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United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510–6125

WEBSITE: http://commerce.senate.gov

March 18, 2016

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

Dear Chairman Wheeler:

Independent agencies such as the Federal Communications Commission (FCC) allow the federal government to regulate complex sectors of our nation's economy. Statutory independence empowers these agencies to focus on their areas of expertise without traditional political pressures. Nevertheless, they remain subject to congressional oversight to ensure they do not stray from their mission, overstep their authority, or misuse taxpayer dollars. Along these lines, I am writing today to request information regarding the possibility that the Office of the Chairman may be improperly promoting certain favored policy objectives while suppressing the communications and opinions of other commissioners. I appreciate your commitment at the March 2, 2016, oversight hearing to cooperate with this inquiry.

As I noted at the hearing, FCC Commissioner Michael O'Rielly recently highlighted the potentially discriminatory application of the Commission's rule governing the disclosure of nonpublic information.[1] The rule defines nonpublic information to include, among other things, "the content of agenda items" and "actions or decisions made by the Commission at closed meetings or by circulation prior to the public release of such information by the Commission."[2] Without a written authorization issued by the Chairman, such information "shall not be disclosed, directly or indirectly, to any person outside the Commission."[3] According to Commissioner O'Rielly, the rule prevents commissioners from soliciting outside expertise to inform their decision-making.[4] He further asserts that high-level Commission staff frequently "conduct private briefings for select members of the press and favored outside parties" and "routinely [put] out blogs and fact sheets to put [the Commission's] 'spin' on the substance around the time when items are circulated to Commissioners for consideration."[5] Indeed,

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[1] FCC Blog, Comm'r Michael O'Rielly, Stop Unfairly Censoring Commissioners, https://www.fcc.gov/news-events/blog/2016/02/24/stop-unfairly-censoring-commissioners (Feb. 24, 2016).
[2] 47 C.F.R. § 19.735-203(a).
[3] *Id.*
[4] FCC Blog, *supra* note 1.
[5] *Id.* For example, in advance of a notice of proposed rulemaking, the Commission issued a fact sheet about the Chairman's proposal regarding set-top boxes. This fact sheet, according to Commissioner

Communications Daily has reported that, in the first half of 2015, the FCC held more off-the-record events for news media than any other federal entity related to communications.[6]

Another area of potential concern relates to the possible role of your office in the recent creation of a public advocacy coalition to urge official actions regarding Next Generation 911 (NG911), a proposed Internet-based emergency communications infrastructure intended to replace legacy 911 systems.[7] On January 29, 2016, speaking at a meeting of the Task Force on Optimal Public Safety Answering Point Architecture, you stated: "I pledge to you that, in the year that I have left in this job, every time that I appear before Congress, the number-one item that I will talk about is the absolute necessity . . . of Congress dealing with the issues in NG911. . . ."[8] On February 23, 2016, less than a month later, the formation of the NG911 NOW Coalition, a group created to advocate for the adoption of NG911 standards, was announced.[9] That same day, you issued a press release and tweeted from your official Twitter account lauding the formation of the NG911 NOW Coalition, calling it "welcome news."[10] Then, during your March 2, 2016 appearance before the Commerce Committee, your prepared testimony noted that you were "encouraged by the recent creation of a coalition to lead a national effort to successfully implement NG911 for all states and territories by the end of 2020."[11]

While the goal of speeding deployment of NG911 is laudable, and one that I share, the timing of the NG911 NOW Coalition's announcement, so soon after you called NG911 your "number-one item" to discuss before Congress, and your subsequent efforts to create publicity for the group through a press release and congressional testimony, create the appearance that the Office of the Chairman may have been involved in, or advocated for, the coalition's creation. If so, such action could be contrary to the letter or spirit of the Anti-Lobbying Act or the fiscal year (FY)

O'Rielly, included nonpublic information. *See* FCC Chairman Proposal To Unlock The Set Top Box: Creating Choice & Innovation, http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0127/DOC-337449A1.pdf (Jan. 27, 2016).

[6] *FCC Led Communications Agencies in Holding News Events That Were Not on the Record*, COMMC'NS DAILY SPEC. REP., Dec. 17, 2015.

[7] Press Release, NG911 NOW Coalition, 9-1-1 Organizations Launch Next Generation Accelerated Deployment Effort (Feb. 23, 2016), *available at* http://www.theindustrycouncil.org/news/NG911_Now_Coalition_pr022316.pdf.

[8] Donny Jackson, *FCC's Wheeler calls on Congress to address next-gen 911, says FCC has "done about everything we can do,"* URGENT COMMC'NS (Jan. 31, 2016), *available at* http://urgentcomm.com/ng-911/fcc-s-wheeler-calls-congress-address-next-gen-911-says-fcc-has-done-about-everything-we-can-d.

[9] NG911 NOW Coalition Press Release, *supra* note 7.

