



November 13, 2015

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, November 17, 2015, at 10:15 a.m. in 2123 Rayburn House Office Building entitled “Oversight of the Federal Communications Commission.”

II. WITNESSES

- Hon. Tom Wheeler, Chairman
- Hon. Mignon Clyburn, Commissioner
- Hon. Jessica Rosenworcel, Commissioner
- Hon. Ajit Pai, Commissioner
- Hon. Michael O’Rielly, Commissioner

III. DISCUSSION

It has been nearly two years since the Committee first received testimony from the full Federal Communications Commission (FCC or Commission). During the past two years, a number of questions have been raised about the Commission’s adherence to statutory requirements, its progress on improving the agency and implementing process reform, and the working relationship among Commission members. The following issues may be discussed at the hearing.

A. Regulation of the Video Industry

The Commission still has not issued the statutorily mandated quadrennial review of media ownership rules for 2010. The last such review was completed in December 2007, when the FCC completed the 2006 quadrennial review. The Commission has now missed two required reports and decided – without the legal authority to do so – that, instead, it will incorporate the 2010 quadrennial review into the 2014 quadrennial review. While the Commission has not completed a quadrennial review of media ownership rules in almost eight years, the Commission

has adopted controversial policies to regulate the media ownership marketplace, such as the decision to abolish broadcast joint sales agreements and diversity of divestiture to minority owners during the merger review process. The FCC's failure to meet its statutory duties is not limited to the media ownership debate.

i. DSTAC

In the STELA Reauthorization Act of 2014, Congress eliminated the integration ban, a rule adopted by the FCC to implement section 629 of the Communications Act.¹ The legislation was intended to relieve the cable industry of a regulatory burden that failed to achieve its intended purpose, but also to preserve the FCC's authority to implement section 629 and ensure the availability of retail customer premises equipment that could access multichannel video programming distributor (MVPD) services. As such, the legislation directed the FCC to convene a working group of technical experts to "identify, report, and recommend performance objectives, technical capabilities, and technical standards of a not unduly burdensome, uniform, and technology- and platform-neutral software-based downloadable security system designed to promote the competitive availability of navigation devices."² The FCC chartered the Downloadable Security Technical Advisory Committee (DSTAC) on December 8, 2014.

From the outset, DSTAC demonstrated internal conflict. Staff guidance on April 27, 2015, indicated that the advisory committee could not agree on a scope of work. The FCC chose to allow DSTAC to focus on navigation interface issues as well as downloadable security. Some members of DSTAC, generally representing the consumer electronics industry and public interest advocates, argued that DSTAC should focus on navigation interfaces in order to accomplish the goals of section 629.³ The FCC staff sanctioned this approach, despite clear direction from Congress to examine the potential for a uniform downloadable security solution – not navigation interfaces – in order to accomplish the goals of section 629. As such, DSTAC was unable to reach a consensus on recommendations for a downloadable security solution for set-top boxes.⁴

ii. Over-the-Top Video

In addition to the changes the Commission is considering for the set-top box marketplace, it is also looking at larger structural reforms to the video distribution market. Reports indicate that the Commission may consider a Report and Order this fall to redefine MVPD to include linear, over the top (OTT) video providers – companies that provide streaming video over the Internet.⁵ Supporters of this approach see the change in definition as a way for small Internet

¹ 47 U.S.C. § 549.

² STELA Reauthorization Act §106(d)(1), Pub. L. No. 113-200, 128 Stat. 2059 (Dec. 4, 2014).

³ FCC Staff Guidance to DSTAC on the Scope of Report, dated April 27, 2015, at <https://transition.fcc.gov/dstac/fcc-staff-guidance-04272015.docx>.

⁴ See DSTAC Final Report at <https://transition.fcc.gov/dstac/dstac-report-final-08282015.pdf>; see also Public Notice, "Media Bureau Seeks Comment on DSTAC Report," DA 15-982 (rel. Aug. 31, 2015) at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-982A1.pdf.

