



July 8, 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, July 12, 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; and
- 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 under Chairman Wheeler’s leadership. The Commission remains bitterly divided along partisan lines, and the industries it regulates face uncertainty as the FCC stands poised to implement major changes.

First, the Commission is contemplating a novel, onerous, and ineffective vision of consumer privacy now that the Commission has reclassified the Internet as a common-carrier – thus removing the Internet from the successful FTC-based privacy regime.

Second, the Commission has proposed sweeping changes to the business models of the video subscription and content industries in an effort to spur competition for set-top boxes. More than 180 bipartisan Members of Congress and both the Senate Majority and Minority Leader have written to the Commission expressing concern with this plan, and Commissioner Rosenworcel has said that the current plan has “real flaws.”

Last, after repeated commitments and several years late, the Commission has finally circulated a quadrennial review of media ownership rules, as required by statute. Unfortunately, after all this time, the Commission's fact sheet seems to indicate that the Commission believes that the media market has not changed enough in the last decade to warrant significant changes in the Commission's rules. A curious conclusion given the changes in the media landscape. While the Committee is pleased that the Commission has met its long overdue obligation to produce the quadrennial review, other examples of FCC inaction in executing elements of its core mission continue to grow.

The following is a summary of some of the issues that may be discussed at the hearing.

A. Regulation of a Portion of the Subscription Video Industry

On February 16, 2016, Chairman Wheeler circulated a Notice of Proposed Rulemaking (NPRM) seeking comment on a requirement that cable and satellite television providers adopt new standards – and the technologies to implement them – for the use of in-home receivers (set-top boxes).¹ This proposal is not the first attempt by this Commission to redefine the Multichannel Video Programming Distributor (MVPD) industry. Previously, the Commission proposed revising the definition of MVPD to include linear, over the top (OTT) video providers. That proposal appears to have stalled in the face of strong opposition from OTT providers² and others.³ Just as in that case, the Commission's set-top box proposal seeks major, structural changes to both the MVPD and content industries, and has met strong opposition from a diverse group of stakeholders.

The proposal, billed by the FCC's under the "Unlock the Box" banner, has been trumpeted by the FCC as spurring competition, choice, and innovation in the set-top box market.⁴ This would be accomplished by requiring all MVPDs – cable and satellite companies – to, among other things, unbundle their service offerings into 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

¹ *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 *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-18A1.pdf at para. 2 (*STB NPRM*).

² *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>.

³ *See e.g.* 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>.

⁴ *See* https://apps.fcc.gov/edocs_public/attachmatch/DOC-337795A1.pdf.

delivery – the video programming itself. The FCC’s proposal would require these streams to be delivered in formats that conform to specifications established by “open standards bodies” to allow entities “not affiliated with an MVPD to design and build competitive devices.”⁵ 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.

The Chairman’s proposed regulatory incursion into this segment of the subscription video industry has garnered widespread opposition. Although some consumer groups have endorsed Chairman Wheeler’s proposal based on its promises of spurring consumer choice in the retail set-top box market and lower prices,⁶ industry participants, content owners, and civil rights groups have raised wide-ranging concerns arguing, among other things, that the promise of lower consumer prices is illusory⁷ and, if implemented as proposed, will result in an erosion of copyright protections, consumer privacy,⁸ and diversity in programming.⁹ These concerns are shared by more than 180 Members of Congress, both Republican and Democrat, who have weighed in on the FCC’s proposal.¹⁰

⁵ *STB NPRM* at paras. 36, 41.

⁶ *See, e.g.*, Press Release, “FCC Vote Brings Video Choice One Step Closer For Consumers,” Public Knowledge (rel. Feb. 18, 2016) available at <https://www.publicknowledge.org/press-release/fcc-vote-brings-video-choice-one-step-closer-for-consumers>.

⁷ Cable and satellite companies assert that the FCC’s proposal will lead 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 thus leading to higher rather than lower consumer prices. These companies also note that the FCC’s approach would suppress innovation by derailing the development of a mobile app-based approach that is already underway in favor of a path that would be costly to implement, take years to fully realize, and has no assurance of success. *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>.

⁸ Content owners argue 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.” *See* Neil Fried, “The FCC Should Say ‘No’ to AllVid: Part Two,” (Feb. 3, 2016) available at <http://www.mpa.org/allvid/#.VuhSRHozxCA>.

