House Energy & Commerce Subcommittee on Communications and Technology
"Oversight of the Federal Communications Commission"
March 22, 2016
Questions for the Record for
FCC Commissioner Jessica Rosenworcel

The Honorable John Shimkus

1. Commissioner Rosenworcel, you have expressed concerns about the best way to implement and enforce the certification process outlined in the Chairman's set-top box proposal. I share your concerns. At this week's Senate Appropriations hearing, Chairman Wheeler expressed opposition to the self-certification process with Lifeline citing specific misuses, including fraud. Self-certifications in the context of the set-top proposal have much broader, potentially very harmful consequences for consumers. How can the Commission reconcile rejecting self-certifications in one context, while advocating for them in another?

The FCC makes use of certifications in order to support a wide range of policy objectives under the Communications Act and related laws. For instance, certifications are used for equipment authorization to prevent harmful wireless interference and ensure compliance with technical protocols. Devices subject to certification include mobile phones, wireless local area networking equipment, cordless phones, and medical telemetry transmitters. In addition, certifications are used to support emergency services. For example, service providers must annually certify that they have taken measures to ensure the reliability and resiliency of 911. Ultimately, the decision to use certifications effectively depends on a careful assessment of the facts, including cost of compliance, enforceability, and impact on consumers. To this end, in the FCC's set-top box rulemaking, the agency invited comment on certification and licensing proposals for third-party set-top box manufacturers, as well as other approaches that can be used to address consumer protection, security, and licensing issues. The FCC will need to carefully review and consider the comments and reply comments on this subject before identifying how to proceed.

The Honorable Steve Scalise

1. As you are aware, prior to the FCC's Open Internet Order, ISPs were subject to the FTC's oversight with respect to their privacy practices. Do you believe that consumers' privacy rights were adequately protected during that time? If not, please provide specific examples where consumers' privacy rights were being violated without action by the FTC to remedy the situation.

For years, the FTC has successfully brought privacy enforcement cases against a broad range of entities pursuant to its authority to police unfair and deceptive acts and practices under Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1). As you note, the reclassification of Broadband Internet Access Service (BIAS) as a telecommunications service has altered the privacy protection scheme that applies to these services and entities that provide these services. Specifically, as a result of the common carrier exemption in the FTC Act, 15 U.S.C. § 45(a)(2),

the FTC's jurisdiction over BIAS is now limited. However, in Section 222 of the Communications Act, 47 U.S.C. § 222, Congress put in place a privacy framework for telecommunications carriers with respect to their provision of telecommunications service. In order to provide greater clarity for carriers and consumers, on March 31, 2016, the FCC adopted a rulemaking to seek comment on the application of Communications Act privacy policies to BIAS. In this rulemaking, the FCC recognized that while "the application of Section 222 to BIAS has implications for the jurisdiction of the FTC . . . the Commission is determined to continue its close working relationship with the FTC."

2. Yes or no – do you think it makes sense to bifurcate oversight of the privacy practices of the Internet ecosystem between the FTC and the FCC? If no, which agency should have sole jurisdiction over this issue?

Yes, under current law.

3. Do you think consumers expect different privacy rules to apply depending on the type of entity collecting their information online rather than the type of information being collected and the intended use of such information? If so, upon what do you base that conclusion?

Consumers can be confused by these distinctions. So as the FCC continues its work on its privacy rulemaking, it is essential that the agency consider how consumers can better understand the way their data is collected, what rules should apply, and how consumers can protect themselves. In the broadband age, consumers should not have to be network engineers to understand who is collecting their data and they should not have to be lawyers to determine if their information is protected.

<u>The Honorable Mike Pompeo</u>

1. **On June 18, 2015, the commission adopted a new TCPA Order that many, who are governed by the law, believe will increase the potential for liability. For example, the reassigned phone number issue does not allow a company to rely on the owner's prior consent to avoid TCPA liability. Companies will now need to develop procedures to avoid strict liability for contacting reassigned numbers.**

a. Can you explain the rationale behind this and why the commission believes that it is the responsibility for companies to use a private database, one that is only accurate 80% of the time, to track reassigned numbers?

