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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