



MEMORANDUM

To: Members, Energy and Commerce Committee
From: Majority Staff
Re: Communications and Technology Subcommittee Hearing

I. INTRODUCTION

On Thursday, November 30, 2023, at 10:30 a.m. (ET), the Subcommittee on Communications and Technology will hold a hearing in 2123 Rayburn House Office Building. The hearing title is “Oversight of President Biden's Broadband Takeover.”

II. WITNESSES

- The Honorable Jessica Rosenworcel, Chairwoman, Federal Communications Commission
- The Honorable Brendan Carr, Commissioner, Federal Communications Commission
- The Honorable Geoffrey Starks, Commissioner, Federal Communications Commission
- The Honorable Nathan Simington, Commissioner, Federal Communications Commission
- The Honorable Anna Gomez, Commissioner, Federal Communications Commission

III. BACKGROUND

The Federal Communications Commission (FCC) is an independent agency established pursuant to the Communications Act of 1934 to regulate interstate and international communications by radio, television, wire, satellite, and cable. On September 7, 2023, Anna Gomez was confirmed as the 5th FCC Commissioner, restoring a full Commission for the first time during the Biden administration.¹ Congress last reauthorized the FCC in 2018, authorizing \$333 million for fiscal year (FY) 2019 and \$339 million for FY2020.² The FCC currently employs approximately 1,600 full-time equivalents (FTE) and was appropriated \$390,192,000 for FY2023. This is the second time that the FCC has testified before the Committee on Energy and Commerce this Congress.³

IV. SELECTED ISSUES

¹ Press Release, Chair Statement on Senate Confirmation of Anna Gomez, (September 7, 2023), FCC <https://www.fcc.gov/document/chair-statement-senate-confirmation-anna-gomez>.

² Consolidated Appropriations Act, 2018, P.L. 115-141, div. P, tit. I, § 101 (2018).

³ *Oversight of the Federal Communications Commission: Hearing before H. Energy and Commerce Comm., Subcommittee on Communications and Technology*, 118th Cong. (2023) (Hearing Memo), https://d1dth6e84htgma.cloudfront.net/06_21_23_C_and_T_Hearing_Memo_e4358785e0.pdf?updated_at=2023-06-16T17:40:55.873Z.

1. Biden's Broadband Takeover

The FCC's regulatory classification of broadband has been strenuously debated over the past decade. The FCC first classified broadband internet access service as an interstate information service in 2002, meaning it would be regulated under the "light-touch" framework of Title I of the Communications Act of 1934.⁴ This changed in 2015, when the FCC adopted, on a party-line vote, the *Open Internet Order*,⁵ reclassifying broadband as a Title II telecommunications service, which imposes utility-style regulation on services and was originally enacted during the Great Depression to address telephone monopolies.⁶

In 2017, the FCC approved the *Restoring Internet Freedom Order*, which reversed the *Open Internet Order*, reinstating Title I's "light touch" regulatory approach to broadband, while also enacting strong consumer protections.⁷ Since then, investment in broadband networks has reached record highs,⁸ giving consumers faster speeds and lower prices.⁹

On October 19, the FCC approved the *Safeguarding and Securing the Open Internet* Notice of Proposed Rulemaking (NPRM), which proposes to reclassify broadband as a Title II telecommunications service.¹⁰ This proposal matches the 2015 *Open Internet Order*. Earlier that week, Energy and Commerce Republicans sent a letter to the FCC opposing this effort.¹¹ The rule comment period ends on January 17, 2024, with final rules expected in the spring.¹²

2. Digital Discrimination

⁴ See *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4802, para. 7 (2002).

⁵ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, 30 FCC Rcd 5601 (2015).

⁶ See, e.g., *id.* (dissenting statement of Commissioner Ajit Pai) ("Imposing on competitive broadband companies the rules designed to constrain Cornelius Vanderbilt's railroad empire or the continent-spanning Bell telephone monopoly will do nothing but raise the costs of doing business.").

⁷ *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Order, Report and Order, 33 FCC Rcd 311 (2017).