[10] Chairman Wheeler, Statement on the Formation of the "NG911 NOW Coalition," Feb. 23, 2016, *available at* https://www.fcc.gov/document/chairman-wheeler-statement-next-generation-911-coalition; Wheeler, Tom (TomWheelerFCC). "Today's launch of the #NG911 NOW Coalition is welcome news. We must work together to modernize the nation's 911 system." 23 Feb. 2016, 1:25 p.m. Tweet.

[11] *Oversight of the Federal Commc'ns Comm'n: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 114th Cong. (Mar. 2, 2016) (test. of Hon. Tom Wheeler, Chairman, FCC).

2016 Consolidated Appropriations Act, which prohibits the use of FY2016 funds for publicity or propaganda purposes.[12]

The FCC's strategic goals include "maintaining a commitment to transparent and responsive processes that encourage public involvement."[13] Preventing other commissioners from expressing their views to stakeholders or using appropriated funds to urge the creation of outside lobbying groups would appear inconsistent with this aspiration. Therefore, in order to resolve the concerns outlined above, and pursuant to the Committee's oversight responsibilities, please provide responses to the following:

1) How many briefings that were not fully on the record did FCC staff conduct with the press or other outside parties between October 29, 2013, and the present? For each briefing, provide dates, a list of any non-media participants and their affiliations, and the subjects covered.

   a. Did any FCC employee disclose, discuss, or otherwise convey any non-public information at any of these briefings? If so, did you provide written authorization? Provide copies of any such authorizations.

2) Did you provide written authorization to FCC staff to disclose nonpublic information at any time since October 29, 2013? If so, provide copies of these written authorizations.

3) According to FCC rules, the Chairman must provide a written authorization to release nonpublic information. How many requests for such authorization have you received from October 29, 2013 to the present?

   a) For each request, please indicate the following:

      i. The employee making the request;
      ii. The date of the request;
      iii. Whether you approved or denied the request;
      iv. The basis for your decision; and
      v. The date of your decision.

   b) Provide all documents and communications relating to each request.

4) Can you confirm that neither you nor any members of FCC staff played a role in the creation of the NG911 NOW Coalition? If you cannot, what role did you or any members of the FCC staff play? Please be as specific as possible.

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[12] 18 U.S.C. § 1913; Consolidated Approps. Act of 2016, Pub. L. No. 114-113, Div. E, § 715, (2015).
[13] Fed. Commc'ns Comm'n., About the FCC, https://www.fcc.gov/about/overview (last visited Mar. 18, 2016).

Please provide the requested information as soon as possible, but by no later than April 4, 2016. If you have any questions, please contact Jason Van Beek or Ashok Pinto of the Majority staff at (202) 224-1251. Thank you again for your commitment to cooperate with this inquiry in a timely manner.

Sincerely,

JOHN THUNE
Chairman

cc: The Honorable Bill Nelson, Ranking Member

The Honorable Roger Wicker, Chairman
Subcommittee on Communications, Technology, Innovation, and the Internet

The Honorable Brian Schatz, Ranking Member
Subcommittee on Communications, Technology, Innovation, and the Internet

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

The Honorable David L. Hunt, Inspector General
Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

April 4, 2016

The Honorable John Thune
Chairman
Committee on Commerce, Science, and Transportation
United States Senate
254 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Thune:

Thank you for your letter regarding disclosure of non-public information outside the Commission and the formation of the NG911 NOW Coalition. I appreciate the opportunity to explain the Commission's rules regarding non-public information and to answer your particular questions.

Under the Commission's rules, FCC employees may not release nonpublic information without proper authorization. That authorization, however, does not always have to be in writing or from the Chairman personally. The rule referenced in your letter and by Commissioner O'Rielly (47 CFR 19.735-203) states that nonpublic information may not be disclosed "[e]xcept as authorized in writing by the Chairman pursuant to paragraph (b) of this section, or otherwise as authorized by the Commission or its rules." Written authorization from the Chairman is required *only* for paragraph (b) situations, which are those in which an employee is "engaged in outside [non-Commission] teaching, lecturing, or writing" and wishes to use nonpublic information for that purpose.

Disclosures in all other contexts may be made if "authorized by the Commission or its rules." There is no requirement that such authorizations be in writing. Consistent with the rules, it has been the agency's practice for many years to rely on authorizations from the Chairman (or his staff, acting on his behalf) when disclosure would be in the interest of the agency. For instance, the Chairman or his staff might authorize sharing information with other federal agencies that have overlapping or related jurisdiction. Authorization in such a case may be in writing, but the rules do not require that.

In answering your specific questions:

- *Question 1:* Commission practice for several decades has been to brief reporters on the substance of complex and important Commission activities on the record, as well as on background. Much of what the Commission does can be highly technical in nature, so the media relations staff must be able to explain complicated issues in an understandable way. When necessary, FCC media relations staff will make subject matter experts available to explain complex Commission policies to reporters.

Periodically, the Office of Media Relations (OMR) hosts press conference calls for members of the news media. The purpose of these calls is to provide information on FCC policies with significant public interest or on issues that may be complicated or highly technical. Written authorization to conduct press calls is not required as a matter of either Commission rule or Commission practice.

