



March 22, 2016

TO: Members, Subcommittee on Communications and Technology
FROM: Committee Majority Staff
RE: Hearing on “Oversight of the Federal Communications Commission”

I. INTRODUCTION

The Subcommittee on Communications and Technology will hold a hearing Tuesday, March 22, 2016, at 10:15 a.m. in 2123 Rayburn House Office Building entitled “Oversight of the Federal Communications Commission.”

II. WITNESSES

- Hon. Tom Wheeler, Chairman, Federal Communications Commission;
- Hon. Mignon Clyburn, Commissioner, Federal Communications Commission;
- Hon. Jessica Rosenworcel, Commissioner, Federal Communications Commission;
- Hon. Ajit Pai, Commissioner, Federal Communications Commission;
- Hon. Michael O’Rielly, Commissioner, Federal Communications Commission.

III. DISCUSSION

This hearing continues the Committee’s examination of the Federal Communications Commission’s (FCC or Commission) policy decisions and the process by which it reaches them. The FCC under Chairman Tom Wheeler has been historic in many ways: in a few weeks the Commission will undertake a first-of-its-kind incentive auction; the Commission mined history by looking all the way back to 1934 to apply monopoly-era common carriage laws to the Internet; and communication and collegiality between the members of the Commission may be at an all-time low. As the FCC nears the end of the current administration, it appears that the number of controversial and market-intrusive policies adopted will accelerate. In the last few weeks alone, the Commission has proposed an onerous technological mandate on a portion of the subscription video marketplace and a sweeping new privacy regime for Internet service providers. These proposals come on the heels of new disclosures that confirm ongoing concerns regarding the legitimacy of FCC process. The following is a summary of issues that may be discussed at the hearing.

A. Broadcast Incentive Auction

The spectrum provisions of the Middle Class Tax Relief and Job Creation Act of 2012 (the Spectrum 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 As directed by 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.²

The FCC launched its efforts to implement this “first of its kind” auction more than three years ago in September of 2012 with the commencement of a proceeding to adopt the rules that would govern the auction. Since that time the FCC has moved deliberately, although its progress has not been without controversy. For example, the proceeding has been plagued with criticism over the Commission’s transparency, and many, including numerous members of Congress and both the broadcast and wireless industries, voiced concerns that the FCC’s auction plan could leave a substantial number of broadcasters in the “duplex gap” and even the portion of the revised 600 MHz band reserved for wireless broadband service.³ Although this outcome would result in impaired spectrum licenses for forward auction participants and could depress spectrum values given the potential for interference, the FCC persisted in this course.

The auction is scheduled to begin on March 29, 2016.⁴ A last minute appeal by Low-Power Television (LPTV) licensees for a stay of the auction was recently denied, so it appears that the auction will commence as planned.⁵ While the outcome remains to be seen, analysts have estimated auction proceeds upward to \$80 billion,⁶ although at least one analyst has estimated that proceeds will reach “only \$25 to \$35 billion.”⁷

Recently, Chairman Wheeler explained that the FCC is “pivoting” toward the post-auction repack of broadcast stations.⁸ As the FCC has commenced this shift, the National Association of Broadcasters (NAB) is again raising its concerns. NAB argues that the 39-month

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

² 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).

³ The “duplex gap” consists of the 6 MHz of spectrum reserved for unlicensed activities and wireless microphones used in television news broadcasts reserved in the wireless portion of the post-incentive auction band.

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

⁵ See <http://www.tvnewscheck.com/article/93179/court-turns-down-auction-stay-request>.

⁶ See <http://www.fiercewireless.com/story/analysts-600-mhz-incentive-auction-could-generate-60-billion-mhz-prices-cou/2015-09-30>.

⁷ See <http://www.fiercewireless.com/story/jp-morgan-fccs-600-mhz-incentive-auction-likely-fetch-only-25b-35b/2016-02-11>.

⁸ See <http://www.broadcastingcable.com/news/washington/fccs-wheeler-spectrum-auction-track-march-29/154258>.

timeline for the repack established by the FCC is not realistic due to constraints in supply chains, including tower crews,⁹ and that the \$1.75 billion Congress set aside to reimburse broadcasters for qualified repacking expenses will be insufficient.¹⁰ These assertions have been challenged by T-Mobile and the Competitive Carriers Association, a wireless industry trade group, who claim that the time and money provided in current law are sufficient to complete the repack.¹¹

B. Privacy

When the FCC majority voted to reclassify broadband Internet access service as a “telecommunications service” subject to regulation under Title II, it also concluded that Section 222 of the Telecommunications Act of 1996 should apply to broadband Internet service providers.¹² 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.¹³ Section 222 has previously been applied to ensure that incumbent telephone providers do not use CPNI to engage in anti-competitive marketing tactics against new entrants. The Commission’s rules implementing Section 222 proscribe, among other things, safeguards for a carrier’s use of CPNI in sales and marketing campaigns.¹⁴

