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OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION

HEARING BEFORE THE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE ONE HUNDRED FIFTEENTH CONGRESS FIRST SESSION

MARCH 8, 2017

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ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

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C O N T E N T S

	Page
Hearing held on March 8, 2017	1
Statement of Senator Thune	1
Letter dated March 7, 2017	74
Statement of Senator Nelson	3
Statement of Senator Schatz	20
Statement of Senator Wicker	22
Statement of Senator Booker	23
Statement of Senator Fischer	25
Statement of Senator Udall	27
Statement of Senator Moran	29
Statement of Senator Peters	31
Statement of Senator Young	33
Statement of Senator Cortez Masto	35
Statement of Senator Capito	37
Statement of Senator Klobuchar	40
Statement of Senator Markey	41
Letter dated March 7, 2017 to Hon. Ajit Pai, Hon. John Thune and Hon. Bill Nelson	43
Statement of Senator Lee	46
Statement of Senator Blumenthal	48
Article dated February 10, 2017 from <i>The New York Times</i> , entitled “An Anti-Consumer Agenda at the F.C.C.”	48
Article dated February 11 from <i>The Washington Post</i> entitled, “The FCC talks the talk on the digital divide—and then walks in the other direction” by the Editorial Board	49
Letter dated March 7, 2017 to Senator John Thune and Senator Bill Nelson from Jonathan Schwantes, Senior Policy Counsel and Laura MacCleery, Vice President of Consumer Policy & Mobilization, Consumers Union	50
Statement of Senator Heller	56
Statement of Senator Cantwell	58
Statement of Senator Hassan	60
Article dated March 6, 2017 from <i>The Hill</i> by Michael Copps, Opinion Contributor, entitled, “It’s urgent that Ajit Pai Vices His Support for a Free Press”	61
Statement of Senator Gardner	62
Statement of Senator Cruz	64
Statement of Senator Sullivan	66
Statement of Senator Johnson	68
Article dated March 3, 2017 entitled, “Taking Stock of FCC Paperwork Burdens” by Michael O’Rielly, Commissioner, Federal Communications Commission	70

WITNESSES

Hon. Ajit Pai, Chairman, Federal Communications Commission	4
Prepared statement	6
Hon. Mignon L. Clyburn, Commissioner, Federal Communications Commission	9
Prepared statement	11
Hon. Michael O’Rielly, Commissioner, Federal Communications Commission	15
Prepared statement	16

IV

APPENDIX

Page

Response to written questions submitted to Hon. Ajit Pai by:	
Hon. John Thune	77
Hon. Roy Blunt	77
Hon. Dean Heller	78
Hon. Bill Nelson	78
Hon. Maria Cantwell	83
Hon. Amy Klobuchar	100
Hon. Richard Blumenthal	103
Hon. Brian Schatz	104
Hon. Edward Markey	106
Hon. Cory Booker	106
Hon. Tom Udall	109
Hon. Gary Peters	118
Hon. Tammy Duckworth	120
Hon. Catherine Cortez Masto	153
Response to written questions submitted to Hon. Mignon L. Clyburn by:	
Hon. Maria Cantwell	154
Hon. Edward Markey	155
Hon. Cory Booker	157
Hon. Tammy Duckworth	158
Hon. Catherine Cortez Masto	158
Response to written questions submitted to Hon. Michael O'Rielly by:	
Hon. Maria Cantwell	159
Hon. Cory Booker	160
Hon. Tom Udall	161

OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION

WEDNESDAY, MARCH 8, 2017

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m. in room SH-216, Hart Senate Office Building, Hon. John Thune, Chairman of the Committee, presiding.

Present: Senators Thune [presiding], Wicker, Blunt, Cruz, Fischer, Moran, Sullivan, Heller, Inhofe, Lee, Johnson, Capito, Gardner, Young, Nelson, Cantwell, Klobuchar, Blumenthal, Schatz, Markey, Booker, Udall, Peters, Baldwin, Hassan, and Cortez Masto.

OPENING STATEMENT OF HON. JOHN THUNE, U.S. SENATOR FROM SOUTH DAKOTA

The CHAIRMAN. Welcome to today's hearing on Oversight of the Federal Communications Commission. I should point out since this Committee has jurisdiction over sports that last night, the South Dakota State University Jack Rabbits punched their ticket to the NCAA tournament by winning the Summit League tournament. So a lot of folks are happy in South Dakota. I know I'm getting gaveled down up here by someone, but—oh, that was applause? That's what you're supposed to do.

[Laughter.]

The CHAIRMAN. All right. The last time that we met was 6 months ago, and a lot has changed since then. We have a new FCC Chairman, a new majority in charge of the agency, and we have several new members of this committee for whom this is their first FCC oversight hearing.

At our last hearing, I said I hoped to see changes to how the Commission operates. I urged all members of the Commission to treat each other fairly, to respect the law, to be willing to ask Congress for guidance, and to seek consensus whenever and wherever possible. While still in the early days, I am heartened because the new FCC leadership seems to have heeded this advice.

The FCC's first actions under Chairman Pai were to make much needed reforms to improve the agency's processes and transparency. Counter to the trend of Chairman Pai's recent predecessors, who often sought to amass as much power in the Chairman's office as they could, these simple steps instead empower the public and other Commissioners.

Chairman Pai has emphasized that bridging the digital divide will be one of the core principles guiding the agency under his lead-

ership. Representing a rural state where many people are still without broadband service, this is a goal he and I both share.

Indeed, the FCC has already taken huge steps to advance broadband deployment by moving forward with the long-delayed second phases of both the Mobility Fund and the Connect America Fund. That the Commission could move forward so quickly with these Universal Service Fund items, even during a time of agency transition, begs the question as to why they were not completed much, much sooner.

Nevertheless, it is refreshing to see the agency take decisive action to help bring broadband to every corner of the country. It is also nice to see the FCC finally move forward with two broadcasting items that will help AM radio and broadcast television better serve the American public.

I recognize, however, that not everything the Commission will do will be as nonpartisan or so positively received as Chairman Pai's first open meeting agenda. I was a vocal critic of the previous Chairman's hyper-partisan leadership style, and I recognize it will not be an easy task to rectify some of the agency's biggest missteps from the last few years. I am referring, of course, primarily to the 2015 Title II order and the subsequent broadband privacy order.

While I am sure there are other actions that may need to be revisited, I do think we need to hit reset on both of these items. And I'm glad to see the FCC has already started that process by staying certain parts of the rules that were set to go into effect last week.

As I suspect everyone in this room knows, I feel pretty strongly that the best way to provide long-term protections for the Internet is for Congress to pass bipartisan legislation. But since we don't yet have agreement on that front, despite good will on both sides, there's no reason for the FCC to hold off doing what is necessary to rebalance the FCC's regulatory posture under current statutes. Something tells me much of today's hearing will be dedicated to this topic.

The open Internet debate, however, should not distract the FCC from important work it must do in other areas as well. For instance, the FCC is in the final stages of the broadcast TV incentive auction, which has been a real success. Eighty-four megahertz of spectrum have been reallocated for wireless broadband and billions of dollars dedicated for deficit reduction.

While the auction process may be almost done, the FCC's work is far from complete. The clock will soon start on the broadcaster repacking process, and this will be no small undertaking for the agency nor for many TV stations. I urge the Commission to do everything in its power to ensure this transition is successful and occurs as quickly and responsibly as possible.

Robocalls represent another problem that needs to be addressed. The FCC's proposed rulemaking on this month's agenda is a positive step in the right direction. The government must do everything we can to protect consumers from those who are truly the bad actors, which is one reason why this committee has also worked on anti-spoofing legislation. But we also need to be sure the government's rules are not unfairly punishing legitimate callers who are not acting maliciously. The FCC's proposed Notice of Inquiry will give a much-needed jumpstart to that conversation.

Last, I would note for my colleagues that we will be busy this year with FCC nominations. Chairman Pai's term has expired, and he is now in his holdover year, but just yesterday the President re-nominated him to another full term. There are obviously two vacant seats on the Commission right now. And Commissioner Clyburn's current term also expires at the end of June. Once the President makes his nominations for the FCC, it is my hope that the Senate will move swiftly to review and confirm the President's appointees.

The most important thing, however, is that we not allow the FCC to fall below a functioning quorum. I know no responsible person would willingly deprive the agency of its ability to protect consumers and the marketplace, and ensuring the agency is sufficiently constituted will be a priority of mine this year.

So thank you, and I'll recognize Ranking Member Nelson for his opening statement.

**STATEMENT OF HON. BILL NELSON,
U.S. SENATOR FROM FLORIDA**

Senator NELSON. Thank you, Mr. Chairman. I welcome all three members of the FCC, including the new Chairman in his first appearance as Chairman. The President has re-nominated him and given him primary responsibility over what this Senator believes is one of the most important consumer protection agencies of the Federal Government.

For the last 8 years, the FCC has had the consumer's back. Ultimately, for this Senator, the success or failure of the Commission rests not on the fulfillment of wish lists, but on how those who are least able to protect themselves have been treated and whether First Amendment rights, including those of journalists, are vigorously protected.

Since assuming the chairmanship in just the last few weeks, the FCC, Chairman Pai, under your leadership has acted to prevent millions of broadband subscribers from receiving key information about the rates, terms, and conditions of their service; acted to guarantee that broadband subscribers will have less protections with respect to the security of their online data, while promising to further weaken the duties broadband providers owe to protect the web browsing history and other personal information of their paying subscribers. By the way, that'll arouse people pretty quick when you start stealing their personal data.

The third thing is just in the last few weeks, threatened the expansion of broadband into the homes of low-income Americans by limiting the effectiveness of new Lifeline program reforms; and the fourth thing in the last few weeks, formally rescinded an FCC staff report detailing the implementation of the agency's comprehensive E-Rate modernization effort that sent shock waves through schools and the libraries across the country, which are worried that you will try to upend this highly functioning and bipartisan program.

These are actions that directly impact the lives of millions of Americans. I hope they're not signs of things to come. Because, at the end of the day, the FCC has the responsibility to put the public interest ahead of powerful special interests. Just as it has with past chairmen, Congress expects the Commission to uphold the

laws it has passed and enforce the regulations properly adopted by the agency. That is what the public interest and this Senator has and will continue to demand.

Now, there's something left undone that hasn't been done, and that is—the three of us right here were just talking about it, discussing my frustration with the fact that Jessica Rosenworcel is not sitting here today in front of us. The failure to confirm her in the last Congress, that was made a commitment as an exchange of the appointment of Commissioner O'Rielly—that commitment was never fulfilled, and that's a black mark on the Senate. And the President's decision to pull her nomination last week, I think, was unfortunate.

I hope that the White House is going to correct that and nominate this impressive public servant for another FCC term once again. And if that happens as it should, it is imperative for the Senate leadership to live up to its promise and confirm her nomination with all dispatch.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Nelson, and I would share your high level of interest in getting a full complement of Commissioners on the Commission, and I hope that we receive those nominations soon, and we will process them very quickly through this Committee when that time comes.

I do want to recognize the Commissioners we have in front of us today, and thank you for being here. We're going to start with Ajit Pai, who I congratulate on being nominated yesterday by the President to another term at the FCC. The agency has a lot of work ahead of it, and getting reconfirmed soon will help you focus on steering the Commission in the right direction, and if we're lucky, perhaps, if you perform well today, this could double as your renomination hearing, allowing us to move quickly toward that confirmation.

And, Commissioner Mignon Clyburn, welcome. It's good to have you here, and Commissioner Mike O'Rielly.

So we'll start with you, Mr. Chairman, if you'd make your remarks, and then turn to Commissioner Clyburn and Commissioner O'Rielly.

Senator NELSON. Did you get that? If you perform well?

[Laughter.]

Chairman PAI. No pressure.

**STATEMENT OF HON. AJIT PAI, CHAIRMAN,
FEDERAL COMMUNICATIONS COMMISSION**

Chairman PAI. Chairman Thune, Ranking Member Nelson, members of the Committee, thank you for holding this hearing today. I also wish to thank the President for the confidence he has shown in me by nominating me to serve a second term at the FCC.

Before discussing the matters relating to the agency, I would like to offer a personal note. I grew up in the great state of Kansas, and I am an Indian American. Just a few months ago, I made a professional visit to Garmin's headquarters in Olathe, Kansas. It was thus quite painful to me to learn of the cold-blooded murder of Garmin engineer Srinivas Kuchibhotla, and the shootings of Alok Madasani and Ian Grillot. I cannot fathom how those involved

must feel. As it stands, words cannot capture how this has hurt those of us, particularly those of Indian descent, who call Kansas home.

But I do want to say that my thoughts and my prayers are with the Kuchibhotla, Madasani, and Grillot families, to thank Mr. Grillot for the courage he showed in risking his life, and to stand alongside the millions of Kansans in saying that the perpetrator is the despicable exception that proves the rule when it comes to the spirit of openness and respect in the sunflower state.

Returning to the focus of today's hearing, I'd like to discuss four FCC priorities: closing the digital divide, promoting innovation, protecting consumers and public safety, and reforming the FCC's processes.

First, high-speed Internet access, or broadband, is critical to economic opportunity. But broadband is unavailable or unaffordable in too many places. The FCC can help close this digital divide by more efficiently targeting Federal funds under USF programs, by revising regulations that deter private investment in next-generation networks, and by creating deployment-friendly best practices.

In the first 6 weeks of my chairmanship, we've already taken told action along these lines. We adopted on a bipartisan basis a \$4.5 billion plan to advance 4G LTE across our country. We finalized rules, again on a bipartisan basis, to provide \$2 billion to deliver fixed broadband to unserved Americans. We've eliminated outdated rules so that providers can spend on broadband deployment rather than on unnecessary paperwork. And we've established for the first time a Broadband Deployment Advisory Committee that will, among other things, develop a model code for localities that are interested in broadband deployment fair and friendly policies.

Second, promoting innovation. Another FCC priority is creating an innovation-friendly regulatory environment. Entrepreneurs are constantly developing new technologies and services. But too often, they are unable to bring them to market for consumers because outdated rules or regulatory inertia stand in the way. Going forward, I want the FCC to facilitate rather than frustrate innovation.

Last month, for example, we proposed to allow television broadcasters to fully enter the digital era by adopting the Next Generation Television standard on a voluntary, market-driven basis. We also authorized the first ever LTE unlicensed devices in the 5 gigahertz band, a significant advance for wireless innovation and spectrum sharing. And we have allowed wireless consumers to benefit from innovative free data offerings.

Third, the FCC's core mission is to serve the broader public interest, and that means protecting consumers. For instance, all Americans seem united in their disgust of robocalls. They are the number one consumer complaint to the FCC year end and year out, and it's no wonder. Every year, Americans receive approximately 2.4 billion robocalls.

So I've teed up an aggressive agenda to target unlawful robocalls. This month, for instance, the Commission will vote on my proposal to allow carriers to block many spoofed robocalls. There is no reason why any legitimate caller should be spoofing numbers so that

they appear to be coming from an invalid or an unassigned phone number.

When it comes to public safety, last Friday, we granted an emergency waiver of caller ID rules to Jewish community centers in order to enable law enforcement to identify those who were responsible for the recent wave of bomb threats. I hope that this measure among others helps bring the perpetrators to justice.

Fourth and finally, process reform. As Chairman, I'm working to make the FCC more open and more transparent. For example, I've always found it strange that the public wasn't allowed to see Commission meeting items until after the Commission voted. Generally well-connected lobbyists were still in the know, but everyday Americans were in the dark.

At long last, that is changing. Last month, I made public the full text of two draft items on the agenda as part of a pilot project. Things went so well that last week I made public the draft text and fact sheets for all six items before our March meeting. That's just one of the many ways I intend to make the FCC more open and accountable to the American people. I look forward to working with my colleagues to implement more process reforms in the time to come.

Chairman Thune, Ranking Member Nelson, and members of the Committee, thank you once again for holding this hearing. I look forward to answering your questions and continuing to work with you in the time to come.

[The prepared statement of Chairman Pai follows:]

PREPARED STATEMENT OF HON. AJIT PAI, CHAIRMAN,
FEDERAL COMMUNICATIONS COMMISSION

Chairman Thune, Ranking Member Nelson, and Members of the Committee, thank you for giving me the opportunity to testify today. For almost five years, it has been an honor to work with many of you on a wide variety of issues. Now, in my new role as Chairman of the Federal Communications Commission, I look forward to continued collaboration as we try to bring digital opportunity to all Americans.

I would like to discuss four areas I will be emphasizing so long as I am privileged to serve as Chairman: closing the digital divide; promoting innovation; protecting consumers and public safety; and reforming the FCC's processes.

1. *Closing the Digital Divide.*—High-speed Internet access, or broadband, is critical to economic opportunity. But there are still too many parts of this country where broadband is unavailable or unaffordable. There is a real and growing digital divide in America. In wealthier, metropolitan areas, 4G LTE is ubiquitous, and gigabit fixed service is expanding. But many rural areas are being left behind.

I've seen this firsthand in my travels across the country. In West Virginia, for example, Senator Capito and I met with small business owners who were frustrated by their lack of high-quality broadband access—and we heard how fixing the problem could revitalize their economy. I've been to the far reaches of Alaska and heard from Alaska Natives that a lack of middle-mile connectivity has made it harder to connect their communities. And I have listened to people in Kansas and South Dakota and Nevada and Mississippi and elsewhere who worry that without broadband, they and their children won't have the ability to compete and prosper in the 21st century.

The FCC has tools that it can use to help close this digital divide. First, we can more wisely apply Federal funds under the Universal Service Fund programs that we administer. Second, we can revise regulations that deter the private sector from investing in next-generation networks. Finally, we can aid state and local governments, as well as the private sector, by creating deployment-friendly best practices. With these tools, we could bring down the cost of deploying broadband and create incentives for providers to connect consumers in hard-to-serve areas.

We are already using these tools and turning the aspiration of ubiquitous Internet access into reality.

First, with respect to subsidies: On February 23, the FCC adopted two separate orders to spur the buildout of mobile and fixed broadband networks in rural America, and with that took two major steps toward connecting rural America.

One order involves what is known as Mobility Fund Phase II. The goal of the Mobility Fund is to ensure that all Americans have access to advanced wireless services. But not all do. I myself was struck, during a recent drive from Wichita, Kansas to Des Moines, Iowa, how often the signal on my mobile phone was either weak or nonexistent. And that was even on relatively major roads such as Interstate 35.

In order to solve this problem, the FCC adopted, on a bipartisan basis, a plan to bring 4G LTE service to millions of rural Americans who don't have it today. Over ten years, we will spend over \$4.5 billion to bring mobile broadband to unserved areas. And by distributing this money through a reverse auction, we will ensure that we do so in a fiscally responsible way.

I appreciate the bipartisan support this initiative has received in Congress (including on this Committee) and at the Commission. And I look forward to working with my colleagues and all of you as we start implementing our plan.

Turning to the second order, the FCC also voted on February 23 to finalize the rules for allocating nearly \$2 billion from the Connect America Fund, which aims to advance fixed broadband service across the country. Here again, we will direct financial support to deploy fixed broadband in unserved rural areas using a competitive reverse auction. My aim is to get the best deal for the American people with the limited funds we have available. And I am pleased that we were able to adopt this order on a bipartisan basis.

And in the FCC's very first vote under my leadership, we approved—yet again on a bipartisan basis, and this time with bipartisan cooperation from Congress—a partnership with New York State to combine up to \$170 million in Federal universal service funds with state funds to deploy broadband in unserved areas in Upstate New York. This means that for the first time, thousands of people in the Empire State will finally have high-speed Internet access.

In addition to providing targeted funding to expand broadband deployment in rural America, the FCC also can lower the cost of deployment through regulatory reform. We need to reduce the red tape and make it easier for broadband providers to build or expand next-generation networks. That's why, on January 31, I announced the creation of the Broadband Deployment Advisory Committee, or BDAC. This advisory committee will focus on the best ways to promote broadband deployment. One of the BDAC's key tasks will be to draft a deployment-friendly model code that any city or town could use as a template. And the BDAC will also look at reforms the FCC can adopt to lower the cost and expedite the process of broadband deployment. The response to the announcement of the BDAC's formation has been tremendous. Over 380 individuals applied, and we are currently in the process of selecting the members and setting up the Committee.

We also have already taken some important steps to clear regulatory burdens which inhibit broadband deployment. In February, for example, we ended the requirement that price cap carriers maintain a separate set of accounting books merely for regulatory purposes. Carriers were spending millions each year to maintain these accounts, even though career staff told us that in the last few years the FCC has *never* needed to rely on data they generated. By clearing away this regulation, carriers will be able to use those resources to invest in new networks rather than unnecessary paperwork. Later this month, we will also vote on reforming our cellular license rules. This will allow carriers to have greater flexibility in using their cellular licenses so they can more easily deploy 4G and 5G mobile services. These types of common-sense regulatory reforms aren't particularly flashy, but they are vital to promoting aggressive buildout throughout our Nation.

2. Promoting Innovation.—Another key priority for the FCC is to create a regulatory environment in which innovation can thrive. Entrepreneurs are constantly coming up with new technologies and services. But consumers aren't well-served when outdated rules and bureaucratic inertia stand in the way of bringing them to the market.

Under my leadership, I want the FCC to facilitate, not frustrate, innovation. That's why last month, for example, we started a proceeding aimed at allowing television broadcasters to innovate and fully enter the digital era. Engineers in the broadcast industry have been hard at work developing a new transmission standard that would let broadcasters merge the capabilities of over-the-air broadcasting with broadband connectivity. This Next Gen TV standard, also known as ATSC 3.0, is the first one to leverage the power of the Internet, and it promises to dramatically transform broadcasting.

With Next Gen TV, broadcasters could offer innovative technologies and services to consumers, including ultra-HD picture and immersive audio, improved over-the-air reception, and more localized content. This new standard would also enable better accessibility options for those with disabilities. It could enable advanced emergency alerting with alerts tailored to particular communities and wake up sleeping devices to warn consumers of imminent emergencies. And it could give consumers the ability to watch over-the-air programming from their mobile devices. But this new standard can't be deployed without the approval of the FCC.

Fortunately, last month, the Commission unanimously proposed to allow broadcasters to deploy Next Gen TV on a voluntary, market-driven basis. I hope that we will be able to give final approval for the standard by the end of the year.

But our work to promote innovation doesn't stop there. Last month, the FCC authorized the first-ever LTE-U (LTE for unlicensed) devices in the 5 GHz band—a significant advance in wireless innovation and spectrum sharing. This means wireless consumers will get to enjoy the best of both worlds: a more robust, seamless experience when their devices are using cellular networks and the continued enjoyment of Wi-Fi, one of the most creative uses of spectrum in history.

The Commission has also ended its investigation into the free-data offerings of wireless carriers. Innovative offerings like T-Mobile's Binge On have been popular with consumers, particularly low-income Americans, and have enhanced competition in the marketplace. I firmly believe the Commission should favor permissionless innovation in this fiercely competitive market—and rely on consumer choice to sort out what innovations best serve the public interest.

3. Protecting Consumers and Public Safety.—The FCC's core mission has always been to serve the broader public interest, and that means protecting consumers and keeping the public safe. We have made progress on each front in just a month and a half.

One thing that seems to unite all Americans is the ever-rising tide of robocalls that disrupts family dinners and target vulnerable populations like older Americans with scams. Robocalls are the number one consumer complaint to the FCC from the public, and it's no wonder: Every month, U.S. consumers are bombarded by about 2.4 billion robocalls. It's time to end this threat.

That's why I have teed up an aggressive agenda to target and eliminate unlawful robocalls. As a first step, the Commission will vote this month on my proposal to let carriers block spoofed robocalls, that is, calls in which a scammer conceals his identity on Caller ID by using a fake number, such as a number associated with the IRS. The proposed rules would allow carriers to block spoofed calls where the owner of the number being spoofed requests it as well as calls that purport to come from unassigned or invalid phone numbers (there's a database that keeps track of all phone numbers, and many of them aren't assigned to a voice service provider or aren't otherwise in use). There is no reason why any legitimate caller should be spoofing numbers in this way—it's just a way for scammers to evade the law.

Another consumer protection is improving communications services for Americans who are deaf and hard of hearing. For 15 years, video relay service (VRS) has enabled deaf and hard-of-hearing individuals to call friends, family members, and others using American Sign Language (ASL) and a videophone, and to have their calls interpreted from signs to voice and vice versa. And for four years, I have been pushing to improve the quality of these services and make them more functionally equivalent to the voice services available to hearing individuals. Later this month, the Commission will vote on concrete steps to do just that—steps such as a skills-based routing trial, standardized quality-of-service metrics, and letting VRS users call directly family members and friends who know ASL.

Another area in which we are working to help the American people is preventing the use of contraband cell phones in correctional facilities. I have visited several of these facilities, from a maximum security prison in Georgia to a minimum security unit in Massachusetts. And I've consistently heard stories of how contraband cell phones are used to run drug operations, to conduct phone scams, and to facilitate violent acts, including murders. The FCC proposed certain reforms four years ago to address this problem. This month, we will finally vote on some of them, such as enabling the use of radio-based technologies to detect and block the use of contraband phones in prisons and jails. I've also asked my colleagues to agree to solicit public input on other solutions for addressing this pressing problem, including disabling illicit devices and geo-fencing.

Furthermore, recent events have made clear that the FCC's public safety role includes urgent short-term action, not just longer-term rulemaking. Last Wednesday, the agency received requests to grant a waiver to Jewish Community Centers and telecommunications carriers to allow them to identify the perpetrator(s) of violent threats to those centers in dozens of locations. I quickly reviewed the requests and

directed the FCC staff to act with dispatch. They did. This past Friday, our Consumer and Governmental Affairs Bureau granted the emergency waiver (with Commissioners' assent, for which I am grateful). I hope this measure helps law enforcement apprehend and bring to justice any person who has made such threats.

4. *Reforming the FCC's Processes.*—For many years, those inside and outside the agency have called for process reforms to make the work of the FCC more transparent. As a minority Commissioner at the agency, I was not shy about pressing for changes that would give all Commissioners greater say in the agency's operations. And as a Chairman, I have made it a priority to implement those reforms. I have taken meaningful steps to devolve power from the Chairman's Office and return it to my colleagues and the agency as a whole. I want to highlight just a couple of those reforms today.

First, I always found it strange that the public was not allowed to see what the FCC was voting on until after the FCC voted. Of course, well-connected lobbyists could generally find out much of what was in the Commission's draft proposals and orders. But hundreds of millions of Americans were left in the dark.

As a Commissioner, I was told that it simply was not practical to release the text of the documents prior to Commission meetings. As Chairman, I worked as quickly as possible to put that proposition to the test. On February 2, three weeks before our February meeting, I started a pilot program and made public the full text of two draft items on the meeting's agenda. Things went so well that last week, I made public the draft text of all six items for our March meeting, as well as one-page fact sheets and a public blog post describing them. Allowing anyone, anywhere to see these documents publicly is another step towards shedding more sunlight on the FCC's operations.

I would like to thank Commissioner O'Rielly for his strong leadership on the issue of process reform. And I would like to commend Commissioner Clyburn for her suggestion that fact sheets accompany the release of draft meeting items. I'm optimistic that after this month's meeting, we will be able to end the pilot program and establish permanent procedures for releasing items to the public three weeks in advance of our meetings. This is just one example of how I intend to make the FCC more open and accountable to the American people. I look forward to working with my colleagues to implement more process reforms in the weeks to come.

* * *

In the first six weeks of my Chairmanship, we have hit the ground running. And let me emphasize the "we." What we have accomplished so far is a tremendous credit to the nonpartisan, Federal employees of the agency—our hard-working professional staff, who are the agency's strongest assets. It is a credit to my colleagues Commissioner Clyburn and Commissioner O'Rielly, who have been integral in moving the agenda forward and doing so time after time on a bipartisan basis. And it is a credit to you, our congressional overseers, as well as other elected officials like Senator Schumer, who have highlighted the many issues the FCC must tackle in a bipartisan manner. These past six weeks have only re-affirmed my view that no FCC office or floor holds a monopoly on wisdom.

And as we move forward, I hope we can continue to work together on a bipartisan basis to close the digital divide, promote innovation, protect consumers and public safety, and improve the FCC's processes and procedures.

Chairman Thune, Ranking Member Nelson, and Members of the Committee, thank you once again for holding this hearing and allowing me the opportunity to speak. I look forward to answering your questions, listening to your views, and continuing to work with you and your staff in the days ahead.

The CHAIRMAN. Thank you, Chairman Pai.
Commissioner Clyburn?

**STATEMENT OF HON. MIGNON L. CLYBURN, COMMISSIONER,
FEDERAL COMMUNICATIONS COMMISSION**

Commissioner CLYBURN. Chairman Thune, Ranking Member Nelson, members of the Committee, good morning. It is an honor to once again appear before you to share my priorities for putting consumers first.

During my more than seven years as an FCC Commissioner, I have been an advocate for those whose voices far too often go un-

heard. This means looking out for our Nation's most vulnerable populations, including families who should not have to give up food or healthcare just to keep in touch with an incarcerated loved one. It also means enabling broadband access for those living at or below the poverty line so they will be able to apply for jobs, start a business, or benefit from telehealth services.

My vision for robust competition, affordable connectivity, reliable service, no-surprise billing, and an Open Internet for all informs what I would like to share with the Committee today, including several of the issues at the top of my priority list. When we talk about the principles underpinning an open internet, a larger question must be asked. Will there be a cop on the beat in a broadband world? When we rightly talk about finite universal service dollars supporting just one provider in a remote area, we cannot rely solely on the disciplining forces of competition to protect consumers.

The FCC must continue in its present role as the protector of consumers and an enabler of choice in the broadband ecosystem. If not the FCC, who will consumers turn to when their broadband provider throttles their favorite website? And what if there were a billing dispute, poor service, privacy concerns? These questions underlie the many reasons why I strongly supported the Commission's 2015 Open Internet Order and continue to believe it provides the best legal framework to protect consumers, innovators, and entrepreneurs.

Consistent with the FTC's privacy framework, I am proud of the steps taken by the FCC last October to empower consumers to make informed choices about their personal information and give broadband providers the flexibility to comply with the rules in a manner that works for their company. I am committed to do everything I can to ensure consumers have the tools to protect their privacy in a broadband world.

While much attention has been given to the Commission's work on Open Internet and privacy, the inmate calling regime continues to be the greatest and most distressing form of injustice I have witnessed in my 18 years as an industry regulator. We cannot continue to turn our backs while a wife pays as much as \$24 for a 15-minute call with her husband. I applaud the leadership of Senators Booker and Duckworth on these issues and look forward to working with all interested offices to ensure that an inmate's debt to society is not paid again and again by their sons and daughters, mothers and fathers, and grandparents.

More broadly, I applaud this Congress' focus on broadband infrastructure and access. The FCC's Universal Service mandate can be described as a four-legged stool, with four different programs working in concert to close the digital divide. Collectively, these programs are enabling rural broadband deployment, improving rural healthcare, they're bringing about connectivity to schools and libraries, and tacking the affordability gap. We cannot leave out any leg of the stool and expect it to continue to stand.

This means we need action on reforming our rural healthcare program. It also means being courageous about reforming the contribution system which is increasingly becoming a heavy burden on senior citizens who can ill afford to shoulder the burden of nationwide broadband deployment.

Turning now to our media ownership rules, I believe the conversation must start by asking how we move the inclusion and opportunity needle for those seeking to fulfill the dream of owning and operating broadcast properties. To this end, I support reinstating an FCC tax certificate program, working with the broadcast industry to start a pilot incubator program to aid new entrance or disadvantaged businesses, and increasing diversity both in front and behind the camera.

Finally, we must focus on enhancing consumer protection. In a *Consumers Report* survey last year—over 172,000 subscribers—of those who were surveyed, only one-third of those said that they were very or completely satisfied with their home internet, pay TV, or telephone service. As a Commissioner at the agency responsible for overseeing the communications sector, this is highly alarming. We can and must do more.

There are many more issues I am hopeful the Commission will tackle, including streamlining of the broadband infrastructure deployment, telehealth and telemedicine, the advancement of 5G, and enhancing access to 911 service. My written testimony addresses many of these issues in greater detail. But, once again, I thank you for the opportunity to present before you today and look forward to answering any questions you may have.

[The prepared statement of Commissioner Clyburn follows:]

PREPARED STATEMENT OF HON. MIGNON L. CLYBURN, COMMISSIONER,
FEDERAL COMMUNICATIONS COMMISSION

Chairman Thune, Ranking Member Nelson and Members of the Committee, good morning. It is an honor to once again appear before you to share my priorities for putting #ConsumersFirst. For me, this includes taking the steps necessary to enable robust competition, affordable connectivity, reliable service, no surprise billing and an open Internet for all.

Not only do I believe the FCC has the legal responsibility under the Communications Act to put consumers first, it has a moral responsibility. By this I mean we have an obligation to look out for our Nation's most vulnerable populations: school children seeking to complete their homework after the dismissal bell rings; families trying to communicate affordably with incarcerated loved ones; or those living at or below the poverty line who desire an affordable broadband option so they can apply for jobs, start a business or access telehealth services.

In pursuit of these goals, last October, our office hosted a solutions-focused policy forum known as #Solutions2020. The half-day event, held on the campus of Georgetown University Law Center was a resounding success with more than 100 attendees and countless more tuning in online for the live stream. Following the event, in December, we released a draft call to action plan, which presented a comprehensive framework and approach to communications policies that will allow for robust, affordable connectivity for all Americans within the next four years.

As a result of public comments from more than two dozen organizations, we expect to release a final action plan later this month on FCC.gov and I remain hopeful that we can work on a bipartisan basis to achieve these basic goals by the end of the decade.

During my more than seven years as an FCC Commissioner, I have made it my focus to be an advocate for those whose voices far too often go unheard. Consistent with this approach, I would like to share several issue areas I intend to prioritize this year.

Preserving a Free and Open Internet

When we talk about the principles underpinning an open Internet, a larger question must be asked. Will there be a cop on the beat in a broadband world? The FCC supports broadband networks with universal service dollars, adjudicates disputes between broadband providers and is paving the way for the transition from a voice world to a broadband world.

I believe that the FCC must continue in its present role as protector of consumers and enabler of competition in the broadband ecosystem. If not the FCC, who will consumers turn to when their broadband provider throttles their favorite website? And what if there is a billing dispute? Poor service? Privacy concerns? These questions underlie the many reasons why I strongly supported the Commission's 2015 Open Internet Order and continue to believe it provides the best legal framework to protect consumers, innovators and entrepreneurs.

Protecting Consumer Privacy

Ninety-one percent of Americans feel they have lost control of their information online, according to one report. This is why I supported the Commission's actions, consistent with the FTC's privacy framework, to empower consumers to make informed choices about their personal information, and give broadband providers the flexibility to comply with the rules in a manner that works for their company.

I was deeply disappointed by the Chairman's decision to effectively gut one of those rules last week. The outcome of the decision is not relief from purported regulatory burdens. In fact, the providers who sought the stay of the privacy rules used the very text of the FCC's rule as the basis for their voluntary code of conduct. The real effect here is a lack of recourse for consumers when their personal information is compromised.

USF Modernization

Our Universal Service program is a four-legged stool, with four different programs that address four distinct goals working in concert to close the digital divide. Without Lifeline, for example, millions of Americans would be unable to afford the cost of voice service. And thankfully last year, the FCC modernized the Lifeline program for the 21st century, to not only support broadband service but further combat fraud by beginning a process to fully take user verification out of the hands of service providers. We also expanded the program, allowing recipients of the Veterans Pension Benefit, among other programs, to access Lifeline service.

But USF modernization cannot stop there. It means reforming our rural healthcare program so that the skilled nursing facilities that Congress explicitly included in the program, are not kept out by the current cap on funding. It also means reforming the contribution system, which is increasingly becoming a heavy tax on seniors, who can ill-afford to shoulder the burden of nationwide broadband deployment.

Inmate Calling Reform

The inmate calling regime is the greatest and most distressing form of injustice I have witnessed in my 18 years as an industry regulator. This past December, I embarked on a 24 day campaign to bring awareness to the benefits of inmate calling reform. The campaign also highlighted some of the egregious practices that keep the generational cycle of incarceration intact, break up families and marriages, and impose financial burdens on families that are least able to afford it.

I applaud the leadership of Senators Booker and Duckworth, both of whom introduced legislation in the previous Congress to address inmate calling and video visitation issues. I look forward to working with all interested offices to tackle these important issues during the 115th Congress.

Expanding Broadband Infrastructure Deployment

In January, Chairman Pai announced the establishment of the Broadband Deployment Advisory Committee. I applaud him for focusing on bridging the deployment gap and share the vision of ubiquitous broadband for all Americans. Accordingly, I have supported the agency's continued focus on targeted spending of universal service dollars to deploy broadband, in the hope that the Congressional directive in Section 1 of the Communications Act will be realized sooner rather than later.

Additionally, I remain supportive of legislative efforts to streamline the deployment of broadband. Among other actions, I am hopeful this Committee will consider the passage of the *Broadband Conduit Deployment Act*; reform of pole attachments; and the advancement of public-private, public-public, and private-private partnerships to assist with all aspects of the infrastructure puzzle and aggregate the demand for services where the economic case for build out is weak.

Improving Broadband Data

One area in which I believe we can all agree is the need for better broadband data. Nowhere is this clearer than in our recent efforts on the Mobility Fund, where the lack of good data could mean it will take longer to deliver on the program's stated goal of bringing connectivity to unserved communities. With improved data, we

could better target our infrastructure efforts and improve the accuracy of our National Broadband Map.

Additionally, it should be noted that the market has undergone significant consolidation since 2013, including transactions involving Charter and Time Warner Cable; Verizon and XO Communications; Windstream and Earthlink; as well as Centurylink and Level 3. Across multiple proceedings, industry has suggested updates to the Form 477 process. I agree that it is time to collect better data, and I look forward to working with my colleagues to make this a reality.

Process Reform

In the first weeks of this new Administration, Chairman Pai has outlined a series of process reforms, many of which have been discussed by this Committee over the past several years. I would like to focus on one of these reforms that the Chairman has implemented at my suggestion: the provision of a public fact sheet for each of the Commission's meeting items. The reality is that most consumers do not have time to read through Commission items that can reach over 300 pages. This simple step will enhance transparency and make it easier for the public to engage and understand the actions being taken by our agency.

Unfortunately, some practices that have been the subject of past Committee inquiries about the use of delegated authority continue to concern me. In fact, just in the past month I have seen an FCC Office issue an Order inconsistent with its delegated authority, seen delegated authority used to resolve new and novel issues, and experienced delegated authority used as a weapon to force a rapid Commission vote on an issue of great significance.

Digital Inclusion for the Modern Era

Among the six pillars I outlined in our draft call to action plan was the need to promote a more diverse media landscape. While there has been much discussion about the elimination of the Commission's ownership rules, I believe the conversation must start by asking how we move the inclusion and opportunity needle for those seeking to fulfill the dream of owning and operating broadcast properties.

To this end, I support reinstating an FCC Tax Certificate Program; working with the broadcast industry to start a pilot incubator program to aid new entrants or disadvantaged businesses; and increasing diversity both in front of and behind the camera.

I also believe we must do more to enhance the voices of independent and diverse programmers outside the broadcast space. The Notice of Proposed Rulemaking (NPRM) on Independent Programming adopted by the Commission in September would achieve this goal by targeting two of the worst offending practices facing many independent video programmers: "unconditional" most favored nation (MFN) clauses and unreasonable alternative distribution method (ADM) provisions. I look forward to working with Chairman Pai to move to an Order that ensures independent and diverse voices have a place in a vibrant media landscape.

Expanding Deployment of Mobile Broadband

The next generation of wireless connectivity, or 5G, promises to fundamentally change the way we live, interact and engage with our communities. 5G technology promises to deliver speeds of up to 10 gigabits per second with lower latency and greater capacity. This improved connectivity has the ability to redefine the industry across many different sectors including healthcare, transportation, energy, agriculture and public safety. In order to reap the benefits of 5G services, however, we need to not only have adequate spectrum, but the necessary infrastructure, such as small cells and distributed antenna systems (DAS), to deploy that spectrum.

Last year, the FCC commenced a proceeding to seek public input on actions the Commission can take to expedite deployment of the infrastructure needed for next generation wireless services. We recognized the need for efficient and streamlined processing of siting applications as well as localities' interests in preserving the aesthetics of their communities and ensuring the safety of their citizens. Indeed, as I have said before, approving applications to site antennas and other infrastructure are difficult policy challenges for local governments. These challenges are even more acute in a 4G and 5G world, where the volume of siting applications has increased substantially. I am committed to engaging with stakeholders on this issue and examining the record developed through this proceeding.

This proceeding notwithstanding, I believe the Commission has a unique role to play in facilitating discussions and dialogue between industry and local communities about the benefits and challenges of small cell deployment. My discussions with representatives from municipalities makes clear that a tailored educational campaign would be well received and highly effective in surmounting the challenges posed by infrastructure siting for next generation 5G services.

Connect2Health

As my staff and I visited many of your offices during recent weeks, we heard a common refrain when it comes to the importance of broadband-enabled healthcare, particularly in rural communities. With estimates suggesting that the United States will have a shortage of up to 90,000 physicians by 2025, we have an opportunity through the use of technology to improve the quality of healthcare and reduce costs. This is an issue I am personally passionate about and I believe it should continue to be a priority for the Commission.

One year ago, Chairman Wheeler circulated to his fellow Commissioners, a Public Notice that posed a series of questions about the intersection of broadband and health. While the notice failed to gain the necessary votes last year, I am grateful that this item remains on circulation. I look forward to working with the Chairman and Commissioner O’Rielly to see it adopted in the near future.

Public Safety

As reflected by the draft Next Generation 911 legislation that Ranking Member Nelson and Senator Klobuchar unveiled last week, and the Commission’s actions over the years, there is a sustained commitment to promoting the deployment of NG 911 networks. The benefits of NG 911 are well documented: IP-based technology is more resilient and reliable than the legacy circuit switched system and will provide public safety professionals better tools to analyze and respond effectively to emergencies.

While there has been a great deal of focus on how to help state and local public safety answering points (PSAPs) make the transition to NG 911, surprisingly, there has been no similar focus on Federal PSAPs. In fact, we do not even know how many Federal agencies run PSAPs or how many Federal PSAPs there are. But I am happy to report that the DHS Emergency Communications Preparedness Center (ECPC)’s Federal 911 Focus Group is working to change this.

The ECPC, the Federal interagency focal point for interoperable and operable communications coordination, is comprised of 14 Federal agencies, including DHS, DOD and the FCC. The 911 Focus Group is currently surveying Federal agencies to develop a comprehensive inventory of all Federal PSAPs.

Preliminary findings highlight that many Federal PSAPs actually lag behind their state and local counterparts. Many of the PSAPs on military bases that we know about are using old technology, have limited capability to locate 911 callers on the base and do not support text-to-911. Indeed, they have not even begun to plan for the transition to NG 911.

The keys to addressing this glaring problem are: awareness, coordination and integration. First, we need to make supporting the transition to NG 911 a priority across all Federal agencies that have PSAPs or support 911 operations. Second, Federal 911 and NG 911 efforts and budgets need to be coordinated across agencies so that efficiencies and economies of scale can be identified, as opposed to each individual agency operating in a silo. Finally, Federal agencies should coordinate and partner with their state and local 911 counterparts in the areas they serve. In those states that have already launched NG 911 initiatives, Federal agencies should be committing resources to the initiative rather than playing catch-up. And in states that have not yet started the NG 911 transition or are in the planning stages, Federal agencies should be proactive in the planning process.

Enhancing Consumer Protection

In a Consumer Reports survey last year of more than 172,000 subscribers, only about one-third of those surveyed said they are “very or completely satisfied” with their home internet, pay TV or telephone service. As a Commissioner at the agency responsible for overseeing the communications sector, this is highly alarming.

Last Fall, the FCC’s Consumer Advisory Committee “No Surprises Task Force” came up with a series of recommendations to improve transparency and disclosure of “below the line” fees, so that when consumers sign up for service, either online or in-store, they will not have to wait for their first bill to learn what their service truly costs. Implementing these recommendations would be a huge win for consumers and an opportunity for providers to show how committed they are to putting consumers first.

Finally, to address the practice of mandatory arbitration, Senator Franken and I authored a joint op-ed this past October. Simply put, we believe you should not have to give up your day in court when you sign up for telecommunications services. Whether it is by legislation or regulation, I believe this consumer-unfriendly practice should be eliminated.

Conclusion

Once again, Chairman Thune, Ranking Member Nelson and Members of the Committee, I want to thank you for the opportunity to present my testimony today and look forward to answering any questions you may have. By working collaboratively, we can ensure that our communications sector remains the envy of the world.

The CHAIRMAN. Thank you, Commissioner Clyburn.
Commissioner O'Rielly?

**STATEMENT OF HON. MICHAEL O'RIELLY, COMMISSIONER,
FEDERAL COMMUNICATIONS COMMISSION**

Commissioner O'RIELLY. Thank you, Chairman Thune, Ranking Member Nelson, and members of the Committee, for the opportunity to appear before this distinguished body to address and discuss the important work occurring at the Federal Communications Commission. I would like to raise a handful of issues to your attention and stand ready to answer any questions you may have.

Last November's election led to a change in leadership at the Commission. There is a breath of fresh air and a new spirit of co-operation not present in the last Commission. Let me acknowledge and applaud Chairman Pai's immediate focus on improving our internal workings and procedures, which has long been a cause of mine.

In approximately five short weeks, the new Chairman has ushered in reforms to improve the efficiency, transparency, and accountability of the Commission. From fixing non-existent post-adoption editorial privileges to publicly releasing the text of documents at the same time they are shared with Commissioners to ending the practice of providing outside parties with information before Commissioners were in the loop, process reform has been a necessary and important mark for the Chairman. Hopefully, there is more to come, as I have a number of ideas for further reforms, including changes to our delegated authority process and our scope of information and data collections.

On another topic, it is discouraging to admit that a core function of the Commission, protecting the integrity of Commission-granted spectrum rights, is not being sufficiently achieved as it pertains to pirate radio stations. Today, these squatters are infecting the radio band at the expense of consumer services, including emergency communications and the functional and financial stability of licensed radio stations. Thankfully, I believe the situation is fixable and preventable. It will certainly take sufficient enforcement commitment and diligence as well as some new limited and targeted statutory authority dedicated to address pirate radio.

In terms of broadband availability, it is a high priority for me to ensure that broadband access is reasonably available to all Americans. To facilitate this, I have been intensely involved in completing the remaining pieces of our high-cost program, or Connect America Fund.

At the same time, standing in the way of greater internet access nationwide are barriers imposed by state, local, and tribal entities. These range from maintaining difficult permitting and approval processes, attempts to extract enormous sums for tower siting and access to rights-of-way, and efforts to establish government sponsored networks accompanied by favorable land tax and approval

procedures. While a vast number of communities see the benefit of broadband deployment and welcome providers seeking to serve their citizens, there are bad actors that will likely require preemptive measures by the Commission.

Last, having just returned from Mobile World Congress in Barcelona, I will share with you that a handful of my conversations with international representatives suggest increased concern that international governments via different forms continue to seek a greater role in internet oversight and policy setting. I believe that the possible expansion of government interference in internet governance and activities remain one of the greatest threats to long-term sustainability and growth of the internet.

Thank you again for the opportunity to testify, and I look forward to your questions.

Thank you.

[The prepared statement of Commissioner O'Rielly follows:]

PREPARED STATEMENT OF HON. MICHAEL O'RIELLY, COMMISSIONER,
FEDERAL COMMUNICATIONS COMMISSION

Thank you, Chairman Thune, Ranking Member Nelson, and Members of the Committee for the opportunity to appear before this distinguished body to discuss the important work occurring at the Federal Communications Commission.

I would like to raise a handful of seemingly unrelated issues to your attention, and I would be pleased to answer any questions you may have.

Process Reform

Last November's election led to a change in leadership at the Commission. While I miss working with two of my since departed colleagues, there is breath of fresh air and a new spirit of cooperation not present in the last Commission. It is certainly early, but the remaining three commissioners seem to be of the mind that if we disagree in some capacity on an item, there is willingness to move on to the next one without laboring in the past, which I think was noticeable at our last Commission Open Meeting.

Let me acknowledge and applaud Chairman Pai's immediate focus on improving our internal workings and procedures, which has long been a cause of mine. In approximately five short weeks, the new Chairman has ushered in reforms to improve the efficiency, transparency, and accountability of the Commission. From fixing non-existent post-adoption editorial privileges to publicly releasing the text of documents at the same time they are shared with Commissioners to ending the practice of providing outside parties with information before Commissioners were in the loop, process reform has been a necessary and important mark for the Chairman. Ultimately, I believe the ideas and reforms adopted to date, and potentially additional ones I have proposed, do not undermine the authority or ability of the Chairman to set and execute the overall Commission agenda. Hopefully, there is more to come, as I have a number of ideas for further reform, including changes to our delegated authority process and the scope of our information and data collections.

On this note, let me reiterate the need to conduct sound cost-benefit analyses as part of the Commission's consideration of new regulations on applicable industries. Too often under the prior Commission leadership, sufficient work was not done, certainly prior to votes by Commissioners, to calculate the particular costs that new burdens or obligations would impose on regulated entities. At the same time, past items have included vague or illusory benefits of these new regulatory burdens. Together, the Commission lacked a key component, that I see as necessary, for determining whether a proposal is in the public interest. While it may take some time to fix this situation, including centralizing and creating a new Bureau of Economics, I remain convinced that it is a necessary and appropriate change to our operating procedures.

Pirate Radio

It is discouraging to admit that a core function of the Commission—protecting the integrity of Commission-granted spectrum rights—is not being sufficiently achieved as it pertains to pirate radio "stations." By illegally broadcasting with makeshift equipment and a laptop, these stations are sprouting up and causing harm to con-

sumers and the industry. Today, these squatters are infecting the radio band at the expense of consumer services, including emergency communications and the financial stability of licensed radio stations. To put this in perspective, I recently learned from the Massachusetts Broadcasting Association that they previously found 24 pirates operating in one of their markets and the problem has only increased since the last examination. While this issue mainly affects four to five larger East Coast radio markets (e.g., Boston, Miami, New Jersey, New York), failure to properly address it highlights a deficiency in the Commission's enforcement tools and undermines our overall creditability.

Thankfully, I believe that this situation is fixable and preventable. It will certainly take sufficient enforcement commitment and diligence, which I think exists from the personnel in our field offices and the addition of our new "tiger teams." At the same time, I humbly suggest that the Commission could use some limited and targeted statutory authority dedicated to address pirate radio. Specifically, I propose that the Commission be able to seize equipment found in common areas that is broadcasting illegally in the radio band. In addition, our current fines should be increased, and some ability to impose penalties on those that directly and intentionally aid pirate stations could be helpful. While I would have concern if this authority were applied across the board, in this instance, I believe it would help minimize our current whack-a-mole approach that has proven less than effective.

Infrastructure

It is a high priority for me to ensure that broadband access is reasonably available to all Americans. To facilitate this, I have been intensely involved in completing the remaining pieces of our high-cost program, or Connect America Fund (CAF). The CAF is a \$4.5 billion annual subsidy program designed to address the difficult economics of serving those locations deemed high cost and extremely high cost. This work includes last year's rate-of-return reforms to permit and fund standalone broadband, the two targeted programs specific to Alaska, the recent creation of rules for the Mobility Fund Phase II, and the upcoming CAF Phase II reverse auction. While I have not agreed with each and every decision—particularly those that may lead to inefficiencies or harm to non-targeted individuals or communities—I am committed to seeing these elements of the program through in a timely manner. Having all of those pieces in place seems to be the only way the Commission can finally make effective the nascent Remote Areas Fund to address the most difficult areas to bring service.

At the same time, standing in the way of greater Internet access nationwide are barriers imposed by state, local, and tribal entities. These range from maintaining difficult permitting and approval processes, attempts to extract enormous sums for tower siting and access to rights-of-ways, and efforts to establish government sponsored networks accompanied by favorable land, tax, and approval procedures. While the vast number of communities see the benefit of broadband deployment and welcome providers seeking to serve their citizens, there are bad actors that will likely require preemptive measures by the Commission. This problem will become even more acute as providers seek to deploy the next generation, or 5G wireless services, that will bring greater capacity, higher speeds and lower latency, but will also require many more wireless tower and antenna siting approvals. I realize that preempting local community decisions is a difficult topic to contemplate, but it has become necessary and appropriate for the Commission to exercise authority provided by Congress to address this situation.

On a related note, I know that there has been and will be considerable debate over whether to include new Federal broadband spending in any larger infrastructure legislation. While this is a matter in the purview of Congress, I would like to add my thoughts to the extent that it is decided to do so. If new Federal funds are made available to expand broadband availability, it would be my opinion and advice that any such funds be allocated on the condition that they be disbursed via the Commission's CAF program, rather than alternatives. The CAF is by no means perfect, but it is the best mechanism, compared to any others, to minimize over-building, inefficiencies and waste, and it could be quickly expanded to reach additional unserved communities.

International Internet Freedoms

Having just returned from the Mobile World Congress in Barcelona, I will share with you that a handful of my conversations with international representatives suggest increased concern that international governments, via different forums, continue to seek a greater role in Internet oversight and policy setting. That should be viewed as deeply troubling by all individuals that support and believe in an Internet relatively free from government control, and particularly by this Committee

given its work to try to prevent ICANN from abusing its role post IANA conversion. I believe that the possible expansion of governmental interference in Internet governance and activities remains one of the greatest threats to its long-term sustainability and growth.

I intend to be active in the international events related to the Commission's functions and would be pleased to keep the Committee informed as circumstances warrant. Moreover, may I suggest that the Senate consider this threat as part of any nomination process to fill related positions within the new Administration, as well as staying in close contact with related offices within the Departments of State and Commerce.

* * *

Thank you again for the opportunity to testify this morning.

The CHAIRMAN. Thank you, Commissioner O'Rielly.

We have a lot of members here today, and I think a lot of members will want to ask questions. So I'm going to ask that we, as closely as possible, adhere to the 5-minute rule so we can get everybody in, and we'll try and enforce that more closely with the gavel.

Mr. Chairman, former FCC Chairman Reed Hundt, who served during President Clinton's term, said that you're off to a—actually off to a very good start. "By all accounts, he has set a very constructive tone with all the bureaus in the agency. He's met with them all individually. He has been very open, and everybody is reacting very positively."

The Office of Personnel Management measures what it calls global satisfaction, which is an index based upon employee satisfaction with their jobs and organization plus their willingness to recommend their organization as a good place to work. From 2013 to 2015, global satisfaction at the FCC fell more than any other department or large agency in the entire Federal Government, a lot more, and this was during a time when governmentwide global satisfaction actually increased. This is a very disturbing development because poor morale leads to ineffective organizations.

I know this is something that you've inherited. But will you, nevertheless, commit to doing your best to address this very serious problem?

Chairman PAI. Yes, Mr. Chairman. Both because I'm a Chairman and because I spent years as a former career staffer at the agency, I take this issue extremely seriously and I'm committed to doing whatever we can to provide an atmosphere of respect and collegiality among the professional staff.

The CHAIRMAN. Commissioner Clyburn, Commission rules require a minimum quorum in order for the agency to be able to fully function without limitations. It has been suggested that you may have the ability to deny the FCC that quorum by either leaving before your term expires at the end of June or refusing to attend open meetings. Will you commit today to serving out your full term and to doing your part as a Senate confirmed member of the Commission to ensure that it maintains a quorum?

Commissioner CLYBURN. Mr. Chairman, what you read has never been suggested or hinted by me. I have no plan to do anything that would jeopardize the functionality of this institution that I love so much.

The CHAIRMAN. Thank you.

Chairman Pai, as part of the Universal Service Reform in 2011, the FCC established a minimum price that telephone companies must charge their customers for local telephone service or risk losing universal service support. This is what's known as the rate floor. Although the Commission granted limited relief in 2014, the rate floor has continued to increase every year, and there appears to have been little effort to assess the impact these increases are having on consumers and service providers in rural America.

Do you have any concerns about the ever-increasing rate floor, and is this something that you expect the Commission will examine?

Chairman PAI. Thank you for the question, Mr. Chairman. I have substantial concerns about the rate floor, and I was outspoken about it several years ago, because it struck me as odd that, under Commission compulsion, rural carriers were forced to raise the telephone rates that rural consumers, who have relatively less median income compared to urban consumers, would have to pay to get telephone service. So that's something I'm committed to working with our bureau staff about, and I'm happy to work with you and your staff as well to make sure that we get it right.

The CHAIRMAN. As you know, there has been a lot of discussion about the FCC's Broadband Privacy Order and what were to happen if it suddenly went away. Is it true that consumers would be left unprotected, or would the FCC still be obligated to police broadband privacy practices under Section 222 of the Communications Act?

Chairman PAI. Mr. Chairman, that's correct. The carriers would still have their obligations under Section 222 in addition to other Federal and state privacy, data security, and breach notification requirements.

The CHAIRMAN. Commissioner O'Rielly, you've said that you are comfortable with the FCC pushing communities to allow timely installation of 5G equipment. What tools are available to the Commission that could be used to help speed deployment of 5G and other next-generation gigabit wireless networks?

Commissioner O'REILLY. Well, I think working with the Chairman—we've talked about the good actors and the steps that they have taken, and there's model code we've talked about. There are a number of different positive things, but I do believe that at some point we may have to get into—use authority that has been provided by the Congress to preempt some bad actor communities that are preventing broadband from being expanded throughout our nation.

The CHAIRMAN. I think that's good for me for now.

I'll hand it off to you, Senator Nelson, and we'll keep this thing moving along.

Senator NELSON. Mr. Chairman, I'm going to let our guys go first, and I'll do cleanup. So I'll flip it to Senator Schatz. But I just want to make sure that you all understand that E-Rate, which was set up, and it was supposed to be looked at in 2018, is so essential broadband to our schools and our libraries. And I would expect the FCC not to make any major changes on this vital program for students until after you evaluate it pursuant to the way it was set up in 2018.

Thank you.
The CHAIRMAN. Senator Schatz?

**STATEMENT OF HON. BRIAN SCHATZ,
U.S. SENATOR FROM HAWAII**

Senator SCHATZ. Thank you, Mr. Chairman.

Thank you, Commissioner Pai. Congratulations on your re-nomination. But many of us were disappointed that the President pulled the re-nomination of Jessica Rosenworcel last week. The Senate should have confirmed her to a term last year, and I'm counting on everyone to honor their original commitment. I certainly hope that we can get back to the long tradition of pairing these nominees so that both Jessica and Chairman Pai can move through the Senate floor quickly.

This is a question for all the commissioners. Congratulations to all of you for overseeing a successful incentive auction, the first one of its kind. We all want the faster Internet service and better coverage that will result from the auction. But I have concerns that consumers could lose access to their local broadcast stations if channels are forced off the air in the repacking process. The three of you previously said that if the stations cannot repack in the 39-month timeframe, they would not be forced off the air.

A yes or no question for each of you, starting with Commissioner Clyburn. Would all of you support legislative efforts to make sure that that does not happen?

Commissioner CLYBURN. I would support any effort that would complement our goal of ensuring that no consumer is negatively harmed.

Senator SCHATZ. Thank you.

Chairman PAI. Senator, I agree with Commissioner Clyburn.

Commissioner O'RIELLY. Without being insulting, depending on how it read, I would agree.

Senator SCHATZ. Thank you.

Chairman Pai, is the FCC going to review the AT&T-Time Warner merger?

Chairman PAI. Senator, as I understand how the parties have structured the transaction, there is no license that would be transferred from one party to the other, which, as you know, is the jurisdictional hook under the Communications Act for us to apply what is known as the public interest standard. And insofar as that remains the case, my belief is that the FCC would not have the legal authority to review that transaction.

Senator SCHATZ. Have you asked the FCC staff to conduct an independent legal analysis to confirm that the FCC has no role?

Chairman PAI. I have not at the current time.

Senator SCHATZ. Would you be willing to do so and share it with the Committee?

Chairman PAI. I would be happy to do that, Senator.

Senator SCHATZ. Thank you. And a question about Net Neutrality in the context of this merger—if you move forward with repeal of the Open Internet Order and we fail to pass legislation, and yet the Comcast merger had Net Neutrality requirements conditions in it, how do we ensure a level playing field with the AT&T merger not having any conditions either in rural or as a condition

of the approval of the merger, and yet one of its major competitors will still be bound by that original requirement?

Chairman PAI. Senator, there are a number of hypotheticals in there that I need to sort out. But I think the basic answer is that we want to act within our authority, of course, to protect the public interest, and in the context of a transaction, that simply depends on whether or not the transfer of a license is in the public interest. With respect to transactions passed, it involves the question of the enforcement of conditions that were agreed upon by prior Commissions. And in the general rulemaking process, of course, there are other factors that go into the analysis. I can't give you a simple answer.

Senator SCHATZ. But the practical impact will be that there are two giants, one that has to abide by Net Neutrality and one that doesn't.

Chairman PAI. Right.

Senator SCHATZ. Chairman Pai, I want to follow up on a private conversation that we've had regarding the Commission itself, and it's something I've talked to actually all three of you about. In one of your previous oversight hearings, you criticized the previous Chairman for the large number of party line votes under his tenure, and you said, "It wasn't always this way. It was once understood that no political party had a monopoly on wisdom, and we recognize that communications issues aren't necessarily partisan issues." And yet for the first two issues that you've tackled, it has been two to one.

