

FRED UPTON, MICHIGAN
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY
RANKING MEMBER

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

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

June 1, 2015

The Honorable Tom Wheeler
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Wheeler:

Thank you for appearing before the Subcommittee on Communications and Technology on March 19, 2015, to testify at the hearing entitled "FCC Reauthorization: Oversight of the Commission."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions with a transmittal letter by the close of business on Monday, June 15, 2015. Your responses should be mailed to Charlotte Savercool, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515 and e-mailed in Word format to Charlotte.Savercool@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



Greg Walden
Chairman

Subcommittee on Communications and Technology

cc: Anna Eshoo, Ranking Member, Subcommittee on Communications and Technology

Attachment

Attachment 1—Additional Questions for the Record

The Honorable Greg Walden

1. Chairman Wheeler, you recently said the Commission has finally begun the process of gathering necessary special access data to examine competition, but you “are not idly waiting for the data to come in” and want to move ahead now on special access terms and conditions. I understand your recent data request was a massive effort, consuming tens of thousands of hours. Why would you initiate a data request and then choose to move forward without the benefit of the data?

2. I understand that Ethernet and fiber services are better, faster technologies rapidly displacing demand for special access services. A recent analyst report points out that there are many Ethernet providers, and cable companies are major competitors. Time Warner Cable, Comcast and Cox are three of the top seven Ethernet providers – and they specifically market their services as replacements for special access. Doesn't this demonstrate a healthy, competitive market?

3. According to a recent press report the number of enforcement actions against pirate radio operators is the lowest it has been since 2005 -- less than 200 in 2014 and it is the first time since 2009 that less than \$100 thousand in penalties were levied.

For each Fiscal Year 2009, 2010, 2011, 2012, 2013, 2014 identify the number of complaints received formally or informally by the FCC regarding pirate radio operations. For each of those years identify the number of pirate radio operations the FCC confirmed were broadcasting. For each pirate radio operation identified in each of those years identify the frequencies being used and location of the unauthorized transmission. For each of those years identify the number and type of enforcement action taken by the FCC to address these unauthorized transmissions. For each transmission subject to enforcement action identify when the illegal transmissions ceased. Identify those instances in which multiple actions were taken against the same entity over the course of the FY2009-2014 period. For each of those years identify the location of each pirate radio operation known to be broadcasting by the FCC and against which no action was taken within 30 days.

Has any guidance or instruction been given by the Office of the Chairman or Enforcement Bureau to Commission staff to not enforce the statute or commission rules with regard to unlawful operation? Identify each instances in which a pirate radio operation was alleged or known by the FCC to be transmitting and no enforcement action was taken within 30 days. For any instances, identify the location of the illegal operation and explain why no action was taken to address the unauthorized transmissions.

4. Congress gave the Commission a statutory mandate to protect specific aspects of consumer privacy when it directed the do-not-call list to be established. Based on the Commission's quarterly complaint reports the FCC has received about 224,000 do-not-call complaints from 2010 – 2013 – almost 75,000 in 2013 with a trend upward. Overall TCPA complaints for that period total nearly 820,000.

In previous submissions to the Committee you told us that generally the FCC needs to issue a citation before it can issue a monetary penalty against an entity violating the TCPA rules. Yet in response to previous inquiries you have informed us that the Enforcement Bureau has issued only 18 citations – 4.5 citations on average a year over the 2010 - 2013 period. In contrast to the level of this enforcement activity your recent data show that the total number of TCPA complaints increased in 2014 and do-not-call complaints increased by nearly 22,000 from the 2013 level to more than 96,000.

How many citations has the Commission issued in 2014 against violators of the do-not-call rules? How many for violations of the Commission's other TCPA rules? Explain what steps the Commission will take to resolve the growing backlog of TCPA complaints, which appears to now exceed one million since 2010.

5. The Commission has made efforts to reform Lifeline over the last few years, including an effort to take the eligibility determination out of the hands of service providers. To that end, the Commission sought to create a National Lifeline Eligibility database. The Commission set for itself a December 31, 2013 deadline for delivering that database. Has the Commission delivered the National Eligibility database? If no, explain why and when will it be implemented?

6. As part of its 2012 Lifeline reform package, the Commission was to deliver within one year a National Duplicate Screening database so that it could properly enforce its "one benefit per household" rule. The Commission took two years to deliver this database. How has this database performed to date? Has the Commission's database approved duplicate enrollments? If so, how many?

