STATEMENT OF

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HEARING ON REVIEW OF E-RULEMAKING COMMENT SYSTEMS

BEFORE THE

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Chairmen Portman and Lankford, and Ranking Members Carper and Sinema, thank you for the opportunity to testify today. I serve as Deputy General Counsel at the Federal Communications Commission (FCC) and am here today to address how the FCC collects and reviews public comments in its rulemakings. My testimony will focus on the role the FCC's "Electronic Comment Filing System" (ECFS) plays in this process. I am providing this testimony from the perspective of a senior FCC lawyer responsible for defending the agency's actions in federal appellate courts and ensuring that the Commission's rulemakings comply with our legal obligations.

The Administrative Procedure Act – Basic Legal Requirements

Like other federal agencies, the FCC adheres to the rulemaking framework Congress established in the Administrative Procedure Act (APA) of 1946. In modern practice, the FCC conducts its rulemaking under the "notice-and-comment" or "informal" rulemaking procedures set forth in section 553 of the APA. This process consists of three steps:

1) The agency publishes a notice of proposed rulemaking;

2) The agency offers the public ("interested parties") an opportunity to comment on its proposal; and

3) The agency publishes a final rule that includes a statement explaining the basis and purpose of the rule.

ECFS Plays an Important Role in Facilitating the Intake and Posting of Comments from the Public

ECFS is the tool the FCC uses to manage the second stage of this process – the point at which the public submits comments regarding our proposed rules. ECFS was created in 1998 and has been modified incrementally over time in response to the increased emphasis on electronic filing and the changing needs of the Commission. The Commission adopted the second generation of ECFS (ECFS 2.0) in 2009 and the third generation of ECFS (ECFS 3.0) in 2016.

Throughout its history, ECFS has been designed to maximize public participation in rulemakings by making the submission and posting of comments as easy and inclusive as possible. This fundamental feature of ECFS – its openness – is not animated exclusively by the FCC's efforts to comply with the APA, which requires that agencies afford the public a meaningful opportunity to comment on the agency's proposals. It is also the product of many decades of practical rulemaking experience at the FCC, the lesson of which is that the policymaking process benefits from vigorous, on-the-record exchanges between parties with different views and that the FCC can improve accountability and transparency through an open rulemaking process.

To facilitate this discourse, ECFS is available 24 hours a day, seven days a week to anybody who wishes to submit a comment, or to search for and review comments that other members of the public have submitted. It accepts comments made in most file formats (although not executable files), scans those filings for viruses and quarantines infected attachments, and posts comments at regular intervals via an automated process. ECFS provides an easy, web-based form for parties who wish to submit brief comments (called "express" comments), but also gives parties the ability to submit comments with voluminous supporting materials, such as technical analyses and expert reports (called "standard" comments).

In its current form, technically sophisticated users can access ECFS through an "application programming interface" (API). The API can be used for various purposes, including the submission of "bulk" comments on behalf of groups and extracting large numbers of comments from the system for content analysis.

ECFS is also an adaptable, "scalable" system. It was designed to manage both rulemakings on technical subjects that may attract only a handful of comments and high-profile proceedings that generate headlines and millions of comments, such as the FCC's 2017 "Restoring Internet Freedom" proceeding. Since 2016, ECFS has been hosted on a cloud computing platform, which has improved the FCC's ability to manage surges of comments such as those experienced in 2017.

In addition to facilitating comment intake and posting submissions to the public docket, ECFS's user interface organizes information to enable members of the public to find and respond

to other comments in the record. It does so by making it possible for individuals to locate specific proceedings and filings by running full-system searches via proceeding number, FCC bureau, author, type of filing, or date ranges, among other things. For those without such information, ECFS contains a page highlighting popular proceedings with links to the agency's most active dockets. Once an individual selects a specific proceeding, ECFS provides shortcuts to the most popular comments by linking to submissions from the top filers and authors. Through the combination of its interface and its features, ECFS plays an important role in providing the public with a meaningful opportunity to weigh in on the agency's proposed actions.

