

MEMORANDUM

TO: MEMBERS OF THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

FROM: REPUBLICAN STAFF

DATE: MARCH 13, 2015

SUBJECT: COMMITTEE HEARING ON “OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION”

On Wednesday, March 18, 2015, at 2:30p.m., the Committee will hold a hearing on “Oversight of the Federal Communications Commission” in Room 253 of the Russell Senate Office Building. Chairman Thune will preside.

The following witnesses will testify before the Committee:

- The Honorable Mignon Clyburn – Commissioner, Federal Communications Commission (FCC)
- The Honorable Michael O’Rielly – Commissioner, FCC
- The Honorable Ajit Pai – Commissioner, FCC
- The Honorable Jessica Rosenworcel – Commissioner, FCC
- The Honorable Thomas Wheeler – Chairman, FCC

The hearing will provide members an opportunity to directly question and hear from all five FCC commissioners regarding the agency’s Fiscal Year (FY) 2016 budget request, its completed and ongoing rulemaking and enforcement activities, and options to improve its processes and efficiency. Policy topics likely to be discussed during the hearing include Internet regulations, universal service program reform, spectrum auctions, and municipal broadband. The hearing will also build the Committee’s public record as it works toward legislation to reauthorize the agency.

FEDERAL COMMUNICATIONS COMMISSION

The FCC is an independent U.S. government agency established by the Communications Act of 1934 for the purpose of regulating interstate communications by radio, television, wireline, satellite, and cable in the United States. The FCC is directed by five commissioners nominated by the President and confirmed by the Senate for five-year terms (except when filling an unexpired term). The President designates one of the commissioners to serve as Chairperson, and only three commissioners can be members of the president’s political party.

The current Commissioners, in order of term expiration, are: Jessica Rosenworcel (Democrat, June 2015); Ajit Pai (Republican, June 2016); Mignon Clyburn (Democrat, June 2017); Chairman Thomas Wheeler (Democrat, June 2018); and, Michael O’Rielly (Republican, June 2019). Commissioners may continue to serve beyond their term’s expiration until a replacement is confirmed or until the end of the next legislative year following their term’s expiration, whichever is earlier.

The FCC’s staff is organized by function, and distributed across seven bureaus and eleven offices, including the Office of the Inspector General (OIG). The FCC’s organizational chart, a summary of

baseline funding, and staffing for individual bureaus and offices can be found in the supplement accompanying this hearing memo.

FISCAL YEAR 2016 BUDGET REQUEST

Under the FY2015 omnibus spending bill, the FCC is appropriated \$339.8 million,¹ including \$11.1 million for salaries and expenses of the OIG. The FCC currently employs 1,708 staff. In addition to its baseline FY2015 appropriation, the FCC is allowed to retain up to \$106 million from the proceeds of spectrum auctions to conduct its Spectrum Auctions Program.² The total congressional appropriation for the FCC for FY2015 is \$445.8 million.

For FY2016, the FCC is requesting a total congressional appropriation of \$530 million.³ This would be \$84.2 million more than FY2015, a 19% increase. Specifically, the FCC seeks a 14% increase of its baseline, to \$388 million; a 10% increase for its Spectrum Auctions Program, to \$117 million; and, a \$25 million transfer from the Universal Service Fund (USF) to offset the agency's work related to the universal service program. The OIG would receive a total funding increase of 15%, to \$12.8 million. The FCC estimates a staffing level of 1,671 full-time equivalents for FY2016, a reduction of 37 from the current level. Within this overall staff level, OIG would increase its staff to 56 from its current 48.

A substantial portion of the FCC's budget increase is a one-time request to spend \$51.36 million to make modifications to ("restack") its existing headquarters,⁴ the lease for which expires in October 2017. As the FCC explains, "If the Commission does not move or restack the building before the termination of the lease, GSA has informed the Commission that the new lease payments are likely to increase by approximately \$9 million per year. It is estimated that the move or restacking will provide up to \$119 million in total savings over fifteen years."

Since FY2009, Congress has required the FCC to assess annual regulatory fees on telecommunications entities to recover its entire appropriation. The entities from which the FCC collects fees fall into one of four main industry sectors (international, media, wireless, and wireline) and are assigned to one of more than 80 fee categories. Each year, the FCC issues a Notice of Proposed Rulemaking (NPRM) in which it proposes how it will assess fees by industry and fee category for that fiscal year. The most recent Regulatory Fees Report & Order was released on August 29, 2014.⁵ An NPRM to assess FY2015 fees to recover the \$339.8 million appropriation has not yet been issued.

