

ONE HUNDRED FOURTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON ENERGY AND COMMERCE

140

2125 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6115

Majority (202) 225-2927  
Minority (202) 225-3641

February 18, 2015

The Honorable Tom Wheeler  
Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Dear Chairman Wheeler:

As you know, we have had longstanding concerns with the fairness, openness, and transparency of several of the Federal Communications Commission's (FCC) administrative and rulemaking processes under your leadership. We have raised these concerns in hearings and various other venues, but without any apparent effect. The recently published story in *The Wall Street Journal* entitled "Net Neutrality: How White House Thwarted FCC Chief"<sup>1</sup> raises additional concerns about whether the Commission is managing its affairs with the independence and openness required by its mandate. Therefore, we are writing to seek additional information to ascertain whether the Commission is fulfilling its statutory responsibilities.

One area of ongoing concern is your office's use of so-called "delegated authority." Under this practice, the Commission often delegates to the Commission's bureaus and offices the authority to address routine, non-controversial matters. For example, delegated authority allows the Wireless Telecommunications Bureau to conduct routine licensing matters without a full Commission vote. It is not appropriate for use with regard to new or novel questions of law or policy.

In March 2014, the Media Bureau, using delegated authority, changed longstanding FCC policy with regard to the approval of broadcast television transactions involving sharing agreements. This policy change was neither routine nor non-controversial. Yet this change in Commission policy was neither debated among your colleagues, nor was it subject to a vote of any kind. Rather, it was announced by the Chief of the Media Bureau in a Public Notice. We alerted you at that time of our concerns.<sup>2</sup>

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<sup>1</sup> Gautham Nagesh & Brody Mullins WALL ST.J., Feb. 4, 2015

<sup>2</sup> Upton, Walden Respond to FCC's End Run of Process on Broadcast Sharing Announcement March 13, 2014, <http://energycommerce.house.gov/press-release/upton-walden-respond-fcc%E2%80%99s-end-run-process-broadcast-sharing-announcement>.

In July 2014, an analogous concern arose. We became aware that a Public Notice related to the then upcoming AWS-3 auction was placed on circulation, beginning the process by which commissioners and their staffs may request edits and ultimately vote on the item. However, subsequent action by your office removed the item from circulation and directed the Wireless Telecommunications Bureau to issue the Public Notice on delegated authority – again, depriving the public of essential process and the members of the Commission an opportunity to vote on the matter. According to the media reports, one of the Commissioners sought information related to the substance of the Public Notice and was told he would be briefed *after* the item was adopted.

In yet another matter, we have been concerned with the process by which the Commission granted a waiver of its rules to permit Grain Management, LLC to qualify as a small business and receive bidding credits. It appears your office sought to employ delegated authority to circumvent a vote by the Commission on a controversial matter. Documents provided to the Committee indicate that it was only after two commissioners challenged the release of this item by the Wireless Telecommunications Bureau on delegated authority that the matter was placed on circulation for vote by the full Commission.

Finally, we witnessed a series of actions that call into question the openness and fairness of the Commission's rulemaking processes. In May 2014, press reports indicated that your office withheld the final version of the Open Internet Notice of Proposed Rulemaking from two commissioners for as long as 24 hours after providing the material to the two other commissioners and to the press during the run up to the May 15th FCC Open Meeting. We voiced our concerns when you testified before the Subcommittee on Communications and Technology on May 20, 2014. Our concerns were compounded when we learned that a substantially revised draft of another item scheduled for vote at the Open Meeting was not provided to other commissioners' offices until the closing minutes of the evening before the public vote.

Not surprisingly, Commissioner Rosenworcel said of the Open Internet Notice of Proposed Rulemaking that “the process that got us to this rulemaking today is flawed” and signaled that the effective execution of the Commission's core functions were at risk. As we cautioned you then,<sup>3</sup> withholding information from other members of the Commission until the eleventh hour precludes the scrutiny and analysis necessary for deliberation and reasoned decision-making.

Despite your commitment to reform FCC process, just this past December your office resorted again to a questionable use of delegated authority. In this case, the Wireless Telecommunications Bureau released two items at the direction of your office. The first granted a petition asking the Commission to regulate cellular data roaming rates by providing – for the

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<sup>3</sup> Opening Statement of the Honorable Greg Walden, Subcommittee on Communications and Technology Hearing on “Oversight of the Federal Communications Commission” May 20, 2014 (As Prepared for Delivery), <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/Hearings/CT/20140520/HHR-G-113-IF16-MState-W000791-20140520.pdf>

first time – an interpretation of the Commission’s 2011 data roaming order. The second was a report assessing the state of competition in the wireless industry, which is a responsibility expressly assigned by Congress to the Commission, not to the Wireless Telecommunications Bureau. According to their Joint Statement regarding the release of these items, two of your colleagues requested that these items be brought before the Commission for a vote only to have the request flatly rejected.

