



The Committee on Energy and Commerce
Internal Memorandum

July 6, 2012

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 Tuesday, July 10, 2012, at 10:15 a.m. in 2123 Rayburn House Office Building entitled “Oversight of the Federal Communications Commission.” One panel of witnesses will testify.

I. **WITNESSES**

Chairman Julius Genachowski
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai

With the May 7, 2012, confirmation of commissioners Rosenworcel and Pai, the Federal Communications Commission (FCC) is back to a full complement of five commissioners. This will be the first hearing with the commissioners since their appointments. What follows is a summary of some of the issues that may arise at the hearing.

II. **ISSUES**

Commercial Spectrum Auctions. The FCC’s 2010 National Broadband Plan recommended making 300 MHz of additional spectrum available by 2015 and 500 MHz available by 2020 to meet the exploding demand for wireless Internet service. Indeed, according to a May 2012 Cisco report, wireless will account for 61 percent of global Internet traffic by 2016, up from 45 percent in 2011. To begin channeling additional spectrum toward that growing need, this subcommittee succeeded in including spectrum provisions in the Middle Class Tax Relief and Job Creation Act of 2012. Among other things, those provisions require the FCC to auction 65 MHz of particular spectrum by February 2015 and authorize the FCC to conduct incentive auctions through September 2022. In an incentive auction, the government shares proceeds with licensees that voluntarily return spectrum for auction. The spectrum provisions authorize both ongoing incentive auctions in which any licensee may relinquish spectrum, as well as a special, one-time incentive auction in which only television broadcasters may relinquish spectrum. To facilitate clearing of contiguous spectrum in the broadcast incentive auction, the legislation creates a \$1.75 billion fund to relocate broadcasters that do not choose to relinquish spectrum. According to some reports, the FCC may begin issuing decisions as early as this fall to start implementing a broadcast incentive auction.

The spectrum provisions of the Middle Class Tax Relief and Job Creation Act also included provisions requested by Federal users of spectrum to improve the Commercial Spectrum Enhancement Act (CSEA). The CSEA authorizes the National Telecommunications and Information Administration (NTIA) to coordinate the relocation of Federal users of spectrum so that the FCC may auction the cleared spectrum for commercial purposes. Some of the auction proceeds pay for the costs of relocating the government users. The CSEA was used successfully in 2006 to free spectrum for what is called Advanced Wireless Service. The NTIA issued a report in March 2012, however, estimating that clearing Federal users from spectrum between 1755 to 1850 MHz—frequencies often identified as desirable by commercial providers—could cost \$18 billion and take 10 years. The NTIA therefore recommended sharing of Federal spectrum rather than outright clearing, although it acknowledged that it based those estimates on agency reporting without conducting an independent analysis. It also has acknowledged that agency cost and time estimates surrounding the 2006 clearing were initially overblown. Chairman Genachowski has nonetheless echoed the NTIA's sentiment, saying in a May 2012 speech that sharing government spectrum, as opposed to clearing it, may be the most promising way forward. To drill down deeper into these issues, T-Mobile has asked the FCC on behalf of the wireless industry for permission to test the feasibility of spectrum sharing in the 1755-1780 MHz band.

Interoperable Public Safety Broadband Network. The Middle Class Tax Relief and Job Creation Act of 2012 also provided for creation of a nationwide interoperable public safety broadband network overseen by a quasi-governmental entity called FirstNet, housed within the NTIA. The legislation required the FCC to establish a technical advisory board to recommend minimum technical interoperability requirements for the network. The FCC approved the board's recommendations on June 21. FirstNet may implement those recommendations, but is not required to do so. The NTIA must appoint the FirstNet board by August 20. There are no deadlines for the rollout by FirstNet of the public safety network.

Prior to passage of the Middle Class Tax Relief and Job Creation Act, some of the spectrum to be used by FirstNet was licensed by the FCC to an entity called the Public Safety Spectrum Trust (PSST) for an earlier attempt at a nationwide, interoperable public safety broadband network. The slow pace of progress prompted some State and local public safety entities to seek FCC waivers to begin building local broadband networks using the PSST spectrum. These local networks would eventually be integrated into the nationwide network. To date, the FCC has granted more than 20 waivers. Other waiver requests are still pending. To facilitate construction, some of the waiver recipients also sought broadband grants from the NTIA through the American Recovery and Reinvestment Act's Broadband Technology Opportunities Program (BTOP). The waiver and grant recipients were in various stages of implementation when Congress passed the Middle Class Tax Relief and Job Creation Act, which requires the FCC to transfer the PSST spectrum to FirstNet. The legislation does not set a deadline for the spectrum transfer and it may be years before FirstNet is up and running, let alone has built out the network in every part of every State. NTIA Administrator Larry Strickling has temporarily suspended the BTOP grants, citing passage of the Middle Class Tax Relief and Job Creation Act and arguing that the projects might turn out to be incompatible with whatever FirstNet deploys in the future. He has also argued that the FCC should revoke the waivers it has issued and refrain from granting additional ones. The FCC has opened a proceeding to determine what steps to take regarding the waivers. The pleading cycle has closed but the FCC has not yet rendered a decision. Grant recipients question the NTIA's authority to suspend BTOP funding for recipients who remain in compliance with their original grant terms. They argue they should be allowed to proceed so long as their networks will be interoperable. Waiver recipients and

applicants similarly argue they should be allowed to proceed, at least until FirstNet has built out to their jurisdictions.

