U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

October 23, 2017

TO: Members, Subcommittee on Communications & Technology

FROM: Committee Majority Staff

RE: Hearing entitled "Oversight of the Federal Communications Commission"

I. INTRODUCTION

The Subcommittee on Communications and Technology will hold a hearing on Wednesday, October 25, 2017, at 2:00 p.m. in 2322 Rayburn House Office Building. The hearing is entitled "Oversight of the Federal Communications Commission."

II. WITNESSES

- Ajit Pai, Chairman, Federal Communications Commission
- Mignon Clyburn, Commissioner, Federal Communications Commission
- Michael O'Rielly, Commissioner, Federal Communications Commission
- Brendan Carr, Commissioner, Federal Communications Commission, and
- Jessica Rosenworcel, Commissioner, Federal Communications Commission

III. BACKGROUND

The Federal Communications Commission (FCC) is an independent agency established pursuant to the Communications Act of 1934 (Act) to regulate interstate and international communications by radio, television, wire, satellite, and cable. The agency is comprised of five commissioners, appointed by the President and confirmed by the Senate.[1] The agency currently has approximately 1,550 full time employees. The agency was last reauthorized in 1990, at an appropriations level of $119.8 million.[2] The current agency appropriation is $473.7 million.[3]

The FCC is responsible for implementing the Communications Act of 1934, the Telecommunications Act of 1996, and other relevant statutes pertaining to a wide variety of communications issues.

[1] Communications Act of 1934, 47 U.S.C. §154.
[2] Federal Communications Commission Authorization Act of 1990, Pub .L. 101-396 (1990).
[3] Consolidated Appropriations Act of 2017, Pub. L. 115-31 (2017).

IV. ISSUES

A. Net Neutrality

On February 26, 2015, the Commission voted to classify broadband Internet service as a "telecommunications service" subject to regulation under Title II of the Communications Act of 1934. In doing so, the FCC reversed course on decades of bipartisan policy under which the Internet flourished and became one of the greatest economic drivers in the Nation's history.[4] By taking this action and treating Internet service providers as "common carriers," the FCC subjected the Internet to a framework designed to regulate monopoly telephone service providers.

On June 14, 2016, a three-judge panel of the D.C. Circuit Court of Appeals upheld the FCC's order.[5] The request of broadband industry groups for review by the full court was denied on May 1, 2017, with two judges dissenting.[6] On July 20, 2017, the Supreme Court granted the request of broadband industry groups to extend the deadline for appealing the June 14th order to the higher court.[7] On May 18, 2017, the FCC adopted a Notice of Proposed Rulemaking seeking comment on returning the regulation of the Internet to the bipartisan framework that created and nurtured the rapid and unprecedented economic growth for which it is known.[8] The comment period concluded on August 16, 2017.

As the rulemaking process proceeds at the FCC, there is a growing recognition on both sides of the debate that with the prospect of continued challenges before the courts, legislative action could bring needed certainty to ensure the future of the Internet will be as bright as its past under the bipartisan light-handed regulatory approach that fostered its growth and the innovation.[9]

B. Broadcaster Repacking Process

The Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act) granted the

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[4] *See* 47 U.S.C. § 230(b); Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd 11501 (1998) at para. 13.

[5] *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir 2016).

[6] *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir 2016) *reh'g en banc denied*, No. 15- 1063, 2017 WL 1541517, at *1 (D.C. Cir. May 1, 2017).

[7] *See* http://thehill.com/policy/technology/342991-supreme-court-gives-telecom-industry-more-time-to-file-for-review-of-net.

[8] *In the Matter of Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108 (Adopted May 18, 2017) *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-60A1.pdf.

[9] *See e.g., https://www.cnet.com/news/the-net-neutrality-fight-is-on-where-do-we-go-from-here/.* The Internet Association – the trade association that "exclusively represents leading global internet companies on matters of public policy" is open to legislation action. *See* In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, Comments of the Internet Association, at p. 17, (July 17, 2017). *See also*, Internet Association *Statement on Fight for the Future's "Betrayal" Billboards* (July 18, 2017) noting IA's willingness to work with Congress *available at* https://internetassociation.org/statement-fight-for-future-betrayal-billboards/.