It is clear that consumers are frustrated by robocalls. In fact, robocalls represent the largest single category of complaints the FCC receives. So in the June 2015 order, the FCC sought to carefully balance "the caller's interest in having an opportunity to learn of [phone number] reassignment against the privacy interests of consumers to whom the number is reassigned." The FCC determined that a "one-call window provides a reasonable opportunity for the caller to learn of the reassignment."

At the same time, the FCC also identified a number of options that, over time, may permit callers to learn of reassigned numbers.

First, as you noted, the FCC recognized that there is at least one database that "can help determine whether a number has been reassigned."

Second, callers can ask consumers to notify them when they switch from a number for which they have given prior express consent.

Third, the June 2015 order made clear that there is "[n]othing in the [Telephone Consumer Protection Act] or our rules [that] prevents parties from creating, through a contract or other private agreement, an obligation for the person giving consent to notify the caller when the number has been relinquished."

Fourth and finally, the record in the proceeding suggests that callers seeking to find reassignments can "(1) include an interactive opt-out mechanism in all artificial- or prerecorded-voice calls so that recipients may easily report a reassigned or wrong number; (2) implement procedures for recording wrong number reports received by customer service representatives placing outbound calls; (3) implement processes for allowing customer service agents to record new phone numbers when receiving calls from customers; (4) periodically send an email or mail request to the consumer to update his or her contact information; (5) utilize an autodialer's and/or a live caller's ability to recognize 'triple-tones' that identify and record disconnected numbers; (6) establish policies for determining whether a number has been reassigned if there has been no response to a 'two-way' call after a period of attempting to contact a consumer; and (7) enable customers to update contact information by responding to any text message they receive, which may increase a customer's likelihood of reporting phone number changes and reduce the likelihood of a caller dialing a reassigned number."

In sum, the Commission concluded that "the existence of database tools combined with other best practices, along with one additional post-reassignment call, together make compliance [with the Telephone Consumer Protection Act] feasible."

b. Do you believe that this additional regulatory burden should be shouldered by companies?

In the Telephone Consumer Protection Act, Congress placed the responsibility for compliance with the law directly on the party that makes or initiates autodialed and prerecorded calls. Therefore, it is the caller's responsibility to obtain the consumer's prior express consent or face liability for violating the Telephone Consumer Protection Act for calls using an autodialer or prerecorded message to wireless numbers and for telemarketing calls using a prerecorded or artificial voice to residential lines.

2. Prior to the June 18, 2015 TCPA Order the Commission's interpretation of autodialer, required that equipment be able to dial telephone numbers without human input. Following the Order, it appears that the decision as to what constitutes an autodialer will be made on a case-by-case basis. It would appear that the FCC is adding to the

burdens of individuals and businesses by clouding the autodialer issue rather than clarifying. As you know, this is one of the many reasons why we have seen so many lawsuits on this very issue.

a. Can you inform the committee as to why the commission adopted this new interpretation and why the change was necessary?

The Telephone Consumer Protection Act defines an "automatic telephone dialing system" as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."

In the June 2015 order, the FCC did not "address the exact contours of the 'autodialer' definition or seek to determine comprehensively each type of equipment that falls within that definition that would be administrable industry-wide." Rather, the 2015 order maintained the Commission's previous conclusion from the 2003 Telephone Consumer Protection Act Report and Order that to be considered an "automatic telephone dialing system" the "equipment need only have the 'capacity to store or produce telephone numbers,'" as the statute dictates.

Finally, it should be noted that the statutory language here referencing autodialers reflects technology in 1991—when the Telephone Consumer Protection Act was enacted. Should Congress choose to revisit this law, updating this provision to reflect the evolution of technology merits consideration.

b. Can you tell the committee whether the impact of the new TCPA Order on specific industries, such as healthcare, was contemplated before making the change what specific industries may face under the new Order the commission considered?

