Perception Issues

Wheeler, Other Commissioners Curtailing Meetings With Investors

Chairman Tom Wheeler and at least two other members of the FCC are no longer doing general meetings with financial analysts and their clients. Wheeler stopped having the meetings last summer, except
for cases where he can open the meeting more broadly, officials said. Commissioners Ajit Pai and Mignon Clyburn also, as a rule, are no longer doing analyst meetings, agency officials said. Analysts confirmed they have hit a roadblock when trying to set up such meetings.

The approach is a marked contrast to the FCC under Julius Genachowski, where Paul de Sa, now an analyst at Bernstein Research, was tasked with outreach to Wall Street. An FCC official confirmed that Wheeler stopped holding nonpublic meetings with small groups of investors as of last June. Wheeler will still talk to investors in more open meetings, and senior staffers, including Phil Verveer and the bureau chiefs, make themselves available to investors, the official said. The FCC also does investor calls on big developments—for example, the recent closing of the AWS-3 auction. As of Thursday, the FCC had not responded to a June Communications Daily Freedom of Information Act request for records about agency officials’ communications with the financial sector since Jan. 1, 2013.

“The FCC’s decision to disengage from meaningful discussions with the investment community regarding FCC actions that directly affect investment decisions in the tech, telecom and media industries, and which, by the FCC’s own words, are actions designed to encourage, not discourage, investment, is a dangerous trend,” Recon Analytics analyst Roger Entner said. Open channels to the investment community provide the agency with an important flow of information and perspective, he said. “Without these lines of communication, the agency’s decision making appears to emulate theories around the businesses it is regulating, not the reality of it,” Entner said. “This is especially ironic for an agency that so often premises its policies on arguments that the policies in question encourage rather than discourage investment. If the agency refuses to take the time to understand what drives investment decisions in this sector at this point in time, one can only imagine what impact the FCC’s policies will in fact have.”

Goldin Associates Managing Director Armand Musey said he understands why commissioners are curtailing meetings with investors. “Given the number of auctions and the amount of money involved, I'd think they probably want to keep their message clean and not give anyone an advantage,” Musey said. “Can you imagine the scandal if a hedge fund had a meeting with an FCC commissioner and then purchased/sold some stock right before the FCC did something to help/hurt that company?”

**M&A Arbitrage**

Commissioners are becoming increasingly sensitive to the “vagaries” of the arbitrage trading firms, a former senior FCC official said. With big mergers and acquisitions pending, people are buying options on whether the deals will close, the ex-official said. “Every hiccup and eyebrow twitch by any commissioner is interpreted in a way that causes the price of these options to go up and down.”

For example, over the past six weeks, based on the price of the options, investors now see only about a 65 percent chance of Comcast’s planned $66 billion deal to buy Time Warner Cable closing, compared with 80 percent in January, and commissioners don’t want to influence that betting, the former official said. “It’s basically a sophisticated form of betting.” Some of the most extreme versions of this have occurred lately, the former official said.

Commissioners are concerned about perception issues, Public Knowledge Senior Vice President Harold Feld said. “In an increasingly charged political atmosphere, it’s easy to see why FCC commissioners increasingly view analyst meetings as too risky.” Concerns come from the right and left, he said. “Seeing
FCC officials hobnobbing with Wall Street analysts does not play well with progressives accusing the FCC of catering to the one percent, or conservatives accusing the FCC of crony capitalism,” he said. “Given the number of FCC officials who have taken jobs with investment firms and management funds, it also gives the appearance that an FCC official is potentially shopping for a future job.”

Net Neutrality Rules

But Hal Singer, senior fellow at the Progressive Policy Institute, said in a recent blog post that communication with investors is more important as the FCC moves to reclassify broadband as a common-carrier service under Communications Act Title II. Singer suggests that if reclassified, carriers might have to pay higher rates when they go to the capital markets. “External investors could demand a risk premium (over and above what they otherwise would demand) to compensate for the added risk associated with the new rules,” he wrote. An investor can fairly ask, “Why should I lend an ISP money for a new project if there is a heightened chance under reclassification that the ISP would be subject to rate regulation or mandatory sharing rules?” Singer said.

Free State Foundation President Randolph May said he doesn’t have an issue, in general, with a commissioner declining a private meeting with a financial analyst, hedge fund manager or investor, “especially if that person is not seeking to meet on behalf of a particular identified party to advocate a position.” There are probably better ways for Wheeler to spend his time, May said. “To be frank, I’d rather see Tom Wheeler spend the time studying the history of common carrier-like regulation, say, the FCC’s awful experience trying to regulate cable rates after the 1992 Cable Act, or the FCC’s disastrous efforts to regulate [unbundled network elements] to benefit CLECs, rather than spending the time meeting with investors,” he said. “I’d like to have an hour alone with him to explain why his Title II proposal is actually akin to those flawed efforts.” — Howard Buskirk
Wheeler’s Hill Hearing Prep Included ‘Murder Boards,’ Plans for Rapid Response

Senior FCC officials sprang into action to prepare Chairman Tom Wheeler for the bevy of Capitol Hill net neutrality hearings earlier this year, according to internal agency emails supplied in response to a
Freedom of Information Act (FOIA) request that Communications Daily filed. Congressional scrutiny of the FCC spiked after the February approval of the agency’s open Internet order, prompting five hearings in March and two more since. The Wheeler aides embraced an all-hands-on-deck strategy to brief Wheeler on key topics and stay ready to respond in real time when Wheeler was in the hearing room.

