



N A R U C
National Association of Regulatory Utility Commissioners

March 14, 2016

The Honorable John Thune
Chairman
Committee on Commerce, Science
& Transportation
512 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Bill Nelson
Ranking Member
Committee on Commerce, Science
& Transportation
254 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Roger Wicker
Chairman
Subcommittee on Communications,
Technology & the Internet
512 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Brian Schatz
Ranking Member
Subcommittee on Communications,
Technology & the Internet
254 Russell Senate Office Building
Washington, D.C. 20510

RE: *The FCC Reauthorization Act of 2016 (S. 2644)*

Dear Chairmen Thune, Wicker and Ranking Members Nelson, Schatz:

As your committees begin consideration of the *FCC Reauthorization Act of 2016*, the National Association of Regulatory Utility Commissioners (NARUC) respectfully requests you consider including some bipartisan FCC process reform proposals in the bill.

NARUC represents the government agencies in all 50 States, U.S. Territories, and the District of Columbia responsible for oversight of critical utility infrastructures – including telecommunications utilities. NARUC’s member commissions, along with other State agencies, share the same interest as each member of Congress: assuring adequate telecommunications service to all of their constituents. State Commissions also face the same regulatory challenges as the FCC. Our members have worked closely with the FCC since its inception. For years, NARUC has proposed improvements in how the FCC conducts business. Many of NARUC’s proposals were included in the *FCC Process Reform Act of 2015* (H.R. 2583), which passed the House of Representatives in November with unanimous bipartisan support.

NARUC’s Telecommunications Act Modernization (TeAM) Task Force recently updated the association’s process reform proposals. As a result of their work, a resolution augmenting our positions on FCC process reform was adopted at the February 2016 NARUC Winter Meeting. That resolution is appended to this letter.

NARUC specifically endorses several bipartisan provisions in H.R. 2583, including those that require the actual language of a proposed rule to be published for comment, specify a minimum 60-day comment cycle, and mandate that all commissioners have “adequate time” to

review any draft decision before voting on it.¹ These provisions can only improve the record upon which the agency must base its decisions and thereby also the resulting decisions.

We are particularly pleased to see inclusion of the so-called “sunshine” reform provisions which allows more than two FCC Commissioners to meet outside of an open meeting and covers deliberations of the Federal-State joint boards and conference. NARUC has endorsed that significant and much needed improvement to the current process for years.² In addition, NARUC has called on the agency to create an online searchable database of consumer complaints and provide more information to help consumers make informed choices.

NARUC is committed to working with Members of Congress, the FCC and other stakeholders to ensure the benefits of competition are available to all Americans. Improved decision making at the FCC will only benefit the marketplace and consumers. NARUC urges the committee to include common sense bipartisan process reforms contained in the *FCC Process Reform Act of 2015* (H.R. 2583) supported by NARUC in any FCC reauthorization. Thank you and please contact NARUC Legislative Director Brian O’Hara at (202)898-2205, bohara@naruc.org or NARUC General Counsel Brad Ramsay at (202)898-2207, jramsay@naruc.org if you would like to discuss this issue further.

Sincerely,

Travis Kavulla
President
NARUC

Chris Nelson
Chair
Committee on Telecommunications

Ronald A. Brise
Chair
TeAM Task Force

CC: Members of the Committee on Commerce, Science and Transportation

¹ See Dec. 12, 2008 Letter from NARUC President Butler to Prof. S. Crawford, Obama Transition Team at: <http://www.naruc.org/Testimony/08%201212%20RV%20FCC%20Transition%20letter.pdf>.

² Resolution on Federal Restrictions Affecting FCC Commissioner Participation on Joint Boards and Conferences at: http://www.naruc.org/Resolutions/participation_jointboards04.pdf.

TC-4 Resolution on FCC Process Reform

WHEREAS, The Telecommunications Act of 1996 embodied the nation's long tradition of federalism under which federal and State policymakers share oversight of communications services; *and*

WHEREAS, The careful balance of competing interests established in the 1996 legislation has overall been a success and should be continued regardless of changes in the technology utilized to deliver intrastate and interstate communications services; *and*

WHEREAS, For the federalism model established in the 1996 Act to work properly, it is important to adjust some procedures in how the FCC conducts business; *and*

WHEREAS, Congress is to be congratulated for addressing FCC process reform, including many previously-adopted the National Association of Regulatory Utility Commissioners (NARUC) proposals for change; *and*

WHEREAS, Chairman Tom Wheeler should be applauded for adjusting some procedures and creating an internal task force to consider improvements in FCC process; *and*

WHEREAS, Across administrations and for several years, NARUC has made several proposals to improve and streamline FCC procedures; *and*

WHEREAS, As both Congress and the FCC are actively considering reform measures, NARUC has created a Telecommunications Act Modernization Task Force (TeAM) to re-examine NARUC's positions on needed substantive and procedural reform; *and*

WHEREAS, This TeAM Task Force has examined many of the proposals for FCC process reform and focused upon those that should be a priority for Congress and the FCC, which will improve federal and State collaboration, the efficiency of the Commission, as well as improve FCC decisions by creating a more thorough record upon which it can base action; *and*

WHEREAS, In the appendix to this resolution, the TeAM Task Force outlines the priority recommendations for process reform grouped into three general categories: 1) transparency and timing; 2) process; and 3) efficiency; *now, therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 2016 Winter Committee Meetings in Washington, D.C., endorses the recommendations of the TeAM Task Force as set out in the appendix and urges Congress and/or the FCC to implement the recommended reforms.