⁹ Producers of minority-focused content warn that the FCC’s proposal will upend hard-fought carriage deals and allow minority content to be obscured in the alternate interfaces presented by third-party set-top box manufacturers, ultimately decreasing access to mainstream audiences. This would significantly undermine revenue to minority content producers and threaten their long-term viability. *See, e.g.*, ex parte letter from Carlos Gutierrez, Head of Legal and Policy Affairs, LGBT Technology Partnership and Institute, to Marlene H. Dortch, Secretary, FCC, dated April 7, 2016, MB Docket No. 16-42; ex parte letter from Sen. Catherine Pugh, President, National Black Caucus of State Legislators, to Tom Wheeler, Chairman, FCC, dated April 1, 2016, MB Docket No. 16-42; ex parte letter of National Urban League, Asian American Justice Center, Japanese American Citizens League, League of United Latin American Citizens, Multicultural Media, Telecom and Internet Council, NAACP, National Action Network, National Coalition on Black Civic Participation, OCA-Asian Pacific American Advocates, and Rainbow Push Coalition to Tom Wheeler, Chairman, FCC, dated March 21, 2016, MB Docket No. 16-42.

¹⁰ *See e.g.*, Letter from the Honorable Charles E. Grassley, Chairman Unites States Senate Committee on the Judiciary to the Honorable Tom Wheeler, Chairman Federal Communications Commission, May 23, 2016 available at <http://futureoftv.com/wp-content/uploads/2016/05/Grassley-letter-to-FCC-re-STB-Proposal-05.23.16.pdf>; Letter from the Honorable Dianne DeGette and the Honorable Joe Barton to the Honorable Tom Wheeler, Chairman Federal Communications Commission, May 11, 2016 available at <http://futureoftv.com/wp-content/uploads/2016/05/DeGette-Barton-letter-on-STB-Privacy-05.11.16.pdf>; Letter from the Honorable Doug Collins, the Honorable Lamar Smith, the Honorable Mimi Walters, the Honorable Judy Chu, and the Honorable

On June 15, 2016, the National Cable and Telecommunications Association (NCTA), joined by industry participants, unveiled an alternative to the Chairman's approach with the support of certain independent, minority-owned TV networks.¹¹ The "Ditch the Box" proposal, which the proponents note builds on the innovations already underway in the market and allows consumers to rid themselves of set-top boxes and the associated monthly rental fees in favor of an app-based approach. Under this alternative framework, all large MVPDs would be required to offer downloadable apps, built on open HTML5 web standards that would be widely compatible with a broad range of customer-owned devices, *e.g.*, smart TVs, game consoles, tablets, and phones. Consumers will have the ability to conduct a unified search for content from both pay-TV and on-line video services through the devices menu.¹² Among other things, proponents of this plan assert that the apps deployed will include the technical means to protect content and enforce program licensing terms, thus promoting content diversity, and will provide consumers the same federal privacy protections they currently enjoy when using traditional-set-top boxes, including emergency alerts.¹³

In addition to the support of minority-owned networks, the response of other major stakeholders appears positive. Google, a major proponent of reform in the set-top box market, called the plan "constructive."¹⁴ The Motion Picture Association of America, an industry trade group representing content owners, called the proposal a "constructive step" and signaled for continued discussions surrounding programmers' rights,¹⁵ a view shared by other major content companies.¹⁶ Members of Congress also have viewed the proposal as a positive development.¹⁷

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>.

¹¹ See Letter from Paul Glist, Davis Wright Tremaine LLP, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, MB Dkt. No. 16-42, CS Dkt No.97-80 (filed June 16, 2016) (*June 16 Ex Parte Proposal*) *available at* http://futureoftv.com/wp-content/uploads/2016/06/June-15-2016-Ex-Parte-Meeting-2016-6-16-MB-Docket-16-42-CS-Docket-97-...pdf_and Letter from Revolt Media, TV, LL, TV One, LLC, and V-me Media, Inc. to Chairman Tom Wheeler, Commissioner Mignon Clyburn, Commissioner Michael O'Rielly, Commissioner Ajit Pai, Commissioner Jessica Rosenworcel, MB Dkt No. 16-42, MB Dkt No. 15-64, CS Dkt No. 97-80 (filed June 16, 2016) *available at* <http://futureoftv.com/wp-content/uploads/2016/06/Independent-Programmers-letter-06.16.16.pdf>.