⁵ In contrast, on-demand video service providers would not be included in the revised definition of MVPD under the proposal.

companies to improve access to programming, assuming that the FCC's program access rules and retransmission rules would then apply to them.⁶

Critics of the proposal argue that the changes would be tantamount to a reclassification of OTT services under an outdated regulatory model. While this shift in regulatory policy has been explained as a way to promote online video as a competitor to traditional cable and satellite providers,⁷ the change would also impose significant burdens on OTT providers. Under the current regulatory regime, MVPDs are subject to a range of rules regarding, among others things, program carriage, good faith negotiations with broadcasters for retransmission consent, the provision of closed captioning and video descriptions, and access to emergency information. If adopted as reported, online video providers offering subscription services delivering multiple linear streams of programming would be subject to these requirements.⁸

Predictably, the over-the-top video distribution market has opposed these new regulations.⁹ Notably, many OTT providers assert that such intervention is not warranted and that it will chill investment and innovation – a concern that has been expressed by both Republicans and Democrats.¹⁰ As one commenter observes, “[t]he NPRM incorrectly assumes that online video content delivery is simply an extension of the current cable television industry.”¹¹ The National Cable & Telecommunications Association and the American Cable Association, trade associations representing MVPDs, are similarly opposed.¹²

B. Broadcast Incentive Auction

The spectrum provisions of the Middle Class Tax Relief and Job Creation Act of 2012 require the FCC to hold an incentive auction – an auction in which a portion of the auction proceeds is offered to existing licensees as an incentive to relinquish its license – for broadcast

⁶ See e.g., <http://www.fierceonlinevideo.com/story/filmons-david-amazon-google-lobbying-heavily-against-regulating-ott-provide/2015-10-13>.

⁷ See <https://www.washingtonpost.com/news/the-switch/wp/2015/07/30/this-idea-by-the-fcc-is-terrifying-apple-amazon-and-microsoft/>.

⁸ Some have noted that even if the FCC's retransmission consent rules were to apply, these companies would not necessarily gain access to the compulsory copyright license granted to cable companies under the Copyright Act (17 USC 111). These companies would still need to negotiate with broadcasters for a copyright license to distribute broadcast programming in addition to negotiating for retransmission consent. See <http://www.lightreading.com/video/ott/to-be-or-not-to-be-an-mvdp/d/d-id/714880>.

⁹ See <https://www.washingtonpost.com/news/the-switch/wp/2015/07/30/this-idea-by-the-fcc-is-terrifying-apple-amazon-and-microsoft/>.

¹⁰ See 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>.

¹¹ See Reply Comments of Amazon.Com, Inc., MB Docket No. 14-261, at pp. 4-5, (filed April 1, 2015) available at <http://apps.fcc.gov/ecfs/document/view?id=60001042144>.

¹² See e.g., <http://www.multichannel.com/news/technology/ncta-fcc-cant-redefine-ovds-mvps/389403>; <http://www.lightreading.com/video/ott/to-be-or-not-to-be-an-mvdp/d/d-id/714880>.

television spectrum.¹³ The FCC began the implementation of the broadcast incentive auction in September 2012 with a Notice of Proposed Rulemaking. The FCC has announced that it plans to start the auction March 29, 2016.¹⁴ Under the FCC's auction process and schedule, the deadline for broadcasters to demonstrate interest in participating in the reverse auction is December 18, 2015.¹⁵

While progress has been made toward the auction's launch, it has not been without controversy and issues that potentially impact the auction's level of success. For example, notwithstanding concerns raised by numerous Members of Congress and both the broadcast and wireless industries, the FCC's adopted an auction plan that could leave a substantial number of broadcasters in the duplex gap – the 6 MHz of spectrum reserved for unlicensed activities and wireless microphones used in television news broadcasts – and even the portion of the revised 600 MHz band reserved for wireless broadband service. This outcome would result in impaired spectrum licenses for forward auction participants and could depress spectrum values given the potential for interference.