Most recently, the Commission’s January open agenda meeting affirmed these concerns. As described by one of your colleagues in a public statement, information requested was withheld until the day before the Commission was to meet and vote – nearly two weeks after the request for the information was made and only days before the expiration of the Commission’s authority to act on the matter.

The Commission’s disregard for openness and transparency has also manifested itself in the agency’s direct dealings with Congress. On June 4, 2014, the Committee, as part of its routine oversight of the agency, sent a letter requesting certain information related to agency management and performance, including the speed-of-disposal metrics for the FCC’s bureaus and offices. This is information that routinely appeared in the FCC’s annual reports until 2009. The agency submitted its “complete” response on June 30, 2014, which lacked information on speed-of-disposal metrics for certain bureaus and offices, including the agency’s largest, without explanation. Despite multiple requests for a full response, it was not until December 16, 2014, nearly six months after the initial request and only after a meeting between Committee staff and senior Commission staff, that the Committee was informed that such metrics were not available because they ceased being employed in the management of the agency’s largest bureau in 2009.

Considered together, these issues lead us to conclude that the Commission under your leadership is not sufficiently committed to fulfilling its obligation to operate independently, with processes that are open, fair and transparent.

In light of this, and pursuant to Rules X and XI of the U.S. House of Representatives, we seek information necessary to understand the facts and circumstances surrounding these various process issues. Accordingly, we request that you provide, by March 4, 2015, requested information and documents relating to:

- (1) Any guidelines, protocols, instructions, or directives relating to the practices and processes of bureaus, divisions, and offices within the FCC with regard to the provision of information requested by other Commissioners and their staff. This includes, but is not limited to, factual information and the legal opinions of the bureaus, divisions, and offices related to matters being decided by the bureaus or presented to the Commission for vote.
  - a. Describe any changes to practices, processes, or interpretations during your Chairmanship regarding the provision of such information to matters requested by Commissioners and their staff.

- b. Provide all documents, including email communications, relating to any such changes.
  - (2) Any guidelines, protocols, instructions, or directives relating to routine practices and processes of bureaus, divisions, and offices within the FCC including guidance or instruction concerning compliance with the Administrative Procedures Act and the FCC's rules.
    - a. Describe any changes to practices, processes, or interpretations during your Chairmanship concerning compliance with the Administrative Procedures Act and FCC's rules.
    - b. Provide all documents, including email communications, relating to any such changes.
  - (3) Any guidelines, protocols, instructions, directives, or legal opinions provided by the Office of General Counsel relating to the practices and processes of bureaus, divisions, and offices of the FCC with regard to the use of delegated authority in the agency's decision-making process.
    - a. Describe any changes to practices, processes, or interpretations during your Chairmanship concerning the use of delegated authority in the agency's decision-making process.
    - b. Provide all documents, including email communications, relating to any such changes.
  - (4) Any guidelines, protocols, instructions, directives, or legal opinions provided by the Office of General Counsel relating to the discretion of the Chairman to direct the use of delegated authority.
    - a. Describe any exercise or direction during your Chairmanship concerning the use of delegated authority in the agency's decision-making process.
    - b. Provide all documents, including email communications, relating to any such exercise or direction provide by you or on your behalf.
  - (5) The FCC's policy on the nature and scope of permissible communications between FCC personnel and outside entities, including, but not limited to, the public, industry representatives, Congress and its staff, and the executive branch.
  - (6) Any guidelines, protocols, instructions, directives, or rules relating to FCC staff use of personal email in the execution of official FCC business.
  - (7) Describe the Commission's document retention policies, including policies relating to the retention of internal or external Commission correspondence, including personal

and official email. Include any guidelines, protocols, instructions or directives relating to these policies and the implementation and practice of these policies.

- a. If these policies have changed or the implementation and practice of these policies has changed since you became Chairman, please describe those changes, the date the changes were instituted, the method by which these changes were implemented, any staff education and oversight activities relating to the changes, and the rationale behind the changes.
- b. Provide all documents, including email communications, relating to any such changes to document retention policies.
- c. Please describe any changes you are contemplating to the Commission's policies regarding document retention.

Instructions for responding to the Committee's document requests are included as an attachment to this letter. In your written responses, please certify that you have fully complied with this information and document request. Should you have any questions you may contact David Redl or Charles Ingebretson of the Majority Committee staff at (202) 225-2927.

