

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
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MEMORANDUM

July 8, 2016

To: Subcommittee on Communications and Technology Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Hearing on “Oversight of the Federal Communications Commission”

On **Tuesday, July 12, 2016, at 10:15 a.m. in room 2123 of the Rayburn House Office Building**, the Subcommittee on Communications and Technology will hold a hearing titled “Oversight of the Federal Communications Commission” (FCC). This will be the sixth subcommittee hearing this Congress with appearances by the Chairman or other commissioners and the eighth overall with representatives of the Commission.¹ This memo provides updates on Commission actions since the last oversight hearing was held on March 22, 2016.

I. KEY ISSUES BEFORE THE FCC

A. Net Neutrality

The D.C. Circuit for the U.S. Court of Appeals upheld the FCC’s net neutrality rules in their entirety in a 2-1 decision released on June 14, 2016.² The decision solidifies the FCC’s authority to regulate broadband service providers under Title II of the Communications Act.

The FCC adopted the network neutrality rules at issue in this case on February 26, 2015. These rules are designed to protect consumers, free expression, and innovation online, and they apply to both wired and wireless broadband services. The bright line net neutrality rules prohibit blocking, throttling, and paid prioritization. In adopting those rules, the FCC also enhanced its

¹ FCC staff participated in two additional hearings this Congress: (1) the March 4, 2015, hearing on the FCC budget, and (2) the March 26, 2015, hearing on spectrum policy.

² *USTA et al. v. FCC*, No. 15-1063, U.S. Court of Appeals for the D.C. Circuit (Jun. 16, 2016) (online at [cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/\\$file/15-1063-1619173.pdf](http://cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/$file/15-1063-1619173.pdf)).

existing rules for transparency and adopted rules that prevent broadband access providers from unreasonably interfering with, or unreasonably disadvantaging consumers' access to the content of their choice. Finally, the FCC announced that it will also take enforcement action to ensure that discrimination against content or services does not occur at points of interconnection, which are those places along the network where a broadband provider receives and hands off traffic from the rest of the internet.

The FCC rooted its Open Internet Order in multiple sections of the Communications Act. Most significantly, the Order classifies broadband Internet access service as a 'telecommunications service' under Title II of the Communications Act. The FCC, however, chose to use its forbearance authority to exempt broadband providers from over 700 regulations that fall under Title II, including rate regulation, tariffing, and last-mile unbundling provisions. The FCC did maintain several key Title II provisions for broadband including those that protect consumer privacy, access for people with disabilities, and universal service. The FCC's rules went into effect on June 12, 2015.³ Some parties have indicated that they plan to seek review of the D.C. Circuit decision to the Supreme Court.⁴

B. Incentive Auction

This hearing takes place just after the FCC closed Stage 1 of the reverse auction portion of the incentive auction. In an incentive auction, spectrum licensees can voluntarily relinquish their licenses in exchange for a portion of the proceeds generated by the sale of those spectrum rights to third-party bidders.

Congress specifically authorized the FCC to conduct incentive auctions, using its competitive bidding authority, in the Middle Class Tax Relief and Job Creation Act of 2012 (the Public Safety and Spectrum Act). The incentive auction awards spectrum currently allocated for broadcast television service to bidders intending to use those frequencies in providing mobile broadband services.

The FCC adopted the final bidding procedures for the incentive auction in August 2015, and the initial commitment deadline for broadcast stations ended March 29, 2016.⁵ The FCC announced on April 29 an initial spectrum clearing target of 126 MHz of spectrum; formal bidding in the reverse auction began on May 31.⁶ Stage 1 of the incentive auction ended on

³ *D.C. Circuit Denies Stay, Open Internet Rules Become Effective June 12*, CommLaw Monitor (June 12, 2015) (online at <http://www.commlawmonitor.com/2015/06/articles/uncategorized/d-c-circuit-denies-stay-open-internet-rules-become-effective-june-12/>).