Sponsored by the Committee on Telecommunications

Adopted by the NARUC Board of Directors on February 17, 2016

Appendix of Recommended FCC Process Reforms

Federal Communications Commission (FCC) process reform continues to receive a lot of attention. In the first Session of this Congress, the House of Representatives adopted bipartisan legislation. Companion legislation was introduced in the Senate. Early in his tenure, the FCC's Chairman Tom Wheeler also focused on process issues, establishing an internal task force to focus on reform. The agency issued a comprehensive report on possible reforms in 2014 and sought comment on its findings. Many commented on the FCC's notice. NARUC too has been very active. We have testified before both houses of Congress either on process reform generally or on specific proposals based on multiple resolutions and a 2008 letter to the Obama Transition Team. NARUC's Telecommunications Act Modernization (TeAM) Task Force recognized that the pending legislation and open FCC proceeding made revisiting NARUC positions a timely endeavor.

Process reform is not a partisan issue. It is required to ensure proper transparency, due process, and efficiency – as well as to assure the creation of a balanced record that targets specific proposals as a basis for agency decisions. The proposals listed below are reforms that will undoubtedly assist the FCC in meeting all these goals. They are divided into three general categories: transparency and timing; process; and efficiency. A few require Congress to pass specific authorization/mandates for the FCC to act. Most of them the agency can implement without waiting for additional Congressional approval.

NARUC recommends the FCC adopt the listed reforms where additional Congressional authorization is not needed. NARUC also recommends that Congress enact into law mandates requiring all these reforms. In so doing, Congress will provide authorization for the few reforms where the agency needs additional authority. For the majority of proposals, additional authority is not needed. But if Congress includes mandates in any legislation, future Commissions will not have the discretion to discard these practices.

The FCC should be required to:

Transparency and Timing Reforms

1. Release and seek comment upon the specific text/rationale of proposed rules and potentially "precedential" adjudications;
2. Post text of draft FCC Open Meeting items publicly at the same time the FCC Chair circulates them to other FCC Commissioners' offices no later than four weeks in advance of a planned vote and assure that a final order is circulated to other FCC Commissioners no later than 24 hours before the start of the Open Meeting;
3. Maintain a publicly available list of all pending deadlines and comment due dates that includes links to the relevant petition or notice;
4. Maintain a publicly available list of all pending proceedings, including at the Bureau level, as well as a list of draft items "circulated" among the Commissioners, indicating which Commissioners have not voted on the item;
5. Create an online searchable database of consumer complaints and provide more information to help consumers make informed choices;
6. Track enforcement fines and penalties to ensure they are actually being collected and enforced;
7. Publish each order, decision, report, or action not later than 30 days after the date of the adoption;

8. Include specific references to the party and ex parte notice in any final rule to the parts of the decision that are based on material provided during oral or written ex parte communications;
9. Set and meet specific deadlines for FCC action on each type of filing submitted to the agency for disposition; and
10. In the case of Petitions for Reconsideration, specify that such petitions are deemed denied unless the FCC has issued a dispositive order within 180 days of filing. (The rule should also provide that if the petitioner filed a request for extension, the time would not expire until 360 days after filing of the original petition.)

Due Process

1. Specify that the agency cannot defend decisions based on evidence not filed in the official record even if the information is publicly available elsewhere;
2. Establish procedures that prohibit introduction of material/presentations into the record to the Commission by the FCC or any other party unreasonably close to the Sunshine Period that prevent a meaningful opportunity for interested parties to respond through meetings or written communications;
3. Set minimum periods for comment and reply comment, subject to a determination by the Commission that good cause exists for departing from such minimum comment periods.
4. Upon petition and for good cause shown for a hearing, provide an opportunity for cross examination before a hearing examiner or the Commission by interested parties of those, including agency personnel, that provide factual record submissions supporting specific outcomes;
5. Change the current ex parte rules to allow States the same ex parte treatment as Congress and other federal agencies and modify the Sunshine Period rules as they apply to State members of Federal State Joint Boards to allow free discussion with other State commissions impacted by the Boards' deliberations;
6. Allow the three FCC members of the Joint Boards to attend Joint Board closed meetings with their five State colleagues at the same time;
7. Refer all matters that significantly affect the definition, composition, funding, or use of the services that are supported by federal universal service support mechanisms to the proper Joint Board for recommendations and clarify that failure to make mandatory referrals shall nullify any resulting promulgated rule;
8. Annually report, along with the State members of the Joint Boards to the appropriate Congressional oversight committees on the frequency and substance of the discussions held, possible needed referrals, and the results achieved from deliberations under 47 U.S.C. § 410(c);
9. Include separate line items in the FCC's budget to fully reimburse each State member for meeting and travel costs, expert assistance, and discovery expenses associated with his or her service on the Board;
10. Require the FCC to undertake a State impact assessment in all decisions to gauge the impact of proposed action on existing State programs and enforcement regimes;
11. Limit the scope of post-adoption "editorial privileges" to non-substantive edits, such as correcting typos and updating cross-references in footnotes; and
12. Alter the forbearance procedure to reduce the likelihood that any petitions can be granted "by operation of law" and thus be effectively immune from appellate review until Congress can eliminate this outcome through corrective legislation.

Efficiency

1. Allow a majority of commissioners to place an item on the agenda of a monthly Open Meeting;
2. Hire experts on staff to advise commissioners on technical issues;
3. Permit filing of confidential documents through the Electronic Comment Filing System; and
4. Include in any proposed rulemaking or order adopting/amending a rule a method to evaluate the effectiveness of the new rule or modification of an existing rule.