¹² See *June 16 Ex Parte*.

¹³ *Id.*

¹⁴ See *Google praises industry backed cable box plan*, The Hill, June 22, 106, *available at* <http://thehill.com/policy/technology/284494-google-praises-cable-industry-box-plan-as-constructive>.

¹⁵ See *NCTA Pitches 'Ditch the Box' Set-Top Box Proposal*, Broadcasting and Cable, June 16, 2016, *available at* <http://www.broadcastingcable.com/news/washington/ncta-pitches-ditch-box-set-top-proposal/157372>.

¹⁶ See *Content Companies Commend Box Ditching Effort*, Multichannel News, July 5, 2016, *available at* <http://www.multichannel.com/news/fcc/content-cos-commend-box-ditching-effort/406110>.

¹⁷ See *e.g., Wheeler's Pending House Appearance Ups Pressure for Deciding Set-Top Plans*, Communications Daily, July 6, 2016; *Rep. Pallone Buoyed By FCC Industry Set-Top Talks* *available at* <http://www.multichannel.com/news/congress/rep-pallone-buoyed-fcc-industry-set-top-talks/406074>.

And Chairman Wheeler has been quoted as saying that “it is absolutely terrific that the cable industry came forward with this proposal.”¹⁸

Soon after the alternative proposal was proffered, Commissioner Rosenworcel, one of three Commissioners that supported the NPRM stated “it has become clear the original proposal has real flaws and, as I have suggested before, is too complicated. We need to find another way forward.”¹⁹

B. FCC Management of the Lifeline Program

The Lifeline program was implemented in 1985 and was an outgrowth of the divestiture of AT&T.²⁰ It was intended to protect low-income households from increases in local rates that occurred as a result of the changes divestiture brought to the marketplace.²¹ The FCC restructured and expanded the program after the passage of the Telecommunications Act of 1996, which codified the longstanding national objective of universal service – the principle that all Americans should have access to a baseline level of telecommunications service.²² Since that time, the FCC programs and policies to implement this principle have been administered by the Universal Service Administrative Company (USAC), an independent, not-for-profit corporation, under the FCC’s direction.²³

Lifeline reimburses telecommunications carriers deemed eligible to participate in the program for discounting customers’ monthly bill for service. Funding for the Lifeline program, as well as the other programs under the Universal Service Fund, comes from mandatory fees on telecommunications providers that are usually passed along to consumers through a charge applied to their monthly telephone bills. As the Government Accountability Office (GAO) has observed, a goal in the effective administration of the program is to ensure the availability of voice service for low income Americans while minimizing the contribution burden on consumers and businesses.²⁴ Or as the FCC has stated in a different way, to administer the program in a manner “keeping money in the pockets of American consumers that otherwise would have been wasted on duplicative benefits, subsidies for ineligible consumers, or fraudulent misuse of

¹⁸ See Ditch the Box Effort Strikes Balance on FCC Set Top Box Proposal, Politic265, June 23, 2016, available at <http://politic365.com/2016/06/23/ditch-the-box-effort-strikes-balance-on-fcc-set-top-box-proposal>.

¹⁹ See Rosenworcel: FCC Needs ‘Another Way Forward’ on Set-Tops, Broadcasting and Cable June 20, 2016, available at <http://www.broadcastingcable.com/news/washington/rosenworcel-fcc-needs-another-way-forward-set-tops/157450>.

²⁰ *MTS and WATS Market Structure, and Amendment of Parts 67 & 69 of the Commission’s Rules and Establishment of the Joint Board*, Report and Order, 50 Fed. Reg. 939 (Jan 8, 1985).

²¹ *Id.*

²² Pub. L. No. 104-104, 110 Stat. 56 (1996).

²³ See <http://www.usac.org/about/>.

²⁴ United States Government Accountability Office, *Telecommunications: FCC Should Evaluate the Efficiency and Effectiveness of the Lifeline Program*, GAO-15335 (March 2015) (2015 GAO Report) at p. 35 available at <http://www.gao.gov/assets/670/669209.pdf>.

