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United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

WEBSITE: <http://commerce.senate.gov>

April 15, 2016

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

Dear Chairman Wheeler:

Thank you for your April 4, 2016 response to my March 18, 2016 letter requesting information regarding the rules governing the release of nonpublic information by the Federal Communications Commission (FCC). While I appreciate your responses to my specific questions about this issue, your letter, particularly in light of events surrounding the Commission's recent open meeting, raises further questions.

According to the interpretation you provided in your response, the rule governing the disclosure of nonpublic information by FCC employees, 47 C.F.R. § 19.735-203, only requires an authorization in writing by the Chairman for the kinds of disclosures described in paragraph (b) of the rule. Paragraph (b) requires written authorization for an employee who is engaged in outside teaching, lecturing, or writing. For all situations outside those covered by paragraph (b), you stated that, "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."

The rule states, however, that "except as authorized in writing by the Chairman pursuant to paragraph (b) of this section, *or otherwise as authorized by the Commission or its rules*, nonpublic information shall not be disclosed . . . to any person outside the Commission."¹ Therefore, in the absence of a rule affirmatively granting the Chairman or his staff the authority to authorize disclosures, the rule requires authorization by the Commission, which would require approval by a majority of commissioners. The rule clearly distinguishes between authorization given to the Chairman and that reserved to the Commission as a whole.

Also, events surrounding the FCC's open meeting, held on March 31, 2016, raise new questions about the Commission's policies for the disclosure of nonpublic information. The open meeting addressed, among other things, providing affordable broadband for low-income Americans.

¹ Letter from Hon. Tom Wheeler, Chairman, Fed. Commc'ns Comm'n, to John Thune, Chairman, U.S. Sen. Comm. on Commerce, Sci., and Transp. (Apr. 4, 2016) (emphasis added).

Specifically, the Commission considered expanding the Lifeline program to include broadband service for the first time.² Previously, the Lifeline program was limited to telephone service.

The open meeting was marked by two highly unusual delays, the appearance of apparently nonpublic information in media reports during a critical juncture in the proceedings, as well as alleged violations of the “Sunshine rules” surrounding the Lifeline item on the agenda. For these reasons, the Committee is seeking further information about what transpired. In all FCC proceedings, a designated “Sunshine Agenda period” prohibits “all presentations to Commission decision-making personnel.”³ The relevant rule states, “No person shall solicit or encourage others to make any improper presentation under the provisions of this section.”⁴

At 10:47 a.m. on the morning of the open meeting, *Politico* reported, based on “sources familiar with the negotiations,” that a Democratic commissioner, Mignon Clyburn, “reached an agreement . . . with the agency’s Republicans on a [Lifeline] budget with a hard cap of \$2 billion.”⁵ Commissioner Ajit Pai has since stated that Commissioner Clyburn’s office signed off on the agreement at 9:49 a.m., just before the scheduled start of the open meeting at 10:30 a.m. (following the second delay, the meeting finally began at 2:00 p.m.).⁶ The timing of this leak of information to the media, less than an hour after an agreement was reached, and soon after the first postponement of the meeting, raises serious questions about the unauthorized disclosure of nonpublic information.

Shortly thereafter, at 11:18 a.m., *Broadcasting & Cable* reported that the FCC appeared poised to reach a compromise in which a \$2 billion cap on the Lifeline program budget would lead to a 5-0 vote on the overall order.⁷ Relying upon a “source familiar with the compromise,” the *Broadcasting & Cable* article further stated that the compromise proposal “took even FCC staffers by surprise.”⁸ It appears that this leak unraveled negotiations that may have been close to resulting in a 5-0 vote, rather than the 3-2 vote along partisan lines that ultimately occurred.

As you know, 47 C.F.R. § 19.735-203 prohibits any disclosure of nonpublic information, including “actions or decisions made by the Commission . . . by circulation prior to the release of such information by the Commission” unless authorized by the Commission or its rules. The aforementioned media reports appear to rely directly upon exactly such nonpublic information.

² Fed. Comm’n Comm’n (FCC), FCC News, FCC Modernizes Lifeline Program for the Digital Age: New Rules Will Help Make Broadband More Affordable for Low-Income Americans (Mar. 31, 2016), <https://www.fcc.gov/document/fcc-modernizes-lifeline-program-digital-age>.