ISSUES AND BACKGROUND

The full Commission last appeared before the Committee for an oversight hearing in March 2013. At that hearing, members focused on a variety of issues, including: reforming the universal service Schools & Libraries Program (E-rate); spectrum auctions and associated funding for the First Responder Network Authority (FirstNet) and deficit reduction; international Internet governance issues; universal service High Cost Program reforms and Connect America Fund implementation; the FCC's quadrennial media ownership review; FCC process reform; mobile phone unlocking; call completion; video

¹ FY2015 Omnibus, PL 113-235: <https://www.congress.gov/bill/113th-congress/house-bill/83/text>

² Section 309(j) of the Communications Act permits the FCC to utilize auction proceeds to fund contracts for services and personnel performing work in support of auctions authorized under that section.

³ FCC FY2016 Budget Estimates: https://apps.fcc.gov/edocs_public/attachmatch/DOC-331817A1.pdf

⁴ An additional \$19,612,782 will be requested in FY2017, for a total modifications cost of \$70,971,499.

⁵ FY2014 FCC Regulatory Fees Report & Order: <http://www.fcc.gov/document/assessment-and-collection-regulatory-fees-fiscal-year-2014>

programming blackouts; and political advertising disclosure. Brief descriptions of some of the issues that may arise at the hearing follow below.

Open Internet Order

On February 26, the FCC voted along partisan lines, 3-2, to adopt a Report and Order that re-classifies broadband Internet access service as a telecommunications service under Title II of the Communications Act for the purpose of imposing broad and unprecedented regulations on broadband Internet providers. The text of the 400 page Order was made public on March 12.⁶ [NOTE: the Committee's review of the text was not yet complete by the time this memo was published; please contact committee staff with any questions about the Order's details.]

The FCC previously attempted to impose "net neutrality" Internet regulations with its 2010 Open Internet Order. In November 2011, Senate Democrats blocked consideration of a resolution disapproving the FCC's Internet regulations, and the motion failed on a 46-52 party line vote.⁷ Republican disapproval of that FCC action was subsequently vindicated by the D.C. Circuit Court of Appeals in January 2014, when the court found the 2010 Order exceeded the FCC's statutory authority.

Litigation to challenge the process and substance of the 2015 Open Internet Order is expected. In Congress, Republican leaders in the Senate and House are jointly pursuing legislation that provides the FCC with authority to protect Internet users, promotes investment, and encourages innovation without having to rely upon Title II regulations designed to manage the 20th century's monopoly telephone service.

FCC Reauthorization

The FCC has been operating with an expired fiscal authorization for 24 years, which represents the oldest expired authorization of any department, agency, or program within the Committee's jurisdiction. The Federal Communications Commission Authorization Act of 1990 (P.L. 101-396) authorized appropriations for the agency for FY1990 and FY1991. Since then, a number of bills to reauthorize the agency have been introduced in Congress but not enacted. The most recent was S. 1264, the FCC Reauthorization Act of 2003, which was introduced by then-Commerce Committee Chairman John McCain and reported favorably by the Committee on a voice vote. In January, Chairman Thune expressed his intent to "get Congress back in the habit of regularly reauthorizing the Commission" and is expected to develop legislation to reauthorize the agency this year.⁸

AWS-3 Spectrum Auction

The Middle Class Tax Relief and Job Creation Act of 2012 (*aka* "the Spectrum Act") directed the FCC to auction several specific bands of spectrum. On January 29, the FCC completed an auction of Advanced Wireless Service (AWS) licenses in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz bands (collectively, the "AWS-3" bands).⁹ This auction raised a total of \$41.3 billion, with 31 winning bidders winning a total of 1,611 licenses. No restrictions were placed on bidders for the auction, and licenses were made available in a variety of geographic sizes. The record-setting proceeds from the AWS-3 auction exceed the various spending and deficit reduction obligations set forth by the Spectrum Act, including for FirstNet (\$7 billion for FirstNet and \$20.4 billion for deficit reduction).

⁶ FCC 2015 Open Internet Order: <http://www.fcc.gov/document/fcc-releases-open-internet-order>

⁷ Senate Roll Call Vote, November 10, 2011:

http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00200

⁸ See Chairman Thune's remarks at the American Enterprise Institute, January 28, 2015:

http://www.commerce.senate.gov/public/?a=Files.Serve&File_id=281c1589-7535-4b9d-8197-3a846a97e8db

⁹ FCC Public Notice, January 30, 2015: https://apps.fcc.gov/edocs_public/attachmatch/DA-15-131A1.pdf

Connect America Fund Implementation

A major component of the FCC's 2011 USF Transformation Order was the creation of the Connect America Fund (CAF), which makes funds available to "price cap" phone companies for broadband deployment.¹⁰ The CAF replaced the legacy USF system by which these providers received subsidies to provide "plain old telephone service." Phase I of CAF was implemented in July 2012 and authorized approximately \$439 million to eligible carriers.