Lifeline funds.”²⁵ The history of the program demonstrates that the FCC has failed consistently to protect consumers and businesses from such waste, fraud, and abuse.

Although the Lifeline program traditionally supported wireline telephone service, actions by the FCC beginning in 2005 set the stage for the program to support prepaid wireless service from non-facilities based carriers, which began in earnest in 2008.²⁶ As a general matter, these carriers market services to consumers eligible for the Lifeline subsidy and provide an allotment for free minutes each month for the cost of the discount. The impact of the introduction of these carriers was immediate and significant. According to GAO, while program participation and disbursements were stable from 2005 to 2008 with 6.9 million participants and \$802 million in disbursements compared to 7.1 and \$823 respectively in 2008, those numbers grew to 8.6 million participants and \$1 billion in disbursements in 2009.²⁷ By 2012 program disbursements reached \$2.19 billion.²⁸ According to the FCC, prepaid wireless carriers accounted for more than 40 percent of all Lifeline support that year.²⁹

Coincident with that growth was growing evidence that waste, fraud, and abuse were rampant in the program and, in the opinion of some, indications that the FCC was failing in its administration and oversight of the program to safeguard the program’s integrity. In its 2010 Report, GAO concluded that the FCC had not developed performance goals and measures that would enable the FCC to “assess changes such as the addition of prepaid wireless and more effectively manage the current and future direction of the program,” but also noted that “developing such goals and measures was not a priority.”³⁰ GAO also concluded that the program “lacks a risk assessment that considers all program vulnerabilities and a systematic process for considering audit results when assessing internal controls.”³¹ Among the identified risks to the program was the “insufficiency of program safeguards to identify duplicate reimbursements” – a determination rendered, according to GAO, by USAC to the FCC in November of 2008.³²

Through a series of orders, the FCC has attempted to implement safeguards to protect the integrity of the program. For example, in June 2011, the FCC adopted the *Duplicative Program Payments Order*, which made clear that an eligible consumer may only receive one Lifeline supported service, established procedures to detect and de-enroll subscribers receiving duplicative supported service, and directed USAC to implement a process to detect and eliminate

²⁵ See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 6656 (2012) (*2012 Lifeline Order*) at para. 2.

²⁶ 2015 GAO Report at pp.6-7. These carriers offer service through the resale of another carrier’s service and do not offer service using their own facilities.

²⁷ 2015 GAO Report at 8.

²⁸ See 2012 Annual Report, Universal Service Administrative Company, *available at* http://www.usac.org/_res/documents/about/pdf/annual-reports/usac-annual-report-2012.pdf.

²⁹ See *2012 Lifeline Reform Order* at para 23.

³⁰ Unites States Government Accountability Office, *Telecommunications: Improved Management Can Enhance FCC Decision Making for the Universal Service Low-Income Program*, GAO-11-11 (October 2010) *available at* <http://www.gao.gov/assets/320/312708.pdf> at p. 26.

³¹ *Id.* at 35-41.

³² *Id.* at 35.

duplicative support.³³ In the *2012 Lifeline Reform Order*, the FCC “comprehensively” reformed the program to eliminate waste, fraud and abuse.³⁴ Among other things, the FCC created and mandated the use by carriers participating in the program a National Lifeline Accountability Database to ensure that multiple carriers do not seek reimbursement for the same Lifeline subscriber and directed USAC to “implement a scrubbing process to substantially reduce if not eliminate current duplicative support.”³⁵

Yet, even as these reforms were implemented evidence of waste, fraud, and abuse in the program continued to mount. In December 2011, the FCC’s Enforcement Bureau issued an advisory noting that it had been brought to the Bureau’s attention that certain Lifeline providers may be in violation of the programs’ rules to safeguard against duplicate enrollments.³⁶ Later, the FCC announced program “savings” realized by eliminating 270,000 duplicative subscriptions in twelve states that “saved” \$33 million in 2011³⁷ and \$16.5 million in the first half of 2012.³⁸ In 2013, the FCC’s Enforcement Bureau took action for the first and last time against more than 300 consumers for the illegal receipt of duplicative lifeline support.³⁹ These individuals had signed-up for and received multiple phones – some as many as eleven – from multiple carriers. These actions were soon followed by a flurry of enforcement actions against eleven wireless resellers for allegedly violating the program’s rules intended to safeguard against duplicate enrollments.⁴⁰ In announcing the first of these proposed penalties, the FCC disclosed that it had eliminated “more than 1.1 million duplicate subscriptions and “saved nearly \$214 million.”⁴¹ Soon after, the FCC noted that it had eliminated “over 2 million duplicate subscriptions . . .” and that “[n]umerous additional investigations are ongoing.”⁴² The FCC added that “the FCC’s Office of Inspector General is working on investigations of Lifeline providers in close

