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Testimony of Randolph J. May

President, The Free State Foundation

Hearing on “FCC Reauthorization: Improving Commission Transparency Part II”

before the

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Committee on Energy and Commerce

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Mr. Chairman, Ranking Member Eshoo, and Members of the Committee, thank you for inviting me to testify. I am President of The Free State Foundation, a non-profit, nonpartisan research and educational foundation located in Rockville, Maryland. The Free State Foundation is a free market-oriented think tank that, among other things, focuses its research in the communications law and policy and administrative law and regulatory practice areas. Especially relevant to today's hearing, by way of background I wish to note that I have served as Associate General Counsel at the Federal Communications Commission. I am a past Section Chair of the American Bar Association's Section of Administrative Law and Regulatory Practice and its representative in the ABA House of Delegates. I am currently a public member of the Administrative Conference of the United States and a Fellow at the National Academy of Public Administration. So, today's hearing on FCC process reform, with its particular focus on improving Commission transparency, is at the core of my longstanding experience and expertise in communications law and policy and administrative law and regulatory practice.

I testified before this Committee on the subject of "Reforming the FCC Process" on June 22, 2011, and July 2013, and I appreciate the opportunity to testify today. I commend Chairman Walden and members of the Committee for their efforts to focus on process reform at the FCC in addition to the commendable work the Committee is undertaking as part of the #CommActUpdate process to reform the substance of our nation's outdated communications laws.

I have generally supported the earlier process reform efforts, such as the Federal Communications Commission Process Reform Act of 2015, which was passed by the House but died in the Senate. And I certainly support legislative efforts that would require the FCC to increase the transparency of its processes. Alexander Bickel, one of the twentieth century's most prominent constitutional and public law scholars, wrote in his 1975 book, *The Morality of Consent*, that "the highest form of morality is almost always the morality of process." Without debating whether sound process is *the* highest form of morality, it is certainly crucial to ensuring accountability, conforming to rule of law and due process norms, and maintaining public confidence in the decision-making of our federal administrative agencies like the FCC. This is especially so because the FCC's decisions, which impact the public and regulated parties, often in significant ways, are made by unelected decision-makers who are not directly accountable to the public.

Since becoming Chairman of the Commission, Tom Wheeler has often touted his desire to reform the agency's processes, including increasing transparency. For example, at a May 20, 2014, oversight hearing before this Committee, Mr. Wheeler said process reform was a priority, and added: "In order to keep up with the rapid pace of change in the industries that we oversee, we must hold ourselves to a high standard to be as agile, efficient, and *transparent* as possible." I could cite other of his statements to this same effect. Without belaboring the point here, I will say this: While I applaud Mr. Wheeler's sentiment, and while he is correct that sound process impacts the ability of the agency to reach good decisions in an efficient manner, in my view the Commission's own process reform efforts have fallen far short of what needs to be done. Indeed, during the past year

or so, “process failures” appear to have increased.¹ This is why this Committee’s efforts are vitally important.

If enacted, the draft bills that are the subject of this hearing would constitute important steps forward in reforming the Commission’s processes and, frankly, I find little in them to disagree with as a matter of substance. The draft “Federal Communications Commission Process Reform Act of 2015,” which requires the Commission to initiate proceedings either to adopt procedural changes or to seek public comment on whether and how to implement other changes, is commendably comprehensive. As I outline below, I believe Congress should adopt some key specific reforms now, without waiting any longer for the Commission to act on its own. But, before doing so, I especially want to note the provisions in the Discussion Draft that require the Commission, in a rulemaking, to establish policies concerning the submission of new comments, reports, and data towards the end of the comment period and after the comment period; to establish procedures for including the specific language of the proposed rule in the rulemaking notice; and to establish requirements for including performance measures for evaluating the effectiveness of Commission program activities. These are common-sense reforms that should be adopted by the agency, and it shouldn’t take a year for the Commission to adopt new rules.

With regard to the inquiry required by proposed Section 13(a)(3), the specific proposals, in and of themselves, are commendable. Each would either enhance the efficiency of the Commission’s processes or increase transparency regarding the agency’s work. This is true, for example, of the proposals to allow a bipartisan majority of

¹ The Memorandum of the Committee Majority Staff, dated April 28, 2015, prepared in conjunction with the April 30, 2015, Part 1 Transparency hearing, details several instances of meaningful process failures during the past fourteen months.