I understand that you have a different perspective and you're in the business of implementing your point of view. But what assurances can you give the Committee, the telecommunications community, the Commission itself, its staff, your Democratic commissioner of your commitment to try to get to five-zero votes whenever possible?

Chairman PAI. Thank you for the question, Senator. I very much appreciate your perspective. The top priority that I listed in my testimony today and in my comments to the career staff on my second day in office was that I wanted to close the digital divide, and two of the topics that have been sitting on the shelf for a while involve the Mobility Fund, bringing wireless service to parts of the country that didn't have it, and the Connect America Fund, giving fixed broadband options to unserved Americans.

My explicit directions to my staff and to the bureau were to work with Commissioner Clyburn, to hear her out and try to accommodate her concerns, and I will certainly let her speak for herself. But I would like to think that the end product, which we validated on February 23, was a bipartisan one that will deliver digital opportunity to millions of Americans.

Now, in terms of process reform as well, she suggested, "Well, I understand, Ajit, that you want to push out these items once we tee them up for Commission consideration at a meeting. What about doing a one-page fact sheet to make it easier for people to understand?" And I said, "You know what? That's absolutely right. Let's do it." I implemented it immediately. That's the spirit I want to carry with me throughout the chairmanship to the best ability that I have.

Senator SCHATZ. Thank you very much.
The CHAIRMAN. Thank you, Senator Schatz.
Senator Wicker?

**STATEMENT OF HON. ROGER F. WICKER,
U.S. SENATOR FROM MISSISSIPPI**

Senator WICKER. Thank you very much, and thank you all for your testimony.

Chairman Pai, let's talk about bringing broadband to economically challenged areas, and this is certainly something that Commissioner Clyburn emphasized in her prepared testimony. You were successful in moving forward two major Universal Service Fund items, including Phase 2 of the Mobility Fund. These will undoubtedly help bring broadband services to rural and hard to reach areas.

You have four major initiatives in this regard, I understand. So tell us about your plan to emphasize areas where average household income falls below 75 percent of the national median, requiring states and localities to have deployment-friendly policies, and I think you used that term in your testimony, also. And then tell about tax incentives and zones that you might designate for the use of tax credits.

Chairman PAI. Thank you, Senator, for the question. It is something I'm really passionate about. I outlined in September what I hoped would be a bipartisan blueprint for action regardless of who assumed leadership of the Commission, precisely because I thought that these ideas knew no partisan angle or party affiliation.

One of the key proposals which you mentioned was my proposal for Congress to give us the authority to set up what I've called gigabit opportunity zones, and the idea here was that you would create a geographic area as small as a city block in an urban environment or as large as a rural county in which the median income of citizens within that area was 75 percent or less of the national average income. And the idea would be to provide tax incentives to providers to build out in those areas. Part of that also would be a requirement that states and localities adopt broadband-friendly policies so that the deployment was eased in terms of the access to rights-of-way and pole attachments and the like.

Additionally, to make sure that entrepreneurs can take advantage of those networks, my idea was to provide some relief for the employer's side of the payroll taxes for new companies who want to set up businesses in those areas. That way, people who live in those areas who want to create jobs in those areas would have a greater incentive to do so.

It was drawn from the spirit of former Secretary Jack Kemp of the Housing and Urban Development. My thinking was why don't we update for the 21st century his idea about enterprise zones, and this could give people who are in poverty or otherwise don't have economic opportunity a greater chance to achieve prosperity in the digital area, and I'm hopeful that working with Members of Congress, we can do that.

Senator WICKER. This is going to require legislation.
Chairman PAI. That is correct, sir.

Senator WICKER. Commissioner Clyburn, what do you think about such legislation?

Commissioner CLYBURN. If such legislation allows us to do what we do best, if such legislation also recognizes that affordability is a factor when it comes to adoption of services. So if we look at all of the universal principles and tools in our arsenal, I think it would be a good series of steps forward in terms of bridging those gaps that currently exist. But affordability has to be a part of the conversation.

Senator WICKER. Chairman Pai, Commissioner Clyburn says there is an affordability gap. Do you agree with this, and what would you do about it?

Chairman PAI. I do agree, which is part of the reason in my response to Chairman Thune that I expressed so much concern about the rate floor, because that actually involves the FCC mandating that companies increase the rates that rural customers have to pay. Here, too, I think we need to do more to ensure that consumers have competition, choice, and affordable access to the internet, and that's something I'm committed to working with her and with you about.

Senator WICKER. The distinguished Ranking Member wants the Commission to be pro-consumer. I think we all agree with that. It seems to me that reversing the Net Neutrality rule with regard to free data and zero rating has turned out to be pro-consumer in that not long after you terminated the investigation into these practices, we saw a series of new pro-consumer unlimited data offerings come into the market. Do you think the new flood of opportunities came as a direct result of your action in this regard?

Chairman PAI. Senator, I don't know if it was a direct result, but I do think it simply confirmed the wisdom of our approach, which is to recognize it's a highly competitive marketplace and that wireless carriers have a strong incentive to compete for the consumers' attention, and as a result, now all four national wireless carriers are offering new or expanded unlimited data plans, and that's a great thing for consumers.

Senator WICKER. It turns out the public really liked that.

Chairman PAI. Correct, sir.

Senator WICKER. At least so far. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Wicker.

Senator Booker?

**STATEMENT OF HON. CORY BOOKER,
U.S. SENATOR FROM NEW JERSEY**

Senator BOOKER. Thank you very much, Mr. Chairman. Just on the point that was just being made, and before I get into my questioning, I just want to reaffirm that I'm a firm—have a firm commitment, an unwavering commitment, to the ideals of Net Neutrality and the 2015 FCC Net Neutrality rules that were put into place which are now the law of the land. They were upheld now in court, and a lot of doom and gloom was predicted if this was to happen.

But, clearly, the sky has not fallen. Businesses, frankly, have continued to innovate in this space. We're seeing a lot of very posi-

tive results, and I'm really hoping that there is a commitment to net neutrality here, not just in the Committee, but also amongst the commissioners. But, obviously, we'll have time to talk about that.

I just want to jump into really another area of bipartisan encouragement—is just this idea to broadband access, which is, I think, so important for when it comes to creating a robust access to education, to telehealth, you name it. This, to me, is something of great urgency.

As most people know, I have a big concern about the way the criminal justice system is operating that has profoundly become a tool to create disparities in our country, and these disparities are stunning. Just, for example, there's no difference between blacks and whites in America for using drugs or even selling drugs, but African Americans are about 3.7 times more likely to be arrested for those nonviolent drug crimes.

As a result of that, you have situations like my state, where African Americans are 14 percent of the state's population but over 60 percent of the prison population. Our prisons are full of people that are disproportionately people of color, disproportionately poor people, in general, disproportionately people with mental health challenges, victims of sexual abuse, and I'm just fiercely committed to this idea of trying to make our society fairer for all Americans, equal justice under the law, and also to empower people who are affected by the prison population, by our mass incarceration problem in America, so that when they're paying their debt to society, they can come out and be successful.

All the data is showing that when people are in prison—and the wardens, the Federal wardens I sat and met with, talked about the urgency to keep a robust connection to family ties. That's why I've been very committed to trying to do everything to make that robust. We have 2.7 million children who right now are separated from an incarcerated parent. They're facing challenges growing up as well, and those links and those connections are vital for the children, for those families, and for the rehabilitation of a person who is incarcerated.

So this issue of affordable access to calls is not just about a guy in prison making a call. This goes fundamentally to a core priority that all of us have, right and left, to making sure we drive down recidivism rates and support families. Video visitation right now is on the rise, which is, again, something that I've talked to numerous wardens who think—and people in the Bureau of Prisons who think this is really strong.

So, Commissioner Clyburn, can you just let me know that if the FCC loses this case that right now is in court, what are the potential consequences for the issues that I'm passionate with and I know people on both sides of the aisle are passionate about?

Commissioner CLYBURN. I have only one word for that. It would be devastating. It would set us back in terms of the efforts that we've attempted to do in terms of closing that gap, you know, and keeping families together, to ensure that more than 39 percent of the population impacted—that they can keep in touch. The number hovers around 38 percent or 39 percent of people keeping in touch because they can't afford to.

And so where it's affordable, we've seen the conversations spike, and we have seen families when—there are 700,000 inmates that are released back into society every year. If the majority of them go home as strangers because they didn't have the opportunity to speak, then by the time 5 years roll around, 75 percent of them are back in. This is a family issue. This is a criminal justice issue. It cannot be decoupled, and providing just, reasonable, and fair rates to families pays dividends to all of us.

Senator BOOKER. And I'll ask some other questions I had about the Lifeline broadband provider issues that I've written to you about and hope we can talk about. But I just would love for you in the last seconds I have to respond to Commissioner Clyburn's sense of urgency as well as mine.

Chairman PAI. Thank you for the question, Senator, and I appreciate Commissioner Clyburn's perspective on this as well. I said when the FCC teed up this proceeding that it took too long. The petitioners should not have had to wait almost a decade for the FCC to finally heed their call. I also suggested early on that I thought this marketplace was broken. This is not a normally functioning marketplace like the wireless marketplace we just discussed in the exchange with Senator Wicker.

So I agree that the Commission has authority to adopt certain rate caps for interstate rates. I agree that the Commission has authority to regulate ancillary fees and some of the other subsidiary issues. There's a question, obviously, that the D.C. Circuit is highlighted for us in terms of the stays of the various orders the FCC has had, and we're working through those. But my commitment to you, regardless of how the case goes, is that we want to make sure the FCC does everything within its legal authority to fix this problem, and we would be happy to work with you on that.

Senator BOOKER. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Booker.

Senator Fischer?

**STATEMENT OF HON. DEB FISCHER,
U.S. SENATOR FROM NEBRASKA**

Senator FISCHER. Thank you, Mr. Chairman.

And thank you to all the members of the panel for the work that you did last year on the rate-of-return reform orders. I have heard from a number of Nebraska companies who opted into the cost model, and they were pleased with the results, and I appreciate your efforts on that. I continue, though, to hear concerns from Nebraska carriers that they are not permitted to get universal service support if they provide standalone broadband service, or that they must charge their customers hundreds of dollars a month to recover their costs for standalone broadband.

So, Mr. Chairman, do you have any thoughts on ways that we can solve this problem so that rural customers have the option to buy affordable standalone broadband service?

Chairman PAI. Thank you for the question, Senator. I've seen the promise of standalone service for myself in places like Diller, Nebraska, so I very much appreciate it. It also feeds into the affordability question that we were just talking about a little bit earlier. This is precisely the reason why 2 years ago, I put on the table a

very simple public one-page plan to allow rural carriers to offer standalone broadband service.

My concern with the rate of return reform proposed last year is that for carriers to be able to calculate how much support they would get for standalone service, they have to jump through 11 different hoops. They're quite technical and complicated, and at the end of the day, they don't necessarily yield enough funding to make standalone broadband service either a viable proposition for them to offer or for consumers to accept.

So my commitment to you is to working with you and others who are interested in this topic to make sure that we make this regulatory system more streamlined and more efficient to allow carriers to offer standalone service.

Senator FISCHER. Thank you.

Commissioner O'Rielly?

Commissioner O'RIELLY. I'm a little defensive, because I spent a great deal of time on rate-of-return issues.

Senator FISCHER. And you have been to Nebraska.

Commissioner O'RIELLY. I have—many of the states. But to the point—and I appreciate the desire to be simplified. When we talked to and worked with closely the carriers, they preferred a model that wasn't as simplified. So we had a choice to go in one direction that would have been much easier, and they preferred another model that we were able to come to agreement about.

Your point is well taken in terms of is it available today—standalone broadband. That is in the hands of the carriers themselves. I know in meeting with—not your state, but in other states—the carriers have said, "It doesn't matter if you pass this or what the changes are, I'm never going to split off the offering of a voice product from standalone broadband because I'm making too much money off that." So we don't have a—

Senator FISCHER. I have carriers who want to be able to offer that standalone broadband service and not be penalized for it.

Commissioner O'RIELLY. Right. They are provided the subsidies under the mechanisms that we designed, so they are not penalized for offering that product compared to a bundled product today.

Senator FISCHER. As long as we can make sure that customers, the consumers out there in rural areas, have that available to them without it costing hundreds of dollars a month.

Commissioner O'RIELLY. Right. We had to find the right price point of how much we could afford to subsidize in terms of our overall budget. So that was an agreement we came to with all the carriers and found—what we found was a rather happy place.

Senator FISCHER. Chairman Pai you mentioned streamlining. I appreciate your willingness to streamline regulations and processes so that we can encourage innovation. Last week, we had a Full Committee hearing on infrastructure deployment, and I asked Shirley Bloomfield about the broadband funds maintained by the FCC and whether it's necessary to maintain the number of programs that are out there, not just under you folks, but also Department of Commerce, Department of Agriculture and there's a lot of funding that's available. What I'm hoping to do is look at encouraging broadband deployment, but not duplicate efforts.

Do you think that we can streamline programs out there, whether it's with the FCC or other agencies, so that we can avoid the duplication of that funding and make sure that we have existing networks that are needed but not overbilled?

Chairman PAI. Thanks for the question, Senator. Obviously, I don't presuppose to tell Congress how it should structure all these programs. But I do think it would be helpful to unify them or at least streamline them to some extent.

I recall early on in my tenure doing a town hall meeting in Parsons, Kansas, my hometown, with Senator Moran, where a number of carriers told us, "Well, on one hand, we have a line of credit that's outstanding from the Department of Agriculture. On the other hand, we're not taking it because the FCC is telling us that if we do, there are going to be very significant regulatory restrictions on how we spend it and the like."

It occurred to me that if we had a unified system that would give greater clarity to the recipients, allow Congress to better oversee how we're spending that money, it could be better for everybody at the end of the day. So I hope that's something that Congress will take up.

Senator FISCHER. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Fischer.

Senator Udall?

**STATEMENT OF HON. TOM UDALL,
U.S. SENATOR FROM NEW MEXICO**

Senator UDALL. Thank you very much, Chairman Thune. Congratulations, Chairman Pai, on becoming Chairman.

Chairman PAI. Thank you, Senator.

Senator UDALL. While we may disagree on some issues such as Net Neutrality, I think we have a shared goal of extending modern communications access to all Americans. That must include Native Americans who face a terrible digital divide on tribal lands, and I know Commissioner Clyburn has seen that firsthand in my state.

Today, I want to ask you about the President's open hostility toward media outlets, that many of those media outlets have business before the FCC, and how you intend to lead the FCC in this climate. This could directly affect matters before your agency and the First Amendment issues that you have been very outspoken on.

Your official FCC biography states that you have been an outspoken defender of First Amendment freedoms. It describes your advocacy in 2014 that helped scrap a proposed study of barriers to entry into the media marketplace. And in an op-ed, you wrote, and I quote, "The government has no place pressuring media organizations into covering certain stories."

In response to an interview question last year about whether there is a, quote, "role for the FCC to play in keeping the political elite from trying to suppress Trump supporters," you replied, "Certainly, I think one aspect of it is the FCC using the bully pulpit that it has to continue advocating for free speech." And you added, and I quote, "I would hope whoever the President is, Americans would return to the tradition that we've had of respectful and ro-

bust public debate. That's something becoming increasingly rare," and end quote there.

Today, President Trump is using bully tactics to try to intimidate the media. He has even declared certain media outlets—and I quote—he called media outlets "the enemy of the American people." His Press Secretary, Sean Spicer, took the unusual step of barring some journalists from attending his daily press briefings.

Chairman Pai, many news organizations or their parent companies have business dealings with the FCC, from regulatory matters to potential merger review. So I'd like to ask you a couple of questions that I think can be answered with a simple yes or no.

Do you agree with President Trump that the media is the "enemy of the American people"?

Chairman PAI. Well, Senator, I don't want to weigh in to the larger political debates, but I'll simply reaffirm the quotes that you offered from last year and the year before.

Senator UDALL. So you refuse to answer that?

Chairman PAI. Oh, no, Senator. I—

Senator UDALL. About the media being the enemy of the American people.

Chairman PAI. I believe that every American enjoys the First Amendment protections guaranteed by the Constitution.

Senator UDALL. And when you met with President Trump in the Oval Office and at Trump Tower, did you discuss any issues related to the media?

Chairman PAI. Senator, I will leave the details of those conversations to the White House to determine. I'm not at liberty to say.

Senator UDALL. And did you discuss any specific company that interacts with the FCC?

Chairman PAI. Again, Senator, I can't comment on the conversations I've had with the President. I would leave that to the White House to disclose.

Senator UDALL. Will the FCC operate independently of the White House?

Chairman PAI. Absolutely, sir.

Senator UDALL. And will you resist any attempt by the White House to use the FCC to intimidate news organizations?

Chairman PAI. Well, Senator, I have said consistently, including just last week in an international forum to the regulators and companies of the world, that we are an independent agency, and for any matter that is placed before me, I will take a sober look at the facts that are based on the papers submitted by interested parties, I will render a decision based on the law and precedents that apply to those facts, and I will make a determination based on what I and my colleagues think is in the public interest.

Senator UDALL. Now, White House Chief Strategist Stephen Bannon told an interviewer in January, and I quote, "The media should be embarrassed and humiliated and keep its mouth shut and just listen for a while." Do you agree with him that the media should keep its mouth shut?

Chairman PAI. Senator, again, I'm not going to weigh in to the larger political debates that are beyond the FCC's—

Senator UDALL. Would you, as an FCC Commissioner, make a comment like that to the media about them keeping their mouth shut?

Chairman PAI. Senator, I certainly have not made comments like that. I've heard it at home every now and then when I don't discharge my personal responsibilities. But, no, I have not said such things like that.

Senator UDALL. The *Wall Street Journal* recently reported that the President's son-in-law, Jared Kushner, raised concerns with a Time Warner executive about CNN's coverage of President Trump. The article quotes—and it notes that Time Warner owns CNN and has a merger, pending potential anti-trust review. So have you had any discussions with or contacts with anyone in the Trump administration about CNN or any other news organizations?

Chairman PAI. Senator, no, I've not had any conversations with him or anyone else in the White House about that transaction.

Senator UDALL. And will you immediately report to this committee if anyone from the White House contacts you or your staff about taking any favorable or negative action regarding any media or communications business?

Chairman PAI. Senator, I will commit to following all the appropriate protocols and ethical requirements that apply to that sort of conversation.

Senator UDALL. Thank you very much.

The CHAIRMAN. Thank you, Senator Udall.

Senator Moran?

**STATEMENT OF HON. JERRY MORAN,
U.S. SENATOR FROM KANSAS**

Senator MORAN. Chairman, thank you.

Chairman Pai and Commissioner O'Rielly and Commissioner Clyburn, thank you very much for joining us. I'll use this as a moment to compliment all three of you. I appreciate the relationship that we have had with you and your staff, the open and receptive way in which we work together, and I thank you for your public service, Commissioners.

Commissioner Pai, I'd like to thank you for your comments in your opening moments of your presentation today. I appreciate the heartfelt nature of those. It was a shocking occurrence in our state and something that we highly, highly deplore.

My first visit as I returned to Washington, D.C., after that was to the Embassy of India to express the concerns that we wanted to have with the families, those who came here from India, and to express the belief that Kansans are warm and welcoming people. And I thank you for your comments today and, again, express my pride in your and other Indian Americans' success and, particularly, Indian Americans' from Kansas success. So thank you so much.

Chairman PAI. Thank you, Senator.

Senator MORAN. A couple of quick questions I'd like to raise. I know that my colleague, Senator Schatz, raised the topic of repack, and I guess he solicited from you and received your commitment to work with him, and I assume that includes the rest of us on the

Committee, should a repack alteration be necessary. Let me ask a couple of more specific questions about that.

Did you believe that the Commission adequately assessed the size and scope of the repack when it first was formulated, when the Commission first formulated its transition plan?

Chairman PAI. Thank you for the question, Senator. I did have some concerns about the agency's course, but, obviously, a lot of decisions have already been made. So at this point, our goal is to work to ensure a smooth and successful transition, and part of that involves in the lead-up to the end of the auction, which is going to be coming up soon, putting out a scheduling public notice that outlines the steps, working with broadcasters to get cost estimates back, and other steps like that. So stay tuned is the best answer I can give you. We want to make sure we work with everybody involved.

Senator MORAN. When will you know if money set aside for the repack is sufficient?

Chairman PAI. We anticipate that 3 months after the close of the incentive auction, we'll be getting cost estimates from all the broadcasters, and at that point, our task force, which has done a tremendous job, will be able to take stock and figure out how much money they estimate it's going to be, and if that number is within the \$1.75 billion that Congress has allocated for us for the repack, then we'll take the appropriate action.

Senator MORAN. And when will you know if the 39-month time period established by your predecessor is sufficient?

Chairman PAI. That will depend, in part, upon, obviously, when the auction closes, and there are some petitions for reconsideration that are pending that have raised some questions about that as well. So we're going to go where the facts take us, and we're just not sure what exactly the time-frame will be for that auction to close.

Senator MORAN. To switch topics, the Mobility Fund Phase 2—congratulations on getting an order adopted for that fund. I'm pleased to see that we're moving forward. I understand that the order recognizes there is a need for a robust challenge process. I agree. We've had this conversation several times before about coverage maps and the challenges, their fallacy. Can you explain how a challenge process would actually operate?

Chairman PAI. Thanks for the question, Senator. First and foremost, the congratulations and the credit are due to my colleagues who are sitting alongside me, working in good faith to put a product on the table that I think will benefit the American people.

In terms of the challenge process, this was inspired, in part, by a drive I took last summer from—or last fall, rather, from Wichita to Des Moines, and I was struck by the fact that in a lot of places, the FCC's map might suggest we did have coverage, but we didn't, in fact. So we want to make sure that this challenge process is robust, that it gives the American people and the FCC accurate information about where consumers are covered and where they're not. So that's one of the issues we teed up in the Mobility Fund document we put out, was to figure out the best way to ensure that that data is accurate. If the map is accurate, great. But if it's not, we want to make sure we act on the basis of firm and accurate data.

Senator MORAN. Let me ask Commissioner Clyburn and Commissioner O'Rielly if they have any comments they'd like to make in regard to either of the questions that have been answered by Chairman Pai.

Commissioner CLYBURN. As you know, I have been pushing for a next phase of a Mobility Fund for some time, and I am happy to see its conclusion. When it comes to the challenge process, that is something that I am very passionate about also. I want to make sure that those who are challenging are not disadvantaged, that they have a means of affordably and in an open and transparent manner being able to say, "No, this is not the case." So I am very proud of this very open and interactive process and look forward to continuing to work with the parties to make sure that we have accuracy and a process that will enable us to meet our goals.

Senator MORAN. Thank you.

Commissioner O'REILLY. I agree with my colleagues. I pushed for inclusion of an improved challenge process, knowing what it needed to improve our mapping. And back to your questions on the repack and the pieces to those, I said I would be the first one to come to Congress if additional funding was necessary and in terms of the timing as well. I think it's a little premature to get to that point. Your question is when will we get to that. I think we're still months away from there.

Senator MORAN. Thank you all three. I'm pleased to see that we're having a conversation by three commissioners, not the normal dialog between two. So it's good to have this set of witnesses here. I've also been in a room with Senator Thune, and I recognize that sometimes I never get asked a question either. So I wanted to make sure you had the opportunity to make your record known.

The CHAIRMAN. I think the Senator's time has expired.

[Laughter.]

The CHAIRMAN. Thank you, Senator Moran.

Senator Peters?

**STATEMENT OF HON. GARY PETERS,
U.S. SENATOR FROM MICHIGAN**

Senator PETERS. Thank you, Mr. Chairman, and thank you to each of the Commissioners for your public service, and we appreciate having you here today and appreciate your openness to discuss these important issues.

Chairman Pai, you have said that the Commission must, and I quote, "commit itself to being a truly independent agency that makes decisions based on facts and law," which is certainly appreciated—you making that comment. I know that you are aware that in September 2015, Chairman Thune, Ranking Member Nelson, Senators Booker, Rubio, and McCaskill and I sent letters to the FCC, the DOT, and NTIA endorsing a plan for the joint testing of two proposals for spectrum sharing in the 5.9 gigahertz band, and I understand that—or I know that that testing is currently underway now.

This band is vitally important to the automotive safety systems which will dramatically decrease highway deaths and will be a major advance when it's fully deployed. So in keeping with your commitment to transparency and letting the data drive the policy,

can you commit to making public all of the data that is collected by the FCC during the bench and field testing phase?

Chairman PAI. Senator, I would be happy to do so with the caveat that to the extent that there is confidential or trade secret or other—law enforcement, for example, information that might otherwise be revealed, we'd be happy to make public whatever we can. I'm not sure that there is, but I just want to make sure that, obviously, we abide by whatever rules and regulations apply to sensitive information.

Senator PETERS. I understand that, but everything else will be made public?

Chairman PAI. We will certainly—I'll be happy to take a look at that. I'm sort of new to this issue as well, but we'd be happy to do whatever we can to make it public.

Senator PETERS. Great. I would also ask if you'd commit today that the Commission's final determination on spectrum sharing in the 5.9 gigahertz band will be based on sound engineering data, which will undergo rigorous and open review so others will be able to fully review the decision that was made?

Chairman PAI. Senator, any action that we take in this area or any area has to be based on a firm factual foundation.

Senator PETERS. Great. What is your target date for making a final determination on spectrum sharing? Do you have a date now?

Chairman PAI. We don't yet. I'm scheduled to sit down at some point with our Office of Engineering and Technology and the other experts of the agency and try to discuss some of these issues, and I'd be happy to get back to you, if that's OK, with a more specific timeframe. But I'm unable to give a date at this point.

Senator PETERS. Well, fair enough. But I'd appreciate it if you could contact my office. This is something that we're obviously following very closely and would love to have that dialog with you.

Chairman PAI. Absolutely.

Senator PETERS. What has been the Commission's experience in coordinating with DOT and NTIA during the transition to the new administration? That coordination is going to be essential for this process, obviously.

Chairman PAI. That's a good question. We are already in the process of doing outreach to both the Department of Transportation and to NTIA, and my commitments—well, my instruction to our staff was to make sure that we are as plugged in as we can be, to make sure that one agency is not acting to the exclusion of any other. So we want this to be an open and cooperative dialog moving forward.

Senator PETERS. Great. I appreciate that. Also, Chairman Pai, I want to pick up on Senator Moran's discussion and questions related to Form 477 data which is going to be critical for us to make sure that our rural areas actually get service. We have, I think, a big issue in Michigan if you look at who may qualify, even though we've got rural areas that, quite frankly, simply don't have service, but it appears as if they do, which is not reality.

It really goes to the heart of the issue, which is beyond the challenge process, which we want to make sure is going to be vigorous and fully open. But we really have to change these maps. They are simply not accurate as far as what I am hearing and have been

told. How are we going to go in and fundamentally make sure that we have good data? Because it's going beyond just the Mobility Fund Phase 2, which is important, but there'll be other issues as well that will arise. We need to have good data or we can't make good decisions.

Chairman PAI. I couldn't agree more with that last sentence you expressed. I think that it's critical, not just for the Mobility Fund, but for any program the FCC administers, to make sure that our data is accurate. If you see a map, and it suggests that, for example, the UP is entirely green when you know it's not, then—

Senator PETERS. It's clearly not. I will tell you that, having just come back from there.

Chairman PAI. Yes, we want to make sure that we capture accurately the realities on the ground, and that's part of what we're hoping to iron out in this challenge process. But even more generally, with respect to the Form 477, is to make sure that the information we're getting is correct, and that's one of the commitments I've got to this committee and, frankly, to our own professional staff going forward.

Senator PETERS. Well, I'd like to work closely with you on that as well, because it's of critical importance to many parts of my state, and I look forward to your commitment to it.

Chairman PAI. Yes, sir.

Senator PETERS. Thank you.

The CHAIRMAN. Thank you, Senator Peters.

Senator Young?

**STATEMENT OF HON. TODD YOUNG,
U.S. SENATOR FROM INDIANA**

Senator YOUNG. Thank you, Chairman. I want to thank the Commissioners for all the time they're spending with us today.

I'm a new member of this committee, so I thought I'd just very quickly lay out some operating principles that I intend to follow as I interact with the FCC. Before I do that, just know that I reviewed the FCC's strategic goals: promoting economic growth, protecting public interest goals, making networks work for everyone, and promoting operations excellence at the FCC. So I think implied in those goals is just a general effort to make sure that you serve the broader public interest.

With that spirit in mind, I'm looking to partner with all of you to promote the following: private sector innovation, transparency at the FCC, bottom-up solutions as opposed to D.C.-driven policies, and sustainable and, wherever possible, bipartisan policies that give our job creators the certainty that they need to innovate.

Commissioner O'Rielly, in your testimony, you spoke at some length about process reforms that you believe are important to create an efficient, transparent, and effective FCC. I couldn't agree more. Process is policy so frequently. I'd like you to give some more specificity to what you've laid out in your testimony.

I've long been a champion of Congress reasserting its role with respect to reviewing major regulations and making sure that what we have in place is still relevant and serves the broader public interest. Why do you believe it's important to create a new Bureau of Economics within the FCC, and are there other bureaus within

the FCC that you believe should be consolidated perhaps to better reflect regulated industries?

Commissioner O'RIELLY. I appreciate the question, and I've put forward a number of different process reform ideas. Most of them deal with the internal workings of the three of us remaining. But your point gets to the question of cost-benefit analysis, something the Commission has not done, even though previous chairmen have promised to do so.

I believe in cost-benefit analysis, and if you read items, as I read every item that I vote on—if you read them, you'll see the cost-benefit analysis is sorely lacking. They do some on the cost, but very little benefit is quantified. Even though it can be difficult, it should be done.

So I've had difficulty with our current structure in that the economists are scattered throughout the different bureaus today, so there's no continuity between the different items that you'll get. One may be a little bit better than the other. Another will be completely lacking. So there may be a sentence or two about cost-benefit analysis, and it always comes in the same form. The benefits are large and the costs are whatever they are, but they're always exceeded by the benefits, so we have to go forward on this item, and that's not quantifiable, in my opinion, and not sufficient.

Senator YOUNG. Thank you. Chairman Pai, you also discussed in your testimony the need to reform internal processes. What additional authorities do you require, if any, to make the sort of reforms that you think are necessary?

Chairman PAI. Thanks for the question, Senator. I do think we have a lot of tools in the toolbox, so to speak. Under Sections 4 and 5 of the Communications Act, we do have the authority to organize ourselves in order to promote efficiency in administration.

There are some things, obviously, that lie within Congress' purview, and Congress is considering, for example, process reforms of its own, reforms of the Sunshine Act, for example, to allow the three of us to collaborate, which we cannot currently do without running afoul of restrictions, and consolidated reporting, that instead of sending up a bunch of reports that consume a lot of staff resources and that very few people read, we provide you a unified product that would better enable you to discharge your legislative responsibilities.

Senator YOUNG. Thank you. I want to commend you on your efforts to close the digital divide and that of other commissioners, and I look forward to working together on that effort. As a matter of follow up here, I'd like to ask you, seeing as the President has proposed that we pass a major infrastructure package at some point in the fairly near term, what lessons you've learned, say, in the past decade, as you look back, about implementing broadband buildout. And if Congress were to appropriate additional funds, do you have thoughts about where we can get the most bang for the buck?

Chairman PAI. Thanks for the question, Senator. I think that the biggest lesson I've learned is that America is a very challenging place, in some cases, to deploy broadband. The business case for the private sector won't necessarily be there, and so we need to think creatively, both in terms of the wide stewardship of Federal

funds under our administration, about modernizing our regulations to ease that business case, and to encouraging others, the states and localities, for example, to adopt broadband-friendly policies. Those three tools, I think, are things that we can and should be implementing.

With respect to the infrastructure plan, I do hope, with due respect to the White House and to this body, that digital infrastructure is a part of that conversation. I think that in the 21st century, as I travel around the country, anyway, that's one of the first things that people mention, is that they might leave their small town or not have the opportunities that others have because they don't have Internet access. That's something I'm committed to solving, and to the extent that Congress can help us solve it, that would be terrific.

Senator YOUNG. Thank you. I yield back.

The CHAIRMAN. Thank you, Senator Young.

Next up is Senator Cortez Masto.

**STATEMENT OF HON. CATHERINE CORTEZ MASTO,
U.S. SENATOR FROM NEVADA**

Senator CORTEZ MASTO. Good morning or afternoon. It's a pleasure to meet all three of you, and I look forward to working with you.

Chairman Pai, congratulations on your re-nomination. I look forward to an opportunity to sit down with you and talk a little bit more about the issues we're discussing today and some others as well.

Chairman PAI. Thank you, Senator.

Senator CORTEZ MASTO. So let me start off—I'm really interested in a couple of things, obviously rural broadband as we have many rural areas in Nevada that are of concern, but before I get to that, one of the things that concerns me is the hiring freeze that the current administration has instituted. From your perspective, Chairman Pai, what impacts have you seen or felt from the White House's hiring freeze to your agency?

Chairman PAI. Thus far, Senator, to be honest, we've been so busy producing work product for the American people that I haven't had a chance to talk to our human resources and other administrative experts to figure out what we haven't been able to do. What I can say is that we're making progress on some of our core priorities using the terrific staff that we've got thus far.

Senator CORTEZ MASTO. And how many years have you been serving as a Commissioner already?

Chairman PAI. I've been a Commissioner from 2012 to January of this year, and I was a staffer for almost four years before that.

Senator CORTEZ MASTO. Can you assure me that the merger reviews or legal challenges aren't being impacted by the need to hire staff?

Chairman PAI. I'm sorry. Can you repeat the question?

Senator CORTEZ MASTO. Sure. Can you assure me that your merger reviews by your agency or legal challenges are not being impacted by the need to hire legal staff or staff, in general?

Chairman PAI. Yes, Senator, I can.

Senator CORTEZ MASTO. And are there positions that, to your knowledge, are vacant currently in the Office of Inspector General?

Chairman PAI. I can't recall if there—I believe there are a few in the Office of Inspector General. I know also with the field offices that there are four vacant agent positions.

Senator CORTEZ MASTO. Could you do me a favor and provide to me in writing answers to the questions with respect to the hiring freeze, the impact, and where they're located throughout your agency? That would be helpful.

Chairman PAI. I'd be more than happy to do that.

Senator CORTEZ MASTO. Thank you very much.

Commissioner O'Rielly, I know that the FCC's Cybersecurity and Communications Reliability Division works with the communications industry to develop and implement improvements that help ensure the reliability, redundancy, and security of the nation's communications infrastructure. What else, specifically, can the FCC be doing to aid in the concern and challenge of cybersecurity and identity theft?

Commissioner O'RIELLY. So I want to be careful here. CCR does a very good job in providing recommendations and improving the relationships that they have with the providers that we oversee. Our statutory authority is relatively limited in the data security space. That would be something they would be open to if Congress were to change those lines of jurisdiction. There are other agencies that the providers do interact with and operate in terms of the data security and pieces of that nature.

Senator CORTEZ MASTO. So limited to no authority right now to engage in that space?

Commissioner O'RIELLY. I think it is extremely limited in terms of the data security. If Congress were to change that, I would implement whatever changes they sought.

Senator CORTEZ MASTO. OK. Thank you.

Getting back now to expanding broadband, we've had discussions on this. I'm interested particularly in the access and siting on public and tribal lands, and I'm aware of these concerns, particularly in the state of Nevada, where over 80 percent of the lands are owned by the Federal Government.

Chairman Pai, your bio page on the FCC website references that your regulatory philosophy is that we need to streamline the process for deploying wireless infrastructure, and your empowerment agenda includes that the Federal Government should speed the deployment of broadband on Federal lands which often impacts our most rural communities by adopting shot-clocks for action, minimizing fees, and mapping Federal assets, among other steps.

Can you please explain to me what we can do to address these challenges, and also what commitment you can make to helping get access to more Nevadans who are impacted by some of these hurdles?

Chairman PAI. Well, Senator, I'll start with the last part of your question first, which is that you've got my hearty commitment to work with you to make sure that all Nevadans, but especially rural Nevadans, have access to digital infrastructure. I saw that for myself on the outskirts of Reno, when I saw a fixed wireless provider providing high-speed connectivity to what was then the Tesla fac-

tory out there, and it was incredible what they were able to do in some pretty challenging environments with respect to wireless connectivity and fiber and the like.

With respect to how we can encourage the deployment, I do think that we need to speed the ability of providers to deploy on Federal lands. Currently, it takes twice as long if you want to get a permit on Federal land as it does on private land, and want to be able to close that gap.

Additionally, we want to make sure that to the extent we're talking about wireless infrastructure that the wireless infrastructure of the future, the small cells, distributed antenna systems, et cetera, aren't subject to the same onerous requirements that would apply to, say, a couple of hundred-foot cell tower. Those 5G networks of the future, as they're known, are going to require much more densified and smaller infrastructure.

Additionally, we want to make sure that we work with all stakeholders to ensure that wireline infrastructure is more easily deployed. So, for example, I was in Carson City, and one of the topics we talked about was dig once, for example. It just makes a lot more sense if you're going to dig up a road as part of a Federal transportation project, why not also install at the same time the conduit that allows any provider, small, big, whoever, to be able to lay the fiber and provide a competitive alternative to consumers.

Senator CORTEZ MASTO. I'm glad you said that, and I don't mean to interrupt. But I think what you're saying is so important. So one of the areas I'd like to see—and I hope that this is something that you could take on—would be establishing or dedicating efforts to an interagency working group of partners to tackle these siting challenges. I've heard a lot of discussion about, yes, it's happening, and we have challenges, but there's no action to try to actually get something done. Is that something you would be dedicated to helping us with in Nevada and in any other state that has similar challenges?

Chairman PAI. Absolutely, Senator. In fact, it's almost—it's, frankly, underway with the direction of what I've called my Broadband Deployment Advisory Committee that my colleagues have agreed to help with. That's one of the things they're tackling, is how to work cooperatively with other agencies to make sure that no one agency or no one part of government is standing in the way of digital opportunity.

Senator CORTEZ MASTO. Thank you. Thank you very much. I look forward to working with all of you.

The CHAIRMAN. Thank you, Senator Cortez Masto. And you were all just having a conversation about the MOBILE NOW bill. So let's pass that through Congress. That would be a good place to start.

Senator Capito is up next.

**STATEMENT OF HON. SHELLEY MOORE CAPITO,
U.S. SENATOR FROM WEST VIRGINIA**

Senator CAPITO. Thank you, Mr. Chairman, and I thank the Ranking Member as well.

Welcome to our witnesses. I've had the opportunity to personally speak with all of you, and I appreciate your service.

Chairman Pai, I appreciate you coming to West Virginia and walking the catwalk at the New River Gorge Bridge. I look forward to seeing you scale that rather than walk it, and I'm sure—

[Laughter.]

Senator CAPITO. Yes, that's a good laugh back there.

Chairman PAI. Senator, there's no more be-Jesus left to be scared out of me at this point.

[Laughter.]

Senator CAPITO. But, anyway, thanks, and I appreciate the conversations that we've had, and I know you've had a lot of conversations with folks about rural America, and I really appreciate your digital empowerment agenda. I appreciate the explanation that you gave earlier—and I was able to hear—on the gigabit opportunity zone, so I will not take the opportunity to ask you for that.

But I would like to know in terms of best practices for states in terms of siting and power pole siting and dig once and all those kinds of things, do you, as FCC Chair, plan to come out with some sort of recommended state initiatives that would help us—because you saw when we were in Fayette County how difficult it is, even in a small state like ours, to deploy.

Chairman PAI. Absolutely, and that experience really informs a lot of the decisions that we're making now. I do think that we need to have a set of best practices that would enable states and localities to move forward if they want to allow their citizens to have digital access.

One of the things that we are going to charge the Broadband Deployment Advisory Committee with is creating a model code so that any jurisdiction could take these policies off the shelf without having to hire people to study the issues, and et cetera, and just be able to say, "We want to deploy broadband. The FCC has given its imprimatur to these sets of policies, so we know that they are going to be in the consumer interest, and let's move forward with those."

Senator CAPITO. I think that would be well appreciated by every state, because states don't have the expertise and a lot of times perceive to have many more barriers than what really exist. So I appreciate that.

Commissioner Clyburn, thank you for coming to Morgantown and visiting the Preston Memorial Hospital. At that point, you were on your Connecting Communities tour. What were your two top-line takeaways from that tour that you included West Virginia in? What would you say?

Commissioner CLYBURN. Broadband and more broadband.

Senator CAPITO. I like that.

Commissioner CLYBURN. So when we got a chance to come off of the mountain after I got my sanity back—if you have been up with her staffer, you will need medical attention.

[Laughter.]

Commissioner CLYBURN. One of the things that I saw on this 11-state tour that included your beautiful state is that every single challenge that we have in America can be improved and enhanced by broadband connectivity. But as we know, every single community is different. Every single community has its challenges, and part of the challenge is that the business case cannot always be made. So you need entities like ours. You need NTIA. You need

RUS. You need all of us to come together and say, "What can we do in a very targeted manner to bring connectivity to these regions?"

So that's the takeaway. That's what I hear when I go everywhere, that we need connectivity in order to make sure—as you mentioned, Mr. Chairman, you really do not have to move. You should not have to relocate in order to thrive, survive, and to be productive in communities, and that's what we're all about.

Senator CAPITO. Thank you. I would be remiss if I didn't mention as a form of reinforcement—we don't terrorize people when they come to West Virginia, but it is rather hilly there, and I do have a new role, Mr. Chairman, as Chair of the Financial Services General Government Appropriations Subcommittee, which appropriates for the FCC. So in case you didn't know, I thought I'd bring that up.

[Laughter.]

Commissioner CLYBURN. So I won't bring up my mental health issues. OK. Thank you.

Senator CAPITO. Mr. O'Rielly, one of the things we talked about in my office was this white space issue that I think could hold some great promise in rural America. I think there has been some discussions on the regulatory space around white space and simplifying and making it easier and more clarified for some of the providers. Could you just talk about that briefly?

Commissioner O'RIELLY. Absolutely. As we talked about in your office, is the opportunity of the space between television channels within a market—can that be used for unlicensed purposes, Wi-Fi? And this committee has looked at this issue for a long time. We are actually farther down the road, which is very good. The software and some of the technology has been a little lacking than I would have liked, and we should be further along.

But I think it has improved, and the Commission has made a number of changes in the last 2 years to improve the detectability to make sure there aren't false positives so we're not displacing broadcasters but still providing an opportunity to use those channels that are available for white space. And then what you can do with that, in partnering together with a number of different companies that operate in the unlicensed band, is quite remarkable. What they're able to do with small slivers is quite remarkable, and they're able to bring connectivity, to bring things like the Internet of Things available and wearables and all the things that will come from that.

Senator CAPITO. Right. I would note that West Virginia University in partnership with AIR.U has been using this white space to connect their two campuses and to make sure that their students are always connected as they're moving back and forth between the campuses.

Thank you all very much.

The CHAIRMAN. Thank you, Senator Capito. And maybe the Senator from West Virginia can share with the other members of the Committee what it is that she has done to the FCC Commissioners to make them so agreeable.

[Laughter.]

The CHAIRMAN. Next up is Senator Klobuchar.

**STATEMENT OF HON. AMY KLOBUCHAR,
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Thank you to the three Commissioners for all the work that you do.

Congratulations, Chairman Pai.

I know this was raised earlier, but we really need, as you all know, to have a full slate of Commissioners, and I hope the President will re-nominate Jessica Rosenworcel. As I always note, not only is she really smart, but I like that she has a name that's harder to pronounce than mine own. So we'd like to get that done.

Broadband deployment, as Senator Capito and you just noted, Commissioner Clyburn, is really the infrastructure challenge of our generation. Senator Capito and I are two of the five or six co-chairs of the Broadband Caucus, and I recently led a letter to the President along with the co-chairs that was signed by 48 Senators urging the President to include broadband as part of any infrastructure initiative. As we know, the MOBILE NOW Act that passed the Committee in January included my provisions to advance dig-once policies and expand wireless coverage. Senator Thune and I have pushed for the standalone broadband reforms.

Chairman, why is direct Federal support like the FCC provides through the Universal Service Fund critical to deploying broadband in the rural parts of our country?

Chairman PAI. Thanks for the question, Senator. I think the core reason is because in too many parts of the country, you simply cannot build a business case for deployment. So, for example, in places like where I'm from in Kansas or in the Iron Range in your state, it's going to be difficult in the absence of Federal subsidies through the Universal Service Fund to figure out a way to lay fiber or to deploy wireless infrastructure, and that's something that, again, working on a bipartisan basis, I'm hopeful we can solve in the time to come.

Senator KLOBUCHAR. Exactly. I started my day with a number of people working on the infrastructure issues, and I'm very glad that both the administration and the proposal we've recently put out for a trillion dollars in infrastructure on the Democratic side include infrastructure. So we're hopeful that when something comes out, it will include broadband in the infrastructure.

I'm Co-Chair of the 911 Caucus, Commissioner Clyburn, and I know you've worked on some of these issues. Senator Nelson and I have announced that we're putting a draft together on—Next Gen 911 Act of 2017—locality issues and things like that. Could you talk about the importance of the transition to Next Gen 911?

Commissioner CLYBURN. It provides us with more continuity. It provides us the ability—in particular, for the American citizen when it comes to the most stressful time of their lives—provides them with more certainty and more robust options when it comes to connecting with their public safety access point.

There are 6,800 of those in this nation, and, honestly, they're not all created equal. So we really have to do what we can to bridge that particular gap when it comes to providing services and catch everyone up so that next-generation 911 is truly a reality.

Senator KLOBUCHAR. Thank you.

Chairman Pai, Senator Lee is here, and he and I work on anti-trust. That's our subcommittee over in Judiciary, and we've heard from small independent programmers that most favored nation clauses create a hurdle that prevents consumers from being able to access their content. Others maintain that MFNs are pro-competitive.

Last year, the Commission issued a Notice of Proposed Rulemaking on this issue. I understand you dissented, at least in part because of process concerns. What are your plans on moving forward with that Notice of Proposed Rulemaking?

Chairman PAI. Thanks for your question, Senator. The comment period just closed a couple of weeks ago, and so our professional staff is taking stock of what's in the record, and at some point, I'll be able to sit down with them and try to figure out the appropriate way forward along with my colleagues.

Senator KLOBUCHAR. Do you want to add anything to that, Commissioner Clyburn?

Commissioner CLYBURN. Yes. This was something that was of great interest to me. I heard from dozens of independent programmers who say that most favored nation clauses that are unfavorable and unfair—you know, other practices—very limiting in terms of their online experience, very limited in terms of the access that they have, and very limited by way of the viability of their business. So I'm hopeful that the Chairman, after careful review, will move forward with this item, because I believe that this needs our attention.

Senator KLOBUCHAR. OK.

Commissioner O'RIELLY. I agree with the Chairman's review process.

Senator KLOBUCHAR. All right. Well, thank you to all of you. Thanks.

Chairman PAI. Thank you, Senator.

The CHAIRMAN. Thank you, Senator Klobuchar.

Next up we have Senator Markey.

**STATEMENT OF HON. EDWARD MARKEY,
U.S. SENATOR FROM MASSACHUSETTS**

Senator MARKEY. Thank you, Mr. Chairman. Regrettably, the Congress and the FCC have already fired their opening salvo in the war on Net Neutrality and the Open Internet Order, and broadband privacy protections are the first victim. Yesterday, Senator Flake introduced a resolution that would undo the FCC's broadband privacy rules by utilizing the Congressional Review Act, or the CRA. And last week, the FCC stopped the implementation of the data security protections of the rules which could make subscribers' sensitive information more vulnerable to breaches and unauthorized use.

I fear that this is just a preview of coming attractions, and Congress or the FCC may take further actions to roll back these critical privacy protections, because big broadband companies don't want to give consumer privacy protections the attention which they deserve. The privacy rules that are on the books aren't cumbersome. They're not complex or complicated. They're common sense.

They simply, one, require the Internet service provider to get consumer consent before using or sharing subscribers' personal information; two, promote transparency by mandating that the ISPs tell the consumer what they're collecting about them; and, three, ensure that the ISPs adopt data security protections and notify consumers if a breach occurs. That's it. That's what the whole fight is about. The big broadband companies don't like it. They don't want to spend the money to give the consumers that information. They would not, as a result, have to abide by those robust privacy protections.

Commissioner Clyburn, isn't it true that many Americans across the country don't even really have a choice as to their broadband provider, so if they don't like the privacy protections that the Internet service company is providing, they don't have another provider to really go to affordably?

Commissioner CLYBURN. Absolutely. There are very few places that have two or more options for individuals.

Senator MARKEY. And isn't it true that consumers pay incredible amounts of money each month in order to have access to the broadband?

Commissioner CLYBURN. Absolutely.

Senator MARKEY. So killing these FCC privacy rules through a CRA would create an unregulated wild west where captive consumers would have no defense against abusive invasions of their privacy by their ISP. The rules are on the books. The broadband providers don't like it. They've always fought it. They are definitely in a situation where they think they can finally escape having to have robust privacy protections in place.

The headlines every day warn us of what can happen with smart TVs, with smart devices, what the broadband revolution makes possible, in terms of the compromise of information of innocent Americans. This is just another example.

Now, moving over to Net Neutrality, the Open Internet Order, the Census Bureau reported that the U.S. broadband and telecommunications industry spent over \$87 billion in capital expenditures in 2015. Meanwhile, last year, almost half of all venture capital funds invested in this country went toward internet-specific and software companies. And yesterday, over 170 organizations sent a letter calling on the FCC to promote economic growth and preserve competition by maintaining the Open Internet Order. I ask unanimous consent that this letter be entered into the record.

[The information referred to follows:]

March 7, 2017

Hon. AJIT PAI,
Chairman,
Federal Communications Commission,
Washington, DC.

Hon. JOHN THUNE,
Chairman,
U.S. Senate Committee on Commerce, Science, and Transportation,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
U.S. Senate Committee on Commerce, Science, and Transportation,
Washington, DC.

Dear Chairman Pai and Senators Thune and Nelson,

Protecting net neutrality is crucial to ensuring that the Internet remains a central driver of economic growth and opportunity, job creation, education, free expression, and civic organizing for everyone. The principles of net neutrality—that all data on the Internet should be treated equally, and Internet service providers (ISPs) should not discriminate or provide preference to any data, regardless of its source, content, or destination—are the foundation that has made the Internet the engine of opportunity it is today. The continuation of net neutrality is essential to the continued growth of the country and to ensuring access to social, political, and economic empowerment for all.

In 2015, millions of people made their support for net neutrality clear in comments to the Federal Communications Commission (FCC) supporting the Open Internet Order. The order, which reclassified broadband Internet under Title II, enshrined the principles of net neutrality in law, and gave the FCC the authority to enforce it. As a result, broadband providers cannot block users' access to content, slow down connections to services, or charge for speedier delivery of preferred content.

Since the order went into effect, broadband infrastructure investment is up, ISP revenues are at record highs, and businesses continue developing innovative ideas and offerings. A *2016 report* found that the total capital expenditures of ISPs increased by 4 percent and that total revenues increased by 5 percent from 2014 to 2015. Moreover, we consistently see businesses innovate and create new ways to provide fresh content and better services to consumers.

We, the undersigned organizations, representing a diverse group of consumer, media, technology, library, arts, civil liberties, and civil rights advocates and content creators, urge you and your colleagues to oppose legislation and regulatory actions that would threaten net neutrality and roll back the important protections put in place by the FCC in 2015, and to continue to enforce the Open Internet Order as it stands.

Net neutrality supports and protects these basic values:

- *Competition:* Net neutrality helps to ensure that all companies, from small startups to larger companies, have equal access to consumers online. It allows companies to fairly compete for customers within their market and incentivizes the development of new services and tools for consumers. This competition is the engine of the U.S. economy, and should be promoted.
- *Innovation:* Net neutrality makes it possible for new companies and new technologies to emerge and ensures that broadband providers do not create undue burdens and cost barriers that can harm small businesses and undermine job growth.
- *Free Speech:* Net neutrality ensures that everyone with access to the Internet can organize and share their opinions online equally, a key safeguard for our democracy. It ensures that ISPs are not arbiters of speech and expression online by favoring particular forums or providing enhanced access to specific content and audiences.
- *Equality of Access:* Net neutrality ensures that access to websites and content is based on individual preferences. This means content creators are not forced to pay ISPs for content distribution in order to reach consumers. It also means that end users are able to access all the content they desire without restrictions from ISPs. This allows all people in the U.S. to access essential healthcare services, educational resources, and employment opportunities and the freedom to choose from the full spectrum of online content. It means that a small church

staffed by volunteers has the same opportunity to reach the public as a large media corporation with an unlimited budget. At a time when there is bipartisan agreement in Congress that we must increase Internet access to all people and bridge the digital divide, the quality of this access is just as essential.

In order to promote continued economic, social, and political growth and innovation, it is imperative that the Internet remain open and accessible to all people in the future. We strongly urge you and your colleagues to protect the free and Open Internet and the benefits it provides to for all people.

Sincerely,

18MillionRising.org	Free Press
Access Humboldt	Free Speech Coalition
Access Now	FREE! Families Rally for Emancipation
Access Sonoma Broadband	and Empowerment
act.tv	Future of Music Coalition
Akaku Maui Community Media	Generation Justice
Alliance of South Asians Taking Action	Global Action Project
Allied Media Projects	Greater Northshire Access Television
Alternate ROOTS	Greenlining Institute
American Association of Law Libraries	Greenpeace USA
American Civil Liberties Union	Hardwick Community Television, Inc.
American Folklore Society	Highlander Research and Education
American Library Association	Center
Appalshop, Inc.	Hollaback!
Arts & Democracy	Hollow Earth Radio
Asamblea de Derechos Civiles	Hope Community/SPEAC
Association of American University	Illinois Campaign for Prison Phone
Presses	Justice
Association of Research Libraries	Institute for Local Self-Reliance
Benton Foundation	Iraq Veterans Against the War
Bill of Rights Defense Committee/	Kingdom Access Television
Defending Dissent Foundation	KPPP-LP 88.1 FM Radio
Brattleboro Community Television,	KRSM—The Southside Media Project
Brattleboro VT	Lake Champlain Access Television
Brown Boi Project	League of American Orchestras
California Center for Rural Policy	Line Break Media
CASH Music	Mad River Valley Television, Inc.
Center for Democracy & Technology	Making Contact
Center for Digital Democracy	Martinez Street Women's Center
Center for Media & Democracy—	May First People Link
Burlington VT	Media Action Center
Center for Media and Democracy	Media Action Grassroots Network
Center for Media Justice	Media Alliance
Center for Popular Democracy	Media Mobilizing Project
Center for Rural Strategies	MediaVox
Central Appalachia Regional Network	Mexican American Opportunity
Champaign-Urbana Citizens for Peace	Foundation
and Justice	Million Hoodies Movement for Justice
Civic Hall	MomsRising.org
Color Of Change	Movement Strategy Center
Common Cause	MoveOn.org Civic Action
Common Frequency	Museums and the Web
Consumers Union	National Association of Latino
Courage Campaign	Independent Producers (NALIP)
CREDO	National Coalition Against Censorship
Daily Kos	National Consumer Law Center, on
Dance/USA Demand Progress	behalf of its low-income clients
Democracy for America	National Digital Inclusion Alliance
Dignity and Power Now	National Domestic Workers Alliance
Easton Community Access Television	National Economic & Social Rights
Electronic Frontier Foundation	Initiative (NESRI)
Ella Baker Center for Human Rights	National Federation of Community
Engine EveryLibrary FAIR	Broadcasters
Faithful Internet	National Guestworker Alliance
Fight for the Future	National Hispanic Media Coalition
Forward Together	National Organization for Women
Fractured Atlas	

National Performance Network & Visual Artists Network	SPNN
Native Public Media	Stop LAPD Spying Coalition
Netroots Nation	Student Power Networks
New America's Open Technology Institute	SumOfUs
New Music USA	Sunlight Foundation
New Orleans Workers Center for Racial Justice	The Alliance for Media Arts and Culture
Open Access Connections	The Authors Guild
Open MIC (Open Media and Information Companies Initiative)	The Harry Potter Alliance
OpenMedia	The Media Consortium
OpenTheGovernment.org	The Nation
Opera America	The People's Press Project
Other Worlds	Theatre Communications Group
Other98	TURN-The Utility Reform Network
OVEC-Ohio Valley Environmental Coalition	U.S. Department of Arts and Culture
PEN America	United Church of Christ, OC Inc.
People's Action	United Plant Savers
People's Press Project	United We Dream
Performing Arts Alliance	Urban Librarians Unite
PhillyCAM	Urbana Champaign Independent Media Center
Popular Resistance	Virginia Rural Health Association
Presente.org	Voices for Racial Justice
Progressive Change Campaign Committee	VOTE MOB
Progressive Technology Project	WAFLS
Prometheus Radio Project	WFNU-LP Frogtown Community Radio (Frogtown Neighborhood Association)
Public Knowledge	Within Our Lifetime
Race Forward	WITNESS
Racial Justice Action Center	WNC Communities
Rewire	Women, Action, and the Media
Right To The City Alliance	Women's Institute for Freedom of the Press
RootsAction.org	Women's Media Center
RYSE Center	Woodhull Freedom Foundation
Southerners On New Ground	Working Narratives
SouthWest Organizing Project	Writers Guild of America, West
	X-Lab
	Young Women United

Senator MARKEY. We've hit the sweet spot. We have \$87 billion invested by the big broadband companies. We have half of all venture capital going into Internet and software companies. That's what you want. You want that kind of a dynamic. You want the innovation over here, and you also want the deployment of broadband. It is happening. There is no problem that needs fixing.

Commissioner Clyburn, has the Open Internet Order really made broadband providers unprofitable? Is it really discouraging these companies from investing billions of dollars in their networks?

Commissioner CLYBURN. All of the reputable figures that I've seen say no, that an investment is occurring. As you mentioned, venture capital money is flowing, and according to SEC filings, where you are to identify if there are any issues or barriers when it comes to a particular process or an action, there was no identification of the Open Internet being a negative when it comes to investment opportunities.

Senator MARKEY. So I'm going to fight very hard to protect those privacy rules that are now on the books, and I'm going to fight very hard to protect Net Neutrality. And, believe me, the 4 million Americans who communicated in the last round on these Open Internet issues are just going to be dwarfed by the number of peo-

ple out there who are going to concerned if privacy and competition rules, Open Internet rules, are taken off the books.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Markey.

Senator Nelson wants to—

Senator NELSON. Mr. Chairman, I've got another commitment and I'm going to go. Since I was going to do cleanup, I will defer that by submitting my questions, particularly to you, Chairman Pai, for the record, and I would appreciate written answers to the questions.

Chairman PAI. Yes, sir.

Senator NELSON. Thank you.

The CHAIRMAN. Thank you, Senator Nelson.

Senator Lee?

**STATEMENT OF HON. MIKE LEE,
U.S. SENATOR FROM UTAH**

Senator LEE. Thank you very much, Mr. Chairman.

Thanks to each of the Commissioners for being here. It's an honor to be with you. This is my first FCC oversight hearing as a member of the Commerce Committee, so I'm glad to have you here.

I wanted to begin my questions and remarks today by sharing the words of a previous FCC Chairman, William Kennard, who served, of course, under President Clinton. He wrote the following in 1998. He said, "Our vision for the future of communications must be a bold one. We must expect that in 5 years, there can be fully competitive domestic communications markets with minimal or no regulation. In such a vibrant, competitive communications marketplace, the FCC would focus only on those core functions that cannot be accomplished by normal market forces. As a result, the traditional boundaries separating the FCC's current operating bureaus should no longer be relevant. In 5 years, the FCC should be dramatically changed."

Chairman Pai, I'll start with you. Tell me what you think about the comments made by then Chairman Kennard, whether you agree with them and whether we have arrived at a place like the one he described?

Chairman PAI. Thank you for the question, Senator. I think Chairman Kennard deserves tremendous credit that, at an early age of the internet, he foresaw that there would be conversions and that the FCC's mission would have to adjust accordingly, and I think that his impressions in a lot of ways about how the marketplace would adjust and how the Commission would have to adjust along with it—obviously, the FCC has long labored under what are known as silos, where we regulate certain companies depending on how they are classified and what technology they use, for example, and those traditional distinctions are increasingly becoming obsolete in the modern age.

So it's one of the things that's incumbent upon the agencies to make sure that we keep abreast of the times, both with respect to our substantive regulations, but also making sure that our staff are tasked with defending the public interest in the most efficient and appropriate way.

Senator LEE. There's a natural inclination in any government entity to look to the preservation of the entity. There's also an obligation, as these comments reveal, to serve the people, and, as he said, we need free markets. We need market forces, and that doesn't always cut in the same direction as expanding the power of the agency in question.

Chairman PAI. That's exactly right, Senator, and that's why one of the things that I've been focused on from the get-go has been process reform, how to adjust the agency's administration and operation to make sure that we give every one of the commissioners and every one of our co-workers, the professional staff, the chance to do what they do best, which is to defend the public interest.

