



July 24, 2015

TO: Members, Subcommittee on Communications and Technology

FROM: Committee Majority Staff

RE: Hearing on “Continued Oversight of the Federal Communications Commission”

I. INTRODUCTION

The Subcommittee on Communications and Technology will hold a hearing Tuesday, July 28, 2015, at 10:15 a.m. in 2322 Rayburn House Office Building entitled “Continued Oversight of the Federal Communications Commission.”

This hearing continues the Committee’s examination of the Federal Communications Commission’s (FCC) policy decisions and the process by which it reaches them. In the months since the Committee’s last examination of the Commission’s actions under the leadership of Chairman Wheeler, concerns regarding FCC process and policy continue to mount. What follows is a summary of some of the major issues that may be discussed at the hearing.

II. WITNESSES

- The Honorable Tom Wheeler, Chairman, FCC
- The Honorable Ajit Pai, Commissioner, FCC

III. DISCUSSION

A. Broadcast Incentive Auction

The spectrum provisions of the Middle Class Tax Relief and Job Creation Act of 2012 (the Act) authorized the FCC to conduct incentive auctions through September 2022, including a special, one-time incentive auction of spectrum in the 600 GHz band currently occupied by broadcasters.¹ This grant of authority reflected the Committee’s efforts to make additional spectrum available to meet the ever-growing demand for mobile wireless services, a goal that the Committee continues to vigorously pursue. The FCC began implementing what will be the first ever incentive auction of broadcast spectrum in October 2012 with the release of a Notice of Proposed Rulemaking.² In October of 2014, the FCC announced the auction would be held in

¹ Pub. L. No. 112-96, Sec. 6403 (2012).

² *Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions, Notice of Proposed Rulemaking*, 27 FCC Rcd 12357 (2012).

early 2016.³ A recent disclosure by the FCC revealed that the auction is scheduled to begin on March 29, 2016.⁴

There is unanimous agreement as to the complexity of this “two sided” auction. As contemplated in the statute, broadcasters will place “reverse bids” to determine how much compensation they will require to either relinquish some or all of their spectrum or to move to a potentially less desirable frequency band. Wireless carriers will then bid in a “forward auction” on licenses created in the newly cleared spectrum. Critical to the success of the auction is the “repacking” of the remaining stations by the FCC in a manner that preserves a broadcast television band for broadcasters while making spectrum available for the new wireless licenses.⁵

Chairman Wheeler recently presented to his fellow commissioners for vote at the July 16, 2015 open meeting a public notice on procedures for the auction that would establish and provide information on “final procedures for setting the initial spectrum clearing target, qualifying to bid, and bidding in the reverse and forward auctions.”⁶ Soon thereafter, the Commission’s Incentive Auction Task Force released into the record new data on potential auction outcomes.⁷

Reports of the public notice and information subsequently released by the Incentive Auction Task Force have raised concerns among a broad range of stakeholders. Of particular concern are scenarios that would result in the relocation of broadcasters into the duplex gap – the spectrum between broadband uplink and downlink that set aside by the FCC in the auction framework order for unlicensed activities and wireless microphones.⁸ These concerns focus on the potential for interference to both licensed and unlicensed services that could result, diminishing the utility and value of the spectrum. A spokesman for the broadcast industry, whose participation is essential to the ultimate success of the auction, has stated that “the FCC could have done a better job of signaling to stakeholders that TV stations might be put in the duplex gap.”⁹ On July 14, 2015, Chairmen Upton and Walden wrote to FCC Chairman Wheeler raising these concerns and asking the FCC to delay its planned vote in order to give interested parties time to meaningfully comment on the data.¹⁰ Despite concerns from the wireless, broadcast, and

³ <https://www.fcc.gov/blog/incentive-auction-progress-report>.

⁴ See <http://www.broadcastingcable.com/news/washington/fcc-signals-march-29-2016-incentive-auction-date/142663>.