Sincerely,



Fred Upton  
Chairman



Tim Murphy  
Chairman  
Subcommittee on Oversight and Investigations



Greg Walden  
Chairman  
Subcommittee on Communications and Technology

Attachment

cc: The Honorable Frank Pallone, Jr., Ranking Member

The Honorable Diana DeGette, Ranking Member  
Subcommittee on Oversight and Investigations

The Honorable Anna Eshoo, Ranking Member  
Subcommittee on Communications and Technology

The Honorable Mignon Clyburn, Commissioner

Federal Communications Commission

The Honorable Jessica Rosenworcel, Commissioner  
Federal Communications Commission

The Honorable Ajit Pai, Commissioner  
Federal Communications Commission

The Honorable Michael O'Rielly, Commissioner  
Federal Communications Commission

## **RESPONDING TO COMMITTEE DOCUMENT REQUESTS**

*In responding to the document request, please apply the instructions and definitions set forth below:*

### **INSTRUCTIONS**

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control or otherwise available to you, regardless of whether the documents are possessed directly by you.
2. Documents responsive to the request should not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee.
3. In the event that any entity, organization, or individual named in the request has been, or is currently, known by any other name, the request should be read also to include such other names under that alternative identification.
4. Each document should be produced in a form that may be copied by standard copying machines.
5. When you produce documents, you should identify the paragraph(s) and/or clause(s) in the Committee's request to which the document responds.
6. Documents produced pursuant to this request should be produced in the order in which they appear in your files and should not be rearranged. Any documents that are stapled, clipped, or otherwise fastened together should not be separated. Documents produced in response to this request should be produced together with copies of file labels, dividers, or identifying markers with which they were associated when this request was issued. Indicate the office or division and person from whose files each document was produced.
7. Each folder and box should be numbered, and a description of the contents of each folder and box, including the paragraph(s) and/or clause(s) of the request to which the documents are responsive, should be provided in an accompanying index.
8. Responsive documents must be produced regardless of whether any other person or entity possesses non-identical or identical copies of the same document.
9. The Committee requests electronic documents in addition to paper productions. If any of the requested information is available in machine-readable or electronic form (such as on a computer server, hard drive, CD, DVD, back up tape, or removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), you should immediately consult with Committee staff to determine the appropriate format in which to produce the information. Documents produced in electronic format should be organized, identified, and indexed electronically in a manner comparable to the organizational structure called for in (6) and (7) above.

10. If any document responsive to this request was, but no longer is, in your possession, custody, or control, or has been placed into the possession, custody, or control of any third party and cannot be provided in response to this request, you should identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control, or was placed in the possession, custody, or control of a third party.

11. If any document responsive to this request was, but no longer is, in your possession, custody or control, state:

- a. how the document was disposed of;
- b. the name, current address, and telephone number of the person who currently has possession, custody or control over the document;
- c. the date of disposition;
- d. the name, current address, and telephone number of each person who authorized said disposition or who had or has knowledge of said disposition.

12. If any document responsive to this request cannot be located, describe with particularity the efforts made to locate the document and the specific reason for its disappearance, destruction or unavailability.

13. If a date or other descriptive detail set forth in this request referring to a document, communication, meeting, or other event is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.

14. The request is continuing in nature and applies to any newly discovered document, regardless of the date of its creation. Any document not produced because it has not been located or discovered by the return date should be produced immediately upon location or discovery subsequent thereto.

15. All documents should be bates-stamped sequentially and produced sequentially. In a cover letter to accompany your response, you should include a total page count for the entire production, including both hard copy and electronic documents.

16. Two sets of the documents should be delivered to the Committee, one set to the majority staff in Room 316 of the Ford House Office Building and one set to the minority staff in Room 564 of the Ford House Office Building. You should consult with Committee majority staff regarding the method of delivery prior to sending any materials.

17. In the event that a responsive document is withheld on any basis, including a claim of privilege, you should provide the following information concerning any such document: (a) the reason the document is not being produced; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; (e) the relationship of the author and addressee to each

other; and (f) any other description necessary to identify the document and to explain the basis for not producing the document. If a claimed privilege applies to only a portion of any document, that portion only should be withheld and the remainder of the document should be produced. As used herein, "claim of privilege" includes, but is not limited to, any claim that a document either may or must be withheld from production pursuant to any statute, rule, or regulation.

18. If the request cannot be complied with in full, it should be complied with to the extent possible, which should include an explanation of why full compliance is not possible.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; (2) documents responsive to the request have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee since the date of receiving the Committee's request or in anticipation of receiving the Committee's request, and (3) all documents identified during the search that are responsive have been produced to the Committee, identified in a privilege log provided to the Committee, as described in (17) above, or identified as provided in (10), (11) or (12) above.

### **DEFINITIONS**

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra-office communications, electronic mail ("e-mail"), instant messages, calendars, contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, power point presentations, spreadsheets, and work sheets. The term "document" includes all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments to the foregoing, as well as any attachments or appendices thereto. The term "document" also means any graphic or oral records or representations of any kind (including, without limitation, photographs, charts, graphs, voice mails, microfiche, microfilm, videotapes, recordings, and motion pictures), electronic and mechanical records or representations of any kind (including, without limitation, tapes, cassettes, disks, computer server files, computer hard drive files, CDs, DVDs, back up tape, memory sticks, recordings, and removable computer media such as thumb drives, flash drives, memory cards, and external hard drives), and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, electronic format, disk, videotape or otherwise. A document bearing any notation not part of the original text is considered to be a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "documents in your possession, custody or control" means (a) documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, or representatives acting on your behalf; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that have been placed in the possession, custody, or control of any third party.