Senator LEE. On that note, I was glad that my colleague, Senator Young, brought up that issue earlier today, and I look forward to working with him and with other members of this committee and other members of the Senate to help move that forward. But as you pointed out earlier, Chairman Pai, there are some things that the Commission itself can do to initiate this process. In fact, as I understand it, the administration has agreed on such a plan or has identified such a plan as kind of a priority. Do you intend to initiate this process?

Chairman PAI. That's one of the issues that has been raised, I know, in the press, and so that's one of the things that we're going to be looking at, and we're obviously open to any suggestions or ways to improve our operations. In the meantime, we're going to keep focused on the public interest and defending it as best we can.

Senator LEE. Thank you. I appreciate that. In its 2015 Open Internet Order, the FCC claimed its unprecedented and sweeping Title II reclassification was necessary because broadband providers, to quote the order, "have the incentive and ability to limit," close quote, the openness of the internet, the extent to which it's open. Yet in the course of its nearly 400 pages within this Order, the FCC failed to effectively prove that it was offering anything that's anything more, in my opinion, than a solution in search of a problem.

Commissioner O'Rielly, in the 2015 Open Internet Order, how many times did the FCC refer to what an Internet Service Provider may, could, might, or potentially do to block or degrade application services or content? Could you offer a guess?

Commissioner O'RIELLY. I can't give you an estimate of the number of times they did that, but it has been clear that these are prophylactic remedies that they've reviewed—I didn't support them, obviously—and the court has said they're prophylactic, so there was no—they're all forward-looking. They're all may, could, might, along those lines. But I couldn't give you an estimate of the exact number.

Senator LEE. By our count, there were several hundred instances in which this happened, and it looks even worse considering the fact that the FCC's chief economist at the time called the order an economics free zone.

I've got more questions. I see I'm out of time, so I suppose I can submit those for the record. Thank you very much. Thank you, Commissioners.

The CHAIRMAN. Thank you, Senator Lee, and I'll be happy to get your questions in the record.

Next up is Senator Blumenthal.

**STATEMENT OF HON. RICHARD BLUMENTHAL,
U.S. SENATOR FROM CONNECTICUT**

Senator BLUMENTHAL. Thanks, Mr. Chairman, and thank you for having this hearing.

Thank you for being here. We're in an oversight hearing, so you'll have to forgive us for not being completely congratulatory and non-critical. I want to put in the record a number of materials, including an editorial from the *New York Times* dated February 10, an editorial from the *Washington Post* dated February 11, and a letter from the Consumers Union written to our Chairman dated March 7.

[The information referred to follows:]

The New York Times—The Opinion Pages / EDITORIAL

AN ANTI-CONSUMER AGENDA AT THE F.C.C.

By THE EDITORIAL BOARD FEB. 10, 2017

As President Trump rushes to dismantle Obama-era rules that protect Americans, he has an energetic helper over at the Federal Communications Commission. Its new Republican chairman has started undoing policies of his predecessor that were intended to make phone, cable and Internet service more fair and more affordable.

Ajit Pai, who was a commissioner before he became Chairman last month, is trying to wipe away net neutrality rules put in place by Tom Wheeler, the former chairman, to prevent broadband companies from creating fast and slow lanes on the internet. Mr. Pai has scrapped a proposal to let people buy cable-TV boxes instead of renting them at inflated prices from companies like Comcast. Many of Mr. Pai's moves would hurt the people who have the least power. For instance, he has backed away from rules to lower the exorbitant rates for prison phone calls. And he has suspended nine companies from providing discounted Internet service to poor people through a program known as Lifeline.

Mr. Pai, who says the Wheeler-era regulations are burdensome, clearly favors policies that serve the interests of large telecommunications companies.

Consider the net neutrality rules, which were put in place to prevent broadband companies from giving preferential treatment to content from their affiliates or business partners. Because only one or two cable and phone companies provide high-speed Internet access to homes in most of the country, they can easily impose abusive policies without fear of losing customers. Those businesses have tried to use their power as Internet gatekeepers to demand that streaming companies like Netflix pay them fees to deliver movies and TV shows to people who are already paying for broadband. The regulations were upheld last year by the United States Court of Appeals for the District of Columbia. If Mr. Pai now scraps them, he will be helping big telecom companies at the expense of Internet users and smaller companies without the deep pockets to pay broadband providers.

Mr. Pai wants cable companies to keep making a mint from renting cable boxes—a revenue stream that totals nearly \$20 billion a year. He seems unconcerned that families across the country are being forced to spend an average of \$231 a year on those fees, when they would save money over the long run if they were allowed to buy the boxes just as they purchase other electronic devices. In fact, Congress directed the F.C.C. to do just that. Yet the commission is ignoring that law and allowing this scheme to continue.

Mr. Pai is aiming right at the poor with his policies on prison phone rates and discounted broadband service. Phone companies filed a lawsuit challenging rules adopted during Mr. Wheeler's tenure to cap prison phone rates, which had been as high as \$17 for a 15-minute phone call. There is simply no justification for those rates. And by suspending companies seeking to offer discounted broadband service through Lifeline, the F.C.C. will deprive children from poor households of the high-speed Internet access they need to do homework. Mr. Pai says he is concerned about fraud and says the affected companies were not properly vetted. But this isn't the

right way to root out abuse. The commission could, for example, subject companies participating in the program to regular audits.

Congress created the F.C.C. to help all Americans obtain access to communication services without discrimination and at fair prices. Mr. Pai's approach does exactly the opposite.

The Washington Post—The Post's View • Opinion

THE FCC TALKS THE TALK ON THE DIGITAL DIVIDE—AND THEN
WALKS IN THE OTHER DIRECTION

Correction: An earlier version of this editorial incorrectly stated that the FCC offered no immediate explanation for changes to its Lifeline program. On the same day as the changes were made, the FCC released the order for reconsideration and a news release about the action. This version has been updated.

By Editorial Board February 11

IN HIS first speech in the role, Federal Communications Commission Chairman Ajit Pai extolled the importance of bridging the digital divide between those who can afford Internet access and those who cannot. Days later, though, he opened another gap, this time between his words and his actions.

Mr. Pai used his inaugural remarks to express his commitment to “bring the benefits of the digital age to all Americans.” Another early *pledge* to publish pending FCC regulations in a pilot program geared toward greater transparency was equally encouraging. But in a *single Friday afternoon*, the FCC took steps to undermine both promises: It removed nine companies from the roster of its Lifeline program for low-income broadband consumers, and it retracted four reports—two directly related to the digital divide—from its record.

The FCC launched *Lifeline* in 1985 to make phone service more affordable for low-income Americans by allowing them to purchase discounted services from participating carriers. In 2016, the FCC shifted its focus to broadband access, and as part of that effort it began granting companies the right to enroll in the program nationally. This move stitched up holes in a state-by-state patchwork of participants to make the market everywhere more competitive. The nine companies booted from Lifeline this month owed their status to the change.

Mr. Pai argues that the Lifeline designations were an Obama administration rush job and that pulling them back affected only a small percentage of the more than 900 companies in the program. An FCC spokesman also noted that the retracted reports remain in the former FCC chairman's online archive, although they now “have no legal or other effect or meaning.”

That's all true. But critics are right to worry that Mr. Pai's decisions may be the first steps in crippling Lifeline. He has long expressed skepticism of the program, citing concerns about fraud, although in a July 2016 congressional hearing on the subject he admitted he had yet to uncover any. Already, Mr. Pai has called for a hold on litigation in a court case challenging the FCC's authority to approve companies for national Lifeline participation, and it is unclear whether the agency will ever resume its defense in the case.

The revocation of the reports—one of the four focused on expanding WiFi networks in primary and secondary schools and libraries, and another on improving the Nation's digital infrastructure—only lends credence to concerns about Mr. Pai's stated commitment to closing the digital divide. It certainly throws cold water on his claims to transparency.

And these aren't the only reasons to fear the FCC is headed in a disturbing direction. Mr. Pai has also expressed eagerness to roll back other Obama-era changes to the agency that make for a freer and fairer Internet. That's one area where we can hope that, once again, he does not mean what he says.

CONSUMERS UNION
March 7, 2017

Senator JOHN THUNE,
 Chairman,
 U.S. Senate Committee on Commerce,
 Science, and Transportation,
 Washington, DC.

Senator BILL NELSON,
 Ranking Member,
 U.S. Senate Committee on Commerce,
 Science, and Transportation,
 Washington, DC.

Re: March 8, 2017 Oversight of the Federal Communications Commission Hearing
 Dear Chairman Thune and Ranking Member Nelson:

Consumers Union, the policy and mobilization arm of Consumer Reports,¹ encourages you to consider the following topics for discussion in advance of the Federal Communications Commission (FCC) oversight hearing scheduled for March 8, 2017. This hearing provides a unique opportunity to learn what newly-appointed Chairman Ajit Pai's agenda is for the Commission, and whether his views on policy matters are aligned with the best interests of consumers.

Perhaps no other sector of the economy has been more dramatically transformed in the past twenty-five years than telecommunications. Just a few decades ago, telecom to the average consumer meant nothing more than picking up the phone and calling someone, or maybe using a fax machine in the office. Only a select few of us were dabbling with the Internet or sending e-mails.

Telecommunications in the early 21st century is all about connecting to the world around us—with friends, strangers, movements, information, art, ideas, and more. We can stream video via YouTube or Netflix, buy just about anything from Amazon or eBay, book an apartment overseas via Airbnb, post updates and organize rallies on Facebook, share photos on Instagram, hail a ride from a stranger via Uber or Lyft, or have a face-to-face chat with a friend on our smartphones. When we encounter something we don't know, we "Google it" or "look it up on Wikipedia" and seconds later, we have our answer. Telecom today means we truly have the world at our fingertips.

These advancements did not magically happen sometime since the mid-1990s. Though both politicians and activists demanded an Internet "free" from regulation, the fact is that government carefully tended the rise of a diverse Internet full of choices—good choices—for consumers. By favoring competition over consolidation and common sense rules of the road instead of unbridled commercialization, policymakers fostered a rich and robust telecommunications industry and a vibrant, Open Internet that is changing our lives for the better every day.

Such smart decisions by government played a role and must continue to do so to protect consumers in the new world of dizzying telecom inventions, and to guarantee a fair marketplace where the next great idea can flourish. Increased consolidation and industry calls for unwarranted deregulation pose challenges to the level playing field that benefits consumers. We at Consumers Union recognize the crucial role the FCC plays in the telecommunications sector, and we urge you to ensure the hearing is an opportunity to raise the critical consumer issues we describe in detail below.

The Clear Need to Protect the FCC's Broadband Privacy Rules

The FCC made history last October when it adopted consumer-friendly privacy rules that give consumers more control over how their information is collected by Internet service providers (ISPs). Said another way, consumers can decide whether an ISP can collect a treasure trove of consumer information, whether it is a web browsing history or the apps a consumer may have on a smartphone. We believe the rules are simple, reasonable, and straightforward.

ISPs, by virtue of their position as gatekeepers to everything on the internet, enjoy a unique window into consumers' online activities. Data including websites consumers visit, videos viewed, and messages sent is very valuable. Small wonder, then, that ISPs are working so hard to have the FCC's new privacy rules thrown out, either through use of the Congressional Review Act or through the reconsideration process at the Commission. But we should make no mistake: abandoning the

¹ Consumers Union is the public policy and advocacy division of Consumer Reports. Consumers Union works for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves, focusing on the areas of telecommunications, health care, food and product safety, energy, and financial services, among others. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumers Reports has over eight million subscribers to its magazine, website, and other publications.

FCC's new privacy rules is about what benefits big cable companies and not about what is best for consumers.

Unfortunately, one of Chairman Pai's first anticipated actions at the FCC is to unravel these rules. Doing so would clearly be choosing corporations over consumers. Chairman Pai said last week that he will seek to harmonize the FCC's privacy rules with those of the Federal Trade Commission (FTC).² Moreover, he claimed consumers were "stripped" of the FTC's privacy protections in 2015, when ISPs were reclassified as common carriers under Title II by the FCC.³ Lacking is any mention that the FCC made this change in order to secure the legal footing to enact net neutrality rules. The Chairman also failed to mention the fact that the FCC's rules on broadband privacy were adopted to protect consumers' privacy in the wake of any losses experienced after reclassification.

Chairman Pai has indicated that he believes "jurisdiction over broadband providers' privacy and data security practices should be returned to the FTC, the Nation's expert agency with respect to these important subjects,"⁴ even though the FTC currently possesses *no* jurisdiction over the vast majority of ISPs thanks to the common carrier exemption—an exemption made stricter by the Ninth Circuit Court of Appeals in last year's *AT&T Mobility* case.⁵

This is such a poor solution that it amounts to no solution at all. For the FTC to regain jurisdiction over the privacy practices of ISPs, the FCC would first have to scrap Title II reclassification—not an easy task which would be both time-consuming and subject to judicial review, and jeopardize the legal grounding of the *2015 Open Internet Order*. Congress, in turn, would have to pass legislation to remove the common carrier exemption, thus granting the FTC jurisdiction over those ISPs who are common carriers. We are skeptical Congress would take such an action. Finally, the FTC does not enjoy the same robust rulemaking authority that the FCC does. As a result, consumers would have to wait for something bad to happen before the FTC would step in to remedy a violation of privacy rights.

Though Chairman Pai's remarks express concern over the "stripped" privacy rights of consumers and the need to fill the "consumer protection gap created by the FCC in 2015,"⁶ this ignores the stark reality that the FCC did just that last October by enacting strong rules which favor consumers over corporations. Chairman Pai also fails to acknowledge that the FCC's privacy rules are stronger than the FTC's guidelines. Any fondness for the FTC's approach to privacy is merely support for dramatically weaker privacy protections favored by most corporations.

There is no question that consumers favor the FCC's current broadband privacy rules. Consumers Union launched an online petition drive last month in support of the Commission's strong rules. To date, close to 50,000 consumers have signed the petition and the number is growing. When asked last week to submit comments to the FCC in opposition to industry's petitions of reconsideration, just under 9,000 comments were filed in a matter of days. Consumers care about privacy and want the strong privacy protections afforded to them by the FCC. Any removal or watering down of those rules would represent the destruction of simple privacy protections for consumers.

We urge you to ask Chairman Pai and his colleagues how favoring the FTC's approach to privacy enforcement is anything less than a weakening of the current FCC broadband privacy rules, and to inquire about the many steps needed for the FTC to exercise comparable jurisdiction over issues critical to consumer privacy.

At Risk: Net Neutrality and the 2015 Open Internet Order

Consumers Union has long been a champion of strong net neutrality rules to ensure non-discrimination of Internet traffic, and to prevent throttling or paid prioritization of web content. We supported the adoption of the FCC's *2015 Open Internet Order* and will oppose any attempt by Congress or the Commission to weaken or abolish the rules contained within the *Order*.

The *2015 Open Internet Order* faces an uncertain future. Despite overwhelming consumer support for net neutrality rules, many Republicans in Congress have vowed to overturn the *Order* via legislation. At the FCC, Chairman Pai and Com-

² Statement, Office of Chairman Pai, *FCC Chairman & FTC Chairman on Protecting Americans' Online Privacy* (March 1, 2017), <https://www.fcc.gov/document/fcc-chairman-ftc-chairman-protecting-americans-online-privacy>

³Id.

⁴Id.

⁵ *Federal Trade Commission v. AT&T Mobility LLC*, xxx F. Supp. 3d xxx No.15-16585 (9th Cir. 2016)

⁶ Statement, Office of Chairman Pai, *FCC Chairman & FTC Chairman on Protecting Americans' Online Privacy* (March 1, 2017), <https://www.fcc.gov/document/fcc-chairman-ftc-chairman-protecting-americans-online-privacy>

missioner O'Reilly dissented to the *Order*'s passage, and thus, many expect they will act to dismantle it in the future.

In support of this position, Chairman Pai's asserted that: "after the FCC embraced utility-style regulation, the United States experienced the first-ever decline in broadband investment outside of a recession. In fact, broadband investment remains lower today than it was when the FCC changed course in 2015."⁷ His statement suggests the FCC's net neutrality rules are stifling investment into broadband services, and therefore, the rules should be scrapped. However, thanks to an investigation of this claim by colleagues at *Consumerist*, we now know the facts do not support Chairman's Pai claim.

According to a February 28, 2017, *Consumerist* article, major broadband providers including Comcast, AT&T, Verizon, CenturyLink, and Charter have all spent the same or more on capital expenditures in 2016 since 2014—such spending does not represent a decline in investment.⁸ Broadband backbone providers also increased their capital investments since the 2015 *Open Internet Order* was adopted. For example, Level 3 Communications spent \$1.33 billion in 2016, more than it spent in either 2015 (\$1.23 billion) or 2014 (\$1.25 billion). Cogent Communications spent \$45.2 million last year, up from \$35.6 million in 2015.⁹ Again, these are investment increases, not declines.

We encourage you to ask Chairman Pai where the facts he cited came from with regard to the historically low levels of broadband investment that he uses as a justification to scuttle the FCC's net neutrality rules. We also ask you to investigate his plans and thinking with regard to net neutrality.

Stemming Rising Cable Prices and the Rapid Growth of Unwarranted, Company-Imposed Monthly Fees

More than six years ago, Charter Communications began charging a "broadcast TV surcharge," purportedly to recoup the rising costs of network programming retransmission consent fees negotiated with broadcasters. Other large pay-TV providers—*e.g.*, Comcast, and Time Warner Cable (now owned by Charter)—followed suit with their own "broadcast fee" in addition to other new charges, such as a "regional sports fee" for sports channels that some consumers never even watch. Some providers even add another "HD technology" fee. These fees are all in addition to set-top box fees that pay-TV providers have been gouging consumers with for years.

Moreover, these add-on fees are tacked on top of the rates advertised to consumers, and are typically shown on the monthly bill near or with government-imposed taxes and fees, misleadingly suggesting that they are also required by law. Company-imposed fees cause consumer confusion, and more importantly, add up. A sample cable bill from December 2016 lists the bundled services rate of \$119.99 for video programming and broadband internet. But then there's an "AnyRoom DVR" fee of \$10, an "HD Technology Fee" of \$9.95, a "Broadcast TV Fee" of \$5, and a "Regional Sports Fee" of \$3. That's almost \$28 in add-ons in one month—nearly a 25 percent surcharge above the advertised base rate—that consumers are often unaware of when signing up for service.

To make matters worse, some of these company-imposed fees have increased dramatically since being introduced a few years ago, and were hiked again for 2017. Taking a look at the same cable bill updated for February reveals a "Broadcast TV Fee" of \$7, and a "Regional Sports Fee" of \$5—a 50 percent increase over what was charged last year. So, the add-ons rose to \$32 a month! This now represents more than a 26 percent surcharge per month on top of the rate for what consumers believe they are paying for cable and broadband service. What better way to camouflage rate increases?

We agree with the FCC's Consumer Advisory Committee's (CAC's) recommendation that pay-TV providers should provide consumers with the estimated dollar amount of their total monthly bill that includes company-imposed fees and surcharges at the time service is initiated. Even better would be if pay-TV providers did away with these arbitrary add-on fees altogether, and offered a competitive bundled rate that fully represents the cost of programming consumers are purchasing.

⁷ Ajit Pai, *Remarks Of Federal Communications Commission Chairman Ajit Pai At The Mobile World Congress* (speech, Barcelona, Spain, February 28, 2017), <https://www.fcc.gov/document/chairman-pais-keynote-mobile-world-congress-barcelona>

⁸ Chris Morran, *FCC Chair Claims Broadband Investment At Historic Low Level Because Of Net Neutrality; That's Not What The Numbers Say*, CONSUMERIST.COM (Feb. 28, 2017), <http://consumerist.com/2017/02/28/fcc-chair-claims-broadband-investment-at-historic-low-level-because-of-net-neutrality-thats-not-what-the-numbers-say/>

⁹ *Id.*

We urge the Committee to ask what Chairman Pai believes should be done to stem the proliferation of company-imposed fees and whether under his leadership, the FCC will adopt the CAC's modest, consumer-friendly recommendation.

Addressing the Punitively High Costs in the Set-Top Box Market

The Commission has a decades-old mandate to inject competition into the market for devices that access and deliver multichannel video programming or pay-TV content—also known as the set-top box market. Titled “Competitive Availability Of Navigation Devices,” Section 629 of the 1996 Telecommunications Act could not be clearer:

The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.¹⁰

The FCC has tried, on more than one occasion, to meet its obligations to open this market to meaningful competition. But, those efforts have come up short for consumers. For example, the CableCARD experiment barely made a dent in the pay-TV providers’ lock on the set-top box market, and 99 percent of consumers still rent a set-top box from their provider.¹¹

This common-sense reform is long overdue. It would directly benefit consumers who currently have little, if any, choice but to rent a set-top box from their pay-TV provider for months, and even years, in perpetuity. These costs add up: according to data in the Federal Communication Commission’s (FCC) October *Report on Cable Prices*, cable prices increased by nearly triple the rate of inflation in the past twenty years.¹² Liberating consumers from burdensome set-top rental fees—which average more than \$231 per household per year¹³—is a critical and long-overdue way to lower unnecessary costs currently reflected in cable bills.

Like the consumers we work alongside, we were disappointed when the *Set-Top Box Order* failed to be enacted last year. We recognize the resistance from the pay-TV and content industries whose multi-billion dollar stranglehold on the set-top box market would finally have been disrupted had the FCC’s proposal succeeded. But consumers have been waiting for almost twenty years for an option to view pay-TV—content they have paid for—without having to fork over extra cash to rent a set-top box. Unlocking the set-top box market is more than just a consumer benefit: Federal law requires it.

We urge the Committee to ask Chairman Pai about his plan to follow the law and open up the set-top box market in a way that would truly benefit consumers.

Ending the Harassment, Nuisance and Scams of Robocalls

Nearly everyone hates robocalls and it remains one of the top consumer complaints we hear about at Consumers Union—we received more than 50,000 complaints about unwanted calls since we started asking the question online last year, and almost 750,000 consumers have joined our End Robocalls campaign which encourages major phone companies to offer free call-blocking tools to their consumers. Consumers Union also works to defend the laws protecting consumers from unwanted robocalls like the Telephone Consumer Protection Act (TCPA). Although the TCPA has been on the books for more than twenty-five years, the increase in unwanted calls, including fraudulent and scam calls, has reached record levels and is only growing. Consumers have every right to be frustrated, annoyed, and skeptical whether the government or the phone companies can help.

¹⁰ See 47 U.S.C. § 549 (codifying section 629 of the Telecommunications Act of 1996)

¹¹ Press Release, Senator Ed Markey of Massachusetts, *Markey, Blumenthal Decry Lack of Choice, Competition in Pay-TV Video Box Marketplace* (July 30, 2015), <http://www.markey.senate.gov/news/press-releases/markey-blumenthal-decrys-lack-of-choice-competition-in-pay-tv-video-box-marketplace>

¹² Steven Lovely, *Cable Prices Have Risen Faster Than Inflation For Each Of The Past 20 Years*, CORDCUTTING.COM (Oct. 31, 2016), <http://cordcutting.com/cable-prices-have-risen-faster-than-inflation-for-each-of-the-past-20-years/>

¹³ Press Release, Senator Ed Markey of Massachusetts, *Markey, Blumenthal Decry Lack of Choice, Competition in Pay-TV Video Box Marketplace* (July 30, 2015), <http://www.markey.senate.gov/news/press-releases/markey-blumenthal-decrys-lack-of-choice-competition-in-pay-tv-video-box-marketplace>

The FCC stepped up last year, and former Chairman Wheeler called on the top phone companies to provide “robust” call-blocking technology to their customers at no charge. At Wheeler’s request, more than thirty companies joined the Robocall Strike Force (RSF), led by AT&T’s CEO, Randall Stephenson, to work together on solutions including call-blocking applications and anti-spoofing measures (caller-ID spoofing is where an incoming call’s true identity is masked as a recognizable number or local area code). The RSF most recently convened in October of last year, and planned to meet six months later, in this coming April. At this time, we are uncertain if Chairman Pai plans to host the work of the RSF at the Commission.

We are encouraged that Chairman Pai announced the inclusion of an anti-spoofing proposal to the FCC’s March Open Meeting agenda. Under this measure, companies will be afforded greater freedom to block spoofed robocalls. Consumers Union supports action by the FCC to combat caller-ID spoofing, and we will continue to work with the Commission to reduce and eliminate robocalls, fraudulent or otherwise.

We suggest asking Chairman Pai if he plans to host a future meeting of the Robocall Strike Force, so it may continue its important work on behalf of consumers with the FCC’s support and cooperation. We also suggest asking whether he will push phone companies to promptly provide their consumers free, advanced robocall-blocking tools so that they can protect themselves from unwanted calls and scammers.

We close with a note of appreciation for holding this important hearing overseeing the work of the FCC. Consumers deserve to know whether the Commission is working to create a telecommunications marketplace that promotes their interests and protects their pocketbooks. We stand ready to work with you, your fellow Senators on the Commerce Committee, and other stakeholders to address the issues we identified to help ensure all consumers have reliable access to affordable products and services, and are empowered to participate fully in the modern-day telecommunications marketplace.

Respectfully submitted,

JONATHAN SCHWANTES,
Senior Policy Counsel.

LAURA MACCLEERY,
Vice President of Consumer Policy
& Mobilization.

cc. Members of the U.S. Senate Committee on Commerce, Science, and Transportation

Senator BLUMENTHAL. I want to ask you, first, with respect to the Time Warner-AT&T merger, your standard is a different one for reviewing mergers, in fact, taking account of the public interest. The parties have structured this deal so as to escape your review. The term of the day sometimes is rigged to escape your review, but I don’t want to use that pejorative. Could you commit to the Committee that you will prepare an analysis based on the public interest standard of this merger?

Chairman PAI. Well, Senator, the FCC would only apply the public interest standard to the merger if it were before us.

Senator BLUMENTHAL. I know that. But I’m asking you to do the analysis. You can say yes or no. Either you’ll do it or you won’t.

Chairman PAI. Oh, Senator, do you mean prepare the public interest analysis to submit to Congress?

Senator BLUMENTHAL. To submit to the Committee.

Chairman PAI. My only hesitation is that to the extent that there is no license transfer, there would be no facts before us to review, and so we wouldn’t be able to opine with any expertise on what the transaction—

Senator BLUMENTHAL. Well, if the parties were willing to submit facts to you.

Chairman PAI. Senator, if it’s okay, I’d be happy to take it back and speak to our General Counsel’s Office to see what the requirements are with respect to that and get back to you.

Senator BLUMENTHAL. OK. In the time so far that the Trump administration has been in office, you've, unfortunately, unwound many of the rules and regulations that, in my view, were designed to protect consumers. You've undone the enhanced transparency rules that ensure broadband ISP consumers know what type of service they're getting. You've withdrawn proposed reforms of the business data service market and pay TV set-top box market that would have saved consumers money. You've moved to block commonsense broadband privacy rules. You've undermined critical programs like Lifeline and E-Rate, and you've backed away from rules that lower the exorbitant rates for prison phone calls, as a number of my colleagues have remarked.

I'm not really interested in what you've communicated with the Trump White House, but it does seem that you have adopted the playbook of diminishing rules that protect consumers and furthering the interest of big businesses. I'd like to know from you what possible rationale there can be for enabling cable companies to continue profiting by renting cable boxes—\$20 billion a year in revenue to them—rather than permitting them to own those boxes when they could save money—\$231 every year per family—especially after, in my view, the Congress has directed you to enable them to own those boxes.

Chairman PAI. Thank you for the question, Senator. I believe, as I think many millions of Americans agree, that the right solution to this problem is not to double down on the 1990s technology of the set-top box but it's to eliminate the box. So, in my view, the FCC would have been better off, looking forward, trying to figure out how to eliminate this hardware that simply adds cost and increases inconvenience for consumers and embrace the more app space approach, for example, that consumers use.

Part of the concern I had with the set-top box proposal of my predecessor was one that was shared by Commissioner Rosenworcel and others on the Commission, and that's part of the reason why we preferred to look forward, so to speak, in terms of our regulatory approach as opposed to getting mired in some of the more intricate legal and policy quagmires of the previous approach.

Senator BLUMENTHAL. So you're unwilling to review your position?

Chairman PAI. Well, Senator, obviously, we're always happy to review our position based on new facts and evidence that is placed before us. But we'd like to move forward for consumers rather than backward.

Senator BLUMENTHAL. Let me ask you on Net Neutrality—I assume that you are aware and will follow the obligations under the APA that you would have to begin a new rulemaking procedure if you were to modify the Net Neutrality rule.

Chairman PAI. Senator, for any action that the FCC takes, as long as I am Chairman, we will comport with the Administrative Procedure Act, the Communications Act, and any other legal requirements that might be pertinent.

Senator BLUMENTHAL. My time has expired, and if I can engage in another round, I will. But I want to yield to my colleagues.

The CHAIRMAN. Well, thank you, Senator Blumenthal.

Next up is Senator Heller.

**STATEMENT OF HON. DEAN HELLER,
U.S. SENATOR FROM NEVADA**

Senator HELLER. Mr. Chairman, thank you, and thanks for holding this hearing. I want to thank the commissioners for being here today.

I want to begin by thanking the Chairman for some of the changes that you've made on how the Commission operates so that, frankly, there's more transparency and openness in your process. Things like releasing the text of an Order before it's voted on—I think that's pretty fundamental. But I was always amazed that your predecessor didn't think that that was necessary. But I do think it's also important that Congress codify some of these changes in legislation so that the FCC maintains an openness from one administration to the next.

Mr. Chairman, are there any other process reforms right now at the FCC that you're contemplating implementing?

Chairman PAI. I think there are a number, Senator. Thank you for the question, first off. Senator—Congress—Commissioner O'Rielly—I keep giving you a promotion. Commissioner O'Rielly has outlined several dozen of them, and we are certainly looking at some of those.

I've proposed a number of them, going back to 2013, for example, a very simple one: creating an online dashboard so that anyone, a Member of Congress, a member of the American public, can see how many consumer complaints are pending at the Commission or how many petitions for reconsideration are pending, what's the meantime to disposition. Those kinds of basic facts, I think, would be helpful for people to know.

There are a lot of things that we can do, and we're committed to doing them as soon as we can if we can spare the bandwidth, so to speak.

Senator HELLER. Commissioner O'Rielly, I know that this has been an important issue for you.

Commissioner O'RIELLY. Very much so. Thank you for the question. Commissioner—Chairman Pai—not to demote you—

[Laughter.]

Commissioner O'RIELLY.—has been wonderful in leading a number of efforts in reforming our internal processes. There are more ideas. I've put together 25. We probably have a good 17 to go, and I've been creating new ones on a weekly basis.

Delegating authority is an important issue to my colleagues. We're trying to figure out how to un-delegate issues that have been sent down to the staff to make decisions. I counted last year that nine times as many items were done by staff than were voted on by commissioners, and we'd like the right and ability to vote on some of those without delaying or disrupting the process.

Another idea that I've put forward that I think is important is to include sunsets in our rules, automatic sunsets, so that we would be forced to review the item, not to necessarily get rid of the rules, but an opportunity for a fresh look at them every couple of years, whether they stay on the books. A number of rules have outlived their longevity. We have a couple of procedures to deal with them, but they aren't getting a full review, in my opinion.

Senator HELLER. Thank you, Commissioner.

Chairman, you were in Carson City a couple of years ago, and I certainly do appreciate you spending some time in Nevada. We've had a discussion on this particular issue, and I want to share some statistics with you. These statistics come from a range of sources, the FCC, the wireless industry groups, Department of Commerce, Pew Research—we can go down that list.

It says here that 99.9 percent of Nevadans have access to mobile broadband service. It also says that 98 percent of Nevada has access to wireline service. You know, I really question these kinds of numbers and these kinds of statistics. Just briefly, Nevada is 110,000 square miles, and I know that probably 85 percent of them live within 10,000 square miles. So we've got 100,000 square miles out there that are quite rural.

I'll give you an example. We have a county commissioner in a county called Eureka. He's also the state veterinarian, and he also is a rancher. So in a conversation with him, he's constantly carrying two phones along with him, hoping that one or the other has service. And, obviously, when he has problems or issues as a state veterinarian, if he doesn't have access, clearly, that could become a problem.

Not only that, but he's had opportunities where he could have called in a public—or a fire. Several times, where a public lands fire broke out on the range lands, and he just didn't have access to let the emergency crews—so I think that does pose a public safety risk. In my view, I think we need to cut red tape and bureaucracy that delays the deployment of this, lift regulatory burdens that prevent investment, and find ways to have access to unserved and underserved areas.

Now, you and I agree on this. This isn't anything that is new. I've been championing these policies since I've been on this committee and have even written legislation. I'll continue to do so as we go forward. But do you have any ideas on what we can do to speed up deployment in these areas?

Chairman PAI. Absolutely, Senator, and in response to Senator Cortez Masto, one of the things that would be critical in Nevada would be speeding up the deployment on or adjacent to Federal lands, because I know Nevada is disproportionately constituted with Federal land. Another thing would be making sure that wireline deployment is—the business case for it is easier, and that involves, in some cases, you know, dig-once or other policies like that that would enable Nevadans to get access.

Another piece of it could be fixed wireless, getting more spectrum into the commercial marketplace to enable fixed wireless providers who are doing a terrific job providing connectivity in some areas where fiber simply is not economical to deploy. I mentioned that I saw some of that outside of Reno, and I think there's great potential there, too.

To me, to be honest, I don't care what technology is used to connect folks in Nevada. We want to bring all of them to bear in the most fiscally responsible way possible to make sure that they, like every other American, have access to the network.

Senator HELLER. Chairman, if an infrastructure bill includes broadband, which I certainly hope it does, how could you deploy

that? How could you make sure that the funding mechanism gets to the right place, where it's needed the most?

Chairman PAI. I think if Congress saw fit to include it in the infrastructure plan, my humble suggestion would be to allow some of that money to be channeled into the FCC's existing programs, with respect to Universal Service Fund distribution, because we've got a pretty good program that we administer to allow rural carriers and others to deploy some of these networks. So instead of having to reinvent a wheel or create a new agency, you could use the existing mechanisms administered by our professional staff, who are terrific, to get the biggest bang for the buck, so to speak.

Senator HELLER. Thank you very much.

Mr. Chairman, thank you, and to the Commissioners, thank you very much for being here today.

The CHAIRMAN. Thank you, Senator Heller.

Senator Cantwell?

**STATEMENT OF HON. MARIA CANTWELL,
U.S. SENATOR FROM WASHINGTON**

Senator CANTWELL. Thank you, Mr. Chairman, and thank you to the Commissioners for being here.

Chairman Pai, I wanted to ask you about media consolidation. Obviously, we've just been through this time period that if we needed an advertisement for why we needed to have diverse sources of media, this is it. So I wanted to get your thoughts on the cross-ownership issue of TV stations, radio stations, owning newspapers in the same markets, and what direction we should be going in.

Chairman PAI. Thank you for the question, Senator. In some cases, our media ownership rules have been on the books for several decades, and so the FCC continually has to determine if they remain in the public interest in the current year. One of my concerns, especially in smaller markets, is that as newspapers and broadcast TV and radio stations are struggling and a lot of them are going out of business, are there ways that we can help them stay in business and do what they do best, which is cover local news. And if it is more efficient for them to be able to distribute that news—collect news together and distribute it on different platforms, that could help them stay in business and provide a vital source of information for localities.

Obviously, there are other considerations as well in terms of consolidation that we have to take into account, and so that's going to be part of what we're discussing in the media ownership context.

Senator CANTWELL. So in the context of media consolidation, would you say that you are aggressive or neutral or, you know, negative on making sure that further consolidation happens?

Chairman PAI. Well, not to be glib, Senator, but I can't really describe an adjective. What I can tell you is that I firmly believe that our rules should match the realities in the marketplace that we're in, and that includes making sure that we take account of the state of the industry, the market structure, and the like to ensure that there's a competitive vibrant marketplace that serves consumers.

Senator CANTWELL. Well, I'm looking at your record, and this is why I'm concerned, because in March 2013, you voiced support for

pursuing a resolution of disapproval against the FCC's media ownership rule and urged further consolidation, and you called for a public vote on the FCC media ownership rules that would have actually increased media consolidation. So now that you're the Chair, we really want to understand this and understand where you're going.

One of the things I think would help in this is—because we've had a lot of dialog here as a committee, and, obviously, the Committee has changed over a long period of time as we have watched this issue. The FCC does have a data collection of information, so the 2015 data about this issue has not been released. So will you commit to making sure that you won't do anything ahead of publishing this data and publishing it in 2017 before any changes are proposed in media consolidation?

Chairman PAI. Senator, to be honest, I'm obviously just 6 weeks on the job, and I haven't yet had occasion to look at the status of that 2015 or 2016 data collection. But I'd be happy to work with you on that.

What I can say, however, is that based on the evidence that's already in the record, we know, for example, that there's literally no evidence to support the newspaper-radio cross-ownership, and everybody has conceded that. The Third Circuit Court of Appeals has told us that some of these regulations are no longer necessary. So we want to make sure that, based on whatever the facts on the record are, we take the appropriate action that's consistent with the court's instructions.

Senator CANTWELL. Great. So there is what's called Form 323, so it's an FCC tool—

Chairman PAI. Right.

Senator CANTWELL.—and that's about data on ownership. We want to make sure that people are complying with it, that you're getting the information, that we're getting the information, and that we're reviewing it. We definitely want to have many voices in the market, and, obviously, we have a different thing that's going on here, which is the entire transitioning of, you know, the sector and the industry and how it moves.

I'm always telling my staff there's a reason why Ma Bell doesn't exist anymore. But the problem is everybody says, "Who's Ma Bell?" You know, there has been that much transition and young people—so what we want to make sure we're getting right is that while we're talking about the transformation of what's happening in the newspaper industry, we don't confuse it with, oh, we must allow consolidation, because if you allow consolidation, then they'll have resources. We want them to flourish, as you were saying, on many platforms and not have a very hierarchical structure where one entity owns all the media and owns all the discussion. We want many resources and information.

So if you will help us take the steps to ensure that these broadcasters are accounting for the ownership and then share that data with us before you guys make a decision, that's what we're after.

Chairman PAI. Absolutely. Just as in the wireline context, with respect to Form 477, when it comes to Form 323, we want to make sure that we've got accurate data as well. That's the predicate, ob-

viously, for the FCC making an informed decision, and so we'd be happy to work with you going forward.

Senator CANTWELL. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Cantwell.

Next up is Senator Hassan.

**STATEMENT OF HON. MAGGIE HASSAN,
U.S. SENATOR FROM NEW HAMPSHIRE**

Senator HASSAN. Thank you, Mr. Chair, and thank you to all the witnesses for being here. I really have appreciated this discussion. I'm also new to the Committee and new to some of these issues, so I appreciate it very much.

Mr. Pai, thank you for meeting with me prior to today's hearing, and I really look forward to working with you. I'm pleased that on the national level, we have committed to ensuring that our first responders reap the benefits of new technologies by providing them with a public safety network known as FirstNet. If done correctly, this will ensure seamless communication for public safety all over the country, enabled with the latest data, video, radio, and wireless capabilities possible.

As you know and as we've discussed, New Hampshire is a state with unique connectivity challenges given our rural areas and our mountainous terrain. I'll take my mountains over West Virginia's. No offense to my West Virginian colleagues. But companies in the Granite State have been exploring alternatives to the national plan so that they can keep all options on the table and make the best decisions for our state when the time comes, and it's something you and I just discussed.

Procedurally, once a state decides to opt out of the national network, their proposal will have to be reviewed and approved by the FCC. And as I understand it, you have an open proceeding on this at the Commission right now. Folks in my state have raised concerns that they will only have one opportunity to get their proposal right. If the FCC declines it, their reading of the statute is that they have no opportunity to revise and resubmit, which seems not a particularly good way of moving forward, from my perspective. As a former Governor, I feel a state deserves to learn where they fell short and be given a second opportunity to comply within reason.

So what are your thoughts on this, and what, specifically, will you do as head of the FCC to ensure that states are given a fair shake when it comes to making decisions about opting out?

Chairman PAI. Thank you for the question, Senator, and for the generous hospitality you extended to me during our visit. With respect to FirstNet, the FCC's rule, as you know, is a somewhat narrow one, which is to facilitate interoperability between the national network and the state network for any states that choose to opt out or seek to opt out. The FCC, as you mentioned, proposed rules last year to try to flesh out what our role should be.

Now, the legislation, as I read it, does state that once the FCC makes a determination that it will not approve an application, that decision is final. But I believe, personally, that opt-out states should have a full and fair opportunity, like any applicants to the FCC, to make sure that they have a fair chance to present their

case that their network will interoperate with the national network.

So I hope that they will have the opportunity to amend or to modify, in consultation with us, their application, should their apparent plans seem to conflict with the interoperability mandate that we've got.

Senator HASSAN. Thank you. Again, a question to Chairman Pai—and, Mr. Chair, if there's no objection, I'd like to enter a recent opinion piece by former FCC Commissioner Michael Copps into the record. It's titled "It's Urgent that Ajit Pai Voices His Support for a Free Press" and was published in *The Hill* on Monday.

The CHAIRMAN. Without objection.

Senator HASSAN. Thank you.

[The information referred to follows:]

The Hill

IT'S URGENT THAT AJIT PAI VOICES HIS SUPPORT FOR A FREE PRESS

By Michael Copps, Opinion Contributor—03/06/17 08:40 AM EST

No citizen should be denied the news and information needed to participate in our democracy. Our freedoms of speech and expression are inextricably linked to freedom of the press and an uninhibited, competitive, and vibrant marketplace of ideas. But freedom of the press is in jeopardy from a president who repeatedly calls our media "the enemy of the American people," and by others in government who are failing in their duty to protect our liberties.

The new chairman of the Federal Communications Commission, Ajit Pai, has been an eloquent spokesman for freedom of the press. I'm confident he agrees that we should not foreclose any points of view unless they pose a threat of violence. Just last year, he *said*, "I think it's dangerous, frankly, that we don't see more often people espousing the First Amendment view that we should have a robust marketplace of ideas where everybody should be willing and able to participate."

No one person—not even the president—should have a monopoly on our national discourse. Pai also once *said*, "In my view, anyone who has the privilege of serving at the FCC—any preacher with a pulpit, if you will—has the duty to speak out whenever Americans' First Amendment rights are at stake."

The FCC is an independent agency of the U.S. Government, created by Congress to ensure our Nation has a world-class communications system that is available and affordable to everyone. The commission is the country's primary authority for enforcing communications law. It also provides public interest oversight for telecommunications and promotes technological innovation.

America's First Amendment rights are clearly in peril. When the President of the United States calls journalists enemies of the American people, when his top advisors call journalists "the opposition party" and promise that the President's battle with the press will only "get worse," when the White House press secretary bars journalists from official briefings, every citizen should be alarmed.

Surely the media have much room for improvement. The consolidation, commercialization, and "skim the surface" journalism that mark much of contemporary journalism do not serve us well. The FCC could help fix that, but not by going down the road the president is racing. Declaring the press the enemy and cutting off its legs is exactly the wrong way to go. Self-government only works when people are sufficiently informed. The First Amendment must not fall victim to the Trump presidency.

Unfortunately, the pulpit to protect the press can also be a platform to suppress it. Some presidents, like Richard Nixon, sought to use the FCC to punish those exercising First Amendment rights. We can never let that happen again.

Appointed to the FCC chairmanship by President Trump, Chairman Pai is in a difficult situation. But this is a time requiring a "profile in courage." Three years ago, then-Commissioner Pai said, "The government has no place pressuring media organizations." Chairman Pai needs to repeat that now, from his new position of authority. His voice would be heard around the Nation. And it would let the new administration know that the FCC is both independent and determined to do its duty.

I don't believe the election changed Pai's convictions. I certainly hope not. I hope he agrees with me that the Constitution is not a partisan issue. When good people

stay silent, bad things happen. We must not let censorship, whatever its source, win. Mr. Chairman, we need to hear from you *now*.

Michael Copps (@Coppsm) served as a Democrat on the Federal Communications Commission from 2001–11, and as acting chairman for a period in 2009. He is a special adviser for Common Cause, a nonprofit group in Washington, D.C.

The views expressed by contributors are their own and are not the views of The Hill.

Senator HASSAN. Chairman Pai, in this piece, former Commissioner Copps quotes you as saying—and here's his quote of you—"In my view, anyone who has the privilege of serving at the FCC, any preacher with a pulpit, if you will, has the duty to speak out whenever Americans' First Amendment rights are at stake." And you agree that's a quote of yours?

Chairman PAI. That is correct.

Senator HASSAN. And I note that your official biography says that you're an outspoken defender of First Amendment freedoms. So there has obviously been over the course of recent months clear tension between members of our nation's press and the current administration, and Senator Udall asked you a question a little while ago, just asking you whether you agreed or not with the statement that the media is the enemy of the American people.

It seemed to me that you kind of declined to answer that, and I'd just like to give you another chance, because it seems to me if you're an outspoken defender of the free press, that should be a pretty easy question for you.

Chairman PAI. Senator, to the contrary. As I said to your predecessor, I agree that every American has a full and fair opportunity to exercise and enjoy the rights protected by the First Amendment to the Constitution, and I've consistently spoken out about that in the context of the 2014—or 2013, rather, critical information needs study that the FCC was—

Senator HASSAN. So yes or no? Do you agree with the statement that the President made that the media is the enemy of the American people?

Chairman PAI. Well, Senator, there's a larger political debate here that I don't want to weigh into. All I can tell you is that I personally believe that every American enjoys the First Amendment freedoms that he or she is granted under the Constitution.

Senator HASSAN. Thank you. I wish your answer had been a little different. I'm out of time. Thanks.

The CHAIRMAN. Thank you, Senator Hassan.

Senator Gardner?

**STATEMENT OF HON. CORY GARDNER,
U.S. SENATOR FROM COLORADO**

Senator GARDNER. Thank you, Mr. Chairman.

Thank you to the witnesses for your time and testimony today. I appreciate your service, particularly the work that you do with this committee and a very long hearing that you're patiently answering a number of questions through, so thank you very much for that.

Chairman Pai, it's great to see you in your new position. Congratulations again on your appointment as Chairman, and your re-nomination as Commissioner as well.

As you, Commissioner O'Rielly, and Commissioner Clyburn have heard me discuss before, we've had two orphan counties in Colorado, in southwestern Colorado, that were receiving satellite broadcasts of New Mexico television instead of Colorado television. I'd like to thank all of you at the Commission as well as the Media Bureau for your decision to grant La Plata County's market modification petition. Thank you. It's a huge development for Colorado that puts my constituents in the southwest one step closer to accessing in-state television broadcasts. So thank you very much for your work on that.

The other county in the southwest corner, Montezuma County, intends to file a very similar petition for market modification, and I would just like your commitment that the Commission will work expeditiously to consider that request as well when filed.

Chairman PAI. Senator, with the caveat that, obviously, any consumers who are forced to watch Denver Broncos football are being burdened, nonetheless, we will give the appropriate treatment to Montezuma's application.

Senator GARDNER. Now, Mr. Chairman, I'll remind you where Kansas' water comes from.

[Laughter.]

Chairman PAI. If I could revise and extend my remarks, Senator, that would be appreciated.

Senator GARDNER. Thank you. Chairman Pai, I've seen that initial comments are due today for the Commission's—and, by the way, in the last question, I think every Commissioner was agreeing affirmatively, so thank you. I've seen that initial comments are due today for the Commission's December public notice regarding streamlining deployment for small cell wireless infrastructure. Reducing barriers to the siting and deployment of such infrastructure is critical to ongoing wireless buildouts and to the future growth of 5G wireless service.

Can you commit that the Commission will pursue a thorough review and timely consideration of siting and deployment issues?

Chairman PAI. Absolutely, Senator. We will do that.

Senator GARDNER. Thank you, Mr. Chairman. Commissioner Pai, again, there are many regions of my state that do not have access to adequate broadband service and remote areas of my state without any access to broadband at all, and I appreciate the time that you have spent in Colorado traveling with me up and down the front range and other areas of Colorado.

One of the most important goals of our national telecommunications policy should be to close the urban-rural broadband divide. There are many technologies that could help in this effort, including fiber and wireless service, among others. But I'd like to know if you believe that satellite could also help close the urban-rural divide?

Chairman PAI. Senator, I do. I think a lot of satellite companies have been very innovative in boosting the speeds that their services are capable of providing and reducing the latency, which allows them to be much more competitive with their terrestrial brethren, and it's part of the reason why in the context of the Connect America Fund reforms we wanted to make sure that we didn't put a

thumb on the scale of one technology like fiber to the exclusion of all others.

As I said in response earlier to a question, we want all these technologies to be brought to bear and let the consumer decide for himself or herself which one best suits the needs of the people.

Senator GARDNER. Thank you, Chairman Pai.

Commissioner O’Rielly, same question. Do you believe satellites can play a role in closing the urban-rural divide?

Commissioner O’RIELLY. Absolutely. I want to make sure that satellite has a fair chance to compete for all of the programs that we have at the Commission. I worry and sent to them in a recent item that I thought it was a little tilted toward fiber instead of satellite. I think we want to give everyone—every different technology—I believe in technology neutrality. I think it’s a core principle of the Commission and should be in our decisions.

Senator GARDNER. Thank you very much.

Chairman Pai, I just want to echo something that Senator Wicker had said earlier today. I appreciate the work that you and the Commission did on the Mobility Fund Phase 2 to ensure that rural areas are not left behind when it comes to mobile wireless service. I also want to support the Commission’s decision to include a challenge process for Form 477 data and will be closely watching the comments on that proceeding as well. But thank you for agreeing with—or the work you did during your conversation with Senator Wicker. I wanted to highlight that as well.

Senator Heller was here talking about carrying two cell phones. I think the state veterinarian in Nevada had to carry two cell phones. I look at the maps, and I see the maps where I live in eastern Colorado, and I’m only supposed to be able to—would only need to carry one phone, but in a lot of those eastern areas, we need two phones as well, so thank you—eastern Colorado area. So thanks very much.

Chairman PAI. Thank you, Senator.

The CHAIRMAN. Thank you, Senator Gardner.

Next up is Senator Cruz.

**STATEMENT OF HON. TED CRUZ,
U.S. SENATOR FROM TEXAS**

Senator CRUZ. Thank you, Mr. Chairman.

Commissioners, thank you for being here. This is an important and exciting time at the Commission, and I congratulate the Chairman on your new appointment and look forward to working closely with you as you continue to implement innovative policies at the Commission to expand competition, to create an environment where jobs and economic growth can flourish, and to empower consumers.

Chairman PAI. Thank you, Senator.

Senator CRUZ. My top priority in the Senate is economic growth. Jobs and economic growth are consistently the number one concern I hear from Texans. In my view, the biggest regulatory threat to economic growth on the internet is posed by the FCC’s Open Internet Order, and as Commissioners are well aware, I have been outspoken as an opponent of that order.

I believe that regulating the Internet as a Title II public utility is contrary to the text of the law and was an illegal power grab, and I also believe it is dangerous. The internet has flourished because it has been an environment free of the meddlesome and burdensome regulation, enabling entrepreneurs to experiment, to innovate without seeking prior approval of government regulators. Indeed, I have called the so-called Net Neutrality Rule “Obamacare for the internet,” and I will note that the results have not been encouraging.

In a 2015 op-ed entitled “This Is How We Will Ensure Net Neutrality,” former Chairman Wheeler wrote when referring to Title II that, “All of this can be accomplished while encouraging investment in broadband networks. To preserve incentives for broadband operators to invest in their networks, my proposal will modernize Title II, tailoring it for the 21st century in order to provide returns necessary to construct competitive networks.”

Now, I’m always concerned when a government official is trying to determine how to regulate the profits and incentives of private companies. But a recent 2016 Domestic Broadband Capital Expenditure Survey conducted by Hal Singer shows that, “Of the 12 firms in the survey, eight experienced a decline in domestic broadband CapX relative to 2014, the last year in which the ISPs were not subject to the common carrier regulations. Across all 12 firms, domestic broadband CapX declined by \$3.6 billion, a 5.6 percent decline relative to 2014 levels.” A regulatory regime that is reducing the investment in broadband is not a regulatory regime that is looking out for the interest of consumers.

Chairman Pai, what is your view on the Open Internet Order and how the Commission should deal with that Order?

Chairman PAI. Thank you for the question, Senator. I favor a free and open internet. I think that the internet, as it has developed, has been one of the greatest free market innovations in history, and it has developed—and thanks in part to light touch regulation that started in the Clinton administration on a bipartisan basis and continued thereafter for about two decades, and it has produced tremendous benefits for the American people, both as consumers and as entrepreneurs.

My concern is with the particular legal framework that the FCC adopted to regulate the internet, and to the extent that, as you pointed out, it is harming investment by broadband providers, not just the big ones which you mentioned, but also the small ones. We have a number of declarations under penalty of perjury that have been submitted by wireless ISPs, for example, that they’re holding back on investment, precisely because of these rules.

That’s my concern. We all want to preserve the core value of the free and open internet, and we want to maximize the incentive to keep building these networks of the future, and that is something that we’re going to strive to do in the time to come.

Senator CRUZ. Well, Chairman Pai, I would encourage you and the Commission to revisit that Order and to rescind it in its entirety. I believe you would have the support of a majority of this committee and substantial support in Congress, and I believe if the Internet is going to be regulated and regulated as a public utility, that is a decision that should be made in the first instance by the

U.S. Congress rather than taking legislation designed for a very, very different context and applying it to the internet.

Let me shift to a second topic because my time is expiring.

Commissioner O'Reilly, you stated in a 2015 blog post that, quote, "By some accounts, the Federal Government currently occupies, either exclusively or on a primary basis, between 60 percent and 70 percent of all spectrum in the commercially most valuable range between 225 megahertz and 3.7 gigahertz, which comes to approximately 2,417 megahertz."

What steps can this committee take to incentivize Federal users, especially the Department of Defense, to make more spectrum available for commercial use? Should Congress consider allowing Federal agencies to keep more of the proceeds from FCC incentive auctions? Should Congress consider spectrum fees, which is another solution that's been suggested? How can we get more of that spectrum in commercial hands to produce thousands more high-paying jobs?

Commissioner O'Reilly. Yes. So incentives have been proposed by a number of my colleagues in the past. I've argued that the carrots are wonderful, but you would require a significant amount of portion from the spectrum auction proceeds to convince them to give back spectrum. I've advocated agency spectrum fees as a mechanism to put an opportunity cost on their holding of particular licenses for particular bands, and by doing so, you make them look at what do they really need to complete their mission as an agency.

I don't want to discourage all the good work that the agencies do. But I do want them to efficiently only hold the spectrum that they need. I think the mechanism to go about it is to put a cost on the spectrum. I'll admit it would be something we could do conservatively, because it would be hard to price. But there are ways to go about doing so, and that would be a mechanism that I would favor.

Senator CRUZ. Thank you very much.

The CHAIRMAN. Thank you, Senator Cruz.

Senator Sullivan?

**STATEMENT OF HON. DAN SULLIVAN,
U.S. SENATOR FROM ALASKA**

Senator SULLIVAN. Thank you, Mr. Chairman.

Mr. Chairman, congratulations, Commissioner Pai, and it's good to see all of you. You know, I just wanted to comment very quickly on the number of my colleagues here, both sides of the aisle, who are talking about the independence of the agency, the independence of you in your Chairman position. I couldn't agree more, and I think that's important, so I'm glad the topic has come up.

I also think you shouldn't use as the example of independence the last Chairman, who a number of us viewed, you know, more of a lieutenant of the White House than an independent agency. So when my colleagues on the other side of the aisle talk about your independence from the Trump administration, we want you independent, but don't use the last Chairman as a model, because I don't think—a lot of us don't think he was very independent at all.

I want to first of all thank all of you. I know you took a lot of time working hard on the Alaska plan. I know you mentioned it,

Chairman Pai, in your opening remarks. It was very apparent that you all dug into that and worked hard with your staff.

Are there any lessons learned you can mention to me or my constituents on challenges or opportunities in Alaska that you learned from kind of working on that issue? I know it wasn't an unanimous Order, but, still, you guys were all very well intentioned. You saw some of the extreme challenges we had up there. I'd welcome any comments on that for just kind of future reference, because there was so much good work done on that.

Chairman PAI. Absolutely, Senator. First, I want to thank my colleagues for working collaboratively. Even if we didn't agree on every jot and tittle, I think we got a product across the finish line that hopefully will benefit Alaskans. One of the things that I think I draw from it is just that Alaska's vastness and complexity is so different from anything you see in the lower 48. I mean, I've been in a fiber trench seeing the permafrost in Fort Yukon and have been sinking in quicksand outside of Barrow, and I've seen the mountains of Cordova and how you've tried to deploy a next-generation network in a place that's so topographically challenging is just—it's just mind numbing, the complexity of it.

So we need to make our rules as simple as possible, but also reflect the difficulties of deploying in Alaska, and that's not going to be an easy square to circle, so to speak. But we've got to do our best to do it, because Alaskans deserve digital opportunity just as much as anyone in the lower 48.

Senator SULLIVAN. Well, I appreciate that sentiment. Any other Commissioners on just lessons learned from that?

Commissioner CLYBURN. My visits to Cordova, which is beautiful, and Kotzebue and some of the other remote villages—it just underscored the fact that telemedicine and other types of opportunities—the infrastructure needed to support that—is so critical. You should not have to get up on that plane, sitting in the cockpit next to the pilot—which, again, I need therapy still from that—to get help. There are opportunities that are unique to Alaska that we need to enable. So, for me, that visit a few years ago really drove home the need for a targeted tailored approach to delivery of services.

Senator SULLIVAN. Right. Thank you.

Commissioner O'Rielly?

Commissioner O'RIELLY. I would agree with my two colleagues. They hit the nail on the head. Alaska is so different, so unique that I was willing to work on projects that were just tailored to Alaska. When other states have said, "Oh, we're unique," it's not any comparison to what happens in Alaska and what they're forced to face with such a short building cycle.

I agree also with Commissioner Clyburn in terms of telehealth. What they're able to do with very small dollars in remote parts of the state is very impressive. It's a model I called for when I returned from my visit, that we should look elsewhere. Other places using telehealth and telemedicine are really eating up some significant dollars, whereas Alaska has been very efficient and addressed the issue very thoughtfully.

Senator SULLIVAN. Let me ask a related question to that. There was some discussion earlier on in the hearing about interagency cooperation, and I'm just interested—whether it's E-Rate or rural

healthcare programs or, as you mentioned, Department of Transportation roadbuilding with cable, do you need additional authorities from the Congress as an independent agency to make sure that you're working closely, say, with the Department of Education? I talked to Secretary DeVos about this on tele-education, or tele-health with the HHS Secretary.

How much are you doing that, and do you need additional authorities from the Congress to be able to do that in a much more robust manner? Because I think, as you saw in the hearing today, everybody agrees that's a good idea. You agree it's a good idea. But what do we need to do to help you do that better with more legal authority?

Chairman PAI. That's a good question, Senator. To be candid, I'm still getting my feet wet, so to speak, in my new role, and part of that involves liaising with my counterparts at other agencies. So thus far, I haven't seen any legal or other impediment to being able to reach out to some of my counterparts. But if and when we do encounter some barrier like that, I'll be sure to let you know, because the last thing we want is for agencies not to be steering in the same direction.

Senator SULLIVAN. Well, when you get your feet settled, if you can get back to us on that, I think you'd see broad bipartisan support for enhancing your ability to do that.

Thank you, Mr. Chairman.

Commissioner CLYBURN. Oh, I'm sorry.

Senator SULLIVAN. I'm sorry. Commissioner?

Commissioner CLYBURN. Senator, I just wanted to let you know that we are attempting to heal ourselves, too. We, a couple of years ago, established a Connect to Health Task Force that is attempting to do that, to work with other agencies like HHS and other departments to ensure that there are no barriers when it comes to providing services that are so vital to our community. So I just wanted to let you know that where we can, we are doing so.

Senator SULLIVAN. Great. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Sullivan.

Senator Johnson?

**STATEMENT OF HON. RON JOHNSON,
U.S. SENATOR FROM WISCONSIN**

Senator JOHNSON. Thank you, Mr. Chairman. Again, I want to thank all the witnesses.

Congratulations, Commissioner Pai.

We all agree that we want greater innovation, we want expansion and greater access to high-speed broadband. I think one of the things that inhibits that is all the rhetoric, the slogans, the buzz words that I'd want to try and cut through a little bit. I know Net Neutrality sounds great, and in trying to convey why that harms investment and innovation, I've come up with an analogy, and I want to run this by you to see if this is pretty accurate.

Let's say a group of neighbors want to build a bridge over a creek so they can cross over and talk to each other a lot. But then they find out it's really for a neighborhood, maybe a dozen people. But then they find out that the government, the local government, is

going to require that that bridge is open to the entire community of a million people. No prioritization whatsoever. They don't get to cross first to go see their neighbor. A million people can come onto their property, ruin their lawns, and walk over that bridge.

Isn't that kind of a similar analogy? Is that a pretty good analogy in terms of what Net Neutrality is all about? Not allowing, for example, a company that is going to invest billions of dollars in the pipeline, not allowing them to sell or prioritize—for example, oh, I don't know, people that want to—doctors that want to prioritize distant diagnostics, they're going to have to share that same pipeline—not prioritization with—for example, people streaming illegal content or pornography. Tell me where that analogy is maybe not accurate.