The immediate effect of the FCC’s action was to create uncertainty for both providers and consumers. In subjecting broadband Internet access service to common carrier regulation under Title II, the FCC removed broadband Internet service providers from the jurisdiction of the Federal Trade Commission (FTC), the federal agency that had policed consumer privacy protections on the Internet since its inception.¹⁵ And although it concluded that Section 222 should apply, the FCC was “not persuaded that the Commission’s current rules implementing Section 222 necessarily would be well suited to broadband internet access.”¹⁶ To that end, the FCC decided to forbear from applying the CPNI rules pending the adoption of rules to govern

⁹ See <http://www.rcrwireless.com/20151110/cell-tower-news/broadcasters-ask-fcc-to-extend-repacking-deadline-site-tower-crew-shortage-tag20>.

¹⁰ See <http://www.broadcastingcable.com/news/washington/broadcasters-head-fcc/153999>.

¹¹ See <http://www.fiercewireless.com/story/cca-nab-bicker-over-incentive-auctions-relocation-fund-spectrum-repacking-t/2016-01-12>. Both entities submitted reports to the FCC to controvert NAB’s claims. See <http://www.cedmagazine.com/news/2016/02/t-mobile-cca-say-repacking-schedule-budget-more-doable>

¹² *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*).

¹³ 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).

¹⁴ See 47 C.F.R. § 64.2009.

¹⁵ Section 5 of the Federal Trade Commission Act expressly exempts common carriers from FTC jurisdiction. See 15 U.S.C. § 45(a)(2).

¹⁶ *Open Internet Order* at para 467.

broadband Internet access service in a separate rulemaking proceeding.¹⁷ Chairman Wheeler announced in June 2015 that the FCC would commence this rulemaking in the fall.¹⁸

Notwithstanding the announcement, no public proceeding was initiated that fall. Rather, the Chairman's office instead engaged in meetings with "various" unidentified parties "reviewing the question" of how the FCC's Title II authority will "translate in an IP world," the very issue to be presented and debated publicly through the notice and comment process.¹⁹

On March 10, 2016, Chairman Wheeler circulated a notice of proposed rulemaking (NPRM) on internet service provider (ISP) privacy. The proposal has been characterized as "[t]he FCC's unprecedented foray into the realm of online privacy."²⁰ Although the text of the NPRM is not public, the FCC has released a fact sheet outlining the proposed rules and Chairman Wheeler outlined his proposal in a blog.²¹ Chairman Wheeler explained that his proposal is premised on an ISP's "broad view of all of [a consumer's] unencrypted activity."

Privacy experts cast doubt on the premise underlying the FCC's approach, stating that "ISP access to user data is not comprehensive – technical developments place substantial limits on ISP's visibility[,]" and other companies – including so called edge providers – "often have access to more information and a wider range of user information than ISPs."²² The FCC's proposal, however, does not extend to "edge providers." Rather, it creates a privacy scheme that one industry association describes as "at odds with the requirements imposed on other large online entities."²³

Recently, it has been reported that Moody's Investors Services concluded that because the FCC's proposed rules do not align with those currently enforced by the FTC and are more prescriptive, the FCC's proposed rules will disadvantage ISPs as they seek to compete with other digital advertisers.²⁴ According to a spokesman for one ISP, the resulting competitive disadvantage ultimately will hinder investment.²⁵

C. Regulation of a Portion of the Subscription Video Industry

¹⁷ *Id.* at para 462.

¹⁸ <http://thehill.com/policy/technology/246259-fcc-to-start-work-on-broadband-privacy-in-fall>.

¹⁹ Federal Communications Commission Open Meeting, November 19, 2015 at 63:53 -64:37 *available at* <https://www.fcc.gov/news-events/events/2015/11/november-2015-open-commission-meeting>.

²⁰ <https://www.washingtonpost.com/news/the-switch/wp/2016/03/10/the-fcc-wants-to-protect-your-data-from-your-own-internet-provider>.

²¹ *See* http://www.huffingtonpost.com/tom-wheeler/its-your-data-protect-online-privacy_b_9428484.html

²² *See* Working Paper: Online Privacy and ISPs, ISP Access to Consumer Data is Limited and Often Less than Access by Others, The Institute for Information Security & Privacy at Georgia Tech *available at* <http://iisp.gatech.edu/working-paper-online-privacy-and-isps>, p.3.

²³ *See* <http://venturebeat.com/2016/03/10/fcc-wont-extend-privacy-proposal-for-broadband-providers-to-twitter-google-or-facebook>.