FCC authority to carry out the broadcast television spectrum incentive auction. The goal of the incentive auction was to reclaim spectrum from broadcasters and repurpose it for new licenses suitable for mobile broadband in an effort to meet the nation's growing demand for mobile services. The incentive auction was comprised of three major pieces: 1) a "reverse auction" in which broadcasters voluntarily relinquish spectrum usage rights in exchange for incentive payments; 2) a "forward auction" of new licenses made available by the recovered spectrum; and 3) a reorganization or "repacking" of the broadcast licensees into the remaining spectrum bands. The reverse portion of the auction concluded in January 2017, yielding 84 MHz of spectrum. The forward auction concluded in March 2017, raising $19.8 billion. The repacking process began in April 2017 and will conclude in July 2020.

The Spectrum Act established a $1.75 billion Broadcast Relocation Fund for the Commission to reimburse costs incurred by broadcasters who are relocated. The Act also provided a 39-month post-auction transition period for the repacking process. Stakeholders have expressed concern that both the fund and the 39-month deadline will be inadequate to complete the repacking process.

On July 20, 2017, Rep. Pallone introduced the Viewer Protection Act (H.R. 3347) which provides an additional $1 billion in funding to reimburse broadcasters assigned to relocate. It also allows the Commission to modify the transition period for specific broadcasters if the Commission determines it is necessary. On September 7, 2017, the Committee held a hearing to examine the repacking process and heard from both the wireless and broadcast industries on challenges that remain in completing the transition.

C. Administration of the Lifeline Program

The Lifeline program, which provides a discount on phone service for low-income consumers, was implemented in 1985 with the goal to ensure that all Americans have access to phone service. Lifeline reimburses telecommunications carriers for discounting customers' monthly bill for service. Funding for the Lifeline program comes from mandatory fees on telecommunications providers that are usually passed along to consumers through a charge applied to their monthly telephone bills. The Universal Service Administrative Company (USAC), an independent, not-for-profit corporation, administers Lifeline under the FCC's direction.[10] According to USAC's most recent annual report, program expenditures slightly exceeded $1.5 billion in 2016.[11]

On June 29, 2017, the U.S. Government Accountability Office (GAO) released a report critical of the program, confirming long-standing concerns that waste, fraud, and abuse are rampant, and the FCC is failing in its administration and oversight of the program to safeguard

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[10] *See* http://www.usac.org/about/.

[11] *See* http://www.usac.org/_res/documents/about/pdf/annual-reports/usac-annual-report-interactive-2016.pdf. $1.3 billion of this amount is paid to wireless carriers. The FCC opened the program to provide support for prepaid wireless service from non-facilities based carriers beginning in 2005 which led to explosive growth in the program. By 2012 program disbursements reached $2.19 billion. *See* http://www.usac.org/_res/documents/about/pdf/annual-reports/usac-annual-report-2012.pdf.

the program's integrity.[12] Among other things, GAO's audit found: over 30 percent of program participants could not be verified for program eligibility,[13] over 5,500 duplicate subscriptions,[14] and 6,378 individuals reported as deceased were enrolled after the time of death.[15]

Regarding the overall integrity of the program GAO stated that "the FCC has failed since the program's introduction to evaluate Lifeline's performance in meeting program goals – increasing subscribership among low-income consumers while minimizing the burden on ratepayers."[16]

GAO's report on the Lifeline program demonstrates that even with the reforms implemented by the FCC over the last few years to improve the program, significant weaknesses remain, leaving the program susceptible to waste, fraud, and abuse.