3. The term "communication" means each manner or means of disclosure, transmission, or exchange of information, in the form of facts, ideas, opinions, inquiries, or otherwise, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, e-mail, instant message, discussion, release, personal delivery, or otherwise.

4. The terms "and" and "or" should be construed broadly and either conjunctively or disjunctively as necessary to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes the plural number, and vice versa. The masculine includes the feminine and neuter genders.

5. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, limited liability corporations and companies, limited liability partnerships, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, other legal, business or government entities, or any other organization or group of persons, and all subsidiaries, affiliates, divisions, departments, branches, and other units thereof.

6. The terms "referring" or "relating," with respect to any given subject, mean anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.

7. The terms "you" or "your" mean and refers to

For government recipients:

"You" or "your" means and refers to you as a natural person and the United States and any of its agencies, offices, subdivisions, entities, officials, administrators, employees, attorneys, agents, advisors, consultants, staff, or any other persons acting on your behalf or under your control or direction; and includes any other person(s) defined in the document request letter.



Federal Communications Commission  
Washington, D.C. 20554

March 4, 2015

The Honorable Fred Upton  
Chairman  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Tim Murphy  
Chairman  
Subcommittee on Oversight and Investigations  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable Greg Walden  
Chairman  
Subcommittee on Communications and Technology  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, D.C. 20515

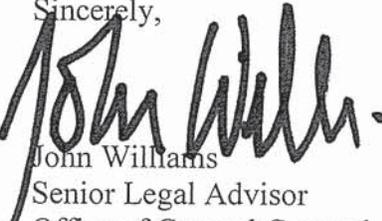
Dear Chairmen Upton, Murphy, and Walden:

Please find attached to this letter an interim response from the Federal Communications Commission (FCC) to the information requested in your letter to Chairman Wheeler on February 18, 2015. This interim response provides answers to interrogatory Nos. 1, 2, 5, 6, and 7. As I discussed with your staff today, Chairman Wheeler intends to send you a final and complete response to your letter next week.

In addition to these responses, also attached to this letter are a number of FCC internal publications that are responsive to your request. Please note that these are non-public, confidential FCC documents.

Thank you for your patience as the Commission continues to respond to your letter.

Sincerely,

  
John Williams  
Senior Legal Advisor  
Office of General Counsel

Enclosure

cc (with enclosure):

The Honorable Frank Pallone, Jr.,  
Ranking Member, Committee on Energy and Commerce

The Honorable Diana DeGette  
Ranking Member, Subcommittee on Oversight and Investigations  
Committee on Energy and Commerce

The Honorable Anna G. Eshoo  
Ranking Member, Subcommittee on Communications and Technology  
Committee on Energy and Commerce

- (1) **Any guidelines, protocols, instructions, or directives relating to the practices and process of bureaus, divisions, and offices within the FCC with regard to the provision of information requested by other Commissioners and their staff. This includes, but is not limited to, factual information and the legal opinions of the bureaus, divisions, and offices related to matters being decided by the bureaus or presented to the Commission for vote.**

RESPONSE: The Commission does not have written guidelines, protocols, instructions, or directives on providing information requested by Commissioners or their staffs. There are, however, a number of regular occasions on which agency staff meet with the Commissioners and their advisors to provide information. For instance, most of the Commissioners have scheduled regular (weekly, bi-weekly, or monthly) meetings with Bureau and Office Chiefs to discuss pending and upcoming matters, and they may use those opportunities to ask questions and request follow-up information. In addition, the Bureaus have regularly-scheduled weekly group meetings with the relevant staff in all of the Commissioners' offices. For instance, when major items are circulated to the Commissioners, Commissioners' staffs are given briefings and have an opportunity to ask questions. Individual Commissioners' offices also request and receive briefings on particular topics, including major items.

- a. **Describe any changes to practices, process, or interpretations during your Chairmanship regarding the provision of such information to matters requested by Commissioners and their staff.**

RESPONSE: There have been no such changes.

- b. **Provide all documents, including email communications, relating to any such changes.**

RESPONSE: As there have been no such changes, there are no such documents.

- (2) **Any guidelines, protocols, instructions, or directives relating to routine practices and processes of bureaus, divisions, and offices within the FCC including guidance or instruction concerning compliance with the Administrative Procedure Act and the FCC's rules.**

RESPONSE: The Office of General Counsel maintains on the FCC's intranet site a number of materials that provide guidance on compliance with the APA, other statutes relating to the administrative process, and FCC rules. These include a manual entitled "What Every FCC Attorney Should Know: An Overview," a "Procedural Resource Checklist," handouts from a course entitled "The Administrative Procedure Act and the FCC Decision-Making Process," and copies of the APA and other administrative law statutes. Copies of these documents are being provided.

- a. **Describe any changes to practices, processes, or interpretations during your Chairmanship concerning compliance with the Administrative Procedure Act and FCC's rules.**

RESPONSE: There have been no such changes.