²⁴ *See* <http://www.reuters.com/article/usa-fcc-internet-moodys-idUSL2N16N19H>.

²⁵ *See* <http://www.wirelessweek.com/news/2016/03/moodys-fccs-proposed-privacy-rules-could-handicap-verizon-t>.

Although the FCC appears to have backed away from its much criticized proposal to redefine Multichannel Video Programming Distributor (MVPD) to include linear, over the top (OTT) video providers,²⁶ the FCC is currently considering plans to impose new requirements on a portion of the subscription video market. Recently, Chairman Wheeler circulated an NPRM seeking comment on requiring cable and satellite television providers to adopt new standards—and the technologies to implement them—for the use of in-home receivers (set-top boxes).²⁷

Under the framework outlined in the NPRM, all MVPDs would, among other things, be required to transmit three information streams including (1) service discovery – information about available programming, such as channel listing and video-on demand line-up, and what content is available on those channels; (2) entitlement – information about what a device is allowed to do with content, *e.g.*, recording; and, (3) content delivery – the video programming itself.²⁸ These streams are to be delivered in formats that conform to specifications established by “open standards bodies” to, according to the FCC, allow entities “not affiliated with an MVPD to design and build competitive devices.”²⁹ Other device manufacturers would be able to take these three information streams and use them to create an alternative interface through which consumers could view content, such as what TiVo, Roku, and others offer today.

Public interest groups that support the FCC’s proposal claim that the framework will spark choice in the retail set-top box market and thus lower prices for such devices.³⁰ In contrast, the reaction of a broad range of stakeholders has been to warn of significant negative consequences.

Cable and satellite companies – traditional MVPDs – assert that the FCC’s prediction of lower consumer prices is illusory, with the FCC’s framework leading instead to higher prices as a result of the new equipment that MVPDs would need to install in their networks and that consumers would need in order to reap the purported benefits.³¹ Moreover, these companies

²⁶ See *e.g.*, Film One’s David: Amazon, Google lobbying “heavily” against regulating OTT providers as MVPDs, <http://www.fierceonlinevideo.com/story/filmons-david-amazon-google-lobbying-heavily-against-regulating-ott-provide/2015-10-13>. See also Summary of Remarks of Ranking Member Frank Pallone, Jr., Future of Video Competition and Regulation, Duke Law Forum, October 9, 2015 available at <https://democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/Summary%20of%20Remarks--Duke%20Law%20Forum%2010-9-15.pdf> and also Remarks Of FCC Commissioner Ajit Pai To The Policy Roundtable of the 2015 Convention of the Cable And Satellite Broadcasting Association Of Asia, Hong Kong, October 26, 2015 available at <https://www.fcc.gov/document/commissioner-pais-remarks-casbaa-convention-hong-kong>.

²⁷ The FCC defines “set-top boxes” to include “hardware, software (including applications) and combinations of hardware and software that consumers could use to access multichannel video programming.” *In re Expanding Consumers’ Video Navigation Choices, et al.*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, MB Docket No. 16-42, CS Docket No. 97-80 (adopted Feb. 18, 2016) FCC 16-18 at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A1.pdf at FN 4 (“*STB NPRM*”).

²⁸ *STB NPRM* at para. 2.

²⁹ *STB NPRM* at paras. 36, 41.

³⁰ See, *e.g.*, Press Release, “FCC Vote Brings Video Choice One Step Closer For Consumers,” Public Knowledge (rel. Feb. 18, 2016) at <https://www.publicknowledge.org/press-release/fcc-vote-brings-video-choice-one-step-closer-for-consumers>.

³¹ See Cable, Satellite Companies Warn of FCC’s Set-Top Box Proposal, available at <http://variety.com/2016/biz/news/fcc-set-top-box-tom-wheeler-1201707240>.

point out that the FCC’s proposal would suppress innovation—derailing the evolutionary track toward a mobile app-based approach that is already underway in the market—in favor of a path that would be costly to implement, take years to fully realize, and has no assurance of success.³² Content owners have also opposed the proposal, arguing that the FCC’s plan simply allows device manufacturers to “siphon the pay-tv content and repackage select portions of it for their own commercial exploitation through fees, advertising, or data collection and without having to enter into agreements with the creators like others in the marketplace must do.”³³ In order to allay concerns that the proposed framework would inadequately protect copyrights and consumer privacy, the FCC has suggested that MVPDs would be required to provide these streams only to navigation devices that comply with copyright provisions and consumer privacy requirements.³⁴ The FCC’s framework lays the bulk of policing any violations on the MVPDs.³⁵

Compounding these challenges are concerns regarding the potential damage to diverse programming created by minority content publishers. Producers of minority-focused content warn that the FCC’s proposal will ultimately lead to less choice in diverse programming.³⁶ These concerns are shared by numerous members of Congress, both Republican and Democrat, who have weighed in on the FCC’s proposal.³⁷

D. FCC Process Reform

³² *Id.*

³³ Neil Fried, “The FCC Should Say ‘No’ to AllVid: Part Two,” (Feb. 3, 2016) *available at* <http://www.mpaa.org/allvid/#.VuhSRHozxCA>.

