JASON CHAFFETZ, UTAH
CHAIRMAN

ONE HUNDRED FOURTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

MAJORITY (202) 225–5074
MINORITY (202) 225–5051

http://oversight.house.gov

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February 23, 2015

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Mr. Chairman:

I am disappointed by your decision not to participate in a hearing before the Committee prior to a vote by the Federal Communications Commission on unprecedented changes to how the Internet is regulated.[1] Throughout this process, the FCC has failed to establish the appearance this rulemaking is independent, fair, and transparent. Although arguably one of the most sweeping new rules in the Commission's history, the process was conducted without using many of the tools at the Chairman's disposal to ensure transparency and public review. Your testimony may help allay concerns that the draft rules are the product of an insufficiently transparent and accountable rulemaking process; I urge you to reconsider your decision.

The Communications Act of 1934 grants the Chairman of the FCC authority to act as the Commission's Chief Executive Officer. As such, it is at the Chairman's discretion that votes are scheduled and delayed, draft rules made public, and the comment periods provided.[2] Yet, with regard to this 332-page order, there were no public hearings,[3] the document remains secret, no comment period existed, and you declined to testify in an open hearing before the Committee. In addition to these concerns, questions exist as to whether the White House had an improper influence on the Commission's drafting of these rule changes. These concerns were heightened by reports over the weekend that the emails exchanged between you and the White House

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[1] Letter from Tom Wheeler, Chairman, Federal Communications Commission, to Jason Chaffetz, Chairman, H. Comm. on Oversight and Gov't Reform, Feb. 20, 2015.

[2] *See, e.g.,* Communications Act of 1934, 47 U.S.C. 155(a).

[3] While the Commission did sponsor six staff-led "roundtable discussions" in its Washington, DC headquarters regarding the May 2014 Notice of Proposed Rulemaking, these discussions did not concern the February 2015 draft order. Furthermore, such informal events are distinguished from public field hearings held before the full Commission. *Compare* Open Internet Roundtables, Federal Communications Commission, *available at* http://www.fcc.gov/open-internet-roundtables, *with* Public Hearings on Media Ownership Issues, Federal Communications Commission, *available at* http://transition.fcc.gov/ownership/hearings.html.

represent "unprecedented coordination."[4] On February 6, 2015, the Committee requested documents in pursuit of this investigation, yet Friday's deadline passed without the documents being produced.

The American people deserve – and have requested – an open and transparent FCC process. Recent polls show that 73 percent of Americans want greater disclosure of the details of the FCC's proposal to regulate the Internet, and nearly eight in ten favor public disclosure of the exact wording and details of the proposal before the FCC votes on it.[5] Indeed, Commissioners Ajit Pai and Michael O'Rielly just today called for exactly this – the public release of the 332-page order and a temporary delay of the vote.[6] Nonetheless, citing past Commission practice, you refused to publicly release the text of the 332-page draft order.[7] In a past rulemaking of similar magnitude, however, the Chairman did publicly release the rule prior to a vote. This was done in response to congressional requests, including calls from then-Senator Barack Obama. In fact, the rulemaking process demonstrated in the drafting and consideration of media ownership rules in 2003 and 2007 illustrated far greater transparency in pursuit of public interest than the process being carried out today.

In 2003, pursuant to a biennial review of the FCC's media ownership rules, Chairman Michael Powell ordered consideration of major revisions to media ownership regulations. Commissioners Michael Copps and Jonathan Adelstein requested a postponement of the vote, arguing that additional time was needed to examine the impact of the changes on the public interest.[8] They further called for a "public airing" of the proposed changes before the vote.[9] Chairman Powell declined these requests, and on June 2, 2003, the Commission adopted a Report and Order and Notice of Proposed Rulemaking.[10] Stakeholders immediately sued, and a year later, the U.S. Court of Appeals for the Third Circuit remanded the Order.[11] The Court found the Order was insufficiently justified and inadequately supported by the record.[12]

Following remand, the Commission initiated another review of its media ownership rules. At the direction of then-Chairman Kevin Martin, the FCC labored to make this process more transparent and allow for greater public input. Chairman Martin issued a notice of proposed rulemaking in July 2006, and opened a 167-day public comment period. Over the next 18