⁸ USTelecom – The Broadband Association, 2022 Broadband Capex Report (Sept. 8, 2023), <https://ustelecom.org/wp-content/uploads/2023/09/2022-Broadband-Capex-Report-final.pdf>.

⁹ Arthur Menko, Business Planning, Inc., USTelecom 2023 Broadband Pricing Index, <https://ustelecom.org/wp-content/uploads/2023/10/USTelecom-2023-BPI-Report-final.pdf> (last accessed Oct. 16, 2023); Jason Shevik, Broadband Pricing Changes: 2016 to 2022, BroadbandNow (May 5, 2023), <https://broadbandnow.com/internet/broadband-pricing-changes>; see also Randolph J. May, Net Neutrality Redux: A Fight Over First Principles, Real Clear Markets, (Oct. 16, 2023), https://www.realclearmarkets.com/articles/2023/10/16/net_neutrality_redux_a_fight_over_first_principles_986000.html.

¹⁰ *Safeguarding and Securing the Open Internet*, WC Docket No. 23-320, Notice of Proposed Rulemaking, FCC 23-83 (rel. Oct. 20, 2023).

¹¹ Letter from Cathy McMorris Rodgers, Chair, H. Comm. on Energy & Commerce, et al, to The Hon. Jessica Rosenworcel, Chairwoman, FCC (Oct. 17, 2023), https://d1dth6e84htgma.cloudfront.net/FINAL_Letter_to_FCC_re_Title_II_Reclassification_5308bd2f7e.pdf.

¹² *Safeguarding*, *supra* note 10.

Section 60506 of the Infrastructure Investment and Jobs Act (IIJA) directed the FCC to “adopt final rules to facilitate equal access to broadband...including preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin.”¹³ On November 15, the FCC adopted final rules on digital discrimination.¹⁴

3. Universal Service Fund

The FCC’s Universal Service Fund (USF) program is a user-fee based support program that subsidizes broadband and telephone services in high-cost, typically rural, areas (High-Cost Program), for low-income households (Lifeline Program), in schools and libraries (E-Rate Program), and at rural health-care facilities (Rural Health Care Program).¹⁵ In 2020, the FCC approved rules creating a 5G Fund, which would auction up to \$9 billion in USF support to carriers to deploy 5G-capable networks in rural America.¹⁶ On September 21, 2023, the FCC approved a Further NPRM seeking to refresh the record and continue the implementation of the 5G Fund.¹⁷

In October, the FCC expanded the use of the E-Rate program by allowing E-Rate dollars to be used to provide Wi-Fi on school buses,¹⁸ despite the limitations stated in Section 254 of the Communications Act.¹⁹ In July, Chair McMorris Rodgers and Senate Committee on Commerce, Science, and Transportation Ranking Member Ted Cruz sent Chairwoman Rosenworcel a letter opposing this proposal.²⁰ Chairwoman Rosenworcel also proposed creating a new pilot program within the USF, outside of E-Rate, to support cybersecurity services for eligible K-12 schools and libraries.²¹

The future of the USF has come into question. Some argue that Congress should appropriate funds for these functions instead of using the current funding model for the USF.²²

¹³ Infrastructure Investment and Jobs Act, P.L. 117-58, div. F, tit. I § 60506(b) (2021) (IIJA).

¹⁴ *Preventing Digital Discrimination in Broadband Internet Access*, GN Docket No. 22-69, Report and Order and Further Notice of Proposed Rulemaking, FCC 23-100 (rel. Nov. 20, 2023), <https://docs.fcc.gov/public/attachments/FCC-23-100A1.pdf>.

¹⁵ Universal Service, FCC (accessed Oct. 30, 2023), <https://www.fcc.gov/general/universal-service>.

¹⁶ *Establishing a 5G Fund for Rural America*, GN Docket No. 20-32, Report and Order, 35 FCC Rcd 12174 (2020), <https://docs.fcc.gov/public/attachments/FCC-20-150A1.pdf>.