Wheeler used the process of “murder boards” to prepare ahead of his five March hearings, all held in under two weeks and before the Senate Commerce Committee, House Oversight Committee, House Communications Subcommittee, House Judiciary Committee and House Appropriations Financial Services Subcommittee. Senior FCC officials divided up different tasks for different staffers to help prepare Wheeler for the onslaught of lawmaker questions. The murder board phrase refers to simulating challenging oral examinations.

Louisa Terrell, an adviser to Wheeler, emailed 17 top agency officials March 11 to discuss “hearing prep,” her email title said. “Sara M and I will confer on E&C/Commerce murderboard prep but huge thanks to Roger who will handle auction/spectrum questions for the [sic] and Clete who will do privacy/cyber/data breach,” Terrell, a former chief of staff to Sen. Cory Booker, D-N.J., told her colleagues. The Roger on the email chain is Roger Sherman, chief of the Wireless Bureau and a former Democratic counsel for House Commerce. Clete Johnson is chief cybersecurity counsel within the Public Safety Bureau. The FCC’s office of media relations was tasked with pulling records from Wheeler’s media appearances from around May and June to November of last year and the legislative staffers were tasked with reviewing past Wheeler testimony. “All process reform questions will go to Diane and then Diane, Jennifer and others will cull and shape answers for a supplemental Q&A document,” Terrell said. Diane Cornell is special counsel to Wheeler tasked with leading internal FCC process overhaul efforts, and Jennifer Tatel is associate general counsel. Names of people identified by only their first names in the body of the emails were verified by checking the distribution list on the emails, which listed full names.

In a different March 10 email, Terrell noted “folks are working 24/7 on hearing preparations.” That email also stressed the need for murder board “details” and the Wheeler “paper” requiring assembling—“cheat sheet on hot legislation, short list of other-than-OI [open Internet] interests for members of House Oversight, written testimony, Committee rules on oral testimony, swearing-in and the like,” she wrote. Sara Morris, who directed the FCC’s office of legislative affairs, thanked several agency officials for “everyone’s 150% efforts as we go into this crazy schedule of hearings,” in a March 10 email. Morris later circulated a “legislation cheat sheet,” including introduced bills and not drafts, to Wheeler’s senior advisers in a March 11 email.

‘Tigers’ Brace for Rapid Response

FCC staffers don’t want to get the facts or the frameworks wrong going into Hill hearings, said Blair Levin of the Brookings Institution, who was a senior FCC staffer under chairmen Reed Hundt and Julius Genachowski. He didn’t find the details of Wheeler’s hearing preparations especially unusual, simply “really different in terms of intensity,” Levin remarked. The most important decision FCC chairmen face, Levin said, is, “How do I spend my time?” That allocation determines plenty, and it’s clear that these five hearings, a concentration higher than any other Levin could remember, took an “enormous” toll on the FCC staffers’ time, he believes. “It’s not clear to me what Congress got out of these five hearings,” Levin said. “In the fullness of time, do we really need five hearings?”

Before Wheeler and Commissioner Ajit Pai testified March 24 before the House Appropriations Financial Services Subcommittee, Morris laid out a strategy to a large group of FCC officials including aide
Daniel Alvarez, Cornell, General Counsel Jonathan Sallett, Counselor Gigi Sohn, Terrell and Senior Counselor Phil Verveer. “Greetings, Tigers,” Morris wrote in a March 23 email. “Rapid response Q/A from the hearing attendees (Jill Pender, Sara Morris, Jon Wilkins) will flow through Dave Toomey to the appropriate FCC point (aka tiger). Answers to Q’s should be extremely brief and returned within 10 min or less wherever possible.” Wilkins is FCC managing director, Pender is chief legislative policy counsel and Toomey is an FCC office of legislative affairs deputy staffer.

A legislative assistant for Sen. Joe Manchin, D-W.Va., checked with Morris and Toomey March 12, less than a week ahead of the March 18 Commerce Committee FCC oversight hearing, featuring all five commissioners. “I expect the boss will want to want to [sic] talk about Lifeline modernization, Net Neutrality (of course), and maybe the Comcast merger, but we’re still working through the draft questions for his review,” Manchin aide Wes Kungel said. “I’ll send along some additional information about the specific areas of interest early next week. We will also have some QFRs [questions for the record] to submit on 911 location accuracy and RF [radio frequency] workers safety, but I do not expect the Senator to raise them in the hearing.” Kungel asked about the best contacts for FCC Commissioner Jessica Rosenworcel’s office and praised the net neutrality order: “Also- HOORAY for the release of the order!!!! Thanks for all the work y’all did to help get it out the door. I can’t wait to read every last sentence.”