⁴ AT&T Public Policy Blog, AT&T Statement on U.S. Court of Appeals Net Neutrality decision (Jun. 14, 2016) (online at attpublicpolicy.com/broadband-classification/att-statement-on-u-s-court-of-appeals-net-neutrality-decision/).

⁵ Federal Communications Commission, *FCC Establishes Bidding Procedures for 2016 Incentive Auction*, Public Notice (Aug. 11, 2015) (online at https://apps.fcc.gov/edocs_public/attachmatch/DOC-334756A1.pdf).

⁶ Federal Communications Commission, *Initial Clearing Target of 126 Megahertz Set for the Broadcast Television Spectrum Incentive Auction; Bidding in the Clock Phase of the Reverse*

June 29 with an \$86.4 billion clearing cost for 126 megahertz of spectrum.⁷ This clearing cost means that wireless carriers participating in the forward auction will have to collectively bid at least \$86.4 billion in aggregate for the auction to complete. If that total is not met, the FCC can lower the spectrum clearing target and hold another stage of the reverse auction.

The FCC required forward auction applicants to make upfront payments to qualify to bid in the auction by July 1, 2016.⁸ After reviewing those payments, the FCC will announce the qualified forward auction bidders and begin accepting bids in the forward auction.

C. Set-Top Box Proposal

Congress required in 1996 that the FCC establish rules to allow consumers to purchase set-top boxes for televisions at retail.⁹ The result of the ensuing proceedings was the “cableCARD,” a hardware device included in every set-top box that decrypts video and other data signals sent from the cable company to viewers. Many hoped the cableCARD regime would set the foundation for a competitive market for new devices by allowing third-party device manufacturers to decrypt cable signals easily. While tens of millions of cableCARDS have been distributed to consumers, the market for third-party devices was never as successful as many had hoped.

Now, as technology has advanced, cable companies are considering moving from their costly, hardware-based cableCARD decryption systems to less expensive and more dynamic software-based downloadable security systems. To explore this idea, Congress included in the Satellite Television Extension and Localism Act Reauthorization Act (STELAR), a requirement that the FCC establish a working group to study and report on the issue of downloadable security for set-top boxes.¹⁰ The FCC established the Downloadable Security Technical Advisory Committee (DSTAC), which reported to Congress on August 28, 2015, without a consensus opinion of the Committee members.¹¹

As part of the DSTAC process, some public interest groups and other stakeholders advocated for an alternative solution to promote competition and provide more choice for

Auction (Auction 1001) Will Start on May 31, 2016, Public Notice (Apr. 29, 2016) (online at apps.fcc.gov/edocs_public/attachmatch/DA-16-453A1.pdf).

⁷ Colin Gibbs, Fierce Wireless, *Huge \$86B clearing cost could lead to extended incentive auction* (Jun. 29, 2016) (online at fiercewireless.com/story/huge-86b-clearing-cost-could-lead-extended-incentive-auction/2016-06-29).

⁸ Federal Communications Commission, *Upfront Payment Instructions for the Forward Auction (Auction 1002) of the Broadcast Television Spectrum Incentive Auction Updated; Updated Appendix on Upfront Payment Amounts*, Public Notice (Jun. 8, 2016) (online at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0608/DA-16-625A1.pdf).

⁹ 47 U.S.C. § 549.

¹⁰ Pub. L. No. 113-200, § 106, 128 Stat. 2059, 2063-4 (2014).

¹¹ Federal Communications Commission, *Final Report of the DSTAC* (Aug. 28, 2015) (online at transition.fcc.gov/dstac/dstac-report-final-08282015.pdf).

consumers. Specifically, these groups proposed requiring that multichannel video programming distributors (MVPDs) use an open technology standard to allow third parties to access an MVPD's video stream. Under this framework, third-parties would produce their own systems to repackage the programming with a new user interface. The third-party service could be available on multiple devices beyond just a television, such as smartphones and tablets. To access the full functionality of the alternative solution, a consumer would also need to subscribe to the MVPD.