⁵ The Act expressly requires that the FCC must “make all reasonable efforts” to preserve “the coverage area and population” by television stations in the repacking process. § 6403(b)(2).

⁶ <https://www.fcc.gov/document/fcc-announces-tentative-agenda-july-open-meeting-2>.

⁷ See <https://www.fcc.gov/ecfs/document/view?id=60001114813> and <https://www.fcc.gov/ecfs/document/view?id=60001114814>.

⁸ See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auction, Report and Order*, 29 FCC Rcd 6567, paras 266, 271, 314. (2014) (*Auction Report and Order*).

⁹ See TRDaily July 23, 2015.

¹⁰ See Letter from The Honorable Fred Upton Chairman, Committee on Energy and Commerce and The Honorable Greg Walden, Chairman Subcommittee on Communications and Technology, Committee on Energy and Commerce, United States House of Representatives to The Honorable Tom Wheeler, Chairman Federal Communications Commission, July 14, 2015 (July 14 Letter) available at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/Letters/20150714FCC.pdf>

unlicensed communities, Chairman Wheeler's reply to Chairmen Upton and Walden states that he is recommending that the Commission adopt the duplex gap option.¹¹

It also remains to be seen if the FCC has responded to bipartisan congressional concerns regarding the impact of interference from Mexican and Canadian licensees on U.S. licensees near the borders in designing the auction.¹² The Committee has emphasized, and the Commission has acknowledged,¹³ the necessity of cross-border coordination to adequately address the potential for interference between licensed services. Without sufficient coordination, broadcast and wireless operations adjacent to the borders could be at risk of substantial interference, diminishing the value of the licenses. Chairman Wheeler has informed the Committee that discussions are on-going with both Mexico and Canada and expressed his optimism that agreements "will be announced soon."¹⁴

B. Revisions to the Designated Entity Rules

On July 16, 2015, the FCC revised the competitive bidding rules governing the Designated Entity (DE) program in a 3-2 partisan vote.¹⁵ Among other things, the DE rules provide bidding credits that operate as a discount on a winning auction bid. Eligibility is based on the potential DEs revenues, as well as those attributable to each DE applicant as a result of business and contractual agreements.¹⁶ The rules also contain restrictions and mechanisms designed to prevent unjust enrichment. The FCC last revised these rules in 2006.¹⁷

¹¹ See Letter from Tom Wheeler, Chairman of the Federal Communications Commission to The Honorable Fred Upton Chairman, Committee on Energy and Commerce and The Honorable Greg Walden, Chairman Subcommittee on Communications and Technology, Committee on Energy and Commerce, United States House of Representatives, July 15, 2015 (FCC July 15 Response).

¹² See March 28, Letter from the Michigan Congressional Delegation regarding international coordination and the incentive auction, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-320994A1.pdf.

¹³ See *Auction Report and Order* at para 12 noting that "the incentive auction and the transition that follows require coordination with our cross-border neighbors, Canada and Mexico."

¹⁴ See FCC July 15 Response.

¹⁵ See *Updating Part 1 Competitive Bidding Rules*, WT Docket No. 14-170, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, *Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver*, RM-11395, *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211, Report and Order; Order on Reconsideration of the First Report and Order; Third Order on Reconsideration of the Second Report and Order; Third Report and Order (July 16, 2015) (*Competitive Bidding Report and Order*) available at <https://www.fcc.gov/document/competitive-bidding-report-order>.

¹⁶ See 47 C.F.R. § 1.2110, *et. seq.*

¹⁷ See *Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, Second Report and Order and Second Further Notice of Proposed Rule Making, 21 FCC Rcd 4753 (2006).