Rules for Phase II have yet to be finalized by the FCC. This phase will give price cap carriers a right of first refusal to funding which, if declined, will be competitively bid to other telecommunications providers. In December 2014, in advance of Phase II rules, the FCC changed the broadband speed benchmark and build-out timeline requirements for CAF recipients (4 to 10 megabits per second). A bipartisan group of senators has expressed concern that increasing the speed benchmark was not offset by an adequate extension of build-out deadlines.¹¹ It is important to note that satellite, cable, competitive wireless, and smaller rural phone companies have thus far been ineligible to receive support through the CAF.¹²

E-rate Program Expansion

In December 2014, by a partisan 3-2 vote, the FCC increased universal service fees on the American public by more than \$15 billion over the next decade.¹³ Specifically, this post-election action by the FCC raised the annual E-rate spending cap from \$2.4 billion to \$3.9 billion, plus future indexing for inflation. This 63% fee increase will, in large part, fund expansions to the program adopted by the FCC in July 2014, by another partisan 3-2 vote.¹⁴ The July order obligated \$5 billion in E-rate spending to provide Wi-Fi capabilities to school classrooms and libraries. At the time, the FCC suggested this new spending would be fully offset by using previously unobligated funds within the E-rate program and efficiencies produced by reforming support for legacy services.

The E-rate program lacks sufficient metrics to determine its effectiveness and need. The program is also not based on the actual costs of service, but rather a system whereby the relative poverty of a school's student population is used as a proxy for such school's relative ability to afford communications services. E-rate's distribution scheme consistently results in lower funding for relatively poor rural areas of the country and higher funding for relatively wealthy and densely populated cities.

Broadcast Spectrum Incentive Auction

The Spectrum Act also gave the FCC authority to conduct incentive auctions, including one to repurpose spectrum in the 600 MHz band from television broadcasting to commercial broadband services. The broadcast incentive auction would provide TV broadcasters the opportunity to voluntarily give up some or all of their spectrum rights (in a reverse auction) in exchange for a portion of the auction proceeds generated by wireless companies bidding (in a forward auction) to use that spectrum for mobile broadband. Those broadcasters that do not participate in the incentive auction may have their TV channel assignments changed to create a more efficient spectrum band. This process, known as

¹⁰A price cap carrier is a carrier not subject to rate base/rate-of-return regulation. A price cap carrier is limited in its ability to raise rates on the basis of a formula defined by the FCC. The extent to which a carrier can raise rates depends on its growth in expenses and a productivity growth factor.

¹¹ See letters from Kansas, New Hampshire, New Mexico, South Dakota, Washington, and Wisconsin delegations.

¹² Rural local telephone companies still operate under the legacy USF support mechanisms for "rate of return" carriers. The USF Mobility Fund has been available to wireless carriers, with Phase I of that Fund awarding \$300 million and Phase II yet to be implemented.

¹³ FCC E-rate Cap Increase: <http://www.fcc.gov/document/fcc-releases-order-modernizing-e-rate-21st-century-connectivity>

¹⁴ FCC E-rate Expansion: <http://www.fcc.gov/document/fcc-releases-e-rate-modernization-order>

“repacking,” concerns many broadcasters because of its potential financial impact and viewer disruption. The broadcast incentive auction was originally expected to be conducted in 2014. It is now expected to take place in 2016. On May 15, 2014, the FCC adopted many rules for the auction by another partisan 3-2 vote.¹⁵ Many concerns surround the rules, including the extent to which the FCC will restrict certain wireless bidders from fully participating and favor certain companies by allowing them to obtain licenses at below-market value. Additionally, the D.C. Circuit heard arguments last week from the National Association of Broadcasters and the FCC regarding whether the incentive auction rules adequately protect the population coverage of television stations that are repacked.

Municipal Broadband

On February 26, in addition to its reclassification decision, the FCC voted along partisan lines, 3-2, to preempt parts of duly enacted state laws in North Carolina and Tennessee that the FCC found too restrictive on cities within those states when expanding municipal broadband networks.¹⁶ The Supreme Court, in its 2004 opinion in *Nixon v. Missouri*, held that the FCC does not have authority to preempt state laws that restrict the provision of municipal telecommunications networks. Litigation to challenge the FCC’s preemption of state laws is expected.

¹⁵ FCC Incentive Auction Report and Order: <http://www.fcc.gov/document/fcc-adopts-rules-first-ever-incentive-auction>

¹⁶ FCC 2015 Municipal Broadband Order: <http://www.fcc.gov/document/fcc-releases-order-preempting-tn-nc-municipal-broadband-restrictions>