³³ *Lifeline and Link Up Reform and Modernization et al.*, Report and Order, WC Dkt. No. 11-42 *et al.*, 36 FCC Rcd 9022 (June 2011).

³⁴ See generally *2012 Lifeline Order*.

³⁵ *2012 Lifeline Reform Order* at paras 179-217.

³⁶ See Public Notice, Enforcement Advisory No. 2011-11, DA 11-1971, (December 5, 2011) available at https://apps.fcc.gov/edocs_public/attachmatch/DA-11-1971A1.pdf.

³⁷ See Update, *Reforms of Lifeline Generate \$43 million in Savings Since January*, Federal Communications Commission, (July 31, 2012) (July 31 Update) available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-315505A1.txt.

³⁸ See *FCC Reforms, Modernizes Lifeline to Keep Low-Income Americans Connected To Jobs, Family, 911 Service* available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-312210A1.pdf

³⁹ See <http://transition.fcc.gov/eb/usfc/Oth.html>. The FCC has not taken action against any individual since then.

⁴⁰ See *FCC Proposes more than \$44 million in Forfeitures Against 3 Lifeline Providers*, Federal Communications Commission (December 11, 2013) available at <https://www.fcc.gov/document/fcc-proposes-nearly-44-million-fines-against-3-lifeline-providers>.

⁴¹ See *FCC Proposes More Than \$14.4 Million in Forfeitures to Combat Duplicative Lifeline Service, Protect Lifeline Program*, Federal Communications Commission (September 30, 2013) available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-323565A1.pdf.

⁴² See *FCC Proposes More Than \$33 Million in Penalties Against Lifeline Providers That Sought Duplicate Payments For Ineligible Subscribers*, Federal Communications Commission (November 1, 2013) available at <https://www.fcc.gov/document/fcc-proposes-33-m-penalties-against-three-lifeline-providers>.

coordination with the U.S. Department of Justice.”⁴³ Additional enforcement actions were taken in 2014 and 2015, although at a diminished level.⁴⁴

The FCC’s efforts to identify and eliminate duplicative subscriptions and disbursements for ineligible consumers and elimination of other low-income mechanisms reduced program disbursements from the high of \$2.19 billion in 2012 to \$1.5 billion in 2015.⁴⁵ However, in March 2015, GAO released another report critical of the FCC’s administration of the Lifeline program.⁴⁶ GAO recommended that the FCC “conduct a program evaluation to determine the extent to which the program is efficiently and effectively reaching its goals of ensuring the availability of voice service for low income Americans while minimizing the contribution burden on consumers and businesses.”⁴⁷ As GAO explained, “[w]ithout a program evaluation, FCC does not know whether Lifeline is effectively ensuring the availability of telephone service for low-income households while minimizing program costs.”⁴⁸

On March 31, 2016, on a party-line vote, the FCC expanded the Lifeline program to include support for broadband service.⁴⁹ While the FCC also adopted additional program reforms to protect against waste, fraud, and abuse, the FCC’s order ignored calls to impose a hard cap on the program’s budget; a fiscal constraint in place for the other three Universal Service programs.⁵⁰ Soon thereafter, on April 7, 2016, the FCC made public a massive fraud on the program dating back to at least 2013 and extending into 2016 when it released an enforcement action proposing a \$51 million penalty against Total Call Mobile, Inc. (Total Call).⁵¹ According to the FCC, Total Call employees had, among other things, enrolled at least 32,000 duplicate consumers into the program and circumvented program safeguards, demonstrating that even with the FCC’s reforms, the program lacks adequate protection against waste, fraud, and abuse.⁵² In response to the on-going allegations of waste, fraud, and abuse evidenced by the FCC’s action

⁴³ *Id.*

⁴⁴ See e.g., Budget PrePay, Inc. d/b/a Budget Mobile, *Notice of Apparent Liability for Forfeiture and Order*, April 7, 2016, available at <http://transition.fcc.gov/eb/Orders/2014/FCC-14-19A1.html>.