The FCC claims that its latest revisions to the DE rules, taken against the backdrop of allegations of abuse of the rules in last January's AWS-3 auction,¹⁸ are "common sense reforms [that] will provide more flexibility for bona fide small businesses, including women and minority-owned businesses and rural carriers" and "will increase transparency and efficiency to prevent abuse as well as protect the integrity of the Commission's auction process."¹⁹ Chairman Wheeler has gone further. According to one report, Chairman Wheeler "portrayed the modified rules as attacking 'economic inequality in one small way'."²⁰

However, critics of the new rules claim that the reforms appear to have weakened the integrity of the auction process in certain respects, creating new avenues for abuse and opportunities for unjust enrichment at the expense of the American taxpayer. Critics note that the FCC repealed the Attributable Material Relationship rule (AMR rule).²¹ The AMR rule provided that when considering DE eligibility, the Commission must attribute to the applicant the revenues of any entity with which the applicant has arrangements for the lease or resale of more than 25 percent of its licenses.²² In the same order, the FCC also eliminated the requirement that a DE use its spectrum to offer facilities-based service.²³ These reforms will permit a DE to obtain as much as a 35 percent discount on spectrum with no obligation to build network facilities and no restriction on the amount of spectrum it could lease. Critics of these changes charge that they create the potential for a set of spectrum arbitrageurs financed by taxpayer dollars with no competitive benefit to the market.

C. Privacy

When the majority voted to reclassify broadband Internet access service as a "telecommunications service" subject to regulation under Title II on February 26, 2015, it also concluded that Section 222 of the Telecommunications Act of 1996 should apply to broadband Internet service providers.²⁴ Section 222 of the Act governs telecommunications carriers' protection and use of Customer Proprietary Network Information (CPNI). CPNI includes personal information that carriers collect about their customers as a result of their business relationship.²⁵ Section 222 has been applied to ensure that incumbent telephone providers do not use CPNI to engage in anti-competitive marketing tactics against new entrants. The

¹⁸ Recent reports indicate that the FCC will reject \$3.3 billion in discounts awarded to two small businesses in the auction. *See e.g.*, <http://www.rcrwireless.com/20150723/carriers/dish-network-set-to-lose-3b-bidding-credit-tied-to-aws-3-auction-tag2>.

¹⁹ <https://www.fcc.gov/document/fcc-reforms-competitive-bidding-rules-spectrum-auctions-0>

²⁰ <http://thehill.com/policy/technology/248198-fcc-approves-spectrum-auction-reforms>

²¹ *See Competitive Bidding Report and Order* at paras 18-28.

²² 47 C.F.R. § 1.2110(b)(3)(iv)(A).

²³ *See Competitive Bidding Report and Order* at paras 26-27.

²⁴ *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 80 FR 19737, GN Docket 14-28, FCC 15-24, paras 462-468 (March 12, 2015) (*Open Internet Order*).

²⁵ CPNI is defined as "(A) information that relates to the quantity, technical configuration, type, destination, location, and the amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer carrier." 47 U.S.C. § 222(h)(1).

Commission's rules implementing Section 222 proscribe, among other things, safeguards for a carrier's use of CPNI in sales and marketing campaigns.²⁶

In concluding that Section 222 should apply to broadband Internet service providers, the majority also stated that they were "not persuaded that the Commission's current rules implementing Section 222 necessarily would be well suited to broadband internet access."²⁷ To that end, the majority decided to forbear from applying "all the CPNI rules at this time" pending the adoption of rules to govern broadband Internet access service in a separate rulemaking proceeding.²⁸

With the application of Section 222 on Internet privacy protections, and the announcement of additional rules to come, the FCC has removed broadband Internet service providers from the jurisdiction of the Federal Trade Commission (FTC). Section 5 of the Federal Trade Commission Act expressly exempts common carriers from FTC jurisdiction.²⁹ In sum, the FCC's reclassification created a regulatory vacuum by removing from the playing field the referee that had policed consumer privacy protections on the Internet since its inception.