- b. **Provide all documents, including email communications, relating to any such changes.**

RESPONSE: As there have been no such changes, there are no such documents.

- (3) **Any guidelines, protocols, instructions, directives, or legal opinions provided by the Office of General Counsel relating to the practices and processes of bureaus, divisions, and offices of the FCC with regard to the use of delegated authority in the agency's decision-making process.**

RESPONSE: The FCC will provide a response to this request next week.

- a. **Describe any changes to practices, processes, or interpretations during your Chairmanship concerning the use of delegated authority in the agency's decision-making process.**

RESPONSE: The FCC will provide a response to this request next week.

- b. **Provide all documents, including email communications, relating to any such changes.**

RESPONSE: The FCC will provide a response to this request next week.

- (4) **Any guidelines, protocols, instructions, directives, or legal opinions provided by the Office of General Counsel relating to the discretion of the Chairman to direct the use of delegated authority.**

RESPONSE: The FCC will provide a response to this request next week.

- a. **Describe any exercise of direction during your Chairmanship concerning the use of delegated authority in the agency's decision-making process.**

RESPONSE: The FCC will provide a response to this request next week.

- b. **Provide all documents, including email communications, relating to any such exercise or direction provided by you or on your behalf.**

RESPONSE: The FCC will provide a response to this request next week.

- (5) **The FCC’s policy on the nature and scope of permissible communications between FCC personnel and outside entities, including, but not limited to, the public, industry representatives, Congress and its staff, and the executive branch.**

RESPONSE: The Commission’s *ex parte* rules, set forth at 47 CFR 1.1200 to 1.1214, delineate the rules governing communications between FCC personnel and outside entities. In particular, these rules specify that certain proceedings and presentations with outside entities are “exempt” and may be made freely; that certain proceedings are “permit but disclose” matters in which discussions are permissible but communications to the agency are subject to disclosure requirements; and that certain proceedings are “restricted,” with *ex parte* presentations to or from the agency prohibited.

Among the *ex parte* rules, there are some provisions specific to Congress and the executive branch. For instance, presentations made by members of Congress or their staffs, or by other agencies or branches of the Federal government or their staffs, are permitted (even during the Sunshine period that begins seven days before a Commission meeting) and must be placed in the record only if they are “of substantial significance and clearly intended to affect the ultimate decision.” 47 CFR 1.1203(a)(4) and 1.1206(b)(3).

- (6) **Any guidelines, protocols, instructions, directives, or rules relating to FCC staff use of personal email in the execution of official FCC business.**

RESPONSE: The FCC maintains agency records in compliance with the Federal Records Act, as implemented by the National Archives and Records Administration (NARA). NARA’s current policy guidance (NARA Bulletin 2013-03) is that agency employees should not generally use personal email accounts to conduct official agency business, while noting that “there may be times when agencies authorize the use of personal email accounts, such as in emergency situations when Federal accounts are not accessible or when an employee is initially contacted through a personal account.” In these situations, agency employees must ensure that all Federal records sent or received on personal email systems are captured and managed in accordance with agency recordkeeping practices.

NARA recently acknowledged that it will have to update this guidance in light of the passage late last year of the “Presidential and Federal Records Act Amendments” of 2014 (P.L. 113-187). This law requires agency employees to copy their official accounts when they send or create federal records on their personal e-mail accounts, or to forward federal records sent or created on personal accounts to their official accounts within 20 days.

- (7) Describe the Commission's document retention policies, including policies relating to the retention of internal or external Commission correspondence, including personal and official email. Include any guidelines, protocols, instructions or directives relating to these policies.**

RESPONSE: The FCC maintains agency records in compliance with the Federal Records Act, as implemented by the National Archives and Records Administration (NARA). The FCC's Managing Director has established and published inside the agency a record disposition schedule for "records common to most offices" as well as 17 additional disposition schedules tailored to the agency's bureaus and offices. New employees are provided training on proper record disposition practices. Each bureau and office has an employee who acts as the records liaison for their units. Copies of all 18 of these schedules are being provided.

These schedules consist of lists with two columns. The left-hand column describes record types, while the right-hand column describes the manner in which each type of record should be treated. Some types of records can be destroyed immediately, some need to be preserved for a certain amount of time, and some need to be treated as permanent records that will be eventually transferred to the National Archives. The disposition policies in the right column come from one of two sources of disposition authority: either NARA's General Records Schedule (GRS) or FCC-proposed disposition policies that have been published and approved by NARA. For categories of documents that are common to many government agencies (e.g., personnel files or FOIA requests), the FCC tends to use policies published in the GRS. For record types that are unique to the FCC (e.g., radio frequency assignments, slamming complaints), the FCC establishes its own NARA-approved disposition policies. These policies are identified with numbers like "N1-173-98-8."

- a. If these policies have changed or the implementation and practice of these policies has changed since you became Chairman, please describe those changes, the date the changes were implemented, any staff education and oversight activities relating to the changes, and the rationale behind the changes.**

RESPONSE: There have been no such changes.

