with the adage that hindsight is more reliable than foresight. This truism suggests that criteria for evaluating the success of a rule will often be best chosen after experience has developed. Consequently, I doubt that requiring the Commission to speculate in advance in almost every rulemaking proceeding as to the grounds by which future decisionmakers will want to judge the success of the rule would be worth the additional complexity that this requirement would bring to the process.

§ 5A(a)(1)(C): This subsection requires a minimum comment period of 30 days, with a minimum additional 30-day period for reply comments. In 1993, ACUS recommended that Congress consider requiring a 30-day minimum comment period, "provided that a good cause provision allowing shorter comment periods or no comment period is incorporated."[1] In line with this recommendation, I would suggest that if the subcommittee decides to go forward with this requirement, it should include a provision that permits the Commission to bypass the requirement if it can establish good cause for doing so.

This suggestion is consistent with a related recommendation that ACUS adopted only last week.[2] The recommendation – which is advisory only and does not propose legislation –

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[1]ACUS Recommendation 93-4, ¶ IV.B; *see also Florida Power & Light Co. v. United States*, 673 F.2d 525 (D.C. Cir. 1982) (upholding fifteen-day comment period where agency was facing a statutory deadline for issuance of the rule).

[2]ACUS Recommendation 2011-2, ¶ 2. The recommendation is expected to be posted within a few days at http://www.acus.gov/administrative-fix-blog/. Because the exact language has not been finalized, I describe the recommendation only in general terms here.

suggests that agencies should *as a general matter* allow sixty-day comment periods for "significant regulatory actions" and thirty-day comment periods for other rules. It goes on to indicate, however, that agencies may in appropriate circumstances set shorter comment periods if they provide an appropriate explanation.

I also would favor providing the Commission with a degree of discretion in regard to providing an opportunity for reply comments. I believe such an opportunity is frequently useful, particularly where initial comments are submitted at the very end of the comment period. By definition, however, allowance of a reply comment period results in some delay in the issuance of a rule. In a particular situation, the agency might conclude that this delay would not be justified by any offsetting benefit, such as where nobody opposed the rule, or where the only opposing views regarding the rule were filed in plenty of time to have enabled persons who might disagree with those views to respond. If the subcommittee decides to prescribe a reply comment period as a standard practice, it should allow a good cause exception here as well.[3]

<u>§ 5A(a)(2)(A)</u>: This subsection seems to be basically a cross-reference to § 5A(a)(1)(A), and the above critique of that subsection also applies here.

<u>§ 5A(a)(2)(B):</u> This subsection essentially provides that an adopted rule must be a "logical outgrowth" of the rule proposed in the NPRM. That test reflects existing case law,[4] which is not particularly controversial. Therefore, while one could debate whether the provision is necessary, it can be viewed as a helpful codification of prevailing administrative law.

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[3]This suggestion is consistent with the new ACUS Recommendation 2011-2, ¶ 6, which encourages agencies to allow reply comment periods *where appropriate.*

[4]*Long Island Care at Home v. Coke*, 551 U.S. 158 (2007).

§ 5A(a)(2)(C)(i): This provision requires that a final rulemaking order that adopts, modifies, or deletes a rule that "may impose additional burdens on industry or consumers" must include an "identification and analysis of the market failure and actual harm to consumers that the adoption, modification, or deletion will prevent." In my judgment, this language is too confining. It might be acceptable in relation to regulations that are primarily intended to serve economic ends; but not all regulations that the Commission might devise as it implements its wide responsibilities would necessarily fit that description. For example, the Commission might propose a rule for the purpose of complying with a congressional directive or court order. It should be able to say so directly, without having to dream up a "market failure" theory to accompany that straightforward explanation.

