July 17, 2025

Brendan Carr
Chairman
Federal Communications Commission
45 L St NE
Washington, D.C. 20554

Re: Delete, Delete, Delete Direct Final Rule **Docket No. 25-133**

Dear Chairman Carr:

The undersigned 22 public interest, civil rights, labor, and digital rights organizations write to express our grave concern with regard to the adoption by the Commission of a procedure to permit the offices and bureaus to eliminate existing rules without traditional notice-and-comment rulemaking under the "good cause" exception of the Administrative Procedure Act. Despite reference to the recent recommendations of the Administrative Conference of the United States,[1] the procedure the FCC would adopt eliminates or relaxes critical safeguards proposed by ACUS to prevent abuse of the process. More importantly, this procedure would ***effectively eliminate any hope for timely judicial review*** of elimination of a rule on delegated authority[2] – a result not intended by ACUS and contrary to the intent of the APA and principles of fundamental fairness.

This item therefore represents a delegation of authority well beyond anything contemplated by the Communications Act, and completely at odds with the importance of public comment emphasized by the APA and the Supreme Court.[3] It undermines the structure of the Commission as an independent, bipartisan agency, and places unprecedented power in the hands of the Chair through the Chair's control of the bureaus.[4] It would permit the bureaus to select and eliminate rules through an accelerated process, without publication in the Federal Register. As a result, impacted parties will have little opportunity to advise the Bureau that supposedly "obsolete" rules remain in use and necessary in the public interest.

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[1] *See* Mark Squillace, Best Practices for Agency Use of the Good Cause Exemption for Rulemaking (December 4, 2024) (report to the Admin. Conf. of the U.S.).

[2] As explained in more detail below, the fact that the decision of the bureau or office goes into effect immediately, 47 U.S.C. § 155(c)(3), combined with the requirement to seek review from the full Commission before going to court, 47 U.S.C. § 405(a), allows a Chairman to block review simply by refusing to circulate a review order.

[3] *See Home Box Office v. FCC,* 567 F.2d 9 (1977) and *DHS v. Regents of University of California*, 591 U.S. (2020).

[4]For simplicity's sake, we use the term "bureau" to refer to all bureaus, offices or other recipients of delegated authority pursuant to 47 U.S.C § 0.5(c).

We therefore strongly urge that you pull the item from the agenda or, at a minimum, do not delegate authority to the bureaus to eliminate rules through Direct Final Rule. If you are determined to bring the matter to a vote, we ask that you modify the item to enable judicial review and to adopt the guardrails against abuse recommended by ACUS.

The Delegation Exceeds the Intent of the Communications Act.

As a general matter, a rule adopted by the full Commission may only be repealed by the full Commission. But the Commission now delegates to the bureaus the authority to eliminate any rule, regardless of origin, provided it meets the criteria given in the pending item. The Order at issue itself recognizes that these decisions should be limited to routine matters and that Bureaus should not decide matters that are either new or novel. Rather, as with DFR itself, the Bureau should act when "the administrative rules is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public."[5] But the scope of potential rules the Commission lists in Paragraph 2 far exceeds this scope. Paragraph 2 states that the Commission intends to eliminate rules that it finds "obsolete, unlawful, anticompetitive, or otherwise no longer in the public interest." These broad and undefined terms potentially exceed considerably the idea of "insignificant" and "inconsequential" given as the proper scope of DFR – particularly on delegated authority,

Section 5(c)(1) of the Act limits delegation to situations "necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business." Determinations on what rules are "anticompetitive" or "contrary to the public interest" are clearly substantive matters worthy of notice and comment rulemaking by the full Commission, not suitable for DFR, let alone determination on delegated authority. Further, the Commission is using a DFR process to substantively expand the authority of bureaus to issue NPRMs, thus the Commission is already proposing to act outside the bounds of notice and comment rulemaking via the DFR process.[6]

Delegation Makes Judicial Review Virtually Impossible, Even Though the Order Goes Into Effect Immediately.

Section 5(c)(7) requires that any party impacted by an action on delegated authority must file an application for review with the Commission as a prerequisite to any petition for judicial review.[7]

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[5] Draft Order at para. 10 (quoting Util. Solid Waste Activities GRP v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2001).

[6] Draft Order at para. 11. The threat is not speculative. The Department of Energy has already proposed to strip civil rights protections in its regulation. *See, e.g.*, Rescinding Regulations Related to Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 90 Fed. Reg. 20788 (May 16, 2025).

[7] 47 U.S.C. § 155(c)(7).

Courts have interpreted this statutory requirement to exhaust administrative remedies strictly.[8] Nor may a party file an application for review by the full Commission, then file a Petition for Review with a court of appeals while the matter remains unresolved by the full Commission.[9]

The rules do not require a Chairman to circulate an order on review of a bureau decision. Nor is there any deadline for Commission action, or a time by which the requirement to wait expires and parties may appeal to a court of review. This does not, however, prevent the removal of the rule from going into effect. Section 5(c)(3) states that a determination by the Bureau "shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission" unless the Commission chooses to review it.[10]

As a result, a Chairman that does not wish to permit judicial review of elimination of a rule through DFR may order a bureau to remove the rule, then simply refuse to take action on the application for review. This would work a severe injustice against injured parties by denying them their "day in court" to challenge whether the eliminated rules are genuinely "insignificant in nature and impact" and therefore suitable for DFR. It would also severely undermine the nature of the Commission as a bipartisan, independent commission by concentrating the power to eliminate rules without effective review in the hands of the Chair.