- b. Provide all documents, including email communications, relating to any such changes to document retention policies.**

RESPONSE: As there have been no such changes, there are no such documents.

- c. **Please describe any changes you are contemplating to the Commission's policies regarding document retention.**

RESPONSE: The FCC is not currently contemplating changes to these policies.





FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON

OFFICE OF  
THE CHAIRMAN

March 13, 2015

The Honorable Fred Upton  
Chairman  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Tim Murphy  
Chairman  
Subcommittee on Oversight and Investigations  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Greg Walden  
Chairman  
Subcommittee on Communications and Technology  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, DC 20515

Dear Chairmen Upton, Murphy and Walden:

This letter and the attached materials provide an updated response to the information requested in your letter of February 18, 2015. The materials in this response supplement the interim response provided to you on March 4, 2015, by the Commission's Office of General Counsel. Please note that some of the information provided in this response consists of non-public, confidential FCC internal documents.

I appreciate the opportunity to provide this additional information, and would be pleased to respond to any additional information requests.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tom Wheeler".

Tom Wheeler

Enclosure

Page 2—The Honorable Fred Upton  
The Honorable Tim Murphy  
The Honorable Greg Walden

cc (with enclosure):

The Honorable Frank Pallone, Jr., Ranking Member  
Committee on Energy and Commerce

The Honorable Diana DeGette, Ranking Member  
Subcommittee on Oversight and Investigations  
Committee on Energy and Commerce

The Honorable Anna G. Eshoo, Ranking Member  
Subcommittee on Communications and Technology  
Committee on Energy and Commerce

## Response to Questions

- (1) **Any guidelines, protocols, instructions, or directives relating to the practices and process of bureaus, divisions, and offices within the FCC with regard to the provision of information requested by other Commissioners and their staff. This includes, but is not limited to, factual information and the legal opinions of the bureaus, divisions, and offices related to matters being decided by the bureaus or presented to the Commission for vote.**

RESPONSE: The Commission does not have written guidelines, protocols, instructions, or directives on providing information requested by Commissioners or their staffs. There are, however, a number of regular occasions on which agency staff meet with the Commissioners and their advisors to provide information. For instance, most of the Commissioners have scheduled regular (weekly, bi-weekly, or monthly) meetings with Bureau and Office Chiefs to discuss pending and upcoming matters, and they may use those opportunities to ask questions and request follow-up information. In addition, the Bureaus have regularly-scheduled weekly group meetings with the relevant staff in all of the Commissioners' offices. For instance, when major items are circulated to the Commissioners, Commissioners' staffs are given briefings and have an opportunity to ask questions. Individual Commissioners' offices also request and receive briefings on particular topics, including major items.

- a. **Describe any changes to practices, process, or interpretations during your Chairmanship regarding the provision of such information to matters requested by Commissioners and their staff.**

RESPONSE: There have been no such changes.

- b. **Provide all documents, including email communications, relating to any such changes.**

RESPONSE: As there have been no such changes, there are no such documents.

- (2) **Any guidelines, protocols, instructions, or directives relating to routine practices and processes of bureaus, divisions, and offices within the FCC including guidance or instruction concerning compliance with the Administrative Procedure Act and the FCC's rules.**

RESPONSE: One of my goals as Chairman of the Commission has been to improve the efficiency and effectiveness of how the FCC conducts its business. In my first week as Chairman, I commissioned a Staff Working Group to examine how the Commission does its work. The Staff Working Group gathered and considered both internal and external

comments, including comments provided by Members of the House Energy and Commerce Committee, and issued its report on February 14, 2014. Since that time, we have been engaged in an ongoing process to address the challenges identified in the report, and I have recently asked the staff to undertake some additional work in this area.

Several recently-implemented reforms address the routine practices and processes of the bureaus, divisions, and offices. These include: a "Consent Agenda" process for voting certain items at an Open Agenda Meeting without a presentation, new accelerated procedures for processing appropriate Applications For Review, revised inter-bureau consultation "best practices" procedures, and new best practices documents on backlog reduction and summary disposition that can be used to help dispose of pending items more efficiently. Copies of these documents are being provided.

The Office of General Counsel maintains on the FCC's intranet site a number of materials that provide guidance on compliance with the APA, other statutes relating to the administrative process, and FCC rules. These include a manual entitled "What Every FCC Attorney Should Know: An Overview," a "Procedural Resource Checklist," handouts from a course entitled "The Administrative Procedure Act and the FCC Decision-Making Process," and copies of the APA and other administrative law statutes. Copies of these documents were provided as part of the March 4 response.

- a. Describe any changes to practices, processes, or interpretations during your Chairmanship concerning compliance with the Administrative Procedure Act and FCC's rules.**

RESPONSE: Please see above for descriptions of some of the recent process reforms that the Commission has implemented.

- b. Provide all documents, including email communications, relating to any such changes.**

RESPONSE: As described above, documents describing these recent reforms are being provided as an attachment. Additional documentation is available.