The FCC adopted a Notice of Proposed Rulemaking on February 18, 2016, seeking comment on the issues regarding the alternative proposal supported by the public interest groups and other stakeholders and some other related set-top box matters.¹²

The cable industry opposed this alternative proposal, claiming it was essentially the same as a proposal the FCC put forward in 2010, called "AllVid" that would have required a universal adapter for all types of pay TV content. Cable providers believe that any proposal similar to AllVid would result in increased fees for consumers, increased power consumption because consumers would need two cable boxes, and possibly a reduction in minority video programming. Content companies have also raised concerns that the FCC proposal could diminish creators' ability to protect copyrighted works. Those supporting the FCC's proposal, including some public interest groups, indicate that the FCC's proposal will not require additional equipment, but merely provides competitors with access to cable company content that can be repackaged for consumer use. The cable industry recently presented the FCC with a substitute proposal based on the MVPDs preferred "apps-based" approach.¹³

D. Privacy

The FCC, by a 3-2 vote, adopted a Notice of Proposed Rulemaking (Privacy NPRM) on March 31, 2016, that would apply the privacy requirements of the Communications Act to fixed and mobile broadband Internet service. The proposed framework and rules would separate information shared between an internet service provider (ISP) and a user into three categories: (1) data necessary for the delivery and marketing of a user's broadband service; (2) data used to market third-party services; and (3) data used for all other purposes.¹⁴ The FCC's proposal states that a user's consent is inherent and implied for the first type of data, opt-out is required for the second type, and opt-in is required for the third.¹⁵

¹² Federal Communications Commission, *Notice of Proposed Rulemaking*, MB Docket 16-42 (Feb. 18, 2016) (online at transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0218/FCC-16-18A1.pdf).

¹³ Letter to Ms. Marlene Dortch, Secretary, Federal Communications Commission, from Mr. Paul Gilst, MB Docket No. 16-42 (Jun. 16, 2016).

¹⁴ Federal Communications Commission, *Broadband Consumer Privacy Proposal Fact Sheet* (Mar. 10, 2016) (online at fcc.gov/document/broadband-consumer-privacy-proposal-fact-sheet).

¹⁵ *Id.*

In addition, the proposal would require broadband providers to adopt stronger data security practices as well as data breach notification standards.¹⁶ The FCC states that its proposal will give consumers greater transparency about the services they purchase and how their data is being used by their ISP.¹⁷

The FCC recently extended the reply comment deadline in this proceeding to July 6, 2016.¹⁸

E. Lifeline

The Lifeline program provides discounted phone service for qualifying low-income households. The FCC has taken significant steps to address waste, fraud, and abuse within the program by imposing measures such as tougher subscriber eligibility requirements and annual recertification requirements. Recognizing the barriers to broadband adoption by low-income households, the FCC has also conducted pilot projects to use Lifeline support for broadband.

The FCC adopted a Report and Order at its March 31, 2016, Open Agenda Meeting to modernize the program. The decision allows that the \$9.25 per month subsidy can be applied to stand-alone broadband service, as well as bundled voice and data packages.¹⁹ The Commission's order also included minimum service standards and established a National Eligibility Verifier, which is an entity that would replace carrier verification in the process, to further deter waste, fraud, and abuse and reduce provider burden.²⁰ Finally, the FCC established a budget of \$2.25 billion, indexed to inflation, which the FCC intended to be sufficient to cover subsidies and other costs.²¹

F. Spectrum Frontiers

In an effort to pave the way for the rollout of 5G mobile service, the FCC adopted a notice of proposed rulemaking in October 2015, seeking comment on how the FCC should allocate high-band spectrum going forward.²² In particular, the FCC proposed allocating four

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Federal Communications Commission, *Wireline Competition Bureau Extends Deadline for Riling Reply Comments in the Broadband Privacy Proceeding*, Public Notice (Jun. 22, 2016) (online at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0622/DA-16-712A1.pdf).