¹⁷ *Establishing a 5G Fund for Rural America*, GN Docket No. 20-32, Further Notice of Proposed Rulemaking, FCC 23-74 (rel. Sept. 22, 2023), <https://docs.fcc.gov/public/attachments/FCC-23-74A1.pdf>.

¹⁸ Press Release, FCC Announces E-Rate Funding Can Support Wi-Fi on School Buses (Oct. 19, 2023), <https://docs.fcc.gov/public/attachments/DOC-397825A1.pdf>.

¹⁹ 47 U.S.C. § 254(h)(2).

²⁰ Letter from Ted Cruz, Ranking Member, S. Comm. on Commerce, Sci. & Transp. & Cathy McMorris Rodgers, Chair, H. Comm on Energy and Commerce, to The Hon. Jessica Rosenworcel, Chairwoman, FCC (July 31, 2023), <https://docs.fcc.gov/public/attachments/DOC-396295A1.pdf>.

²¹ Press Release, FCC Chairwoman Rosenworcel Takes Steps to Protect Schools Against Cyber Attacks, FCC (June 26, 2023), <https://docs.fcc.gov/public/attachments/DOC-395069A1.pdf>.

²² See, e.g., Daniel Lyons, *A Common-sense Opportunity to Reform the Universal Service Fund*, American Enterprise Inst. (Jan. 28, 2021), <https://www.aei.org/technology-and-innovation/a-common-sense-opportunity-to-reform-the-universal-service-fund/>.

The USF is also the subject of litigation. Consumers' Research, an advocacy organization, filed lawsuits in the United States Court of Appeals for the Fifth Circuit,²³ Sixth Circuit,²⁴ and Eleventh Circuit,²⁵ arguing that the Congress' delegation of authority to the FCC to provide universal service violates the nondelegation doctrine, and that the FCC cannot rely on a private company (the Universal Service Administrative Company) to administer the USF. The Sixth Circuit ruled in favor of the FCC,²⁶ as did the Fifth Circuit initially,²⁷ before vacating the decision to hear the case *en banc*.

4. Affordable Connectivity Program

The Consolidated Appropriations Act, 2021 established the temporary \$3.2 billion Emergency Broadband Benefit (EBB) program at the FCC, which the IIJA amended and renamed the Affordable Connectivity Program (ACP).²⁸ Congress changed certain program requirements to expand eligibility, reduce the subsidy, and appropriated an additional \$14.2 billion dollars for the ACP. As of September 4, there are over 20.7 million households enrolled in ACP and \$6.9 billion remaining for the FCC to disburse.²⁹ The remaining funds will likely be depleted by early-to-mid 2024. The Biden administration included a request for \$6 billion to fund this program in its supplemental funding request.³⁰

5. Spectrum

One of the most heavily utilized mechanisms for making spectrum available for commercial use is spectrum auctions. The FCC's authority to conduct auctions expired on March 9, 2023. The Committee unanimously passed H.R. 3565, the Spectrum Auction Reauthorization Act of 2023, which would extend auction authority until September 30, 2026, and direct proceeds from future auctions to fund Committee priorities.³¹

²³ *Consumers' Rsch. v. FCC*, No. 22-60008 (5th Cir. Filed Jan. 5, 2022).

²⁴ *Consumers' Rsch. v. FCC*, No. 21-3886 (6th Cir. filed Sept. 30, 2021).

²⁵ *Consumers' Rsch. v. FCC*, No. 22-13315 (11th Cir. filed Oct. 3, 2022).

²⁶ *Consumers' Rsch. v. FCC*, No. 21-3886 (6th Cir. May 4, 2023),

<https://www.opn.ca6.uscourts.gov/opinions.pdf/23a0093p-06.pdf>.

²⁷ *Consumers' Rsch. v. FCC*, 63 F.4th 441 (5th Cir. 2023).

²⁸ IIJA, div. F tit. V § 60501 et seq.