³⁴ *STB NPRM* at paras. 71-78.

³⁵ *STB NPRM* at paras. 71-78.

³⁶ *See e.g.*, Letter dated Feb. 17, 2016 to Chairman John Thune and Ranking Member Bill Nelson, Senate Committee on Commerce, Science, and Transportation, and to Chairman Fred Upton and Ranking Member Frank Pallone, House Committee on Energy and Commerce, from Roger M. Bobb, President, BobbCat Films; Victor Cerda, Senior Vice President, VMe Media Inc.; Sang H. Cho, President & CEO, MNET America; Brett Dismuke, President & COO, Swirl Group; Jorge Fiterra, President & CEO, Condista Networks; Feliciano Garcia, President & CEO, Manteca Media; Timothy Greenfield Sanders, Perfect Day Media; Bel Hernandez, Creator/Executive Producer, Hola! LA, Latin Heat Media; Alfred Liggins, President & CEO, TVOne; Eva Longoria, UnbeliEVable Entertainment; Melissa Narvaez, Vice President of Productions, Stateless Media; Catherine Pino, Founder, Freemind Beauty; Robert Rader, General Counsel, Ovation TV; Marisa Rivera, MPowerment Works; Mario Solis Marich, President & CEO, Feel Good TV; Tirrell D. Whittle, CEO & Principal, LIQUID SOUL; Tommy Walker, Producer and Partner, Freemind Ventures; and Frank Washington, CEO, Crossings TV *at* <http://futureoftv.com/wp-content/uploads/2016/02/Opposition-to-FCC-AllVid-Mandate-Programmer-Letter-2-17-161.pdf>.

³⁷ *See e.g.*, Letter from the Honorable Doug Collins, the Honorable Lamar Smith, the Honorable Mimi Walters, the Honorable Judy Chu, and the Honorable Adam Schiff, Congress of the United States, to the Honorable Tom Wheeler, Chairman Federal Communications Commission, February 16, 2016 *available at* <http://src.bna.com/cFZ>; Letter from 30 members of the Congressional Black Caucus, Congress of the United States, to the Honorable Tom Wheeler, Chairman Federal Communications Commission, December 1, 2015 *available at* <http://futureoftv.com/wp-content/uploads/2016/01/Letter-from-CBC-to-Chairman-Wheeler-on-AllVid.pdf>.

On November 16, 2015, the United States House of Representatives passed H.R. 2583, the FCC Process Reform Act of 2015. H.R. 2583 was preceded by similar bills in the 112th and 113th Congresses. These actions bear witness to the long standing concerns regarding procedural failures and abuses of process and agency transparency, efficiency, and accountability in its decision making and in the execution of its other core functions, and the Committee's commitment under both Republican and Democrat leadership to remedy those concerns.

Since November 13, 2013, the date Chairman Wheeler was sworn in to lead the agency, the Committee has held a series of oversight hearings taking up matters of FCC process reform. And since that time, notwithstanding the Chairman's commitments to reform agency process, failures have not only continued, but have escalated with Commission decision making becoming increasingly opaque amid growing indications that the process is rigged to achieve predetermined outcomes for the purpose of political ends.

There is perhaps no more unsettling demonstration of the erosion of the integrity of FCC's process than the disclosures in the recently released Senate report on the influence of the White House in the outcome of the FCC's Open Internet Order.³⁸ The documents in that report reveal that the agency's most senior lawyer solicited meetings with targeted outside parties who favored regulating the Internet under Title II of the Communications Act to "beef up" the record to support that outcome.³⁹ In the face of recommendations from career FCC staff that the record was insufficient on certain relevant issues and that further public comment was warranted, the FCC's General Counsel chose instead to solicit support from a select few to achieve the outcome dictated by the White House.

IV. STAFF CONTACT

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

³⁸ See *Regulating the Internet: How the White House Bowled Over FCC Independence*, A Majority Staff Report of the Committee on Homeland Security and Government Affairs, United States Senate, February 29, 2016, available at <https://www.hsgac.senate.gov/media/majority-media/chairman-johnson-releases-report-on-how-the-white-house-bowled-over-fcc-independence>.

³⁹ *Id.* at 21.