Commissioners to place an item on the Commission's meeting agenda; to require publication of agency decisions within 30 days of their adoption; and to establish procedures for publishing the text of agenda items to be voted on at an open meeting in advance of the meeting.

As I said above, there is no reason why Congress should not act now to adopt certain reform measures. Indeed, without necessarily endorsing all of the specifics, such as particular deadlines, in each bill, I support the conceptual proposals contained in the Discussion Drafts produced by Vice Chairman Latta and Representatives Kinzinger and Ellmers. These bills, by increasing the transparency of the Commission's processes, would promote rule of law and due process norms, enhance public confidence in the integrity of the agency's decision-making, and increase the Commission's efficiency.

In some quarters, Rep. Kinzinger's proposal requiring advance publication of items to be considered by the Commission at a Sunshine meeting provokes the most controversy. But it should not. Indeed, it should seem odd that at, and in advance of, a so-called Sunshine meeting, the text of the document the Commission is voting on is kept out of the public's hands – in the dark. When the Commissioners read their prepared statements (there are almost never any meaningful unrehearsed exchanges among the Commissioners),² the public can only guess at the substance of what is being discussed. And there is no reason why, subject to the usual exemptions regarding confidentiality and

² This is why, in conjunction with the other reforms I discuss, I favor changes in the Sunshine Act to allow collaborative discussions among three or more Commissioners as proposed in the Walden, Eshoo, Kinzinger Discussion Draft. In 1995, I chaired a Special Committee of the Administrative Conference of the United States which proposed Sunshine Act reforms, and I have been an advocate of such reforms ever since. See Randolph J. May, *Reforming the Sunshine Act*, 49 AD. LAW REV. 415 (1997), may be accessed at: http://freestatefoundation.org/images/ABA_Ad_Law_Review___Reforming_the_Sunshine_Act.pdf

privilege, that the text of the document to be voted on at the Sunshine meeting should not be released in advance of the meeting date at the time the item is circulated to the Commissioners, or at least substantially in advance of the meeting. Inevitably, there are often leaks concerning the proposed texts of Commission items, some accurate and some not, some with winks, some with nods. Some members of the public, by virtue of position, proximity, or personal relationships, may receive – or appear to receive – more or better information concerning the proposed texts than others. This does not inspire public confidence in the integrity of the Commission’s decision-making. And it doesn’t enhance the soundness of the Commission’s decisions either. As Commissioner O’Rielly has pointed out, in discussions with members of the public prior to the Sunshine cut-off quiet period, the inability to talk in specifics about the proposed item inhibits the usefulness of exchanges with the public that might produce better, more informed decisions. Importantly, Rep. Kinzinger’s bill makes clear that nothing in his proposal may be construed to prevent the Commission from making changes to the text after its release.

I mentioned at the beginning of my testimony that I am a Public Member of the Administrative Conference of the United States (ACUS). As President Obama has proclaimed, “ACUS is a public-private partnership designed to make government work better.” It has a bipartisan membership that is composed of agency officials, scholars, non-profit leaders, and private sector representatives. I want to call your attention to ACUS Recommendation 2014-2, “Government in the Sunshine Act,” adopted June 5, 2014. The Recommendation is intended to highlight a number of “best practices”

undertaken by agencies covered by the Sunshine Act and to encourage others to consider and implement them as appropriate. Recommendation 2 is especially relevant:

For open meetings, covered agencies should post a meeting agenda on their websites as far in advance of the meeting as possible. **Except for documents that may be exempt from disclosure under the Freedom of Information Act, agencies should also post in advance all documents to be considered during the meeting.** When an agency cannot post non-exempt meeting documents in advance, it should do so not later than the start of the meeting or in a timely manner after the meeting has occurred. (Emphasis added.)³

While the Recommendation does not suggest how far in advance the documents to be considered at the meeting should be publicly posted, Rep. Kinzinger's draft is certainly consistent with the ACUS "best practices" recommendation.