²⁹ Universal Serv. Admin. Co., ACP Enrollment and Claims Tracker (last accessed Sept. 12, 2023),

<https://www.usac.org/about/affordable-connectivity-program/acp-enrollment-and-claims-tracker/#total-enrolled>

³⁰ *White House Calls on Congress to Support Critical Domestic Needs*, The White House (Oct. 25, 2023),

<https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/25/fact-sheet-white-house-calls-on-congress-to-support-critical-domestic-needs/#:~:text=The%20Administration%20continues%20to%20call,and%20development%2C%20and%20national%20security;see%20also%20Summary%20of%20Funding%20Request%20to%20Meet%20Critical%20Needs>

<https://www.whitehouse.gov/wp-content/uploads/2023/10/Summary-of-Funding-Request-to-Meet-Critical-Needs.pdf>.

³¹ Spectrum Auction Reauthorization Act of 2023, H.R. 3565, 118th Cong. (2023),

<https://www.congress.gov/bill/118th-congress/house-bill/3565?q=%7B%22search%22%3A%22H.R.+3565%22%7D&s=4&r=1>.

6. Media Issues

The 2018 Quadrennial Review remains pending due to litigation over the 2014 Quadrennial Review, which did not conclude until the Supreme Court's *FCC v. Prometheus Radio Project* decision in 2021.³² In September, the U.S. Court of Appeals for the D.C. Circuit issued a ruling giving the FCC 90 days to complete the 2018 Quadrennial Review of ownership rules by December 27, 2023, or show cause why the National Association of Broadcasters' (NAB) petition for mandamus should not be granted. The NAB's petition, filed in April 2023, requests that the D.C. Circuit compel the FCC to conclude the agency's still-pending 2018 review.³³

Separately, on December 19, 2014, the FCC released a NPRM seeking comment on a proposal to update its rules to reflect the fact that video services are being provided over the Internet.³⁴ The proposal was never adopted and lies dormant at the FCC. In August, Chair McMorris Rodgers (R-WA) and Chair Bob Latta (R-OH) sent a letter to the FCC urging Chair Rosenworcel not to reopen the proceeding, stating that "if the laws and regulations governing the video marketplace need to be reexamined, it is up to Congress to make updates, not the FCC."³⁵

7. Satellite Communications Licensing

The FCC established the Space Bureau on April 10, 2023.³⁶ Since then, the FCC has adopted new rules governing spectrum sharing among satellite constellations and sought comment on additional rules that are designed to promote market entry, regulatory certainty, and spectrum efficiency through good-faith coordination.³⁷ On September 22, 2023, the FCC directed the Space Bureau to provide interested parties with guidance regarding the FCC's space station and earth station application and authorization procedures.³⁸

8. Rip-and-Replace

³² 141 S.Ct. 1150, 1154 (2021).

³³ David Oxenford, *Court Orders FCC to Complete Quadrennial Review by December 27: What Are the Issues for Review by the Commission?*, Broadcast Law Blog (Oct. 3, 2023), <https://www.broadcastlawblog.com/2023/10/articles/court-orders-fcc-to-complete-quadrennial-review-by-december-27-what-are-the-issues-for-review-by-the-commission/>.

³⁴ *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, Notice of Proposed Rulemaking, 29 FCC Rcd 15995, para. 1 (2014).

³⁵ Letter from the Honorable Cathy McMorris Rodgers and the Honorable Robert E. Latta, U.S. House of Representatives, to Jessica Rosenworcel, Chairwoman, FCC (Aug. 8, 2023), https://d1dth6e84htgma.cloudfront.net/08_08_23_Letter_to_FCC_on_v_MVP_Ds_359d8b2454.pdf.

³⁶ *Establishment of the Space Bureau and the Office of International Affairs and Reorganization of the Consumer and Governmental Affairs Bureau and the Office of the Managing Director*, MD Docket No. 23-12, Order, FCC 23-1 (rel. Jan. 9, 2023), <https://docs.fcc.gov/public/attachments/FCC-23-1A1.pdf>.

³⁷ *Revising Spectrum Sharing Rules for Non-Geostationary Orbit, Fixed-Satellite Service Systems*, IB Docket No. 21-456, Report and Order and Further Notice of Proposed Rulemaking, FCC-23-29 (rel. Apr. 21, 2023), <https://docs.fcc.gov/public/attachments/FCC-23-29A1.pdf>.