Additionally, with this first-of-its-kind auction, the availability of information for potential participants and comfort with new Commission procedures is more critical than ever. Unfortunately, the Commission's proceeding has been plagued with criticism over the Commission's transparency. Access to Commission information necessary for potential participants to make informed decisions and actively participate in the docket has not been timely, or in some cases, forthcoming. The Commission has made significant strides in this respect, but work remains. With the designated March 2016 start date rapidly approaching, little time remains for potential participants to prepare, and a lack of actionable information for bidders could hinder auction revenues. Moreover, in order to ensure a smooth auction with new auction systems, the wireless industry has requested that the FCC conduct multiple auction simulations in advance of the auction.¹⁶

Finally, there remain concerns among Members of Congress and licensees of Low-Power Television and broadcast translator stations that the Commission's proposal to reserve at least one broadcast channel in each market for unlicensed use will have an adverse impact on consumers of over-the-air television. Unfortunately, this proposal appears to have the support of the FCC's majority, despite potential legal and policy concerns raised by Congress and the FCC's minority commissioners.

C. Universal Service Support for Rural America

In 2010, the FCC began the complex undertaking to reform and modernize the programs supported by the universal service fund. In November of 2011, the FCC issued an order

¹³ See Middle Class Tax Relief and Job Creation Act of 2012, P.L. 112-96, §6404 (2012).

¹⁴ See <http://www.fiercewireless.com/story/fccs-wheeler-supremely-confident-incentive-auction-will-take-place-march/2015-09-09>.

¹⁵ <https://www.fcc.gov/document/application-procedures-broadcast-incentive-auction>.

¹⁶ See <http://thehill.com/policy/technology/overnights/259343-overnight-tech-pai-says-fcc-should-be-willing-to-postpone>.

reforming the distribution of universal service subsidies to carriers in high-cost and rural areas of the country and expanding the program to support broadband. These actions were, according to the FCC, the beginning of the transition for rate-of-return carriers toward a more incentive-based form of regulation to encourage efficient operation and broadband deployment.

As the FCC has contemplated reform in the intervening years, Members of Congress from both parties have called for immediate, targeted reform through revisions to the current rules to permit the funding for stand-alone broadband.¹⁷ Recent reports suggest that the Chairman will present the Commission with an item adopting some form of the bifurcated approach before year's end. Rural carriers have suggested that, given the complexity of the proposals being considered, more time is necessary to ascertain the impact of those proposals on rural broadband investment. Additionally, other concerns have been raised with regard to the FCC's development of the cost model focusing on whether model inputs adequately represent carrier costs.

D. FCC Management

The Committee is committed to improving the FCC's operation and management. H.R. 2583, the FCC Process Reform Act of 2015, passed the Committee in June and will be on the Floor the Week of November 16.¹⁸ Despite the Committee's bipartisan oversight and reform efforts, the FCC continues to suffer from significant failings, and the Commission's efforts to date have produced few, if any, institutional changes.

i. FCC Efforts at Self Reform

In one of his first acts upon confirmation, Chairman Wheeler identified process reform as a major priority and directed one of his special advisors to head a temporary working group and submit a report on FCC reform by early January 2014.¹⁹ The Commission released the report to the public on February 14, 2014, identifying a number of areas in which Commission process and transparency could be improved. However, following the release of the report, little was done to implement reforms. As the list of process failings grew, continued calls for reform from both inside and outside the agency prompted the formation of a second task force on reform in March 2015 to respond to what Chairman Wheeler called "some legitimate issues."²⁰ This

¹⁷ See Letter from the Honorable Kevin Cramer and the Honorable Don Young, and other Members of the United States House of Representatives to the Honorable Tom Wheeler, Chairman, Federal Communications Commission, May 12, 2015 available at <http://cramer.house.gov/media-center/press-releases/cramer-calls-for-fcc-reform-of-universal-service-fund>. See also Letter from the Honorable John Thune and the Honorable Amy Klobuchar and other Members of the United States Senate to the Honorable Tom Wheeler, Chairman, Federal Communications Commission, May 11, 2015 available at <http://www.commerce.senate.gov/public/cache/files/15daff5b-4d50-4d14-a17d-85647f3ff97a/5F944C3A243A8E0A0C87755E172D99C5.thune-klobuchar-standalone-rural-bb-2015-3-.pdf>.

¹⁸ See Federal Communications Commission Process Reform Act of 2015, H.R. 2583, 114th Cong. (2015).

¹⁹ See Opening Day at the FCC: Perspectives, Challenges, and Opportunities by: Tom Wheeler, FCC Chairman November 5, 2013 available at <https://www.fcc.gov/blog/opening-day-fcc-perspectives-challenges-and-opportunities>.