The Research Report accompanying the Recommendation found, upon the basis of a survey of the ACUS-coordinated Council of Independent Regulatory Agencies (CIRA), that many independent agency officials pointed to the electronic posting of agency documents relevant to open meetings as worthwhile, in the same way that all documents, including drafts, working papers, and agenda items, which are prepared for consideration by Federal Advisory Committees, must be made available for public inspection. With respect to matters to be considered at a Sunshine meeting, the Report states:

Documents that agencies post in connection with open meetings include the following: meeting notices (including Federal Register notices announcing upcoming meetings), press releases, meeting agendas, staff memoranda to be considered at meetings, meeting transcripts and/or minutes, public comments received by the agency, and background documents needed to comprehend the meeting discussions (e.g., briefs and copies of relevant past decisions for an

³ ACUS Recommendation 2014-2 may be accessed at:
<https://www.acus.gov/recommendation/government-sunshine-act>

adjudication undertaken by a multi-member agency).

Ideally, staff memoranda, public comments, and other background documents that may be beneficial for stakeholders and interested members of the public who wish to study the matters to be addressed at the meeting should be released in advance of the meeting, preferably providing interested parties sufficient time to review the materials and analyze the issues to be addressed at the meeting.⁴

In my view, the FCC certainly should adopt the ACUS-recommended “best practice” of posting the text of open meeting agenda items in advance of the public meeting so that the public is fully informed concerning what the agency is considering doing, supposedly in the Sunshine.

It should not be surprising that another Recommendation 2014-2 “best practice” urges that agencies endeavor to post online meeting minutes or transcripts in a timely manner after the meeting.⁵ Aside from whatever specific time period is selected, this is consistent with the requirement in Rep. Ellmers’ draft bill that the text of rules adopted by the Commission be published online within 24 hours of adoption. In light of legitimate concerns regarding the abuse of the FCC’s ubiquitous grant of “editorial privileges” to the staff at the time of adoption of agenda items, there should be some action-forcing publication requirement to help ensure that the item before the Commission at the time of a vote, in all material respects, is the order or rule that, per the vote, will become the official final agency action. After all, if this is not the case, than the very purpose of the Sunshine Act is vitiated – if not violated – for the public is not actually witnessing a vote on the actual agency item.

⁴ The Research Report may be accessed at:
<https://www.acus.gov/sites/default/files/documents/Government%20in%20the%20Sunshine%20Act%20Draft%20Report%20REVISED%205-7-14.pdf>

⁵ Recommendation No. 5.

Rep. Latta’s draft bill to require that items to be decided pursuant to delegated authority be identified on the agency’s website at least 48 hours in advance certainly makes sense and ought to be non-controversial. While it is appropriate for many items that do not present novel or significant questions to be decided by the staff, the Commissioners, nominated by the President and confirmed by the Senate, have the ultimate decision-making authority on matters within the Commission’s jurisdiction. So, it is imperative that the Commissioners have an opportunity to vote, if they wish, on all matters on which official agency action is taken. Commissioner O’Rielly’s recent blog, “Delegated Authority: Serious Objections and Solutions,” addresses the “customary,” but not uniform, practice whereby some bureaus, at least at some times, notify Commissioners in advance of an action’s release on delegated authority.⁶ By codifying the customary 48-hour rule, Rep. Latta’s bill would increase transparency, and accountability to the public because, as the Commission’s website proclaims, “[t]he FCC is directed by five commissioners appointed by the president of the United States and confirmed by the U.S. Senate for five-year terms.”

In sum, there is a real need for reform of the FCC’s processes, and, as outlined above, I applaud and support the efforts of this Committee to adopt measures that would accomplish such reforms. Indeed, while I see no need to condition adoption of the proposals in the Latta, Kinzinger, and Ellmers draft bills, if necessary to overcome objections to near-term adoption, I suggest that some form of a “sunset” date might be considered, say 3-5 years, so that the results of these reforms may be evaluated after they

⁶ FCC Commissioner Michael O’Rielly, “Delegated Authority: Serious Objections and Solutions,” February 2, 2015, may be accessed at: <https://www.fcc.gov/blog/delegated-authority-serious-objections-and-solutions>

have been in effect for some period of time. While I have little reason to doubt that these reforms, by increasing transparency, will accomplish their intended purposes without producing negative consequences, if I am wrong then Congress can evaluate the results and make any necessary adjustments.

Thank you for giving me the opportunity to testify today. I will be pleased to answer any questions.