Chairman Pai testified before the U.S. Senate Committee on Homeland Security and Governmental Affairs on September 14, 2017, regarding the FCC's lifeline program. In his testimony, he highlighted the challenges faced by Lifeline providers despite oversight by the FCC and USAC. The Chairman stated in his testimony that he "[has] directed USAC to implement aggressive administrative changes to correct the problems that the GAO, [his office], and the FCC's Inspector General have identified."[17]

D. Media Ownership

The FCC regulates the number of radio stations, television stations, and newspapers that a single entity can own within a local market and nationwide. The Commission is statutorily required to review its media ownership rules every four years (Quadrennial Review) to ensure that the rules keep pace with changes in the marketplace. The most recent Quadrennial Review, which was due in 2014, was released on August 25, 2016.[18] Despite undeniable and significant

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[12] United States Government Accountability Office, Telecommunications: *Additional Action Needed to Address Significant Risks in FCC's Lifeline Program*, GAO-17-538 (May 2017) (2017 Lifeline Report) *(available at* http://www.gao.gov/assets/690/684974.pdf. *See also* United 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* and United States Government Accountability Office, Telecommunications*: FCC Should Evaluate the Efficiency and Effectiveness of the Lifeline Program*, GAO-15335 (March 2015) *available at* http://www.gao.gov/assets/670/669209.pdf.
[13] 2017 Lifeline Report at p. 38
[14] *Id.*
[15] *Id.* at p.43.
[16] *Id*. at pp. 16-19.
[17] Testimony of FCC Chairman Ajit Pai before the U.S. Senate Committee on Homeland Security & Governmental Affairs, "FCC's Lifeline Program: A Case Study of Government Waste and Mismanagement," September 14, 2017 http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0914/DOC-346716A1.pdf
[18] *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 14-50; 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182; Promoting Diversification of Ownership in the Broadcasting Services, MB Docket No. 07-294; Rules and Policies Concerning Attribution of Joint*

changes in the media marketplace, which suggest current ownership rules are irrelevant and in fact harmful, the FCC, under Chairman Wheeler, voted to retain most of the rules that have been in place since 2003.

Chairman Pai acknowledged that current media ownership rules are outdated and has committed to review them.[19] The Commission has already taken steps to revise certain rules. For example, on April 20, 2017, the Commission voted to reinstate the Ultra High Frequency (UHF) discount. The UHF discount is tied to the FCC's national television ownership cap, which prohibits a single entity from owning television stations that reach more than 39 percent of the total television households in the United States. For purposes of this cap, a UHF station was only attributed 50 percent of the households it served in its market. In 2016, the FCC eliminated this discount on a party-line vote, dramatically increasing the number of households attributed to UHF stations and therefore compliance with the 39 percent cap. Concluding that the discount and the cap were inextricably linked, the Commission voted to reinstate the discount and vowed to revisit it alongside the national cap.

On December 7, 2016, Chairman Walden and Rep. Yarmuth introduced a bipartisan bill to repeal another antiquated media ownership rule – the newspaper broadcast cross-ownership ban.[20] The bill, an acknowledgement of the significant changes in the media industry over the last several decades, was intended to provide greater flexibility to combine newspapers and broadcasters in order to better compete in the modern communications marketplace.

E. FirstNet

The Spectrum Act created the First Responder Network Authority (FirstNet), an independent authority within the Department of Commerce. FirstNet is tasked with building and operating the nationwide public safety broadband network (NPSBN) using 20 MHz of spectrum in the 700 MHz band under a license with a 10-year term, subject to renewal.[21] The law established the framework for this endeavor and made available up to $7 billion from spectrum auction proceeds for FirstNet to use toward the construction of the NPSBN.[22]

Although the law tasked FirstNet with building and operating the NPSBN, certain functions were assigned to the FCC, including some actions required to get FirstNet operational. To provision FirstNet with the spectrum necessary for the network's operation, the law directed the FCC to grant a license to FirstNet. The Commission granted this license on November 15,

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Sales Agreements in Local Television Markets, MB Docket No. 04-2562014, Second Report and Order, (Rel. Aug. 25, 2016).