Wheeler has spent time cultivating relationships with lawmakers, several told us earlier this year (see 1506080038). He was seen as adept at developing these private lines of communications, despite what many acknowledged were divisive and partisan telecom issues that embittered some individuals on Capitol Hill.

Eyes on Twitter

After the hearings, FCC staffers stayed watchful. Legislative office staffers made sure to acquire transcripts from all the hearings and eventually circulated them to Wheeler’s senior aides.

Brittany Stevenson, a new media associate at the agency, emailed a mix of senior Wheeler aides, bureau chiefs and agency spokespeople what she titled “3/24 hearing sweeps,” collecting what people wrote on Twitter. The FCC grouped the Twitter accounts it tracked—“FCC Employees (Past/Current),” featuring tweets from commissioners and commissioner aides and those from Wheeler aide Sohn; “Elected Officials,” which in the email showed tweets from Reps. Marsha Blackburn, R-Tenn., and Jose Serrano, D-Calif.; “People,” encompassing a mix of journalists and advocates, including Communications Daily Executive Senior Editor Howard Buskirk, Free Press Policy Director Matt Wood and Public Knowledge Vice President-Government Affairs Chris Lewis; and “Publications/Organizations,” encompassing groups from Free Press and Public Knowledge to CTIA and Mobile Future.

Kevin Werbach, a former member of the Obama administration’s FCC transition team, saw little surprising in the FCC’s Hill engagement, saying three of the five commissioners are former Hill staffers, one is the daughter of a congressman and Wheeler “interfaced extensively” with the Hill for years as the leader of trade associations. “One would expect significant engagement with the Hill, even if the scope of FCC legal authority wasn’t such a hot topic,” said Werbach, professor at the University of Pennsylvania’s Wharton School. When considering hearing preparation, he said “everything depends on the team in place, how Hill-savvy they are, and the political dynamics of the time.”

“High profile and contentious issues that trigger intense congressional oversight, like net neutrality, almost always stir up anxiety and activity among FCC staffers charged with making the chairman—any
chairman—look good,” said former FCC Commissioner Robert McDowell, now with Wiley Rein. “Key advisors will have differences of opinion, and emails can provide a window into how strong passions may run. The intensity of discussions the emails reveal has probably always been conveyed among policymakers since pre-historic times. But now, with the permanent memory of digital communications, the American public has the ability to see direct evidence of the often-messy sausage-making process. Thank goodness for FOIA.” — John Hendel
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Robust reporting on submarine cable outages will improve the FCC’s ability to understand the nature and impact of any damage and disruption to communications, help mitigate any impact on emergency services and consumers, and assist in service restoration,” Wheeler said. “Long-term, better reporting about the status of undersea cables will help us better anticipate and prevent disruptions to service.”

O’Rielly cited a few concerns that he hoped would be addressed. He suggested the NPRM’s proposed “strict liability” covered too many parties, its proposals for timely reporting of “root causes” were too demanding, and its estimates for industry reporting costs were too low. On the latter, he told reporters afterward, “I think they’re imagining a world that doesn’t exist today” in terms of the amount of time it would take licensees to fill out reports and how much they would have to pay lawyers. He said the NPRM anticipated $80/hour in lawyer fees. “I’m not sure where you get that,” he said, noting he expected parties to be cautious and have multiple lawyers examine filings, raising the cost even more.

International Cable Protection Committee General Manager Keith Schofield said any new outage reporting requirements for cables landing in the U.S. are likely to be of interest to his group’s members. “We will be preparing a considered response in due course,” he told us.

AT&T, Level 3, Sprint, Tata Communications and Verizon are among the 18 members of the North American Submarine Cable Association. None of them commented Thursday.

— David Kaut

40-Plus Delayed Items

FCC-Delayed Federal Register Submissions Hurt Public Participation, Some Say

The FCC this year repeatedly delayed releasing information on proceedings to the public in the federal government’s central repository, a Communications Daily review of Federal Register publications found. Net neutrality rules, processes ensuring that consumers can keep their phone numbers when they change service providers, USF provisions, rules on telemarketing calls and other proceedings affecting a wide array of consumers and industries were among those rulemakings subject to publication delays of more than a month and sometimes approaching a year.

Some experts say in this Part I of the series that our database shows the FCC routinely delayed Federal Register notification, even though the agency does release the items on its own Web page and on its Daily Digest. But sometimes, the FCC implies, the Federal Register itself is at least partly to blame for delays. Part II discusses that process and focuses on complaints from inside and outside the agency that staffers who write items that commissioners publicly vote on then make changes before release.

We found more than 40 instances this year in which items didn’t appear in the Federal Register for at least one month after the FCC released notices of actions. On several occasions notice of FCC monthly commissioner meetings, advisory committee meetings and changes to meeting agenda items appeared in the Federal Register after, not before, the correlating meetings occurred.

“If the general public finds out about an FCC action after it’s too late to participate in the proceedings, or finds out about it later than those who are more closely connected to the commission’s actions, then it makes it less likely that their participation is meaningful,” said Free State Foundation President Randolph May. Michael Copps, special adviser for Common Cause’s Media and Democracy Initiative and a past FCC
Democratic member, said the trend isn’t “good for the commission.” And “it’s not good for the people” waiting for the results or effects of commission orders and rulemakings, he added.