³ 47 C.F.R. § 1.1203.

⁴ *Id.* § 1.1210.

⁵ Margaret Harding McGill, *FCC delays meeting for last-minute Lifeline negotiations*, POLITICO PRO, Mar. 31, 2016, <https://www.politicopro.com/tech/whiteboard/2016/03/fcc-delays-meeting-for-last-minute-lifeline-negotiations-069665>.

⁶ Alex Byers & Kate Tummarello, *Intrigue at the FCC: Clyburn compromise falls through*, POLITICO, Apr. 1, 2016, <http://www.politico.com/tipsheets/morning-tech/2016/04/intrigue-at-the-fcc-clyburn-compromise-falls-through-republicans-clyburn-reneged>; FCC, Mar. 2016, Open Comm’n Meeting (Mar. 31, 2016), <https://www.fcc.gov/news-events/events/2016/03/march-2016-open-commission-meeting>.

⁷ John Eggerton, *Sources: FCC Strikes Lifeline Compromise: Budget will be set at \$2 billion*, BROADCASTING & CABLE, Mar. 31, 2016, <http://www.broadcastingcable.com/news/washington/sources-fcc-strikes-lifeline-compromise/155110>.

⁸ *Id.*

The proper functioning of the FCC depends on the confidentiality of Commission deliberations. Indeed, the Commission's rules require it. Therefore, in light of the foregoing, and pursuant to the Committee's oversight responsibilities, please provide responses to the following:

1. You stated in your April 4, 2016 response that, "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." Provide a list of every authorization you or employees acting on your behalf have made of disclosures of nonpublic information from October 29, 2013 to the date of this letter.
2. To clarify the source of the authority you cited in your April 4, 2016 response, please indicate to which specific FCC rules you were referring in your response when you stated that the agency's practice of relying on authorizations from the Chairman or his staff to permit disclosure of nonpublic information was "consistent with the rules"? If no such rules exist, please provide documentation showing the approval of such disclosures by a majority of Commissioners.
3. Shortly after the first postponement of the open meeting held on March 31, 2016, nonpublic information about the fact that Republican commissioners had reached an agreement with Commissioner Clyburn on a "cap" for the Lifeline program was disclosed to *Politico*, which published an article based on this disclosure at 10:47 a.m.
 - a. Did you or any other Commission employee disclose or authorize disclosure of nonpublic information relating to these negotiations or the Commission's deliberations on the Lifeline order to *Politico*, any other media outlet, or any other person not employed by the Commission?
 - b. If so, provide the legal justification, if any, for doing so.
 - c. If not, does the Commission plan to investigate who leaked information about the deliberations, pursuant to Commission rules? If not, why not?
4. The disclosure of nonpublic information in the 10:47 a.m. *Politico* article appeared designed to engage outside interest groups to disrupt the deal struck between the Republican Commissioners and Commissioner Clyburn. The Sunshine rules require FCC employees to terminate any discussion with someone who may be making a prohibited *ex parte* presentation and then to forward information about any such improper contact to the Commission's Office of General Counsel (OGC) (47 C.F.R. § 1.1212). Indeed, anyone failing to report such information may be subject to sanction (47 C.F.R. § 1.1216).
 - a. Has any FCC employee forwarded information regarding prohibited *ex parte* discussions to OGC in relation to the March 31 open meeting?

5. Have you notified the Inspector General of any potential employee misconduct in relation to the March 31, 2016 open meeting as required by Commission rules?

To the extent that an investigation of whether Commission employees may have engaged in improper conduct related to these matters is not already underway within the Commission, please consider this letter a complaint requiring an investigation pursuant to 47 C.F.R. § 19.735-107 (b). The Inspector General is copied on this letter pursuant to paragraph (c) of that rule. Please provide the requested information as soon as possible, but by no later than May 2, 2016. In addition, please make arrangements to brief Committee staff on this matter. If you have any questions, please have your staff contact Ashok Pinto or David Quinalty of the Majority staff at (202) 224-1251. Thank you in advance for your prompt attention to this matter.

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

Mr. David L. Hunt
Inspector General
Federal Communications Commission