Or – to use an example drawn from a case about which I have recently written in my own scholarship – suppose the Commission wanted to adopt a rule to codify its holding in *Fox Television Stations, Inc. v. FCC*[5] that television stations may not broadcast awards shows in which celebrities utter "fleeting expletives" that may be offensive to families with children. "Market failure" would be quite peripheral to the purposes of such a rule, and the Supreme Court acknowledged that the Commission's evidence of "actual harm" was also scant.[6]

In this regard, the language of § 5A(a)(2)(C)(i) seems similar in its intentions to the benchmarks that recent Presidents have incorporated into their executive oversight orders. In fact, however, the terms of those orders have all contemplated broader latitude for rulemaking agencies. Perhaps the closest analogy would be to the directive in President George W. Bush's

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[5] 129 S.Ct. 1800 (2009).

[6] *Id.* at 1813.

oversight order, but that directive was actually more openended. It said that agencies should identify the "specific market failure . . . *or other specific problem*" that a particular rule intends to address.[7] President Clinton's oversight order, revived and reaffirmed by President Obama,[8] was even less confining in this regard.[9] In short, market failures are frequently pertinent, but all of the recent oversight orders reflect a sound insight that they should not be treated as controlling in all circumstances.

Putting to one side issues about the precise wording of § 5A(a)(2)(C)(I), I would recommend against including a provision of this nature in the bill. That view is consistent with a 1993 ACUS recommendation that "Congress should reconsider the need for continuing statutory analytical requirements that necessitate broadly applicable analyses or action to address narrowly-focused issues."[10] In a similar vein, the ABA, in a 1992 resolution sponsored by the Administrative Law Section, "urge[d] the President and Congress to exercise restraint in the overall number of required rulemaking impact analyses [and] assess the usefulness of existing and planned impact analyses."[11] The Section's report supporting this latter pronouncement

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[7]The italics are mine, but the exact language was: "Each agency shall 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, as well as assess the significance of that problem, to enable assessment of whether any new regulation is warranted." Executive Order 13,422, § 1(b)(1), 72 Fed. Reg. 2763 (2007).

[8]See Executive Order 13,563, § 1(b), 76 Fed. Reg.3821 (2011).

[9]Executive Order 12,866, § 1(b)(1), 58 Fed. Reg. 51,735 (1993) ("Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.").

[10]ACUS Recommendation 93-4, *supra*, ¶ II.C.

[11]ABA Recommendation 113, 117-1 ABA Reps. 31, 469 (1992).

contained the following pertinent warning:

> The steady increase in the number and types of cost-benefit or rulemaking review requirements has occurred without any apparent consideration being given to their cumulative effect on the ability of agencies to carry out their statutory obligations. . . . [T]he existence of multiple requirements could have the effect of stymieing appropriate and necessary rulemaking.[12]

Since the early 1990s, when these statements were issued, the accumulation of new issues that an agency is required to address during rulemaking proceedings has actually increased.[13] So the warnings of these two groups have become even more timely. Deliberating on, seeking consensus on, and drafting the numerous recitals that are currently required consumes real resources – a matter that should be of special concern at the present moment, when agencies are facing and will continue to face severe budget pressures. In short, mandatory recitals regarding specific issues (such as the relationship between a rule and market failure) often seem appealing on their own terms, but their collective impact is debilitating.

To be clear, I agree, of course, that Congress acts within its legitimate and constitutionally necessary role when it gives substantive direction to the FCC and other agencies in their respective organic statutes. The extent to which the FCC should focus on "market failures" and other types of harm to industry and consumers is certainly a matter for the legislature to determine. However, I see no need for the *procedural* sections of the Communications Act to spell out issues that a rulemaking order must address. Even without

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[12] *Id.* at 470.

[13] One scholar has compiled a list of eighteen different mandates impinging on agency rulemakers by virtue of executive orders and statutes othre than the APA, although not all of these mandates apply to the FCC. Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 Fla. St. U.L. Rev. 533 (2000).

such language, the courts will require the Commission to explain carefully the reasoning that lies behind any given rule — including, most prominently, the manner in which the rule promotes whatever objectives the substantive mandates in the Act have instructed the Commission to pursue.