Administrative experts point to several possible reasons behind the delays. Cary Coglianese, University of Pennsylvania Law School professor and director of the Penn Program on Regulation, said every federal regulator faces certain administrative challenges, but “sometimes regulators can be strategic” about when they post or release certain items. May suggested assumptions made by the commission about the timeliness of the Federal Register process could play a factor in the lack of urgency to submit items to the repository. “It may be that the commission is assuming the parties that are most interested in its actions are getting sufficient notice of those actions through the release” of its Daily Digest, May said.

“The volume of matters the FCC sends to the Federal Register and the complexity is much greater than at most other agencies,” a commission official speaking on behalf of Chairman Tom Wheeler’s office told us. The commission each year releases nearly 950,000 bureau-level items—many more than commission-level items, the official said, but many of the bureau items don’t need to be published in the Federal Register.

Varied Delays

We found various possible reasons for FCC delays, depending on the nature of the late item.

The complexity of the administrative process when incorporating standards from other agencies into certain commission rules and items may affect the time it takes to file with the Federal Register. A final rule updating the FCC’s radiofrequency equipment authorization program released by the commission in docket 14-208 Dec. 30 appeared in the June 12 Federal Register—a span of nearly six months. The FCC, after research conducted by commission staff, said the item was “an ‘incorporation by reference’ item, which require[s] special handling as we are incorporating standards from other agencies into our document.”

In at least one instance, bureau-level oversight contributed to a delay. A rule on local number portability was released by the commission in docket 14-842 June 20, 2014, and appeared in the May 26, 2015, Federal Register—almost a year after agency release. After research by its staff, the commission acknowledged this was an oversight by the Wireline Bureau, which failed to file the item with the Federal Register. “When the bureau noticed the oversight, it immediately submitted the item,” the FCC said.

Another item was published after nearly a year. An exemption granted by the Consumer and Governmental Affairs Bureau, which excused toll-free package delivery notifications from Telephone Consumer Protection Act restrictions on autodialed phone calls, was released by the FCC March 27, 2014, and appeared in the Federal Register the following March 25. The action became effective on the date it appeared in the Federal Register.

A delay in the publication of an action with an effective date tied to its appearance in the Federal Register could be a tactic used by the commission to slow things down, said Public Citizen Regulatory Policy Advocate Amit Narang. But Narang said from the FCC’s perspective, it would be counterproductive to do so.

Mixed Opinions

Experts are split on the effects of the commission’s late submissions.

Those who said the issue doesn’t raise many concerns said the FCC posts on its own website the items it adopts and interested persons seeking notice of commission actions will typically get them from
the commission, not the Federal Register. “The FCC seems to have its act together,” said Harry Cole, an attorney with Fletcher Heald, which has broadcaster and other clients. Cole, an FCC employee in the 1970s, reviews the Federal Register daily for his law firm, and writes blog posts about them. “Most people who want and need to know [will] find out before it shows up in the Register,” Cole said. Copps said process improvements always can be made, but “this commission has generally done a pretty good job” of releasing items in a timely manner.

Narang said the delay in publication could pose issues in terms of transparency and public participation, but said they're “minor” ones compared with some other transparency issues. “In the grand scheme of things,” Narang said, “there is an issue here but not one that is as big as other [issues] currently happening.”

Some see the matter as limiting public input. If an item is delayed in Federal Register appearance for as long as six months to a year, “that’s not indicative of how things should be happening,” Copps said. “The general public is also interested in the FCC’s actions as well [and] likely does rely on the Federal Register to learn about agency action,” May said. He also said the practice of delayed postings limits public participation. — Jacob Rund
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'Editorial Privilege’ Criticized

FCC Faces Criticism for Practices Some Say Limit Agency Transparency

As the FCC faces scrutiny for delays in the publication of rulemaking items in the federal government’s central repository for regulatory bodies, another long-standing commission practice has faced even more criticism. Part I of this series found some experts criticized the lengthy delays, numbering more than 40 instances in 2015 when items were published a month and sometimes a year after they were released by the agency (see 1509070003). Part II discusses portions of the FCC administrative process, differing opinions on the timeliness of the repository’s publication of submitted items, and transparency concerns raised by certain agency practices that are drawing heat from individuals in the public and private sectors, including Commissioner Michael O’Rielly in a Tuesday interview and in other comments.

Under Title 5 of the U.S. Code, enabled by the 1946 Administrative Procedure Act (APA), federal agencies are required to “separately state and currently publish in the Federal Register for the guidance of the public” certain information, including “substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency” and “each amendment, revision, or repeal.” Current code offers no definitive time frame by which agencies must publish items in the Federal Register. Though agencies are subject to APA and other laws for internal processes, they have a lot of leeway in how they proceed, said Cary Coglianese, University of Pennsylvania Law School professor and director of the Penn Program on Regulation. Agencies are able to “fill in the gaps” as they see fit, he said.