Yes. Although I did not support all aspects of the June 2015 order, the FCC in that order addressed calls from specific industries, including both healthcare and financial services.

Section 227(b)(2)(c) of the Telephone Consumer Protection Act authorizes the Commission to exempt from its prior express consent requirement calls to a number assigned to a cellular telephone service that are not charged to the consumer, subject to conditions the Commission may prescribe "as necessary in the interest of" consumer privacy rights. In the June 2015 order, the FCC addressed petitions filed on behalf of both the healthcare and financial services industries and created specific exemptions under this statutory authority.

For the healthcare industry, the FCC granted an exemption to "calls for which there is exigency and that have a healthcare treatment purpose, specifically: appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions." Additionally, the FCC exempted calls from banks and other financial institutions that concern "transactions and events that suggest a risk of fraud or identity theft; possible breaches of security of customers' personal information; steps consumers can take to prevent or remedy harm caused by data security breaches; and actions needed to arrange for receipt of pending money transfers."

3. As you are aware, there are a number of petitions before the commission regarding the July 18, 2015 TCPA Order. When can the committee expected the commission to resolve these petitions?

I am aware that there are a number of petitions before the FCC related to the Telephone Consumer Protection Act. I believe it is important for the FCC to address matters that come before the agency in a timely manner, including these petitions.

4. The 2015 TCPA Order rejected the use of prior business relationships as a test regarding prior express written consent? What was the rationale for this change and what work has the Commission done to measure the impact the change will have on American businesses?

The established business relationship exemption was not addressed in the June 2015 order. However, the FCC addressed the established business relationship exception to the consent requirement in a February 2012 order. In that decision—which predated my arrival at the agency—the FCC concluded that "[b]ased on the record in this proceeding and the volume of complaints filed by consumers that have an established business relationship with the caller . . . the public interest would be served by eliminating the established business relationship exemption for telemarketing calls." This conclusion was supported by the Commission's record and was in line with the FTC's 2008 decision to eliminate its policy of forbearing from bringing enforcement actions against sellers and telemarketers who make calls that deliver prerecorded messages to consumers with whom the seller has an established business relationship.

5. Can you explain to the committee the timeline for developing the new regulations required as a result of Section 301(b) of the Bipartisan Budget Act of 2015?

Yes. Section 301(b) of the Bipartisan Budget Act of 2015 provides that the FCC "shall prescribe regulations to implement the amendments made in this section" within 9 months. In practice, this means regulations should be prescribed by August 2, 2016. To that end, on May 6, 2016, the FCC released a rulemaking that seeks comment on regulations to implement Section 301(b) of the Budget Act of 2015. Public comments on this rulemaking were due on June 6, 2016 and reply comments are due on June 21, 2016.

6. The bipartisan letter sent to Chairman Wheeler on November 17, 2015, requested that the FCC work closely with the Consumer Financial Protection Bureau to develop a coordinated approach on the limited number of calls permitted under Section 301 of the Bipartisan Budget Act of 2015. Has the commission done what the letter requested? If not, why the delay?

In preparing the rulemaking pursuant to the Bipartisan Budget Act of 2015, FCC staff coordinated with the staff of the Consumer Financial Protection Bureau. As we move ahead, I hope that we can continue to work closely with our federal partners.

7. The FCC is currently receiving comments on a proposal to impos[e] new privacy regulations on broadband Internet service providers that will not apply to so-called "edge" providers. The FTC currently oversees a successful program to ensure consumer privacy is protected online that, until the Open Internet Order, applied to both access and edge providers.

a. Given the disparity between what the FCC has proposed and the FTC's existing regime to ensure online privacy, please provide analysis demonstrating that the Commission has considered whether its imposition of new rules will create confusion for Internet users.