²⁰ See FCC Reauthorization: Oversight of the Commission: Hearing Before the Committee on Energy and Commerce, United States House of Representatives, 114th Cong. 34 (2015) (statement of Tom Wheeler, Chairman,

effort, which incorporated staff from each commissioner, was instructed to “look at how other similarly situated agencies conduct business, with an eye toward improving the FCC's processes.”²¹ On November 4, 2015, the Chairman provided the Committee with a status update on the FCC’s own internal process reform efforts, explaining that it is making “tangible, impactful progress.”²² Unfortunately, the letter does not contain any material to corroborate that any progress has, in fact, been made despite two years of FCC effort on this topic.

ii. Special Access Docket Processes

The Committee has spent a significant amount of time detailing the Commission’s process failings, both through oversight hearings and through the legislative process of adopting FCC process reform legislation in three successive Congresses.²³ While the Committee remains concerned as process failures continue to mount, it is particularly concerning that these failures seem to have emerged in new form. Through its history with process reform, the Committee has challenged the “data-dump” – the Commission’s practice of insertion significant new data at the last minute into the record of a rulemaking before Commission action. This practice denies participants the opportunity to adequately review the data and participate meaningfully in the decision-making process.²⁴

Recent FCC actions with regard to its inquiries into the special access marketplace raise similar concerns of denial of meaningful participation. There are currently two FCC inquiries into the special access marketplace. In the first, the FCC is conducting a broad inquiry into the competitiveness of the marketplace through a broad data collection on market participants, seeking information on location and pricing data. In the second related proceeding, the FCC is conducting an investigation into certain special access tariffs offered by four of the five largest incumbent local exchange carriers.

Federal Communications Commission) <http://docs.house.gov/meetings/IF/IF16/20150319/103182/HHRG-114-IF16-20150319-SD003.pdf>.

²¹ See <http://www.broadcastingcable.com/news/washington/wheeler-creates-process-task-force/138944>.

²² See Letter to the Honorable Greg Walden, Chairman, Subcommittee on Communications and Technology, Committee on Energy and Commerce and the Honorable Anna G. Eshoo, Ranking Member, Subcommittee on Communications and Technology, Committee on Energy and Commerce, United States House of Representatives, from the Honorable Tom Wheeler, Chairman, Federal Communications Commission, November 4, 2015.

²³ See Federal Communications Commission Process Reform Act of 2105, H.R. 2583, 114th Cong. (2015). See also Federal Communications Commission Process Reform Act of 2014, H.R. 3675, 113th Cong. (2014); Federal Communications Commission Consolidated Reporting Act of 2013, H.R. 2844, 113th Cong. (2013); Federal Communications Process Reform Act of 2012, H.R. 3309, 112th Cong. (2012); and Federal Communications Commission Consolidated Reporting Act of 2012, H.R. 3310, 112th Cong. (2012). The House of Representatives passed the Federal Communications Commission Consolidated Reporting Act, H.R. 734, for the third time with unanimous approval on Feb. 24, 2015.

²⁴ See e.g., Letter from The Honorable Fred Upton Chairman, Committee on Energy and Commerce and The Honorable Greg Walden Chairman Subcommittee on Communications and Technology, Committee on Energy and Commerce, United States House of Representatives to The Honorable Julius Genachowski, Chairman Federal Communications Commission, November 28, 2011 available at http://archives.republicans.energycommerce.house.gov/Media/file/Letters/112th/112811_FCC_processes.pdf.

Although the deadline for submission of data in the FCC's broad inquiry was February 2015, the FCC did not begin providing access to the significant amount of data collected – including location and pricing for special access facilities and services – until October. The Commission's procedures for this docket require the submission of initial comments on January 6, 2016. Interest parties have raised concerns with the Commission that it is unrealistic to expect them to be able to analyze and meaningfully comment on this data in a six week period, which includes two major holiday seasons – data that took nearly three years for the carriers to compile and more than six months for the FCC to make available. Moreover, because the data is commercially sensitive and viewing is restricted to in-person review by certain third-parties, reports that the data is not stable and that key tools are missing from the FCC's database are particularly troubling and would appear to challenge the ability of participants to review the data and meaningfully respond.

IV. STAFF CONTACT

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