§ 5A(a)(2)(C)(ii): This provision requires that every rule that "may impose additional burdens on industry or consumers" must be accompanied by a cost-benefit analysis. It is my understanding that the impetus for this requirement is the idea that executive agencies are obliged by presidential executive order to prepare cost-benefit analyses to accompany their rules, but the FCC is not, because the relevant portions of the order do not apply to the Commission and other independent agencies.[14] Thus the intent is to bring FCC rulemaking into line with the requirements that executive agencies already observe.

For the sake of discussion, I will accept the premise of the subsection as just stated. That said, however, the provision needs revision because, as it stands, it actually goes beyond the presidential executive order in two important respects. First, presidential executive orders have never required cost-benefit analyses for *all* rules. Rather, the prevailing guideline, which has been in place for many years, is that the oversight order prescribes cost-benefit analyses only for

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[14]Majority Committee Staff Memorandum accompanying the subcommittee's May 11, 2011 hearing on FCC Process Reform 2 (May 11, 2011), available at http://republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/051311/Memo.pdf The memo referred in this connection to President Obama's Memorandum for the Heads of Executive Departments and Agencies, *Regulatory Flexibility, Small Business, and Job Creation*, 76 Fed. Reg. 3827 (Jan. 21, 2011), but I assume that the intent was actually to cite to the President's Executive Order 13,563, *supra*, which was issued simultaneously. The executive order does apply in relevant part to executive agencies only, *see id.* § 7(a) (incorporating by reference Executive Order 12,866, supra, § 3(b)), but the presidential memorandum dealt with the Regulatory Flexibility Act, which already applies to both executive agencies and independent agencies, including the FCC. 5 U.S.C. § 601(1).

"significant regulatory actions."[15] Each year, only about six hundred rules proposed by *all* federal agencies covered by the order are designated as falling within this category.[16] Moreover, the most intensive cost-benefit obligations are reserved for a narrower set of rules, "economically significant regulatory actions."[17] Roughly speaking, these are rules that may have an annual effect on the economy of $100 million or more. Only about a hundred proposed rules per year are determined to fall within this more limited category.[18]

In contrast to this carefully calibrated set of threshold criteria, § 5A(a)(2)(C)(ii) sets a much lower bar. Virtually any substantive rule that imposes requirements, as distinguished from benefits, might be described as one that "may burden industry or consumers." Thus, the subsection seems very overbroad in its scope. Preparation of a professional, sophisticated cost-benefit analysis is a resource-intensive activity that requires close attention of qualified policy analysts. It is reasonable to require such scrutiny prior to the issuance of highly expensive or consequential regulations, as the executive oversight order does. As to routine regulations, however, such a requirement would, itself, not be cost-justified.

Second, an important feature of the cost-benefit analysis obligations in the presidential executive order is that the adequacy of an agency's compliance with these obligations is *not*

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[15]Executive Order 12,866, *supra*, §§ 3(f), 6(a)(3)(B)(ii). The Bush and Obama orders made no changes to the Clinton order in this regard.

[16]Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. Chi. L. Rev. 821, 847 (2003).

[17]Executive Order 12,866, *supra*, §§ 3(f)(1), 6(a)(3)(C).

[18]Croley, *supra*, at 851.

judicially reviewable.[19] Courts will consider whether the agency's rule is defensible on the merits in light of the cost-benefit analysis documents in the record, but they do not treat an agency's possible failure to perform the analysis as the executive order contemplates as being, in and of itself, a basis for reversal.[20] As § 5A(a)(2)(C)(ii) is currently written, however, the FCC's compliance or noncompliance with that subsection would presumably be judicially reviewed in the same way as any other alleged violation of the Communications Act.

If the subcommittee chooses to leave this provision as it stands, the likelihood and magnitude of opposition to the bill would likely increase enormously. This prediction rests on direct experience in connection with proposals to amend the Administrative Procedure Act (APA) during the regulatory reform debates of 1995. Proposals to codify cost-benefit requirements and to open up agencies' fulfillment of those mandates to challenge in the courts led to fierce opposition. This issue was a major factor that caused the proposed amendments to stall and eventually die, following filibusters in the Senate.[21] There is good reason to anticipate, therefore, that the prospect of unfettered judicial review of compliance with § 5A(a)(2)(C)(ii) would greatly augment the apprehensions of some constituency groups that FCC regulation could be hampered by the threat or reality of unproductive or obstructive litigation.

