

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

March 19, 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, March 22, 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 fifth subcommittee hearing this Congress with appearances by the Chairman or other commissioners.¹ This memo provides updates to Commission actions since the last oversight hearing was held, on November 17, 2015.

I. KEY ISSUES BEFORE THE FCC

A. Incentive Auction

This hearing takes place just as the FCC is poised to begin a first-of-its-kind, incentive auction of spectrum. In an incentive auction, spectrum licensees can voluntarily relinquish their licenses in exchange for a portion of those 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 format is designed to award 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,

¹ FCC staff also 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.

and announced that the start date for the auction will be March 29, 2016.² The Commission began accepting applications from broadcast stations on December 8, 2015, and is currently educating bidders on how to participate.³

B. 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.⁴ 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 back on the issue of downloadable security for set-top boxes.⁵ 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.⁶

As part of that process some public interest groups and other stakeholders advocated for an alternative solution to promote competition and provide more choice for consumers. Specifically, they proposed to require that multichannel video programming distributors (MVPDs) use an open technology standard that would allow third parties access to the video stream. Third-parties could 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. In order to access the full functionality of the alternative solution, a consumer would also need to subscribe to the MVPD.

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

² 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).

³ Federal Communications Commission, *Broadcast Incentive Auction* (Accessed Mar. 15, 2015) (online at fcc.gov/about-fcc/fcc-initiatives/incentive-auctions).

⁴ 47 U.S.C. § 549.

⁵ Pub. L. No. 113-200, § 106, 128 Stat. 2059, 2063-4 (2014).

⁶ Federal Communications Commission, *Final Report of the DSTAC* (Aug. 28, 2015) (online at transition.fcc.gov/dstac/dstac-report-final-08282015.pdf).

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. Those in disagreement with cable providers, including some public interest groups, indicate that their proposal will not require additional equipment, but merely provides competitors with access to cable company content that can be repackaged for consumer use.

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.⁷

C. Privacy

The FCC circulated a Notice of Proposed Rulemaking (Privacy NPRM) on March 10, 2016, that would apply the privacy requirements of the Communications Act to fixed and mobile broadband Internet service. According to an FCC fact sheet, 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.⁸ 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.⁹

In addition, the proposal would require broadband providers to adopt stronger data security practices as well as data breach notification standards.¹⁰ 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.¹¹

The Privacy NPRM will be voted on by the full Commission at the March 31 open meeting and would be followed by a period of public comment, if adopted.

D. Net Neutrality

The FCC adopted network neutrality rules on February 26, 2015, which are designed to protect consumers, free expression, and innovation online. The rules apply to both wired and wireless broadband services and prohibit blocking, throttling, and paid prioritization. The FCC also enhanced its existing rules for transparency and adopted rules that prevent broadband access providers from unreasonably interfering with, or unreasonably disadvantaging consumers' access

⁷ 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).

⁸ Federal Communications Commission, *Broadband Consumer Privacy Proposal Fact Sheet* (Mar. 10, 2016) (online at fcc.gov/document/broadband-consumer-privacy-proposal-fact-sheet).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

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 its network where a broadband provider receives and hands off traffic from, and to connect to, the rest of the Internet.

The FCC rooted its decision 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, after the U.S. Court of Appeals for the D.C. Circuit denied a stay request filed by US Telecom.¹² The broader court challenge filed by US Telecom and other parties remains pending in the D.C. Circuit. Oral arguments took place on December 4, 2015. Many observers believe that a decision by the D.C. Circuit is imminent and could possibly come down before the end of this month.

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 opened a proceeding on June 18, 2015, to seek comment on restructuring the program to support broadband service and to streamline eligibility processes.¹³ The FCC plans to vote on a Report and Order at its March 31, 2016, Open Agenda Meeting to modernize the program. According to an agency fact sheet, the proposal would apply the \$9.25 per month support to stand-alone broadband service, as well as bundled voice and data packages.¹⁴ The proposal includes minimum service standards and would establish 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.¹⁵ Finally, the proposal establishes a budget of

¹² *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/>).

¹³ Federal Communications Commission, *FCC Takes Steps to Modernize and Reform Lifeline for Broadband*, News Release (June 18, 2015) (online at https://apps.fcc.gov/edocs_public/attachmatch/DOC-333992A1.pdf).

¹⁴ Federal Communications Commission, Factsheet (Mar. 8, 2016) (online at transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0314/DOC-338113A1.pdf

¹⁵ *Id.*

\$2.25 billion, indexed to inflation, which is intended to be sufficient to cover subsidies and other costs.¹⁶

F. Pending Merger Transactions

Generally, proposed telecommunications mergers must be approved by the FCC and the Department of Justice (DOJ). DOJ must determine whether a transaction raises antitrust concerns or may result in competitive harms. The scope of the FCC's merger review, on the other hand, is broader and takes other factors, which could affect the public interest into consideration.

The FCC has two major cable transactions pending. The first is between Charter Communications and Time Warner Cable. The companies announced their intention to merge on May 26, 2015, along with a deal for Charter to buy Bright House Networks.¹⁷ The formal comment period closed on November 12, 2015.¹⁸ The Commission is nearing the end of its informal 180-day shot clock period.

The second is between Altice, a Netherlands-based telecommunications firm, and Cablevision. Altice announced its intention to acquire Cablevision for \$17.7 billion on September 17, 2015.¹⁹ The FCC sought comment on the application, with the applicable comment periods ending on December 22, 2015.²⁰

G. 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, including establishing criteria for it to evaluate and compare replacement and legacy services. 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

¹⁶ *Id.*

¹⁷ *Charter Communications To Buy Time Warner Cable For \$55 Billion, Creating Cable Powerhouse*, Forbes (Mar. 26, 2015) (online at www.forbes.com/sites/antoinagara/2015/05/26/charter-communications-to-buy-time-warner-195-71-55-billion-cable-giant-john-malone/).