- (3) Any guidelines, protocols, instructions, directives, or legal opinions provided by the Office of General Counsel relating to the practices and processes of bureaus, divisions, and offices of the FCC with regard to the use of delegated authority in the agency's decision-making process.**

RESPONSE:

Several documents that provide general guidance on the practices and processes used by Bureaus and Offices in the exercise of delegated authority are discussed below, and copies are provided.

The Commission's use of delegated authority is as set forth in the Communications Act, the Commission's rules (codified at 47 C.F.R.), and Commission orders.

Section 5(c)(1) of the Communications Act, 47 U.S.C. § 155(c)(1), says that "[w]hen necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions [with a few enumerated exceptions] to a panel of commissioners, an individual commissioner, an employee board, or an individual employee." A copy is being provided of a one-page Office of General Counsel memorandum, dated April 4, 2002, summarizing the legal basis for delegated authority.

As explained in the Commission's rules, delegations of authority are made by rule or by order, by vote of a majority of the members of the Commission. See 47 C.F.R. § 0.201(d). Functions "of a continuing or recurring nature" are delegated by rule, and are set out in sections 0.211 to 0.392 of the rules. 47 C.F.R. §§ 0.211-0.392. Under those rules, the Chairman, Commissioners, and Bureau and Office Chiefs each have specific delegations of authority, which generally bar Bureaus and Offices from deciding matters that "present new or novel questions of law or policy which cannot be resolved under outstanding Commission precedents and guidelines." 47 C.F.R. § 0.331(a)(2) (delegation to Wireless Telecommunications Bureau Chief). A copy is being provided of an internal Office of General Counsel memo to then General Counsel Jane Mago (dated June 19, 2002) that addresses this "new and novel" exception to the delegation of authority in the Commission's rules. Also provided is a copy of an "e-Checklist on the Delegated Authority Process," which gives practical guidance to Commission staff regarding the preparation and issuance of orders on delegated authority. It is posted on the FCC's intranet. There is also a brief mention of effective dates for actions on delegated authority on page 81 of the "What Every Attorney Should Know" manual referenced above in response to Question 2. As a general practice, when an order on delegated authority is expected to receive significant public attention, a Bureau or Office may give Commissioners advance notice.

In addition to the delegation contained in the Commission's rules, specific functions "pertaining to a particular matter or proceeding" are sometimes granted by the Commission. 47 C.F.R. § 0.201(d)(2). As an example, the Commission's orders reforming its various universal service programs have included language similar to the following from its 2012 Rural Health Care reform order, delegating to the Wireline Competition Bureau authority "to make any further rule revisions as necessary to ensure the reforms adopted in this Order are reflected in the rules." *Healthcare Connect Fund Order*, WC Docket No. 02-60, 27 FCC Rcd 16678, 16827, para. 375 (2012).

It is important to note that delegated authority is a starting point but never the finish line. All decisions made by the staff on delegated authority are subject to review by the full Commission either on the Commission's own motion (47 C.F.R. § 1.117) or through an application for review filed by an affected party (47 C.F.R. § 1.115).

Delegated authority is one of the important tools the FCC uses to promote the "prompt and orderly conduct of its business." 5 U.S.C. § 155(c)(1). As the table below indicates, the bureaus and offices have very consistently used this authority over time to conduct the activities the Commission has delegated to them. Over the past decade, DA items generally represent about 90% of the Commission's actions during any given year.

**Number of DA Items and FCC Items Adopted - 2004 - 2014**

<b><u>Year</u></b>	<b><u>2004</u></b>	<b><u>2005</u></b>	<b><u>2006</u></b>	<b><u>2007</u></b>	<b><u>2008</u></b>	<b><u>2009</u></b>	<b><u>2010</u></b>	<b><u>2011</u></b>	<b><u>2012</u></b>	<b><u>2013</u></b>	<b><u>2014</u></b>
<b># DA Items</b>	4025	3250	2544	3542	2732	2446	2366	2039	2014	2414	1845
<b># FCC Items</b>	300	230	175	240	285	127	215	193	188	185	252

- a. **Describe any changes to practices, processes, or interpretations during your Chairmanship concerning the use of delegated authority in the agency's decision-making process.**

RESPONSE:

There have been no changes to the general guidance described above.

- b. **Provide all documents, including email communications, relating to any such changes.**

RESPONSE:

As there have been no such changes, there are no such documents.

**(4) Any guidelines, protocols, instructions, directives, or legal opinions provided by the Office of General Counsel relating to the discretion of the Chairman to direct the use of delegated authority.**

RESPONSE:

We referred above to the 2002 legal memoranda regarding the scope of delegated authority. Beyond those, we are not aware of any other memoranda specifically addressing the Chairman's general discretion to direct the use of delegated authority.