⁴⁵ The elimination of duplicate subscriptions and ineligible recipients in the program accounted for only a portion of the decrease. The FCC took other actions, including the elimination of toll limitation service and Link Up, due to changes in the communications marketplace. See *2012 Lifeline Reform Order* at paras 226-254.

⁴⁶ United States Government Accountability Office, *Telecommunications: FCC Should Evaluate the Efficiency and Effectiveness of the Lifeline Program*, GAO-15335 (March 2015).

⁴⁷ *Id.* at p. 36

⁴⁸ *Id.*

⁴⁹ See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38 (March 31, 2016) (*March 31 Order*) at para. 2.

⁵⁰ Capturing the history of its failure in protecting the program’s integrity and the wasted consumer dollars, the FCC explained that as it updated the program to acknowledge the change in communications technologies – wireless services – it failed “at the same time [to] adjust the program rules to keep pace with the new technologies, the financial incentives, or the subsequent growth in the program” leading to “the onset of waste and abuse in the program.” *March 31 Order* at para 25. This exposition lends little confidence in the integrity of the program going forward with the FCC’s latest update to expand the program.

⁵¹ The timing of the public disclosure of such a large scale fraud until after the vote to expand the program to include broadband service raised questions with some. Indeed, the FCC previously expressed the sentiment that “waste, fraud, and abuse in the program were threatening its future.” See July 31 Update.

⁵² Total Call Mobile, Inc., *Notice of Apparent Liability for Forfeiture and Order*, April 7, 2016, available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-44A1.pdf.

against Total Call and disclosures by Commissioner Pai that his office is investigating potential frauds approaching \$500 million,⁵³ the Committee launched an investigation into waste, fraud, and abuse in the program on May 26, 2016.⁵⁴

C. Quadrennial Review

The Commission is statutorily required to complete a review of its media ownership rules every four years (Quadrennial Review) to ensure that the rules keep pace with the competitive changes in the marketplace.⁵⁵ The FCC regulates the number of radio stations, television stations, and newspapers that a single entity can own within a local market and nationwide, with the goal of promoting competition, localism, and diversity. Critics of the rules have argued that the market has evolved so drastically that the ownership rules are not only irrelevant, but actively detrimental to the health of newsgathering organizations. Supporters of the media ownership rules have argued that the rules are necessary to prevent consolidation of media ownership and homogenization of viewpoints.

In the Quadrennial Review, the FCC is charged with determining “whether any of such rules are necessary in the public interest as the result of competition.”⁵⁶ Unfortunately, the FCC’s attempts to do so have been rejected by the courts in 2004⁵⁷ and in 2011.⁵⁸ Former FCC Chairman Genachowski never completed the 2010 review, and current Chairman Tom Wheeler committed instead to sweeping the 2010 review into the 2014 review, which he promised this Committee to have drafted by June of 2016. In short, the FCC has failed to complete a Quadrennial Review of the media ownership rules since 2006, and the media ownership rules themselves remain largely unchanged since 2004,⁵⁹ a delay characterized as “problematic” by the courts⁶⁰

⁵³ See *FCC Republican raises new questions about phone subsidy fraud* The Hill (June 6, 2106) available at <http://thehill.com/policy/technology/282707-fcc-republican-raises-new-questions-about-phone-subsidy-fraud>

⁵⁴ See <https://energycommerce.house.gov/news-center/press-releases/committee-launches-investigation-universal-service-lifeline-program>.

⁵⁵ Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004).

⁵⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996). The “very purpose” of Section 202(h) is “to function as an ongoing mechanism to ensure that the Commission’s regulatory framework would keep pace with the competitive changes in the marketplace.” *Prometheus Radio Project v. FCC*, Nos. 15-3863, 15-3864, 15-3865 & 15-3866, at 36 (3d Cir. May 25, 2016) (*Prometheus III*).