7. The January 31, 2012, Lifeline reform Order states the Commission will determine an appropriate budget for the Lifeline program within a year of order. It has been over three years since this Order was adopted and the Commission has yet to adopt a budget for the Lifeline program. When will the Commission follow through on its order and adopt an appropriate budget for the program and what will that budget be?

The Honorable Brett Guthrie

1. A concern has been raised with me by some of my local video distributors about the definition of the term "buying group" as it relates to program access rules. As a result of the restrictive definition, I understand that many multichannel video programming distributors are unable to avail themselves of the program access protections intended by statute since they negotiate the bulk of their programming agreements through their buying group, the National Cable Television Cooperative.

My understanding is that the Commission has been reviewing for a few years now a pending Further Notice of Proposed Rulemaking, which contained a tentative conclusion that the definition of buying group should be updated as it applies under the program access rules. Since no final decision has yet been rendered, what is the status of this rulemaking? Will the Commission take up this issue by the end of the summer?

The Honorable Mike Pompeo

1. Mr. Chairman, I have been trying to understand the motivation for your agency in taking a Title II course of action on broadband when it is clear that the marketplace situation does not demand that action, and the FCC concedes in its order that it does not even intend to impose much of that regulatory regime on the companies providing Internet service.

I don't think I've ever seen an order that corrects for problems that do not now exist, and may never have been an issue. This abuse of the FCC's discretion, whether quarterbacked by the Obama Administration or not, is very jarring to this committee. It calls into question in my opinion the very role of an independent federal agency. Your actions should not be delineating business models for a particular industry. Putting your thumb on the scale is not the role of an independent agency. And that is what is happening here.

Moreover, this is not the only place where your agency is doing exactly that. You know well the concerns I have expressed to you over the agency's actions on the (Local Number Portability Administrator) LNPA contract, specifically to ensure that federal, state and local law enforcement and security agencies have unfettered access to this database, as they do today, to conduct their sensitive investigations.

I understand that there was an effort to have additional proposals submitted during the bidding. Recent reports suggest that the FCC staff may have played a role in making the decision not to permit additional proposals. And there is nothing in the public record that explains what did happen.

- Can you tell me what role the agency had in the decision to cut off further bidding that would have had the result of driving down prices paid by the industry to access this data base?

2. Section 224 of the Communications Acts establishes two formulas for determining the rate carriers pay utilities to attach their lines to utility poles – the cable rate and the telecommunications rate. While the FCC's 2011 reforms attempted to equalize the rates produced by these two formulas, under certain circumstances the telecommunications rate formula may still produce significantly higher rates. Reclassifying cable broadband services as telecommunications services will subject cable operators to these higher rates. NCTA estimated the annual cost of these increased fees could be as high as \$150-200 million. This will have a detrimental effect on deployment, especially in rural areas where there are many more poles than in urban areas, and on adoption, as the higher rates will ultimately be borne by consumers.

- Chairman Wheeler, what effect does reclassification have on the costs that cable ISPs will have to pay to attach their wires to utility poles?

3. Chairman Wheeler, in the fact-fiction sheet that the FCC recently released, you list as myth: This will increase consumers' broadband bills and/or raise taxes and fact: The Order doesn't impose new taxes or fees or otherwise increase prices.

I notice that the "Fact" response is very carefully worded to indicate that the FCC won't impose new taxes or fees. You also note that the Internet Tax Freedom Act (ITFA) prohibits state and local taxes on broadband access.

- First, you make no mention of the possible imposition of state fees on broadband service. If broadband is now reclassified as a telecommunications service, can't states start to impose telecommunications fees, like state USF fees, on broadband?

4. There's also been considerable debate whether states and local governments can find a way around ITFA to begin taxing broadband service – if not directly on consumers, higher up in the chain. Not everyone agrees with your assessment that ITFA protects against all taxes in light of the reclassification.

- Chairman Wheeler, I want to ask for your commitment to keep the Internet tax free, so I have a question. You have spoken about the use of Section 706 to encourage the deployment and adoption of broadband services. And you interpreted that as giving you the authority to stroke down state laws regarding municipal broadband. Would you agree that increasing the cost of broadband service through taxes and fees discourages broadband adoption?
- Would you use your authority under Section 706 to pre-empt any state or local law that seeks to impose any fees or taxes on broadband service?