³⁸ *Expediting Initial Processing of Satellite and Earth Station Applications*, IB Docket No. 22-411, Report and Order and Further Notice of Proposed Rulemaking, FCC 23-73 (rel. Sept 22, 2023), <https://docs.fcc.gov/public/attachments/FCC-23-73A1.pdf>.

On March 12, 2020, Congress enacted the Secure and Trusted Communications Networks Act (STCNA) of 2019.³⁹ Through the Consolidated Appropriations Act, 2021, Congress provided \$1.9 billion to the FCC to reimburse eligible communications providers to replace communications equipment or services that pose a national security threat.⁴⁰ In July 2022, the FCC announced that submitted requests for reimbursement totaled \$4.98 billion—a shortfall of \$3.08 billion.⁴¹ Congress has not yet funded this shortfall.

9. Combatting Illegal Robocalls

In 2019, Congress enacted the TRACED Act to provide the FCC, the Department of Justice, communications providers, and consumers new tools to combat illegal robocalls.⁴² Since 2017, the FCC has taken several actions on its own to combat illegal robocalls. These include permitting call blocking of robocalls,⁴³ (1) requiring gateway providers bringing foreign traffic into the United States to use call authentication on foreign-originated calls and to perform robocall mitigation,⁴⁴ and (2) requiring all providers to participate in 24-hour traceback.⁴⁵ The FCC also proposed rules requiring providers to offer analytics-based call blocking and block calls based on a reasonable do-not-originate list. In March, the Commission adopted rules requiring mobile providers to block texts purporting to be from numbers on a reasonable do-not-originate list.⁴⁶ The FCC also proposed additional rules to require blocking of additional texts. On October 23, FCC Chairwoman Jessica Rosenworcel announced plans to circulate a Notice of Inquiry exploring how AI affects illegal robocalls, including protecting consumers from such calls under the Telephone Consumer Protection Act (TCPA).⁴⁷

V. KEY QUESTIONS

³⁹ Secure and Trusted Communications Networks Act of 2019, P.L. 116-124 (2020), *codified at* 47 U.S.C. 1601, et seq.

⁴⁰ Consolidated Appropriations Act, 2021 § 906(2).

⁴¹ Letter from Jessica Rosenworcel, Chair, FCC, to the Hon. Maria Cantwell et al. (July 15, 2022), <https://docs.fcc.gov/public/attachments/DOC-385335A1.pdf>.

⁴² Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, P.L. 116-105 (2019).

⁴³ *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Declaratory Ruling and Third Notice of Proposed Rulemaking, 34 FCC Rcd 4876 (2019), <https://docs.fcc.gov/public/attachments/FCC-19-51A1.pdf>.

⁴⁴ *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 et al, Sixth Report and Order and Seventh Further Notice of Proposed Rulemaking, 37 FCC Rcd 6865 (2022).

⁴⁵ *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 et al, Seventh Report and Order and Eighth Further Notice of Proposed Rulemaking and Third Notice of Inquiry, FCC 23-37 (re. May 19, 2023), <https://docs.fcc.gov/public/attachments/FCC-23-37A1.pdf>.

⁴⁶ *Targeting and Eliminating Unlawful Text Messages*, CG Docket No. 21-402, Report and Order and Further Notice of Proposed Rulemaking, FCC 23-21 (rel. Mar. 17, 2023), <https://docs.fcc.gov/public/attachments/FCC-23-21A1.pdf>.

⁴⁷ Press Release, FCC Chairwoman Launches Effort to Better Understand AI's Impact on Robocalls and Robotexts, FCC (Oct. 23, 2023), <https://docs.fcc.gov/public/attachments/DOC-397925A1.pdf>.

- America's broadband networks are performing well, why is it necessary to impose heavy-handed regulations on them?
- How does the FCC plan to enforce its new digital discrimination rules?
- Will the FCC try to impose a 30-year-old law on streamers?

VI. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Kate O'Connor, Slate Herman, Giulia Leganski, John Lin, or Evan Viau of the Committee Staff at (202) 225-3641.