Chairman PAI. Senator, I think you've put your finger on one of the core concerns, which is that all of us favor a free and Open Internet where consumers can access lawful content of their choice. We also want to incentivize the construction of these networks, which requires massive capital expenditures, especially as we're going into the future with 5G networks and the like. So how to balance those concerns is something that I think people of good will can disagree on. But our goal is obviously to make sure, to use your analogy, that those bridges continue to be built, that they continue to be maintained and upgraded as traffic modernizes over time.

Senator JOHNSON. In my example, I don't think too many neighbors would chip in the money to build that bridge when they realize they're not ever going to be able to use it or certainly not get priority on it.

Let's talk a little bit about privacy rulemaking as well. Again, a lot of buzz words—opt-in, opt-out. Let's cut to the chase. What is fair about having different providers with different rules in terms of opting in versus opting out of the data collection and use? And what I'm really talking about is the fact that it's that data collection, that data use, that has allowed the internet to flourish and basically be free to consumers.

Chairman PAI. Thanks again for the question, Senator. I think the principles that we need to embrace are twofold. Number one, as a general matter, but especially in this context, we need to make sure that there's a level playing field in terms of anyone who is competing in the online space; and, number two, the consumers have a uniform expectation of privacy. When they go online, they shouldn't have to be lawyers or engineers or technologists to figure out the regulatory classification of the entity that's holding their sensitive information. So our goal is, obviously, to vindicate that consumer preference by applying an even regulatory set of requirements to everybody who's competing in the space.

Senator JOHNSON. Again, the point I want to make is if we put everybody on the level playing field and had opt-in, most people wouldn't allow their information to be shared—what would that do in terms of cost of internet, for example?

Chairman PAI. I think the FTC has done a lot of work in this area, and they've struck that calibration, I think, appropriately, which is to say consumers expect their sensitive information to be opt-in and their not so sensitive information to require opt-out. So

I think that's one of the things that has allowed the internet economy, according to the FTC and the experts over there, to thrive.

Senator JOHNSON. Commissioner O'Rielly, I enjoyed our meeting yesterday and we had this similar conversation. But I was also interested in the column you wrote, and this is eye-popping, that the cost of active information collection at the FCC is approaching a billion dollars a year, \$798 million. Just talk a little bit about that in my remaining 45 seconds.

Commissioner O'RIELLY. Sure. We just did a snapshot to alert people what is actually happening. We have extensive collection mechanisms at the Commission. They aren't reviewed often enough, and now there are 73 million hours a year and \$800 million annually for those, just the collection.

We've talked to small rate of return carriers. We have 100 filings a year, and that's just not one person in an office filing something to the Commission. That requires a consistent portion of their resources to try and answer different things to the Commission. That keeps them from serving their customers, providing new services. So I think that's extensive, and we should look at these more often and extensively. I suggest—there's a proposal to create new task forces that the administration has put forward. I think that would be something that would be very valuable for the agency to look at and deploy for this particular purpose.

Senator JOHNSON. Well, this is an excellent column. If it's not in the record, I'd ask unanimous consent to enter it into the record of the hearing.

The CHAIRMAN. Without objection.

Senator JOHNSON. Thank you, Mr. Chairman.
[The information referred to follows:]

Federal Communications Commission

TAKING STOCK OF FCC PAPERWORK BURDENS

March 3, 2017—4:15 pm

By Michael O'Rielly, Commissioner

I am pleased that the Commission has begun to take steps to review and eliminate unnecessary burdens on the communications industry.¹ It is a worthy task, and something I have been advocating for since I arrived at the agency almost three and half years ago. As the Commission embarks on these efforts, I thought it would be helpful to understand the current state of play. There are many types of costs that an agency can put on regulatees, but lacking solid information on most burdens due to the absence of cost-benefit analyses in prior items, I want to at least highlight one category of costs that the agency is required to track: paperwork burdens.

The Paperwork Reduction Act (PRA) requires the FCC to seek Office of Management and Budget (OMB) approval before asking entities to fill out forms, maintain records, or disclose information to others. The intent was to require agencies to carefully consider the need for additional information before collecting it, thereby minimizing burdens. Once approved, the cost estimates are posted online and searchable by agency.

Even I was a bit surprised to see the extent of the FCC's information collection efforts, which seem disproportionately costly. According to OMB, as of the end of February, the FCC has 423 active collections demanding 457,355,706 responses each year requiring a total of 73,200,049 hours to complete at a total cost of \$798,204,803. In short hand, that's 73 million hours and \$800 million annually just to fill out FCC paperwork, and there is a decent chance that these figures are

¹This is being done both informally on an ad-hoc basis and as part of the Commission's biennial review obligations under Section 11 of the Communications Act.

lowballed. That is well above the cost figures of several other major agencies, as seen below.

Agency	Total Cost of Active Information Collections
Department of Education	\$305,014
Department of Housing & Urban Development	\$1,942,728
Department of Veterans Affairs	\$11,141,104
Department of Energy	\$49,550,308
Department of the Interior	\$178,634,533
Department of Agriculture	\$397,848,225
FCC	\$798,204,803

While I strongly believe in data driven decision making and the need to ensure accountability, I have to question how much of the existing information collection is truly justified. I've observed that every new FCC policy seems to require a brand new data collection. And, once in place, the rules can live on long past their usefulness. Moreover, without sufficient coordination within the agency, the burdens can pile up without any clear understanding of the total burden on any given segment of the industry.

For example, I have heard from small rural telephone companies that now have to make close to 100 filings with the FCC each year. That's a significant amount of time and resources that are being diverted away from delivering service to consumers. Last March, the Commission sought comment on eliminating several types of burdens on these providers, which I viewed as the tip of the iceberg. The Commission even observed that these small companies may be subject to duplicative sets of network outage reporting requirements and sought comment on whether to eliminate one set. Almost a year later, the Notice remains pending. In addition to acting quickly on these known problems, the agency should complete a holistic data review to determine which collections remain necessary, look at ways to streamline those collections, and eliminate those that are duplicative or unnecessary.

I am also troubled that the Commission does not currently track burdens by industry segment or even by size. The Regulatory Flexibility Act (RFA) requires Federal agencies to review regulations for their impact on small businesses and consider less burdensome alternatives. Therefore, in each rulemaking item, there is a lengthy appendix listing all of the types of small entities impacted by the Commission's action. I asked our Office of Communications Business Opportunities, which is the agency's small business liaison, for information on the total burdens on each type of small business regulated by the agency, as well as the number of times that the Commission considered but declined to make accommodations for small businesses. However, they were unable to provide the requested information because they do not keep track of it. In fact, the response was that it is not required under the Regulatory Flexibility Act, the Paperwork Reduction Act, or any executive order. This explanation completely missed the point. These data points and other basic data should be available to help us understand the impact of the Commission's activities. Therefore, I recommend that, going forward, we require OCBO to begin tracking this information. At a minimum, the agency should be able to catalog and track the paperwork burdens imposed on small providers given that it is already required to calculate those costs for PRA and already specifies which small providers are impacted by rule changes for purposes of the RFA. Combining the two should not be too hard, and would be worth the effort.

At the same time, the Commission should enthusiastically embrace—whether required to do so or voluntarily—the Administration's Executive Order creating regulatory reform officers and agency regulatory reform task forces. The idea is simple: assemble dedicated people in each government agency to make recommendations to repeal or simplify existing regulations that are unnecessary, burdensome or harmful to the economy. While seemingly repetitive of efforts already underway, it has some unique proprieties that could generate new reform ideas not considered or explored before. In the end, it's a sound and worthy goal to provide strong and vibrant American industries to employee Americans and improve economic productivity. One of the first jobs of the new FCC task force should be to examine our paperwork burdens.

* * *

As I've said before, regulations impose costs on companies and, ultimately, consumers. We must be careful not to place undue burdens on companies whether in specific rulemakings, or as the product of cumulative Commission actions. By tracking and regularly reviewing the requirements we put on providers, we can better ensure that the costs we do impose are narrowly tailored and truly warranted.

The CHAIRMAN. Thank you, Senator Johnson.

Senator Schatz, I think, has some questions he wants to submit for the record.

Senator SCHATZ. Just a request to submit in the record on behalf of Senator Nelson a letter to the Committee from the Leadership Conference on Civil Rights—Civil and Human Rights—raising concerns regarding the FCC's recent actions on Lifeline, media ownership, and a few other issues.

The CHAIRMAN. Appreciate that. We'll include it in the record without objection.

Thank you, Senator Schatz.

[The information referred to follows:]

THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS
Washington, DC, March 7, 2017

Hon. JOHN THUNE,
 Chairman,
 Committee on Commerce, Science, and
 Transportation,
 United States Senate,
 Washington, DC.

Hon. BILL NELSON,
 Ranking Member,
 Committee on Commerce, Science, and
 Transportation,
 United States Senate,
 Washington, DC.

Dear Chairman Thune and Ranking Member Nelson:

On behalf of The Leadership Conference on Civil and Human Rights, I request that the attached letter be included as part of the formal record of the Senate Committee on Commerce, Science and Transportation hearing entitled, "Oversight of the Federal Communications Commission." Thank you for your interest in the priorities of the civil rights community with regard to media and telecommunications policy.

If you have any questions about this request, do not hesitate to contact Leadership Conference Managing Policy Director Corrine Yu—yu@civilrights.org.

Sincerely,

WADE HENDERSON
President & CEO
 NANCY ZIRKIN
Executive Vice President

Enclosure

THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS
Washington, DC, March 7, 2017

Chairman AJIT PAI,
 Federal Communications Commission,
 Washington, DC.

Re: MB Docket Nos. 09-182, 07-294, 14-50; BO Docket No. 12-30; WC Docket Nos. 09-197, 11-42, 12-375

Dear Chairman Pai:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national advocacy organizations charged by its diverse membership to promote and protect the rights of all persons in the United States, we write to request a meeting to express our concern regarding your policy agenda as the newly-designated Chairman of the Federal Communications Commission. While we appreciate your announced intentions to address the digital divide and to proceed in a more transparent manner, your recent decisions on Lifeline, Joint Sales Agreements (JSAs), and inmate calling rates are of profound concern to The Leadership Conference and its Media/Telecommunications Task Force, organizations that are

dedicated to ensuring affordable broadband, increasing media ownership diversity, and ending predatory prison phone rates.

Lifeline

The Leadership Conference strongly supports the Lifeline program and its modernization to make broadband more affordable.ⁱ Bipartisan consensus confirms that broadband is an essential service in the modern economy, and all available data shows that people of color are falling behind.ⁱⁱ Cost is a major barrier to broadband adoption and Lifeline is the only program that addresses the cost of broadband for low-income families. Last year's Lifeline modernization order adopted changes to enhance competition in Lifeline provision and thus improve service quality and lower prices. Your recent decision to revoke Lifeline Broadband Provider (LBP) designations for nine broadband service providersⁱⁱⁱ will reduce the number of providers offering broadband and thus decrease the competitive forces available to drive down prices. When you opened your Chairmanship with a pledge to focus on the digital divide, you pledged to "help the private sector" without specifically mentioning helping the low-income communities on the wrong side of the divide.^{iv} This pledge, combined with your extensive attacks on the program,^v give us concern that you will undermine the Lifeline program rather than strengthen it.

Media Ownership

We believe that media concentration leads to fewer owners and fewer entrepreneurial opportunities, whereas actions to tighten the media ownership rules will lead to more owners and more such opportunities for people of color and women. The Commission has a long way to go before it fulfills its obligation to measure and remedy the lack of ownership diversity in broadcasting—particularly given that the Commission has not yet released or analyzed its Form 323 ownership data collected in December 2015. The Commission's decision to rescind its two-year old 2014 Joint Sales Agreement (JSA) guidance not only withdrew a policy that led to the only increase in television ownership diversity in recent years,^{vi} but also was inconsistent with your stated intent to remove "midnight rules."^{vii}

Prison Phone Rates

We are extremely disappointed that you have chosen to attack and dissent from the Commission orders addressing exorbitant prison phone rates. Your actions here are especially troubling given that you have noted your "up-close understanding of the social and economic challenges faced by those who are incarcerated and their families,"^{viii} acknowledged that the provision of inmate calling constitutes "market failure,"^{ix} and said that you are "convinced that [the Commission] must take action to meet our duties under the law, not to mention our obligations of conscience."^x Now that, under your leadership, the Commission has refused to defend critical components of the rules in federal court, we believe it is your duty, once the court reaches a decision, to act immediately to protect families and reduce recidivism through just, reasonable, and fair inmate calling rates and fees.

ⁱ See, e.g., Leadership Conference Quadrennial Review Comments, MB Docket Nos. 09-182, 07-294, 14-50; BO Docket No. 12-30) (filed Aug. 11, 2014).

ⁱⁱ E.g., Free Press, *Digital Denied: The Impact of Systemic Racial Discrimination on Home-Internet Adoption* (December 2016) at 85 (39 percent of non-internet Hispanic households and 35 percent of non-internet Black households cite "can't afford it" as a reason for not subscribing).

ⁱⁱⁱ Telecommunications Carrier Eligible for Universal Service Support, Order on Reconsideration, WC Docket 09-197, 11-42, DA 17-128 (rel. Feb. 3, 2017) available at: <https://transition.fcc.gov/DailyBusiness/2017/db0203/DA-17-128A1.pdf>.

^{iv} Chairman Ajit Pai, Remarks to the Federal Communications Commission (Jan. 24, 2017) available at: <https://www.fcc.gov/document/chairman-pai-remarks-federal-communications-commission>.

^v See, e.g., Testimony of Commissioner Ajit Pai before the House Subcommittee on Communications and Technology (July 14, 2017) available at: <https://www.fcc.gov/document/commissioner-pai-statement-house-oversight-hearing>.

^{vi} See *Making Good on the Promise of Independent Minority Ownership of Television Stations* at <https://www.fcc.gov/blog/making-good-promise-independent-minority-ownership-television-stations> (December 4, 2014).

^{vii} Media Bureau, Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests, DA 14-330 (rel. March 12, 2014) available at: https://docs.google.com/viewer?url=http%3A%2F%2Fhraunfoss.fcc.gov%2Fdocs_public%2Fattachmatch%2FDA-14-330A1.pdf

^{viii} Dissent of Ajit Pai, Rates for Interstate Inmate Calling Services, WC Docket No. 12-375 (2013) at 111.

^{ix} *Id.*

^x *Id.*

These three issues comprise the core of the Commission's obligations under the Communications Act to "make available . . . to all people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."^{xi} Thus, we hope to meet with you soon to discuss the above concerns.

Despite our differences, we are encouraged that you are interested in hearing from parties with whom you do not agree. We are pleased that you are adopting procedures to improve Commission transparency and regular operations. Finally, we agree with you that "the FCC is at its best when it proceeds on the basis of consensus; good communications policy knows no partisan affiliation," and with your insistence that the agency "respect the law as set forth" by Congress and the courts.^{xii}

We will be in touch with your office to schedule this meeting. In the meantime, please feel free to contact Media/Telecommunications Task Force Co-Chairs Cheryl Leanza, United Church of Christ, Office of Communication, Inc., cleanza@alhmail.com, or Michael Macleod-Ball, American Civil Liberties Union, mmacleod@aclu.org, or Corrine Yu, Leadership Conference Managing Policy Director, yu@civilrights.org to discuss the issues raised in this letter.

Sincerely,

WADE HENDERSON,
President & CEO.
NANCY ZIRKIN,
Executive Vice President.

The CHAIRMAN. All right. I want to submit for the record a letter signed by 18 organizations, including representatives from both the tech and telecom industries supporting the use of the Congressional Review Act repeal, the FCC's broadband privacy rule. So we'll submit that.

[The information referred to follows:]

March 7, 2017

Hon. JOHN THUNE,
Chairman,
Senate Committee on Commerce,
Science, and Transportation,
Washington, DC.

Hon. BILL NELSON,
Ranking Member,
Senate Committee on Commerce,
Science, and Transportation,
Washington, DC.

Dear Chairman Thune and Ranking Member Nelson,

We, the undersigned organizations and trade associations, thank the Senate Commerce, Science, and Transportation Committee for holding its oversight hearing of the Federal Communications Commission ("FCC") and congratulate Commissioner Ajit Pai on his designation as Chairman.

We oppose the FCC's midnight Broadband Privacy Rule, which was adopted just days before last year's election, and urge Congress to use the Congressional Review Act ("CRA") to disapprove this innovation-inhibiting regulation.

The rule harms consumers because it creates confusion in a regulatory environment in which customer data is regulated by two different agency standards, based on whether information is used by an Internet service provider or edge provider. Last year, Chairman Pai testified before Congress about the negative effects of the FCC tearing up the unified approach to privacy regulation that was previously administered by the Federal Trade Commission ("FTC"). In fact, the FCC refused to adopt the FTC's recommended privacy framework, which has served customers well for years. The FCC provided no evidence to substantiate the proposition that broadband providers respected consumer privacy any less than other members of the Internet ecosystem.

Last month, a leading representative of the technology sector testified before this Committee that the rule may set a dangerous precedent for the entire Internet ecosystem. Consumers enjoy the advertising-supported Internet and innovation, and investment thrived before the rule's adoption. The FCC's rule also threatens the eco-

^{xi} 47 U.S.C. § 151.

^{xii} Ajit Pai, Biography, Regulatory Philosophy, available at: <https://www.fcc.gov/about/leadership/ajit-pai>.

nomic health of broadband providers whose infrastructure is critical to new technologies like 5G and the Internet of Things.

If Congress employs the CRA to disapprove the rule, customers will still enjoy reasonable privacy protections under Section 222 of the Communications Act.

Congress should disapprove of this anti-consumer data rule so that the new Chairman and Commission can focus on removing other regulatory hurdles to innovation and restore regulatory balance to broadband service and the rest of the Internet ecosystem.

Sincerely,

American Consumer Institute	Interactive Advertising Bureau
Americans for Tax Reform	National Association of Manufacturers
AMT-The Association for Manufacturing	National Black Chamber of Commerce
Technology	NCTA—The Internet & Television
Competitive Enterprise Institute	Association
Consumer Technology Association	Small Business & Entrepreneurship
Council for Citizens Against Government	Council
Waste	Taxpayers Protection Alliance
CTIA ®	Tech Knowledge
Digital Liberty	U.S. Chamber of Commerce
Electronic Transactions Association	USTelecom

The CHAIRMAN. I would say we'll keep the hearing record open for two weeks, and if there are questions that Senators want to submit, feel free to do that, and we'll encourage upon receipt witnesses submitting their written answers to the Committee as soon as possible, and, particularly, any questions of Chairman Pai that might be relevant to his re-nomination as well.

So with that, this hearing is adjourned. Thank you.

[Whereupon, at 12:35 p.m., the hearing was adjourned.]

A P P E N D I X

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN THUNE TO HON. AJIT PAI

Question. Chairman Pai, what steps will you take to ensure the Commission has the benefit of robust economic analysis in its rulemakings, which has been sorely lacking in recent years, and is not constrained by legacy “silos” in approaching increasingly convergent communications technologies? What reforms to the FCC’s organization and structure will be necessary, if any, to reflect the changing nature of telecommunications?

Answer. Historically, the FCC had been a model for the use of economic analysis in Federal policymaking. For example, FCC economists have crafted white papers that have been significant drivers of incredibly important policy innovations, such as the use of auctions to assign licensed spectrum and the use of price cap regulation, rather than rate-of-return regulation. Unfortunately, robust economic analysis has been sorely lacking in the Commission’s decision-making in recent years. For instance, in compliance with the Regulatory Right to Know Act, OMB submits an annual report to Congress detailing the benefits and costs of Federal rules. According to OMB’s 2016 assessment, the FCC issued 11 major rules from 2006 to 2015. By their count, *not one* was accompanied by an estimate of benefits or costs. Additionally, FCC experts have published nearly 90 white papers since 1980, but zero since 2012. Finally, the functions of economic and data analysis are performed by terrific FCC staff scattered throughout the agency, unlike the legal function (vested in the Office of General Counsel) and engineering (housed in the Office of Engineering and Technology).

This decline in the use of economic analysis motivated me to announce recently the creation of a working group to establish an Office of Economics and Data, or OED, at the FCC. This Office will combine economists and other data professionals from around the Commission. I envision it providing economic analysis for rulemakings, transactions, and auctions; managing the Commission’s data resources; and conducting longer-term research on ways to improve the Commission’s policies. The working group will develop a plan of action by this summer. The Commission will then carefully consider that plan. My goal is to have the new office up and running by the end of the year. My hope is that this Office will enable the more systematic use of core regulatory principles such as cost-benefit analysis and accuracy of data that underlies FCC decisions.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. ROY BLUNT TO HON. AJIT PAI

Question. I applaud your work on the recent Order regarding the weighting of application tiers for the CAF II Auction. Rural Missourians have been watching this proceeding closely, and are pleased with your leadership on behalf of rural areas. Does the Commission have a timeline for concluding the auction?

Answer. I appreciated working closely with your office earlier this year as we moved forward on the Connect America Fund Phase II auction. Just last week, I announced the formation of the Rural Broadband Auctions Task Force to oversee implementation of this auction, among others. The Task Force is diligently working through the pre-auction process, with the expectation of conducting the auction in early 2018.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DEAN HELLER TO
HON. AJIT PAI

Question 1. I have constituents in rural Nevada who rely on over the air tv to get local news and other programming. And the only reason they have that access is because of translators that can get the signal out to them.

But my concern is that after the spectrum auction is over and broadcast stations have been repacked, rural Nevadans access to over the air tv will be drastically cut.

What impact will repacking have on translators and rural Nevadans access to over-the-air tv?

Answer. Translators provide important services upon which many in rural communities rely. Although the Spectrum Act does not protect translators in the repacking process, I am committed to doing what we can to ensure that as many translators as possible will stay on the air (and flagged this issue when the FCC adopted its Notice of Proposed Rulemaking for the incentive auction in September 2012). For example, the FCC will open a special filing window for operating TV translator stations that are displaced by the repacking and reallocation of the television bands. The FCC has also adopted rules to permit LPTV and TV translators located in the new wireless band (except the guard bands) to remain on their existing channels during the post-auction transition period until they are notified that a forward auction winner is within 120 days of commencing operations. This could allow continued operations in some locations for a number of years. And just last month, the Commission extended additional channel sharing rights to LPTV and TV translator stations and broadened the rules applicable to other stations to increase the likelihood of displaced stations finding a post-auction channel.

Question 2. I appreciate that one of your first moves as Chairman was establishing a new Broadband Deployment Advisory Committee. The Commerce Committee has a lot of members with rural states, including my state of Nevada, and deployment is one of the greatest challenges in our rural areas.

But deployment and access can't be successful without expansion of infrastructure, and utility poles are an essential part of that equation.

Given how technical and complicated pole attachments can be, will this Advisory Committee include any stakeholders from electric companies?

Answer. Yes. On April 6, 2017, I announced the 29 members selected for the Broadband Deployment Advisory Committee (BDAC). Pertinent to your question, I named Jim Matheson, Chief Executive Officer of the National Rural Electric Cooperative Association and former Utah Congressman, as well as Allen Bell, DOT, Joint Use and Franchise Manager, Georgia Power Company, representing Southern Company.

Question 3. In Nevada, we have 2.8 million wireless subscribers, and 70 percent of high-speed broadband connections in the state are mobile. We need spectrum to meet this demand and continue innovating, creating jobs, and boosting the economy.

But time is the critical factor. In the past, it's taken 13 years on average from start to finish to reallocate spectrum. Does the FCC have any tools to maximize the use of bands that are already authorized for commercial use?

Answer. Yes. And I am proud that the Commission has already taken several actions during my tenure to do just that. For example, in February, the Commission adopted the Mobility Fund Phase II, which will direct \$4.53 billion over the next decade to facilitate the deployment of advanced mobile service to rural America, where spectrum too often now lies fallow. Also that month, we certified the first LTE-U devices, paving the way for gigabit LTE through the efficient sharing of unlicensed spectrum with Wi-Fi. In March, the Commission also rolled back its outdated regulations that prevented the use of 800 MHz cellular spectrum for broadband technologies like LTE, and this month the Commission will be considering a package of reforms aimed at speeding the deployment of wireless infrastructure. Each of these actions should help maximize the use of bands that are already authorized for commercial use.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BILL NELSON TO
HON. AJIT PAI

Question 1. What is your vision for fulfilling your roles and responsibilities as the FCC Defense Commissioner?

Answer. As FCC Defense Commissioner, my top priorities are to ensure the safety and welfare of all Americans, to promote the protection of property, and to support the government's continuity of operations in the event of a national disaster. In this capacity, I will continue to work in close coordination with the Department of Home-

land Security, other departments and Federal agencies, state and local governments, and tribal and territorial authorities, to promote our Nation's emergency preparedness, homeland security, and defense readiness.

Question 2. Since you joined the FCC in 2012, have you reached out to the Department of Defense (DOD) for a briefing on national security spectrum issues? If not, what are your plans to receive such a briefing in the near future?

Answer. During my tenure as a Commissioner after I joined the FCC in 2012, I unfortunately did not have the pleasure to work with DOD. As Chairman and Defense Commissioner, however, I have discussed national security spectrum issues with DOD. I plan to continue to maintain contacts with my counterpart at DOD and others at the Department, as appropriate, to discuss several areas of mutual interest, including national security spectrum issues. The FCC and DOD have already established a longstanding relationship through the interagency process, and I want to make sure this collaboration continues under my leadership.

Question 3. Given the importance of Federal Government missions that rely on spectrum access in our Nation's interest (*i.e.*, Federal Aviation Administration, DOD, NASA, others), how do you plan to ensure a balance in spectrum policy to meet the needs of both Federal and non-Federal users?

Answer. Although I support accelerated processes that move spectrum into the commercial marketplace, I am very cognizant of the mission-sensitive needs of our Federal Government partners. Our experience has been that coordination efforts are often complex and engineering-intensive, so we emphasize an objective, data-driven perspective when working with other agencies. As part of this process, the Commission's staff liaises routinely with the National Telecommunications and Information Administration (NTIA) and the various Federal agencies. For example, FCC staff participate in NTIA's Interdepartment Radio Advisory Committee (IRAC) and Policy and Plans Steering Group (PPSG), both of which include representatives from the various Federal agencies and departments that have responsibilities that requiring significant access to spectrum. During my tenure, we will continue to maintain this productive working relationship with the NTIA and other Federal agencies at the highest levels to satisfy our mutual legal mandates.

Importantly, in multiple statutes, Congress has directed the Commission to work with other agencies to provide access to more commercial spectrum through repurposing and sharing Federal spectrum. The Bipartisan Budget Act of 2015 aided this process by giving Federal agencies the funding to plan for future transitions and spectrum sharing. I look forward to working with Federal agencies as we continue to review spectrum use.

Question 4. Given that spectrum is a finite resource, and both Federal and non-Federal requirements are critical, what are your policy priorities in key areas such as increasing spectrum sharing and access opportunities for both Federal and non-Federal users?

Answer. We have a crucial role to play in spectrum policy—a role made more critical by resource constraints and potential technical complexity. Since most of the spectrum is occupied, but often on a limited basis in terms of geography or time of use, we must continue to pursue opportunities for sharing spectrum. Technology has advanced in ways that enable meaningful access to spectrum on a shared basis while continuing to protect incumbent users against harmful interference. I also believe that sharing should be done in ways that benefit both Federal and non-Federal users, and we will continue to work with Federal stakeholders to find ways to achieve this. We also will continue to identify opportunities for making spectrum available on an exclusive basis. The broadcast incentive auction illustrates that this can be a complex process.

More generally, we need to ensure that the Government's spectrum policies are meeting the needs of all users, Federal and non-Federal. Accordingly, we will continue rely on our talented staff who work on spectrum issues and to maintain our relationships with the NTIA and our Federal partners as we try to adapt spectrum policy to the times. In order to help the FCC meet this goal, one key policy priority includes approving new technologies and services within one year, as long required (but oft neglected) under Section 7 of the Communications Act.

Question 5. What are your plans to ensure that ongoing coordination efforts between NTIA and FCC on spectrum policy continue to move forward smoothly?

Answer. A key FCC priority in this area is to work with the Interdepartment Radio Advisory Committee (IRAC), which is an advisory committee to NTIA that is made up of representatives of the Federal agencies. NTIA considers the advice of the IRAC, but has the final say on the position of the Executive branch. The Commission already serves an active liaison role with the NTIA on the IRAC. We also have formal and informal contacts and processes to foster ongoing discussions and

coordination with NTIA as well as our sister agencies. I will continue to encourage these relationships, as well as provide leadership directly from my office to facilitate productive negotiations and coordination.

Question 6. I have heard from my local broadcasters that illegal pirate radio stations have been a big problem in Florida. Importantly, those broadcasters tell me that these pirate radio stations interfere with the Emergency Alert System, which is incredibly important given the natural disasters that can affect Florida.

Answer. I agree, which is why enforcement against pirate radio broadcasters—in Florida and elsewhere—is a priority of mine and will remain that way as long as I am Chairman.

Question 7. What are you doing to address pirate radio stations, both in Florida and nationwide? Will you commit to making combating pirate radio operations a priority during your time as Chairman of the FCC, including devoting sufficient resources to stop these illegal broadcasts? Are you able to use fines and equipment seizures to stop these broadcasts, or do you need additional enforcement authority?

Answer. I appreciate your concern with the need to combat pirate radio operations. I have directed the FCC's Enforcement Bureau to aggressively pursue pirate broadcasters. Pirate radio can cause interference to other licensed broadcasters and non-broadcast services. And in some circumstances, it can even endanger public safety—for example, by interfering with the signal of a legitimate broadcaster that is delivering an Emergency Alert System (EAS) message. The Commission takes such interference very seriously.

Parties found to be operating radio stations without FCC authority could be subject to a variety of enforcement actions, including seizure of equipment, imposition of monetary forfeitures, ineligibility to hold FCC licenses, and injunctive relief. Due to the gravity of pirate operations' interference, especially when it comes to public safety, we are also considering whether criminal sanctions may be appropriate in certain situations. The FCC also has the authority to inspect radio installations. Such inspections are done by the Enforcement Bureau's field agents. As for additional enforcement authority, I would be happy to work with you and your staff on any policies that could bolster our enforcement actions against pirate radio violators.

Question 8. As you may know, Westelcom Network Inc., a small fiber-based broadband provider in New York has filed for a limited waiver request with respect to 47 C.F.R. § 61.26(a)(6) of the FCC's rules—which defines rural competitive local exchange carriers (CLEC). The company lost its classification as a rural CLEC after a 2012 Census Bureau reexamined its classification for Watertown, NY (one of the six counties in Westelcom's service area) and decided to include Fort Drum in its population area for the first time ever. The population increase associated with the military base caused the area to be reclassified from a "rural" to an "urbanized" area. As a result of this new classification, the FCC determined that Westelcom could no longer qualify for the rural exemption rate provided for those entities defined as rural CLECs, despite the fact that Army policy prohibits Westelcom from serving the base.

Because of the change in status, the small carrier will no longer receive the transition period the FCC's 2011 *USF Transformation Order* provided to rural companies and now faces a 96 percent cut in revenue. This has the potential to devastate critical institutions in the region, which receive the bulk of their broadband services from the company. In fact, nearly 100 health care facilities, telemedicine networks, municipalities, and education facilities receive service from the company.

The waiver in question would restore to Westelcom the transition period it unfairly lost and allow the company time to stabilize its operations, consistent with the Commission's goal of ensuring broadband deployment in rural America. Furthermore, we know that continued delays, especially for a small company such as Westelcom, severely harm the future of the company and prevent continued investments in the region. Given your support for rural broadband deployment, what steps will your Commission take to ensure prompt action is taken on this waiver request?

Answer. Over the last couple of months, my office has been working with Westelcom, Bureau staff, and my colleagues to address this issue. On April 5, after further discussions with the company, my office circulated a revised waiver order that would allow the company to stabilize its operations and maintain its service in rural America. I am working with my colleagues to get that order adopted promptly.

Question 9. Due to the efforts of the company and of your predecessor, a compromised waiver was negotiated to allow a phase-down period for the company. The order was then put on circulation in December of 2016. Despite this, and the fact that the waiver enjoys bipartisan support from Members of Congress, the FCC has

not taken official action on it. Is there a reason that action on this deal has stalled? If so, what additional information could this company provide to help the Commission make its decision?

Answer. Over the last couple of months, my office has been working with Westelcom, Bureau staff, and my colleagues to ensure that Westelcom indeed met the extraordinary circumstances that are normally required for a waiver of Commission rules. During that period, the company was able to provide our staff with additional facts and assurances to make clear that unique situation it faces and to justify that a waiver in this specific circumstance would serve the public interest.

Question 10. Chairman Pai, during the FCC Oversight hearing on March 8, Senator Thune asked you a question about the agency's broadband privacy rules and whether the FCC would still be obligated to regulate broadband provider privacy practices if these rules were repealed using the Congressional Review Act. Specifically, Senator Thune stated, “[i]s it true that consumers would be left unprotected, or would the FCC still be obligated to police broadband privacy practices under Section 222 of the Communications Act?” In your response, you indicated that Senator Thune was correct in his assessment that the FCC would still play a role in broadband privacy and you state that “the carriers would still have their obligations under Section 222 in addition to other Federal and state privacy, data security, and breach notification requirements.”

What are the obligations of broadband providers under Section 222 to which you referenced in your answer? Are those specific, enumerable responsibilities that can provide consumers with transparency and certainty about how their data is collected, used, and sold?

Answer. In the FCC's 2015 *Open Internet Order*, the Commission declined to forbear from the application of Section 222 to broadband providers, stating that the statute “itself directly provides important privacy protections.” Among these protections is the right of customers of telecommunications carriers (a category which includes ISPs under the terms of the *Title II Order*), to decide whether and how their customer proprietary network information (CPNI) will be used.

Section 222 imposes a duty on telecommunications carriers to obtain the approval of their customers prior to using or sharing customer proprietary network information (CPNI), subject to certain limited exceptions. Specifically, under Section 222, a telecommunications carrier “shall only use, disclose, or permit access to individually identifiable [CPNI]” to provide the service from which such information is derived or services necessary to, or used in, the provision of such service. In addition, section 222 enumerates specific uses of CPNI that do not require customer approval, including for the provision of 911 service, to protect the rights and property of the carrier, to protect users and other carriers from fraud, and to bill and collect for the telecommunications service.

The Commission has also interpreted section 222 as imposing on carriers a general duty to protect the confidentiality of CPNI, including a duty to take reasonable precautions to prevent the unauthorized disclosure of a customer's CPNI. Though the Commission has adopted detailed regulations to help clarify the applicability of this duty to voice services, the statutory duty applies independently.

With respect to the second portion of your question, yes, section 222 contains specific, enumerated responsibilities, including the points discussed above.

Question 11. Given the FCC's 2015 forbearance from its rules implementing Section 222, how would the FCC act to ensure that broadband carriers meet these obligations that you referred to in your response?

Answer. As discussed above, in the *Title II Order*, the Commission did not forbear from the application of Section 222, including as it applies to ISPs. The Commission did, however, forbear from applying certain rules that had been implemented pursuant to Section 222 for telephone companies. As such, section 222 and its requirements apply to ISPs, and the Commission has authority to enforce those statutory obligations.

Question 12. Do you believe that the FCC would continue to play a role in broadband privacy if broadband providers were no longer classified as a telecommunications service subject to Title II of the Communications Act? If not, what agency would have that responsibility, especially in light of the 9th Circuit Court of Appeals decision on the scope of the common carrier exception in *AT&T v. FTC*?

Answer. In the circumstances this question contemplates—and as was the case prior to the FCC classifying broadband as a Title II service in 2015—Congress has given the Federal Trade Commission jurisdiction over broadband privacy. The FTC exercised this role for decades following the commercialization of the Internet in the 1990s, and the evidence shows that it is a highly effective cop on the beat that can and will protect broadband consumers' privacy. The FCC has been, is, and would

be ready and willing to offer the FTC any expertise the FCC may have to help them carry out that role.

Question 13. You have indicated that the FCC would need to take time to evaluate the legal implications of a Congressional Review Act resolution of disapproval when it comes to its privacy and data security authority. If that is the case, how can you claim that broadband providers would still have privacy obligations following enactment of a resolution of disapproval? Would those obligations fall under Section 222, which is only applicable to common carrier services and would not apply should the FCC eventually reverse classification of these services as common carrier services?

Answer. The CRA resolution which has now become law maintains the *status quo* regarding broadband privacy. Section 222 still applies to broadband providers, and the FCC can take enforcement action under this authority. In the event broadband providers were no longer common carriers, the FTC would be back in the same position it held prior to 2015 of enforcing privacy protections in the online ecosystem.

Question 14. Has the FCC evaluated what privacy and data security rules will be applicable to services that are common carrier services if this resolution is enacted and all of the reforms adopted last year are vitiated?

Answer. Yes. All rules except those disapproved by Congress and the President in the CRA resolution are applicable to common carriers.

Question 15. Chairman Pai, I serve as ranking member on the Armed Services Committee's Subcommittee on Cybersecurity. We live in a nation, in a world, where so much of what we do relies on connections to IP-based communications networks—and that means bad actors, anywhere in the world—with a keyboard—can potentially hack into those networks and exploit the underlying data. And it happens all-day, every day.

The FCC is the expert agency overseeing our Nation's communications networks. Yet you have taken pains to try to make clear in your statements and in recent actions undoing and setting aside the FCC's cyber related items and reports, including staying the FCC's data security rule—that you do not believe the FCC has a role in our cyber defenses. Putting aside, for a moment, the NIST cyber framework, which includes critical infrastructure, or past regulatory debates at the FCC—everyone agrees that we need to be doing more, not less, to protect our Nation's communications networks against cyber attack.

If you are keeping the FCC from being part of the solution, are you making it part of the problem?

Answer. The FCC is very much a part of the solution. The agency has contributed and continues to contribute its subject matter expertise in close collaboration with the Department of Homeland Security, other Federal agencies, and industry, to counter cyberthreats. Given the scope of and potential harm from cyberthreats, it's important for all relevant agencies of the government to work together, in coordination with industry, to detect, minimize, and neutralize such threats. To this end, I have and continue to support the FCC's efforts to combat this problem through the established interagency process.

Question 16. Is it tenable for the FCC, as the expert agency over our communications networks, to sit on the sidelines in the battle to protect our Nation from cyber attack?

Answer. Despite the FCC's limited resources, some of our best professionals are working on a dedicated 24/7 basis with our counterparts in both other government agencies and industry to identify, mitigate, and disrupt real and potential threat vectors each and every day. In addition, in just the past year alone, the FCC has adopted rules strengthening and safeguarding our national emergency alert and warning systems. The FCC has also supported DHS and NIST in their development of voluntary industry standards to protect our Nation's communications networks.

Question 17. Chairman Pai, throughout its history, the FCC has been active in its enforcement of all rules duly adopted by the agency. That has been true for the agency under the leadership of both Democratic and Republican Chairs. As a result, it surprised me to hear of your announcement in January—before you had officially assumed the Chair of the agency—that you did not intend to enforce the broadband transparency rules duly adopted by the agency in 2015 upon the expiration of the small business exemption in order. It makes me wonder if there are other rules adopted by the agency that you do not plan to enforce as Chairman.

Will you commit to this Committee that you will fully enforce the statutes governing the FCC, and the rules duly adopted by the agency, even if you personally disagree with those statutes or rules?

Answer. Yes.

Question 18. Chairman Pai, one of the responsibilities of the Chair of the agency is to help direct the agency's legal defense of its own actions. I understand that you have chosen not to defend certain rules adopted by the FCC under the leadership of your predecessor. I fear that these moves signal a willingness on your part to walk away from other litigation over actions by your predecessor as a way to undermine those actions—which would cause me great concern.

At present, is there other ongoing litigation in which you intend to instruct your staff not to defend the actions of the agency?

Answer. No.

Question 19. Chairman Pai, some have suggested that you use the FCC's power to issue interpretive rules to undo key actions taken by the FCC under your predecessor, including the classification of broadband as a common carrier service. The groups who favor this approach suggest that these sorts of interpretive actions would not be subject to full notice and comment requirements under the Administrative Procedure Act (APA), and thus could be taken much more quickly. I would argue that such actions would undermine public faith for the agency, as using this authority would be inappropriate in this context, result in less transparency, and represent hasty decision making built upon predetermined political outcomes.

I know that you disagree with many of the actions taken by the FCC under your predecessor—you clearly have not been silent on that in your time as a Commissioner. But the appropriate way to reconsider those previous actions, including the classification of broadband, is through full and fair rulemakings pursuant to standard APA notice and comment processes. In my opinion, using an interpretive rule would be inappropriate in this context. Will you commit that any major actions you take as Chairman of the agency, including possible action related to the classification of broadband as a common carrier service, will only occur after a full notice and comment rulemaking process that allows adequate time for public comment and consideration?

Answer. I have long believed that an open and transparent process that gives a full opportunity for public consideration is best. That is why, in one of my first actions as Chairman, I created a pilot program to test the releasing of the draft text of Commission decisions three weeks before a Commission vote. That program was so successful in February that I expanded it to encompass all six items on the March agenda and all seven on the April agenda. Similarly, I have steadfastly believed that Commission must rigorously adhere to the dictates of Federal law, including specific requirements of the Administrative Procedure Act. I accordingly commit to doing so going forward.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO
HON. AJIT PAI

Question 1. You have been an advocate of loosening or eliminating altogether the rules that govern how many broadcast stations and newspapers a company can own in any one market. And it is my understanding that you hold this view because you think the rules don't reflect the current media marketplace.

What FCC data are you relying on to support this conclusion?

Answer. At the outset, I note that the Newspaper/Broadcast Cross-Ownership (NBCO) Rule is currently before the Commission on reconsideration and any subsequent decision to modify or repeal the rule would be based on the record developed in the Commission's media ownership review proceeding. That record contains extensive information about the current media marketplace and support for the conclusion that the NBCO Rule is outdated and harmful.

In my dissent to the August 2016 Second Report and Order that effectively retained the existing ban on the common ownership of newspapers and broadcast stations, I provided an extensive analysis showing that the NBCO Rule—originally adopted in 1975—no longer reflects the current media marketplace. For example, since 1975, approximately one quarter of newspapers in the United States have gone out of business, while others no longer publish on a daily basis or have abandoned the print medium altogether in favor of digital-only distribution, meaning they no longer meet the definition of a daily newspaper under the Commission's rule. And the newspaper industry has been particularly hard hit since 2000, enduring significant declines in circulation, advertising revenues, and employment. Moreover, the Internet has fundamentally transformed the ways in which the American people consume news and information, but the Commission's media ownership rules have failed to keep pace (indeed, they do not factor in the transformative impact of the Internet on media). In light of all this, the government should be finding ways

to promote investment in the newspaper industry, not discouraging investment with antiquated regulations that do not reflect the current media marketplace.

For your reference, I have provided a copy of my August 2016 dissent.

Question 2. What evidence do you have that proves consolidated ownership creates more journalism and more jobs?

Answer. As provided in greater detail in my August 2016 dissent, the record in the media ownership proceeding is replete with studies spanning almost four decades demonstrating that common ownership of newspapers and broadcast stations leads to increased investment in local journalism and improved service in local communities. For example, Commission-sponsored studies from 2007 found that cross-owned television stations provided more news programming, local news coverage, and coverage of state and local politics than non-cross-owned stations. Another Commission-sponsored study from 2007 found that a cross-owned radio station was four to five times more likely to have a news format than a non-cross-owned station. Moreover, owners of grandfathered newspaper/broadcast combinations provided numerous unrebutted examples of how their cross-owned combinations provided more comprehensive news coverage to their local communities, including Atlanta, Cedar Rapids, Milwaukee, Phoenix, South Bend, Spokane, Topeka, and Amarillo.

Question 3. Form 323 is the FCC's tool for gathering data on ownership data from broadcasters, but response rates are low. Historically, broadcasters have faced little to no penalty for noncompliance. Response rates for some broadcast services, such as AM radio, were as low as 79 percent, a service you have highlighted as important for enhancing ownership diversity.

What steps will you take to ensure that broadcasters provide a full accounting of ownership information?

Answer. The Commission has been and continues to be engaged in an intensive effort to improve its broadcast ownership data, seeking to reduce the burden on filers and, at the same time, ensure that the data are reliable, searchable, and aggregable. Since adopting a unified biennial filing deadline in 2009, the Commission has taken various steps that have helped improve response rates. In the most recent filing windows, the Commission's Media Bureau has hosted information sessions for Form 323 filers designed to increase awareness of the filing requirement, present an overview of Form 323, conduct a filing demonstration, and address common filing mistakes. The Commission has also engaged in targeted outreach to increase awareness of the sessions. The Commission anticipates that a similar event will be held prior to the 2017 filing period. Prior to the filing periods, the Commission has also released multiple public notices alerting filers of the upcoming filing window. In addition, it is anticipated that the significant improvements to Form 323 adopted in January 2016 will further improve the quality and rate of responses in the upcoming filing.

Now, as Chairman, I intend to explore additional ways to help improve response rates, reduce filing burdens, and improve the overall quality of the Commission's broadcast ownership data. At the same time, I'm taking steps to ensure that our efforts to collect ownership data do not have unintended consequences. For example, at the April 2017 Open Meeting, the Commission will consider an Order to expand options for how noncommercial broadcasters can comply with the ownership reporting requirements.

Question 4. You are on record as saying that the FCC should engage in transparent and data-driven decision making. During your chairmanship you will have an opportunity to preside over the FCC's statutorily mandated periodic review of the FCC's media rules.

As part of this periodic review, the FCC is obligated to gather ownership data every two years.

The 2015 data collection has not been released. The FCC is scheduled to collect media ownership data again in 2017.

Will you release the 2015 data collected as a result of the 2015 biennial review of the FCC's media rules within 2 weeks of the submission of your answers to these QFRs? If not, why not?

Answer. The 2015 data regarding the ownership of commercial broadcast stations collected on FCC Form 323 ownership reports filed biennially by commercial licensees is publicly available on the Commission's website. Currently, the Media Bureau is working to finalize and release a report that analyzes that ownership data in various ways, as it has done in the past. This is a priority for us, and the Commission is working to release that report as soon as possible.

Question 5. Will you commit to keeping the FCC on schedule to conduct, in 2017, a timely and complete data collection regarding the media rules? If not, why not?

Answer. We are currently on schedule to receive the ownership data for the next biennial filing window that opens this fall. We are in the process of implementing changes to the FCC Forms 323 and 323-E (ownership forms) to ensure that they reflect the changes adopted by the Commission in 2016, as well as any modifications adopted by the Commission at the April 20, 2017 open agenda meeting. These revised forms should simplify the filing process for licensees, increase the response rate, improve the quality of submitted ownership data, and facilitate the Commission's analysis of that data.

Question 6. Will you commit to collecting and publishing and analyzing the 2017 data collection ahead of any changes or reconsiderations of existing broadcast ownership policies? If not, why not?

Answer. The 2017 biennial ownership filing window will close on December 1, 2017, after which the Commission, and others, can begin the process of reviewing and analyzing the ownership data. While the Commission intends to analyze the submitted ownership data and release a report as quickly as possible, it is premature at this point to determine whether that timing will coincide with the Commission's resolution of the pending petitions for reconsideration of the 2010/2014 quadrennial media ownership proceeding, which were filed in December 2016.

Question 7. The U.S. Census Bureau's Annual Capital Expenditures Survey for 2015 for the entire telecom industry shows that the total capital expenditures by wired telecom carriers, cable distributors, broadband ISPs, wireless telecom carriers, and telecom resellers increased by more than \$550 million over the 2014 level.

Moreover the annual earnings reports of several leading broadband providers' show that investment is up, not down in the two years since the FCC's 2015 order.¹

Given these facts, what's the basis for your repeated suggestion that the legal definitions underpinning Net Neutrality, and broadband privacy are responsible for any downward change in investment?

In your answer please cite your sources and provide examples where relevant.

Answer. By looking at data from the Census Bureau's Annual Capital Expenditure Survey (ACES) from 2013 through 2015, the decline in capital investment before and after Title II reclassification is much clearer. Using the ACES data you cite (for wired telecom carriers, cable distributors, broadband ISPs, wireless telecom carriers, and telecom resellers), comparing 2013 (*i.e.*, the year before President Obama announced his desire for Title II re-classification) with 2015 (*i.e.*, the year the FCC reclassified broadband as a Title II service) shows annual capital investment being slightly lower in 2015 compared with 2013. (Sources: Sources: Table 4b at <https://www.census.gov/data/tables/2014/econ/aces/2014-aces-summary.html>; Table 4a at <https://www.census.gov/data/tables/2015/econ/aces/2015-aces-summary.html>).

In addition, other third-party sources also indicate an overall decline in investment. Economist Hal Singer finds by tracking investment of twelve major ISPs between 2014 and 2016 that domestic capital expenditures declined by 5.6 percent or \$3.6 billion. (Source: <https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era/>) Studies suggesting an increase in overall investment often make critical methodological errors by, for example, counting as domestic network investment a major U.S. carrier's multi-billion dollar investment in upgrading its wireless network in Mexico, or another major U.S. carrier's changed accounting treatment of handsets from an operating expense to a capital expense.

Question 8. Smart technologies will enable cities to improve community livability, services, communication, safety, mobility, and resilience to natural and manmade disasters; reduce costs, traffic congestion, air pollution, energy use, and carbon emissions; and promote economic growth and opportunities for communities of all sizes.

¹ For example, in its most recent earnings report, Comcast—the nation's largest broadband provider—noted that in 2016 year over year “capital expenditures increased 7.5 percent to \$9.1 billion.” The lion's share (\$7.6 billion) of that \$9.6 billion went to the company's Cable Communications division, “primarily reflecting increased investment in line extensions, a higher level of investment in scalable infrastructure to increase network capacity and continued spending on customer premise equipment related to the deployment of the X1 platform and wireless gateways”—that \$7.6 billion was an increase of 7.9 percent over the previous year.

Likewise, AT&T said it its most recent earnings that it spent \$22.9 billion on capital investment in 2016, up from \$20.7 billion in 2015. Granted, the 2015 number was slightly down from the \$21.4 billion spent in 2014, but it's higher than the \$19.7 billion or \$20.2 billion spent in 2012 or 2011, respectively, seeming to undercut claims of historic low levels of investment.

Broadband back bone company Level 3 Communications, which is currently being acquired by CenturyLink, spent \$1.33 billion in 2016, more than it spent in either 2015 (\$1.23 billion) or 2014 (\$1.25 billion). Cogent Communications, another broadband backbone company, spent \$45.2 million last year, up from \$35.6 million in 2015.

Smart City market estimates show rapid growth in coming years, and the number of Internet-connected devices in Smart Cities alone is expected to grow from 1.2 million in 2015 to 3.3 billion in 2018. Mobile broadband is the engine for the proliferation of smart cities.

This aspect of our Internet economy is expected to grow from almost \$2 billion in 2015, to \$147.5 billion by 2020.

The FCC is the agency charged with making more spectrum available for mobile broadband.

Given this rapid growth in Smart Cities technology, what is the Commission doing now to usher in next-generation networks to meet anticipated spectrum demands?

Answer. In recent years, the Commission has made an unprecedented amount of new spectrum available for flexible wireless use, including technologies that will enable the growth of Smart Cities. These efforts include: (1) the broadcast incentive auction; (2) the Spectrum Frontiers proceeding; (3) the Citizens Broadband Radio Service proceeding; and (4) the AWS-3 auction. In the Spectrum Frontiers proceeding alone, the Commission made available almost 11 gigahertz of spectrum above 24 GHz for licensed and unlicensed fixed and mobile use, proposed to make available 18 gigahertz of additional spectrum, and sought comment on making spectrum above 95 GHz available for commercial use (this last aspect is one I personally pushed in 2015). The Commission also has several ongoing proceedings designed to improve access to and efficient use of a variety of additional spectrum bands and is actively exploring opportunities to expand access to even more spectrum in the future.

Question 9. Does the Commission need additional statutory authority to meet the demand for spectrum?

Answer. Although the Communications Act, as amended, gives the Commission substantial authority to accommodate the demands for more spectrum, legislation such as the Spectrum Act have played a critical role in advancing the ball. Most recently, the Making Opportunities for Broadband Investment and Limiting Excessive and Needless Obstacles to Wireless Act (also known as the Mobile Now Act) represents an opportunity for the United States to show international leadership in the area of spectrum management and the move to 5G.

Question 10. What is the Commission's role in ensuring that Smart City devices have adequate protections against cybersecurity breaches? If the Commission has no role, which part of the Federal Government has responsibility for this?

Answer. The FCC has a role to play within the clear confines of its defined statutory authority to protect the reliability of the Nation's communications industry and to contribute to the primary roles that other agencies like the Department of Homeland Security have to address cybersecurity challenges. The security of America's communications networks is a top priority, but the Commission cannot take action on this issue beyond the role prescribed by Congress. I believe that the industry needs to lead, and voluntary mechanisms are a good way to provide benchmarks and expectations of protections for these providers and consumers.

We have opportunities as network experts to contribute to interagency dialogues related to this topic, and to support the primary efforts of the industry to secure their networks by clearing away red tape or regulatory ambiguities that would impair their ability to effectively plan and execute their cybersecurity responsibilities. The Communications, Security, Reliability, and Interoperability Council (CSRIC) is a good example of this process—a stakeholder-led effort providing the Commission with “in the trenches” insight into proven means to mitigate cyber risks.

Question 11. The FCC is currently considering a petition seeking broad pre-emption of state and local authority over rights of ways and siting.

The relief sought by the petitioner seems like a very extreme measure for a problem that's solvable with some outreach, communication and coordination with state and local siting authorities as well as Tribes.

Is the FCC willing to convene a working group with wireless industry stakeholders and representatives of state local and Tribal siting authorities to come up with a game plan for wireless infrastructure deployment that includes things like: information sharing about 5G technology, creating model ordinances, creating model franchise applications and other best practices to streamline the deployment process? If not, why not?

Answer. At my first open meeting as Chairman, I announced the creation of the Broadband Deployment Advisory Committee, which will consist of wireless industry stakeholders, representatives of state, local, and Tribal government authorities, and others, to consider ways to accelerate the deployment of broadband infrastructure, including 5G wireless service.

Question 12. Senator Shaheen and I sent a letter to the Commission in June 2016 asking that the FCC commit to providing an assessment of whether the \$1.75 billion budget and 39 month timeline for the incentive auction repack are sufficient for a successful repack of the broadcasters.

Then Chairman Wheeler wrote back to us later in the year committing to provide the information to us in a timely fashion after the completion of the forward auction.

I understand that the forward portion of the incentive auction is still ongoing.

Will you honor that commitment and send us the information requested at the close of the forward auction? If not, why not?

Answer. Yes. I have consistently said that broadcasters shouldn't have to pay for relocation costs out of their own pockets. We will know more about the adequacy of the \$1.75 billion fund once we receive the cost estimates from broadcasters and have had a chance to review them; these estimates are due 90 days after the release of the Closing and Channel Reassignment Public Notice.

I have also said that it is not the Commission's intention to force stations off the air if they fail to complete their transition to new facilities on schedule. It's premature at this point to determine conclusively whether the 39-month time-frame will be sufficient. We have a transition plan in place that creates a schedule taking into account resource constraints, complex tower facilities, interference between stations, and other important factors. It is designed to minimize viewer inconvenience, efficiently allocate the resources necessary for broadcasters to operate on their new frequencies, and ensure that winning bidders for wireless licenses in the forward auction can deploy in the 600 MHz band in a timely manner. The plan is the product of more than two years of engagement with the broadcast industry, the wireless industry, antenna manufacturers, tower crews, and other stakeholders.

Question 13. There was a *GAO report* stating that threats to the security of mobile devices and the information they store and process have been increasing significantly.

In 2012, the Government Accountability Office recommended that the Federal Communications Commission encourage the private sector to implement a broad, industry-defined baseline of mobile security safeguards. They specifically asked the commission to continue to work with wireless carriers and device manufacturers on implementing these cybersecurity best practices by encouraging them to implement a complete industry baseline of mobile security safeguards based on commonly accepted security features and practices.

In response to the GAO's recommendation the Commission tasked the Communications, Security, Reliability, and Interoperability Council (CSRIC) to update these cybersecurity best practices. What the council developed were "voluntary mechanisms" that increased assurance that communication providers are taking the necessary measures to manage cybersecurity risks. It was also to provide implementation guidance to help communication providers use and adapt the "voluntary" cybersecurity framework.

Now that you are Chairman, do you feel that these "voluntary mechanisms" are adequately protecting consumers from cybersecurity breaches?

Answer. The FCC has a role to play within the clear confines of its defined statutory authority to protect the reliability of the Nation's communications industry and to contribute to the primary roles that other agencies have to address cybersecurity challenges. The security of America's communications networks is a top priority, but the Commission cannot take action on this issue beyond the role prescribed by Congress. I believe that the industry needs to lead, and voluntary mechanisms are a good way to provide benchmarks and expectations of protections for these providers and consumers.

However, to the extent that network security risks disrupt critical communications services, like 911, the FCC will do whatever we can, with other stakeholders and within our authority, to mitigate those risks. The FCC can act to identify network security risks that jeopardize critical communications services and act, again within the confines of our statutory authority, to reduce them.

We have opportunities as network experts to contribute to interagency dialogues related to this topic, and to support the primary efforts of the industry to secure their networks by clearing away red tape or regulatory ambiguities that would impair their ability to effectively plan and execute their cybersecurity responsibilities. CSRIC is a good example of this process—a stakeholder-led effort providing the Commission with "in the trenches" insight into proven means to mitigate cyber risks.

I would add that to the extent that Congress grants the FCC additional authority and resources in this area, I would faithfully administer those legal and administrative provisions.

Question 14. In 2013, the GAO was asked to assess the extent to which the FCC has effectively implemented appropriate information security controls for the initial components of the Enhanced Secured Network (ESN) project, and implemented appropriate procedures to manage and oversee it.

The GAO found that in the initial components of the ESN project the FCC did not effectively implement appropriate information security controls. To help strengthen IT and project management controls over the ESN project, GAO recommended in a *report* released, that the Commission establish standard operating procedures related to project management. These guidance documents instruct officials in performing key project management activities, including cost estimating, scheduling and project scope management.

Has the FCC implemented these recommendations? And if so do you feel that the FCC is currently and effectively protecting its systems and information from cyber threats?

Answer. The FCC's Office of Managing Director has briefed me concerning this issue. I understand that the FCC has come a long way since this report detailed the systems in place in 2012. According to OMD staff, we followed through on the recommendations where they were not superseded by new systematic improvements and built on this program's initial successes to develop a much more secure network that complies with appropriate guidelines, corrects all deficiencies and adheres to legal requirements. Please be assured that I will be working to ensure that we do not repeat past IT failures.

Question 15. If not, do you intend to remedy this problem? If so, how. If not, why not?

Answer. I have been advised that the FCC has implemented all recommendations and that GAO has verbally committed to closing all 18 open findings.

Question 16. Broadband access is not a luxury, it is a necessity. The Internet expands opportunities for commerce and strengthens our economy.

In 2015, the GAO *recommended* that the FCC more clearly establish the outcomes it intends to achieve when addressing broadband adoption barriers faced by demographic groups with low levels of adoption.

GAO recommended that the FCC revise its strategic plan to more clearly indicate whether addressing broadband adoption barriers is a major priority, if so, to identify the outcomes the commission will strive to achieve.

Did the Commission follow these recommendations?

Answer. Since I have assumed leadership of the Commission, I have made it clear that I intend to support efforts that make broadband more widely available and affordable for all Americans. To that end, I have identified several outcomes that I intend to pursue and have begun implementing changes to strengthen the Commission's work on broadband adoption.

Notably, I have laid out a Digital Empowerment Agenda that proposes concrete steps the Commission and Congress can take to support broadband deployment. I believe this agenda could help bring broadband and digital opportunity to our Nation's economically deprived areas. By promoting infrastructure investment, the Commission can encourage competition that will bring affordable broadband to more communities and increase adoption. Additionally, my agenda promotes entrepreneurship and innovation so that firms are incentivized to create businesses that rely on these networks and bring further economic opportunity to low-income Americans.

Question 17. As Chairman, you will have an opportunity to craft a strategic plan for the agency. How do you intend to address broadband adoption barriers in your strategic plan?

Answer. As Chairman, closing the digital divide, and thus addressing barriers to broadband adoption, will be a core priority reflected in the Commission's strategic plan. The reality is that people cannot adopt broadband where it is not available. Thus, our strategic plan will emphasize a consistent approach to supporting broadband deployment across the Nation and particularly in rural America.

Indeed, the Commission is already working towards these strategic goals. In just the first two months of my Chairmanship, we have adopted a plan to advance 4G LTE across the country, approved \$2 billion in support for building out networks to high-cost areas through the Connect America Fund, and established a Broadband Deployment Advisory Committee that will bring together stakeholders to develop a model code for municipalities that wish to encourage broadband investment in their areas. The Commission is also poised to open comprehensive reviews of the legal frameworks for wireline and wireless infrastructure deployment. Our goal is to identify regulatory barriers and evaluate how the Commission can alleviate them. In turn, our aim is to give broadband providers a greater incentive and ability to deploy, maintain, and upgrade their networks to meet the growing demand for

broadband—and for more affordable broadband options to be available for low-income and rural consumers.