[19] Ted Johnson, "FCC Chairman Ajit Pai Interview: Ownership Rules 'Quite Antiquated" Variety, Mar. 14, 2017 *available at* http://variety.com/2017/biz/news/fcc-ajit-pai-media-ownership-1202008630/

[20] *See Bipartisan Bill Takes Aim at 'Disco-Era' Media Regs*, Broadcasting & Cable, *available at* http://www.broadcastingcable.com/news/washington/bipartisan-bill-takes-aim-disco-era-media-regs/161672. Text of the bill is available at https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/analysis/20161207WaldenYarmuth.pdf.

[21] Pub. L. No. 112-96, §6202(a), §6201

[22] Pub. L. No. 112-96, §6413(b)(3)

2012.[23] The law also established within the FCC a Technical Advisory Board for First Responder Interoperability (Interoperability Board), charging it with developing and submitting to the FCC recommended minimum technical requirements to ensure a nationwide level of interoperability for the NPSBN.[24] The FCC established the Interoperability Board and ultimately transmitted the Board's recommendations to FirstNet on June 21, 2012.[25]

Additionally, the FCC was assigned a critical function in the State "opt out" provision of the law. Should a State decide to opt-out, the State must submit its plan to the FCC for approval before moving forward. In August 2016, the FCC commenced a rulemaking seeking comment on the opt-out process to be conducted by the Commission.[26] On June 22, 2017, the FCC released a Report and Order adopting procedures governing the State opt-out process and specifying standards by which the Commission will review State applications.[27] States must submit opt-out applications by December 28, 2017.

F. Process Reform

Over the past several years, this Committee has expressed concern with the lack of transparency, efficiency, and accountability of the FCC. The Committee has worked to conduct oversight and adopt legislation that improves the agency's processes.

In the 110th Congress, the Committee and its Subcommittee on Oversight and Investigations investigated the FCC's procedures, and the Committee ultimately released a report documenting abuses at the agency.[28] The Committee has held hearings on agency process on a regular basis and has considered a variety of bills aimed at reforming FCC processes. The FCC Process Reform Act was introduced and passed the House in the 112th, 113th, 114th, and 115th Congresses. These bills were based on multiple Congressional hearings and investigations, as well as multiple reports from the Government Accountability Office, assessing the transparency and fairness of FCC procedures.[29] On October 11, 2017, the Committee marked up a staff draft of the FCC Reauthorization Act, which included the FCC Process Reform Act of 2017.

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[23] See Universal Licensing System, License Call Sign WQQE234 (Nov. 15, 2012)
[24] Pub. L. No. 112-96, §6203(c)(1)
[25] See Recommendations of the Technical Advisory Board for First Responder Interoperability, PS Docket No. 12-74, Order of Transmittal, FCC 12-68
[26] *See*, Procedures for Commission Review of State Opt-Out Requests from the FirstNet Radio Access Network, Report and Order and Notice of Proposed Rulemaking, PS Docket No. 16-269, FCC 16-117 (August 24, 2016)
[27] *See*, Procedures for Commission Review of State Opt-Out Requests from the FirstNet Radio Access Network, Report and Order, PS Docket 16-269, FCC 17-75 (June 22, 2017)
[28] *See* House Committee on Energy and Commerce, Deception and Distrust: The Federal Communications Commission under Chairman Kevin J. Martin, 110th Cong. (2008).
[29] *See* Government Accountability Office Report 10–249, "Information Collection and Management at the Federal Communications Commission," Mar. 2010 at *http://www.gao.gov/products/GAO-10-249*; Government Accountability Office Report 10–79, "FCC Management: Improvements Needed in Communication, Decision-Making Processes, and Workforce Planning," Jan. 2010 at *http://www.gao.gov/products/GAO-10-79*; Government Accountability Office Report 08-125, "FCC Has Made Some Progress in the Management of Its Enforcement Program but Faces Limitations, and Additional Actions Are Needed," Mar. 2008 at *http://www.gao.gov/products/GAO-08-125*; Government Accountability Office Report 07–1046, "FCC Should Take