The Proposed Procedure Removes Important Safeguards Recommended by ACUS.

The Administrative Conference of the United States, aware of the danger that agencies may use DFR where inappropriate to circumvent the important process of public notice and comment, and lists several recommendations to safeguard against this.[11] For example, ACUS recommends:

- The agency should publish notice of the proposed DFR action, as well as an explanation for why DFR is appropriate in this case, in the *Federal Register*.
- The agency should provide 30 days for interested parties to comment.

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[8] *See Richmond Bros Records v. FCC*, 124 F.3d 1302 (D.C. Cir. 1997) (Because petitioner failed to file an application for review of Wireline Bureau Order, petition for review by court dismissed for failure to exhaust administrative remedies).

[9] *See International Telecard Assoc. v. FCC*, 166 F.3d 387 (D.C.Cir.1999) (petition for judicial review "incurably premature" when filed 3 months after application for review by full Commission and matter still pending); *see also Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002) (parties may not evade exhaustion requirement by simultaneously filing application for review and judicial appeal).

[10] 47 U.S.C. § 155(c)(3).

[11] *See* Admin. Conf. of the United States, Recommendation 95-4 (June 15, 1995), https://www.acus.gov/sites/default/files/documents/95-4.pdf; *see also* Admin. Conf. of the United States, Recommendation 2024-6 (Dec. 12, 2024), https://www.acus.gov/sites/default/files/documents/Public-Engagement-Agency-Rulemaking-Good-Cause-Exemption-Final-Recommendation.pdf.

- The agency should withdraw the rule and move to regular rulemaking in the event it receives ***any*** significant adverse comment, and specifies what process it will use (if any) if it determines that the rule is not suited to DFR.
- The ACUS defines a "significant adverse comment" rather than leave it entirely to the discretion of the agency.
- If the agency acts by DFR, it should print a confirmation notice in the *Federal Register*, or provide for an effective date greater than 30 days.

The draft Delete Order, by contrast:

- The Commission will permit comment for only 10 days after publication in the *Federal Register*, rather than the 30 proposed by ACUS.
- Although ACUS recommends that the agency revert to standard notice-and-comment rulemaking in the event of a ***single*** adverse comment, the draft Order requires ***multiple*** adverse comments – at which point the bureau/Commission will *consider* whether to shift to notice-and-comment rulemaking.
- If the bureau/Commission decides that adverse comments are not "substantive," it will explain its determination in a public notice that will not be filed in the *Federal Register.*
- The Commission states that it will be guided, but not bound, by the definition of "adverse comment" recommended by ACUS.
- The Commission will not file a notice of confirmation unless adverse comments are filed, but intends DFRs to go into effect 60 days after publication in the *Federal Register* unless otherwise stated.

These changes dramatically increase the danger that the Commission will use DFR where inappropriate. Often, notice and comment allows stakeholders to demonstrate that a rule widely considered "obsolete" because of changes in technology remains relevant because the technology remains relevant – typically to vulnerable and marginalized populations. For example, the Commission has targeted rules relating to calling cards and telephone booths in the draft Order as "obsolete." However, calling cards and pay phones remain important technologies for rural areas, immigrant communities, the unhoused, and others without reliable access to modern communications services. The impact on these communities is not clear and will not likely be clear in the short time provided for comment.

Ten days is a very short time for advocates for these communities to discover the proposed rule changes and organize the community to respond effectively. It is very short even for large corporations. But the proposed Order affirmatively would prohibit any new comments that might show harmful impacts of the proposed rule change outside the 10 day comment period. But the draft Order offers no real explanation for this extremely short deadline other than that such haste "accords with the purpose of the comment process for direct final rules." But this abbreviated opportunity for public comments does ***not*** accord with the purpose of the comments process – to

determine whether the rule is genuinely "insignificant in nature and impact, and inconsequential to the industry and the public." To the contrary, the timeline and process proposed in the draft Order appear calculated to allow the agency to select rules for elimination with minimum public input and virtually no chance for judicial review.

The Chairman Should Pull the Item from the Agenda and Seek Comment on the Proposed Process for DFR.

The process proposed for direct final rulemaking in the draft Order raises grave concerns. On its face, it lacks sufficient safeguards to qualify as an appropriate exercise of the "good cause" exception to the APA that justifies direct final rulemaking. The undersigned strongly urge that the Chairman therefore withdraw the current draft of the item. Instead, if the Chairman wishes to adopt a version of DFR for regular use by the FCC, the APA requires the Chairman to seek comment on how to best implement the ACUS recommendations in light of the unique structure of the Communications Act and the exhaustion of remedies requirement in Section 5(c)(7).

Sincerely,

Public Knowledge
Asian Americans Advancing Justice-AAJC
Benton Institute for Broadband & Society
Center for Digital Democracy
Common Sense Media
Communications Workers of America
Electronic Privacy Information Center
HTTP
LGBT Tech
Media Access Project
MediaJustice
Multicultural Media, Telecom and Internet Council
National Action Network
NBJC
National Council of Negro Women
National Digital Inclusion Alliance
National Hispanic Media Coalition
National Urban League
New America's Open Technology Institute (OTI)
The Leadership Conference on Civil and Human Rights
United Church of Christ Media Justice Ministry
UnidosUS