¹⁹ Federal Communications Commission, Factsheet (Mar. 8, 2016) (online at transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0314/DOC-338113A1.pdf)

²⁰ *Id.*

²¹ *Id.*

²² Federal Communications Commission, *Use of Spectrum Bands Above 24 GHz For Mobile Radio Services*, Notice of Proposed Rulemaking, GN Docket No. 14-177 (Rel. Oct. 23, 2015) (online at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-138A1.pdf).

spectrum bands for new uses.²³ The FCC proposed to authorize mobile service in the 28 and 39 GHz band, unlinked used in the 64-71 GHz band, and a hybrid use in the 37 GHz band.²⁴ The FCC plans to vote on an order and further notice of proposed rulemaking in the spectrum frontiers proceeding at its July open meeting.

G. Media Ownership Quadrennial Review

The FCC is required under the Telecommunications Act of 1996 to review its broadcast ownership rules every four years to determine whether the rules are in the public's interest.²⁵ On June 27, 2016, Chairman Wheeler circulated a draft Order that would:

- Generally preserve existing rules that (1) prohibit co-ownership of newspaper/broadcast cross ownership in the same market, but provides a new exception for failed or failing entities, (2) allow ownership of two, non-top four rated, TV stations in the same market if at least eight independent stations remain post-merger, (3) limit total number of commonly-owned radio stations in the same market based on market size, (4) limit total number of commonly-owned radio and TV stations in the same market depending on how many independent voices remain post-merger; (5) prohibit mergers among any of the top four national television broadcast networks (ABC, NBC, CBS, and FOX).
- Readopt a rule treating substantial joint sales agreements (JSAs)—agreements under which one broadcast station can sell advertising on behalf of another station in the same market—as representing ownership interests and therefore subject to ownership caps.
- Adopt a definition of shared services agreements (SSA). The proposal defines SSA's as an agreement in which a station provides another station with administrative, technical, and/or programming support.²⁶

The FCC also readopts a revenue-based eligible entity standard to promote small businesses and new entrants to the broadcasting industry in response to a court remand regarding diversity issues.²⁷ The FCC declined to adopt a race- or gender-based preferences because it believes that it lacks a basis for such preferences that would withstand Supreme Court scrutiny.²⁸

H. Tech Transition

The wireline communications industry has been steadily decreasing its reliance on analog copper infrastructure while using more IP-based fiber optic cable. To keep pace, the FCC has been exploring ways to modernize its rules to reflect changing technology. As part of this effort,

²³ See *id.* at ¶ 4.

²⁴ See *id.*

²⁵ Circulation of the draft 2014 Quadrennial Review order fulfills a commitment by Chairman Wheeler to circulate an order by June 30, 2016 to complete both the 2010 and 2014 reviews.

²⁶ Federal Communications Commission, *Fact Sheet on Media Ownership Rules* (June 27, 2016) (online at fcc.gov/document/fact-sheet-media-ownership-rules).

²⁷ *Id.*

²⁸ *Id.* at 2.

the FCC has begun establishing new criteria for it to use when evaluating applications by wireline telecommunication seeking to retire legacy telecommunications infrastructure.

In August 2015, the FCC acted to continue to allow carriers to have the flexibility to retire copper networks as they transition to fiber, but required that consumers be notified at least three months in advance of any retirement plans.²⁹ In an order adopted on the same day, the FCC required carriers to give consumers the option of purchasing backup power from their carriers using fiber-optics lines.³⁰ By purchasing backup power, consumers can replicate the resiliency of the copper network as they switch to a fiber-optic network.