On March 31, 2016, the FCC adopted a rulemaking to consider application of "the traditional privacy requirements of the Communications Act to Broadband Internet Access Service (BIAS)." As you note, the FCC's rulemaking does not propose to apply Communications Act privacy requirements on information providers at the edge of the network and specifically acknowledges that they "are not subject to the same regulatory framework." Comments in this proceeding were filed on May 27, 2016. Reply comments are due on June 27, 2016.

As the FCC continues its work on this proceeding, it will need to carefully review the record that develops. In the process, I believe the agency should strive to identify how consumers can better understand the way their data is collected, what rules apply, and how they can protect themselves under the law.

b. What impact would application of the FCC's proposed rules to edge providers have on the products and innovations that consumers currently enjoy? Please provide specific examples of popular services that would remain free from impact if the proposed rules were applied to them as well as services that would be impacted.

The scope of the Commission's privacy proceeding and Section 222 of the Communications Act, 47 U.S.C. § 222, is limited. The privacy provisions in Section 222 specifically address the provision of telecommunications services by telecommunications carriers. As a result, the proceeding now underway is designed to update the rules implementing these provisions of the law, in order to ensure that they are modernized to reflect not only the provision of voice services, but also the provision of broadband. To be clear, the statute does not apply to a range of services used by consumers, including the manufacturers of wireless phones, the developers of operating systems, or the operators of websites.

8. Moody's Investor Services recently reported that the FCC's proposed rules will disadvantage ISPs as they seek to compete with other digital advertisers. Do you acknowledge that the FCC's will amount to the FCC picking winners and losers in the digital advertising marketplace? If not, how do you explain Moody's reaction to the FCC's proposal?

The scope of the Commission's privacy proceeding and Section 222 of the Communications Act, 47 U.S.C. § 222, is limited. The privacy provisions in Section 222

specifically address the provision of telecommunications services by telecommunications carriers. As a result, the law does not encompass the services provided by digital advertisers. In other words, the FCC will need to apply the law only to those entities covered under the Communications Act—to do otherwise would be to act outside of the authority provided to the agency by Congress. Acknowledging, however, that digital advertising is not covered by the law, in our rulemaking the FCC sought comment on "what effect, if any, our proposed… framework will have on marketing in the broadband ecosystem, over-the-top providers of competing services, the larger Internet ecosystem, and the digital advertising industry." I look forward to reviewing the record that develops.

The Honorable David Loebsack

1. I would like to talk about small providers. Commissioner Rosenworcel, when the Commission adopted its Notice of Proposed Rulemaking on set-top boxes, you said "this rulemaking is complicated," "important questions have been raised about copyright, privacy, diversity - and a whole host of other issues," and "more work needs to be done to streamline this proposal." Nevertheless, the Commission only provided 30 days for interested parties to comment and 30 days for reply comments (both measured from Federal register publication) an unusually short comment period for issues such as these. As the American Cable Association, which represents small cable operators, has said in asking for an additional 30 days to provide comments, "The NPRM includes 150 question marks, 87 recitations of the phrase "seek comment" and numerous other statements that invite or warrant comment on scores of particulars of the NPRM' s undeniably 'complicated' proposals." The FCC Media Bureau granted a mere seven-day extension for comments saying "we are committed to resolving the issues raised ... in a timely manner."

a. Commissioner, consistent with your previous statements about the need to streamline this complex proceeding, wouldn't the issuance of a Further Notice of Proposed Rulemaking focusing on a streamlined proposal be more appropriate once the current comment cycle is done in May, rather than jumping to a final set of rules on which comment will by necessity have been limited?

The FCC is in the process of reviewing the extensive record in this proceeding. To the extent that alternative or modified proposals are identified and are being considered by the FCC for adoption, the FCC will need to consider whether an additional notice or further rulemaking is required.