ECFS Facilitates the Agency's Review of Comments

ECFS also plays an essential role in the third step of the APA rulemaking process – the point at which the FCC analyzes the contents of the rulemaking record and prepares its final rule. Staff in the FCC's Bureaus and Offices use ECFS to review the public comments submitted in a proceeding. The goal of this review is to identify and summarize comments that raise significant factual, policy, and legal arguments. Attorneys in the FCC's Bureaus and Offices then use the comments and summaries to ensure that the agency responds to relevant evidence, analysis, and arguments in the record, and to organize and draft the documents that eventually become final Commission rules and orders.

The FCC Focuses on the Content of Comments in Satisfying its Obligation to Respond to Significant Factual, Legal, and Policy Arguments in the Record

Agency rulemaking is the process by which federal agencies propose and promulgate regulations. When adopting any final rule, the Commission is required to address important aspects of whatever problem it is attempting to solve, offer reasoned explanation for its decisions, and consider and respond to significant substantive legal and policy arguments in the record. Compliance with these legal obligations necessitates a platform like ECFS that enables agency staff to create a complete administrative record and to accept, search, retrieve, and review the comments that constitute that record.

Guided by our statutory obligations and case law interpreting and applying the APA, we focus on the content of comments, rather than the number that advance a specific position. Courts have made clear that we are not required to tally the number of comments for or against our proposed action; a rulemaking is not a public opinion survey. Likewise, the identity of a filer, although potentially relevant if the comment purports to offer factual assertions or analysis based on expertise, is generally not critical to our analysis. It is usually the substance of a comment that matters.

By storing and preserving comment submissions and providing search and retrieval functionalities to facilitate our review, ECFS plays an integral role in our efforts to consider

relevant material, address significant issues commenters have raised, ground our decisions in record evidence, and reasonably explain our regulatory action.

We are Continuing to Make Improvements to ECFS and are Making Plans for ECFS 4.0

ECFS has been updated several times since the FCC first permitted electronic commenting in 1998. Many of those updates have been driven by the expanding role information technology plays in agency rulemakings and the growing volume of electronic comments we receive. Historically, the FCC's approach to the comment process has been to err on the side of openness and accessibility. We have generally taken the view that more robust public participation and a complete administrative record are features of rulemaking, rather than flaws. But we have always understood that there is a tradeoff involved in this approach: the easier it is for people to comment on our proposed rules, the easier it is for bad actors to abuse the system. We have endeavored to mitigate some of the opportunities for mischief by ensuring sufficient network capacity to prevent system disruptions and optimizing ECFS's search capabilities so that those looking to review and respond to substantive comments can find them.

To that end, over the past three years, the FCC's Information Technology staff has made a number of improvements to ECFS. These improvements include, among other things, optimizing search result queries to make them faster and more accurate and adding data validation checks to ECFS's web interface to ensure only permissible data is submitted into the application.

Even more importantly, we have launched a fulsome review to overhaul the system. A cross-bureau working group has been tasked with leading this effort. They are now in the process of convening roundtables with various external stakeholders to ensure that the next generation of ECFS is both accessible and secure. Among other things, we are exploring changes like the implementation of CAPTCHA to distinguish human comment filers from automated submissions, tools to authenticate identities, the creation of docket home pages that highlight comment deadlines and links to major filings, and the elimination of ECFS's open API to limit bot activity in agency proceedings.

As we move ahead with our system overhaul, the Commission will follow the guidance of the performance audit provided us by GAO and the recommendations of the FCC's Inspector General. We will also carefully consider the recommendations you have made in the report the PSI Subcommittee released this week and welcome any other suggestions you have for us today or in the future. Our objective is to use all available resources—financial and human—to ensure that the next generation of ECFS is even more accessible, secure, and resilient than our current system.

Thank you for the opportunity to testify today. I look forward to answering your questions.