The FCC also adopted interim measures to require that large telecommunications providers give smaller carriers access to their IP networks at reasonable and comparable rates to what these smaller carriers were charged for access to legacy networks. The FCC plans to vote on an item at its July 14 Open Meeting that “adopts a framework to guide transitions to next-generation communications technologies while protecting the interests of consumers and competition.”³¹

I. Business Data Services (formerly known as Special Access)

Business Data Services, or “special access” lines, refer to those wholesale, high-capacity communications lines that larger telecommunications carriers often lease to smaller carriers. Smaller carriers lease these high-capacity lines to deploy more robust networks that they otherwise might not have the resources to build themselves. Many of these special access lines are controlled by a small number of major carriers. Some allege these carriers may have economic incentives to overcharge their smaller competitors.

Responding to these concerns, the FCC has sought to review the special access market in two proceedings. First, the FCC began a data collection effort in 2012 to evaluate, and potentially address, whether there is sufficient competition in the market for special access generally.³² Second, the Wireline Competition Bureau initiated an investigation of the terms and conditions of certain larger carriers’ special access pricing plans.³³ This investigation responds

²⁹ Federal Communications Commission, *FCC Modernizes Rules to Encourage Technology Transitions, Protect Consumers and Competition*, Public Notice (Aug. 6, 2015) (online at https://apps.fcc.gov/edocs_public/attachmatch/DOC-334747A1.pdf).

³⁰ Federal Communications Commission, *Ensuring Continuity of 911 Communications*, Report and Order, PS Docket No. 14-174 (Rel. Aug. 7, 2015) (online at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-98A1.pdf).

³¹ Federal Communications Commission, *FCC Announces Tentative Agenda for July Open Meeting*, News Release (Jun. 23, 2016) (online at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0623/DOC-339989A1.pdf).

³² Federal Communications Commission, *FCC Takes Major Step in Review of Competition in \$40 Billion Special Access Market*, Public Notice (Sept. 17, 2015) (online at https://apps.fcc.gov/edocs_public/attachmatch/DOC-335352A1.pdf).

³³ Federal Communications Commission, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plan*, Order Initiating Investigation and

to allegations that several major carriers were using anti-competitive “lock-up provisions” in their special access agreements with smaller carriers.³⁴ An example of a lock-up provision is one which requires a carrier to commit in advance to purchasing a large volume of special access services to receive a discount on those services.³⁵

The FCC sought comment on how best to reform and modernize its rules for Business Data Services on April 28.³⁶ It also resolved the pending investigation, finding that certain terms and conditions in agreements were unjust and unreasonable, and ordering that companies withdraw the illegal terms and file new tariffs within 60 days of release of the Order.³⁷ Reply comments are due in the Further Notice on July 26, 2016.

J. Public Safety

The FCC continues to work to improve the nation’s public safety communications. Near the start of 2015, the Commission adopted new rules to improve the accuracy of location data that first responders receive when someone calls 911.

The FCC adopted an NPRM seeking comment on proposals to strengthen and improve the Emergency Alert System (EAS).³⁸ The EAS NPRM seeks to encourage more engagement at the state and local level, while providing more testing and awareness.³⁹ The FCC also recently launched the EAS Test Reporting System (ETRS), an improved electronic filing system and online database related to the nationwide testing of EAS.⁴⁰

Designating Issues for Investigation, WC Docket No. 5-25 (Rel. Oct. 16, 2015) (online at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1194A1.pdf).

³⁴ *Id.* at ¶ 7-9.

³⁵ *Id.*

³⁶ Federal Communications Commission, Tariff Investigation Order and Further Notice of Proposed Rulemaking, WC Docket No. 16-143 et al., (Apr. 28, 2016) (online at apps.fcc.gov/edocs_public/attachmatch/FCC-16-54A1.pdf).

³⁷ *Id.* at ¶ 86 *et seq.*

³⁸ Federal Communications Commission, *FCC Proposes Strengthening the Emergency Alert System*, News Release (Jan. 28, 2016) (online at apps.fcc.gov/edocs_public/attachmatch/DOC-337475A1.pdf).