At the FCC, once an order is adopted through a vote and the text finalized, “the staff typically goes through a process of slimming it down” to prepare it for publication in the Federal Register—a process the commission said it attempts to complete “fairly quickly” but is dependent on the complexity of the item. “Only [the information] required for the Federal Register is included,” an FCC official speaking on behalf of Chairman Tom Wheeler’s office told us. After the item is slimmed down, it’s reformatted—including double-spacing and other formatting changes—to comply with the Federal Register’s document requirements. The commission’s review process also requires legal review of the document and the document summary, plus technical edits such as fixing typographical errors.

Delays of a few days accrued during the Federal Register’s processing of FCC submissions don’t appear to account for the bulk of the time between the commission’s release of rule-making items and their appearance in the repository, Communications Daily’s research and database found. The Federal Register “attempts to publish [documents] within three days of receipt,” first in what is called public document inspection and then a day later in the publication itself, Jim Hemphill, special assistant to the Federal Register director, told us. “Basically, but not always, what is included in public inspection is tomorrow’s Register.”

The FCC has seen matters take longer than three days before publication from the time of submission to the Federal Register, said an FCC official speaking on behalf of the Wheeler’s office. Ex-Commissioner Mike Copps agreed. “My impression is that a lot of items have sat more than three to four days before they were published,” said Copps, now at Common Cause. The average time for publication, from when an item is sent by the FCC to the federal repository until it appears in the daily Federal Register, is typically four to five days, the commission official said.
The average delay from FCC release to publication in the *Federal Register* of most rules and items this year with commission release dates made available is more than five weeks, our research found. Hemphill said the *Federal Register* “purely deals with the forms as they are received” and has “no power over when documents are submitted.” Hemphill also said his office has no oversight over other agencies, and any sort of rules about the timeliness of postings “are determined by the agencies themselves.”

**Transparency Concerns**

Administrative experts and government transparency advocates have raised concerns about another common FCC practice—withholding the exact text of items voted on before the release of a final order, and utilizing “editorial privileges” to privately make changes to orders after they're adopted and before they're released. This is a practice that is unique to the FCC, said Scott Wallsten, Technology Policy Institute vice president-research, who authored a TPI report on what he called the commission’s abuse of editorial privilege.

“Other agencies don’t do” this, Wallsten said in an interview. “There is no way to know if what finally appears [upon agency release] is what they originally voted on, and that does differ from other agencies. You do generally know what it is when they vote on [items] at other agencies.” According to Wallsten, this commission practice became prevalent in the 1970s, and resulted in long delays between the FCC’s adoption of an order and its release of that order. The length of an order isn’t correlated with the length of the delay of its release, “suggesting that it is not simple copy editing that is responsible for the delay between vote and [agency] publication,” Wallsten said in a February report. “There is no way to know if there is ever any funny business going on,” he told us. “It’s just not supposed to be that way.”

Free State Foundation President Randolph May has witnessed similar delays. “If it takes more than a couple of days after a sunshine meeting to release an order, which it has, that would lead one to conclude that it’s more likely the exercise of editorial privilege is being exercised,” he said. Named after the 1976 Government in the Sunshine Act, sunshine meetings are public meetings at the FCC, such as those each month when commissioners vote on items. “If what transpires through the exercise of editorial privileges is just grammar and [syntax] errors” and doesn’t alter the meaning, “most people would probably say that’s OK,” May said. While some administrative experts say the delay between the adoption of an order and its release has gotten somewhat better, May said he has seen the time increase during the three decades he has been participating in FCC proceedings. “It now takes longer than it used to,” he said. “I don’t know the reason for that.”

**O’Rielly Concerns**

O’Rielly has long advocated for FCC process reform and has made several suggestions he said could begin to fix certain commission issues. They include that the commission make the text of proposed orders publicly available the same day they are circulated to the offices of the commissioners. “A number of areas” need improvement, he said.

O’Rielly said the editorial privileges exercised by the commission aren’t outlined in rules and he has seen its adverse effects firsthand. “Editorial privileges are not contained [in the rules] in any capacity, so that’s my fundamental problem,” he said. “We're giving authority that doesn’t really exist.” Even assuming there is the authority, O’Rielly continued, “the problem is that it’s not just about making technical and grammatical fixes to an item. It’s actually including whole new paragraphs, new content, new decisions, [and] it’s also rebutting commissioner decisions.”
“During the editorial privileges process, I'm equally offended they add new stuff that was not considered before us, so we vote on something and then the document changes,” O’Rielly said, adding that rebuttals, or “cheap shots,” by the majority have been also added into documents after a final vote. “I find it not to be a very fruitful process,” he said. Instead of changing the documents after votes have been cast, O’Rielly suggests the commission “put [its] best foot forward” and finalize the text of items prior to open meetings. After receiving documents on proposed rules 21 days before a meeting, O’Rielly said he reviews the items and sends his concerns and proposals to the offices of the other commissioners. “They know my concerns early on, so they should be able to address anything in that time period before we get to the meeting,” he said. “They seem to be kind of wait and see and ‘we'll do it after the fact.’ But I'm voting on what’s before me, not some document down the road.”