5. I have recently heard concerns related to the excessive royalty rate of the ATSC patent pool, which is administered by a private patent pool administrator, MPEG LA. The licensing fees charged by the ATSC patent pool are five times as much as fees charged for similar technologies around the world (Europe and Japan).

As the FCC requires all TVs and tuning devices sold in the US to include an ATSC tuner, making it a government granted monopoly, manufacturers are left without choice but to pay the high royalty. Importantly, the December 1996 FCC report and order on the DTV proceedings stated that the “proponents agreed to make any relevant patents that they owned available either free of charge or on a reasonable, nondiscriminatory basis.”

As you know, I submitted a letter to the FCC on October 27, 2014 expressing my concerns about this potential exploitation. Although I appreciated Chairman Wheeler's response to my letter on November 26, 2014, there were two incorrect assertions in the response letter.

First, the statement that “the ATSC patent pool fees include the patent royalty for the MPEG-2 decoding standard” is incorrect. ATSC receiver products include the capability of an MPEG-2 decoder, however does not include any licenses to MPEG-2 patent portfolio. Therefore, a separate license and payment of additional royalty of \$2 is required under MPEG-2 Video and Systems patents. As a result, many manufacturers end up paying \$7 per TV (\$5 for ATSC licensing and \$2 for MPEG-2 licensing), which increases the hidden tax on U.S. consumers.

Second, the statement that “other venues – including the Patent and Trademark Office and the International Trade Commission – are viable options for entities seeking resolution of patent fee issues” is also incorrect. If an entity thinks another is charging excessive royalty, there is nothing that the PTO can do. An entity can try to invalidate patents that it deems inappropriate, which is not relief. Also, an entity cannot go before the ITC and complain about excessive royalty. The only way is for an entity to not pay royalty, then get sued at the ITC by a patent owner, then subsequently raise FRAND defense at the ITC. This approach, however, has not been successful to date and does not address fees, as it only grants exclusion orders.

- Could you please elaborate on:

- Whether the FCC has any plans to conduct oversight of the ATSC patent pool to monitor potential market abuse, and
- Why I have not received a proper written correction to the agency's response letter?

The Honorable Gus Bilirakis

1. You committed to preserve the integrity of public safety communications infrastructure by adhering to the goal articulated in your Fiscal Year 2016 Budget Request of taking action on 99 percent of complaints of interference to public safety communications within 1 day. You also committed to provide the Committee with a quarterly report detailing the Enforcement Bureau's success in meeting this metric. To that end, commencing with the second quarter of calendar year 2015 through the last quarter of your Chairmanship provide the Committee with a quarterly report. The report should be filed no later than ten business days after the last day of the quarter and include the following information:

- a. Date and time the FCC was notified of alleged interference.
- b. Identity of FCC field office notified.
- c. Manner in which notification was made.
- d. Location of alleged interference.
- e. Date and time FCC personnel were dispatched to address alleged interference.
- f. Location of FCC field office responding to notification.
- g. Disposition of alleged interference including date and time resolved.
- h. Type of service impacted by interference.
- i. Analysis of whether metric was met.

Finally, in order to further ensure openness and transparency in the FCC's process post the data reported on the Commissions website when submitted to the Committee.

The Honorable Anna Eshoo

1. Earlier this month, the FCC's Managing Director testified that the agency needs additional funds to upgrade its IT infrastructure and move its headquarters within the next two years. How would these efforts be impacted if the Commission's appropriations were locked at the current level for the next four fiscal years, as the Majority's discussion draft proposes?

2. It's my understanding that the Majority's draft legislation would cap the USF fund at \$9 billion for the next two years and provides no budget for the program beyond 2017. Would the draft bill impact the FCC's ongoing efforts to reform the four USF programs, including the

recent updates to the E-Rate program? Wouldn't this proposal create uncertainty for USF recipients, including schools and libraries?

3. I congratulate you on the successful adoption of last month's net neutrality rules. Can you highlight a few of the consumer protections that are the part of the FCC's order but are NOT addressed in the Majority's legislative discussion draft?

4. Thank you for your continuing commitment to ensure that the upcoming incentive auction rules are sufficient to prevent excessive concentration of spectrum among the nation's largest wireless providers. Do you agree that wireless carriers who lack substantial low-frequency spectrum are at a competitive disadvantage?