The Commission has moved quickly to fill the regulatory gap it created and impose its own rules on the Internet. On April 28, 2015, the FCC convened a workshop "to explore the Commission's role in protecting the privacy of consumers that use broadband Internet access service."³⁰ The workshop was soon followed by a release of an "Enforcement Advisory" by the chief of the FCC's Enforcement Bureau putting broadband providers on notice how the Bureau intends to enforce Section 222, pending the adoption of rules.³¹ As stated, the Bureau "intends to focus on whether broadband providers are taking reasonable, good-faith steps to comply with section 222 rather than focusing on technical details." Providers were also reminded that the Bureau would provide guidance as they consider how best to comply with Section 222, noting that a request for guidance "will tend to show that the broadband provider is acting in good faith."

The Commission's nullification of the FTC's jurisdiction and entry into the sphere of consumer online privacy raises significant and immediate concerns beyond the legality of the majority's reclassification of broadband internet service as a telecommunications service, a matter currently pending before the court of appeals. As that process unfolds, the FCC has made clear through the Enforcement Advisory of its intention to scrutinize practices and hold

²⁶ See 47 C.F.R. § 64.2009.

²⁷ *Open Internet Order* at para 467.

²⁸ *Id.* at para 462.

²⁹ 15 U.S.C. § 45(a)(2).

³⁰ *FCC Staff Announce Agenda for Public Workshop on Broadband Consumer Privacy*, Public Notice (Apr. 22, 2015); Public Workshop on Broadband Consumer Privacy (Apr. 28, 2015), available at <https://www.fcc.gov/events/wcb-and-cgb-public-workshop-broadband-consumer-privacy>.

³¹ *Open Internet Privacy Standard: Enforcement Bureau Guidance: Broadband Providers Should Take Reasonable, Good Faith Steps to Protect Consumer Privacy*, FCC Enforcement Advisory (May 20, 2015) available at <https://www.fcc.gov/document/isps-should-take-reasonable-steps-protect-privacy>.

broadband internet service providers liable notwithstanding the lack of established rules.³² In the absence of such certainty, providers are advised that they “should employ effective privacy protections in line with their privacy policies and core tenets of basic privacy protections.”³³ Critics of this approach have charged that this amounts to a “mother-may-I” regulatory philosophy and that the lack of clarity is exacerbated by recent actions by the FCC to expand the limited scope of Section 222.³⁴

Chairman Wheeler recently announced that the FCC will commence a rulemaking proceeding this fall “to clarify its expanded privacy authority under new Internet rules.”³⁵

D. FCC Process Reform

FCC process reform has been a focus of the work of the Subcommittee since 2011. During the 112th and 113th Congresses, the House unanimously approved a number of bipartisan bills designed to minimize the potential for procedural failings and abuse of process, and to improve agency transparency, efficiency, and accountability.³⁶ This effort has continued in the 114th Congress with the Committee’s passage of H.R. 2583, the FCC Process Reform Act.³⁷

As the Committee has continued efforts to reform FCC process, the recent history of FCC activities demonstrates that although FCC leadership has publicly committed to process reform on more than one occasion,³⁸ process failings persist. The incidents of process failures – some stark, others subtle – have been vetted before the Committee in prior hearings, have been the subject of letters from this Committee to the Chairman, and have been the subject of numerous press reports. The abuses of delegated authority,³⁹ lack of transparency and accountability in

³² In contrast, the Commission’s take-over of internet privacy protection from the FTC has been deemed insufficient by some. On June 15, 2015 Consumer Watchdog, a nonprofit, nonpartisan consumer advocacy organization, petitioned the FCC to expand even further its oversight of consumer privacy on the internet by “initiat[ing] a rulemaking proceeding requiring “edge providers” (like Google, Facebook, YouTube, Pandora, Netflix, and LinkedIn) to honor “Do Not Track” Requests from consumers.”

<http://www.consumerwatchdog.org/resources/fccdnptpetiton061515.pdf>.

³³ See FCC Enforcement Advisory (May 20, 2015).