In the strategic plan, we will build on these efforts and set goals for providing greater regulatory flexibility, streamlining our rules, and encouraging investment in next generation networks. Beyond that, we will stress interagency coordination on efforts to overcome barriers to broadband adoption and outreach to communities about the benefits of broadband.

Question 18. Access to broadband Internet is crucial to improving access to information, quality of life, and economic growth. A number of mobile and fixed-or-in-home-Internet service providers have begun using a practice known as usage-based pricing. This involves the provider changing the price to customers, or adjusting their service, based on the amount of data they use.

In late 2014, GAO said that the FCC collaborate with providers to develop a voluntary code of conduct to improve communication and understanding of data use and pricing by Internet consumers. GAO concluded that this would help to ensure that the application of usage-based pricing for fixed Internet would not conflict with the public interest.

Has the FCC complied with this recommendation? If not do you plan to direct the FCC's compliance?

Answer. The prior Administration recognized that “the number of consumer complaints regarding [usage-based pricing] by fixed providers appears to be small and that UBP plans are less common for fixed Internet customers than mobile customers, it is unclear that any action is needed at this time.” Nonetheless, we will continue to monitor complaints and provider offerings for trends that might indicate that more action is needed.

Question 19. Do you feel that creating a voluntary code of conduct is or would be enough to protect consumers from predatory pricing structures?

Answer. As the prior Administration recognized, “it is unclear that any action is needed at this time.” Nonetheless, we will continue to monitor complaints and provider offerings for trends that might indicate that more action is needed.

Question 20. Do you believe that broadband service providers are providing clear, and transparent pricing and service, and speed information to their customers?

Answer. Based on agency filings and a review of complaints to the agency, it appears that most broadband service providers are providing adequate information to their customers.

ATTACHMENT—AUGUST 2016 DISSENT

Federal Communications Commission—FCC 16-107

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: 2014 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 14-50; 2010 Quadrennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182; Promoting Diversification of Ownership in the Broadcasting Services, MB Docket No. 07-294; Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets, MB Docket No. 04-256.

“The more things change, the more they stay the same.” When French journalist Jean-Baptiste Alphonse Kerr first expressed that sentiment 167 years ago, he obviously didn’t have the FCC’s media ownership regulations in mind. But his words ring true as the Commission finally gets around to finishing the 2010 Quadrennial Review.

Congress instructed the FCC to reassess its media ownership regulations every four years. It also provided that the agency “shall” get rid of outdated rules.¹ This

¹ Compare Telecommunications Act § 202(h) (FCC “shall” review media ownership rules on quadrennial basis, “shall determine whether any of such rules are necessary in the public interest,” and “shall repeal or modify” any unnecessary regulations) with Letter from Tom Wheeler, Chairman, FCC, to the Honorable Anna Eshoo, U.S. House of Representatives (Mar. 18, 2016) (“Section 629 of the Communications Act is explicit: The Commission *shall . . .* adopt regulations to assure the commercial availability [of set-top boxes!],” available at <http://go.usa.gov/xDjbA>; Statement of Chairman Tom Wheeler, August 2016 Open Meeting Press Conference at 1:03:08, <http://go.usa.gov/xDjbJ> (“Make no mistake, we *will* obey the law. The law [section 629]

Continued

was because Congress recognized that regulations designed to promote localism, diversity, competition, and investment in media could have exactly the opposite effect if they didn't keep up with the times.

But here, the FCC has failed on both counts. In terms of timing, the Commission has thumbed its nose at Congress for the past eight-and-a-half years by refusing to complete a single quadrennial review. This is the regulatory equivalent of completing your figure-skating routine for the 2010 Vancouver Winter Olympics after the Olympic flame has been extinguished at the closing ceremony of the 2016 Games in Rio de Janeiro. What took us so long? Based on the "substance" of this *Order*, I have no idea, for the agency essentially does nothing but stick its head in the sand.

The changes to the media marketplace since the FCC adopted the Newspaper-Broadcast Cross-Ownership Rule in 1975 have been revolutionary. Over the last four decades, newspaper circulation and advertising revenue have plummeted, and hundreds of publications have gone out of business. The Internet has become the go-to source for news. National and regional cable news networks have flourished. The days of Americans waiting for the morning newspaper to learn about what is going on around them are long gone. Yet, instead of repealing the Newspaper-Broadcast Cross-Ownership Rule to account for the massive changes in how Americans receive news and information, we cling to it.

And over the near-decade since the FCC last finished a "quadrennial" review, the video marketplace has transformed dramatically. Especially with the rise of over-the-top video, the market is now more competitive than ever. Never before have Americans been able to choose from such a wide array of content. They now demand to view that content when they want and on the device of their choice. And high-profile news is increasingly made and distributed on online video networks that didn't even exist just a few years ago.² Yet, instead of loosening the Local Television Ownership Rule to account for the increasing competition to broadcast television stations, we actually tighten that regulation.

And instead of updating the Local Radio Ownership Rule, the Radio-Television Cross-Ownership Rule, and the Dual Network Rule, we merely rubber-stamp them.

The more the media marketplace changes, the more the FCC's media regulations stay the same.

This ostrich of an *Order* is not at all what Congress envisioned. And it is a thumb in the eye of the United States Court of Appeals for the Third Circuit, too. Five years ago, the Third Circuit vacated the FCC's definition of "eligible entity."³ Earlier this year, the Third Circuit said "enough is enough"⁴ and demanded that the FCC take prompt action on its "stalled efforts to promote diversity in the broadcast industry."⁵ So what does the Commission do here in response to the court? Precisely one thing: It re-adopts the *exact same* "eligible entity" definition that the Third Circuit rejected in 2011!

This proceeding is proof of this agency's plenary and purposeful abdication of its statutory duty. It shows that this Commission that does not believe it is accountable to Congress or the courts. And it is evidence that unless Congress or a court steps in and takes action, this is the way that it will continue to be: The Commission's media ownership regulations will never be relaxed. Efforts to promote diversity will remain stalled. The law, the marketplace, and common sense will continue to be ignored.

Today's result is all the more unfortunate because compromise was well within reach. For example, a bipartisan majority of commissioners was willing to repeal the outdated Newspaper-Broadcast Cross-Ownership Rule. But for some reason, we were told that this rule would not be repealed *unless all commissioners agreed*. And sadly, one chose to exercise that veto.

As someone who has been on the losing end of more 3-2 votes than I care to remember, I am baffled by this new requirement for unanimity. We've been told for years by the FCC's leadership that 3-2 votes are what democracy is all about. Except, I guess, when it isn't. Or more precisely, 3-2 votes are what democracy is all about so long as the commissioners are divided cleanly along party lines. As a re-

says, "the Commission *shall*' provide for competitive choice [in navigation devices]. We *will* obey the law.").

²See, e.g., Daniel Victor & Mike McPhate, "Critics of Police Welcome Facebook Live and Other Tools to Stream Video," *The New York Times* (July 7, 2016) (discussing "the power of [online] video, especially when live, in drawing public attention"), available at <http://nyti.ms/29lMKOS>.

³*Prometheus Radio Project v. FCC*, 652 F.3d 431, 437 (3d Cir. 2011).

⁴*Prometheus Radio Project v. FCC*, 824 F.3d 33, 37 (3d Cir. 2016) (quoting *Public Citizen Health Research Group v. Chao*, 314 F.3d 143, 158 (3d Cir. 2002)) (emphasis and internal quotation marks omitted) (*Prometheus III*).

⁵*Id.*

sult, we end up keeping a rule on the books that almost no one at the FCC actually believes make sense any longer. This is a shame because our regulations should always be shaped only by the facts and law—not crass political considerations.

If I were to detail all of this *Order*'s deficiencies, my dissenting statement would be almost as long as the *Order* itself (161 pages). In the interest of space, I'll focus on what I consider to be the *Order*'s most problematic aspects: (1) doubling down on the Newspaper-Broadcast Cross-Ownership Rule; (2) tightening, rather than loosening, the Local Television Ownership Rule; and (3) failing to take meaningful action to promote diversity.

I.

The newspaper industry is in crisis. Since the FCC adopted the Newspaper-Broadcast Cross-Ownership Rule in 1975, approximately one-quarter of newspapers in the United States have gone out of business.⁶ That's over 400 publications.⁷ In the last decade, newspapers have shut down in Denver, Tucson, Cincinnati, Honolulu, Tampa, and other major cities.⁸ Other newspapers, including the *New Orleans Times-Picayune* and the *Birmingham News*, no longer publish on a daily basis.⁹ Still others, such as the *Seattle Post-Intelligencer*, have abandoned the print medium altogether and now exist only as a digital platform.¹⁰

Since 1975, the population of the United States has increased 49 percent while total newspaper circulation is down by one-third, with the substantial majority of that decline occurring since 2000.¹¹ Adjusting for inflation, newspaper advertising revenues, both print and digital, are down 64 percent since 2000, from \$65.8 billion to \$23.6 billion.¹² And since 2000, employment in newspaper newsrooms has dropped by 42 percent.¹³

Earlier this month, Warren Buffett, whose company owns 32 newspapers across the country, summarized the bleak picture: “[L]ocal newspapers continue to decline at a very significant rate. And even with the economy improving, circulation goes down, advertising goes down, and it goes down in prosperous cities, it goes down in areas that are having urban troubles, it goes down in small towns—that's what amazes me.”¹⁴

Of course, newspaper reporters continue to do important work throughout our country each and every day. Many were recently reminded of the impact that their stories can have through the 2015 film *Spotlight*, which won the Academy Award for Best Picture. The movie focused on *The Boston Globe*'s investigation into widespread child sex abuse by Roman Catholic priests in and around Boston—reporting that ended up having a worldwide impact on the Catholic Church. But given the newspaper industry's profound financial troubles, it is becoming harder and harder for publications to do this type of investigatory journalism, hold our elected officials to account, and let Americans know what is going on in their communities.

That's why it makes no sense for the government to be discouraging investment in the newspaper industry. In this day and age, if you are willing to invest in a newspaper, we should be thanking you, not imposing regressive regulations. But that is precisely what the Commission is doing in this *Order* by maintaining the Newspaper-Broadcast Cross-Ownership Rule.

Our action (or, to be more accurate, lack of action) is particularly unfortunate because broadcasters are well-situated to partner with newspapers. The reason is simple. Investments in newsgathering are more likely to be profitable when a company can distribute information over multiple platforms. This is not just a theory. Because the FCC grandfathered newspaper-broadcast combinations that predated the

⁶See Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50, 09-182, at 2 (July 7, 2016) (NAB July 7 *Ex Parte* Letter).

⁷See *id.*

⁸See *Newspaper Death Watch: Chronicling the Decline of Newspapers and the Rebirth of Journalism*, <http://newspaperdeathwatch.com/> (Aug. 16, 2016).

⁹See *id.*

¹⁰See William Yardley and Richard Pérez Peña, “Seattle Paper Shifts Entirely to Web,” *The New York Times* (Mar. 16, 2009), available at <http://nyti.ms/2bM4yt>.

¹¹Daily circulation was 60.655 million in 1975, 55.773 million in 2000, and 40.420 million in 2014. See *Newspaper Association of America*, *Newspaper Circulation Volume*, <http://bit.ly/2b2r9f2> (linked spreadsheet) (Aug. 16, 2016).

¹²See NAB FNPRM Comments at 71.

¹³See NAB July 7 *Ex Parte* Letter at 3–4.

¹⁴Jake Sherman and Anna Palmer with Daniel Lippman, “**EXCLUSIVE** PLAYBOOK INTERVIEW: Warren Buffett!—Dem EMAIL HACK ‘wider than believed’—KASIE HUNT engaged—B’DAY: David Brooks,” *Politico*, <http://politico.co/2aMjqC1> (Aug. 11, 2016).

1975 adoption of the Newspaper-Broadcast Cross-Ownership Rule, we have seen this theory play out in practice across the United States.

The National Association of Broadcasters has pointed to no fewer than 15 studies demonstrating that newspaper-television cross-ownership increases the quantity and/or quality of news broadcast by cross-owned television stations.¹⁵ These studies span almost four decades, and some were commissioned by the FCC itself. For example, one FCC-sponsored study in 2007 found that newspaper cross-owned TV stations supply about 7–10 percent more local news coverage and about 25 percent more coverage of state and local politics, on average, than non-cross-owned stations.¹⁶ And another FCC-sponsored study that same year found that cross-owned TV stations broadcast 11 percent more news programming than non-cross-owned stations.¹⁷ The same is true with respect to newspaper-radio cross-ownership. An FCC-sponsored study found that a cross-owned radio station is four to five times more likely to have a news format than a non-cross-owned station.¹⁸

And we need not rely on statistics alone. The record contains numerous unrebutted examples of how newspaper-broadcast cross-ownership has provided more comprehensive news coverage to communities throughout our nation, including Atlanta, Cedar Rapids, Milwaukee, Phoenix, South Bend, Spokane, Topeka, and Amarillo.¹⁹ In Dayton, for example:

Cox Media Group's cross-ownership of the *Dayton Daily News* and CBS affiliate WHIO-TV helped to uncover one of the most prominent stories of [2014]: the mismanagement of the Department of Veterans Affairs. Working together, journalists at the newspaper and television station analyzed the quality of care that veterans were receiving, and discovered that the Department had paid more than \$36 million to settle claims resulting from treatment delays. Months of congressional inquiries, national and global media studies, and, ultimately, the resignation of the Secretary of Veterans Affairs followed. These treatment delays would not have come to light had it not been for the dogged efforts of both the newspaper and television reporters, working together.²⁰

So in the face of all of this data and evidence, why does the Commission choose to retain the Newspaper-Broadcast Cross-Ownership Rule? It claims that this regulation remains necessary to promote viewpoint diversity.²¹ But the evidence overwhelmingly shows that there is little if any connection between viewpoint diversity and ownership.²² Most notably, a 2011 FCC-sponsored study found no statistically significant relationship between ownership and viewpoint diversity, and a 2012 update to that study actually found viewpoint diversity to be positively associated with the number of co-owned television stations in a market.²³ Indeed, research generally shows that a media outlet's viewpoint is driven by the preferences of its audience rather than ownership.²⁴

But the larger problem with the Commission's conclusion is that it ignores the realities of the modern media marketplace. This isn't the 1970s anymore. Most Americans don't wait for the morning newspaper or the 11:00 PM newscast to learn what's going on around the globe or at home. That world set sail with *The Love Boat*. Today, most Americans get the information they want when they want it by going online and scouring a wide variety of sources, including digital-only news outlets and social networks such as Facebook and Twitter. When it comes to news, we can now choose from an amazingly diverse array of options. Last year, for example, Pew Research Study counted 143 news providers in Denver alone.²⁵

¹⁵ NAB FNPRM Comments at 75–76.

¹⁶ See Jeffrey Milyo, *The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News* (2007).

¹⁷ See Daniel Shiman, *The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming* (2007).

¹⁸ See Craig Stroup, *Factors that Affect a Radio Station's Propensity to Adopt a News Format* (2007).

¹⁹ See NAA FNPRM Comments at 3–10; Morris Communications Co., LLC FNPRM Comments at 17–23.

²⁰ NAA FNPRM Comments at 5–6 (emphasis in original).

²¹ Order at para. 142.

²² See NAB FNPRM Comments at 79–82, App. C (listing 15 studies).

²³ See Adam D. Rennhoff and Kenneth C. Wilbur, *Local Media Ownership and Viewpoint Diversity in Local Television News* (2011); Adam D. Rennhoff and Kenneth C. Wilbur, *Further Revisions to Local Media Ownership and Viewpoint Diversity in Local Television News* (2012).

²⁴ See, e.g., Matthew Gentzkow and Jesse M. Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers*, 78 *ECONOMETRICA* 35 (2010); Sendhil Mullainathan and Andrei Shleifer, *The Market for News*, 95 *AM. ECON. REV.* 1031 (2005).

²⁵ See Pew Research Center, *Local News in a Digital Age* at 4 (Mar. 5, 2015).

The record contains a plethora of statistics detailing how the Internet has transformed the American people's consumption of news and information, and I don't believe that it is necessary to review all of them here. Instead, I'll focus on two other glaring problems with the Commission's analysis that render its decision to retain the Newspaper-Broadcast Cross-Ownership rule in the name of viewpoint diversity fatally flawed.

First, the Commission contends that newspapers and broadcast television stations "continue to be the predominant providers of local news and information upon which consumers rely."²⁶ But then, in order to justify retaining the prohibition against common ownership of a newspaper and a radio station, the Commission also claims that "broadcast radio stations continue to be an important source of viewpoint diversity in local markets."²⁷

These statements place the Commission on the horns of a dilemma. The only reason that the Commission performs a stunning about-face and suddenly claims that radio stations are a significant source of viewpoint diversity²⁸ is so that it can retain the Newspaper-Radio-Cross Ownership Rule (which generally prohibits cross-ownership). But if radio stations are an important source of viewpoint diversity, then they must be included in the total number of voices in the market. And if that is true, then there is no way that the agency's Newspaper-Broadcast Cross-Ownership Rule can survive.²⁹

Take the New York City media market, for example. If there are five major newspapers, over twenty television stations, and about 60 radio stations in the market contributing to viewpoint diversity, then how can prohibiting a newspaper from purchasing a single one of those radio stations or television stations be necessary to preserve viewpoint diversity? With over 80 voices in the market, how can common ownership of just two cause a problem?

Second, the Commission discounts the rise of the Internet by arguing that most of the news found there is provided by websites affiliated with traditional providers, such as newspapers.³⁰ (This myopic conclusion itself would be news to a wide variety of popular online upstarts, ranging from locally-focused platforms such as *The Texas Tribune*, which earned two Online News Association awards last year for explanatory and topical reporting, and *Voice of San Diego*, which has won national awards for its investigative reporting, to more nationally-focused platforms like BuzzFeed, Vox Media, and Yahoo! News.) But the FCC's regulation only precludes the common ownership of a broadcast station and a newspaper *if the newspaper publishes at least four times a week*. So, for example, newspapers such as the *Patriot-News* of Harrisburg, Pennsylvania, or the *Press-Register* of Mobile, Alabama, which print only three days a week but update their websites constantly, may be commonly owned with a television station.

How does this make any sense? If the content that a newspaper provides on its website is critical to the retention of the Newspaper-Broadcast Cross-Ownership Rule, why should it matter how many days a week it circulates a print edition? So long as newspapers regularly update their websites with breaking news and information, why should a newspaper that offers a print edition seven days a week be treated differently than one that only distributes three print editions a week? Or a newspaper that has chosen to go entirely online? Why should we create an incentive for newspapers to cut back on print editions in order to get more favorable regulatory treatment? The *Order* offers no answers to these questions. That there are no good ones highlights how outdated the Newspaper-Broadcast Cross-Ownership Rule has become. At a time when more and more content is being consumed over the Internet, it makes no sense to base ownership regulations on whether a news outlet distributes a print edition and/or how many times a week it does so. The product, not pulp, is what matters.

Perhaps recognizing its difficulty in justifying the retention of the Newspaper-Broadcast Cross-Ownership, the Commission purports to "provide for a modest loosening" of it.³¹ However, the modest steps that it sets forth are entirely inadequate and largely illusory.

²⁶ *Order* at para. 142.

²⁷ *Id.*

²⁸ See, e.g., 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al., MB Docket No. 14-50, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4435-36, paras. 144-45 (2014) (2014 Quadrennial Review Notice).

²⁹ Conversely, if radio stations are not an important source of viewpoint diversity, then the Newspaper-Radio Cross-Ownership Rule must be eliminated.

³⁰ See *Order* at para. 148 & note 389.

³¹ *Order* at para. 130.

To begin with, the Commission adopts an express exception “for proposed combinations involving a failed or failing newspaper, television station, or radio station.”³² But the newspaper industry has explained that this standard’s specific criteria “will not open any opportunities for newspaper companies to obtain investment from the media industry, and certainly will not serve the public interest.”³³ And there is an even more fundamental problem with this exception. By the time that a newspaper has failed or is failing, it might be too late to save and/or might not be an attractive investment opportunity for a broadcaster. Our goal should be to maintain newspapers as healthy and vibrant institutions. We shouldn’t deprive them of the investment they need to thrive until they are at death’s doorstep and then hope that someone will swoop in at the last minute to save them.

Additionally, the Commission states that companies may obtain a waiver of the Newspaper-Broadcast Cross-Ownership Rule if they are able “to show that their proposed combination would not unduly harm viewpoint diversity in the local market.”³⁴ What does this mean? Who knows? Curiously, the Commission rejects re-adopting the four-factor test that applied to waiver requests under the vacated 2007 modification of the Newspaper-Broadcast Cross-Ownership Rule because it claims that those factors (e.g., whether the combined entity would significantly increase the amount of local news in the market) “would be vague, subjective, difficult to verify, and costly to enforce.”³⁵ But the waiver standard adopted by the Commission today is far vaguer and more subjective than the 2007 standard for it lacks *any* objective criteria. “Knowing it when we see it” is hardly the stuff of administrative precision.

Moreover, we’ve seen this song-and-dance before. When the Commission adopted JSA restrictions two years ago, it set up a similar waiver process to preserve beneficial JSAs that it publicly touted when useful for defending its new policy.³⁶ But that process was a sham. For the entire time that the Commission’s JSA restrictions were in effect, not one waiver request was granted. (That may have been one reason why Congress, in an overwhelming bipartisan vote, required that the FCC protect existing JSAs.³⁷) I have little doubt that the same thing will happen here.

Where does that leave us? In the face of overwhelming evidence of the newspaper industry’s dire condition, the benefits that newspaper-broadcast cross-ownership could bring, and a media marketplace transformed by the Internet, the Commission chooses to leave in place an absurdly antiquated rule that reduces investment in the newspaper business. The FCC’s decision is not based on the law or the facts in the record. Nor is it based on common sense. For example, does anyone seriously believe that allowing a newspaper to buy a single radio station in any American city would harm anyone? But politics—in particular, fear of partisan special interests in the Beltway that have banged the same sad drum for years (ironically, mainly online)—has made it impossible for us to repeal this rule.

At this rate, absent congressional or judicial intervention, the Newspaper-Broadcast Cross-Ownership Rule will outlive print newspapers themselves.

II.

In this *Order*, the Commission refuses to relax its Local Television Ownership Rule. This rule prohibits anyone from owning two television stations in a Designated Market Area (DMA) unless at least one of those stations falls outside the top-four stations in the market (top-four prohibition) and there are at least eight independently-owned television stations in the DMA (eight-voices test).

However, record evidence demonstrates that the eight-voices test lacks any foundation in economics or the realities of today’s television marketplace. Indeed, repealing that test would promote competition and localism in the video marketplace.

For one, the eight-voices test has no basis in modern competition theory and is inconsistent with fundamental antitrust principles.³⁸ The test often prohibits mergers that “are unlikely to have adverse competitive effects and ordinarily require no further analysis,” according to the United States Department of Justice & Federal

³² *Order* at para. 173.

³³ Letter from Danielle Coffey and Kurt Wimmer, Newspaper Association of America, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50, 09-182, 07-294, at 2 (Aug. 9, 2016).

³⁴ *Order* at para. 187.

³⁵ *Order* at note 542.

³⁶ See 2014 *Quadrennial Review Notice*, 29 FCC Rcd at 4540, para. 364.

³⁷ See Consolidated Appropriations Act, 2016, § 628, Pub. L. No. 114-113 (2015).

³⁸ Kevin W. Caves and Hal J. Singer, An Economic Analysis of the FCC’s Eight Voices Rule, at 9-16 (July 19, 2016) (Caves & Singer Study), attached to Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50, 09-182 (July 19, 2016).

Trade Commission's Horizontal Merger Guidelines.³⁹ And it often prohibits transactions that do not create a presumption of increased market power according to those guidelines.⁴⁰ Simply put, in no other industry does the government condition mergers and acquisitions on the maintenance of eight independent competitors in a market. Indeed, under modern antitrust principles, the government does not impose any rigid screen at all.⁴¹

For this reason, economists Kevin Caves and Hal Singer have concluded that the eight-voices test "does not constitute a reliable competitive screening device. Instead, [it] imposes a presumption of anticompetitive effects over transactions that would not justify such a presumption under standard antitrust practice. [It] compounds this error by making its presumption impossible to overturn, regardless of evidence of procompetitive merger-driven efficiencies."⁴²

Caves and Singer's analysis of advertising prices in all local television markets bears out their conclusion.⁴³ Controlling for other factors, they found no statistically meaningful difference between advertising rates in markets with eight or more independently owned and operated television stations and advertising rates in markets with fewer voices.⁴⁴ Moreover, their econometric analysis demonstrated that reducing the number of voices in a market has the impact of *lowering* advertising rates rather than *raising* them, and that this effect holds true whether or not there are fewer than eight voices in a market.⁴⁵ Specifically, in markets with fewer than eight voices, local advertising rates are expected to fall by 2.9 percent with each decrease in the voice count. And in markets with eight or more voices, such rates are expected to fall by 2.4 percent with each decrease in the voice count.⁴⁶

These findings are fatal to the eight-voices test. First, they demonstrate that there is no meaningful competitive difference between markets with fewer than eight voices and those with eight or more. In each type of market, the response to the reduction in the voice count is similar; advertising rates are statistically the same controlling for other factors. There is no significance to maintaining eight independently owned and operated stations in a market. Thus, that number is entirely arbitrary.

Second, the Caves and Singer findings demonstrate that reducing the voice count by one in a market with fewer than eight voices leads to a more competitive market, not a less competitive one. As reviewed above, when the voice count is reduced by one in such markets, advertising prices fall, not rise, in a statistically significant way.⁴⁷

³⁹ See Caves & Singer Study at 12, 14.

⁴⁰ See *id.* at 14.

⁴¹ See *id.* at 13. Rather, the starting point for merger analysis is the Herfindahl-Hirschman Index (HHI), which is used to assess how much individualized scrutiny a transaction requires.

⁴² See *id.* at 15–16.

⁴³ See *id.* at 21–28.

⁴⁴ See *id.* at 24–26.

⁴⁵ See *id.* at 26–28.

⁴⁶ See *id.* at 28.

⁴⁷ Unable to formulate a substantive response to the Caves & Singer Study, the Commission refuses to consider it, claiming that it was submitted too late. See *Order* at note 147. But this study merely provides additional empirical support for arguments that the National Association of Broadcasters (NAB) has advanced throughout the 2010 and 2014 Quadrennial Reviews. See, e.g., NAB FNRPM Comments at 39, 55 (arguing that the eight-voices test is "arbitrary" and "makes no sense"). As such, the Commission may not simply disregard it, and the authority that the *Order* relies upon for doing so is inapposite. In *Verizon v. FCC*, 770 F.3d 961, 968 (D.C. Cir. 2014), for example, the D.C. Circuit said that the Commission was not obliged to consider a late-filed proposal for partial forbearance. Here, however, the Caves & Singer Study and NAB's accompanying *ex parte* letter advanced no new proposal. Rather, they provided support for the NAB's longstanding proposal in this proceeding for the FCC to eliminate the eight-voices test. Similarly, in *Globalstar, Inc. v. FCC*, 564 F.3d 476, 484 (D.C. Cir. 2009), the D.C. Circuit ruled that a party had not provided the Commission with a fair opportunity to pass upon an argument by raising it the day an order had been adopted. That case, however, deal with an entirely new claim of inadequate notice. Here, by contrast, NAB merely submitted additional support for a claim that it has advanced for years during this proceeding. Moreover, the Caves & Singer Study was submitted weeks before this *Order* was adopted, not the day of adoption. While the Commission notes that UCC cites rule 1.415(d) ("No additional comments may be filed unless specifically requested or authorized by the Commission") in opposing consideration of the Caves & Singer Study, see *Order* at note 147 (citing 47 C.F.R. § 1.1415(d)), the note to that rule specifically provides that in some rulemaking proceedings, "interested persons may also communicate with the Commission and its staff on an *ex parte* basis, provided that certain procedures are followed." In this proceeding, *ex parte* communications were specifically allowed by the Commission. See 2014 *Quadrennial Review Notice*, 29 FCC Rcd at 4546, para. 378. Indeed, this *Order* is replete with references to *ex parte* communications. See, e.g., *Order* at note 204. Moreover, NAB indisputably complied with all relevant procedures in submitting the Caves & Singer

Continued

Another indication that the eight-voices test impedes competition and localism in the video marketplace is the mass of record evidence showing that common ownership of television stations in local television markets leads to *more* local news and information programming.⁴⁸ According to the Commission, “[t]he data demonstrate that the duopolies permitted subject to the restrictions of the current rule have created tangible public interest benefits for viewers in local television markets that offset any potential harms associated with common ownership. Such benefits include substantial operating efficiencies, which potentially allow a local broadcast station to invest more resources in news or other public interest programming that meets the needs of its local community.”⁴⁹ In other words, common ownership increases competition and localism by creating stronger, better-funded competitors.

But the eight-voices test denies those benefits produced by common ownership to viewers in most of our Nation’s television markets. And those markets are the ones where the efficiencies of common ownership can yield the greatest benefits: smaller markets where advertising dollars (typically the source of funding for local programming) are scarce.

In contrast, the *Order*’s justification for maintaining the eight-voices test is utterly devoid of factual support. Indeed, all the Commission can muster in support of the eight-voices test is two paragraphs of unsupported assertions. In the first, the *Order* says:

Nearly every market with eight or more full-power television stations—absent a waiver of the Local Television Ownership Rule or unique circumstances—continues to be served by each of the Big Four networks and at least four independent competitors unaffiliated with a Big Four network. Competition among these independently owned stations serves an important function by motivating both the major network stations and the independent stations to improve their programming, including increased local news and public interest programming. This competition is especially valuable during the parts of the day in which local broadcast stations do not transmit the programming of affiliated broadcast networks and rely on local content uniquely relevant to the stations’ communities.⁵⁰

Let’s unpack this. The Commission begins by arguing that competition between stations affiliated with the Big Four networks and at least four independent competitors unaffiliated with a Big Four network “serves an important function by motivating both the major network stations and the independent stations to improve their programming, including increased local news and public interest programming.”⁵¹ But what evidence does the Commission cite to support this proposition? What evidence does it marshal to show that the presence of stations unaffiliated with a Big Four network improves the quality of programming in a television market? What evidence does it produce to show that such independent stations lead to increased local news and public interest programming? The answer to each of these questions is the same: None.⁵²

And even if the Commission were able to offer some evidence to back up its assertions, the question would then become: Why is it important to have at least four independent competitors unaffiliated with a Big Four network in a market? Why wouldn’t two or three suffice? Or, on the other hand, why not five or six? The *Order* makes a feeble attempt to address those questions in its next paragraph:

We continue to believe the minimum threshold maintained by the eight-voices test helps to ensure robust competition among local television stations in the markets where common ownership is permitted under the rule. The eight-voices test increases the likelihood that markets with common ownership will continue to be served by stations affiliated with each of the Big Four networks as well

Study. Finally, it is important to recognize that the Commission frequently accepts and relies upon data and studies that it receives shortly before an order is adopted. See, e.g., *Amendment of Part 15 of the Commission’s Rules for Unlicensed Operations in the Television Bands, Repurposed 600 MHz Band, 600 MHz Guard Bands and Duplex Gap, and Channel 37 et al.*, ET Docket No. 14-165, Report and Order, 30 FCC Rcd 9551, 9636, 9639, nn.523, 539 (2015) (citing and relying upon a 128-page technical study and a 16-page technical study that had been submitted to the Commission as an *ex parte* filing seventeen days before the *Order*’s adoption).

⁴⁸ See, e.g., *Order* at note 86.

⁴⁹ *Order* at para. 38.

⁵⁰ *Order* at para. 56 (footnotes and citations omitted).

⁵¹ *Id.*

⁵² Neither does the *Order* offer any explanation for why stations unaffiliated with a Big Four network play a distinct competitive role in the marketplace than those affiliated with a Big Four network. Many of these stations, after all, are not independent stations. Rather, they are affiliated with a national network, such as the CW or Univision.

as at least four independently owned and operated stations unaffiliated with these major networks. Also, because a significant gap in audience share persists between the top-four stations in a market and the remaining stations in most markets—demonstrating the dominant position of the top-four-rated stations in the market—we continue to believe that it is appropriate to retain the eight-voices test, which helps to promote at least four independent competitors for the top-four stations before common ownership is allowed. Accordingly, we retain the eight-voices test.⁵³

This explanation brings to mind the classic Peggy Lee song: *Is That All There Is?*

To be sure, I agree that the eight-voices test “increases the likelihood that markets with common ownership will continue be served by stations affiliated with each of the Big Four networks as well as at least four independently owned and operated stations unaffiliated with these major networks.”⁵⁴ But again, the key question is: Why is it important to have “four independently owned and operated stations unaffiliated with these major networks?” The only justification the Commission provides is the assertion that “a significant gap in audience share persists between the top-four stations in a market and the remaining stations in most markets.”⁵⁵ But even assuming that to be true, how does this justify the choice of maintaining “four independently owned and operated stations unaffiliated with the major networks,” as opposed to two, three, five, or six? The *Order* offers no explanation, cites no evidence, and refers to no economic theory. It appears that the number four, and thus the eight in the “eight-voices test,” was plucked out of thin air. Moreover, if there is a significant gap in audience share between the top-four stations and the other stations in a market, wouldn’t that suggest common ownership of non-top four stations would be pro-competitive, insofar as it would allow for stronger competitors to the top-four stations to emerge?

But it gets even worse. The Commission readopts the restrictions on joint sales agreements (JSAs) that were vacated by the Third Circuit in *Prometheus III*—restrictions which have the practical effect of tightening the Local Television Ownership Rule. The Commission provides little new analysis to justify these limits. Rather, it “incorporate[s] by reference the rationale articulated” in its 2014 *Order*.⁵⁶ As such, rather than repeat at length the arguments that I advanced against the Commission’s JSA decision two years ago, I similarly incorporate by reference the relevant portions of my 2014 dissenting statement.⁵⁷ However, it is worth emphasizing three points.

First, just as the Commission is unable to point to any evidence to justify retaining the eight-voices test, neither is it able to cite any evidence supporting its decision to readopt JSA restrictions. Back in 2014, the Commission based its decision on its hypothesis that a JSA allows one station to exert undue influence over another station’s programming decision and operations. But as I pointed out at the time, the Commission couldn’t come up with “a single example of a station in a JSA exercising undue influence over another station.”⁵⁸ Indeed, it couldn’t round up “a single instance where a JSA has allowed one station to influence a *single programming decision* of another station.”⁵⁹

Flash forward two years. Despite the fact that numerous television stations across the country have participated in JSAs for many years, the Commission *still* cannot find a single case in which one station in a JSA has exercised undue influence over another station or influenced a single programming decision of another station. The Commission’s JSA analysis remains unjustified jabberwocky.

Second, in my 2014 dissenting statement, I reviewed at length all of the public interest benefits that have been produced by JSAs.⁶⁰ In this *Order*, the Commission does not contest any of those benefits. Instead, it claims that “[t]he arguments that television JSAs should not be attributed because they produce public interest benefits are essentially indistinguishable from arguments that the ownership limits should be relaxed because common ownership produces public interest benefits. We acknowledge and address these arguments throughout; however, we ultimately de-

⁵³ *Order* at para. 57 (footnotes and citations omitted).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Order* at para. 62.

⁵⁷ 2014 *Quadrennial Review Notice*, 29 FCC Rcd at 4590–95, 4597–99 (Dissenting Statement of Commissioner Ajit Pai).

⁵⁸ *Id.* at 4597.

⁵⁹ *Id.* (emphasis in original).

⁶⁰ *See id.* at 4592–95.

termine that the Local Television Ownership Rule should be retained with a minor modification to the contour standard.”⁶¹

But here’s the problem with that evasion. Maintaining the status quo with respect to JSAs is *not* the equivalent of relaxing the Local Television Ownership Rule. Rather, as the Third Circuit recognized, “[a]ttribution of television JSAs modifies the Commission’s ownership rules by making them more stringent.”⁶² And the Commission’s JSA decision here does not contain any rationale whatsoever for why the local television ownership rule should be tightened. In fact, it concludes that the benefits of making the rule more stringent are outweighed by the harms of taking that step.⁶³

So on one side of the ledger, we have uncontested evidence of the public interest benefits yielded by JSAs. And on the other side of the ledger, the Commission points to no evidence of any corresponding harms and does not advance any argument for why the Local Television Ownership Rule should be made any stricter. Yet, it does just that. This deliberate refusal to make a “rational connection between the facts found and the choice made” defines arbitrary and capricious decision-making.⁶⁴

Third, the decision to attribute television JSAs is fundamentally inconsistent with the Commission’s other recent attribution decisions.⁶⁵ Consider, for example, last year’s repeal of the attributable material relationship (AMR) rule in the context of wireless spectrum. The AMR rule used to require that the revenues of any company leasing or reselling more than 25 percent of the spectrum capacity of a small business’s wireless license must be attributed to that small business. In 2015, however, the same Commission majority as here concluded that the AMR rule was “overbroad” and “we no longer need[ed] a bright-line, across-the-board, attribution rule to ensure that a small business makes independent decisions about its business operations.”⁶⁶ This followed a 2014 decision where the same Commission majority as here waived the AMR rule for a private equity firm that leased 100 percent of its spectrum capacity to our Nation’s two largest wireless carriers. There, the Commission reasoned that the firm in question would not necessarily be “unduly influence[d]” by the wireless carriers leasing all of their spectrum capacity because of the firm’s representation that the “agreements at issue did not confer any” such influence.⁶⁷

So here is where we are today. Under the Commission’s rules, a small business can lease 100 percent of its spectrum capacity to a Fortune 50 wireless carrier—that is, engage in pure, profitable arbitrage—with *any* attribution requirement being triggered. Yet, as a result of today’s *Order*, attribution will automatically kick in whenever one television station sells more than 15 percent of another television station’s advertising time.

How does this make any sense? The Commission purports to attribute television JSAs because selling 16 percent of a station’s advertising inventory gives licensees “the opportunity, ability, and incentive to exert significant influence over the brokered station.”⁶⁸ Yet, one company leasing *all* of another company’s spectrum does not give rise to the same concerns regarding undue influence? A company depending upon a 100 percent spectrum lease is plainly more subject to undue influence than a television station that agrees to let another station sell 16 percent of its advertising. However, the *Order* offers no reason why the latter relationship, but not the former, triggers an attribution requirement. As I’ve written before in commenting upon the 2014 waiver of the AMR rule, “A foolish consistency may be the hobgoblin of little minds, but a deliberate inconsistency is the ogre of arbitrariness.”⁶⁹

⁶¹ *Order* at note 176.

⁶² *Prometheus III*, 824 F.3d at 58.

⁶³ See *Order* at para. 38.

⁶⁴ *Prometheus III*, 824 F.3d at 40 (quoting *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983)).

⁶⁵ See Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jeannine Timmerman, Deputy General Counsel and Senior Vice President, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50, 09-182, at 2-3 (July 29, 2016).

⁶⁶ *Updating Part 1 Competitive Bidding Rules et al.*, WT Docket Nos. 14-170 *et al.*, Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, Third Report and Order, 30 FCC Rcd 7493, 7504, para. 21 (2015).

⁶⁷ *Grain Management, LLC’s Request for Clarification or Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission’s Rules et al.*, WT Docket Nos. 05-211 *et al.*, Order, 29 FCC Rcd 9080, 9084-85, paras. 13-14 (2014) (*Grain Waiver Order*).

⁶⁸ *2014 Quadrennial Review Notice*, 29 FCC Rcd at 4527, para. 340.

⁶⁹ *Grain Waiver Order*, 29 FCC Rcd at 9091 (Dissenting Statement of Commissioner Ajit Pai).

III.

The Commission spends almost 50 pages discussing the issue of ownership diversity in this *Order*. That's certainly a lot of talk. But what concrete action does this Commission take to advance diversity in the *Order*? One thing: It reinstates the very same "eligible entity" definition that the Third Circuit rejected five years ago. To describe this decision is to discredit it.

During my time at the Commission, I have made it a priority to encourage greater diversity in the broadcast industry. Each summer, for example, I meet with those participating in the Broadcast Leadership Training (BLT) Program, run by the National Association of Broadcasters Education Foundation. The BLT program educates a diverse group of executives who aspire to be station owners or managers by exposing them to "the fundamentals of purchasing, owning, and running a successful operation of radio and television stations."⁷⁰ Each time, I come away inspired by their spirit and optimistic about the future of broadcasting. These sessions also reinforce my determination to do what I can at the FCC to expand opportunities in the industry.

Occasionally, I have been successful. For example, the progress that the FCC has been able to make in revitalizing AM radio, the Nation's most diverse broadcast service, has been a big step forward. But too often, the Commission has fallen short. The FCC's leadership has prioritized setting aside spectrum for unlicensed operations in the post-auction television band over saving low-power television stations that often serve minority communities. It has allowed the Advisory Committee for Diversity in the Digital Age to lay dormant. And in this *Order*, it falls short once again.

I am particularly disappointed that the Commission refuses once again to adopt an incubator program, which would allow established broadcasters to provide financing and other forms of assistance to new entrants looking to break into the broadcasting business. This proposal enjoys the support of civil rights organizations, including the National Urban League, LULAC, the Rainbow/PUSH Coalition, the National Council of La Raza, the Minority Media and Telecommunications Council, and the Asian American Justice Center.⁷¹ It enjoys the support of industry.⁷² One would think that moving forward with this initiative would be a no-brainer.

The Commission claims that an incubator program would be too difficult to administer and consume too many staff resources.⁷³ But it is difficult to take that argument seriously. When the FCC's leadership thinks that an issue is important, it is more than willing to adopt regulations that are difficult to administer and consume an enormous amount of staff resources, far more than any incubation program would. Moreover, as detailed in the *Order* itself,⁷⁴ the Commission has expended a lot of staff resources *studying* the broadcast diversity issue. If we think that diversity is important, why not spend less time researching the issue and more time actually *doing* something to make things better?

In my view, the real reason why the Commission refuses to adopt an incubator program is ideological in nature. In order to incentivize broadcasters to incubate a new entrant, the FCC would allow participating broadcasters to own one more radio station in a market than they otherwise could under the local ownership rule. A small number oppose this because they fear that this slight and targeted relaxation of our ownership rules would promote concentration in the radio industry. But my response to them is simple. The benefits of incubating a new voice in a market would far outweigh any such harm, especially since an incubator is likely to be most valuable in small-town markets where finding broadcast spectrum is easy but the economics of the broadcast business are hard.

* * *

As we bring our 2010 Quadrennial Review to an end, it is worth stepping back and looking at the FCC's actions over the past few years from a broader perspective. In the many years in which the 2010 Quadrennial Review has been pending, the Commission has approved the \$13.8 billion purchase by our Nation's largest cable operator (Comcast) of one of our Nation's top four broadcast networks (NBC). It has signed off on the \$49 billion merger of our Nation's second and fifth largest

⁷⁰See National Association of Broadcasters Education Foundation, Broadcast Leadership Training, <http://nabef.org/blt/default.asp> (last visited Aug. 18, 2016).

⁷¹See, e.g., Initial Comments of the Diversity and Competition Supporters in Response to the Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294, at 19-21 (July 30, 2008).

⁷²See, e.g., NAB FNPRM Comments at 92-93; NAA FNPRM Comments at 15.

⁷³See *Order* at paras. 319-21.

⁷⁴See *Order* at paras. 246-70.

multichannel video programming distributors (AT&T and DIRECTV). And it has blessed a single \$79 billion transaction combining our Nation's second, third, and sixth largest cable providers (Charter, Time Warner Cable, and Bright House).

Yet today, after many years of delay and "deliberation," the FCC tells us the prospect of a newspaper purchasing a single television or radio station for relative pocket change still shocks the conscience? One television station selling more than 15 percent of another's advertising inventory in order to cut costs is a dire threat to competition? A program to incubate diverse voices in the broadcast industry is a bridge too far because it would allow some companies to own an additional radio station in a market? It makes no sense at all.

Soon, I expect outside parties to deliver us to the denouement: a decisive round of judicial review. I hope that the court that reviews this sad and total abdication of the administrative function finds, once and for all, that our media ownership rules can no longer stay stuck in the 1970s consistent with the Administrative Procedure Act, the Communications Act, and common sense. The regulations discussed above are as timely as "rabbit ears," and it's about time they go the way of those relics of the broadcast world. I am hopeful that the intervention of the judicial branch will bring us into the digital age.

For all of these reasons, I dissent.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. AMY KLOBUCHAR TO
HON. AJIT PAI

Question 1. I've heard from local broadcasters in Minnesota who are concerned about being able to complete the incentive auction repacking process in the required time. In Minnesota we face additional challenges because of our short construction season. For example, International Falls is home to the coldest annual average temperature in the contiguous United States. At 1,505 feet, the KPXM Tower in International Falls is also the tallest structure in Minnesota. I can't imagine any of us would want to climb to the top of it in February. Chairman Pai, how will the FCC work with broadcasters to develop resilient repacking plans that take into account local conditions and unexpected events like severe weather?

Answer. FCC staff has actively engaged with the broadcast industry, the wireless industry, antenna manufacturers, tower crews, and other stakeholders for more than two years to develop the Transition Scheduling Plan, which was released in January. The plan details how the FCC will determine the order and schedule of stations' channel moves. The plan is designed to minimize viewer inconvenience, efficiently allocate the resources necessary for broadcasters to operate on their new frequencies, and ensure that winning bidders for wireless licenses in the forward auction can deploy in the 600 MHz band in a timely manner. The Closing and Channel Reassignment Public Notice that signals the formal close of the auction will also detail the final schedule and explain how the Commission staff adjusted the schedule to reflect the realities of weather and major events in places like International Falls.

Question 2. Rural call completion is an important issue for me. It is simply unacceptable that residents and businesses in rural areas have to cope with calls that never connect. My Improving Rural Call Completion and Reliability Act, which I introduced with Senators Tester and Thune, passed the Commerce Committee in January. Chairman Pai, how could a registry of intermediate providers as is called for in my bill help improve service for rural consumers?

Answer. Wherever you live—whether it's Pittsburg, Kansas, or Pittsburgh, Pennsylvania—and whatever technology you use—whether it's a landline, a cellphone, or VoIP—your phone should ring shortly after your number is dialed. The pending bipartisan rural call completion legislation would help the Commission target providers in the path of a long distance call, known as intermediate providers, who may not be completing calls to rural areas in order to avoid the higher costs associated with delivering such calls. The legislation could help increase the reliability of intermediate providers by requiring them to register with the agency and comply with service quality standards, and in the process improve call completion to rural areas. Commission staff stands ready to work with your staff and provide technical assistance on the proposed legislation.

Question 3. I have been advancing legislation to make broadband deployment easier by requiring coordination between state departments of transportation and broadband providers during construction projects so that they only have to "dig once." A provision based on my legislation passed the Commerce Committee in January as part of the MOBILE NOW Act. Chairman Pai, how can dig once policies improve broadband access in rural America?

Answer. I believe we must make dig once policies a central tenet of our Nation's transportation policy. The concept is simple: every road and highway construction project across America, including those in rural areas, should include the installation of the conduit that can carry fiber optic cables. Installation is the most expensive part of any new broadband deployment, so it's common-sense to leverage construction that will take place anyway to put in place the necessary conduit. Cities like Seattle enacted dig once policies long ago and now have extensive public conduit that the private sector has used to lower the cost of deployment. Policies like dig once can provide innovators with greater incentives to build out their own broadband networks, upgrade their equipment, and focus on serving their customers. That's especially important in rural areas, where the private-sector case for broadband deployment is much more difficult. Dig once has been successful on the local level, and I hope it soon becomes the law of the land.

Question 4. Chairman Pai, you recently announced the formation of the Broadband Deployment Advisory Committee to make recommendations and offer best practices on accelerating broadband deployment. While best practices and policy recommendations can be useful, many local governments do not have the resources or expertise to implement them. How can the FCC support local governments as they look to implement recommendations from the Broadband Deployment Advisory Committee?

Answer. One of the key tasks the Broadband Deployment Advisory Committee will be asked to do is draft for the Commission's consideration a model code for broadband deployment, which will cover topics like local franchising, zoning, permitting, and rights-of-way regulations. The model code will be a particularly valuable tool for communities that desire access to broadband but lack, as you note, the resources or the expertise to develop policies conducive to deployment. The FCC last week announced the membership and structure of the BDAC, and it will commence deliberations this month.

Question 5. As co-chair of the Next Generation 911 Caucus, I know our Nation's 911 system is in urgent need of upgrades. I am the Senate sponsor of Kari's Law, which would ensure that multi-line telephone systems allow direct dial 911 without the need for prefixes. The bill passed this Committee in January and I am hopeful it will be considered by the full Senate soon. Chairman Pai, I thank you for your advocacy on this important issue. Based on your experience, are there technological solutions for those that use multiline telephone systems to implement the reforms contained in Kari's Law?

Answer. First, I am heartened to see that Kari's Law is one step closer to becoming the law of the land. We all owe Kari's father, Hank Hunt, a debt of gratitude for his decision to press forward and help ensure that every call to 911 goes through. Second, I look forward to working with Congress on these and other important issues as Chairman of the FCC, and I salute you for your leadership on this and other public safety issues. Third, this is an issue that has been near and dear to me and that I've championed for several years at the FCC. As a Commissioner, I worked with hotel chains, for example, to promote their voluntary efforts to provide 911 direct dial capabilities to hotel guests. The FCC itself instituted direct dialing through the basic programming parameters of its multi-line telephone system (MLTS). This is a simple best practice that should be universally implemented on all MLTS and campus/in-building systems.

Question 6. Today access to broadband is a critical part of students' learning. However, 41 percent of those living on rural Tribal lands do not have access to broadband. Some have proposed a "Tribal priority" for the E-Rate program to close the digital divide as it relates to Indian education. Chairman Pai, what more can the FCC do to make sure that students living on reservations have access to broadband in school?

Answer. I share your concern for closing the digital divide. In my first remarks as Chairman of the Federal Communications Commission to the agency's staff, I stressed that one of my top priorities would be to close the gap between "those who can use cutting-edge communications services and those who do not."

In February, the Commission adopted the Tribal Mobility Fund Phase II, which will direct approximately \$340 million to build out 4G LTE coverage on Tribal lands. Additionally, I circulated to my colleagues an order that would assist carriers serving Tribal lands in deploying, upgrading, and maintaining modern high-speed networks. The proposal would allow carriers serving Tribal lands a greater ability to recover operating expenses, thus improving the financial viability of operating a broadband network serving Tribal lands.

E-rate plays a vital role in helping schools and libraries connect to high-speed Internet. In the past two funding years alone, E-rate disbursed over \$66 million to

schools and libraries identified as Tribal. This is why I have called E-rate “a program worth fighting for.”

Before I became Chairman, I proposed a student-centered E-rate program that would reduce the amount of paperwork that E-rate applicants must file to receive funds, cut back on the complexity of current E-rate regulations, and reduce wasteful spending. Additionally, my proposed changes would significantly increase the support that rural and remote applicants, many of whom are Tribal schools and libraries, receive. Such changes would account for the significant barriers that many Tribal schools and libraries face in attempting to connect to high-speed broadband. I look forward to working on these issues further during my tenure as Chairman.

Question 7. Chairman Pai, what can we do to increase broadband coverage on Tribal lands more broadly?

Answer. I share your desire to address the digital divide on Tribal lands, where approximately 40 percent of the population live in census blocks lacking fixed broadband of 25/3 Mbps. In the first three months of my Chairmanship, we’ve already taken a number of actions to connect those on Tribal lands. As discussed above, at the February Open Meeting, we adopted the Tribal Mobility Fund Phase II, which will direct approximately \$340 million to build out 4G LTE coverage on Tribal lands. I have also asked the Commission’s Office of Native Affairs and Policy to coordinate with the Wireless Telecommunications Bureau and the Wireline Competition Bureau to help direct that funding to reach Tribal members in remote areas that would otherwise be without access to next generation services.

Additionally, in early February, I circulated to my colleagues an order that would assist carriers serving Tribal lands in deploying, upgrading, and maintaining modem high-speed networks. The order recognizes that carriers serving Tribal lands incur costs that other rural carriers do not face, resulting in significantly higher operating expenses to serve very sparsely populated service areas. The proposal would allow carriers serving Tribal lands a greater ability to recover operating expenses, thus improving the financial viability of operating a broadband network serving Tribal lands. I also directed the Universal Service Administrative Company to give additional time to Tribal families living in the remote reaches of the Navajo Nation to comply with a certification deadline for the Lifeline program. We must work to bring the benefits of the digital age to all Americans, and we will continue to pursue common-sense regulatory reforms to close the digital divide on Tribal lands.

Question 8. A provision based on my Rural Spectrum Accessibility Act—which I introduced last Congress with Senator Fischer—was included in the MOBILE NOW Act that passed the Commerce Committee in January. This provision would require the FCC to explore ways to provide incentives for wireless carriers to lease unused spectrum to rural or smaller carriers in order to expand wireless coverage in rural communities. Chairman Pai, what incentives could be useful for encouraging large carriers to lease spectrum to smaller, rural carriers?

Answer. Promoting the deployment of robust mobile broadband service in rural communities is one of my top priorities as Chairman. High-speed mobile coverage is increasingly critical to rural America for everything from the app economy to precision agriculture.

The Commission’s spectrum licensing rules are intended to lower regulatory barriers to spectrum leasing for small and rural carriers, including rules that streamline the regulatory process for leasing spectrum. Our rules also provide parties with great flexibility in the partitioning and disaggregation of licensed spectrum. We will continue to explore ways to eliminate unnecessary rules and regulatory barriers in order to encourage small rural carriers (among others) to expand wireless coverage in rural communities to deliver mobile broadband to all Americans.

In addition, because deployment by rural carriers on leased spectrum counts toward the primary licensee’s construction benchmark, adopting and enforcing meaningful construction requirements that require licensees to build out in rural parts of their license area in order to keep their license at the end of the term incentivizes carriers to lease spectrum to rural carriers. In other words, in these situations, large carriers have incentives to lease spectrum to rural carriers that have the ability and expertise to deploy coverage in rural areas.

We also need to continue to think about further steps in this area. For instance, in my September 2016 speech outlining my Digital Empowerment Agenda, I proposed to increase the buildout obligation associated with an initial license to 95 percent and extend license terms from 10 to 15 years. This would substantially increase rural coverage and also make build-out more economically feasible for carriers by providing an additional five years of certainty.

Question 9. The FCC has taken a number of enforcement actions against companies for cramming, including a record level joint FCC-FTC settlement with AT&T.

Consumers have enough to worry about with ever-changing technologies and plan options. They need to know that they are being billed fairly. Chairman Pai, how do you plan to combat cramming and prevent scammers from moving on to new technologies?

Answer. Cramming often results in significant consumer harm because the unauthorized charges are often small amounts and can go undetected by consumers for many months, and they are typically not disclosed clearly or conspicuously on a multipage telephone bill. Further, consumers who receive electronic bills or who have authorized automatic deductions from their bank accounts for payment of monthly invoices are especially vulnerable, because they may not even look at their bills prior to payment. Under Section 201(b) of the Act, the Commission can pursue action against telecommunications service providers that bill for unauthorized services or assess other unauthorized charges on consumer telephone bills. As you note, the Commission has taken a number of enforcement actions to protect consumers in this area, and we will continue to aggressively pursue companies that seek to scam and cram consumers in violations of our rules. In addition, we have actively been monitoring consumer complaints and other sources of information to determine whether scammers are migrating to other platforms or technologies to cram charges on customers' bills. As scammers extend cramming-like actions to other technologies, we will carefully explore our authority to take enforcement action against this type of behavior.

Question 10. Consumers have made it clear they do not want robocalls invading their privacy and disrupting their lives. Earlier this year, I joined Senator Markey and several other Senators on this Committee in calling for the FCC to protect consumers from receiving unwanted and intrusive robocalls. Chairman Pai, I was glad to see in your response that you share our commitment to combatting robocalls. One particular strategy that has been effective is the Robocall Strike Force made up of more than 30 companies in the telecommunications industry. Will you commit to continue to convene the Robocall Strike Force with the support of the FCC?

Answer. Robocalls are consistently a top consumer complaint to the FCC from the public. It is reported that U.S. consumers have been bombarded by an estimated 2.4 billion robocalls in a single month. Last month, the Commission took important next steps to combat the scourge of robocalls by proposing rules to permit providers to block spoofed robocalls when the caller uses an unassigned or invalid phone number. The proposed rules also would allow providers to block spoofed robocalls when the subscriber to a particular telephone number requests that calls originating from that number be blocked (sometimes called a "Do-Not-Originate" request). We also seek comment on further steps the Commission could take to protect consumers and empower voice service providers to block illegal robocalls. I strongly support the good work done by the industry-led Robocall Strike Force, which made significant progress toward arming consumers with call blocking tools and identifying ways voice providers can proactively block illegal robocalls before they ever reach the consumer's phone. The Commission is committed to helping industry and consumers stop unwanted robocalls, including by encouraging companies to adopt robocall blocking technologies and working to develop comprehensive solutions to prevent, detect, and filter unwanted robocalls.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. RICHARD BLUMENTHAL TO
HON. AJIT PAI

Introduction. FCC rulemaking is governed by the Administrative Procedure Act ("APA"). Before adopting the 2015 *Open Internet Order*, the agency established a clear record demonstrating the need for the rules. The FCC also explained the legal framework governing its conclusion that broadband Internet access service ("BIAS") should be reclassified as a telecommunications service.

The order found that consumers make decisions on broadband primarily based on the service's speed and ability to transmit their data. BIAS providers market and price their services based on this transmission capability—and not on any sort of information storage and processing function that BIAS providers may offer on the side (such as e-mail).

And consumers do not confuse their broadband provider with their e-mail provider or the websites they visit. They are able to distinguish between content on the Internet and the provider of their access to that content.

Therefore, the FCC rightly concluded that "broadband Internet access service is marketed today primarily as a conduit for the transmission of data across the Internet." For that reason, broadband Internet access is a telecommunications service

that offers the public the ability to transmit information of users' choosing, rather than an information service.

As the *Open Internet Order* explained, this legal classification is essential to the adoption of rules prohibiting Internet blocking and other forms of unreasonable discrimination by broadband providers. When it struck down previous iterations of the Open Internet rules finally upheld last year, the DC Circuit Court of Appeals explained that the rules against blocking "impos[e] *de facto* common carrier status on providers of broadband Internet access service in violation of the Commission's [earlier] classification of those services as information services."

In other words, there is no clear path—under the Commission's current statutory authority and controlling judicial precedent—to preserve the FCC's rules against blocking, throttling, and paid-prioritization in the absence of the telecommunications services classification.

You have suggested that you view the *Open Internet Order* and its classification decisions as a mistake. Yet you testified that you understand the value of the open internet, which the order's legal framework and rules protect.

As you know, any steps you take to undo the rules and the Commission's prior legal interpretations would be governed by the APA, just as the adoption of those rules were.

Question 1. Do you agree that a change in administration alone is not a sufficient basis to undo an independent regulatory agency's rulemaking?

Answer. I fully support and will abide by the Supreme Court's decision in *FCC v. Fox Television Stations*, in which the Court laid out the legal standard for reversing an agency's rulemaking: "An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. . . . And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." 556 U.S. 502, 515 (2009) (emphasis in original).

Question 2. Do you agree that you would need a factual record and legal analysis sufficient to reverse course yet again, just two years after the order was adopted and less than one year after it was upheld in court, should you decide to pursue your promise to undo the *Open Internet Order*?

Answer. As stated above, the FCC is bound by the standard outlined by the Supreme Court in *FCC v. Fox Television Stations* governing the legality under the Administrative Procedure Act of agency action that represents a policy change.

Question 3. Do you agree that if an independent commission reviews a past decision, it should do so with an open mind and not pre-judge whether facts and circumstances have changed?

Answer. Yes.

Question 4. In light of the DC Circuit's several decisions on this issue, can you articulate any basis for retaining rules that prohibit broadband providers from blocking, throttling, and prioritizing websites unreasonably in the absence of the telecommunications services classification you so often attack? Or is it your intention to eliminate these rules—ignoring the factual record and legal analysis that undergirds them—based on your disagreement with that legal framework?

Answer. I support a free and Open Internet and I oppose Title II. I am currently reviewing the Commission's options for moving forward with respect to this issue.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BRIAN SCHATZ TO
HON. AJIT PAI

Question 1. Have you asked for information from either AT&T or Time Warner about the transaction, including information related to how any spectrum licenses presently held by Time Warner or its subsidiaries will be dealt with in the transaction?

Answer. Congress has not tasked the Commission with reviewing mergers or transactions generally. Instead, section 310 of the Communications Act extends our authority only to transfers of licenses or the transfer of a control of a corporate entity that holds FCC licenses. With respect to AT&T's proposed acquisition of Time Warner, the companies have not filed any application for the transfer of control of a license or transfer of control of a corporate entity that holds a license, and the companies have stated they do not anticipate that Time Warner will transfer any

of its FCC licenses to AT&T. As a result, the Commission has not asked for information from either party.

Question 2. Has the FCC conducted its own analysis of the transaction to make sure that it was not set up to evade FCC review? If not, please conduct such an analysis.

Answer. Because the companies have not filed and apparently will not file any application for the transfer of control of a license or transfer of control of a corporate entity that holds a license, the Commission has not conducted an analysis pursuant to section 310 of the Communications Act of the kind you describe.

