The Committee on Energy and Commerce

Memorandum

May 16, 2014

To: Members, Subcommittee on Communications and Technology

From: Majority Committee Staff

Subject: Hearing on “Oversight of the Federal Communications Commission”

The Subcommittee on Communications and Technology will hold a hearing on Tuesday, May 20, 2014, at 10:30 a.m. in 2123 Rayburn House Office Building entitled “Oversight of the Federal Communications Commission.” Tom Wheeler, Chairman of the Federal Communications Commission, will be the sole witness.

The Federal Communications Commission (FCC or Commission) has been under the leadership of Chairman Wheeler for six months. In that time the Commission has acted on a number of issues central to the future of the communications ecosystem and our economy while deferring action on other issues.

SUMMARY OF ISSUES THAT MAY ARISE AT THE HEARING

Net Neutrality. On May 15, 2014, the Commission adopted a Notice of Proposed Rulemaking (NPRM) regarding “net neutrality” rules. Two previous FCC attempts to impose net neutrality were struck down by the U.S. Court of Appeals for the District of Columbia Circuit. This NPRM offers new justifications for the Commission’s desire to impose regulations on the Internet.

Of particular concern is the Commission’s willingness to consider regulating the Internet under Title II of the Communications Act – rules that find their roots in 19th century railroad regulation and were designed to regulate the world of a telephone monopoly. The practical consequences of reclassification are to give the FCC the authority to second-guess business decisions and to regulate the Internet.

Commercial Spectrum Auctions. Making additional spectrum available for auction to commercial wireless broadband providers has been a focus of this Committee’s efforts to meet the exploding demand for wireless Internet service. In February 2012, the spectrum provisions of the Middle Class Tax Relief and Job Creation Act of 2012 (Spectrum Act) delivered on these efforts by requiring the FCC to auction 65 MHz of spectrum by February 2015 and authorizing the FCC to conduct incentive auctions through September 2022.

Included in the auctions authorized by the Spectrum Act was a one-time incentive auction of broadcast television spectrum. This auction presents a first-of-its-kind opportunity for mobile wireless broadband providers to purchase licenses from broadcasters without the limitations of a broadcasting license. The FCC began the auction process almost two years ago and on May 15, 2014, the Commission adopted a Report and Order establishing rules for the broadcast auction. An examination of the details of the Report and Order, testimony, and questions at the hearing will inform the Committee's view of whether the Commission has satisfied the directives set forth in the Spectrum Act.

Mobile Spectrum Holding Rules. The Commission supplemented its incentive auction rules with the adoption of a separate Report and Order that modifies the Commission's policies and adopts rules regarding the aggregation of spectrum by mobile wireless licensees. The item makes two notable changes to the Commission's spectrum aggregation rules: (1) raises the "spectrum screen" by recalculating what spectrum bands are counted toward wireless spectrum aggregation limits; and, (2) establishes a screen for spectrum below 1 GHz that applies toward bidding limits in the broadcast incentive auction.

Leading up to the May 15, 2014, Commission Agenda Meeting reports indicated that the Chairman's proposed modifications to the spectrum aggregation rules would result in a set aside of spectrum licenses within the auction and prohibit certain bidders from winning those licenses. Such an approach violates the express language of the Spectrum Act which prohibits the FCC from preventing participation in the auction if an interested bidder complies with the statutory requirements and frustrates the goal of the Spectrum Act to bring market forces to bear on the question of how best to allocate valuable spectrum resources.

Members from both sides of the aisle registered concerns with the reported approach. Republicans and Democrats wrote the Commission in the days leading up to the public meeting urging an auction that maximizes participation by all bidders. Although subsequent reports and ex parte letters from industry participants suggest that the Commission's Report and Order as adopted takes a more balanced approach; questions remain as the Commission has not yet made public the text of the item.

Media Ownership. The FCC is charged under the Telecommunications Act with reviewing the limitations on ownership of broadcast properties every four years to determine whether the ownership laws continued to serve the public interest given the changes in the marketplace (the "Quadrennial Review"). Through this process, the Commission must repeal or modify any regulation that is determined to be no longer in the public interest. It has been six years since the Commission last completed a Quadrennial Review and Chairman Wheeler announced that the Commission would end the 2010 Quadrennial Review, and "begin in earnest" the 2014 Quadrennial Review.

Despite the failure of the FCC to complete the statutorily mandated review, the FCC has not let that stand in the way of making major changes to the regulations that govern media ownership. Earlier this year the Commission adopted changes to its "attribution rules" that determine how to count stations when applying the local television ownership rule. The rule limits the number of television stations that a broadcaster may own within a single market and, like the other media ownership rules, is designed to promote competition, diversity, and localism. Despite the transformative impact of the Internet on media, the local television ownership rule has not changed since the late 1990s. Despite the FCC's inability to modernize the local ownership rule, the Commission initiated a rulemaking on eliminating the UHF discount, which would double the impact of each UHF station as they are counted toward ownership limits. The FCC also stated that it would begin counting certain shared service arrangements toward the local ownership cap. In order to comply with local ownership rules, these pronouncements likely will force broadcasters to divest stations and unwind shared service agreements that are beneficial to bringing local content to smaller markets. Neither result benefits the communities served by the broadcasters.

It is unclear that the FCC engaged in adequate process when it chose to limit broadcasters' ability to engage in shared service agreements. In March, the FCC chose to restrict license transfers involving certain shared service agreements, which had long been approved implicitly by the Commission. The National Association of Broadcasters filed suit against the FCC on May 15, stating the Commission's action was "arbitrary and capricious" because the agency failed to follow adequate notice-and-comment procedures required by the Administrative Procedure Act.

<u>FCC Reform</u>. FCC process reform has been an on-going priority of the Committee.

In one of his first actions, Chairman Wheeler identified process reform as a priority. At his direction, a Commission working group was formed to address the issue. It delivered a report on FCC reform to the Chairman on January 4, 2014. Notably, the report claims to "further the goal of having the agency operate in the most effective, efficient, and transparent way possible." When last appearing before the Committee, Chairman Wheeler again voiced his commitment to agency reform.

However, in the short time since that appearance, indications are that self-reform is in jeopardy. For example, early signs of retrenchment began with the release of a statement from the Chief of the Media Bureau announcing a new Commission policy with regard to broadcast TV transactions. As described above, this action, taken at the Bureau level, changed the official policy of the Commission without a vote or deliberation of the Commissioners.

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