³⁹ *Id.*

⁴⁰ Federal Communications Commission, *Public Safety and Homeland Security Bureau Launches EAS Test Reporting System (ETRS) and Seeks Comment on EAS Operating Handbook*, Public Notice (Jun. 27, 2016) (online at transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0627/DA-16-721A1.pdf).

The FCC announced a two-month testing period for a new version of its Network Outage Reporting System (NORS) in May.⁴¹ The new platform is intended to increase reliability and security of NORS, and to allow the system to better integrate new technologies and methods in the future.⁴² Following the testing, the FCC expects to take the new NORS system live on July 20, 2016.⁴³

K. Process Reform

FCC Chairman Wheeler has stated since his tenure began in November 2013 that one of his priorities is to improve the efficiency and transparency of the agency's processes. Upon taking office, Chairman Wheeler directed an advisor to develop process reform recommendations, resulting in a February 2014 report of proposed recommendations that are being implemented by the Chairman's office.⁴⁴ In 2015, the Chairman also created a Task Force on FCC Process Reform that includes representatives from each Commissioner's office.⁴⁵

In its most recent quarterly workload report to the Committee, the FCC indicated that since May 1, 2014, the total volume of items pending for more than six months has dropped more than 47 percent, with the total volume of licensing-related items pending more than six months also dropping, by more than 36 percent.⁴⁶

L. FCC Budget

The FCC requested \$358 million to fund the agency for FY 2017.⁴⁷ The request is approximately \$25.7 million less than what was provided by Congress for FY 2016. The FCC offsets its budgetary spending through the collection of regulatory fees from the entities that it regulates, and has not received any direct funding from the Treasury for many years.

⁴¹ Federal Communications Commission, *PSHSB Announces the Opening of a Two-Month Testing Period for the New Version of the Network Outage Reporting System*, Public Notice (May 9, 2016) (online at apps.fcc.gov/edocs_public/attachmatch/DA-16-514A1.pdf).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Federal Communications Commission, *Report on FCC Process Reform* (Feb. 14, 2014) (online at www.fcc.gov/article/da-14-199a2).

⁴⁵ Federal Communications Commission, *Task Force on FCC Process* (July 21, 2015) (online at <https://www.fcc.gov/blog/task-force-fcc-process>).

⁴⁶ Letter to Chairman Walden and Chairman Murphy from FCC Chairman Tom Wheeler (Apr. 21, 2016).

⁴⁷ Federal Communications Commission, *FCC FY 2017 Budget Request* (online at apps.fcc.gov/edocs_public/attachmatch/DOC-337668A2.pdf).

The FCC receives authority to retain proceeds from spectrum auctions to conduct its auction-related activities. The FCC currently has a \$117 million cap on auction-related activities for FY 2016, and requested an increase in the cap to \$124 million for FY 2017.⁴⁸

Additionally, the FCC seeks approximately \$16.9 million as a second installment to complete the FCC headquarters move or reconfiguration.⁴⁹ The FCC also requested an additional \$4.8 million in one-time costs to cover essential IT infrastructure upgrades.⁵⁰ Finally, the FCC seeks the authority to transfer \$9.5 million from the Universal Service Fund in order to cover costs from the oversight of the fund by the Enforcement Bureau and Office of Managing Director.⁵¹

FCC Chairman Wheeler and Commissioner Ajit Pai testified before the House Appropriations Subcommittee on Financial Services and General Government (FSGG) on March 15, 2016 regarding the FY2017 FCC budget request. The House Appropriations Committee favorably reported H.R. 5485 on June 15. The bill, as reported, provides the FCC with \$314 million and reduced the auction-related cap to \$106 million.

II. WITNESSES

The following witnesses have been invited to testify:

Tom Wheeler
Chairman
Federal Communications Commission

Mignon Clyburn
Commissioner
Federal Communications Commission

Jessica Rosenworcel
Commissioner
Federal Communications Commission

Ajit Pai
Commissioner
Federal Communications Commission

Michael O’Rielly
Commissioner
Federal Communications Commission

⁴⁸ *Id.* at 9.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 4.