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[4] Lynn Stanton, *Chaffetz Seeks Unredacted Emails With White House on Net Neutrality*, TRDAILY, Feb. 20, 2015.
[5] Press Release, Progressive Policy Institute, New Survey Finds Americans Skeptical that FCC Regulation of the Internet Will Be Helpful; Favor More Disclosure (Feb. 19, 2015).
[6] Press Release, Statement of FCC Commissioners Ajit Pai and Mike O'Rielly Requesting Public Release of Internet Regulation Plan and Temporary Delay of Vote (Feb. 23, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-332168A1.pdf.
[7] Letter from Tom Wheeler, Chairman, Federal Communications Commission, to Sen. John Thune, Rep. Fred Upton, and Rep. Greg Walden, Feb. 2, 2015, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0212/DOC-332047A1.pdf.
[8] Press Release, FCC Commissioners Adelstein and Copps Call for Public Airing of Media Concentration Rules, (May 13, 2003).
[9] *Id.*
[10] Report and Order and Notice of Proposed Rulemaking, July 2, 2003, *available at*https://apps.fcc.gov/edocs_public/attachmatch/FCC-03-127A1.pdf.
[11] *Prometheus Radio Project v. FCC*, 373 F. 3d 372, 382 (3d Cir. 2004).
[12] *Id.*

months the Commission held eight public hearings, authorized ten independent studies, and accepted hundreds of thousands of public comments.[13]

Notwithstanding these efforts, many Members of Congress argued the Commission should be even more transparent. At a September 2007 public hearing in Chicago, Senator Obama submitted a statement that he "strongly requested" the FCC "put out any changes that they intend to vote on in a new notice of proposed rulemaking."[14] A month later, in a letter to Chairman Martin, Senator Obama argued that both the "proposed timeline and process are irresponsible."[15] He specifically noted while a certain proposal "may pass the muster of a federal court, Congress and the public have the right to review any specific proposal and decide whether or not it constitutes sound policy. And the commission has the responsibility to defend any new proposal in public discourse and debate."[16] The following month Senator Obama cosponsored bipartisan legislation to block the Commission's vote on the rulemaking, pursuant to a 90-day comment period.[17]

In response to these criticisms, and less than one week later, Chairman Martin publicly released the proposed changes and opened a four-week comment period. As he would later explain it:

> Although not required, I took the unusual step of sharing with the public the actual text of the one rule I thought we should amend. Because of the intensely controversial nature of the media ownership proceeding and my desire for an open and transparent process, I wanted to ensure that Members of Congress and the public had the opportunity to review my proposal prior to any Commission action.[18]

In a further effort to solicit input from Congress and the American public, all five FCC Commissioners testified before the House Committee on Energy and Commerce on December 5, 2007. Chairman John Dingell lamented that, "we have heard too many tales of short-circuited decision-making processes . . . [t]he victim in this breakdown is a fair, open, and transparent regulatory process."[19] Telecommunications and the Internet Subcommittee Chairman Ed

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[13] *Oversight of the Federal Communications Commission: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 110th Cong. 93 (2007) (response to written questions submitted by Sen. Byron Dorgan to FCC Chairman Kevin Martin).

[14] John Eggerton, *Obama Calls for Tighter FCC Regulation of Broadcasting*, BROADCASTING & CABLE, Sept. 20, 2007.

[15] Letter from Sen. Barack Obama to Kevin Martin, Chairman, Federal Communications Commission, Oct. 22, 2007.

[16] *Id.*

[17] S. COMM. ON COMMERCE, SCIENCE, AND TRANSPORTATION, 110TH CONG., REPORT ON THE MEDIA OWNERSHIP ACT OF 2007 (COMM. PRINT 2007), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-110srpt461/pdf/CRPT-110srpt461.pdf.

[18] Report and Order and Order on Reconsideration, Federal Communications Commission at 100, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-07-216A1.pdf.

[19] *Oversight of the Federal Communications Commission: Media Ownership: Hearing before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 110th Cong. 7 (opening statement of Chairman John Dingell).

Markey, while praising the FCC for only proceeding after "months of public and corporate input and several public hearings around the country," nonetheless urged delay, so as to provide further opportunities for public participation.[20] A week later, all five Commissioners again testified before the Senate Commerce Committee.[21] Chairman Daniel Inouye was concise and unequivocal: "a transparent regulatory process is essential."[22]

The Commission proceeded with the vote on the rule change as scheduled – but only after conducting many public hearings, publishing the proposed changes, offering a public comment period, and defending the changes in congressional testimony.[23]

The current drafting and scheduled vote on net neutrality rules has afforded none of these opportunities for a public airing and only raised concerns regarding the process. There is a clear lesson to be drawn from the FCC's prior experience with the media ownership rulemakings: the federal courts, Congress, and the American people deserve an independent, transparent, and accessible regulatory process. Accordingly, I urge you to immediately make the Report and Order for "Protecting and Promoting the Open Internet" publicly available. I also urge you to reconsider and accept the invitation to testify before Congress and the American people prior to the Commission's vote on Thursday.

Sincerely,

Jason Chaffetz
Chairman

cc: The Honorable Elijah E. Cummings
Ranking Minority Member

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[20] *Id.* at 12 (opening statement of Subcommittee Chairman Ed Markey).
[21] *Oversight of the Federal Communications Commission: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 110th Cong. (2007).
[22] *Id.* at 1 (opening statement of Chairman Daniel Inouye).
[23] Report and Order and Order on Reconsideration, Federal Communications Commission, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-07-216A1.pdf.