- a. Describe any exercise or direction during your Chairmanship concerning the use of delegated authority in the agency's decision-making process.**

RESPONSE:

A Bureau or Office may on occasion seek guidance from the Chairman's Office regarding whether an order should be voted on by the full Commission, even if such an order is within the scope of the Bureau or Office's delegated authority. Similarly, the Chairman may on occasion request that an order be presented to the Commission for a vote, even if issuance of the order is within the scope of the authority delegated to the Bureau or Office. This exercise of direction is within the scope of the authority provided to the Chairman under Section 5 of the Communications Act, which authorizes the Chairman "generally to coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission," 47 U.S.C. § 155(a), and pursuant to the authority delegated to him under the Commission's rules. 47 C.F.R. 0.211.

- b. Provide all documents, including email communications, relating to any such exercise or direction provided by you or on your behalf.**

RESPONSE:

Neither I nor the Chairman's Office staff has provided any general written guidance with respect to the exercise of delegated authority.

- (5) The FCC's policy on the nature and scope of permissible communications between FCC personnel and outside entities, including, but not limited to, the public, industry representatives, Congress and its staff, and the executive branch.**

RESPONSE: The Commission's *ex parte* rules, set forth at 47 C.F.R. §§ 1.1200 to 1.1214, delineate the rules governing communications between FCC personnel and outside entities. In particular, these rules specify that certain proceedings and presentations with outside entities are "exempt" and may be made freely; that certain proceedings are "permit but disclose" matters in which discussions are permissible but communications to the agency are subject to disclosure requirements; and that certain proceedings are "restricted," with *ex parte* presentations to or from the agency prohibited.

Among the *ex parte* rules, there are some provisions specific to Congress and the executive branch. For instance, presentations made by members of Congress or their staffs, or by other agencies or branches of the Federal government or their staffs, are permitted (even during the Sunshine period that begins seven days before a Commission meeting) and must be placed in the record only if they are “of substantial significance and clearly intended to affect the ultimate decision.” 47 C.F.R. §§ 1.1203(a)(4) and 1.1206(b)(3).

**(6) Any guidelines, protocols, instructions, directives, or rules relating to FCC staff use of personal email in the execution of official FCC business.**

RESPONSE: The FCC maintains agency records in compliance with the Federal Records Act, as implemented by the National Archives and Records Administration (NARA). NARA’s current policy guidance (NARA Bulletin 2013-03) is that agency employees should not generally use personal email accounts to conduct official agency business, while noting that “there may be times when agencies authorize the use of personal email accounts, such as in emergency situations when Federal accounts are not accessible or when an employee is initially contacted through a personal account.” In these situations, agency employees must ensure that all Federal records sent or received on personal email systems are captured and managed in accordance with agency recordkeeping practices.

NARA recently acknowledged that it will have to update this guidance in light of the passage late last year of the “Presidential and Federal Records Act Amendments” of 2014 (P.L. 113-187). This law requires agency employees to copy their official accounts when they send or create federal records on their personal email accounts, or to forward federal records sent or created on personal accounts to their official accounts within 20 days.

**(7) Describe the Commission’s document retention policies, including policies relating to the retention of internal or external Commission correspondence, including personal and official email. Include any guidelines, protocols, instructions or directives relating to these policies.**

RESPONSE: The FCC maintains agency records in compliance with the Federal Records Act, as implemented by the National Archives and Records Administration (NARA). The FCC’s Managing Director has established and published inside the agency a record disposition schedule for “records common to most offices” as well as 17 additional disposition schedules tailored to the agency’s bureaus and offices. New employees are provided training on proper record disposition practices. Each bureau and office has an employee who acts as the records liaison for their units. Copies of all 18 of these schedules were provided with the March 4 interim response.

These schedules consist of lists with two columns. The left-hand column describes record types, while the right-hand column describes the manner in which each type of record should be treated. Some types of records can be destroyed immediately, some need to be preserved for a certain amount of time, and some need to be treated as permanent records that will be eventually transferred to the National Archives. The disposition policies in the right column come from one of two sources of disposition authority: either NARA's General Records Schedule (GRS) or FCC-proposed disposition policies that have been published and approved by NARA. For categories of documents that are common to many government agencies (e.g., personnel files or FOIA requests), the FCC tends to use policies published in the GRS. For record types that are unique to the FCC (e.g., radio frequency assignments, slamming complaints), the FCC establishes its own NARA-approved disposition policies. These policies are identified with numbers like "N1-173-98-8." We are also providing a copy of a briefing sheet which the Office of the General Counsel used in early 2015 to brief Commissioner offices on record retention requirements, including those in the recently-enacted Presidential and Federal Records Act Amendments of 2014.

- a. If these policies have changed or the implementation and practice of these policies has changed since you became Chairman, please describe those changes, the date the changes were implemented, any staff education and oversight activities relating to the changes, and the rationale behind the changes.**

RESPONSE: There have been no such changes.

- b. Provide all documents, including email communications, relating to any such changes to document retention policies.**

RESPONSE: As there have been no such changes, there are no such documents.

- c. Please describe any changes you are contemplating to the Commission's policies regarding document retention.**

RESPONSE: The FCC is not currently contemplating changes to these policies.