Wheeler recently established a FCC Process Review Task Force, on which one member from the staff of each commissioner will get together to discuss various process changes and how they might best be implemented. O’Rielly said the outcome of the task force depends on how committed people are to getting a resolution. He said not all of his colleagues might agree with his approaches to reform, and some may not want any changes. “I would like to see us make a number of changes and make this task force effective,” O’Rielly said. “I'm not expecting it to change the balance of power.”

As for how the issue of editorial privilege and the commissions’ administrative practices, which some say are ethically questionable, should be addressed, May said that it “probably will require an act of Congress.” Wallsten agreed. Congress has held hearings in the past on FCC process reform and O’Rielly said they are currently working on legislation to address the issue. “I leave it in their capable hands [as to] when and where it can move,” he said. However, Coglianese suggested a different course of action is needed: “It’s up to the commissioners to enact change.” — Jacob Rund
Special Report Shows Effects of Partisanship, Declining Staff, Recent Flat Budgets

Wheeler Commission Has Many More Party-line Votes in Meetings Than Predecessors

Congress Juggles ‘Political Football’ in Securing FCC’s Annual Funding

FCC Led Communications Agencies in Holding News Events That Were Not on the Record

Pirate Radio Threat Real Despite Closing of FCC Field Offices, Broadcasters Say

FCC Cites Progress on Cutting Some Backlogs, With Media Bureau Leading Way

Wireline Bureau Seen as Generally Productive, More So on Chairman’s Priorities

Special Report Shows Effects of Partisanship, Declining Staff, Recent Flat Budgets

This Communications Daily Special Report “a Portrait of the FCC in a Partisan Era” shows the impact of recently flat FCC budgets and a long-shrinking overall staff, as well as partisanship, on agency operations and more. Subscribers also can now access these six stories online at www.communicationsdaily.com.

Howard Buskirk reports (see 1512150014) that radio stations are being threatened by pirate radio stations, which some say are now largely unchecked by the Enforcement Bureau. The bureau had to close offices and scale back operations due to recent budget cuts. One whistleblower even said the bureau is allegedly ignoring any interference these rogue broadcasters are causing to licensed operations.

FCC funding itself has become what one appropriator called “a real political football,” reports John Hendel (see 1512150011). Funding has been frozen in recent years despite agency requests for more, as the 1,708 full-time equivalent employees as of its most-recent budget request was a decline from numbers of 2,000 and more two decades ago. But, contrary perhaps to common wisdom, the agency’s budget of $340 million is many millions more than what it was when there were more employees. But the budget has been flat for some years.
Amid increased partisanship on Capitol Hill, FCC members themselves also are divided more often than in the past, reports Monty Tayloe (see 1512150030). He found that in 2014, the Tom Wheeler-led commission approved items at FCC open meetings with a party-line vote 11 times, compared with two such votes under Kevin Martin in 2008 and just one under Julius Genachowski in 2012. The trend is on track to continue this year.

Increased partisanship at the commission and among its congressional overseers is thought to be why the agency holds more events for news media that aren’t on the record than those that are, reports Jonathan Make (see 1511200019). The FCC exceeds all other communications-related agencies in holding such anonymous news briefings, which experts say hurts government accountability.

Not all FCC trends are alarming to stakeholders. David Kaut reports (see 1512150021) that, even amid overall agency cutbacks, industry officials said the Wireline Bureau is doing a good job in addressing some big-ticket items and backlogs. But backlogs on some issues persist, the agency’s own figures show.

And at the Media Bureau, Buskirk, Kaut and Matt Daneman report (see 1512150040), much progress was made cutting the backlog. Overall at the commission, they write, the total backlog fell 37 percent May 1-Dec. 31, 2014. More-recent figures weren’t available.

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priations subcommittee. FCC officials have testified before Senate appropriators at least once a year for the last several years, starting under Moran's leadership. "The agencies and departments ought to be in front of Appropriations Committee for oversight on an ongoing, regular basis," Moran said. "That in my view needs to happen more often than it does, FCC and otherwise."

Moran cited the many technical challenges facing the FCC on issues such as managing spectrum and USF. He wants to ensure the "technical skill level of their staffing to be able to deal with issues that are very challenging," and balance that prioritization with the other conversations he feels appropriators should have with agency officials, he said.

"What I think that means for somebody like me, who cares about making sure they have adequate resources, is to figure out what areas which I think ought to be prioritized," Moran said. "And at the same time use their constant or continual demand for additional dollars, to say, hey, we need your attention on issues, not necessarily as big or as political as net neutrality, but lots of things that happen. And I care a lot about broadband deployment. To get the FCC's attention on issues that they might not otherwise exhibit [interest in]."

The recent two-year budget deal secured higher spending caps for appropriators, which Moran said may mean more funding for the FCC and be a "positive development" in that sense. Appropriators have spent the past several weeks hammering together a FY 2016 omnibus funding bill based on the higher caps. "I hope we give them adequate funding," Udall said. "That's what we need to do."