Question 3. What is the FCC's authority over a transaction that has been structured to evade FCC review?

Answer. The test for FCC jurisdiction remains whether the parties to a transaction seek a transfer of control of a license, or of a corporate entity that holds a license. If there is no such transfer sought, the agency lacks jurisdiction under the Communications Act to review the matter. However, should a party transfer FCC licenses without having first obtained any required regulatory pre-approvals, the FCC would have authority to take action, including by issuing monetary forfeitures and/or revoking any unlawfully transferred licenses. For example, if Time Warner were to transfer a broadcast license to AT&T without first seeking Commission approval, the Commission could revoke that license and prohibit AT&T from broadcasting in that licensed area on that licensed channel.

Question 4. The FCC has recognized that there is a need for providers to have access to low, mid and high-band spectrum. Each meets different requirements because, among other things, they have different propagation characteristics. I was very encouraged that the Commission made high-band spectrum available for unlicensed use in the recent Spectrum Frontiers proceeding. But, I understand that recent studies from the Wi-Fi Alliance and others indicate that there will be a significant shortfall of mid-band unlicensed spectrum in the upcoming years.

Do you agree that there is a need to identify additional mid-band spectrum for unlicensed use?

Answer. Yes.

Question 5. What options are the Commission exploring to meet this now-well documented need?

Answer. The Commission is exploring a number of paths toward meeting the need for more unlicensed spectrum that could be used for innovative technologies like Wi-Fi and Bluetooth.

For instance, we continue to work aggressively to identify additional unlicensed spectrum in the 5 GHz band. Currently, we are performing testing to determine whether unlicensed might share the 5.9 GHz band with transportation services. This band is particularly attractive because it is adjacent to spectrum that is already used by unlicensed.

We also have made spectrum available at 3.5 GHz that includes provisions for “licensed-light” operation that is similar to unlicensed. And, we have made an additional 7 GHz available for unlicensed at 64–71 GHz, which together with existing rules permitting unlicensed operations in the 57–64 GHz creates a huge 14 GHz band ripe for innovative use.

Finally, we stand ready to work with Congress to identify more opportunities to free up spectrum for unlicensed use. One bill we've actively engaged on is the “MOBILE NOW Act,” which calls for identifying 100 MHz of spectrum for unlicensed below 6 GHz.

Question 6. In the Middle Class Job and Tax Relief Act, Congress identified the need for additional unlicensed spectrum and requested the FCC and NTIA to conduct studies on 5350–5470 MHz and 5850–5925 MHz bands. I understand that after 5 years, the studies have not provided us with a way forward at 5350 MHz, and the FCC continues to examine prospects for sharing at 5850 MHz. In the meantime, the need for additional unlicensed spectrum has continued to grow, as evidenced by recent spectrum needs studies.

If sharing in the 5350–5470 MHz band is not feasible, what are the alternatives?

Answer. As I've noted several times before, this Committee deserves credit for drawing attention to the 5 GHz band in the 2012 Act. Congress directed the affected agencies to evaluate known and proposed spectrum sharing technologies and risks to Federal users if unlicensed wireless devices were allowed to operate in the 5.850–5.925 GHz band.

But right now, this band is designated for vehicle to vehicle use. I have directed the Commission's staff to move ahead expeditiously with this matter while maintaining a data-driven process designed to elicit the best engineering solutions and allay concerns about co-existence.

There are also a number of bands the FCC teed up in its Spectrum Frontiers proceeding, which focuses on spectrum above 24 GHz. Some of this spectrum could be used for unlicensed operations; the agency is actively studying this issue.

Question 7. A number of Wi-Fi companies believe that 6 GHz is a potential opportunity for unlicensed designation. Would you agree that this is a good band to examine for unlicensed use?

Answer. I favor examining as many bands as possible for potential innovative uses, and would be happy to work with you on the 6 GHz band in particular.

Question 8. What are the next steps you'd recommend to move forward here?

Answer. I am aware that the Wi-Fi industry is exploring ideas for accessing spectrum above 6 GHz. It is far too early to know whether this effort will bear fruit, but I can assure you we will encourage innovation and consider any potential new technologies and services within the one year period that I have mentioned in previous statements. The lack of service rules will not impede technological development or innovative band use—we will do whatever is necessary to get the spectrum out there, put the bands on the table and let the engineers and the marketplace help us decide the best use.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. EDWARD MARKEY TO
HON. AJIT PAI

Question. In 2015, I sent a letter to the FCC urging the Commission to keep the Boston FCC office open. This office promotes public safety by preventing communications interference involving local police departments and emergency response organizations, among other functions. I shared my concern that reducing and relocating Boston's agents could disconnect the FCC from local incidents, potentially challenging the FCC's ability to maintain the 24-hour response standard. Instead of eliminating this office, the FCC restructured its local field offices and maintained the Boston office. What are your future plans for this important Boston office?

Answer. I agree with you on the importance of FCC field offices. As I stated in my statement on the 2015 field reorganization plan, "The Enforcement Bureau's field agents perform essential work. They resolve interference that threatens public safety communications. They ferret out pirate radio operators. And they play a critical role in ensuring that everyone complies with the Commission's rules." (My statement is available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-81A2.pdf.) Regarding the Boston field office, a Senior Agent was recently selected for that office and is responding to area signal interference complaints. The Enforcement Bureau is monitoring the office workload and if necessary, will make staffing modification recommendations.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CORY BOOKER TO
HON. AJIT PAI

Question 1. As you know, I recently joined Senator Blumenthal on a letter asking you to explain your decision to revoke Lifeline Broadband Provider status for nine companies. Thank you for your response, but given your directive to revoke Lifeline Broadband Provider (LBP) status for nine carriers, whose petitions for LBP status now return to "pending," I wanted to ask you additional questions.

The very first issue you addressed in your written testimony is closing the Digital Divide. The Universal Service Fund is designed to do exactly that. Will you commit not to cap the budget for, or otherwise curtail, Universal Service programs?

Answer. As you know, the Universal Service Fund comprises four different programs under one umbrella: the rural healthcare program, the high-cost program, the E-Rate program, and the Lifeline program. Currently, the first three of these programs are subject to caps, based on the bipartisan decisions of past Commissions. Going forward, the FCC must balance the goals of universal service with the fact that dollars are scarce and need to be directed in a fiscally responsible way. As Chairman, I intend to continue to balance these factors as the FCC implements the statute and aims to close the digital divide.

Question 2. Broadband providers who saw your recent decision may worry that the rug will be pulled out from under their investments if they try to enter the market for Lifeline broadband services. What is your plan to encourage broadband providers to participate in Lifeline so that low-income households have the choice and competition that helps us close the Digital Divide?

Answer. As I said in my statement last month on Lifeline, "I want to make it clear that broadband will remain in the Lifeline program so long as I have the privi-

lege of serving as Chairman. And we will continue to look for ways to make the program work even better." I also explained that "as we implement the Lifeline program—as with any program we administer—we must follow the law. . . . Congress gave state governments, not the FCC, the primary responsibility for approving which companies can participate in the Lifeline program under Section 214 of the Communications Act." Hundreds of companies have been approved to participate in the Lifeline program through a lawful process which properly allows the state to designate Lifeline providers if they so choose. Indeed, over 99.6 percent of Americans currently participating in the broadband portion of the program receive service from a company designated within the strictures of the law. New companies can enter the program using existing processes, and I encourage them to continue to do so.

Question 3. Former Chairman Wheeler spoke often about competition in the wireless broadband market, and that the FCC, Congress, companies, and communities must always foster more competition, because it is important for lowering prices and fostering innovation. How do you view competition in the wireless market right now? Would consolidation reduce competition and give consumers in my state less choice?

Answer. I believe the current wireless marketplace is highly competitive. The national wireless carriers compete vigorously on price and service (recently, all national carriers either introduced new unlimited data plans or expanded old ones), and many smaller carriers compete to serve consumers in cities and towns across the country. I'm committed to fostering continued innovation and investment across the mobile ecosystem to promote consumer welfare. Whether consolidation would benefit or burden competition is a fact-specific question; for my part, I will continue to prioritize regulatory decisions that further advance consumer benefits like lower prices, broader availability, and more flexible service options.

Question 4. The FCC blocked broadband policy rules that were set to go into effect in March 2017. Among the rules to go into effect were data security practices to require ISPs and phone companies to take "reasonable" steps to protect consumers' information, like Social Security numbers, financial and health information, and such. The rules were not prescriptive, but would require these companies to basically show they had a plan. What is the plan now to protect consumers?

Answer. Section 222 of the Communications Act gives the FCC authority to address violations by a common carrier of its customers' privacy. The FCC's Enforcement Bureau has existing guidance in place governing how ISPs must comport with this requirement. Since the privacy rules never went into effect, consumer privacy protections remain as they were over the past two years.

Going forward, I intend to work closely with the Federal Trade Commission to ensure that consumers continue to be protected under a uniform privacy regime for the entire online ecosystem.

Question 5. In 2015, researchers at Rutgers University studied the impacts of journalism in three New Jersey communities. They found that lower-income communities suffer from a lack of local news sources, and generally receive their news from a smaller range of sources than wealthier communities.

I am deeply concerned about the lack of diversity in media ownership. The FCC is supposed to collect data on media ownership every other year, but the 2015 data has not been released.

Now that the FCC's 2017 deadline for data collection is approaching, what is your plan to ensure that this data is expeditiously collected, analyzed, and released to the public?

Answer. The Commission collects broadcast ownership data on a biennial basis and immediately makes the collected data available to the public via the Commission's website. In addition, the Media Bureau releases a biennial report that analyzes the submitted data in various ways.

We anticipate that recent modifications to the Commission's broadcast ownership report forms will improve the quality of the data submitted to the Commission and enable us to analyze submitted data more quickly and accurately. The Commission is in the process of implementing changes to the Form 323 and Form 323-E to ensure that they reflect the changes adopted by the Commission in 2016, as well as any modifications that may be adopted by the Commission at the April 20, 2017 open agenda meeting. These revised forms should simplify the filing process for licensees, increase the response rate, improve the quality of submitted ownership data, and facilitate the Commission's analysis of that data.

Question 6. In order to unlock the full benefits of Gigabit Wi-Fi, American consumers need access to more unlicensed spectrum in the 5 GHz band. As pointed out in a new study for the Wi-Fi Alliance, we need more contiguous unlicensed spectrum

to support the 160 MHz wide channels used by Gigabit Wi-Fi. What is the Commission's plan for moving forward in the near term to authorize shared unlicensed use of the 5.9 GHz band to bring American consumers faster, better Wi-Fi?

Answer. As you know, we are performing testing to determine whether unlicensed operations might share the 5.9 GHz band with transportation services. This band is particularly attractive because it is adjacent to spectrum that is already used by unlicensed operators. I am confident that we will conclude this testing process in the near term and move forward using engineer-based solutions to maximize the opportunities for efficient spectrum use, including by expanding unlicensed access to spectrum.

Question 7. As you know, in the previous Congress, I joined with Senator Marco Rubio to introduce bipartisan legislation that would have explored whether it's possible to safely share unlicensed spectrum with vehicle safety technology in the 5.9 GHz band. I'm pleased that your agency, with DOT and the Commerce Department have been testing prototype technology to determine if it is possible to safely share this precious band, and see whether it can be used without interfering with V2V—or vehicle-to-vehicle communications. How will the Commission move forward with this project? What are next steps?

Answer. Right now, this band is designated for vehicle-to-vehicle and vehicle to infrastructure use. Wi-Fi stakeholders have proposed alternatives to share this band while protecting most of the applications that are being considered, and I am confident that we can find a solution.

This band is attractive for Wi-Fi because it's contiguous with the lower adjacent band already used for Wi-Fi. Also, if you look higher or lower in the spectrum chart, I think you'd be hard pressed to find a band that has fewer hurdles to getting it into consumers' hands. Both Qualcomm (with its re-channelization approach) and Cisco (with its detect and avoid approach) have identified paths forward.

The Commission is working collaboratively with other government agencies, such as the U.S. Department of Transportation and the U.S. Department of Commerce's National Telecommunications and Information Administration, to ensure appropriate testing in the 5.9 GHz band to mitigate the risk of harmful interference with Intelligent Transportation Systems (a component of which is the transportation-related technology called Dedicated Short-Range Communications, or DSRC).

The cooperating agencies developed a three-phased testing plan that would involve reviewing equipment in the FCC's Columbia Lab, testing sample/prototypes off-campus utilizing DOT facilities and procedures, and tests in real-world scenarios. We received nine devices for testing from five different companies and performed most of the bench tests as planned.

Although we had hoped to conclude and submit the Phase 1 test results by January 15, 2017, the results of those tests showed a clear need for supplemental testing. We need to better understand the potential interactions between U-NII and DSRC devices. To date, we've generated thousands of data points that our engineers are analyzing. Our staff is also working with DOT and NTIA looking towards the next steps of field testing.

We need to finish these additional tests before moving on to Phase 2. Our engineers have been in touch with engineers at DOT to begin planning Phase II which will involve some basic field testing and then Phase III will involve real-world testing.

The collection of relevant empirical data will assist the FCC, DOT, and NTIA in their ongoing collaboration to analyze and quantify the interference potential introduced to DSRC receivers from unlicensed transmitters operating simultaneously in the 5.850–5.925 GHz band.

Question 8. I understand that on July 28, 2016, a group of managed care providers petitioned the FCC seeking declaratory ruling and/or clarification of the TCPA to reconcile the regulation of a health plan member's telephone number under the TCPA with the regulation of the same use under the Health Insurance Portability and Accountability Act ("HIPAA").

The Petitioners argue that a clarification is necessary to harmonize the TCPA, HIPAA, and prior Commission rulings to protect member health care communications. The calls covered by these clarifications fall within categories recognized by the Department of Health and Human Services as covered by HIPAA to enhance the individual's access to quality health care. HIPAA, as you know, regulates the privacy practices of covered entities and expressly encourages and permits such calls to be made. Congress passed HIPAA in 1996 and the HITECH Act in 2009, well after the TCPA, which was enacted in 1991. HIPAA and the HITECH Act, therefore, represent the more recent intent of Congress in regulating these specific types of communications.

What is the Commission's view on protecting non-telemarketing calls allowed under HIPAA in light of their unique value to and acceptance by consumers?

What is the Commission's view on acting to protect these calls expeditiously so that beneficiaries' access to health care is not jeopardized, rather than waiting for a larger "omnibus" TCPA ruling that could take much longer?

Answer. The treatment of non-telemarketing healthcare calls subjected to HIPAA has been raised in a Joint Petition filed by WellCare Health Plan (WellCare), among others. The petition is under consideration by the Commission and we have sought public comment on the matter. The comment cycles have been completed and Commission staff is carefully reviewing the record in the proceeding. And FCC staff have met with WellCare and the other petitioners several times to discuss their request. I can assure you that we will take into consideration the issues and concerns presented by all stakeholders as the Commission makes every effort to conclude its review as quickly and equitably as possible.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO
HON. AJIT PAI

Question 1. The FCC website and Universal Licensing System (ULS) database indicate that the FCC has issued more than 50 licenses for antennas located on Trump Organization properties across the country, from the Trump National Golf Club in New Jersey to the Trump International Hotel in Washington, D.C. These licenses seem to cover uses such as local radio systems for business purposes ("Industrial/Business Pool") to microwave TV broadcast translators ("TV Intercity Relay"). Please submit for the hearing record a complete list of all current and pending FCC licensing, regulatory, and other matters dealing with Trump Organization properties and President Trump-connected businesses.

Answer. After a rigorous search, Commission staff have identified 29 licenses classified as Industrial/Business Radio Pool, which is used to support business operations, that appear responsive to your request. They are as follows: WQIN529, WQQY855, WQMZ782, WQYP438, WPPH436, WQTJ467, WQKM691, WQRA547, WQNT571, WQTH485, WQNC924, WQIG662, WQHT553, WQHP632, WQJA413, WQOU575, WQTG225, WQCR619, WQIS558, WQVW586, WQJP502, WQVK323, WQLA781, WQLI397, WQBF905, WPIX211, WPRL940, WQVW586, and WQSI465. Staff was unable to identify any pending applications that appeared responsive to your request.

Staff also found 42 active licenses held by individuals that either have the last name "Trump" or a last name including "Trump." However, none of these individuals appears to be President Donald J. Trump. Finally, we note that the above question references "TV Intercity Relay" service but our search for the name "Trump" did not result in any active licenses that are used for this service.

Question 2. Will you inform this committee in writing of any new FCC licensing, regulatory, and other matter dealing with Trump Organization properties and President Trump-connected businesses that arises?

Answer. Commission staff stands ready to repeat this search upon request, and I am happy to inform the Committee in writing of any such results.

Question 3. Will you inform this committee in writing if President Trump or any member of the Trump Administration discusses any licensing, regulatory, or other matter before the FCC that concerns a Trump Organization property and President Trump-connected business?

Answer. Yes.

Question 4. Will you commit to ensuring that the FCC will continue to be a truly independent agency when it comes to licensing, regulatory, and other matters before the FCC that concern Trump Organization properties and President Trump-connected businesses?

Answer. Yes.

Question 5. The FCC regulates cable and wireless companies that have a poor reputation when it comes to customer service. So I was pleased when the FCC implemented a new consumer complaints database system following a letter that Senator Nelson and I sent in 2014 to then Chairman Wheeler. The FCC's Consumer Complaint Data Center website is much more functional than the old complaints web page. How is the FCC using the data from this new tool to identify emerging consumer issues, analyze trends and inform FCC policymaking?

Answer. The Consumer Complaint Data Center (CCDC) expands the data the Commission produces from a handful of charts and graphs to a comprehensive database of individual complaints filed at the Commission since 2015. The CCDC allows

users to easily track, search, sort and download information. Consumers can build their own visualizations, charts and graphs. The data is also available via application programming interface, which allows developers to build applications, conduct analyses and perform research. The data can also be embedded on other websites. The CCDC includes visualizations of various communications issues profiled in the consumer complaints, as well as geographic search features by city, state and zip code. The Commission has used its enhanced data to inform both policy and consumer education. For example, the Commission recently issued several consumer robocalls advisories based in part on our data center's improved abilities. And third party developers of robocall blocking apps use the enhanced data to arm consumers with better tools to stop unwanted robocalls.

Question 6. Your testimony makes clear that you want to reduce "regulatory burden" on corporations. Please describe what specific actions you have taken as a Commissioner to help protect consumers and what actions you plan to take to protect consumers now that you are Chairman?

Answer. As FCC Commissioner, I have been an ardent supporter for the American consumer. For example, to ensure the safety and life of all Americans, I have voted to adopt rules to help first responders better locate wireless 911 callers. I have also voted to ensure that Americans with disabilities are not ignored by supporting actions to improve the closed-captioning of television so that hard of hearing consumers are afforded the same quality of life opportunities as non-hard of hearing consumers.

Since becoming Chairman, the Commission has "hit the ground running" and have acted on several pro-consumer initiatives. By establishing the Broadband Deployment Advisory Committee (BDAC), I have taken a crucial step to ensure that all Americans will have the opportunity to enjoy reliable, high-speed internet, by reducing regulatory barriers to infrastructure investment and streamlining processes. In late March, I also took steps to protect the American consumers from fraudulent, illegal, or spoofed robocalls. During this same time, I also issued improvements to the video relay services to better ensure that deaf and hard-of-hearing individuals experience service that is functionally equivalent to voice services available to hearing individuals. As Chairman, I remain committed to ensuring that the rules and policies of the FCC protect the interests of all Americans. And I look forward to taking further actions to close the digital divide, to protect consumers from unwanted and illegal robocalls, and ensure that disabled individuals have a full opportunity to participate in the 21st century economy.

Question 7. You stated in a speech on First amendment issues last year that "our cultural consensus on the importance of being able to speak one's mind is eroding. And nowhere is that consensus more at risk than on college campuses." You further stated that "[e]lected officials should intervene to defend free speech when it is under attack at public universities" (Commissioner Pai's Remarks at Media Institute's 2016 Awards Banquet available at <https://www.fcc.gov/document/commissioner-pais-remarks-media-institutes-2016-awards-banquet>). President Trump seemed to threaten to withdraw Federal funding from the University of California at Berkeley following its decision to cancel an event that featured a provocative speaker, Milo Yiannopoulos, who wrote for the far-right Breitbart News. Do you support withholding Federal funds from universities like UC Berkeley for a matter like this?

Answer. Federal funding for universities is not a matter within the FCC's jurisdiction. However, with over 20 million students currently attending school in an American post-secondary educational institution, it is a problem that liberty seems to find no refuge on the modern American campus. I believe that the cause of free speech has no partisan affiliation. Consider these words by Janet Napolitano, President of the University of California system and former Obama and Clinton Administration official: "We have moved from freedom of speech on campuses to freedom from speech. If it hurts, if it's controversial, if it articulates an extreme point of view, then speech has become the new bête noire of the academy." And I hope all administrators would heed the words of the University of Chicago's Committee on Free Expression, which states that "[I]t is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. . . . [C]oncerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community."

Question 8. My understanding is that the FCC issues radio and antenna licenses to universities. Will you exercise your authority as chairman of the FCC in an impartial manner when it comes to licensing, regulatory and other matters related to colleges and universities?

Answer. Yes.

Question 9. Section 254 of the Communications Act charges the Commission with ensuring that “Consumers in all regions of the Nation” have access to telecommunications and information services “that are reasonably comparable” to those in urban areas. The latest FCC data show that 96 percent of American in urban areas have access to fixed broadband. This compares to just 59 percent of those on tribal lands. Given this gap, has the FCC failed to live up to its duties under Section 254 of the Communications Act?

Answer. Yes. I believe closing the digital divide should be the FCC’s top priority, and nowhere does that hold more true than with respect to rural, remote, and Tribal areas. Unfortunately, the state of digital access on Tribal lands is far inferior to those on non-Tribal lands. This is not consistent with Section 254, and I’m committed to improving the situation now that I have the privilege of serving as Chairman.

Question 10. Will you assure me that the FCC will prioritize tackling the digital divide in Indian country?

Answer. Yes—closing the digital divide for all Americans, including those living in Indian country, is my top priority.

Question 11. In 2010, then FCC Chairman Julius Genachowski stood up the Office of Native Affairs and Policy (ONAP). This tribal liaison office is vital for ensuring robust tribal consultation and better input from tribes on important FCC actions that impact them. So I am very disappointed that the FCC did not provide ONAP even the modest \$300,000 in funding that Congress directed for tribal consultation in Fiscal Years 2015 and 2016. Will you assure me that FCC will not repeat this mistake for the current fiscal year?

Answer. As head of the agency, I take my responsibility for Tribal consultation seriously, and I will ensure that the agency allocates the resources it needs to fulfill that engagement responsibility.

Question 12. Does the Federal hiring freeze impact the FCC’s ability to fill any open positions within ONAP?

Answer. The Commission is blessed with an excellent staff that has hit the ground running. I am not aware of any impacts of the hiring freeze thus far on the ability of the agency, including ONAP, to carry out its responsibilities.

Question 13. The National Congress of the American Indian and others believe ONAP could be more effective if it were located within the Chairman’s office rather than within an FCC bureau. Do you agree?

Answer. The staff of the Office of Native Affairs and Policy are hardworking professionals who have effectively engaged with Native Nations, Tribal representatives, and others to provide the outreach and education needed to improve broadcast and broadband opportunities on Tribal lands. I look forward to continuing to work with the office, and always welcome recommendations for how the agency can be more effective in its efforts. However, I generally do not support incorporating other offices into the Chairman’s office.

Question 14. The Mobility Fund II order and further notice issued by the FCC on March 7th announced up to \$34 million per year for a Tribal Mobility Fund Phase II. Please provide the calculations undertaken by the FCC to reach a conclusion that \$34 million per year will provide Tribal lands with access to services that are reasonably comparable in quality and price to those available in our Nation’s urban areas, as contemplated by Section 254 of the Communications Act.

Answer. The budget for the Tribal Mobility Fund will be determined by applying the ratio of square miles in eligible Tribal Lands (adjusting for a terrain factor) to square miles of all eligible areas (adjusting for a terrain factor) to the total \$4.53 billion budget for Mobility Fund Phase II. The preliminary estimate of \$340 million for the Tribal Mobility Fund is based on analysis of current Form 477 data, which concluded that ratio is approximately 7 percent. Eligible areas for both Tribal and non-Tribal lands will be finalized after a comprehensive challenge process, at which point the ratio will be recalculated and applied to the total Mobility Fund Phase II budget. Notably, the Tribal Mobility Fund Phase II budget serves as a floor, not a ceiling, on the potential support in Tribal lands.

Question 15. At a rate of \$34 million in annual universal service investment, how long will it take to achieve reasonable comparability between tribal lands and urban areas for mobile broadband?

Answer. The Tribal Mobility Fund Phase II envisions a ten-year term of support with a final buildup benchmark at the six-year mark, at which point a winning bidder must demonstrate reasonably comparable advanced mobile services in the support area.

Question 16. What amount of annual universal support would be necessary to achieve reasonable comparability between tribal lands and urban areas for mobile broadband within five years?

Answer. Shortening the buildout benchmark by one year would likely increase the amount of support demanded by competitors in the Mobility Fund Phase II and Tribal Mobility Fund Phase II, and likely reduce the total coverage of Indian country by participants in the auction. Because these auctions will rely on market forces to determine the specific funding required to serve any area, the precise impact of such a change is at this point in time unknowable.

Question 17. In a September 2016 interview on the Sean Hannity Show, you spoke about concerns about the long-planned expiration of NTIA's Internet Assigned Numbers Authority (IANA) functions. You reportedly stated that, "[I]f you cherish free expression, and free speech rights generally, you should be worried, I think, when there's—this oversight role's going to be ceded to potentially, foreign governments who might not share our values" (see Hanchett, Ian. "FCC Commissioner on Internet Oversight Switch: 'If You Cherish Free Expression,' You Should Be Worried,' This Is 'Irreversible'." available at <http://www.breitbart.com/video/2016/09/28/fcc-commissioner-on-internet-oversight-switch-if-you-cherish-free-expression-you-should-be-worried-this-is-irreversible/>). This expiration occurred on October 1, 2016. Do you still have these concerns about the IANA transition?

Answer. The previous model of Internet governance was a tremendous success. Under American stewardship, the Internet became an unprecedented platform for free expression, innovation, and democratization. In my view, those favoring a change had a burden of proof to show why such a momentous change would benefit Internet users. In any event, now that the transition has occurred, we must continue to be vigilant to ensure that the Internet is free from unwarranted government intrusion.

Question 18. At a May 12, 2015 hearing of the Financial Services and General Government Subcommittee of the Committee on Appropriations, you testified that you "do not believe that funds for moving the FCC's headquarters . . . should be included within the FCC's general budget authority." You further stated that "Congress should provide [FCC] with specific budget authority for this purpose." What specific budget authority will you seek from Congress for moving the FCC's headquarters?

Answer. We received adequate funds in Fiscal Year 2016 to initiate the FCC's headquarters move and/or facilities restacking. We expect to receive the remaining funds in the final Fiscal Year 2017 appropriations bill. We have continued to work with GSA to ensure an orderly transition; however, there is an outstanding appeal from the initial U.S. Court of Federal Claims decision granting authority for moving our headquarters. Accordingly, we will continue to work with the Appropriations Committee to ensure that we have the appropriate level to handle this process and any related matters in the next year.

Question 19. At a March 27, 2014 hearing of the Financial Services and General Government Subcommittee of the Committee on Appropriations, we discussed your idea of having an FCC "dashboard" to improve transparency and accountability. Do you plan to implement such a dashboard?

Answer. Yes, I am still interested in implementing such a dashboard.

Question 20. I am interested in learning your thoughts about how to craft spectrum policy that is "future proof." The United States Frequency Allocation Chart (available at https://www.ntia.doc.gov/files/ntia/publications/january_2016_spectrum_wall_chart.pdf) indicates that essentially all available spectrum has already been allocated. So the challenge today seems to be finding efficiencies and repurposing spectrum when new uses become important. How do we ensure that allocations made today do not unintentionally prevent us from meeting spectrum needs in the future?

Answer. The spectrum allocation table is likely here to stay for the foreseeable future, but we have had incredible success enabling the various radio services the ability to innovate and deploy new technologies as they become available. Two examples stand out. The flexibility of our technical rules for commercial wireless spectrum have allowed the transition from the first through fourth and soon the fifth generation technologies without the need for continual FCC approvals. Similarly, Wi-Fi and Bluetooth were developed and deployed in successive generations due to the flexibility of our unlicensed rules.

I am committed to building on this foundation by identifying and eliminating any unnecessary rules that may stand in the way of innovation. One key to this process is encouraging the rapid deployment of innovative technologies and opening up previously underutilized spectrum bands for use. This can be accomplished through a

variety of accelerated agency actions as well as nimble market-based approaches, such as a streamlined secondary market.

Question 21. Astronomers from around the world use the Very Large Array (VLA) radio telescope located outside Socorro, New Mexico to make observations of stars, quasars, pulsars, and galaxies that are not possible with optical telescopes. Current law allocates certain radio frequencies for such scientific use and protects against harmful interference. This is critical for radio astronomers to be able to do their research. Do you agree that Federal policy should continue to ensure that radio astronomers have access to spectrum needed for their research?

Answer. Yes.

Question 22. Unlicensed use of the TV “white spaces” spectrum has the potential to enable low cost fixed broadband connectivity in rural areas. My understanding is that proponents of using TV white spaces believe it is essential that there be adequate access to useable 6 MHz channels in every U.S. market. Will you commit to making this issue a priority as you finalize the remaining policy issues in the TV white space related proceedings and petitions for reconsideration?

Answer. I am a strong believer in unlicensed use of spectrum, which has led to innovations such as Wi-Fi. I agree that unlicensed access is especially critical in rural markets, and I agree that the Commission must do what it can to ensure that the repacking of the TV bands does not foreclose wireless Internet service providers and others from increasing broadband deployment in rural America through the use of white-space devices.

Question 23. What steps will you take as FCC Chairman to create new opportunities for Tribal Nations to access spectrum?

Answer. As stated above, one of my top priorities as Chairman is to close the digital divide, including on Tribal lands. I've proposed that we increase buildout obligations (in conjunction with extending license terms) in order to ensure that licensees build out on Tribal lands and other areas that don't have coverage. The Tribal Mobility Fund also will play an important part of ensuring Tribal areas have coverage. I have also announced the formation of the Broadband Deployment Advisory Committee to explore ways to accelerate deployment of high-speed broadband nationwide and close the digital divide.

Question 24. Windstream declined almost \$28 million in Connect America funding for rural broadband in New Mexico. Windstream and other companies will be able to bid in a “reverse auction” process to bring broadband service to these customers. When will this reverse auction take place?

Answer. The Commission is working through the pre-auction process, with the expectation of conducting the CAF II auction in early 2018. Following the Commission's bipartisan vote on February 23, the auction will offer almost \$2 billion to bidders to connect the unserved over the next decade. It incorporates rules to induce new entrants to participate—competitive entrants like wireless Internet service providers, small-town cable operators, and electric utilities. The CAF II auction order adopted auction weights designed to give every bidder—no matter what technology they use—a meaningful opportunity to compete for Federal funds, while ensuring the best value for the American taxpayer. These weights account for the value of higher speeds, higher usage allowances, and low latency, but also balance these preferences against our objective of maximizing the effectiveness of finite USF funds to serve consumers in unserved areas.

Question 25. I am very concerned that, even after a “reverse auction” process for Connect America funding for rural broadband in New Mexico, the most costly areas to deploy service will still be left behind. It seems to me that if FaceBook and Google can bring Internet service to developing countries, it should be within our means to make sure all New Mexicans have access to broadband. Could you share your thoughts on how the FCC could use pilot projects or encourage new technologies to bring broadband service to remote rural areas?

Answer. While the Commission previously decided to include areas that are deemed to be extremely high-cost in the CAF II auction, it recognized that not all areas will receive bids. Therefore, the Commission has concluded that it will award support in a subsequent Remote Areas Fund competitive bidding process with respect to areas that, after the CAF II auction, remain unserved. The Commission's goal is to commence the Remote Areas Fund auction within a year of the close of the CAF II auction. Both the CAF II and the Remote Areas auctions are technology neutral, meaning providers using new technologies that can offer voice and the minimum level of broadband service are eligible to participate.

Question 26. The Federal agency overseeing broadband providers and Internet policy should be a flagship agency when it comes to using the best IT tools avail-

able. Yet when record numbers of Americans tried to submit comments on net neutrality, the FCC's electronic filing system crashed. How do you plan to prioritize the FCC's IT reform efforts moving forward?

Answer. I am working with the Office of Managing Director to review all IT projects for the next fiscal year to determine the success/fail ratio of prior year projects. However, I believe that the Commission has made considerable progress since the system crash described by you, including appropriate upgrades and maintenance improvements. I look forward to working with our Office of Managing Director and our CIO to pinpoint the cause of past deficiencies and develop leadership tools to avoid system breakdowns. Also, the FCC will work with OMB and Congress to ensure that we have adequate funds to prioritize essential projects going forward.

Question 27. What are the most important FCC IT systems that need to be modernized?

Answer. The FCC systems supporting Auctions (ISAS/ABS), Equipment Authorization (EAS/ELS), and Licensing (ULS/CDBS).

Question 28. Describe the role of the FCC Chief Information Officer (CIO) in the development and oversight of the IT budget. How is the CIO involved in the decision to make an IT investment, determine its scope, oversee its contract, and oversee continued operation and maintenance?

Answer. As you know, the Commission is a very small agency, with less than 1,600 FTEs and a relatively limited budget for IT projects. The FCC has a small permanent IT staff of 45 with approximately 275 contractors—although we have been increasing the staff-to-contractor ratio during the past few years. Accordingly, we do not have the structure or apparatus to support a large, independent office of Chief Information Officer (CIO) as some larger agencies have established. The CIO at the FCC oversees the IT budget process and reports directly to the Managing Director, who in turn reports directly to the Chairman's Chief of Staff.

The agency's Chief Financial Officer is on the same level as the CIO within the Office of Managing Director (OMD), and provides budgetary expertise to ensure that proposed projects are properly evaluated.

The CIO supervises staff within the office tasked with developing project concepts, and requests funds from the Managing Director in consultation with the CFO and procurement staff. The final decision on priority projects and funding is made by the Chairman's Chief of Staff with recommendations by the Managing Director. Once a project is approved and the procurement processed, the CIO has operational supervision over implementation and is responsible for programmatic results.

Question 29. Describe the existing authorities, organizational structure, and reporting relationship of the Chief Information Officer.

Answer. The CIO reports directly to the Managing Director, who reports directly to the Chairman's Chief of Staff. The CIO leads and oversees all IT programs, functions and proposals within the Commission. The CIO is responsible for the supervision of 45 FTEs and 275 contractors. The IT team's resources are organized under two deputy CIOs. The CIO coordinates programmatic financial analysis with the CFO, who is on the same level within the Office of Managing Director.

Question 30. According to the Office of Personnel Management, 46 percent of the more than 80,000 Federal IT workers are 50 years of age or older, and more than 10 percent are 60 or older. Just four percent of the Federal IT workforce is under 30 years of age. Does the FCC have such demographic imbalances? How is it addressing them?

Answer. The FCC does not consider age to be an impediment to a successful workforce. We strive to maintain a balance of more experienced employees to serve as supervisors and mentors for less experienced employees, and we hire for positions based on specific, demonstrated agency needs.

Question 31. How much of the FCC's budget goes to Demonstration, Modernization, and Enhancement of IT systems as opposed to supporting existing and ongoing programs and infrastructure? How has this changed in the last five years?

Answer. The FCC has steadily reduced Operations and Maintenance (O&M) spending and has increased investment in Demonstration, Modernization, and Enhancement (DM&E). The five-year historical reporting is as follows:

- FY14—86 percent O&M, 14 percent DM&E
- FY15—73 percent O&M, 27 percent DM&E
- FY16—48 percent O&M, 52 percent DM&E
- FY17—49 percent O&M, 51 percent DM&E
- FY18—49 percent O&M, 51 percent DM&E (projected)

Question 32. What are the 10 highest priority IT investment projects that are under development at the FCC? Of these, which ones are being developed using an “agile” or incremental approach, such as delivering working functionality in smaller increments and completing initial deployment to end-users in short, six-month time frames?

Answer. Although we are currently reviewing all management practices within the FCC, I have been advised that all FCC IT efforts have been delivered under an “agile” process, emphasizing short sprints of three weeks or less. The IT staff, under the direction of OMD, uses an “adapt first, purchase second, develop last” methodology to reduce cost and complexity in modernization efforts. According to the CIO, solutions are ideally adapted or reused from existing capabilities; purchased off-the-shelf; and otherwise developed, when not readily available. The 10 highest priority efforts are as follows:

1. Mobility Fund 2
2. Connect America Phase II
3. Reimbursement Fund Administration System
4. Integrated Spectrum Auction System AM Revitalization
5. Incentive Auction Form 399 Modernization
6. SaaS Platform Migration/ULS 2.0
7. Universal Licensing System Forms 603 & 608
8. Universal Licensing System 700 MHz
9. Cybersecurity Enhancements and Modernization/Identify Management/Single Sign-On
10. Windows 10/Office 2016 Migration

Question 33. What are the 10 oldest IT systems or infrastructures in your department and how old are they? Would it be cost-effective to replace them with newer IT investments?

Answer. The Office of Managing Director has provided the following list of legacy systems and needed actions:

1. Equipment Authorization System, launched 1998, hardware most recently upgraded at least 6 years ago, needs to be moved from commercial service provider currently hosting it to a public cloud.
2. Experimental Licensing System, launched 1998, hardware most recently upgraded at least 6 years ago, needs to be moved from commercial service provider currently hosting it to a public cloud.
3. International Bureau Filing System, launched 1998, hardware most recently upgraded at least 6 years ago, needs to be moved from commercial service provider currently hosting it to a public cloud.
4. Universal Licensing System, launched 2004, hardware most recently upgraded at least 6 years ago, needs to be moved from commercial service provider currently hosting it to a public cloud.
5. Legacy Server Infrastructure, launched 2005, most recently upgraded at least 6 years ago will be eliminated by cloud migration
6. Integrated Spectrum Auction System, launched 2005, hardware most recently upgraded at least 6 years ago, needs to be moved from commercial service provider currently hosting it to a public cloud.
7. Consolidated Database System, launched 2007, hardware most recently upgraded at least 6 years ago, needs to be moved from commercial service provider currently hosting it to a public cloud.
8. Canadian Co-Channel Serial Coordination System, launched 2008, hardware most recently upgraded at least 6 years ago, needs to be moved from commercial service provider currently hosting it to a public cloud.
9. Broadband Map, launched 2009, hardware most recently upgraded at least 6 years ago, needs to be moved from commercial service provider currently hosting it to a public cloud.
10. Enforcement Bureau Activity Tracking System, launched 2011, hardware most recently upgraded at least 6 years ago, needs to be moved from commercial service provider currently hosting it to a public cloud.

The dates above reflect the year the application was originally designed and launched. The software components are continuously updated.

Question 34. How does FCC's IT governance process allow for FCC to terminate or "off ramp" IT investments that are critically over budget, over schedule, or failing to meet performance goals? Similarly, how does FCC's IT governance process allow for your department to replace or "on-ramp" new solutions after terminating a failing IT investment?

Answer. The Managing Director has advised me that the CIO's senior management team uses a robust governance process that provides a consistent and results-focused investment review. On a weekly basis, the managers review projects for roadblocks and risks. On a monthly basis, they review all active projects and provide an internal Information Technology Review (ITR).

The staff examines projects showing risk in cost, schedule, or performance to determine viability and return on investment. When they determine that projects are in a "failure status," they realign resources immediately to prioritize ongoing and future corrective efforts, including replacement of the failed project. Performance within a 10 percent variance of cost and schedule are considered healthy. Replacement solutions are evaluated on an individual basis, with customer engagement and risk factors considered before resources are assigned.

As a small, non-CFO Act agency with limited budgetary resources for IT projects, the entire spending on IT during the past year was approximately \$78 million. The FCC has a small permanent IT staff of 45 with approximately 275 contractors—although we have been increasing the staff to contractor ratio during the past few years. The use of permanent, highly qualified FTEs to evaluate projects has helped with the quality control process and enhanced our ability to move forward with the most cost-effective IT projects.

Question 35. What IT projects has FCC decommissioned in the last year? What are FCC's plans to decommission IT projects this year?

Answer.

- Consumer Complaint Management System (Legacy)—decommissioned
- Broadcast Public Inspection File—decommissioned
- Broadband Map Infrastructure (Legacy)—decommissioned
- VIZMO Broadband Reporting—decommissioned
- FCC.gov Internet Service (Legacy)—decommissioned
- FCC E-mail Infrastructure (Legacy)—decommissioned
- Network Outage Reporting System (Legacy)—decommissioned
- SharePoint On-Premises Infrastructure—scheduled for decommissioning
- BMC Remedy Auctions Hotline—scheduled for decommissioning
- Legacy Cybersecurity Tools (5+ systems)—scheduled for decommissioning
- ISAS Legacy Components—scheduled for decommissioning
- Electronic Comments Filing System (Legacy)—scheduled to be decommissioned

Question 36. Please describe FCC's efforts to identify and reduce wasteful, low-value or duplicative information technology (IT) investments as part of these portfolio reviews.

Answer. The Commission has established an internal Technology Review Board (TRB) for this purpose. On a monthly basis, the TRB reviews the Technology Reference Model, which includes all of the approved technology applications within the FCC, and carries out thorough quarterly reviews to ensure the technology portfolio is optimized for the Commission. All new proposals are evaluated against existing services and ideally matched with current services when possible. By using established Software-as-a-Service (SaaS) and Platform-as-a-Service (PaaS) capabilities, which provide the foundations of the modernized applications and systems being rolled out to the Commission and the public, we have reduced complexity and achieved cost reductions.

Question 37. In 2011, the Office of Management and Budget (OMB) issued a "Cloud First" policy that required agency Chief Information Officers to implement a cloud-based service whenever there was a secure, reliable, and cost-effective option. How many of the FCC's IT investments are cloud-based services (Infrastructure as a Service, Platform as a Service, Software as a Service, etc.)? What percentage of the department's overall IT investments are cloud-based services? Does FCC have a Cloud strategy to encourage the use of Cloud computing solutions? If not, by when do you plan to have such a strategy in place?

Answer. The FCC IT Strategic Plan details the Commission's commitment to cloud sourcing as follows:

“We will leverage cloud service offerings to the fullest extent possible, ensuring the service provider meets all government requirements for security, privacy, and reliability. The FCC will leverage commercial solutions that drive improved performance, security, and availability. By leveraging managed security solutions and partnerships with the commercial market, the FCC is able to reduce costs and improve security by capitalizing on the economies of scale through a managed security provider.”

As a result, almost all of our IT investments are cloud-based services. All of the remaining infrastructure was transferred to a commercial service provider in 2015, with a small remaining contingent of FCC-owned infrastructure at the Commission’s COOP site. The FCC uses a combination of IaaS, PaaS, and SaaS across the breadth of the IT services it provides. All new applications are configured using SaaS or PaaS solutions, whichever best fits the business requirements. Applications developed using IaaS foundational solutions are situational and are only applicable if SaaS or PaaS solutions do not meet the business requirements. No new applications are considered for development and deployment to on-premises infrastructure or systems.

Question 38. Congress passed the MEGABYTE Act (PL 114-210) to encourage agencies to achieve significant savings in managing IT assets including software licenses. What policies or processes are in place at FCC to improve software management?

Answer. The FCC takes advantage of blanket purchasing agreements, volume licensing models, consumption based cloud services, and variable cost models for cloud computing as part of the process to reduce licensing and hardware/software costs. The Senior Procurement Executive, in coordination with the Chief Information Officer, has published a policy memorandum on how the FCC will gain efficiencies under the MEGABYTE Act. Additionally, the specific guidance addresses responsibility after the purchase by specifying “This shall include a complete inventory of software licenses and maintenance of a mechanism to track, maintain, and analyze software use.”

Question 39. Provide short summaries of three recent IT program successes—projects that were delivered on time, within budget, and delivered the promised functionality and benefits to the end user. How does FCC define “success” in IT program management? What “best practices” have emerged and been adopted from these recent IT program successes? What have proven to be the most significant barriers encountered to more common or frequent IT program successes?

Answer. A review of the Commission’s most recent spending shows an emphasis on IT. I plan to continue this trend while also ensuring that it is accomplished using business practices that are results-oriented. Success is only achieved when the customer can speak directly to the value of the IT team’s work. To deliver these results, OMD’s IT staff has partnered with Bureaus and Offices to define project success prior to initiating a project, and continually reviews progress and performance to ensure goals are met. Below are three recent IT program successes cited by OMD:

- FCC Consumer Helpdesk. FCC IT delivered a cloud-based consumer helpdesk solution, but instead of the \$3.2 million quote to internally build a new system over two years, FCC spent \$450,000 for a system that was ready to go in six months. Additionally, the new solution has annual operations costs of \$100,000 a year instead of an estimated \$640,000 to maintain an on-premise system with FCC contract staff and government-owned equipment and software.
- Office365 and Virtual Desktop Infrastructure. The FCC IT team completed a 100 percent migration of the Commission staff to a Microsoft Office365 cloud environment in August of 2015. The Commission now has a virtual desktop infrastructure in place that supports remote computing for nearly the entire staff. In addition to improving accessibility and remote capabilities, these improvements delivered a robust platform for information sharing and collaboration, and eliminated nearly a dozen legacy servers.
- FCC.gov Modernization. FCC IT conducted a complete overhaul of FCC.gov. Work included upgrading the web content management system, upgrading the design to be mobile-friendly and modern-looking, as well as completely redoing the information architecture to improve site navigation. All of these efforts were informed by extensive user research with internal and external stakeholders. The FCC.gov site search was also replaced with a federated application that indexes FCC.gov and EDOCS content.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. GARY PETERS TO
HON. AJIT PAI

Introduction. Connected and automated vehicles have the potential to greatly improve safety, reduce energy consumption, and enhance mobility. Dedicated Short Range Communications (DSRC) technology allows our vehicle fleet to communicate seamlessly, improving our transportation system, and offers vehicles a wireless sensor capable of providing 360 degree awareness to support vehicle safety and automated driving. Vehicle-to-vehicle technology, which utilizes DSRC, requires secure and reliable communications without harmful interference or delay. Safety messages sent to warn drivers must be sent without interruption—even fractions of a second matter with automotive safety. DSRC, operating in the 5.9 band, has been proven to deliver that fraction of a second communication, and can save lives now.

Over 35,000 Americans died on our roads last year. As the Federal Communications Commission continues to study whether the band can be shared, we must not lose sight of the critical safety benefits DSRC can bring.

We need clear Federal leadership to ensure that we have a uniform vehicle safety policy that promotes innovation and leads to the responsible deployment of the connected and automated vehicles. The Commission has been updating and refreshing the record since summer 2016 in the 5GHz band specifically looking at the viability of potential sharing solutions between high-power WiFi and DSRC operations. It is also my understanding that you have looked at several prototypes to see if sharing in the band can work.

Question 1. Do you support vehicle-to-vehicle and vehicle-to-infrastructure communications? If yes, why? If no, why?

Answer. I support safety enhancements for vehicles. Indeed, I had a chance to learn about some of the technological development in this area during a recent visit to General Motors in Detroit. Going forward, I believe it is important to have a data-driven, objective process for evaluating spectrum use and interference issues.

Question 2. Do you agree with the National Highway and Traffic Safety's assessment of vehicle-to-vehicle and vehicle-to-infrastructure communications that these technologies have the potential to mitigate or eliminate up over 80 percent of non-impaired crashes?

Answer. Our agency's expertise relates to the engineering components of the proposal and whether commercial spectrum can be shared without harmful interference. I cannot say, based on my own independent judgment, whether NHTSA's assessment is correct.

Question 3. With the conclusion of the U.S. Department of Transportation's Smart City Challenge, and municipalities around the country already developing and deploying vehicle to infrastructure communications, do you agree that it is especially important to ensure that the 5.9 GHz band and DSRC services remain clear from harmful interference?

Answer. Our objective with respect to our examination of potential spectrum sharing between unlicensed devices and DSRC is to prevent harmful interference. We intend to work with the relevant stakeholders to develop engineering solutions that support this goal.

Question 4. Please provide an overall update on the status of the 5.9 GHz interference testing. Please provide a description of the prototypes received to date and the results of any initial testing, including results on co-channel and cross-channel interference.

Answer. We have received nine devices to date—two each, including an access point and client device, from KEA Technologies, Cisco, Qualcomm, and Broadcom, and a roadside reflector from CAV Technologies. These devices are all designed to work with the current 5.9 GHz band plan to evaluate the proposed detect and vacate sharing scheme. We also are anticipating another device from Broadcom in early April that is designed to operate on a modified 5.9 GHz band plan to evaluate the proposed rechannelization sharing scheme.

The ongoing Phase I testing consists of three components: RF characterization, benchtop interference testing, and investigation of interference mitigation. Most of the tests have been completed. The data generated during the tests is currently being analyzed.

Question 5. Please explain how the FCC is working with the Department of Transportation and the National Telecommunications and Information Administration (NTIA) as they examine sharing around this life-saving technology.

Answer. The Department of Transportation and the NTIA have been our partners throughout the testing process. Each organization provided input to develop the test

plan. The Department of Transportation also helped secure some DSRC devices for testing.

Question 6. What is the FCC's target date for completion of Phase 1 of testing?

Answer. We just recently received the device that will allow us to fully evaluate the re-channelization sharing scheme. We are currently evaluating it under the same process as the previous devices we examined. I have been advised by our Office of Engineering and Technology that based on their experience with those devices, they anticipate that it will take four to six weeks to complete testing and analyze the data. I understand that because this device functions differently from the previous devices tested, there may be additional tests that we need to conduct to fully understand how it may interact with DSRC devices.

Question 7. What is the FCC's target date for completion of Phase 2 and Phase 3 of testing?

Answer. Phases 2 and 3 will require additional input and resources from the Department of Transportation and NTIA. More specifically, because those phases include installing and testing devices on actual vehicles in motion, they will need to be conducted on test ranges and under real world conditions. We will have a better idea of the timing once we complete the Phase 1 testing, and will work with our partners at DOT and NTIA to finalize the additional test plans.

Question 8. Will you include industry stakeholders in Phase 2 and Phase 3 testing to ensure a complete understanding before making any decisions, given their more than a decade of development, availability of equipment and understanding of vehicle-to-vehicle applications?

Answer. The Commission's staff met with the industry stakeholders to discuss the test plan prior to its finalization and subsequently to discuss some of our early test results. I understand that plans are underway to meet the parties again to review Phase 1 results and plan for Phases 2 and 3. Additionally, any rule changes the Commission may consider are subject to public comment, so industry stakeholders will have ample opportunity to weigh-in prior to any final decision.

Question 9. Will you commit to making public all of the data collected by the FCC during the bench and field testing phases?

Answer. The Commission will make all non-proprietary or non-confidential data available to the public.

Question 10. What is the Commission's target date for making a final determination on spectrum sharing in the 5.9 GHz band with unlicensed devices?

Answer. The Commission's staff is working to make a decision as expeditiously as possible. Because the testing is ongoing, it is difficult to set a date for final determination at this time.

Question 11. If proven that the "re-channelization" proposal will cause harmful interference to DSRC services within the 5.9 GHz band, will you still move forward with allowing for unlicensed Wi-Fi to share that band of spectrum? If yes, why?

Answer. Under our rules, unlicensed devices may not cause harmful interference. Any rules the Commission were to adopt would be designed to ensure that DSRC devices do not receive harmful interference from unlicensed devices.

Question 12. If both the "detect and vacate" and "re-channelization" proposals are proven to cause harmful interference to DSRC services will you continue the status quo and allow DSRC to operate in the 5.9 GHz band on their own without sharing the spectrum? If not, why?

Answer. I cannot commit to any course of action without having a full, concrete set of facts. And the Commission has not proposed to change the DSRC rules.

Question 13. It is critical that the FCC evaluate the sharing proposals based on facts, not opinions. Subjective judgements about what will or will not work are no substitute for solid engineering data, which has undergone rigorous and open review. Will you commit that the FCC's final determination on spectrum sharing in the 5.9 GHz band will be based on sound engineering data, which has undergone rigorous and open review?

Answer. Yes. We will comply with the Administrative Procedure Act and our own rules as we move forward with this matter. Accordingly, industry stakeholders will have an opportunity to review the engineering data and weigh-in prior to any final decision by the Commission.

Introduction. On March 1, 2017, the Senate Commerce Committee held a hearing entitled, "Connecting America: Improving Access to Infrastructure for Communities Across the Country" to examine the challenge of connecting Americans, particularly in rural areas, to transportation and information networks. The Committee heard from several witnesses about how DSRC technology has improved traffic congestion and reduced pedestrian accidents in their communities. The witnesses also stressed

the need to preserve the use of the 5.9 GHz spectrum for DSRC safety critical applications. Many states, including my own, have a real interest in the benefits that connected cars and autonomous vehicles can bring to our communities. NHTSA has released a draft regulation that would require DSRC on 50 percent of all new vehicles by 2021 model year and GM is already selling cars that are equipped with DSRC services. There are DSRC deployments in several states underway, including a “SPAT-challenge” to deploy DSRC-equipped intersections that would broadcast signal phase and timing in corridors in all 50 states by 2020.

Question 14. Are we moving in a direction where we will see this technology and spectrum used for the lifesaving applications as it was intended—or are we running the risk of these investments being wasted due to spectrum interference?

Answer. The Commission has a responsibility to accommodate the introduction and growth of new radio communications services and technologies while also considering whether there may be any adverse impact to incumbent radio services. Our staff has always seriously considered any such evaluations and focus on potential risks of harmful interference to safety-based services or applications, and I intend for that to continue under my Chairmanship.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TAMMY DUCKWORTH TO
HON. AJIT PAI

Introduction. As Commissioner Clyburn noted in her testimony, I authored the *Video Visitation in Prisons Act* last Congress to increase oversight of telecommunications in prisons and permit prisoners who demonstrate good behavior to stay in touch with their family through video conferencing. Because the vast majority of prisoners will eventually be released, it is not a matter of *if* we need to prepare these individuals to rejoin society, but rather, a matter of *how well* we do it. And the FCC has a critical role to play in this important national challenge. Across the country, jails and prisons have begun implementing a new way for families and friends to stay in touch with their incarcerated loved ones: *video conferencing*.

In Illinois, remote video conferences have provided the only way for some families to stay in touch, one example is the Menard Correctional Center, which is more than 300 miles from Chicago, where many of its prisoners come from and still have family who live there.

Studies show that prisoners who remain in close contact with family members achieve better post-release outcomes and lower rates of recidivism. Yet, too often, prisoners and their families struggle to maintain regular contact, whether through in-person visits, calls or “video visitation.”

Question 1. Would you agree that the prison video visitation service industry remains a largely unregulated area of commerce, which has led to low-quality service paired with exorbitant, cost-prohibitive fees that prisoners and their families cannot afford?

Answer. Video visitation is an emerging service in the ICS market. At this point, we are still learning about the potential, positive role this service can play. The Commission has adopted annual reporting requirements and will be collecting data from ICS providers regarding their services, including video visitation. The providers’ reports will offer us further insight into video visitation services and pricing. Generally speaking, I’ve long believed, as I publicly stated in 2013, that with respect to this market “we cannot necessarily count on market competition to keep prices for inmate calling services just and reasonable.”

Question 2. As technology changes and more prisons start using video conferencing, what are some of your recommendations for the future of this technology?

Answer. Video conferencing offers some very valuable opportunities for inmates’ families to stay connected. We are hopeful that this emerging service will continue to evolve in a manner consistent with the needs of inmates and their families.

Question 3. Why is it important that video visitation supplement—not supplant—in-person visitation?

Answer. Family support plays an important role in helping released prisoners reenter society and in reducing recidivism. In-person visitation has historically been an important component to ensuring that inmates stay connected with their families and maintain a sense of well-being prior to their re-entry into society.

Introduction. Chairman Pai, one of your first actions was to direct the Wireline Competition Bureau to overturn an order designating nine wireless companies to provide Lifeline Broadband service through the USF Lifeline program, which provides support to low-income households in order to gain phone and broadband access.

One of the wireless companies that lost its Lifeline designation was Applied Research (AR) Designs, a certified Minority Business Enterprise and African-American owned company in Chicago. AR Designs applied for a first-time designation with the FCC as a Lifeline Broadband Provider with streamlined consideration and was approved on January 18, 2017.

But last month, you revoked their designation based on concerns about “waste, fraud and abuse” and now will be limited in providing affordable Lifeline-supported broadband service to Chicago’s low-income, underserved communities.

This program would allow access for schoolchildren to complete homework assignments and parents who are unemployed, to seek employment and economic development. The designation would also benefit Veterans and seniors, who are on fixed incomes and cannot otherwise, afford higher priced plans. Non-eligible Lifeline customers would be offered the same plan at a fixed price of \$9.25.

Question 4. Revoking these Lifeline designations, with immediate action to address the loss of access to affordable broadband service, harms my constituents residing in low-income and underserved Chicago communities.

Please provide a detailed explanation as to why you revoked designations for AR Designs and the other firms.

Answer. As the Wireline Competition Bureau explained in its *Order on Reconsideration*, giving the agency additional time to review these designations “would promote program integrity by providing the Bureau with additional time to consider measures that might be necessary to prevent further waste, fraud, and abuse in the Lifeline program” because “[p]otential waste, fraud, and abuse through the use of the independent economic household worksheet, identity verification dispute resolution processes, address verification, and discrepancies between reimbursement requests and subscriber listings in the National Lifeline Accountability Database (NLAD) raise concerns that the [designations] fail[ed] to resolve.” In addition, the Bureau agreed with the National Tribal Telecommunications Association the “certain providers seeking designation as an LBP failed to fulfill their obligations under section 54.202(c) of the Commission’s rules” and that the “designation [of] FreedomPop and KonaTel prior to the 30-day public comment period deadline represents a clear and obvious error.” Finally, the law here is clear: Congress gave state governments, not the FCC, the primary responsibility for approving which companies can participate in the Lifeline program under Section 214 of the Communications Act. This is how the program worked over two decades, over three Administrations, and over eight Chairmanships. By letting states take the lead on certification as envisioned by Congress, we will strengthen the Lifeline program and put the implementation of last year’s order on a solid legal footing. This will benefit all Americans, including those participating in the program.

Question 5. Please provide a justification as to why you did not have the full Commission vote on these revocations.

Answer. In the *Lifeline Modernization Order*, the Commission delegated authority to the Wireline Competition Bureau to act on Lifeline Broadband Provider (LBP) designations. Just as the prior Administration used this delegated authority to direct the Bureau to designate these providers, the current Bureau relied upon that authority in returning these LBP applications to the queue.

Question 6. Please attach to your response all materials that the FCC relied on to make the determination to revoke these designations.

Answer.

- *Total Call Mobile, Inc.*, Order, 31 FCC Rcd 13204 (EB 2016).
- Testimony of FCC Commissioner Ajit Pai Before the Subcommittee on Communications and Technology of the United States House of Representatives Committee on Energy and Commerce, Oversight of the Federal Communications Commission, at 4–5 (July 12, 2016), available at <https://www.fcc.gov/document/commissioner-pai-statement-house-oversight-hearing> (*Pai Testimony*).
- Petition for Reconsideration of National Tribal Telecommunications Association of the Lifeline Broadband Designation Order, WC Docket No. 09–197, *et al.*, (filed Jan. 3, 2017)
- Response and Opposition of Boomerang Wireless, LLC DBA enTouch Wireless to the Petition for Reconsideration of National Tribal Telecommunications Association, WC Docket No. 09–197, *et al.*, (filed Jan. 19, 2017).
- Response and Opposition of KonaTel, Inc. to the Petition for Reconsideration of National Tribal Telecommunications Association, WC Docket No. 09–197, *et al.*, (filed Jan. 19, 2017).

- Response and Opposition of STS Media, Inc. DBA FreedomPop to the Petition for Reconsideration of National Tribal Telecommunications Association, WC Docket No. 09-197, *et al.*, (filed Jan. 19, 2017).
- 47 CFR § 54.202(c).

Question 7. Will you commit to an on-time implementation of the Lifeline Modernization Order's third-party eligibility verifier, which will provide an additional layer of safeguards against any waste, fraud and abuse? In addition, please provide a detailed implementation status update.

Answer. USAC, overseen by Commission staff, continues to work on a National Verifier that will create a more effective, efficient, and fiscally responsible program by having USAC take responsibility for determining subscriber eligibility. I am confident that the launch of the National Verifier will help root out waste, fraud, and abuse in the program. USAC, the FCC staff, states, and numerous other interested parties have made progress on designing and implementing the National Verifier in order to meet the timing commitments made by the Commission last year.