The Honorable John Yarmuth

1. The free exchange of information is at the heart of our democracy. All of us are well aware that television and radio political advertisements have saturated the airwaves since the Citizens United, SpeechNow, and McCutcheon decisions. Our constituents deserve to have as much information about these ad buys as possible. First, I want to commend the Commission for their ongoing work to expand the online public political file.

The FCC's online political ad files have received approximately 5 million views, which shows that the public clearly has an interest in seeing who is spending money in politics. However, much of the data in the political ad files is not sortable/searchable. While projects like Political Ad Sleuth have done an effective job at making the data more accessible, I believe the FCC could significantly improve the usability of the files so that millions of Americans could more easily view the information.

- o Will you commit to improving the political ad file to ensure that its data is fully searchable and sortable so that the public knows who is trying to influence them during election season?

The Honorable Yvette Clarke

1. In addition to the 9-1-1 upgrades, what is being done to ensure that the EAS reflects the growing ethnic and language diversity of our nation? And, when can we expect for these advances in the EAS to happen?

2. Congress requires the FCC to report on market entry barriers every three years, but your latest Report to Congress – the Section 257 report – was due December 31, 2012 and is still forthcoming. Would you please explain this and share how the FCC will prioritize this as a process reform to ensure more diversity and inclusion in the media and telecom industries?

3. Two years ago I sent a letter to then FCC Chairman Julius Genachowski asking that the issue of activated FM chips in cellphone be examined. I also understand that you, Chairman Wheeler, are interested in this issue. What progress has been made to ensure my constituents have every tool at their disposal to receive lifesaving information in the event of another terrorist attack, power grid outage or a weather emergency?

The Honorable Tony Cardenas

Chairman Wheeler, as you know from my communications with you, I strongly oppose the proposed merger between Comcast and Time Warner Cable. I stated last month that I believe the merger would be bad for consumers, harm competition, lead to less diverse content and more expensive cable and Internet access, and will eliminate good program-related jobs in my home state of California.

For Latino consumers, the merger will result in a near state of monopoly. In a post-merger world, over 90% of all Latino households will fall within television markets served by Comcast. The company will have control over the cable market in 18 of the top 25 Latino markets, including the major California markets of Los Angeles and San Francisco. In 16 of these markets, the merged company will dominate any competition.

A merged Comcast-Time Warner Cable will cover 84% of all of California. In some markets, the merged company will be the sole broadband provider and in many others, one of only two broadband providers. Comcast and Time Warner were ranked number 1 and number 2 for worst customer service by the University of Michigan's 2014 American Consumer Satisfaction Index. The market dominance of a merged company would destroy the free market ability that consumers should have to choose to leave a provider that mistreats them or provides substandard products and move to a competitor.

I could go on and on.

The point is, the combined Comcast-Time Warner Cable will not best serve the public interest. This merger, if granted, will reshape the media landscape by combining large players in cable, DBS, broadband and wireless/wireline services. I hope that by the end of this hearing, we learn from you how the FCC expects the media marketplace to look like in the near future.

I realize that you cannot comment on an ongoing merger review at the FCC. However, I believe that this Committee, in its oversight role, is able to hear how you approach such mergers and your vision for the media future in which these companies today play key roles:

1. You have stated publicly and the Commission has adopted language to the effect that 25Mbps/3Mbps is the threshold broadband speed required to support the best range of Internet applications, from HD video to video conferencing. Is this a metric you can or may consider in determining the applicable market for broadband in the merger context?
2. The FCC historically has said that a 30% market share is the most any competitor should control in the pay-TV market. Comcast has voluntarily proposed capping its national pay-TV market share at that level. I have seen information that the merged entities will reach over 90% of the households in which Latinos reside and as I mentioned, will control the cable market in 18 of the Top 25 Latino markets and will dominate 16 of those. Does the FCC view other dominant industry identified market as a category which a similar 30% threshold should apply?
3. The Internet Essentials program arose from the 2011 Comcast-NBC Universal merger. In turn, Time Warner Cable, at least in California, offers an inexpensive and fairly robust Internet service to a small number of low-income American homes. Recently, an Administrative Law Judge of the California PUC required that, were the merger to go through, Comcast offer a

complete and comprehensive Internet Essentials service, including seniors. Will the FCC be considering the California action for application throughout the US?

4. Can you articulate your understanding of the public interest standard and whether it applies to the ability of pay-TV subscribers to have provided to them a high degree of variety in the programming offered by MVPDs? For example, does the public interest encompass the provision of content delivery providers offering independent, unaffiliated programming in both English and Spanish?