— John Hendel

About Twelve in Six Months

**FCC Led Communications Agencies in Holding News Events That Were Not on the Record**

The FCC held some dozen events for news media that weren’t on the record in the first half of this year, more than any other communications-related federal body. Such commission media events, often “on background” where officials couldn’t be identified, numbered twice as many as were fully on the record. Partisan politics (see 1510280062 and 1512150011) and a divided FCC (see 1512150030) appear to be making commission officials more cautious in what they say when their names are attached, said experts who reviewed a *Communications Daily* database. They said such politics partly reflect a politically divided Washington. That’s apparent to a lesser degree at NTIA and the Office of the U.S. Trade Representative.

Like the FCC, NTIA and USTR held more news events that weren’t on the record than those that were. But the absolute numbers were smaller than at the commission. Experts said the FCC stands out for its extensive use of events where officials speak on behalf of the agency to groups of reporters but the officials can’t be identified by name or quoted verbatim. Further, the officials can’t be described as speaking in their official capacities sanctioned at the highest levels and on behalf of the agency or its head. Experts noted that even a decade ago, most events for news media were entirely on the record, and anything off the record was mostly limited to officials’ conversations with individual journalists.

The FCC doesn’t comport with some PR or journalism best-practices, as they were described in interviews with practitioners. The National Association of Government Communicators, which represents government spokespeople, advises against labeling an event that’s not on the record as a news event, said Chris O’Neil, a volunteer communications director for NAGC. Such events don’t “foster greater transpar-
ency or greater accountability in government,’’ he said. The Society of Professional Journalists and other media associations have repeatedly brought such concerns to the Obama administration (see 1511130013). They had a meeting to voice those frustrations Tuesday with White House officials like Press Secretary Josh Earnest, said SPJ Freedom of Information Committee member Kathryn Foxhall.

The government anonymity is “disappointing,” said University of Maryland journalism professor Mark Feldstein, a former broadcast and cable-news journalist. “It certainly shows a continuation of a trend that started at the more high-visibility and controversial government agencies and has trickled down over the years even to some of the most obscure ones.” Many PR experts said they couldn’t recall any agency other than the FCC that holds news events that aren’t on the record so routinely on matters unrelated to national security. “I personally haven’t seen it” as a Capitol Hill press secretary, said Dan Scandling, now an Ogilvy senior vice president. “If the media is going to allow it, as a [PR] practitioner, you give us an inch, we’re going to take a mile.” Others, too, leveled blame at reporters for participating in such briefings. Reporters from this and many other publications participate in such briefings, which for purposes of this report are defined as those that an agency itself organizes and are aimed at news media.

What was said at not-on-the-record briefings rarely made news, and was often accompanied by news releases, blog posts and other public statements. FCC officials also spoke off the record at least several times at industry and other events in the first half of this year, more than the combined number of such instances at all other communications-related agencies. The topics weren’t all necessarily controversial: June 10, FCC officials working on the agency’s healthcare task force spoke to an FCBA off-the-record brown-bag lunch about the initiative.

Busy Times

However, the six-month period in our data analysis was busy and contentious. During it, the FCC adopted on a party-line vote net neutrality rules (see 1502260043) that are now being appealed in court, floated procedures related to government auctions of spectrum that later were approved 3-2 by politically divided commissioners, and issued a record-setting proposed $100 million fine against AT&T (see 1506170050), also over dissents of Commissioners Mike O’Rielly and Ajit Pai. Such issues were discussed by FCC officials at “on background” news events.

The agency under Chairman Tom Wheeler took “significant steps to provide the press and public timely information about pending and current Commission actions,” a spokesman emailed us. “Briefings were conducted on ‘background’ by Commission staff to discuss open meeting items that had been circulated, but not approved. Under these ground rules, reporters are free to use the information provided, but may not use verbatim quotes or name the officials in order to allow a more free exchange of information while respecting the fact that the proposals have not been adopted by the full Commission and may change. In addition, fact sheets, data, on-the-record statements, blogs or other supporting written materials were provided to accompany these briefings.”

In total in the first half of 2015, “the FCC conducted 23 press briefings, 21 of which were open to all members of the media who chose to attend,” the spokesman said. “Of these, 12 were on-the-record press briefings by the Chairman and staff.” The disparity between our figures and the agency’s is that it counted as a news conference each time Wheeler spoke to reporters every month after the commissioners’ public meeting as well as separately the comments that agency staff made immediately following Wheeler about specific items that were voted on. The FCC said our analysis was wrong to not consider off the record and
on background events separately, because they’re “two fundamentally different terms,” emailed the spokes-
man. “The FCC’s use of regular background briefings when open agenda meeting items are circulated pro-
vides the entire press corps that follows the FCC with information about the Chairman’s proposals, while
respecting the fact that no proposal is final until all five commissioners vote at the Open Meeting—which
typically is followed by an on-the-record press conference. Off-the-record briefings, by contrast, provide
the press and public with no information.”