The Honorable Ben Ray Luján

1. Currently more than 30 percent of New Mexico's schools lack access to high-speed Internet. You and I both agree that this is a problem. To achieve a true 21st century education, students must learn vital digital skills and must have access to the modern learning tools that increasingly make school blackboards obsolete.
Last fall, my home state, working with EducationSuperHighway, announced a plan to make high-speed Internet available to every New Mexico classroom by 2018. To meet this

goal, the state will combine $49 million in state funding along with additional funding from the E-Rate program.

a. I know that you're extremely proud of the Commission's efforts to modernize E-Rate, which included increasing funding for this program by $1.5 billion annually. Can you discuss what these reforms mean to state like New Mexico that are working to connect more schools?

I am proud of the FCC's efforts to modernize the E-Rate program.

E-Rate is the nation's largest educational technology program. But until recently, it was stuck in the dial-up era. However, as a result of the FCC's efforts to modernize the E-Rate program, it is now fully updated for the broadband age. This is important because 21st century education requires the development of digital skills, which depend on access to high-speed connectivity in our schools.

The FCC's reform efforts did three key things. First, the agency refocused the E-Rate program on broadband capacity. The FCC set capacity goals designed to bring high-capacity broadband and Wi-Fi to all schools over a five-year period. Second, the FCC streamlined the application process to make it simpler to participate in the program. Third, the FCC updated the program budget to better reflect the needs of the broadband age.

In New Mexico, these changes are already making an impact. After receiving no "category 2" funding for the previous two years, the state of New Mexico received category 2 funding commitments totaling over $7 million in funding year 2015. This funding will help connect New Mexico classrooms with Wi-Fi and better prepare New Mexico students for competing in the digital economy. I saw this firsthand last month when I visited Hatch Valley High School in Hatch, New Mexico—a school with connectivity supported by E-Rate. While there, I spoke to the school superintendent, teachers, students, and parents about the importance of broadband access in education. In addition, I observed a classroom and learned how new digital teaching tools are changing the way that students create, participate, and learn at school.

2. According to the FCC, 34 million Americans lack access to high-speed broadband. This includes forty percent of people living in rural communities and 80 percent on Tribal lands. In my home state of New Mexico, those numbers are 61 percent and 80 percent. In your testimony, you discuss how this digital divide harms students. You note that "roughly seven in ten teachers assign homework that requires access to broadband." But for students without broadband, "just getting homework done is hard." I completely agree. In an age where connectivity is the key to opportunities and economic success, we cannot allow millions of students to be cut off.

a. What is the FCC doing to bridge this digital divide and what can we be doing here in Congress to ensure that every student has the opportunity to succeed?

The Homework Gap is the cruelest part of today's digital divide. And, according to the Pew Research Center, five million households out of the 29 million with school-aged children nationwide are falling into this gap.

The good news is that we have identified this problem—the Homework Gap—and have given it a name. Because of this, the Homework Gap is finally getting the attention it deserves. To this end, the FCC recently took steps to modernize the Lifeline program that will help narrow the Homework Gap. First, the agency incorporated broadband into the Lifeline program. This simple change can help bring more broadband to low-income households with school-aged children. Second, the agency modernized the program by making sure that devices used for Lifeline broadband services are able to access Wi-Fi signals and that these devices can be turned into Wi-Fi hotspots. For a student with a computer but no way to connect at home, a hotspot can be the difference between keeping up in class and falling behind. Finally, the Lifeline order encourages providers to help make eligible families with school-aged children aware of the Lifeline program.

These changes are important, but it is also essential to remember that addressing the Homework Gap will require more than the Lifeline program. It will require public and private partnerships to get high-speed services in low-income homes. It will require policies to expand unlicensed spectrum—because Wi-Fi democratizes Internet access and putting more Wi-Fi in more places can provide more students with more opportunity to get their homework done. But above all, it will require continued focus and attention from policymakers, school administrators, educators, parents, and students to bring attention to the Homework Gap and creative efforts to close it.