Since Chairman Pai's appointment, he has enacted multiple process reforms, based on the legislation and bipartisan input from other commissioners. These reforms include releasing a fact sheet for any proposal to be considered at an open meeting,[30] requiring that any substantive edits to an item on circulation be proposed by a Commissioner instead of staff,[31] requiring a Commission vote before entering into a consent decree on certain items,[32] restrictions of the scope of "editorial privileges' for items that have been adopted by vote,[33] briefing commissioners on open meeting agenda items before the text or content of the items is shared with the public,[34] and a pilot program to release the text of documents to the public in advance of a vote by the Commission at an open meeting.[35] While these changes satisfy some of the concerns surrounding the function of the agency, outstanding issues still exist, including timeliness of decision making, transparency in regards to the status of agency proceedings, policies surrounding the submission of comments to the Commission, public availability of proposed rules, and the use of delegated authority.

G. FCC Emergency Response

Among the core purposes of the Communications Act of 1934 is the promotion of safety of life and property through the use of communications. Indeed, the Act can be traced in part to the Radio Act of 1912, which became law in response to a public safety issue of international import - the sinking of the Titanic. Presently, the law achieves public safety communications needs through statutory mandate and through the FCC's exercise of its statutory authority under the Act.

To that end, the FCC actively, among other things, assesses the vulnerability of communications infrastructure during times of disaster, both natural and man-made, and examines the impact of new technologies to ensure that robust and resilient communications capabilities are available to the Nation's first responders and the public in times of crisis. The FCC's Disaster Information Reporting System (DIRS) provides a venue for wireless, wireline, broadcast, and cable providers to report impacted infrastructure. In consultation with the Federal Emergency Management Agency (FEMA), the FCC determines when to activate DIRS. The system, which operates through a web-based portal, enables communication providers to identify appropriate contacts, which quickens response time; assists parties in receiving help quickly, such as locating generators and fuel; streamlining requests for all government agencies, which tracks providers who are having issues; and providing critical and credible updates to communities being impacted. Recent steps by the FCC to improve Wireless Emergency Alerts

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Steps to Ensure Equal Access to Rulemaking Information," Sept. 2007 at *http://www.gao.gov/products/GAO-07-1046*.

[30] http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0207/DOC-343394A1.pdf.

[31] *Id*.

[32] http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0208/DOC-343421A1.pdf.

[33] http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0209/DOC-343447A1.pdf.

[34] http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0206/DOC-343355A1.pdf.

[35] http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0202/DOC-343303A1.pdf.

and the consideration of additional improvements to WEA may further promote their use as a critical tool to inform the public during the most dangerous of times.

More recently, Chairman Pai announced a Hurricane Recovery Task Force.[36] The internal task force will continue efforts in support of communications services in areas affected, with an emphasis on challenges facing Puerto Rico and the U.S. Virgin Islands. The task force will complement FCC efforts already under way as it supports the Department of Homeland Security and FEMA under the National Response Framework.

H. FCC Reauthorization

The FCC has not bee authorized since 1990. The appropriation level when the Commission was last authorized was $109 million, today it is over $430 million. Recognizing the statute needs to be updated to reflect the current state of the communications marketplace, the Subcommittee held an FCC oversight hearing in July 2017 and reviewed a discussion draft of the FCC Reauthorization Act.

On October 11, 2017, the Subcommittee marked up an updated discussion draft, which includes a number of of bipartisan policies and makes several agency reforms, including updates to the Commission's application and regulatory fee structure, requirements to adopt rules governing agency process, and the establishment of an independent Inspector General. The Subcommittee advanced the discussion draft by a voice vote.

I. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Robin Colwell, Lauren McCarty, or Tim Kurth of the Committee staff at (202) 225-2927.

[36] http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1006/DOC-347113A1.pdf