Federal Communications Commission
Washington, D.C. 20554

February 23, 2015

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Chaffetz:

I am responding on behalf of Chairman Wheeler to your February 20, 2015, letter requesting unredacted copies of certain e-mails that are responsive to your February 6, 2015, request for information about how the Federal Communications Commission (FCC) developed its proposed Open Internet order.

The e-mails you are requesting were collected, reviewed and released pursuant to a Freedom of Information Act (FOIA) request made by journalist Jason Leopold. As described in the correspondence between Mr. Leopold and FCC FOIA officials, the FCC redacted portions of these e-mails in accordance with FOIA exemptions.

While these e-mails contain matters that the FCC has consistently withheld from public disclosure, in this instance Chairman Wheeler has decided to provide them to you without redactions as an accommodation and as a demonstration of the FCC's commitment to working with you and your staff. Notwithstanding the production of these documents, the FCC reserves its right to protect deliberative materials in future productions.

Attached to this letter please find the following documents:

- An e-mail chain dated April 23 and April 24, 2014, with the subject line, "NYT story is wrong," and involving Chairman Wheeler, Jeffrey Zients, John Podesta, Jason Furman, and Tom Power;

- An e-mail chain dated April 29, 2014, with the subject line, "FINAL NCTA," and involving Chairman Wheeler, Tom Power, and others;

- An e-mail chain dated between May 11 and May 14, 2014, with the subject line, "Stormy Weather," involving Chairman Wheeler, Larry Strickling, Tom Power, Ross Edelman, and others; and

- An e-mail Chairman Wheeler sent on April 29, 2014, with the subject line, "Open Internet update," to Jeffrey Zients, Jason Furman, Tom Power, and John Podesta, and attaching his remarks to the National Cable and Telecommunications Association.

While the Commission is providing unredacted versions of these documents, we request that you redact Chairman Wheeler's internal FCC e-mail address and mobile phone number if and when you share them with outside parties. In their current form, these documents are non-public Commission documents.

As you will see, these e-mails document Chairman Wheeler's efforts to set the public record straight on the FCC's proposed Open Internet rule. They were sent in response to media stories published on April 23, 2014, describing the Open Internet Notice of Proposed Rulemaking that the Commission began considering on April 24, 2014, and approved on May 15, 2014. Chairman Wheeler felt that these stories mischaracterized the proposal as permitting Internet "fast lanes" and sent a series of e-mails and follow-up e-mails to White House staff, Congress, and other stakeholders alerting them that he felt the stories were inaccurate. He also published two FCC blog entries and delivered a speech that he felt corrected the inaccurate impression the stories had created.[1]

As we told your Committee staff when we met with them on February 13, 2015, we are ready to work with you to move forward on document production and get you the information you have requested. In order to start producing documents, Committee staff agreed at this meeting to discuss a limited set of custodians and search terms. We agreed to propose custodians and search terms for the Committee's review by the middle of the following week. In addition, due to questions from Committee staff regarding the FCC's e-mail and archiving practices, we agreed to identify an FCC employee who could answer the staff's technical questions. We agreed that the timetable for the FCC's response would be addressed in greater detail once the Committee agreed to the proposed custodians and search terms for the initial search, but that the FCC was not expected to produce documents by the February 20, 2015, deadline identified in your February 6 letter. We agreed we would produce documents on a rolling basis once search terms and custodians were finalized. We also agreed to provide the FCC's *ex parte* rules and document retention policies. Although Committee staff requested the internal document preservation notice circulated by the FCC, we did not agree to provide it at that time.

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[1] Tom Wheeler, *Setting the Record Straight on the FCC's Open Internet Rules*, FCC Blog (Apr. 24, 2014), http://www.fcc.gov/blog/setting-record-straight-fcc-s-open-internet-rules; Tom Wheeler, *Finding the Best Path Forward to Protect the Open Internet*, FCC Blog (Apr. 29, 2014), http://www.fcc.gov/blog/finding-best-path-forward-protect-open-internet; Remarks of Tom Wheeler, Chairman, Federal Communications Commission, National Cable & Telecommunications Association (Apr. 30, 2014), http://www.fcc.gov/document/chairman-tom-wheeler-remarks-ncta.

The FCC was closed the following Monday and Tuesday. The first opportunity to address the items we discussed at the February 13 meeting was Wednesday, February 18. On that date, however, the FCC received a request from the Committee to produce its document preservation notice. We produced the preservation notice to the Committee on February 19, 2015, the same day you invited Chairman Wheeler to testify before your Committee. The next day, February 20, 2015, the FCC received your request for the unredacted e-mails discussed in this letter. We remain ready and willing to address the items discussed at our February 13 meeting in order to move the document production process forward.

Sincerely,

John Williams
Senior Legal Advisor
Office of General Counsel

cc: The Honorable Elijah E. Cummings
Ranking Member