⁵⁷ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 394 (3d Cir. 2004) (*Prometheus I*).

⁵⁸ *Prometheus Radio Project v. FCC*, 652 F.3d 431, 437 (3d Cir. 2011) (*Prometheus II*).

⁵⁹ The national ownership cap was revised and removed from Commission review by the Consolidated Appropriations Act.

⁶⁰ See *Prometheus III*, Discussing the printed newspaper/broadcast cross-ownership rule specifically, the Court stressed that the rule provides a “telling example” of why the FCC’s delay in deciding the 2010 and 2014 quadrennial reviews “is so problematic.” *Id.* at 37. After summarizing the history of the FCC’s decisions about the rule since its 2002 ownership review, the Court concluded: “As a result, the 1975 ban remains in effect to this day even though the FCC determined more than a decade ago that it is no longer in the public interest. This has come at significant expense to parties that would be able, under some of the less restrictive options being considered by the Commission, to engage in profitable combinations.” *Id.* at 38. The court went on to note the FCC’s delay hampered judicial review because there is no final agency action for parties to challenge. *Id.*

On June 27, the FCC released a fact sheet outlining the draft Order for the media ownership rules. Based on the fact sheet, it appears that the Commission intends to retain most of the rules that have been in place since 2003. In fact, the Commission proposes to further restrict media ownership rules, by re-implementing the restrictions on joint sales agreements that were recently overturned by the courts.⁶¹ The Commission also intends to require stations to begin reporting shared service agreements, requiring stations to log agreements that allow them to share sales staff, reporting equipment, engineering staff, or other arrangements aimed at reducing overhead costs.⁶²

Given the proliferation of media sources in the market and the significant changes in how people consume media, the FCC's defends maintaining the status quo due to the "continuing importance of traditional media outlets to their local communities."⁶³ Yet, studies have shown that Americans are turning to sources other than traditional media for news and information. For example, the Pew Research Center indicates 61 percent of millennials report getting political news on Facebook in a given week.⁶⁴ While social media increases in importance to consumers, local TV news viewership is declining, even though the number of news hours produced held steady.⁶⁵ Newspapers continue to decline. In 2015, weekday circulation fell 7 percent and Sunday circulation fell 4 percent, both showing their greatest declines since 2010. Advertising revenue experienced its greatest drop since 2009, falling nearly 8 percent from 2014 to 2015. The newspaper workforce has shrunk by about 20,000 positions, or 39 percent, in the last 20 years. Overall, the industry continues to shrink, with Editor & Publisher's DataBook listing 126 fewer daily papers in 2014 than in 2004.⁶⁶

A cursory glance at the market does not appear to support the FCC's proposition that the media ownership rules remain necessary. When the last changes to the media ownership rules were instituted, Facebook and many other social networking sites did not exist. In fact, the FCC's rules may be producing outcomes that counter its goals of competition, localism, and diversity, by preventing other broadcasters – entities with expertise in newsgathering – from investing in struggling properties that might otherwise seek bankruptcy protection. On the other hand, large Internet companies are permitted to acquire struggling news properties without any onerous restrictions. Yet, there is little guarantee that competition, localism, and diversity will be improved by such a purchase. The FCC's rules are intended to promote the health of the industry, but recent actions have shown that FCC inaction is harming the industry instead.

⁶¹ See *Prometheus III*.

⁶² FCC Fact Sheet: Updating Media Ownership Rules in the Public Interest at <https://www.fcc.gov/document/fact-sheet-media-ownership-rules> (FCC Fact Sheet).

⁶³ FCC Fact Sheet.

⁶⁴ Amy Mitchell, *et al.*, "Millennials and Political News: Social Media – the Local TV for the Next Generation?" Pew Research Center for Journalism and Media at <http://www.journalism.org/2015/06/01/millennials-political-news/>

⁶⁵ Pew Research Center for Journalism and Media, State of the News Media 2016 Report, Local TV News: Fact Sheet, at <http://www.journalism.org/2016/06/15/local-tv-news-fact-sheet/>.

⁶⁶ Pew Research Center for Journalism and Media, State of the News Media 2016 Report, Newspapers: Fact Sheet, at <http://www.journalism.org/2016/06/15/newspapers-fact-sheet/>.

IV. STAFF CONTACT

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