¹⁸ Federal Communications Commission, *Commission Seeks Comment on Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations*, Public Notice (Sept. 11, 2015) (online at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1010A1.pdf).

¹⁹ *Everything to Know About the Altice-Cablevision Deal*, Time (Sept. 17, 2015) (online at <http://time.com/4038623/cablevision-altice-merger-deal/>).

²⁰ Federal Communications Commission, *Applications Filed for the Transfer of Control of Cablevision Systems Corporation to Altice N.V.*, Public Notice (Nov. 5, 2015) (online at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1105/DA-15-1258A1.pdf).

retirement plans.²¹

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.

H. Special Access

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.²² Because the data collected may be sensitive, the FCC has authorized only certain members of the public to review this data and provide analysis to the Commission.²³ Analysis is ongoing.

Second, the Wireline Competition Bureau initiated an investigation of the terms and conditions of certain larger carriers' special access pricing plans.²⁴ This investigation responds to allegations that several major carriers were using anti-competitive "lock-up provisions" in their special access agreements with smaller carriers.²⁵ 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.²⁶ The Government Accountability Office has noted "[t]hese types of contracts may inhibit choosing competitive alternatives because the customer does not receive the applicable discount, credit, or incentive if the revenue targets are

²¹ 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).

²² 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).

²³ *Id.*

²⁴ Federal Communications Commission, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plan*, Order Initiating Investigation and 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).

²⁵ *Id.* at ¶ 7-9.

²⁶ *Id.*

not met, and additional penalties may also apply.”²⁷ The FCC’s investigation is ongoing as well.

I. 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).²⁸ The EAS NPRM seeks to encourage more engagement at the state and local level, while providing more testing and awareness.²⁹

J. Consumer Protection

1. Robocalls

The FCC also adopted new rules in June 2015, regarding robocalls. While the new rules clarify a number of issues raised in related litigation, critics allege they create new loopholes that could lead to an increase in unwanted calls. Others have raised concerns that the rules could hamper the democratic process. A number of petitions for clarification of the FCC’s rules remain pending at the Commission.

The Bipartisan Budget Act of 2015 provides for a new exemption that would allow the placement of robocalls for debt collection of Federal loans.³⁰ The FCC is directed to modify its rules within nine months of enactment, and has the flexibility to limit the number and duration of debt collection calls to mobile phones. The FCC circulated a draft NPRM on February 17, 2016, that seeks comment on how to satisfy the Budget Act mandate while protecting consumers from unwanted robocalls.³¹

²⁷ Government Accountability Office, *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, at 30 (GAO-07-80) (Nov. 2006) (online at <http://www.gao.gov/new.items/d0780.pdf>).

²⁸ 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).

²⁹ *Id.*

³⁰ Pub. L. No. 114-74, Title III (2015).

³¹ Letter to the Honorable Frank Pallone from Tom Wheeler (Feb. 25, 2016).

2. Inmate Calling Services

The FCC adopted an Order addressing inmate calling services (ICS) on October 22, 2015.³² The comprehensive reforms supersede the reforms that the FCC adopted in 2013, and according to the FCC, will “correct a market failure, foster market efficiencies, encourage ongoing state reforms, and ensure that ICS rates and charges comply with the Communications Act.”³³ The FCC also sought comment on, among other things, rates for international calls and promoting competition in the ICS industry.³⁴

The Court of Appeals for the D.C. Circuit issued a partial stay of the FCC’s 2015 Order on March 7, 2016.³⁵

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.³⁶ In 2015, the Chairman also created a Task Force on FCC Process Reform that includes representatives from each Commissioner’s office.³⁷

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 46 percent, with the total volume of licensing-related items pending more than six months also dropping, by more than 34 percent.³⁸

L. FCC Budget

The FCC requested \$358 million to fund the agency for FY 2017.³⁹ The request is approximately \$25.7 million less than what was provided by Congress for FY 2016. The FCC

³² Federal Communications Commission, *Second Report and Order and Third Further Notice of Proposed Rulemaking*, WC Docket No. 12- 375 (Oct. 22, 2015) (online at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1105/FCC-15-136A1.pdf).

³³ *Id.* at 7.

³⁴ *Id.* at 9.

³⁵ *See* *Global Tel*Link v. FCC*, Order, No. 15-1461, United States Court of Appeals for the District of Columbia Circuit (Mar. 7, 2016) (online at cdn.arstechnica.net/wp-content/uploads/2016/03/prison-phone-rates-stay-order.pdf).

³⁶ Federal Communications Commission, *Report on FCC Process Reform* (Feb. 14, 2014) (online at www.fcc.gov/article/da-14-199a2).

³⁷ Federal Communications Commission, *Task Force on FCC Process* (July 21, 2015) (online at <https://www.fcc.gov/blog/task-force-fcc-process>).

³⁸ Letter to Chairman Walden and Chairman Murphy from Tom Wheeler (Jan. 21, 2016).

³⁹ Federal Communications Commission, *FCC FY 2017 Budget Request* (online at apps.fcc.gov/edocs_public/attachmatch/DOC-337668A2.pdf).

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.

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 2017.⁴⁰

Additionally, the FCC seeks approximately \$16.9 million as a second installment to complete the FCC headquarters move or reconfiguration.⁴¹ The FCC also requested an additional \$4.8 million in one-time costs to cover essential IT infrastructure upgrades.⁴² 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.⁴³

FCC Chairman Wheeler and Commissioner Ajit Pai testified before the House Appropriations Subcommittee on Financial Services and General Government on March 15, 2016 regarding the FY2017 FCC budget request.

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

⁴⁰ *Id.* at 9.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 4.