ATTACHMENTS

Federal Communications Commission—DA 16-1399

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

In the Matter of)	
)	
Total Call Mobile, Inc.	)	File No.: EB-IHD-14-00017650
	)	Acct. No.: 201632080004
	)	FRN: 0017274911
)	
)	

ORDER

Adopted: December 22, 2016

Released: December 22, 2016

By the Chief, Enforcement Bureau:

1. The Enforcement Bureau (Bureau) of the Federal Communications Commission (Commission) and Total Call Mobile, Inc. (TCM), have entered into a Consent Decree as part of a global settlement totaling \$30,000,000 to fully resolve the Notice of Apparent Liability for Forfeiture and Order the Commission issued against TCM,¹ the Commission's Investigation into whether TCM violated the Commission's Lifeline program rules (Rules),² and the FCC's forfeiture penalty claims, as well as claims related to the Covered Conduct as defined and specified in the settlement between TCM and the U.S. Attorney's Office for the Southern District of New York (SDNY Settlement).

2. As part of the Universal Service Fund (USF), the Lifeline program assists qualified low-income consumers in obtaining the opportunities and security that phone service brings, including connecting to jobs, family members, and emergency services. The Lifeline program is administered by the Universal Service Administrative Company (USAC), which is responsible for, among other things, support calculation and disbursement payments for the Lifeline program. An ETC, like TCM, may receive \$9.25 per month for each qualifying low-income consumer receiving Lifeline service (Basic Support), and up to an additional \$25 per month if the qualifying low-income consumer resides on Tribal Lands.³ Before receiving such support reimbursements, however, an ETC must meet stringent requirements under the Commission's Lifeline Rules.⁴

¹ *Total Call Mobile, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 31 FCC Red. 4191 (2016) (TCM NAL).

² Investigation means the investigation commenced by the Bureau in File No. EB-IHD-14-00017650, and the TCM NAL.

³ See 47 CFR § 54.403(a); 47 CFR § 54.400(a), (e). See also 47 CFR § 54.409.

⁴ See 47 CFR §§ 54.400–54.422.

3. In response to concerns about TCM's participation in the Lifeline program, the Enforcement Bureau's USF Strike Force conducted an extensive investigation into the company's compliance with the Commission's Rules, including whether TCM enrolled duplicate and ineligible consumers in the Lifeline program through the misuse of eligibility documents such as temporary Supplemental Nutrition Assistance Program (SNAP) cards, including enrolling "phantom" consumers who were created by using the identity information of an individual without the individual's consent, and the accuracy of the consumer data TCM provided in support of its USF reimbursement requests. In addition, the Commission's Wireline Competition Bureau (WCB) directed USAC to hold Lifeline disbursements to TCM beginning with the May 2016 data month.⁵

4. On April 7, 2016, the Commission issued the *TCM NAL* against TCM alleging violations of the Commission's Rules that govern the Lifeline program.⁶ To settle this matter, as well as a civil False Claims Act matter with the U.S. Attorney's Office for the Southern District of New York, TCM agrees to pay \$30,000,000 in connection with this global settlement, admits that it violated the Commission's Rules governing the Lifeline program, relinquishes its Federal and state Eligible Telecommunications Carrier (ETC) designations, and agrees to no longer participate or seek to participate in the Lifeline program. Pursuant to this settlement agreement, TCM will withdraw and not pursue any objections presently before USAC and the Commission related to claims involving the \$7,460,884 in Lifeline reimbursements held by USAC, including the Letter from Steve Augustino, Counsel for TCM, Kelley Drye & Warren, LLP, to Michelle Garber, USAC (May 9, 2016) and Total Call Mobile, Inc., NAL/Acct. No. 201632080004, Response to Paragraph 102 of the Notice of Apparent Liability for Forfeiture, FCC 16-44 (2016). The \$7,460,884 shall be deemed to be part of the global settlement amount paid by TCM.

5. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree and terminating the referenced investigation of TCM.⁷

6. We do not set for hearing the question of TCM's basic qualifications to hold or obtain any Commission license or authorization, as TCM with this Consent Decree is agreeing to withdraw from, and not participate again in, the Lifeline program.

7. Accordingly, *IT IS ORDERED* that, pursuant to Sections 4(i), and 503(b) of the Act⁸ and the authority delegated by Sections 0.111 and 0.311 of the Rules,⁹ the attached Consent Decree *IS ADOPTED* and its terms incorporated by reference.

8. *IT IS FURTHER ORDERED* that the above-captioned matter *IS TERMINATED* and the NAL and Order are *CANCELLED*.

9. *IT IS FURTHER ORDERED* that a copy of this Order and Consent Decree shall be sent by first class mail and certified mail, return receipt requested, to Yasunori Matsuda, Chief Executive Officer, Total Call Mobile, LLC, 1411 W. 190th Street, Gardena, CA 90248, to Patrick O'Donnell and Brita Stransberg, Harris, Wiltshire & Grannis, LLP, counsel for Total Call Mobile, Inc., 1919 M Street, NW, 8th Floor, Washington, DC. 20036, and to Steven A. Augustino, Kelley Drye & Warren LLP, Washington Harbour, Suite 400, 3050 K Street, NW, Washington, D.C. 20007.

FEDERAL COMMUNICATIONS COMMISSION
TRAVIS LEBLANC,
Chief, Enforcement Bureau.

⁵ *Total Call Mobile, Inc.*, Order Directing Temporary Hold of Payments (DA 16-708) (June 22, 2016).

⁶ *TCM NAL*.

⁷ Investigation means the investigation commenced by the Bureau's USF Strike Force in File No. EB-IHD-14-00017212 and the *TCM NAL*.

⁸ 47 U.S.C. §§ 154(i), 503(b).

Federal Communications Commission—DA 16-1399

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, DC 20554

In the Matter of)	
)	
Total Call Mobile, Inc.	)	File No.: EB-IHD-14-00017650
	)	Acct. No.: 201632080004
	)	FRN: 0017274911
)	

CONSENT DECREE

1. The Enforcement Bureau of the Federal Communications Commission and Total Call Mobile, LLC (TCM),¹ by their authorized representatives, hereby enter into this Consent Decree for the purposes of terminating the Bureau's Notice of Apparent Liability for Forfeiture and Order and the Bureau's investigation, as defined below, into whether TCM violated Sections 54.405, 54.407, 54.409, and 54.410 of the Commission's rules governing the provision of Lifeline service to low-income consumers,² from at least November 2012 through April 2016.

2. On December 19, 2016, TCM, along with affiliated entities, entered into a Stipulation and Order of Settlement and Dismissal (the "SDNY Settlement") with the United States Attorney's Office for the Southern District of New York to resolve claims that TCM engaged in certain fraudulent conduct in connection with the Lifeline program and a *qui tam* action that was filed in the United States District Court for the Southern District of New York pursuant to the False Claims Act, as amended, 31 U.S.C. § 3729 *et seq.* (FCA).³

I. DEFINITIONS

3. For the purposes of this Consent Decree, the following definitions shall apply:
 - (a) "Act" means the Communications Act of 1934, as amended.⁴
 - (b) "Adopting Order" means an order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
 - (c) "Basic Support" means Lifeline support of \$9.25 per month for eligible Lifeline consumers.
 - (d) "Bureau" means the Enforcement Bureau of the Federal Communications Commission.
 - (e) "Commission" and "FCC" mean the Federal Communications Commission and all of its bureaus and offices.
 - (f) "Communications Laws" means collectively, the Act, the Rules, and the published and promulgated orders and decisions of the Commission to which TCM is subject by virtue of its business activities, including but not limited to the Lifeline Rules.
 - (g) "SDNY" means the United States Attorney's Office for the Southern District of New York.
 - (h) "Effective Date" means the date by which both the Bureau and TCM have signed the Consent Decree and the U.S. District Court for the Southern District of New York has approved the proposed Stipulation and Order of Dismissal, whichever is later.
 - (i) "ETC" means an eligible telecommunications carrier designated under, or operating pursuant to, Section 214(e) of the Communications Act, as amended, 47 U.S.C. § 214(e), as eligible to offer and receive support for one

¹On March 31, 2015, Total Call Mobile was re-organized as a limited liability corporation under the laws of Delaware. The FCC was notified of this *pro forma* transfer of control by letter dated April 30, 2015. See *Notification, pursuant to Section 63.24(f) of the Commission's Rules, of a pro forma transfer of control of Total Call Mobile, LLC which holds international Section 214 authority et al.*, File No. ITC-ASG-20150430-00114 (Apr. 30, 2015).

²See 47 CFR §§ 54.405, 54.407, 54.409, 54.410.

³The scope of the releases in the SDNY Settlement are specified in that agreement.

⁴47 U.S.C. § 151, *et seq.*

or more services that are supported by the Federal universal support mechanisms.

- (j) “Investigation” means the investigation commenced by the Bureau in File No. EB-IHD-14-00017650, and in *Total Call Mobile, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 31 FCC Rcd. 4191 (2016) (*TCM NAL*) regarding whether TCM violated the Lifeline Rules.
- (k) “Lifeline Rules” means Title 47, Code of Federal Regulations, Sections 54.400–54.422, Section 254 of the Act, and Commission orders related to the provision of Lifeline service.
- (l) “Monies Held” means the Lifeline support payments to Total Call Mobile temporarily held by USAC pursuant to the notice provided to the company on April 8, 2016, and order issued by the Wireline Competition Bureau dated June 22, 2016 (DA 16–708).
- (m) “NLAD” means the National Lifeline Accountability Database that ETCs are required to use, unless otherwise provided, pursuant to 47 CFR § 54.404. NLAD is a third-party independent verification system used by the Universal Service Administrative Company that was designed to identify and deny the enrollment of any potential intra-company duplicate Lifeline consumers.
- (n) “Parties” means TCM and the Bureau, each of which is a “Party.”
- (o) “Person” shall have the same meaning defined in Section 153(39) of the Communications Act, as amended, 47 U.S.C. § 153(39).
- (p) “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.
- (q) “TCM” or “Company” means Total Call Mobile, LLC, and its predecessors in interest and successors in interest, including Total Call Mobile, Inc.
- (r) “USAC” means the Universal Service Administrative Company, which serves as the administrator for the Federal Universal Service Fund.⁵

II. BACKGROUND

3. Lifeline is part of the Federal Universal Service Fund (USF or the Fund) and helps qualified consumers have the opportunities and security that essential communications service brings, including being able to connect to jobs, family members, and emergency services.⁶ Lifeline service is provided by ETCs designated pursuant to the Act.⁷ An ETC may seek and receive reimbursement from the USF for revenues it forgoes in providing the discounted services to eligible consumers in accordance with the Rules. Section 54.403(a) of the Lifeline Rules specifies that an ETC may receive \$9.25 per month in Basic Support for each qualifying low-income consumer receiving Lifeline service.⁸

4. The Lifeline Rules establish explicit requirements that ETCs must meet to receive Lifeline support reimbursements.⁹ Section 54.407(a) of the Lifeline Rules provides that “[u]niversal service support for providing Lifeline shall be provided to an eligible telecommunications carrier based on the number of actual qualifying low-income consumers it services[.]”¹⁰

5. The Lifeline Rules prohibit an ETC from seeking reimbursement for providing Lifeline service to a consumer unless the ETC has confirmed the consumer’s eligibility to receive Lifeline service.¹¹ Section 54.410 requires an ETC to receive a certification of eligibility from a subscriber demonstrating that the consumer meets the income-based or program-based eligibility criteria for receiving Lifeline service prior to seeking reimbursement from the USF. Section 54.410(a) further requires ETCs to “implement policies and procedures for ensuring that their Lifeline subscribers are eligible to receive Lifeline services.”¹²

⁵ See 47 CFR § 54.701.

⁶ See *Lifeline and Link Up Reform and Modernization et al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Dkt. No. 11–42 et al., FCC Rcd 6656, 6662–66, paras. 11–17 (2012) (*2012 Lifeline Reform Order*); see also 47 CFR §§ 54.400–54.422.

⁷ See 47 U.S.C. § 254(e) (providing that “only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support”); see also 47 U.S.C. § 214(e) (prescribing the method by which carriers are designated as ETCs).

⁸ See 47 CFR § 54.403(a).

⁹ See 47 CFR §§ 54.400–54.422.

¹⁰ See 47 CFR § 54.407(a).

¹¹ See 47 CFR § 54.410(b), (c).

¹² See 47 CFR § 54.410(a).

6. ETCs that provide qualifying low-income consumers with Lifeline discounts file a Form 497 with USAC to request reimbursement for providing service at the discounted rates. Section 54.407(d) provides that an ETC may receive reimbursement from the Fund if the ETC certifies as part of its reimbursement request that it is in compliance with the Lifeline Rules and, to the extent required under that sub-part, has obtained valid certifications for each consumer for whom the ETC seeks reimbursement.¹³ An ETC may revise its Form 497 data within 12 months after the data is submitted.¹⁴

7. TCM is an ETC designated to provide wireless Lifeline service in at least 19 states and territories. TCM offered eligible low-income Lifeline consumers a plan that allowed it to seek reimbursements from the Fund. TCM solicited and enrolled consumers for its Lifeline-supported services by contracting with master agents, who were based throughout the United States. These TCM master agents in turn recruited individual TCM sales agents, who performed the individual Lifeline enrollments and were supervised by TCM master agents; since early 2014, enrollments performed by TCM sales agents were reviewed by TCM in real time.

8. In response to a referral made by the Commission's Wireline Competition Bureau and USAC, the Bureau's USF Strike Force (Strike Force) initiated and conducted the Investigation of TCM's Lifeline consumer enrollment practices.

9. TCM relied primarily on in-person sales events to enroll consumers in the Lifeline program. TCM solicited and enrolled consumers by contracting with several distributors based throughout the country, referred to as "master agents," who in turn hired individual "field agents" to engage in face-to-face marketing at public events and spaces. The field agents collected the consumer's information and performed individual enrollments. TCM paid the master agents based in part on the number of subscribers successfully enrolled, and the master agents in turn paid their field agents primarily or exclusively on a commission basis.

10. TCM received and reviewed the vast majority of its Lifeline applications electronically. Using tablet computers, field agents were required to enter a consumer's demographic information (e.g., name, address, date of birth, last four digits of Social Security number) and capture images of the consumer's proof of identification and proof of eligibility (e.g., Supplemental Nutrition Assistance Program (SNAP) card, Medicaid card). TCM had electronic access to the documentation, information, and data entered during the enrollment process, and was responsible for verifying the eligibility of Lifeline applicants.

11. For much of the time from September 2012 to May 2016, TCM failed to adequately screen and train the field agents who acted on the company's behalf. Although TCM provided training to its master agents, from September 2012 until late 2014, TCM relied on the master agents to train field agents and did not ensure that such training was provided. TCM started to directly train field agents thereafter.

12. TCM failed to implement effective policies and procedures to ensure the eligibility of the subscribers for whom TCM requested reimbursement for Lifeline discounts, as required by Lifeline Rules. Although TCM had certain policies and procedures that improved over time, TCM did not effectively monitor compliance with these policies and procedures and failed to prevent the enrollment of ineligible individuals. For much of the time from September 2012 to May 2016, TCM allocated insufficient staff and resources to verifying the eligibility of Lifeline subscribers. For example, pursuant to TCM's 2013 business plan, one staff member was expected to review the eligibility of 6,000 prospective Lifeline customers each month.

13. Hundreds of TCM field agents engaged in fraudulent practices to enroll consumers who were duplicate subscribers¹⁵ or who were otherwise not eligible for the Lifeline program. For example:

- a. Certain field agents repeatedly used the same benefit program eligibility proof to enroll multiple consumers. Agents frequently enrolled several different individuals by submitting an image of the same improperly obtained program eligibility card or, in some instances, a fake program eligibility card. Field agents relied on temporary SNAP cards to enroll consumers because these cards did not include the actual benefit recipient's name. Although TCM and Locus managers received numerous reports that field agents were relying on the same program eligibility card repeatedly, they failed to put in place adequate systems and procedures to prevent this practice for much of the time from September 2012 to May 2016.

¹³ See 47 CFR § 54.407(d).

¹⁴ See 2012 Lifeline Reform Order, 27 FCC Rcd at 6788, para. 305.

¹⁵ A "duplicate subscriber" refers to an individual enrolled to receive Lifeline services from TCM even though the individual or someone in the individual's household also received Lifeline services from TCM, in violation of the one-benefit-per-household requirement.

- b. Certain field agents slightly altered the way in which a subscriber's demographic information was input to avoid having TCM identify the application as a duplicate. TCM knew that field agents developed ways to manipulate the consumer's data to bypass the limited automated duplicate checks in place, and failed to put in place an adequate system for screening out duplicate subscribers. TCM enhanced its duplicate check system during the latter portion of the time from September 2012 to May 2016, but some duplicate subscribers continued to be enrolled.
- c. Certain field agents tampered with identification or program eligibility cards, and intentionally transmitted blurry or partial images of the documentation, to try to conceal the fact that the information on the documentation did not match the subscriber's actual name or the other information on the Lifeline application. TCM enrolled individuals in the Lifeline program and sought reimbursement for discounts provided to them notwithstanding clear legibility issues with the proof submitted.
- d. Certain field agents provided their own signature, printed their own name, or wrote a straight or curvy line where the prospective subscriber's signature was supposed to appear on Lifeline applications. TCM enrolled individuals in the Lifeline program and sought reimbursement for discounts provided to them even though the field agents had completed the required customer certification instead of the actual consumer.
- e. Certain field agents submitted false consumer addresses and social security numbers to enroll duplicate or otherwise ineligible subscribers. TCM failed to take sufficient actions to identify this false information during its review, and enrolled these individuals in the Lifeline program and sought reimbursement for discounts provided to them.

14. TCM failed to put in place effective mechanisms to oversee the conduct of field agents and detect and prevent field agent abuses. Further, during much of the time from September 2012 to May 2016, even when managers learned that field agents were using the same program eligibility card repeatedly or engaging in some other type of improper practice, TCM often allowed the field agent to continue to enroll subscribers. TCM rarely took corrective actions against field agents who engaged in improper conduct until the latter portion of the time from September 2012 to May 2016, when it enhanced its oversight of field agent practices and deactivated a number of field agents.

15. During the time from September 2012 to May 2016, TCM submitted hundreds of monthly reimbursement requests on Form 497s to USAC that listed the purported total number of qualifying low-income Lifeline subscribers served and the total reimbursement claimed for the month. In each Form 497, TCM certified that the company was in compliance with all of the Lifeline rules and that it had obtained valid certification forms for each subscriber for whom TCM sought reimbursement. At the time that TCM submitted many of these Form 497s, TCM knew that its policies and procedures for reviewing Lifeline applications, verifying consumer eligibility, conducting duplicate checks, and detecting duplicate subscribers were deficient. Although TCM revised some of its Form 497s to correct errors or remove subscribers who were subsequently determined to be potentially ineligible, these revised forms still included consumers who did not meet the Lifeline eligibility criteria.

16. TCM sought and received reimbursement for tens of thousands of consumers who did not meet the Lifeline eligibility requirements.

17. On April 7, 2016, based upon these violations of the Lifeline Rules, the Commission released the *TCM NAL* charging TCM with apparently violating Sections 54.405, 54.407, 54.409, and 54.410 of the Lifeline Rules.¹⁶

18. On April 8, 2016, USAC issued a letter to TCM notifying it of the impending hold of all Lifeline Program funding to the Company in light of the evidence outlined in the *TCM NAL* and requiring the Company to provide sufficient documentation demonstrating its compliance with the Lifeline Rules.¹⁷ On May 9, 2016, TCM submitted a response to USAC objecting to the impending hold of Lifeline funding.¹⁸ Also on May 9, 2016, as directed in Paragraph 102 of the *TCM NAL*, TCM submitted a report explaining why the Commission should not take certain actions, in-

¹⁶ See *Total Call Mobile, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 31 FCC Rcd. 4191 paras. 6, 73, 83, 103 (2016).

¹⁷ See Letter from USAC to Mr. Hideki Kato, President, Total Call Mobile, Inc. (Apr. 8, 2015).

¹⁸ Letter from Steve Augustino, Counsel for TCM, Kelley Drye & Warren, LLP, to Michelle Garber, USAC (May 9, 2016).

cluding suspension of all Lifeline reimbursements to TCM.¹⁹ On June 1, 2016, the Wireline Competition Bureau issued a letter to TCM seeking additional documentation and information relating to TCM's Paragraph 102 Response. TCM responded to that letter on June 13, 2016, June 22, 2016, and June 27, 2016. TCM responded to a supplemental letter from the Wireline Competition Bureau, dated June 30, 2016, with responses on July 6, 2016, July 8, 2016, July 13, 2016 and July 22, 2016.

19. On June 22, 2016, the Wireline Competition Bureau issued a temporary suspension of TCM's USF reimbursements, pending its review of TCM's responses to the WCB's request(s) for information (*WCB Temporary Hold Order*).²⁰ On July 22, 2016, TCM filed a Petition for Reconsideration of the *WCB Temporary Hold Order*, which remains pending. TCM responded to the *TCM NAL* on July 5, 2016.²¹

20. The agreed final amount of Lifeline funding held by USAC is \$7,460,884. In the event that there are any additional Monies Held as a result of post-settlement filings or adjustments by TCM, TCM waives its right to the additional Monies Held.

21. The parties negotiated the following terms and conditions of settlement and hereby enter into this Consent Decree as provided below.

III. TERMS OF AGREEMENT

22. *Adopting Order.* The provisions of this Consent Decree shall be incorporated by the Bureau in an Adopting Order.

23. *Jurisdiction.* For purposes of this Consent Decree, TCM agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and has the authority to enter into and adopt this Consent Decree.

24. *Effective Date.* The Parties agree that this Consent Decree shall become effective on the Effective Date as defined herein. As of the Effective Date, the Parties agree that the Adopting Order and this Consent Decree shall have the same force and effect as any other order adopted by the Commission. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order. If the Bureau determines that TCM made any material misrepresentation or material omission relevant to the resolution of this Investigation, the Bureau retains the right to seek modification of this Consent Decree.

25. *Termination of Investigation.* In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate the Investigation and resolve the *TCM NAL*. In consideration for the termination of the Investigation, TCM agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that, in the absence of new material evidence, it will not use the facts developed in the Investigation through the Effective Date, or the existence of this Consent Decree, to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against TCM concerning the matters that were the subject of the Investigation. This Consent Decree is contingent upon court approval of the SDNY Settlement, but otherwise does not terminate any other investigations that have been or might be conducted by other law enforcement agencies or offices.

26. *Admission of Liability.* TCM admits for the purpose of this Consent Decree and for the Commission's civil enforcement purposes, and in express reliance on the provisions of paragraph 25 herein, that its actions in paragraphs 9 through 16, and that were the subject of the *TCM NAL* violated Sections 54.405, 54.407, 54.409, and 54.410 of the Commission's Rules.²²

27. *Relinquishment of License.* In consideration for the termination of the Investigation, and in express reliance on the provisions of paragraph 25 herein, TCM agrees to: (1) transfer its Lifeline customers and cease providing Lifeline service on or before December 31, 2016; (2) not participate in the Lifeline program after December 31, 2016; (3) no longer apply for or receive Lifeline universal service support on or after December 31, 2016; (4) relinquish its ETC designation from the Commission and all respective ETC designations TCM has received from all states and territories of the United States, and withdraw any applications TCM submitted for ETC designation, on or before December 31, 2016; and (5) not reapply for ETC designations from the Commission or any state or territory of the United States after

¹⁹ Total Call Mobile, Inc., NAL/Acct. No. 201632080004, Response to Paragraph 102 of the Notice of Apparent Liability for Forfeiture, FCC 16-44 (May 9, 2016) (*TCM Paragraph 102 Response*).

²⁰ Total Call Mobile, Inc., Order Directing Temporary Hold of Payments, DA 16-708 (Wireline Comp. Bur., June 22, 2016).

²¹ See Total Call Mobile, LLC's Response to the Notice of Apparent Liability for Forfeiture (July 5, 2016) (*TCM NAL Response*).

²² See 47 CFR §§ 54.405, 54.407, 54.409, 54.410.

the Effective Date of this Agreement. TCM shall submit copies of all requests to relinquish its ETC designations and withdraw its applications for ETC designation to Loyaan Egal, Director, Strike Force, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Washington DC 20554, with copies submitted electronically to Loyaan Egal at *Loyaan.Egal@fcc.gov*, to Rakesh Patel at *Rakesh.Patel@fcc.gov*, to David M. Sobotkin at *David.Sobotkin@fcc.gov*, and to Dangkhoa Nguyen at *Dangkhoa.Nguyen@fcc.gov*.

28. *Section 208 Complaints; Subsequent Investigations.* Nothing in this Consent Decree shall prevent the Commission or its delegated authority from adjudicating complaints filed pursuant to Section 208 of the Act²³ against TCM or its affiliates for alleged violations of the Act, or for any other type of alleged misconduct, regardless of when such misconduct took place. The Commission's adjudication of any such complaint will be based solely on the record developed in that proceeding. Except as expressly provided in this Consent Decree, this Consent Decree shall not prevent the Commission from investigating new evidence of noncompliance by TCM with the Communications Laws.

29. *Settlement Amount.* TCM agrees to a Global Settlement Amount with the FCC and SDNY with a value of \$30,000,000.00 (Global Settlement Amount) to fully resolve the *TCM NAL*, the Investigation, and the FCC's forfeiture penalty claims, as well as claims related to the Covered Conduct as defined and specified in the SDNY Settlement. The Global Settlement Amount addresses the loss to the Fund. A percentage of the Global Settlement Amount will be paid to the Relator in the *qui tam* action to resolve the Relator's claim to a portion of the Global Settlement Amount pursuant to 31 U.S.C. § 3730(d)(1).

- a. In furtherance of the foregoing, TCM will withdraw its Petition for Reconsideration and not pursue any objections presently before USAC and the Commission related to claims involving the \$7,460,884 in Lifeline reimbursements held by USAC, including the Letter from Steve Augustino, Counsel for TCM, Kelley Drye & Warren, LLP, to Michelle Garber, USAC (May 9, 2016) and Total Call Mobile, Inc., NAL/Acct. No. 201632080004, Response to Paragraph 102 of the Notice of Apparent Liability for Forfeiture, FCC 16-44 (2016). The \$7,460,884 shall be deemed to be part of the Global Settlement Amount paid by TCM and shall be deemed part of the amount repaid to the Fund.

30. *Waivers.* As of the Effective Date, TCM waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order. TCM shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Consent Decree or the Adopting Order, neither TCM nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and TCM shall waive any statutory right to a trial *de novo*. TCM hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act²⁴ relating to the matters addressed in this Consent Decree.

31. *Severability.* The Parties agree that if any of the provisions of the Consent Decree shall be held unenforceable by any court of competent jurisdiction, such unenforceability shall not render unenforceable the entire Consent Decree, but rather the entire Consent Decree shall be construed as if not containing the particular unenforceable provision or provisions, and the rights and obligations of the Parties shall be construed and enforced accordingly.

32. *Invalidity.* In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

33. *Subsequent Rule or Order.* The Parties agree that if any provision of the Consent Decree conflicts with any subsequent Rule or Order adopted by the Commission (except an Order specifically intended to revise the terms of this Consent Decree to which TCM does not expressly consent) that provision will be superseded by such Rule or Order.

34. *Successors and Assigns.* TCM agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

35. *Final Settlement.* The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties with respect to the Investigation. In furtherance of settlement, and subject to the other terms of this Consent Decree, the Parties agree as follows:

²³ 47 U.S.C. § 208.

²⁴ See 5 U.S.C. § 504; 47 CFR §§ 1.1501–1.1530.

- a. This Consent Decree is contingent upon court approval of the SDNY Settlement, but, otherwise, does not settle any other investigations that have been or might be conducted by other law enforcement agencies or offices;
- b. TCM will withdraw its Petition for Reconsideration and not pursue any other objections presently before USAC and the Commission related to claims involving the \$7,460,884 in Lifeline reimbursements held by USAC, including the Letter from Steve Augustino, Counsel for TCM, Kelley Drye & Warren, LLP, to Michelle Garber, USAC (May 9, 2016) and *Total Call Mobile, Inc.*, NAL/Act. No. 201632080004, Response to Paragraph 102 of the Notice of Apparent Liability for Forfeiture, FCC 16-44 (2016); and
- c. TCM agrees not to initiate any additional actions or proceedings, including before any court or tribunal, seeking payments for Lifeline services that are the subject of the Investigation.

36. *Modifications.* This Consent Decree cannot be modified without the advance written consent of both Parties.

37. *Paragraph Headings.* The headings of the paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

38. *Authorized Representative.* Each Party represents and warrants to the other that it has full power and authority to enter into this Consent Decree. Each person signing this Consent Decree on behalf of a Party hereby represents that he or she is fully authorized by the Party to execute this Consent Decree and to bind the Party to its terms and conditions.

39. *Counterparts.* This Consent Decree may be signed in counterpart (including electronically or by facsimile). Each counterpart, when executed and delivered, shall be an original, and all of the counterparts together shall constitute one and the same fully executed instrument.

Travis LeBlanc
Chief
Enforcement Bureau

Date

Yasunori Matsuda
Chief Executive Officer
Total Call Mobile, LLC

Date

TESTIMONY OF FCC COMMISSIONER AJIT PAI—July 12, 2016

Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee, thank you for giving me the opportunity to testify this morning. Since 2012, it has been an honor to work with you on a wide variety of issues, from freeing up more spectrum for consumer use to encouraging the deployment of high-speed broadband.

I want to begin by expressing my gratitude to the Members of this Subcommittee for the bipartisan leadership you have shown on a number of important matters, particularly those involving public safety.

The Kari's Law Act of 2016 is one such example. Dialing 911 should always connect someone in need with emergency personnel who can help. But this doesn't always happen. In some hotels, offices, college dorms, and other large buildings, calls to 911 won't go through because the multi-line telephone systems (MLTS) in use in those facilities require callers to dial a "9" before placing the call. The Kari's Law Act of 2016 would help fix this problem by requiring MLTS systems to have a default configuration that allows direct 911 calling.

I want to thank the Subcommittee for holding a hearing on the Kari's Law Act three months ago. I can say that your efforts, along with the courageous work of Hank Hunt, Kari's father, and many others, are making a difference. Indeed, just one month after your hearing, this legislation passed the House. I hope the Senate moves quickly to pass the companion legislation introduced by Senators Deb Fischer, Amy Klobuchar, John Cornyn, Ted Cruz, and Brian Schatz, and that this common-sense, bipartisan public safety measure soon becomes law.

I would like to focus the rest of my testimony on two other important topics: the FCC's set-top box proposal and the waste, fraud, and abuse that have plagued the FCC's Lifeline program.

Set-Top Box.—I am deeply concerned about the FCC's proposed set-top box rules. The public input submitted to the agency in recent weeks makes clear that I am not alone. During my time at the Commission, I've never seen such a large and diverse coalition come together with respect to any other issue. Chairman Wheeler's proposal has united content creators and cable operators. It has brought together Democrats and Republicans, conservatives, moderates, and liberals. And it has led to civil rights organizations,¹ privacy advocates,² environmental organizations,³ and free-market proponents⁴ making common cause—all in opposition to the FCC's proposal. The breadth and depth of opposition signal how badly the FCC's scheme misses the mark. I cannot put it any better than Commissioner Rosenworcel did last month when she said that the FCC's proposal has "real flaws" and "[w]e need to find another way forward."⁵

What should that way forward look like?

First, it must protect the intellectual property of content creators. Currently, video programmers use licensing and contractual agreements with cable operators to protect and control their content. But as Senate Minority Leader Harry Reid has pointed out, under the FCC's proposal, it is "unclear what . . . duty [third-party set-top box providers] would have to protect programming content or otherwise comply with the licensing agreements" and whether "programmers would have any ability to enforce these agreements directly with the third-party providers."⁶ This, according to Senator Dianne Feinstein, raises concerns about whether "third-parties could create devices that enable piracy and hinder the ability of content providers to control their creative work."⁷ Senator Bill Nelson, the Ranking Member of the Senate Commerce Committee, has said that FCC rules should not "be the means by which third parties gain, for their own commercial advantage, the ability to alter, add to, or inter-

¹ See, e.g., Letter from Brent Wilkes, National Executive Director, League of United Latin American Citizens, to the Honorable Tom Wheeler, Chairman, FCC, MB Docket No. 15-64 (Feb. 17, 2016).

² See, e.g., Electronic Privacy Information Center Comments, MB Docket No. 16-42 and CS Docket No. 97-80 (Apr. 22, 2016).

³ See, e.g., Noah Horowitz, *FCC Proposal Could Undermine Efforts to Bring Down National Set-Top Box Energy Use*, NRDC (May 04, 2016), <https://www.nrdc.org/experts/noah-horowitz/fcc-proposal-could-undermine-efforts-bring-down-national-set-top-box-energy> (last visited July 7, 2016).

⁴ See, e.g., TechFreedom and Competitive Enterprise Institute Comments, MB Docket No. 16-42 and CS Docket No. 97-80 (Apr. 22, 2016).

⁵ David Shephardson, *U.S. Cable Industry Proposes Allowing Consumers to Scrap Set-Top Boxes*, REUTERS (June 17, 2016), <http://www.reuters.com/article/us-fcc-tv-regulations-idUSKCN0Z32DK>.

⁶ Letter from Senator Harry Reid to the Honorable Tom Wheeler, Chairman, FCC (June 14, 2016).

⁷ Letter from Senator Dianne Feinstein to the Honorable Tom Wheeler, Chairman, FCC (May 25, 2016).

fere with programming provided by content providers.”⁸ But unfortunately, that’s just what the FCC’s proposed rules would do. They would facilitate piracy. They would allow third-party set-top box manufacturers to insert their own advertising into programmers’ content. And they would allow those same manufacturers to remove advertising from that content—all without the programmers’ consent.

Relatedly, we must pay special attention to the concerns that have been raised about the impact of the FCC’s proposal on minority programmers. As Reverend Jesse Jackson has put it, the FCC’s proposed rules would allow third-party set-top box manufacturers to “pull networks apart, ignore copyright protections and dismantle the local and national advertising streams that have traditionally supported high quality, multicultural content.”⁹ He continued, “[t]he result [would be] a deep threat to the entire creative ecosystem, and especially smaller, independent and diverse networks and programmers that often lack the deep pocket resources to weather this type of transition.”¹⁰ Moreover, the FCC’s proposal would allow third-party set-top box manufacturers to rearrange cable operators’ channel lineups, to the detriment of minority programmers. This digital redlining shouldn’t be permitted.

That’s why Representative Yvette Clarke of this Subcommittee and many other members of the Congressional Black Caucus have called for the FCC to stop pushing this proposal until it analyzes the “impact of the proposed rules on diversity of programming, [and] independent and minority television programming.”¹¹ A similar request has been made by major civil rights organizations, including the League of United Latin American Citizens (LULAC) and the National Urban League.¹² The FCC should listen to what these voices are saying.

Second, we must address the special challenges faced by small video providers. The record makes clear that it would be very expensive for all video providers to comply with the Commission’s proposed rules. And as is so often the case, these rules would have a disproportionate impact on small companies. Indeed, the American Cable Association has stated that the FCC’s proposed rules would force over 200 small cable operators to either go out of business or stop offering video service.¹³ And the message from small telecommunications carriers that are in the video business has been similar.¹⁴ Small wonder, then, that Capitol Hill is also concerned. A bipartisan group of 61 U.S. Congressmen, led by Representative Kevin Cramer, recently told the Commission that it is “concerned the proposal threatens the economic welfare of small pay-TV companies providing both vital communications services to rural areas and competitive alternatives to consumers in urban markets.”¹⁵ This concern was reiterated by another bipartisan group of ten U.S. Senators who stressed that “[s]mall providers will not be able to afford the costs that could be associated with building new architecture to comply with the proposed rule.”¹⁶

The impact of the FCC’s proposed rules would thus be particularly severe for rural Americans because they are disproportionately served by smaller operators. They will be left with fewer choices for video service. Moreover, the FCC’s rules will hamper rural broadband deployment as small operators devote limited funds to complying with the FCC’s set-top box rules rather than delivering better, faster, and cheaper Internet access.

Third, we must protect Americans’ privacy. Senate Minority Leader Harry Reid has pointed out that many third-party manufacturers will find “real value . . . not

⁸Letter from Senator Bill Nelson to the Honorable Tom Wheeler, Chairman, FCC (Feb. 12, 2016).

⁹Jesse L. Jackson, *Future of TV Must Not Sacrifice Minority Media: Jesse Jackson*, USA TODAY (June 6, 2016), <http://www.usatoday.com/story/opinion/2016/06/06/fcc-set-top-box-proposal-minority-impact-opposition-media-diversity-column/85301308t>.

¹⁰*Id.*

¹¹Letter from Representative Yvette Clarke *et al.*, to the Honorable Tom Wheeler, Chairman, FCC (Apr. 22, 2016).

¹²See Letter from Marc H. Morial, President and CEO, National Urban League *et al.*, to the Honorable Tom Wheeler, Chairman, FCC, MB Docket No. 16–42, CS Docket No. 97–80, and MB Docket No. 16–41 (Mar. 21, 2016).

¹³ACA Applauds Senate Letter Asking FCC to Press Pause on Set-Top Box Proceeding, AMERICAN CABLE ASSOCIATION (May 27, 2016), <http://www.americancable.org/node/5736> (last visited July 7, 2016).

¹⁴See generally NCTA—The Rural Broadband Association Comments, MB Docket No. 16–42 and CS Docket No. 97–80 (Apr. 22, 2016); WTA—Advocates for Rural Broadband Comments, MB Docket No. 16–42 and CS Docket No. 97–80 (Apr. 22, 2016).

¹⁵Letter from Representative Kevin Cramer *et al.*, to the Honorable Tom Wheeler, Chairman, FCC (May 5, 2016).

¹⁶Letter from Senator Steve Daines *et al.*, to the Honorable Tom Wheeler, Chairman, FCC (May 26, 2016).

in producing or selling the [set-top] box but in the data that the box will collect.”¹⁷ That is why Senator Patrick Leahy, Ranking Member of the Senate Judiciary Committee, has stressed that the “same Federal privacy protections and enforcement mechanisms that apply to proprietary set-top boxes today should apply to third-party navigation systems as well.”¹⁸ Unfortunately, the FCC’s proposal fails this basic test. There should not be one set of privacy rules for cable operators’ set-top boxes and another for third-party boxes. There should not be one enforcement mechanism for cable operators’ set-top boxes and another for third-party boxes. The regulatory playing field should be level. *All* customers should have the same privacy protections.

Fourth, we must embrace the technology of the future rather than cling to the hardware of the past. I don’t believe that the American people want more set-top boxes in their homes. But that’s precisely what the FCC’s plan would produce. To comply with the proposed rules, video providers would likely place a new gateway device into each subscriber’s home to join the set-top box or boxes that are already there. Thus, the FCC’s proposal would shackle us to an old technology that nobody seems to want. Echoing the sentiments of Senator Nelson, I, and millions of others, “long for the day when the clunky set-top box fades away.”¹⁹

We need to focus on the future. Our goal should not be to have more boxes. Nor should it be to “unlock the box.” It should be to get rid of the set-top box altogether. And that goal is now within our grasp. Americans are increasingly accessing video programming through apps. And with an app, there is no need to have a set-top box. So instead of paying a monthly fee to rent a box from a cable operator, your smartphone, tablet, or smart television can be your navigation device.

I believe that the FCC should welcome and encourage the market’s movement in the direction of apps. That’s why I thought that the Commission’s Notice of Proposed Rulemaking should have given equal and fair treatment to the app-based solution set forth by the FCC’s Downloadable Security Technology Advisory Committee, rather than dismissing it in three cursory and critical paragraphs. And that’s why I note with interest the recent industry proposal that embraces an app-based approach. My office is currently reviewing that proposal and meeting with a wide range of stakeholders to see what they think about it. I look forward to hearing the views of the Members of this Subcommittee on this alternative proposal, too.

Lifeline Abuse.—The FCC must be vigilant in stopping abuse of the Universal Service Fund. Recall that this program is funded by a tax on the phone bills that consumers pay each month. That tax is now at 17.9 percent, nearly double what it was in January 2009. Hard-working Americans deserve to know that the money they contribute each month to the Fund is not wasted or put to fraudulent use. So I applaud the decision of House Energy and Commerce Committee Chairman Fred Upton to launch an investigation into the waste, fraud, and abuse in the Lifeline program.

Unfortunately, the Commission’s recent investigation of Total Call Mobile revealed much about the dubious practices of many wireless resellers. We learned, for example, how Total Call Mobile’s sales agents repeatedly registered duplicate subscribers (that is, individuals receiving multiple subsidies) and used fake Social Security numbers to register duplicate subscribers—all resulting in the Universal Service Administrative Company (USAC) finding 32,498 enrolled Lifeline duplicates. We learned how Total Call Mobile’s sales agents repeatedly overrode the safeguards of the National Lifeline Accountability

Database (NLAD)—abuse so far-reaching that at one point, 99.8 percent of Total Call Mobile’s new subscribers were a result of overrides. We also learned that Total Call Mobile was not alone. Its sales agents testified that they worked side-by-side with sales agents and supervisors who worked at various points with other Lifeline wireless resellers.

After the revelations of the Total Call Mobile case, I began investigating the effectiveness of our Federal safeguards. What I have found so far is disturbing.

Some background. Duplicate subscribers have long plagued Lifeline. To combat this problem, the FCC in 2012 prohibited a single household from obtaining more than one Lifeline subscription. It also established the NLAD. Administered by the USAC at the FCC’s direction, the NLAD is designed to help carriers identify and prevent duplicate claims for Lifeline service. But is it really stopping such duplicate claims?

¹⁷ *Supra* note 6.

¹⁸ Letter from Senator Patrick Leahy to the Honorable Tom Wheeler, Chairman, FCC (May 26, 2016).

¹⁹ *Supra* note 8.

Although my investigation is still ongoing, initial results suggest that American taxpayers should be concerned. The extent of waste, fraud, and abuse in the program appears greater than I imagined.

First, USAC explained that the NLAD determines whether a Lifeline subscription would duplicate another at that same address. But wireless resellers may override a duplicate determination, called an independent economic household (IEH) override, and may do so without USAC oversight. An applicant (or, more likely, an unscrupulous wireless reseller) need only check a box. USAC's data reveal that wireless resellers enrolled 4,291,647 subscribers using the IEH override process since October 2014. That's more than 35.3 percent of all subscribers enrolled in NLAD-participating states during that period. That's more than the population of the State of Oregon. And the annual price to the taxpayer is steep—about \$476 million.

Second, USAC reported that at least 16 other major Lifeline wireless resellers have used similar tactics as Total Call Mobile. I asked USAC whether these wireless resellers enrolled duplicate subscribers, and indeed they did. Between October 2014 and May 2015, USAC discovered 213,283 duplicates among these wireless resellers. One year of service for these duplicates costs taxpayers almost \$23.7 million.

Third, USAC explained that the NLAD does not prevent wireless resellers from requesting and receiving Federal subsidies for subscribers who are not enrolled in the NLAD. In other words, a wireless reseller may seek Federal funds for phantom subscribers—subscribers who aren't subject to Federal safeguards at all—and can get away with it unless they're caught after the fact. And in a 16-state sample, these wireless resellers exploited that loophole 460,032 times, costing taxpayers almost \$4.3 million.

Fourth, USAC explained that the NLAD verifies the identity of an applicant using a third-party identity verification (TPIV) process in which an applicant's first name, last name, date of birth, and the last four digits of his or her Social Security number are matched against official records. But wireless resellers can override that safeguard, and before February 2, 2015, they did so without any Federal oversight. From October 2014 through February 2015, 10 wireless resellers overrode Federal safeguards more than half the time, with seven—like Total Call Mobile—overriding the TPIV process more than 90 percent of the time. Roughly one-third of applicants enrolled by wireless resellers during that period, or 821,482 subscribers, were enrolled using a TPIV override.

On February 2, 2015, USAC implemented a new process for TPIV overrides. Now, a wireless reseller is supposed to review the appropriate documents for an applicant and certify to USAC that it has done so. USAC staff reviews that certification—but not the actual underlying documents—before authorizing a TPIV override. USAC's data reveal that wireless resellers enrolled 277,599 subscribers through the new TPIV process, with some wireless resellers relying on that process much more heavily than others. In all, the annual cost of subscribers enrolled through TPIV overrides approaches \$122 million.

Fifth, USAC explained that the NLAD authenticates an applicant's address with the U.S. Post Office database but that wireless resellers can override a failed address authentication without any review by USAC staff. USAC's data reveal that wireless resellers enrolled 494,921 subscribers through the address override process since October 2014, with some wireless resellers relying on that process much more heavily than others. The annual cost of subscribers enrolled through address overrides is almost \$55 million.

Putting these numbers together, wireless resellers provided service to 213,283 known duplicates, claimed support for up to 460,032 phantom customers, and enrolled 5,885,649 subscribers by overriding Federal safeguards between October 2014 and April 2016. That likely resulted in hundreds of millions of Universal Service Fund money—taxpayer money—going not to deserving low-income consumers but to wireless resellers. That's outrageous. I plan to work with this Committee and my colleagues to stop this spending spree immediately.

Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee, thank you again for holding this hearing and inviting me to testify. I look forward to answering your questions, listening to your views, and continuing to work with you and your staff in the days ahead.

January 3, 2017

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of))
Lifeline and Link Up Reform and	)	WC Docket No. 11-42
Modernization))
Telecommunications Carriers Eligible for	)	WC Docket No. 09-197
Universal Service Support))

PETITION FOR RECONSIDERATION OF NATIONAL TRIBAL
TELECOMMUNICATIONS ASSOCIATION

I. Introduction

Pursuant to Section 1.429 of the Commission's rules, the National Tribal Telecommunications Association ("NTTA") submits this Petition for Reconsideration of the Wireline Competition Bureau's ("Bureau") *Order* adopted in the Federal Communications Commission's ("FCC" or "Commission") above-captioned proceeding conditionally granting designation to certain mobile wireless resellers to be Lifeline Broadband Providers ("LBP") under the Commission's Lifeline universal service support mechanism.¹

NTTA's member companies consist of Tribally-owned communications companies including Cheyenne River Sioux Telephone Authority, Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., Hopi Telecommunications, Inc., Mescalero Apache Telecom, Inc., Saddleback Communications, San Carlos Apache Telecommunications Utility, Inc., Tohono O'odham Utility Authority, and Warm Springs Telecom. NTTA's mission is to be the national advocate for telecommunications service on behalf of its member companies and to provide guidance and assistance to members who are working to provide modern telecommunications services to Tribal lands.

NTTA members have long served their tribal communities and helped advance the communications priorities and goals of those communities as articulated by their tribal governments. The Commission has recognized this right of tribal governments since it determined that carriers seeking to be designated as eligible telecommunications carriers ("ETC") to serve tribal lands should petition the Commission, instead of state jurisdictions, which in turn would work with tribal governments to ensure the Commission's fiduciary duties were fulfilled.² Protection of tribal sovereign rights to determine how to advance communications priorities and goals coupled with a showing of the failure by the Bureau to follow procedures established by the Commission and set forth in its rules, form the basis of this petition for reconsideration.

In considering a petition for reconsideration, the Commission requires that petitioners "shall state with particularity the respects in which petitioner believes the action taken should be changed."³ As will be demonstrated, there are particular violations of Commission rules that warrant the reconsideration of the Bureau's decision in the *LBP Designation Order*. Further, the facts NTTA puts forward below are ones that were made to and known by the Commission. NTTA filed comments in the proceeding and explained that the rule at issue in this petition was not complied with by either the applicants for LBP designation or the Commission.⁴ NTTA, therefore, respectfully requests that the Commission consider the merits of this petition and reverse the Bureau's decision. NTTA further requests that the Commission make clear that any LBP applicant seeking to serve Tribal lands must comply with

¹ *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al., Order, DA 16-1325 (Dec. 1, 2016) (*LBP Designation Order*).

² See *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208 (2000) (2000 *Tribal Lifeline Order*).

³ 47 C.F.R. § 1.429(c).

⁴ 47 C.F.R. § 1.429(l)(2).

the requirements of section 54.202(c) and acknowledge its own need to comply with this rule.

II. PURSUANT TO COMMISSION RULES, TRIBAL GOVERNMENTS AND TRIBAL REGULATORY AUTHORITIES SHOULD HAVE RECEIVED NOTICE FROM THE APPLICANTS AND THE COMMISSION SHOULD HAVE PROVIDED NOTICE THAT IT WAS SEEKING COMMENT ON THE PETITIONS FOR DESIGNATION TO BE LBPs.

In the *2016 Lifeline Modernization Order*, the Commission retained the requirement that Lifeline providers be designated as ETCs, but it streamlined procedures for entities to be designated as LBPs.⁵ Streamlining of the process, however, did not relieve filing carriers of their obligation to provide a copy of their petition to affected tribal government and tribal regulatory authorities at the time they filed their petition with the Federal Communications Commission, nor did it relieve the Commission of its obligation to notify tribal governments and tribal regulatory authorities of requests made by carriers to serve tribal lands.⁶ The requirements of section 54.202(c) are important obligations the Commission must uphold as they are grounded in the Commission's Federal trust obligation and the tribes' sovereignty and self-determination rights. There is no evidence in the record of compliance with section 54.202(c) by the carriers granted LBP status in the *LBP Designation Order*. For this reason, the Commission should reconsider and reverse the Bureau's granting of LBP status to those petitioners that seek to serve on tribal lands.

A. Important Tribal Rights are Embodied in Section 54.202(c)

Section 54.202(c) of the Commission's rules traces its genesis back to a series of decisions made by the Commission beginning in 2000 that have continued through its 2016 decision in this proceeding. In 2000, the Commission took concrete steps to formalize its recognition of tribal sovereignty, self-determination, and its Federal trust obligation. The Commission recognized, through its *Tribal Policy Statement*, the unique legal relationship and Federal trust relationship it, as part of the Federal Government, has with tribal governments. It further recognized the tribal governments' "inherent sovereign powers over their members and territory."⁷ In order to foster better coordination between the FCC and tribal governments, the Commission committed to "consult[ing] with tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources."⁸

Concurrent with the adoption of the *Tribal Policy Statement*, the Commission also expounded on its authority, under section 214(e)(6) of the Telecommunications Act of 1996, to determine whether state commissions had jurisdiction over carriers seeking to serve tribal lands within their boundaries and designating ETCs to serve tribal lands where the Commission found the state commission lacked jurisdiction.⁹ As the Commission stated in the *2000 Tribal Lifeline Order*, "we are mindful that the Federal trust doctrine imposes on Federal agencies a fiduciary duty to conduct their authority in manner that protects the interest of the tribes."¹⁰

In 2005, the Commission took additional steps to formalize notice requirements it and carriers seeking designation to serve tribal lands would need to undertake in order to provide tribal governments and tribal regulatory authorities a meaningful opportunity to comment on petitions that would affect their tribal lands.¹¹ Applicants seeking designation for ETC status on tribal lands were required to provide

⁵ See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al., Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 4063, para. 223 (2016) (*2016 Lifeline Modernization Order*).

⁶ *Id.* at 4067, para. 284 ("All LBPs, regardless of whether they qualify for streamlined treatment, must meet the requirements for designation as a Lifeline-only ETC established in Section 214(e) of the Act and section 54.201 and 54.202 of the Commission's rules."). See 47 C.F.R. § 54.202(c) ("A common carrier seeking designation as an eligible telecommunications carrier under section 214(e)(6) for any part of Tribal lands shall provide a copy of its petition to the affected tribal government and tribal regulatory authority, as applicable, at the time it files its petition with the Federal Communications Commission. In addition, the Commission shall send any public notice seeking comment on any petition for designation as an eligible telecommunications carrier on Tribal lands, at the time it is released, to the affected tribal government and tribal regulatory authority, as applicable, by the most expeditious means available.").

⁷ See *Statement of Policy on Establishing Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080 (2000).

⁸ *Id.* at 4081.

⁹ *2000 Tribal Lifeline Order*, 15 FCC Rcd 12208.

¹⁰ *Id.* at 12263, para. 119.

¹¹ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 20 FCC Rcd 6371, 6400, para. 66 (2005).

copies of their petitions to the affected tribal governments and tribal regulatory authorities at the time of the filing of their application with the Commission. In addition, the Commission was required to send a copy of the public notice seeking comment on the petition to the tribal governments and regulatory authorities via overnight mail.¹² The 2005 *Tribal ETC Designation Order* adopted the requirement that carriers and the Commission provide notice to tribal governments that is today section 54.202(c) of the Commission's rules, which remains in effect.

B. Petitioners and the Commission Did Not Comply with the Requirements of 54.202(c)

NTTA filed comments on November 17, 2016, reminding the Commission of the obligations that exist under section 54.202(c).¹³ In that filing, NTTA noted that it had only anecdotal evidence of one petitioner seeking to comply with the requirements. In a subsequent review of the 21 applications filed to date that clearly intend to serve Tribal lands, NTTA found only two applications that cited their compliance with the requirements of 54.202(c).¹⁴ TracFone, which has applied for a nationwide grant, stated in its petition that "in accordance with 47 C.F.R. § 54.202(c), TracFone is sending a copy of its Petition to the relevant tribal governments and tribal regulatory authorities."¹⁵ Similarly, the petition filed by Commnet Wireless, LLC notes that "section 54.202(c) requires a common carrier that seeks designation as an ETC under Section 214(e)(6) on Tribal lands to provide a copy of its petition to the affected tribal government and tribal regulatory authority at the time it files its petition with the Commission."¹⁶ Commnet acknowledges such a requirement and certifies that a copy of its Petition will be provided to the Tribal governments and/or tribal regulatory authorities identified in [its petition] at the time of this [its] filing."¹⁷ No other applications certify their compliance.¹⁸

Applicants that failed to comply with this rule deny Tribal governments their rightful opportunity to review applications and evaluate whether those applicants will help advance the communications priorities and goals of the Tribal government. Such harm is an affront to Commission precedent and its trust obligations to Tribal governments which rely on the Commission to enforce its rules in protection of their interests.

Moreover, it is unclear whether the Commission itself provided any notice to the affected tribal governments. NTTA has consulted with some of the tribal governments that oversee their member companies and has not been able to identify a tribal government that was notified by the Commission of the existence of an application that sought designation to become an LBP on their Tribal lands.¹⁹ By failing to follow its own codified process, the Commission has also denied those affected Tribal governments an opportunity to review the applications.

As explained above, section 54.202(c) represents more than another requirement, it is the manifestation of the tribal sovereignty and Federal trust relationship between the Commission and tribal governments. As such, it is deserving of recognition and compliance. There is no evidence that the carriers granted LBP designations in the *LBP Designation Order* complied with their requirements under section 54.202(c). Moreover, it would appear that the Commission did not comply with its obligations under that rule either. Therefore, NTTA asks that the Commission reconsider the Bureau's actions and reverse the granting of the petitions until such time as the Commission is able to remedy these rule violations.

¹² *Id.* at 6401, para. 67. The overnight mail requirement was subsequently changes to be "the most expeditious means available." 47 C.F.R. § 54.202(c).

¹³ Comments of National Tribal Telecommunications Association, WC Docket No. 09-197, 11-42.

¹⁴ NTTA reviewed the Commission's designated page for Lifeline Broadband Provider Petitions and Public Comment Periods at <https://www.fcc.gov/lifeline-broadband-provider-petitions-public-comment-periods> (last visited Dec. 28, 2016). In reviewing the applications, NTTA was able to identify 21 applications that clearly intend to serve Tribal lands, six that exclude Tribal lands, and four that are unclear on whether the applicant intends to serve Tribal lands.

¹⁵ TracFone Wireless, Inc.'s Petition for Designation as a Lifeline Broadband Provider, WC Docket No. 09-197 (filed Oct. 31, 2016).

¹⁶ Commnet Wireless, LLC's Petition for Streamlined Designation as a Lifeline Broadband Provider Eligible Telecommunications Carrier, WC Docket No. 09-197 at 11 (filed Dec. 8, 2016).

¹⁷ Mescalero Apache Telecom, Inc was able to verify that its tribal government received a copy of TracFone's LBP petition.

¹⁸ NTTA does not consider the posting of LBP petitions filed, along with comment dates and states covered by petition, as adequate public notice.

III. THE COMMISSION SHOULD RECONSIDER THE BUREAU'S RECENT DESIGNATION OF TWO LBPs BECAUSE THEY WERE GRANTED BEFORE THE COMMENT PERIOD HAD ENDED.

The Commission must also reconsider the grant given to KonaTel and Freedom Pop because the comment period on the applications had not ended prior to the Bureau's granting of the LBP designation to these entities.¹⁹ As noted on the Commission's website, the deadline for filing comments on the KonaTel *Petition* was December 21, 2016. The deadline for filing comments on the *FreedomPop Petition* was December 10, 2016. The Commission, however, granted the petitions on December 1, 2016 thereby denying potential commenters a full opportunity to consider the merits of the applications. KonaTel and FreedomPop are two of the 21 applications that failed to comply with the requirements of section 54.202(c), a point that could have been raised in the record had the comment period been completed. NTTA, therefore, asks that the Commission reconsider the designation of LBP given by the Bureau to KonaTel and FreedomPop to afford the public a full opportunity to comment on their petitions.

IV. Conclusion

For the above enumerated reasons, the Commission should reconsider the Bureau's *LBP Designation Order*. As NTTA has demonstrated, the rules that were not complied with by either the applicants or the Commission are important to the on-going relationship between tribal governments and the Commission. They are relied upon to ensure the communications priorities and goals of the Tribal government are recognized. In addition, the Commission should reconsider the designations given to KonaTel and FreedomPop because the comment period for their petitions had not concluded prior to the Bureau's action granting the petitions.

Respectfully submitted,

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January 18, 2017

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC

In the Matter of)	
Telecommunications Carriers Eligible for	)	WC Docket No. 09-197
Universal Service Support)	
Petitions for Designation as a Lifeline	)	WC Docket No. 11-42
Broadband Provider)	

**RESPONSE AND OPPOSITION OF BOOMERANG WIRELESS, LLC D/B/A
ENTOUCH WIRELESS TO THE PETITION FOR RECONSIDERATION OF
NATIONAL TRIBAL TELECOMMUNICATIONS ASSOCIATION**

Boomerang Wireless, LLC d/b/a enTouch Wireless (Boomerang or the Company), by and through the undersigned counsel, respectfully submits this response and opposition to the National Tribal Telecommunications Association's (NTTA's)¹ petition for reconsideration of the Wireline Competition Bureau's (WCB's or Bureau's) De-

¹⁹ Petition of KonaTel Inc. for Streamlined Designation as a Lifeline Broadband Provider Eligible Telecommunications Carrier, WC Docket No. 09-197 (filed Nov. 21, 2016) (KonaTel Petition); Petition of STS Media, Inc. DBA FreedomPop for Streamlined Designation as a Lifeline Broadband Provider Eligible Telecommunications Carrier, WC Docket No. 09-197 (filed Nov. 10, 2016) (FreedomPop Petition).

¹ See Petition for Reconsideration of National Tribal Telecommunications Association, WC Docket Nos. 11-42, 09-197 (Jan. 3, 2017) (Petition). Notably, NTTA does not represent any sovereign Tribal nation or other Tribal authority, but rather is a coalition of Tribally-owned communications companies. Boomerang notes that not a single Tribal nation or organization that represents Tribal nations has objected to either the form or substance of Boomerang's LBP petition or designation.

ember 1, 2016 Order designating Boomerang as a Lifeline Broadband Provider (LBP).² Boomerang acknowledges NTTA's concerns regarding notice requirements for LBP petitions and the Commission's long-standing policy of recognizing the sovereignty of Tribal governments and to involve Tribal governments in policy decisions that affect Tribal consumers. However, the Petition presents no evidence of a material error or omission that would justify reconsideration or reversal of the LBP Designation Order. Neither the Company's petition for designation as an LBP nor the Commission's review and approval of it violated the Commission's rules with regard to LBP eligible telecommunications carrier (ETC) designations. Additionally, the streamlined process for the docketed filing and review of LBP petitions established in the Lifeline Modernization Order is consistent with processes employed by the Commission for streamlined review in other contexts, and provided NTTA and its members adequate notice and opportunity to comment on Boomerang's petition. Accordingly, the Petition should be denied.

Notwithstanding the foregoing, Boomerang is both cognizant and respectful of the sovereignty of Tribal governments and it is committed to notifying, and, if required, seeking approval from the relevant Tribal authorities in each state where it received LBP designation prior to providing services to Tribal consumers in those states. Moreover, Boomerang acknowledges that NTTA's Petition illustrates the potential for confusion about the LBP review and approval process. As discussed below, Boomerang would support certain actions by the Bureau to clarify these processes and avoid uncertainty going forward.

I. Standard of Review Under Section 1.429

NTTA submits its Petition pursuant to section 1.429 of the Commission's rules, which allows an interested party to seek reconsideration of a final order in a rule-making proceeding.³ The rule also states, however, that petitions for reconsideration "may be dismissed or denied by the relevant bureau(s) or office(s) [if they] . . . [f]ail to identify any material error, omission, or reason warranting reconsideration."⁴ As set forth in this response, the Petition fails to present any evidence of a material error or omission that would warrant reconsideration of the LBP Designation Order, and therefore should be denied.