If the subcommittee wishes to avoid this level of controversy, it should consider foreclosing judicial review of the FCC's compliance with this subsection, or at least

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[19] *Id.* § 10.

[20] *Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986).

[21] Ronald M. Levin, *Statutory Reform of the Administrative Process: The American Experience and the Role of the Bar*, 83 Wash. U.L.Q. 1875, 1887-88 (2005).

circumscribing it. One option for limiting, though not eliminating, judicial review was, in fact, proposed by the House of Representatives in a bill it passed during those same 1995 debates. Its bill would have prescribed a "substantial compliance" test for judicial review of agency risk assessments (a form of regulatory analysis closely related to cost-benefit analysis).[22]

In short, if the basic purpose of § 5A(a)(2)(C)(ii) is to place the FCC on an equivalent footing with most executive agencies, Congress can fulfill that purpose with much less overbreadth and controversy if it will limit the scope of the subsection as I have suggested.

§ 5A(a)(2)(c)(iii): This subsection provides that a final rule that "may impose additional burdens on industry or consumers" must be accompanied by "performance measures for evaluating the effectiveness of" the rule. I would be skeptical about the value of this requirement for the same reasons as I discussed regarding the corresponding requirement for NPRMs, in § 5A(a)(1)(B)(ii) above.

§ 5A(b): This subsection essentially provides that, in all FCC proceedings, all commissioners should be informed of available options and have adequate time to review the proposed decision, and the public should have adequate time to review the proposed text before the Commission votes.

I do not have the specialized knowledge that I would need in order to comment meaningfully on the ground rules that should prevail among commissioners. Even the provision that relates to the interests of the general public might be better addressed by observers who

[22]H.R. 9 (as amended and engrossed in the House), § 441, 104th Cong. (1995); *see also* 2010 Model State Administrative Procedure Act § 305(f) ("If an agency has made a good faith effort to comply with this section [which requires a cost-benefit analysis for certain rules], a rule is not invalid solely because the regulatory analysis for the proposed rule is insufficient or inaccurate.").

practice before the Commission. However, I will offer one observation regarding the latter provision. If any such mandate is enacted, it should be drafted with sufficient latitude to take account of the diversity of matters that come before the Commission. As to some of these matters, a requirement that the public must have advance access to the text of a proposed decision may be ill-advised. Some such matters may be confidential. Some may be urgent. Some may be minor in importance. Some may be adjudicative matters presenting narrow factual issues on which public input would be of little value. If the subcommittee goes forward with this subsection, it should ensure that the rulemaking authority granted by the preamble to § 5A(b) is sufficiently broad to allow the Commission to take account of these circumstances.

§ 5A(c): This subsection would set forth a new approach to facilitating nonpublic collaborative discussions among commissioners. It would, therefore, constitute an alternative to the constraints now imposed by the Government in the Sunshine Act. I strongly support this initiative. Like many authorities on administrative law, spanning the ideological spectrum, I concur in the subsection's premise that the Sunshine Act, as presently structured, can often hamper effective deliberation among multimember administrative bodies.[23] I anticipate, therefore, that you would find wide support in the administrative law community for an experiment with a different approach.

I have not formed an opinion about the specific mechanism proposed in § 5A(c), but I certainly believe it is worthy of sympathetic consideration by your subcommittee and by the Congress.

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[23] *See* Letter from Chairman Powell and Commissioner Copps to the Honorable Ted Stevens, Feb. 2, 2005, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-256655A1.pdf.

§§ 5A(d)-(j): All of these provisions relate to communications policy, public administration and management, and other issues distinctive to the FCC. Because they fall outside the traditional domain of administrative law, I will respectfully refrain from commenting on them and leave them for discussion by persons who are more knowledgeable than I am in those areas.

This concludes my written testimony, and I will be happy to respond to any questions that you may have. Thank you again for inviting me to testify today.