³⁴ In October of 2014 the FCC appears to have expanded unilaterally its authority beyond the regulation of CPNI to include any form of personally identifiable information when it took enforcement action against two telecommunications carriers for failing to protect personally identifiable information or PPI. See *TerraCom, Inc. and YourTel America, Inc.*, Notice of Apparent Liability, 29 FCC Rcd 13325 (2014).

³⁵ <http://thehill.com/policy/technology/246259-fcc-to-start-work-on-broadband-privacy-in-fall>.

³⁶ See Federal Communications Commission Process Reform Act of 2014, H.R. 3675, 113th Cong. (2014); Federal Communications Commission Consolidated Reporting Act of 2013, H.R. 2844, 113th Cong. (2013); Federal Communications Commission Process Reform Act of 2012, H.R. 3309, 112th Cong. (2012); and Federal Communications Commission Consolidated Reporting Act of 2012, H.R. 3310, 112th Cong. (2012). The House of Representatives passed the Federal Communications Commission Consolidated Reporting Act, H.R. 734, for the third time with unanimous approval on Feb. 24, 2015.

³⁷ See Federal Communications Commission Process Reform Act of 2015, H.R. 2583, 114th Cong. (2015).

³⁸ See <http://www.broadcastingcable.com/news/washington/wheeler-creates-process-task-force/138944>.

³⁹ See e.g., <http://energycommerce.house.gov/press-release/upton-walden-respond-fcc's-end-run-process-broadcast-sharing-announcement>.

agency decision-making and other agency processes (such as agency restructuring and budgeting),⁴⁰ and agency overreach, paints an unsettling picture.

That the deficiencies in process have continued notwithstanding the Committee's scrutiny is of particular concern. Since the Subcommittee's last hearing with the Commission, there have been multiple process issues, but the Incentive Auction Task Force's insertion into the record of significant new data, as noted above, is the most recent example. Although the FCC waived the "sunshine" period prohibition – which closes the record in a rulemaking proceeding – allowing for public comment until 7:00 p.m. on Wednesday, July 15, this far from cured the procedural problems, it exacerbated them.⁴¹ Closing the record the evening prior to the scheduled open meeting and vote raised concerns as to the public's ability to meaningfully comment on the data and the opportunity of the commissioners to critique and respond and make an informed vote. Indeed, the last minute introduction of data by the Commission into the record of a proceeding leading up to a vote has been rebuked by the Committee and stakeholders when carried out by previous chairmen.⁴² Left unchecked, these departures from process could undermine the success of the auction.

As discussed above, Chairman Upton and Chairman Walden asked Chairman Wheeler to delay the vote on the public notice to provide the other members of the Commission and all stakeholders enough time to analyze the data and comment and to ensure an informed vote. In response, Chairman Wheeler removed the item from the agenda for the July 16th open meeting and rescheduled it for consideration at the scheduled August 6, 2015 agenda meeting.⁴³

IV. STAFF CONTACT

If you have any questions regarding this hearing, please contact David Redl of the Committee staff at (202) 225-2927.

⁴⁰ See e.g., Letter to FCC Regarding Rationale and Analytical Support for Field Office Closures <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/114/Letters/20150423FCC.pdf>.

⁴¹ <https://www.fcc.gov/document/waiver-sunshine-period-prohibition-agenda-item-july-16th>.

⁴² See e.g., Letter from The Honorable Fred Upton Chairman, Committee on Energy and Commerce and The Honorable Greg Walden Chairman Subcommittee on Communications and Technology, Committee on Energy and Commerce, United States House of Representatives to The Honorable Julius Genachowski, Chairman Federal Communications Commission, November 28, 2011 *available at* <https://prodnet.www.neca.org/publicationsdocs/wwwpdf/112811congressletter.pdf>.

⁴³ See <http://www.broadcastingcable.com/news/washington/fcc-postpones-incentive-auction-rules-until-august-6/142583>.