

December 5, 2016



COMPETITIVE
ENTERPRISE
INSTITUTE

NISKANEN
C E N T E R



The Honorable Mitch McConnell
Senate Majority Leader
S-230, The Capitol
Washington, DC 20510

The Honorable Harry Reid
Senate Minority Leader
S-221, The Capitol
Washington, DC 20510

Dear Majority Leader McConnell, Minority Leader Reid:

As academics, experts and policy organizations focused on technology policy, we look forward to fundamental reforms at the two agencies chiefly responsible for regulating the Internet and other emerging technologies: the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC). We expect the two to become even more closely intertwined as the FCC returns Net Neutrality and other broadband issues to the FTC's jurisdiction early next year.

Not since the 1990s has Congress made any significant updates to these agencies' processes, or even managed to reauthorize the agencies. This has left them adrift. They have struggled mightily with how to deal with new technologies. Both have exceeded the legal authority granted to them by Congress: The FCC has claimed sweeping new powers to regulate the Internet, while the FTC has claimed vast discretion in wielding its consumer protection powers without meaningful judicial review. Both chairmen wield too much power over what are supposed to be collegial, multi-member bodies. They take too little account of the opinions of experts both inside and outside the agencies, especially economists, when those opinions do not fit their preconceived agenda.

Ultimately, it is up to Congress and the President to enact permanent reforms of both agencies. Only legislation can put technology regulation on a stable footing, and prevent further oscillation from election to election.

But there is much that new chairmen can do to begin the reform process, and to inform how Congress crafts legislation — particularly over the internal operations of the agencies. For example, FCC Chairman Tom Wheeler repeatedly refused to share draft orders with Republican commissioners until the last possible minute, has prohibited agency staff from making draft orders public — including the colossally important Open Internet Order — and has continued to edit

orders even after they have been voted upon. These and other practices must change to ensure that the FCC's decisions are made in a truly open, transparent and considered manner.

Reform of the FCC and FTC should begin on January 20. Democrats should be consulted and invited to participate in the process in ways that Republicans were not by the outgoing Democratic chairmen. We commend FTC Chairman Edith Ramirez for negotiating one important reform with Republican Commissioner Josh Wright two years ago: finally issuing a policy statement to define the FTC's Unfair Methods of Competition authority. But little else has changed under the last several chairmen. FCC Chairman Wheeler has not only blocked reform, but has greatly expanded both his own and the FCC's powers via an unprecedented series of partisan 3-2 votes.

We expect both Chairman Wheeler and Ramirez to honor the traditions of their agencies, and of independent agencies more generally, by resigning before January 20. As Chairman Wheeler put it last summer: "elections *do* have consequences." By the same token, we believe Republicans are now entitled to take control of both Commissions as soon as possible, so they may begin to implement long overdue-reforms. This is simply democracy at work.

At the FTC, this will require appointment of at least one additional Republican Commissioner, since Chairman Ramirez's resignation would leave the agency in a 1-1 deadlock. This should happen as quickly as possible. Ideally, all three new Commissioners (two Republicans and one Democrat) should be confirmed together as a package — provided this does not prolong the deadlock.

At the FCC, Chairman Wheeler's resignation would shift control of the Commission — unless Commissioner Jessica Rosenworcel were reconfirmed during the *Lame Duck* Congress. We fully support her reconfirmation. We have often disagreed with Commissioner Rosenworcel, but have always respected her thoughtfulness and her independence. That is why we urge the Senate to reconfirm her — along with Republican Commissioner Ajit Pai¹ and a third Republican Commissioner. In other words, her term should be renewed as quickly as possible, but not if doing so creates a deadlock at the Commission — and, of course, absolutely not before Wheeler has actually left the Commission: If both Wheeler and Rosenworcel stayed on the Commission, Democrats would retain control of the FCC through June, 2017.²

Unfortunately, there simply is not time to properly consider a new nomination now, even if Chairman Wheeler were to resign immediately and President Obama were to nominate a Republican chosen by the President-elect. So the only way to avoid hamstringing the new FCC Chairman (acting or otherwise) is for Commissioner Rosenworcel to take a brief hiatus from the Commission. This is unfortunate, but better than the alternative. Pairing her with Republicans will give both parties a strong incentive to move quickly on all three nominations. We expect that both could be confirmed by March. In the interim, Chairman Wheeler could shift Rosenworcel's staff to regular agency positions. This would make it easy for her to reconstitute her office when she returns to the Commission, without her staff missing a paycheck.

¹ Pai's tenure on the Commission will end in December 2017 if he is not reconfirmed.

² By statute, the earliest that the third Democrat, Mignon Clyburn, could be replaced with a Republican is July 1, 2017.

We do not make this recommendation lightly, nor with any malice. We expect Commissioner Rosenworcel to be a constructive participant in reforming the FCC's broken processes. Even with a majority at the Commission, Republicans will need to sustain a fresh spirit of bipartisanship if they hope to succeed in making FCC reform permanent — *through legislation*. Thus, we urge that Commissioner Rosenworcel be reconfirmed as quickly as possible — but *not* if it means continued Democratic control or a deadlock.

Any deadlock could significantly delay the lengthy and complex process of FCC reform. The window for legislative action before the midterm elections will be far shorter than most realize. Congress will not really be able to take up the issue in earnest until the FCC's new Republican chairman has had an opportunity to begin voting out his agenda. Having waited two decades to pick up where the 1996 Telecom Act left off, we simply cannot afford to miss this narrow window for reform.

Finally, we strongly recommend that the four open seats at these two agencies be filled with Commissioners who are ready to go on Day One. Technology and telecom regulatory issues are too arcane and complex to be learned on the job. Given the difficult tradeoffs faced by the FCC and FTC alike, both Commissions should include an economist at all times. And given the ongoing interplay between the two agencies, commissioners on each agency should have a strong background in how the other works. But most critically, all new Commissioners should enter office with a commitment to thoroughly reexamining and reforming their agency.

This is especially critical for the Chairmen, who must be able to lead fundamental reform. Their model should be Alfred Kahn, who freed the skies for airline competition under President Carter, the last great Democratic reformer in the White House. Kahn's greatest regret was that he could not also fix the FCC. Now, forty years later, that time has finally come.

Respectfully,

TechFreedom
Competitive Enterprise Institute
Free the People
Niskanen Center