The agency is navigating “highly politicized waters,” said P.J. Crowley, who teaches crisis commu-
ications at George Washington University and was a State Department spokesman under Secretary Hillary
Clinton. “The higher the tension inside the commission, the more likely you are to communicate, but not
in a way where you might be hauled in front of a House subcommittee.” While he was at State, it held a
daily on-the-record briefing for reporters, with a session afterwards on background, Crowley recalled. “To
the extent that agencies are now communicating more on background and not on the record, I think that is
just a reflection of what they see as a higher risk factor.” Given “the political climate that we’re in,” he said,
that’s understandable.

NTIA during 2015’s first half held only one news event, and it wasn’t on the record, on Feb. 27,
about privacy principles the Obama administration released that day (see 1502270052). And Feb. 10, NTIA
Administrator Larry Strickling and Associate Administrator-Office of International Affairs Fiona Alexander
were scheduled to have addressed an event partly organized by the FCBA in Singapore during a meeting of
ICANN. It was a “successful event with a good turnout in the midst of the week of ICANN 52 meetings,”
a writeup said. The FCBA, which held four of the six events where FCC and other government officials
spoke off the record during this year’s first half, had no comment.

“NTIA provides information to reporters and the public in an open and transparent manner,” a
spokeswoman emailed. “In limited instances, we have provided background briefings to reporters in an
effort to explain complex issues with NTIA staff who don’t typically interact with media. Reporters have
communicated to us that they find these interactions helpful.”

Breadth of Subjects

At the FCC, officials spoke on a not-for-attribution basis on many subjects. Such issues included
controversial subjects like an order that pre-empted some state restrictions on communities building out
broadband networks, on which O’Rielly and Pai dissented and which is being appealed in court by North
Carolina and Tennessee (see 1511090056). The Pennsylvania Public Utility Commission tried to correct the
record from what was said anonymously (see 1502020037), telling the federal commission that the state
didn’t completely bar municipal broadband (see 1502130031).

Some things that were the subject of background briefings were approved unanimously: rules for a
new so-called Citizens Broadband Radio Service, and letting FCC staff negotiate moving from Neustar to
an Ericsson affiliate a contract for assuring that people’s phone numbers move with them when they change
providers locally (see 1503040053). Neustar shares closed down 11 percent the day of the preview of the
item that was later approved.

Accountability gets lost in not-for-attribution events, experts agreed: Getting to the heart of important
regulatory issues thus becomes more difficult. It “restricts the untrammeled flow of information to the public,
about how their tax dollars are really being spent,” University of Maryland’s Feldstein said. “It allows them
to get their message out in the most controlled way possible with the greatest defense possible.”
“People are saying things where they are not held to account,” Crowley said. On-the-record dialogue is “an important element of government accountability,” he said. Corporate PR practitioner Scandling is “surprised the media lets you [PR people] get away with it,” he said. “Is that really transparent?” If none of a briefing is on the record, “I’m not sure how that’s a press conference,” Scandling said.

**Cooperation, Transparency Varies**

The extent of agency transparency varied widely, as did agencies’ cooperation with the creation of our database. The FCC fully cooperated, confirming after a few months of queries the accuracy of all information in the database and without a Freedom of Information Act request. So, too, did the FTC and NTIA.

The FTC alone among agencies here said it doesn’t hold any off-the-record briefings with groups of reporters. Transcripts are generated at such “press availability” events, and the documents are always released, a spokesman said. In the FTC’s one instance in this database, Commissioner Julie Brill spoke on a Jan. 29 Center for Democracy & Technology panel (see 1501290053) about privacy that wasn’t on the record. Brill had no comment, the FTC spokesman said. CDT’s “always on” panels are done under Chatham House Rules, so what’s said isn’t attributable to the speaker, though formal presentations at such events are on the record, said a spokesman. “CDT uses Chatham House Rules for a number of our events and in our policy working groups. We believe this allows for a more open, honest, and frank dialogue across sectors and interests, which leads to better informed policy positions and outcomes. This is not something we do for government officials, nor was it requested by any as terms of participation.”

The USTR held frequent news media events that weren’t on the record and didn’t cooperate in the creation of our database. Like the FCC, USTR held more events for groups of reporters that weren’t on the record than were on the record. The trade agency often held events that had a portion on the record, where top officials and sometimes legislators would speak, and then a portion that wasn’t on the record, where staff spoke. The USTR had no comment after months of requests via FOIA and by phone, email, U.S. mail and facsimile.

Best practices for any agency in dealing with news media and the public are to be more transparent than the FCC was, government PR veterans and journalists said. “If you’re out there consistently not being quoted, not attributing information to a credible source, you are not furthering the integrity of the organization,” NAGC’s O’Neil said. “I cannot imagine a situation where that is beneficial.”

SPJ’s Foxhall compared government officials speaking anonymously to officials misusing public resources. Like the author of this story, she’s on the board of the SPJ D.C. Professional Chapter, and she was part of Tuesday’s White House meeting. The White House didn’t respond to requests for comment by phone and email over several months. “It is very distressing,” Foxhall said earlier of the government anonymity. “It shows a dictatorial attitude toward the press, but more importantly, toward the public.” — Jonathan Make