The Office of the Chairman works with the OMR as it does with all offices and bureaus in the Commission. Many of my proposals have garnered intense media and stakeholder interest. OMR should be prepared to answer incoming questions from the press about Commission proposals – whether they are on circulation or have been adopted – to the best of their ability and in a timely manner.

Since October 29, 2013, OMR has held at least twenty-two (22) press conference calls with members of the news media and senior FCC officials on number of proposals and actions. Attached is a list of the press calls conducted. Only credentialed news media are permitted on media conference calls as well as relevant staff. OMR staff strictly enforces this rule and has endeavored to remove non-credentialed media from calls when such entities have attempted to participate.

Once information is authorized for release, it is no longer considered non-public information. As I explained above, written authorization to conduct press calls is not required as a matter of either Commission rule or Commission practice.

- *Question 2:* As explained above, the Chairman must provide written authorization to release non-public information only if that information is to be used for outside writing, teaching, or speaking purposes. I have not provided such a written authorization to release non-public information since October 29, 2013.

- *Question 3:* As explained above, the Chairman must provide written authorization to release non-public information only if that information is to be used for outside writing, teaching, or speaking purposes. I have not received any such requests since October 29, 2013.

- *Question 4:* One of the core purposes of the FCC, embedded in the very first section of the Communications Act of 1934, is "promoting safety of life and property through the use of wire and radio communication." Fulfilling this statutory duty to protect public safety has been one of my top priorities as Chairman of the FCC. As the FCC official designated to represent the Commission "in all matters relating to legislation," I have not hesitated to express my views about public safety issues before Congressional committees, in public speeches, or in other forums. For example, in my testimony before your Committee last month, I reiterated my concerns that many communities do not have the resources to upgrade their 911 emergency response systems and urged you to help provide them these resources.

My public advocacy for updating our dangerously out-of-date 911 response system does not violate either the letter or the spirit of the Anti-Lobbying Act or the "general rider" appropriations language you cite in the letter. To the contrary, I believe the agency's statutory obligations in the area of public safety compel me to speak out about how our public safety answering points (PSAPs) are failing to upgrade their technologies, leaving our emergency responders less prepared to deal with emergencies. In my remaining months as FCC Chairman, I will continue to publicly advocate for the resources and planning necessary to speed up the Next Generation 911 (NG911) transition.

The NG911 NOW Coalition shares this same policy goal, but is the creation of its member organizations and operates entirely independently of the Commission. Neither I nor other FCC staff played any role in creating this group. A few FCC staff members became generally aware in late 2015 that public safety and industry groups were discussing the formation of this group. FCC staff learned of these discussions while attending a series of meetings convened by the National 911 Office (which is housed within the National Highway Traffic Safety Administration at the Department of Transportation) that brought together experts from public safety, industry, and academia to discuss issues associated with NG911. At these meetings, FCC staff limited their participation to matters of public record and did not share non-public information.

During the course of the meetings, some of the organizations began to discuss the formation of a coalition to raise public awareness of NG911 and advocate for completing the NG911 transition by the end of 2020. FCC staff in attendance did not contribute to these discussions and made clear that the Commission, as a regulatory agency, could not participate in the development or be a member of the coalition. FCC staff also did not participate in any planning of outreach or advocacy by the coalition, and has had no involvement with the coalition's outreach or advocacy since it was created.

I appreciate you reaching out to me regarding this issue. Please let me know if I can be of further assistance.

Sincerely,

Tom Wheeler

APPENDIX

Press Calls or Briefings: October 29, 2013 – April 4, 2016
(Unless noted otherwise, these calls were conducted on background)

2014
February 19 – Open Internet framework
March 6 – JSA Notice of Proposed Rulemaking
April 24 – Open Internet Notice of Proposed Rulemaking
June 18—Measuring Broadband America Report release
June 20 – E-Rate Notice of Proposed Rulemaking
September 25 – Inmate Calling Service Notice of Proposed Rulemaking
December 11 – E-rate press call with Senator Markey and Chairman Wheeler (*Note: This call was on the record*)

2015
February 2 – Municipal Broadband Petitions
February 4 – Open Internet Order
February 6 – Incentive Auction
March 4 – LNPA trade publication briefing
March 12 – Open Internet Order (day item was released)
March 27 – 3.5 Citizens Broadband Radio Service
April 8 – AT&T Consumer Privacy Investigations settlement
May 27 – Telephone Consumer Protection Act declaratory ruling
May 29 – Lifeline Second Further Notice of Proposed Rulemaking, Second Report and Order
June 17 – AT&T $100 Million Notice of Apparent Liability
June 25 – Incentive Auction competitive bidding rules
June 25 – Incentive Auction Procedure Rules pen and pad for trade publications
July 10 – Technology Transitions Report and Orders and FNPRM
October 16 – Incentive Auction opening bid prices

2016
January 31 –Set-Top Box Notice of Proposed Rulemaking proposal
March 8 – Lifeline Order proposal
March 10 – Privacy Notice of Proposed Rulemaking proposal