Universal Service. The FCC issued an order in November 2011 reforming the distribution of universal service subsidies to carriers in high-cost and rural areas of the country and expanding the program to broadband. The Commission continues to implement the order. The FCC argues that the order will promote broadband deployment while either reducing the size of the high-cost fund—which currently costs consumers approximately \$4.5 billion per year—or at least slowing its growth. Cable, wireless, and satellite companies argue that the reforms did not go far enough, either because the order continues to subsidize deployment where unsubsidized companies already provide service or because the order neglects to sufficiently subsidize them. Rural carriers argue that the order went too far, reducing their subsidies below sustainable levels. Separately, the FCC released a notice of proposed rulemaking in April 2012 seeking comment on how to reform assessment of contributions to the Universal Service Fund. The pleading cycle closes August 7.

Special Access. “Special access” is a wired telecommunications service that provides a dedicated, high-capacity connection to business customers. Other wired and wireless phone companies sometimes buy special access as a component to provide their own competing phone and broadband Internet services. Special access services were under price-cap regulation until 1999, when a Democrat-led FCC found the market was competitive in certain places and created a deregulatory mechanism allowing pricing flexibility. Where competitive triggers are met, incumbent providers are relieved of some of their rate regulation, but they are not allowed to discriminate and must offer the same terms to similarly situated customers. Opponents of the pricing flexibility regime argue that the incumbents face little or no competition in the special access market, that prices are too high, and that the pricing flexibility triggers focus on the wrong measures of competition. The incumbents argue that the pricing flexibility regime is working; that prices have gone down, not up; that re-regulation would be a mistake because the artificially lowered rates would deter cable, wireless, and other providers from investing in their own facilities; and that those advocating re-regulation have the burden of proving the current regime is flawed. The Chairman’s office circulated a draft item last month that would have frozen the granting of further pricing flexibility provisions pending re-examination of the regime. AT&T and Windstream objected on the grounds that they had pricing flexibility petitions pending that met the current criteria and that the FCC should not change the rules of the game midstream. In the face of such concerns, the FCC granted the pending petitions and is reported to be working on a revised item that would require collection of additional data to evaluate the current regime.

Video and Broadcast Ownership Regulation. As discussed at the June 2012 Future of Video hearing, the competitive and technological landscape has changed drastically over the last two decades. This calls into question not only traditional cable regulation, such as rules governing program access and program carriage, but also limitations on broadcast media ownership. Indeed, the Third Circuit held in 2004 that reasoned analysis supports the FCC’s previous determination that the absolute ban on newspaper-broadcast cross-ownership undermines localism and is no longer needed to ensure diversity of viewpoints. In December 2007, then-Chairman Martin sought to relax the ban in favor of a case-by-case review. Cross-ownership would be presumed permissible in the 20 largest markets and presumed impermissible in smaller markets. He proposed to retain the other restrictions, namely the dual network, national and local TV, and local radio ownership restrictions. The U.S. Court of Appeals for the Third Circuit overturned the proposal to relax the newspaper-broadcast cross-ownership restriction in its July 2011 *Prometheus Radio Project v. FCC*

ruling, however, on the grounds that the editorial Chairman Martin used to propose the revision did not constitute sufficient notice under the Administrative Procedure Act. The Third Circuit ruled that the FCC's decision to retain the other limits was not so arbitrary and capricious as to violate the Administrative Procedure Act. This does not necessarily mean, however, that the restrictions represent good policy.

As part of its statutorily mandated quadrennial review, the FCC proposed in December 2011 to relax the newspaper-broadcast cross ownership rule largely as proposed by Chairman Martin and to eliminate the radio/TV cross-ownership rule. It proposed to retain, however, the dual network, national and local TV, and local radio ownership restrictions.

Cable Spectrum Transfer. SpectrumCo—a coalition of cable companies—is seeking FCC approval to transfer 122 Advanced Wireless Service (AWS) licenses to Verizon for \$3.6 billion. SpectrumCo originally acquired the licenses at auction in 2006 for \$2.3 billion but has not deployed service. Verizon and the SpectrumCo cable companies have also entered into agreements to become resellers of each other's services. In the course of the FCC's consideration of this transaction, Verizon has announced plans for two additional spectrum transfers that are contingent on FCC approval of the SpectrumCo transaction. Should the transaction be approved, Verizon has committed to selling its 700 MHz lower A- and B-block licenses. Verizon has also entered into a contingent transaction with T-Mobile to exchange AWS licenses that the parties say would permit them to better align their individual AWS holdings. The FCC has announced that it will apply the self-imposed 180-day "Time Clock" it typically uses for consideration of mergers and acquisitions. The FCC is not legally bound to complete its review within that time period, however, either in the merger and acquisition context or as applied to this transaction. The FCC started the clock on January 19, 2012. Without interruption, the 180 days would elapse July 17, 2012. The FCC set the clock back 21 days on May 1 to accommodate additional document submissions on the original filing as well as comment from third parties. The FCC stopped the clock for 14 days on June 26 to permit parties to comment on the proposed Verizon/T-Mobile transaction. The clock is scheduled to restart July 10. Barring additional stoppages, the 180-day clock will run out August 21, 2012.

June 29 Storm Outages. According to press accounts, the "derecho" storm system that hit the Mid-Atlantic States two weeks ago caused both 911 and non-emergency communications service outages across Maryland, Virginia, West Virginia, and the District of Columbia. During the storm and its aftermath, wireline, wireless, cable and broadcast systems all experienced outages. All 911 services were reportedly restored by July 4. The FCC is currently investigating these outages. Broadcasters have pointed to the storm in renewing calls to include FM radio chips in cellphones. Wireless providers argue that inclusion of such chips should be left to the marketplace, that more than 50 wireless devices with such chips are already commercially available, and that the wireless industry is deploying an emergency alert program as a result of the 2006 WARN Act. The FCC has announced that it will hold a meeting with wireless and broadcast providers on July 20 to discuss the FM chip issue.