II. Section 54.202(c) Does Not Apply to Petitions for LBP Designation

NTTA's Petition relies primarily on the argument that Boomerang and the Commission failed to comply with the procedural requirements of section 54.202(c) of the Commission's rules.⁵ Specifically, NTTA asserts that Boomerang was obligated to provide a copy of its LBP petition to "affected tribal government and tribal regulatory authorities at the time" that Boomerang submitted its petition to the Commission.⁶ NTTA bases its assertion on language in the Lifeline Modernization Order which states that "[a]ll LBP[s] . . . must meet the requirements for designation as a Lifeline-only ETC established in section 214(e) of the [Communications] Act and section 54.201 and 54.202 of the Commission's rules."⁷ However, a closer examination of section 54.202 and the Lifeline Modernization Order shows that subsection (c) does not apply to LBP petitions.

Through the Lifeline Modernization Order, the Commission codified the requirements for requests for LBP designation through a new subsection (d) to section 54.202.⁸ This new subsection states that "[a] common carrier seeking designation as a Lifeline Broadband Provider eligible telecommunications carrier must *meet the requirements of paragraph (a) of this section*."⁹ The adoption of separate requirements for LBP petitioners that expressly imposes only certain requirements of section

²See *Telecommunications Carriers Eligible for Universal Service Support, Petitions for Designation as a Lifeline Broadband Provider*, WC Docket Nos. 09-197, 11-42, Order, DA 16-1325 (WCB rel. Dec. 1, 2016) (LBP Designation Order). The LBP Designation Order was issued pursuant to the rule changes adopted in the Federal Communications Commission's (FCC's or Commission's) Lifeline Modernization Order. See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38 (rel. Apr. 27, 2016) (Lifeline Modernization Order).

³See 47 C.F.R. § 1.429.

⁴See 47 C.F.R. § 1.429(l).

⁵See Petition at 4-8.

⁶See *id.* at 4. NTTA further claims that the Commission was required to "notify tribal governments and tribal regulatory authorities of requests made by carriers to serve tribal lands." *Id.*

⁷See *id.*; see also Lifeline Modernization Order ¶284.

⁸See 47 C.F.R. § 54.202(d). The Commission also adopted a new subsection (e) to section 54.202, which addresses requests for expansion of an LBP's approved service area. See 47 C.F.R. § 54.202(e).

⁹See 47 C.F.R. § 54.202(d) (emphasis added).

54.202(a)¹⁰ on LBP applicants demonstrates that the Commission did not intend for subsection (c) to apply to LBP designation requests. Therefore, Boomerang was not required to provide copies of its petition to the relevant Tribal governments and Tribal regulatory authorities in the states where it was seeking LBP designation.

III. The Process for Reviewing and Approving LBP Petitions Is Consistent with the Commission's Processes for Streamlined Reviews in Other Contexts and Gave NTTA Adequate Notice of and Opportunity to Comment on Boomerang's Petition

The Commission's process for issuing the LBP Designation Order is consistent with traditional Commission practice regarding streamlined reviews. Applications chosen for streamlined review are presumed to be deemed granted unless the Commission informs the applicant otherwise during the streamlined review period.¹¹

In the Lifeline Modernization Order, the Commission explained that a provider's petition for LBP designation will be subject to "expedited review and will be deemed granted within 60 days of the submission of a completed filing" unless the Commission notifies the petitioner the designation is not "automatically effective."¹² The Commission further noted that petitions that do not meet the streamlining criteria will not receive a presumption of approval after 60 days but rather petitioners can expect action within six months of submission. It is clear from the language in the Lifeline Modernization Order that the Commission intended to adopt a streamlined procedure for LBP petitions consistent with its regulatory precedents¹³ on such matters.

As a result, the streamlined LBP petition process does not contemplate nor include a formal notice and comment procedure. The decision to set up a LBP tracker webpage was simply a courtesy done for informational purposes only, and the "comment deadline" indicated was neither an official act of the Commission nor the Bureau. It is well settled that informal postings or releases do not bind the Commission. For example, in *MCI v. FCC*, the court found that a Commission-issued press release was an unofficial, informal summary of agency action and could not be relied on as formal public notice.¹⁴ Comparably, here, the Bureau's LBP petitions webpage serves as a mere summary of LBP petition activity and cannot be relied on by NTTA or any other interested party as a legal mechanism establishing a formal comment cycle.

Though the Commission webpage does not constitute an official mechanism for comment, NTTA and its members had sufficient notice and opportunity to comment on Boomerang's petition. Boomerang's petition was electronically submitted and filed in a public docket designated to this proceeding. The requisite filing of the LBP designation petition in a pre-designated public docket afforded NTTA and its members adequate notice and opportunity to comment or oppose if they sought fit. Indeed, NTTA did in fact file comments with the Commission on November 17, 2016 regarding petitions filed for LBP designation at that time, and specifically referenced Boomerang's petition. Yet, NTTA raised no substantive issues about the petitions at that time. Thus, any claim by NTTA that it lacked notice of Boomerang's petition is moot and does not warrant reconsideration of Boomerang's LBP designation.

Pursuant to the Lifeline Modernization Order, the Commission may approve a streamlined LBP petition at any point within 60 days of submission of a completed LBP petition.¹⁵ Therefore, the grant of Boomerang's LBP designation does not warrant a reconsideration of the Commission's decision.

¹⁰ See Lifeline Modernization Order ¶284, n.746 (noting that the requirement to submit a 5-year improvement plan as required under section 54.202(a) would not apply to LBPs).

¹¹ See *id.* ¶¶278, 281; see also *Worldcom, Inc. et al. v. FCC and U.S.A.* No. 99-1395 (D.C. Cir. 1974) (noting that in the Interexchange Proceeding, the Commission adopted streamlined procedures whereby business service tariffs filed by AT&T were given streamlined processing whereby they were "presumed lawful" upon filing and would become effective after a fourteen day notice period); *Streamlining the International Section 214 Authorization Process and Tariff Requirements*, IB Docket No. 98-118, Report and Order, FCC 96-79 (rel. Feb. 29, 1996) (International Section 214 Order) (explaining that international section 214 applications are deemed automatically granted upon acceptance for streamlined processing); *Review of Commission Consideration of Applications under the Cable Landing License Act*, IB Docket No. 00-106, Report and Order, FCC 01-332 (rel. Dec. 14, 2001) (Cable Landing License Order).

¹² See Lifeline Modernization Order ¶278 (indicating petitions that do not qualify for streamlined processing will not be presumed to have LBP status approval) (emphasis added).

¹³ See generally International Section 214 Order; Cable Landing License Order.

¹⁴ See generally *MCI v. FCC*, 515 F.2d 385 (D.C. Cir. 1974).

¹⁵ See Lifeline Modernization Order ¶278 (stating that LBP petitions eligible for streamlined processing "will be deemed granted within 60 days of the submission . . .").

IV. Boomerang Will Notify, and If Required, Seek Approval from the Relevant Tribal Authorities Prior to Providing Lifeline Service on Tribal Lands

While Boomerang respectfully opposes NTTA's Petition, it fully supports Commission policy recognizing the sovereignty of Tribal nations and similarly respects the sovereignty of all relevant Tribal governments and authorities throughout its LBP service area. Boomerang also acknowledges the Commission's policies designed to address the "the difficulties many Tribal consumers face in gaining access to basic services" and the "important role of universal service support in helping to provide telecommunications services to the residents of Tribal lands."¹⁶ As such, Boomerang commits to notify and seek approval, if required, from the relevant Tribal authorities in each of the states where it was—or may in the future be—granted LBP designation prior to providing service to Tribal residents.

Boomerang is a well-established provider of Lifeline services. The Company's business model includes a focus on providing service to residents on Tribal lands, and Boomerang currently provides Lifeline services to Tribal residents in 12 states. As a result of this experience, Boomerang has a unique understanding of the requirements to provide Tribal Lifeline service in various parts of the country. As it has done with respect to its Lifeline voice offerings, Boomerang will notify and seek the requisite approvals from the appropriate Tribal government or authority prior to offering Lifeline broadband services to residents of Tribal lands. Moreover, Boomerang previously agreed that it would not provide Lifeline voice services in certain territories served by Tribally-owned providers in Arizona, New Mexico and South Dakota, and will honor those agreements with respect to its Lifeline broadband services as well. Boomerang submits that these commitments will ensure that its Lifeline broadband service will best serve the interests of Tribal subscribers as well as advance the communications priorities and goals of Tribal authorities in each jurisdiction it serves.

V. NTTA's Petition Illustrates that Clarification from the Bureau Regarding the LBP Designation Process Is Warranted

Despite the deficiencies in the Petition that make reconsideration or reversal of the LBP Designation Order unwarranted, NTTA's request does illustrate the potential for confusion regarding the appropriate process for LBP petitions. As such, Boomerang would support certain actions by the Bureau to provide clarity about LBP petition requirements, and the process for reviewing and approving such petitions on a prospective basis, including the following:

- Issuance of guidance to clarify that section 54.202(c) does not apply in the LBP context in light of the adoption of section 54.202(d);
- Removal of the "Comment Deadline" column from the LBP petitions "tracker" page on the Commission's website and adoption of a formal mechanism to clarify expectations regarding streamlined LBP applications modeled after the approach for streamlined processing that is used for international section 214 applications wherein the Commission issues a Public Notice noting the presumption of approval at any point within 60 days after submission of a petition that qualifies for streamlined processing without establishing a formal comment period; and
- Issuance of a public notice explaining that a streamlined LBP petition may be acted upon at any point within 60 days after submission, which would make clear that interested parties should submit comments on the petition as soon as possible.

Boomerang submits that these clarifications would help manage public expectations of the LBP review and approval process, and would prevent uncertainty going forward.¹⁷

VI. Conclusion

Boomerang respects the sovereignty of Tribal nations and understands the importance of ensuring that these entities have notice from service providers prior to commencement of service on sovereign Tribal lands. However, for the reasons set forth in this response, and in light of Boomerang's commitments to cooperate with the ap-

¹⁶ *Id.* ¶206.

¹⁷ The Public Notice requirement contemplated herein should apply on a prospective basis only as new petitions for LBP designation are filed.

properiate Tribal authorities prior to providing Lifeline broadband services in Tribal areas, the Petition should be denied.

Respectfully submitted,

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January 18, 2017

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC

In the Matter of)	
Telecommunications Carriers Eligible for	)	WC Docket No. 09-197
Universal Service Support)	
)	
Petitions for Designation as a Lifeline	)	WC Docket No. 11-42
Broadband Provider)	

RESPONSE AND OPPOSITION OF KONATEL, INC. TO THE PETITION FOR
RECONSIDERATION OF NATIONAL TRIBAL TELECOMMUNICATIONS
ASSOCIATION

KonaTel, Inc. (KonaTel or the Company), by and through the undersigned counsel, respectfully submits this response and opposition to the National Tribal Telecommunications Association's (NTTA's)¹ petition for reconsideration of the Wireline Competition Bureau's (WCB's or Bureau's) December 1, 2016 Order designating KonaTel as a Lifeline Broadband Provider (LBP).² KonaTel acknowledges NTTA's concerns regarding notice requirements for LBP petitions and the Commission's long-standing policy of recognizing the sovereignty of Tribal governments and to involve Tribal governments in policy decisions that affect Tribal consumers. However, the Petition presents no evidence of a material error or omission that would justify reconsideration or reversal of the LBP Designation Order. Neither the Company's petition for designation as an LBP nor the Commission's review and approval of it violated the Commission's rules with regard to LBP eligible telecommunications carrier (ETC) designations. Additionally, the streamlined process for the docketed filing and review of LBP petitions established in the Lifeline Modernization Order is consistent with processes employed by the Commission for streamlined review in other contexts, and provided NTTA and its members adequate notice and opportunity to comment on KonaTel's petition. Accordingly, the Petition should be denied.

Notwithstanding the foregoing, KonaTel is both cognizant and respectful of the sovereignty of Tribal governments and it is committed to notifying, and, if required, seeking approvals from the relevant Tribal authorities in each state where it received LBP designation prior to providing services to Tribal consumers in those states. Moreover, KonaTel acknowledges that NTTA's Petition illustrates the potential for confusion about the LBP review and approval process. As discussed below, KonaTel would support certain actions by the Bureau to clarify these processes and avoid uncertainty going forward.

¹See Petition for Reconsideration of National Tribal Telecommunications Association, WC Docket Nos. 11-42, 09-197 (Jan. 3, 2017) (Petition). Notably, NTTA does not represent any sovereign Tribal nation or other Tribal authority, but rather is a coalition of Tribally-owned communications companies. KonaTel notes that not a single Tribal nation or organization that represents Tribal nations has objected to either the form or substance of KonaTel's LBP petition or designation.

²See *Telecommunications Carriers Eligible for Universal Service Support, Petitions for Designation as a Lifeline Broadband Provider*, WC Docket Nos. 09-197, 11-42, Order, DA 16-1325 (WCB rel. Dec. 1, 2016) (LBP Designation Order). The LBP Designation Order was issued pursuant to the rule changes adopted in the Federal Communications Commission's (FCC's or Commission's) Lifeline Modernization Order. See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al., Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38 (rel. Apr. 27, 2016) (Lifeline Modernization Order).

I. Standard of Review Under Section 1.429

NTTA submits its Petition pursuant to section 1.429 of the Commission's rules, which allows an interested party to seek reconsideration of a final order in a rule-making proceeding.³ The rule also states, however, that petitions for reconsideration "may be dismissed or denied by the relevant bureau(s) or office(s) [if they] . . . [f]ail to identify any material error, omission, or reason warranting reconsideration."⁴ As set forth in this response, the Petition fails to present any evidence of a material error or omission that would warrant reconsideration of the LBP Designation Order, and therefore should be denied.

II. Section 54.202(c) Does Not Apply to Petitions for LBP Designation

NTTA's Petition relies primarily on the argument that KonaTel and the Commission failed to comply with the procedural requirements of section 54.202(c) of the Commission's rules.⁵ Specifically, NTTA asserts that KonaTel was obligated to provide a copy of its LBP petition to "affected tribal government and tribal regulatory authorities at the time" that KonaTel submitted its petition to the Commission.⁶ NTTA bases its assertion on language in the Lifeline Modernization Order which states that "[a]ll LBPs . . . must meet the requirements for designation as a Lifeline-only ETC established in section 214(e) of the [Communications] Act and section 54.201 and 54.202 of the Commission's rules."⁷ However, a closer examination of section 54.202 and the Lifeline Modernization Order shows that subsection (c) does not apply to LBP petitions.

Through the Lifeline Modernization Order, the Commission codified the requirements for requests for LBP designation through a new subsection (d) to section 54.202.⁸ This new subsection states that "[a] common carrier seeking designation as a Lifeline Broadband Provider eligible telecommunications carrier must *meet the requirements of paragraph (a) of this section*."⁹ The adoption of separate requirements for LBP petitioners that expressly imposes only certain requirements of section 54.202(a)¹⁰ on LBP applicants demonstrates that the Commission did not intend for subsection (c) to apply to LBP designation requests. Therefore, KonaTel was not required to provide copies of its petition to the relevant Tribal governments and Tribal regulatory authorities in the states where it was seeking LBP designation.

III. The Process for Reviewing and Approving LBP Petitions Is Consistent with the Commission's Processes for Streamlined Reviews in Other Contexts and Gave NTTA Adequate Notice of and Opportunity to Comment on KonaTel's Petition

The Commission's process for issuing the LBP Designation Order is consistent with traditional Commission practice regarding streamlined reviews. Applications chosen for streamlined review are presumed to be deemed granted unless the Commission informs the applicant otherwise during the streamlined review period.¹¹

In its Petition, NTTA maintains the Commission's actions were improper and warrant reconsideration of the LBP designation to KonaTel because "the comment period on the applications had not ended prior to the Bureau's granting of" LBP designation KonaTel.¹²

NTTA fails, however, to acknowledge the specific parameters of what it means for a petition to be approved for streamlined processing. Commission precedent with

³ See 47 C.F.R. § 1.429.

⁴ See 47 C.F.R. § 1.429(l).

⁵ See Petition at 4–8.

⁶ See *id.* at 4. NTTA further claims that the Commission was required to "notify tribal governments and tribal regulatory authorities of requests made by carriers to serve tribal lands." *Id.*

⁷ See *id.*; see also Lifeline Modernization Order ¶284.

⁸ See 47 C.F.R. § 54.202(d). The Commission also adopted a new subsection (e) to section 54.202, which addresses requests for expansion of an LBP's approved service area. See 47 C.F.R. § 54.202(e).

⁹ See 47 C.F.R. § 54.202(d) (emphasis added).

¹⁰ See Lifeline Modernization Order ¶284, n.746 (noting that the requirement to submit a 5-year improvement plan as required under section 54.202(a) would not apply to LBPs).

¹¹ See *id.* ¶¶278, 281; see also *Worldcom, Inc. et al. v. FCC and U.S.A.*, No. 99-1395 (D.C. Cir. 1974) (noting that in the Interexchange Proceeding, the Commission adopted streamlined procedures whereby business service tariffs filed by AT&T were given streamlined processing whereby they were "presumed lawful" upon filing and would become effective after a fourteen day notice period); *Streamlining the International Section 214 Authorization Process and Tariff Requirements*, IB Docket No. 98-118, Report and Order, FCC 96-79 (rel. Feb. 29, 1996) (International Section 214 Order) (explaining that international section 214 applications are deemed automatically granted upon acceptance for streamlined processing); *Review of Commission Consideration of Applications under the Cable Landing License Act*, IB Docket No. 00-106, Report and Order, FCC 01-332 (rel. Dec. 14, 2001) (Cable Landing License Order).

¹² See Petition at 8.

streamlined procedures illustrates that applications that meet the specified streamlining criteria are expected to be noncontroversial and as such it is presumed that they will be deemed granted.¹³ In this case, the Commission's LBP Designation Order confirms this assessment by explaining "there is no contradictory evidence available to us raising concern" about KonaTel's LBP petition or any other LBP petition granted.¹⁴

In the Lifeline Modernization Order, the Commission explained that a provider's petition for LBP designation will be subject to "expedited review and will be deemed granted within 60 days of the submission of a completed filing" unless the Commission notifies the petitioner the designation is not "automatically effective."¹⁵ The Commission further noted that petitions that do not meet the streamlining criteria will not receive a presumption of approval after 60 days but rather petitioners can expect action within six months of submission. It is clear from the language in the Lifeline Modernization Order that the Commission intended to adopt a streamlined procedure for LBP petitions consistent with its regulatory precedents¹⁶ on such matters.

As a result, the streamlined LBP petition process does not contemplate nor include a formal notice and comment procedure. The decision to set up a LBP tracker webpage was simply a courtesy done for informational purposes only, and the "comment deadline" indicated was neither an official act of the Commission nor the Bureau. It is well settled that informal postings or releases do not bind the Commission. For example, in *MCI v. FCC*, the court found that a Commission-issued press release was an unofficial, informal summary of agency action and could not be relied on as formal public notice.¹⁷ Comparably, here, the Bureau's LBP petitions webpage serves as a mere summary of LBP petition activity and cannot be relied on by NTTA or any other interested party as a legal mechanism establishing a formal comment cycle.

Though the Commission webpage does not constitute an official mechanism for comment, NTTA and its members had sufficient notice and opportunity to comment on KonaTel's petition. KonaTel's petition was electronically submitted and filed in a public docket designated to this proceeding. The requisite filing of the LBP designation petition in a pre-designated public docket afforded NTTA and its members adequate notice and opportunity to comment or oppose if they sought fit. Indeed, NTTA did in fact file comments with the Commission on November 17, 2016 regarding petitions filed for LBP designation at that time. Yet, NTTA raised no substantive issues about the petitions on file at that time—or at any time since about those or any other LBP petitions. Thus, any claim by NTTA that it lacked notice of KonaTel's petition appears to be one of form over substance and does not warrant reconsideration of KonaTel's LBP designation.

Pursuant to the Lifeline Modernization Order, the Commission may approve a streamlined LBP petition at any point within 60 days of submission of a completed LBP petition.¹⁸ Therefore, the grant of KonaTel's LBP designation does not warrant a reconsideration of the Commission's decision.

IV. KonaTel Will Notify, and If Required, Seek Approval from the Relevant Tribal Authorities Prior to Providing Lifeline Service on Tribal Lands

While KonaTel respectfully opposes NTTA's Petition, it fully supports Commission policy recognizing the sovereignty of Tribal nations and similarly respects the sovereignty of all relevant Tribal governments and authorities throughout its LBP service area. KonaTel also acknowledges the Commission's policies designed to address the "the difficulties many Tribal consumers face in gaining access to basic services" and the "important role of universal service support in helping to provide telecommunications services to the residents of Tribal lands."¹⁹ As such, KonaTel commits to notify and seek approval, if required, from the relevant Tribal authorities in each of the states where it was—or may in the future be—granted LBP designation prior to providing service to Tribal residents.

KonaTel's LBP designation is limited to 15 states. The Company commits that it will notify and, if required, seek approvals from the appropriate Tribal government

¹³ See e.g., Cable Landing License Order ¶13 (explaining that only applications that do not pose a risk will be streamlined); *Worldcom, Inc. et al., v. FCC and U.S.A.*

¹⁴ See LBP Designation Order ¶8.

¹⁵ See Lifeline Modernization Order ¶278 (indicating petitions that do not qualify for streamlined processing will not be presumed to have LBP status approval) (emphasis added).

¹⁶ See generally International Section 214 Order; Cable Landing License Order.

¹⁷ See generally *MCI v. FCC*, 515 F.2d 385 (D.C. Cir. 1974).

¹⁸ See Lifeline Modernization Order ¶278 (stating that LBP petitions eligible for streamlined processing "will be deemed granted within 60 days of the submission . . .").

¹⁹ *Id.* ¶206.

or authority prior to offering Lifeline broadband services to residents of Tribal lands (in the case of Oklahoma, KonaTel commits to notifying the Public Utilities Division of the Oklahoma Corporation Commission). KonaTel submits that these efforts will ensure that its Lifeline broadband service will best serve the interests of Tribal subscribers as well as advance the communications priorities and goals of Tribal authorities in each jurisdiction it serves.

V. NTTA's Petition Illustrates that Clarification from the Bureau Regarding the LBP Designation Process Is Warranted

Despite the deficiencies in the Petition that make reconsideration or reversal of the LBP Designation Order unwarranted, NTTA's request does illustrate the potential for confusion regarding the appropriate process for LBP petitions. As such, KonaTel would support certain actions by the Bureau to provide clarity about LBP petition requirements, and the process for reviewing and approving such petitions on a prospective basis, including the following:

- Issuance of guidance to clarify that section 54.202(c) does not apply in the LBP context in light of the adoption of section 54.202(d);
- Removal of the “Comment Deadline” column from the LBP petitions “tracker” page on the Commission’s website and adoption of a formal mechanism to clarify expectations regarding streamlined LBP applications modeled after the approach for streamlined processing that is used for international section 214 applications wherein the Commission issues a Public Notice noting the presumption of approval at any point within 60 days after submission of a petition that qualifies for streamlined processing without establishing a formal comment period; and
- Issuance of a public notice explaining that a streamlined LBP petition may be acted upon at any point within 60 days after submission, which would make clear that interested parties should submit comments on the petition as soon as possible.

KonaTel submits that these clarifications would help manage public expectations of the LBP review and approval process, and would prevent uncertainty going forward.²⁰

VI. Conclusion

KonaTel respects the sovereignty of Tribal nations and understands the importance of ensuring that these entities have notice from service providers prior to commencement of service on sovereign Tribal lands. However, for the reasons set forth in this response, and in light of KonaTel’s commitments to cooperate with the appropriate Tribal authorities prior to providing Lifeline broadband services in Tribal areas, the Petition should be denied.

Respectfully submitted,

JOHN J. HEITMANN
AVONNE BELL
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Kelley Drye & Warren LLP
Counsel for KonaTel, Inc.

²⁰The Public Notice requirement contemplated herein should apply on a prospective basis only as new petitions for LBP designation are filed.

January 18, 2017

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC

In the Matter of))
Telecommunications Carriers Eligible for	)	WC Docket No. 09-197
Universal Service Support))
Petitions for Designation as a Lifeline	)	WC Docket No. 11-42
Broadband Provider))

RESPONSE AND OPPOSITION OF STS MEDIA, INC. D/B/A FREEDOMPOP
TO THE PETITION FOR RECONSIDERATION OF
NATIONAL TRIBAL TELECOMMUNICATIONS ASSOCIATION

STS Media, Inc. d/b/a FreedomPop (FreedomPop or the Company), by and through the undersigned counsel, respectfully submits this response and opposition to the National Tribal Telecommunications Association's (NTTA's)¹ petition for reconsideration of the Wireline Competition Bureau's (WCB's or Bureau's) December 1, 2016 Order designating FreedomPop as a Lifeline Broadband Provider (LBP).² FreedomPop acknowledges NTTA's concerns regarding notice requirements for LBP petitions and the Commission's long-standing policy of recognizing the sovereignty of Tribal governments and to involve Tribal governments in policy decisions that affect Tribal consumers. However, the Petition presents no evidence of a material error or omission that would justify reconsideration or reversal of the LBP Designation Order. Neither the Company's petition for designation as an LBP nor the Commission's review and approval of it violated the Commission's rules with regard to LBP eligible telecommunications carrier (ETC) designations. Additionally, the streamlined process for the docketed filing and review of LBP petitions established in the Lifeline Modernization Order is consistent with processes employed by the Commission for streamlined review in other contexts, and provided NTTA and its members adequate notice and opportunity to comment on FreedomPop's petition. Accordingly, the Petition should be denied.

Notwithstanding the foregoing, FreedomPop is both cognizant and respectful of the sovereignty of Tribal governments and it is committed to notifying, and, if required, seeking approval from the relevant Tribal authorities in each state where it received LBP designation prior to providing services to Tribal consumers in those states. Moreover, FreedomPop acknowledges that NTTA's Petition illustrates the potential for confusion about the LBP review and approval process. As discussed below, FreedomPop would support certain actions by the Bureau to clarify these processes and avoid uncertainty going forward.

I. Standard of Review Under Section 1.429

NTTA submits its Petition pursuant to section 1.429 of the Commission's rules, which allows an interested party to seek reconsideration of a final order in a rule-making proceeding.³ The rule also states, however, that petitions for reconsideration "may be dismissed or denied by the relevant bureau(s) or office(s) [if they] . . . [f]ail to identify any material error, omission, or reason warranting reconsideration."⁴ As

¹ See Petition for Reconsideration of National Tribal Telecommunications Association, WC Docket Nos. 11-42, 09-197 (Jan. 3, 2017) (Petition). Notably, NTTA does not represent any sovereign Tribal nation or other Tribal authority, but rather is a coalition of Tribally-owned communications companies. FreedomPop notes that not a single Tribal nation or organization that represents Tribal nations has objected to either the form or substance of FreedomPop's LBP petition or designation.

² See *Telecommunications Carriers Eligible for Universal Service Support, Petitions for Designation as a Lifeline Broadband Provider*, WC Docket Nos. 09-197, 11-42, Order, DA 16-1325 (WCB rel. Dec. 1, 2016) (LBP Designation Order). The LBP Designation Order was issued pursuant to the rule changes adopted in the Federal Communications Commission's (FCC's or Commission's) Lifeline Modernization Order. See *Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 et al., Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38 (rel. Apr. 27, 2016) (Lifeline Modernization Order).

³ See 47 C.F.R. § 1.429.

⁴ See 47 C.F.R. § 1.429(l).

set forth in this response, the Petition fails to present any evidence of a material error or omission that would warrant reconsideration of the LBP Designation Order, and therefore should be denied.

II. Section 54.202(c) Does Not Apply to Petitions for LBP Designation

NTTA's Petition relies primarily on the argument that FreedomPop and the Commission failed to comply with the procedural requirements of section 54.202(c) of the Commission's rules.⁵ Specifically, NTTA asserts that FreedomPop was obligated to provide a copy of its LBP petition to "affected tribal government and tribal regulatory authorities at the time" that FreedomPop submitted its petition to the Commission.⁶ NTTA bases its assertion on language in the Lifeline Modernization Order which states that "[a]ll LBP[s] . . . must meet the requirements for designation as a Lifeline-only ETC established in section 214(e) of the [Communications] Act and section 54.201 and 54.202 of the Commission's rules."⁷ However, a closer examination of section 54.202 and the Lifeline Modernization Order shows that subsection (c) does not apply to LBP petitions.

Through the Lifeline Modernization Order, the Commission codified the requirements for requests for LBP designation through a new subsection (d) to section 54.202.⁸ This new subsection states that "[a] common carrier seeking designation as a Lifeline Broadband Provider eligible telecommunications carrier must *meet the requirements of paragraph (a) of this section*."⁹ The adoption of separate requirements for LBP petitioners that expressly imposes only certain requirements of section 54.202(a)¹⁰ on LBP applicants demonstrates that the Commission did not intend for subsection (c) to apply to LBP designation requests. Therefore, FreedomPop was not required to provide copies of its petition to the relevant Tribal governments and Tribal regulatory authorities in the states where it was seeking LBP designation. FreedomPop respectfully notes that its petition for and grant of LBP designation invoked Tribal lands in only two states—Hawaii and Oklahoma—where Tribal lands are not governed by Tribal sovereigns.¹¹

III. The Process for Reviewing and Approving LBP Petitions Is Consistent with the Commission's Processes for Streamlined Reviews in Other Contexts and Gave NTTA Adequate Notice of and Opportunity to Comment on FreedomPop's Petition

The Commission's process for issuing the LBP Designation Order is consistent with traditional Commission practice regarding streamlined reviews. Applications chosen for streamlined review are presumed to be deemed granted unless the Commission informs the applicant otherwise during the streamlined review period.¹²

In its Petition, NTTA maintains the Commission's actions were improper and warrant reconsideration of the LBP designation to FreedomPop because "the comment period on the applications had not ended prior to the Bureau's granting of" LBP designation FreedomPop.¹³ NTTA fails, however, to acknowledge the specific parameters of what it means for a petition to be approved for streamlined processing. Commission precedent with streamlined procedures illustrates that applications that meet the specified streamlining criteria are expected to be noncontroversy.

⁵ See Petition at 4–8.

⁶ See *id.* at 4. NTTA further claims that the Commission was required to "notify tribal governments and tribal regulatory authorities of requests made by carriers to serve tribal lands." *Id.*

⁷ See *id.*; see also Lifeline Modernization Order ¶284.

⁸ See 47 C.F.R. § 54.202(d). The Commission also adopted a new subsection (e) to section 54.202, which addresses requests for expansion of an LBP's approved service area. See 47 C.F.R. § 54.202(e).

⁹ See 47 C.F.R. § 54.202(d) (emphasis added).

¹⁰ See Lifeline Modernization Order ¶284, n.746 (noting that the requirement to submit a 5-year improvement plan as required under section 54.202(a) would not apply to LBPs).

¹¹ FreedomPop notes further that in these states, it will endeavor to notify and work cooperatively with Tribal interests, including securing appropriate authority prior to distributing Lifeline services on property owned or controlled by Tribal nations.

¹² See Lifeline Modernization Order ¶¶278, 281; see also *Worldcom, Inc. et al., v. FCC and U.S.A.*, No. 99–1395 (D.C. Cir. 1974) (noting that in the Interexchange Proceeding, the Commission adopted streamlined procedures whereby business service tariffs filed by AT&T were given streamlined processing whereby they were "presumed lawful" upon filing and would become effective after fourteen day notice period); *Streamlining the International Section 214 Authorization Process and Tariff Requirements*, IB Docket No. 98–118, Report and Order, FCC 96–79 (rel. Feb. 29, 1996) (International Section 214 Order) (explaining that international section 214 applications are deemed automatically granted upon acceptance for streamlined processing); *Review of Commission Consideration of Applications under the Cable Landing License Act*, IB Docket No. 00–106, Report and Order, FCC 01–332 (rel. Dec. 14, 2001) (Cable Landing License Order).

¹³ See Petition at 8.

sial and as such it is presumed that they will be deemed granted.¹⁴ In this case, the Commission's LBP Designation Order confirms this assessment by explaining "there is no contradictory evidence available to us raising concern" about FreedomPop's LBP petition or any other LBP petition granted.¹⁵

In the Lifeline Modernization Order, the Commission explained that a provider's petition for LBP designation will be subject to "expedited review and will be deemed granted *within* 60 days of the submission of a completed filing" unless the Commission notifies the petitioner the designation is not "automatically effective."¹⁶ The Commission further noted that petitions that do not meet the streamlining criteria will not receive a presumption of approval after 60 days but rather petitioners can expect action within six months of submission. It is clear from the language in the Lifeline Modernization Order that the Commission intended to adopt a streamlined procedure for LBP petitions consistent with its regulatory precedents¹⁷ on such matters.

As a result, the streamlined LBP petition process does not contemplate nor include a formal notice and comment procedure. The decision to set up a LBP tracker webpage was simply a courtesy done for informational purposes only, and the "comment deadline" indicated was neither an official act of the Commission nor the Bureau. It is well settled that informal postings or releases do not bind the Commission. For example, in *MCI v. FCC*, the court found that a Commission-issued press release was an unofficial, informal summary of agency action and could not be relied on as formal public notice.¹⁸ Comparably, here, the Bureau's LBP petitions webpage serves as a mere summary of LBP petition activity and cannot be relied on by NTTA or any other interested party as a legal mechanism establishing a formal comment cycle.

Though the Commission webpage does not constitute an official mechanism for comment, NTTA and its members had sufficient notice and opportunity to comment on FreedomPop's petition. FreedomPop's petition was electronically submitted and filed in a public docket designated to this proceeding. The requisite filing of the LBP designation petition in a pre-designated public docket afforded NTTA and its members adequate notice and opportunity to comment or oppose if they sought fit. Indeed, NTTA did in fact file comments with the Commission on November 17, 2016 regarding petitions filed for LBP designation at that time. Yet, NTTA raised no substantive issues about the petitions on file at that time—or at any time since about those or any other LBP petitions. Thus, any claim by NTTA that it lacked notice of FreedomPop's petition appears to be one of form over substance and does not warrant reconsideration of FreedomPop's LBP designation.

Pursuant to the Lifeline Modernization Order, the Commission may approve a streamlined LBP petition at any point within 60 days of submission of a completed LBP petition.¹⁹ Therefore, the grant of FreedomPop's LBP designation does not warrant a reconsideration of the Commission's decision.

IV. FreedomPop Will Notify, and If Required, Seek Approval from the Relevant Tribal Authorities Prior to Providing Lifeline Service on Tribal Lands

While FreedomPop respectfully opposes NTTA's Petition, it fully supports Commission policy recognizing the sovereignty of Tribal nations and similarly respects the sovereignty of all relevant Tribal governments and authorities throughout its LBP service area. FreedomPop also acknowledges the Commission's policies designed to address the "the difficulties many Tribal consumers face in gaining access to basic services" and the "important role of universal service support in helping to provide telecommunications services to the residents of Tribal lands."²⁰ As such, FreedomPop commits to notify and seek approval, if required, from the relevant Tribal authorities in each of the states where it was—or may in the future be—granted LBP designation prior to providing service to Tribal residents.

As noted above, FreedomPop's LBP petition requested authority to serve Tribal subscribers only in Hawaii and Oklahoma. Neither of these states have a Tribal sovereign authority that regulates Lifeline services offered to residents of either Hawaii-

¹⁴ See e.g., Cable Landing License Order ¶13 (explaining that only applications that do not pose a risk will be streamlined); *Worldcom, Inc. et al., v. FCC and U.S.A.*

¹⁵ See LBP Designation Order ¶8.

¹⁶ See Lifeline Modernization Order ¶278 (indicating petitions that do not qualify for streamlined processing will not be presumed to have LBP status approval) (emphasis added).

¹⁷ See generally International Section 214 Order; Cable Landing License Order.

¹⁸ See generally *MCI v. FCC*, 515 F.2d 385 (D.C. Cir. 1974).

¹⁹ See Lifeline Modernization Order ¶278 (stating that LBP petitions eligible for streamlined processing "will be deemed granted *within* 60 days of the submission . . .").

²⁰ *Id.* ¶206.

ian Home Lands or former reservations in Oklahoma. Nevertheless, FreedomPop commits to notifying both the Department of Hawaiian Home Lands in Hawaii and the Public Utilities Division of the Oklahoma Corporation Commission to ensure that its provision of Lifeline broadband service offerings to eligible residents of Tribal lands in these states is well known and serves the interests intended to be served through the enhanced Lifeline program for eligible Tribal residents in these two states.

V. NTTA's Petition Illustrates that Clarification from the Bureau Regarding the LBP Designation Process Is Warranted

Despite the deficiencies in the Petition that make reconsideration or reversal of the LBP Designation Order unwarranted, NTTA's request does illustrate the potential for confusion regarding the appropriate process for LBP petitions. As such, FreedomPop would support certain actions by the Bureau to provide clarity about LBP petition requirements, and the process for reviewing and approving such petitions on a prospective basis, including the following:

- Issuance of guidance to clarify that section 54.202(c) does not apply in the LBP context in light of the adoption of section 54.202(d);
- Removal of the “Comment Deadline” column from the LBP petitions “tracker” page on the Commission’s website and adoption of a formal mechanism to clarify expectations regarding streamlined LBP applications modeled after the approach for streamlined processing that is used for international section 214 applications wherein the Commission issues a Public Notice noting the presumption of approval at any point within 60 days after submission of a petition that qualifies for streamlined processing without establishing a formal comment period; and
- Issuance of a public notice explaining that a streamlined LBP petition may be acted upon at any point within 60 days after submission, which would make clear that interested parties should submit comments on the petition as soon as possible.

FreedomPop submits that these clarifications would help manage public expectations of the LBP review and approval process, and would prevent uncertainty going forward.²¹

VI. Conclusion

FreedomPop respects the sovereignty of Tribal nations and understands the importance of ensuring that these entities have notice from service providers prior to commencement of service on sovereign Tribal lands. However, for the reasons set forth in this response, and in light of FreedomPop’s commitments to cooperate with the Department of Hawaiian Home Lands in Hawaii and the Public Utilities Division of the Oklahoma Corporation Commission prior to providing Lifeline broadband services in Tribal areas, the Petition should be denied.

Respectfully submitted,

JOHN J. HEITMANN
AVONNE BELL
JENNIFER R. WAINWRIGHT
Kelley Drye & Warren LLP
Counsel for STS Media, Inc. d/b/a FreedomPop

²¹The Public Notice requirement contemplated herein should apply on a prospective basis only as new petitions for LBP designation are filed.

Federal Communications Commission**§ 54.202**

(3) This paragraph does not apply to offset or reimbursement support distributed pursuant to subpart G of this part.

(4) This paragraph does not apply to support distributed pursuant to subpart F of this part.

(b) A state commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (d) of this section as an eligible telecommunications carrier for a service area designated by the state commission.

(c) Upon request and consistent with the public interest, convenience, and necessity, the state commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the state commission, so long as each additional requesting carrier meets the requirements of paragraph (d) of this section. Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the state commission shall find that the designation is in the public interest.

(d) A common carrier designated as an eligible telecommunications carrier under this section shall be eligible to receive customer service support in accordance with section 254 of the Act and shall, throughout the service area for which the designation is received:

- (1) Offer the services that are supported by federal universal service support mechanisms under subpart B of this part and section 254(c) of the Act, either using its own facilities or a combination of its own facilities and the facilities of another carrier's services (including the services offered by another eligible telecommunications carrier); and
- (2) Advertise the availability of such services and the charges therefore using media of general distribution.

(e) For the purposes of this section, the term *facilities* means any physical components of the telecommunications provider's network in the transmission or routing of the services that are designated for support pursuant to subpart B of this part.

(f) For the purposes of this section, the term "own facilities" includes, but is not limited to, facilities obtained as unbundled network elements pursuant to part 51 of this chapter, provided that the facilities meet the definition of the term "facilities" under this subpart.

(g) A state commission shall not require a common carrier, in order to satisfy the requirements of paragraph (d)(1) of this section, to use facilities that are located outside the relevant service area, as long as the carrier uses facilities to provide the services designated for support pursuant to subpart B of this part within the service area.

(h) A state commission shall designate a common carrier that meets the requirements of this section as an eligible telecommunications carrier irrespective of the technology used by such carrier.

(i) A state commission shall not designate as an eligible telecommunications carrier a telecommunications carrier that offers the services supported by federal universal service support mechanisms exclusively through the resale of another carrier's services.

[6 FR 3294, June 17, 1997, as amended at 63 FR 2125, Jan. 13, 1998; 64 FR 62123, Nov. 16, 1999; 71 FR 63750, Nov. 9, 2006]

§ 54.202 Additional requirements for Commission designation of eligible telecommunications carriers.

(a) In order to be designated an eligible telecommunications carrier under section 254 of the Act, a common carrier in its application must:

- (i) Commit to provide service throughout its proposed designated service area to all customers making a reasonable request for service. Each applicant shall certify that it will:
 - (A) Provide service on a timely basis to requesting customers within the applicant's service area where the applicant's network already passes the potential customer's premises; and
 - (B) Provide service within a reasonable period of time, if the potential customer is within the applicant's licensed service area but outside its existing network, to connect to service can be provided at reasonable cost by:
 - (i) Modifying or replacing the requesting customer's equipment;

§ 54.202**47 CFR Ch. I (10-1-10 Edition)**

(2) Deploying a roof-mounted antenna or other equipment;

(3) Adjusting the nearest cell tower;

(4) Adjusting network or customer facilities;

(5) Reselling services from another carrier's facilities to provide service or

(6) Employing, leasing or constructing an additional cell site, cell extender, repeater, or other similar equipment.

(7) Submit a five-year plan that describes what specific proposed improvements or upgrades to the applicant's network on a wire center-by-wire center basis throughout its proposed designated service area. Each applicant shall demonstrate how signal quality, coverage or capacity will improve due to the receipt of high-cost support. The plan shall include a completion date for each improvement and the estimated amount of investment for each project that is funded by high-cost support; the specific geographic areas where the improvements will be made; and the estimated population that will be served as a result of the improvements. If an applicant believes that specific improvements at a particular wire center are not needed, it must explain its basis for this determination and demonstrate how funding will otherwise be used to further the provision of supported services in that area.

(8) Demonstrate its ability to remain functional in emergency situations. In other words, an applicant that has a reasonable amount of back-up power to ensure functionality without an external power source, is able to reroute traffic around damaged facilities, and is capable of managing traffic spikes resulting from emergency situations.

(9) Demonstrate that it will satisfy applicable consumer protection and service quality standards and commitment by wireless applicants to comply with the Cellular Telecommunications and Internet Association's Consumer Code for Wireless Service will satisfy this requirement. Other commitments will be considered on a case-by-case basis.

(10) Demonstrate that it offers a local usage plan comparable to the one offered by the incumbent LEC in the service areas for which it seeks designation.

(11) Certify that the carrier acknowledges that the Commission may require it to provide equal access to long distance providers in the event that no other eligible telecommunications carrier is providing equal access within the service area.

(12) Any common carrier that has been designated under section 214(e)(6) as an eligible telecommunications carrier or that has submitted its application for designation under section 214(e)(6) before the effective date of these rules must submit the information required by subparagraph (11) of this section no later than October 1, 2006, as part of its annual reporting requirements under §54.209.

(13) *Public Interest Standard.* Prior to designating an eligible telecommunications carrier pursuant to section 214(e)(6), the Commission determines that such designation is in the public interest. In making this decision, the Commission shall consider the benefits of increased consumer choice, and the unique advantages and disadvantages of the applicant's service offering. In instances where an eligible telecommunications carrier applicant seeks designation below the study area level of a rural telephone company, the Commission shall also consider a cross-subsidization analysis that compares the population density of each wire center in which the eligible telecommunications carrier applicant seeks designation against that of the wire centers in the study area in which the eligible telecommunications carrier applicant does not seek designation. In its creamslicing analysis, the Commission shall also consider other factors, such as disaggregation of support pursuant to §54.315 by the incumbent local exchange carrier.

(14) A common carrier seeking designation as an eligible telecommunications carrier under section 214(e)(6) for any part of tribal lands shall provide a copy of its petition to the affected tribal government and tribal telecommunications authorities as available at the time it files its petition with the Federal Communications Commission. In addition, the Commission shall send

Federal Communications Commission**§ 54.207**

the relevant public notice seeking comment on any petition for designation as an eligible telecommunications carrier on tribal lands, at the time it is released to the affected tribal government and tribal regulatory authority, as applicable, by overnight express mail.

(e) All eligible telecommunications carriers shall retain all records required to demonstrate to auditors that the support received was consistent with the relevant documentation and program rules. These records should include the following: data supporting line count filings; historical customer records; fixed asset property accounting records; general ledgers; invoice copies for the purchase and maintenance of equipment; maintenance contracts for the upgrade or equipment; and any other relevant documentation. This documentation must be maintained for at least five years from the receipt of funding.

(70 FR 2995, May 25, 2005, as amended at 72 FR 54217, Sept. 24, 2007)

§ 54.203 Designation of eligible telecommunications carriers for unserved areas

(a) If no common carrier will provide the services that are supported by federal universal service support mechanisms under section 25(c) of the Act and subpart B of this part to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services, and the state commission with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof.

(b) All common carriers or carriers ordered to provide such service under this section shall meet the requirements of section 54.201(d) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

§ 54.205 Relinquishment of universal service.

(a) A state commission shall permit an eligible telecommunications carrier

to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier may seek to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the state commission of such relinquishment.

(b) Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing service in an area served by more than one eligible telecommunications carrier, the state commission shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The state commission shall establish a time, not to exceed one year after the state commission approves such relinquishment under this section, within which such purchase or construction shall be completed.

§ 54.207 Service areas.

(a) The term *service area* means a geographic area established by a state commission for the purpose of determining universal service obligations and support mechanisms. A service area defines the overall area for which the carrier shall receive support from federal universal service support mechanisms.

(b) In the case of a service area served by a rural telephone company, service area means such company's "study area" unless and until the Commission and the states, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of the Act, establish a different definition of service area for such company.

(c) If a state commission proposes to define service area based on a rural telephone company to be other than such company's study area, the Commission will consider that proposed

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CATHERINE CORTEZ MASTO
TO HON. AJIT PAI

Question 1. As we discussed during the hearing, I am concerned about barriers to the siting of telecommunications equipment on Federal and tribal lands, like under the Bureau of Land Management. Can you please explain in writing specifically what we can do to address these challenges?

Answer. As part of the recently formed Broadband Deployment Advisory Committee, one of the initial working groups announced this week will tackle the issue of deployment on Federal and tribal lands. In particular, the *Streamlining Federal Siting* working group will examine challenges related to siting on these lands and will provide recommendations on how to reduce or eliminate these barriers. In addition to members from the private sector and state and local governments, I plan to invite Federal representatives from key agencies, such as the Department of Interior, to participate.

Question 2. And during our interaction, you said “absolutely” in response to my request that you commit to establishing an interagency working group of Federal partners to tackle these siting challenges. Please confirm this commitment and let me know what I can do to help expedite this effort.

Answer. I am committed to working with Federal partners to tackle siting issues on Federal lands in order to facilitate infrastructure deployment.

Question 3. I am aware of an Interagency Broadband Working Group that currently exists, but that does not appear to have solved some hold up in get infrastructure sited in Nevada. Please inform me what you can commit to do to solve this challenge through a new or existing effort across Federal agencies, including the U.S. Department of Interior, the U.S. Army Corps of Engineers, and the U.S. General Services Administration.

Answer. The FCC will continue to work with other Federal agencies to tackle infrastructure deployment issues such as siting on Federal and Tribal lands. The BDAC will be a forum for formulating an action plan to solve these issues.

Question 4. During the hearing I raised concerns regarding the proper staffing of the FCC and you said you needed to check and respond after the hearing, so here are my questions again for your detailed response:

From your perspective, what impacts have you seen, or felt, from the White House's misguided blanket hiring freeze?

Answer. So far, the impact of the hiring freeze has been minimal. During this 90-day pause in hiring, we are prioritizing agency staffing needs in consideration of long-term workforce plans. We have been able to temporarily reallocate internal resources to meet mission-critical needs. In the event matters involving national security or public safety responsibilities require us to hire from outside the agency before the freeze ends, we will seek an exemption as provided under the executive order.

Question 5. How many openings would you estimate you have to fill at the Commission currently?

Answer. We are currently in the process of figuring out how many openings we will need to fill once the hiring freeze is over. I do not have an estimate of that number at this time.

Question 6. Can you assure me that merger reviews or legal challenges aren't being impacted by the need to hire staff?

Answer. Yes.

Question 7. Can you assure me that the hiring freeze will not have any negative impact on the conclusion and transition of the incentive auction?

Answer. Yes.

Question 8. And are there positions that are vacant and need to be filled at the FCC Office of Inspector General?

Answer. The Office of Inspector General currently has six vacancies. The hiring of one GS-15 Program Analyst, a reemployed annuitant, has been delayed due to the freeze. While initially delayed by the freeze, OIG is in the process of hiring a writer-editor, two Auditors and two Management and Program Analysts. The freeze will likely be over before these recruitment actions are finalized.

Question 9. I have reviewed the Equal Employment Opportunity Commission's (EEOC) 2016 report on "Diversity in High Tech," and it contains some frustrating and concerning observations regarding minority and female employment and leadership representation.

Namely:

- "Compared to overall private industry, the high tech sector employed a smaller share of African Americans (14.4 percent to 7.4 percent), Hispanics (13.9 percent to 8 percent), and women (48 percent to 36 percent)."
- "Of those in the Executives category in high tech, about 80 percent are men and 20 percent are women. Within the overall private sector, 71 percent of Executive positions are men and about 29 percent are women."
- 2014 data of the labor force participation rate at select leading "Silicon Valley tech firms," with similarly upsetting trends: "Among Executives, 1.6 percent were Hispanic and less than 1 percent were African American."

As Chairman, and an appointee seeking reconfirmation from the Senate, what is your plan to establish a more inviting sector to diversity of staff and leadership?

Answer. While the FCC has equal employment opportunity rules that apply to broadcasters and cable operators, we do not have the statutory authority to impose such rules on Silicon Valley tech firms. I do, however, believe that the FCC should seek to lead by example in the area of diversity. I am proud, for example, to be the first Asian-American to lead the Commission. And I would also note that the majority of Bureau Chiefs at the FCC are currently women.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO
HON. MIGNON L. CLYBURN

Question 1. Smart technologies will enable cities to improve community livability, services, communication, safety, mobility, and resilience to natural and manmade disasters; reduce costs, traffic congestion, air pollution, energy use, and carbon emissions; and promote economic growth and opportunities for communities of all sizes.

Smart City market estimates show rapid growth in coming years, and the number of Internet-connected devices in Smart Cities alone is expected to grow from 1.2 million in 2015 to 3.3 billion in 2018. Mobile broadband is the engine for the proliferation of smart cities.

This aspect of our Internet economy is expected to grow from almost \$2 billion in 2015, to \$147.5 billion by 2020.

The FCC is the agency charged with making more spectrum available for mobile broadband.

Given this rapid growth in Smart Cities technology, what is the Commission doing now to usher in next-generation networks to meet anticipated spectrum demands?

Answer. Thank you for the question, Senator. The Commission has been working diligently to free up much needed spectrum to meet the increasing demand for mobile broadband connectivity. The Commission's overall strategy has been to make spectrum available in low (600 MHz), mid (3.5 GHz), and high frequency bands (above 24 GHz) with flexible rules; continuing to remove barriers to infrastructure siting; and quickly approving requests to test new technologies in these bands.

Question 2. Does the Commission need additional statutory authority to meet the demand for spectrum?

Answer. While the Commission has clear statutory authority to reallocate and repurpose spectrum, passage of legislation such as the *MOBILE NOW Act*, could better facilitate our work in making more spectrum available for commercial use and breaking down barriers to deployment.

Question 3. What is the Commission's role in ensuring that Smart City devices have adequate protections against cybersecurity breaches? If the Commission has no role, which part of the Federal Government has responsibility for this?

Answer. I believe that the Commission has a fundamental responsibility to promote security and reliability in communications networks. This has become even more important in an increasingly IP environment. Communications providers operate critical infrastructure upon which individuals, communities and the Nation depends, and the Commission should ensure that providers protect that service appropriately. Under the prior Administration, the Commission's policy was to encourage industry to take the lead in developing and implementing effective, industry-driven security risk management practices and policies. Earlier this year, however, Chairman Pai rescinded two cybersecurity items released by the prior Administration,

and pulled a third item from circulation, so it is unclear what role the Commission will play going forward.

Question 4. At a time when the need for funds to support broadband deployment and adoption are at their highest, the universal service contribution factor is approaching its highest levels due to the declines in the interstate revenue that serves as its funding base. There is wide consensus that the current contribution methodology model is unsustainable.

The demand for more money for rural broadband is causing some industry stakeholders to suggest reducing the amount of USF committed to support broadband service for our Nation's schools, libraries and low income consumers.

We should not be "robbing Peter to pay Paul." Instead as good stewards of the universal service fund and the mandate for universal service found in the Telecommunications Act, we should be figuring out the best way to create a sustainable universal service ecosystem. Do you agree that the current contribution methodology framework is unsustainable?

Answer. Thank you for the question, Senator Cantwell. That the current contribution factor is 17 percent should underscore that the current approach is unsustainable. In fact, the current system is disproportionately burdening our Nation's seniors: the ones who subscribe to legacy telecommunications at an above-average rate.

Question 5. Do you advocate lowering the amount of USF committed to the E-Rate and Lifeline/Link up programs and shifting those monies to support the USF mechanisms that support rural broadband?

Answer. No.

Question 6. Over the years, the FCC has reviewed several different proposals to reform contribution methodology to shore up the contributions base.

Among the proposals made to reform contribution methodology are:

Numbers Plan—all communications service providers with working, "in use" telephone numbers (or equivalents) would be assessed a flat, per number fee;

Connections Plan—all connections to an interstate public or private network would be assessed a flat, per number fee;

Numbers/Hybrid Plan—would assess residential users a fee based on working numbers and business users a fee based on working connections; and

Modified Revenue—expanding the contribution base to maintain current system, require broadband providers and other communications service providers to contribute.

Has the Commission done any study of how any of the previously proposed contribution methodology reforms would impact the contribution factor or the universal service fund? If so what did those studies reveal?

Answer. While the Commission staff has conducted internal analysis of these proposals, I fear that disclosing this analysis is the Chairman's prerogative. Thus, I must respectfully defer to Chairman Pai on what that analysis reveals.

Question 7. Does the Commission have plans to reform contribution methodology? If so when? If not, why not?

Answer. I have dutifully led and served on the Joint Board for Universal Service for the past several years, under the leadership of Commissioner Rosenworcel, and will continue to do so under Commissioner O'Reilly. I look forward to the release of a recommendation for reform under the current chairmanship and I stand ready to engage on universal service contribution reform at the Commission, which I believe is long overdue.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. EDWARD MARKEY TO
HON. MIGNON L. CLYBURN

Question. While libraries provide communities with crucial access to free internet, less than 3 percent of public libraries offer 1 Gigabit/second connection speed, according to research conducted by the American Library Association. How can the E-Rate Modernization Orders approved in 2014 help close this divide and ensure that our constituents can enjoy high-speed broadband in our libraries?

Answer. The 2014 E-Rate Modernization Orders took significant steps to modernize and streamline the E-rate program with a focus on supporting Wi-Fi networks and robust broadband connectivity for all schools and libraries. It also addressed the connectivity gap facing many schools and libraries by expanding options

for purchasing affordable broadband and increasing the E-rate funding cap to fully meet applicants' needs.

Continued support for those Orders is critical to ensuring libraries have the connectivity they need. Implementation of those Orders brought about a 61 percent decline in schools not connected to fiber, and saw the cost per-megabit-per-second decrease from \$22 in 2013 to \$7 in 2016. This is in large part due to additional construction flexibility afforded to schools and libraries, including putting leased lit and dark fiber on equal footing, permitting construction and operation of self-provisioned networks, and making additional E-rate funding available when a state or Tribe puts up their own funding for construction as well.

ATTACHMENT

AMERICAN LIBRARY ASSOCIATION
Washington, DC

HIGH SPEED LIBRARY BROADBAND IS CRITICAL NATIONAL INFRASTRUCTURE

Objective: Bring the benefits of high-speed broadband service to every rural and underserved community in the Nation by recognizing and funding America's libraries as critical national infrastructure. Leveraging libraries will assure that every community, entrepreneur, small business, family, veteran or student has the opportunity to meaningfully contribute to our digital economy.

Perspective: There are 25 percent more public libraries than Starbucks in the United States (16,559 v. 13,172). Libraries are visited more than 1.4 billion times each year. That's more than 3.8 million people per day or 2,663 per minute. Libraries are indispensable to the personal and economic welfare of users of all ages and the health of America's economy, often providing the only means of free broadband connectivity for many communities and small internet-based businesses. Consider:

- 100 percent of libraries offer free access to the internet;
- 97 percent help patrons complete government forms online;
- 95 percent assist kids with their homework and offer summer reading programs;
- 90 percent train children and adults alike in computer literacy and other online skills;
- 77 percent provide online health resources;
- 73 percent aid patrons with job applications and interviewing skills;
- 68 percent help patrons use databases to find job openings;
- 48 percent provide entrepreneurs and small business owners with online resources;
- 36 percent offer dedicated work space for mobile workers; and
- Hundreds of libraries even make 3D printers available to their patrons!

But . . . far too few Americans, and a tiny number of the millions in rural communities, have the access to high speed broadband service that they and the Nation need to thrive in our digital economy:

- Less than 3 percent of public libraries offer 1 Gigabit/second connection speed: the national goal;
- A fraction of 1 percent of libraries offer "1 Gig" service in rural or underserved areas;
- Just 4 percent of rural libraries have a connection speed over 100Mbps (90 percent less than the goal);
- Rural library connection speeds average just 25 percent of those in urban libraries;
- Over 40 percent of rural libraries have no market option to improve their broadband speeds; and
- The rural cost of deploying high speed broadband can be 200–300 percent of urban area costs.

Priority: The future belongs to those with access to high-speed broadband. Congress must fully enable the millions of Americans in rural and underserved communities to build their futures, and the nation's, by strategically investing directly in both dramatically expanded library high speed broadband service and library facilities as critical national infrastructure.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CORY BOOKER TO
HON. MIGNON L. CLYBURN

Question 1. E-Rate is an important Universal Service Fund (USF) program that provides funding for schools and libraries to connect to high-speed Internet. I cannot overstate the value of broadband access for these learning centers. To remain competitive in the 21st century, our children must learn how to interact with information in the digital world.

In 2015, my home state of New Jersey received \$87 million for E-Rate, which it used to help connect 161 libraries to high-speed Internet.³ Do you share my disappointment that the Modernization Progress Report was revoked? What is the importance of this report for ensuring that E-Rate can help schools and libraries prepare our children and communities for the future?

Answer. Thank you for the question, Senator. I share your concern that the E-Rate Modernization Progress Report was revoked. In my years as a Commissioner, I have never seen a staff report revoked, especially where there is a lack of clarity on whether an office has delegated authority to do so.

This report is important to highlight the successes of the 2014 E-Rate Modernization Orders, particularly as they related to improving the efficiency of Federal E-Rate funding. Implementation of those Orders brought a 61 percent decline in schools not connected to fiber, and saw the cost per-megabit-per-second decrease from \$22 in 2013 to \$7 in 2016. This is in large part due to additional construction flexibility afforded to schools and libraries, including putting leased lit and dark fiber on equal footing, permitting construction and operation of self-provisioned networks, and making additional E-rate funding available when a state or Tribe puts up their own funding for construction as well.

Question 2. I understand that on July 28, 2016, a group of managed care providers petitioned the FCC seeking declaratory ruling and/or clarification of the TCPA to reconcile the regulation of a health plan member's telephone number under the TCPA with the regulation of the same use under the Health Insurance Portability and Accountability Act ("HIPAA").

The Petitioners argue that a clarification is necessary to harmonize the TCPA, HIPAA, and prior Commission rulings to protect member health care communications. The calls covered by these clarifications fall within categories recognized by the Department of Health and Human Services as covered by HIPAA to enhance the individual's access to quality health care. HIPAA, as you know, regulates the privacy practices of covered entities and expressly encourages and permits such calls to be made. Congress passed HIPAA in 1996 and the HITECH Act in 2009, well after the TCPA, which was enacted in 1991. HIPAA and the HITECH Act, therefore, represent the more recent intent of Congress in regulating these specific types of communications.

What is the Commission's view on protecting non-telemarketing calls allowed under HIPAA in light of their unique value to and acceptance by consumers?

Answer. Thank you for the question, Senator. I agree that non-telemarketing calls made for the purpose of improving healthcare outcomes have unique consumer value. This view was reiterated by data shared with my office that found such communication can reduce hospital readmission rates and increase the number of individuals receiving preventive health screenings.

In the Commission's 2015 *Declaratory Order*, which I supported, the agency stated that "that provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA by a HIPAA-covered entity and business associates acting on its behalf, as defined by HIPAA, if the covered entities and business associates are making calls within the scope of the consent given, and absent instructions to the contrary." Some stakeholders have suggested that further clarification is needed. Should such a clarification be issued by the Commission, it is critical that consumers continue to be empowered with the tools to easily opt out, should they choose to no longer receive these type of calls.

Question 3. What is the Commission's view on acting to protect these calls expeditiously so that beneficiaries' access to health care is not jeopardized, rather than waiting for a larger "omnibus" TCPA ruling that could take much longer?

Answer. There is not currently an Order before me for consideration. Should the Chairman circulate such an Order, I would carefully review it to ensure it balances the value of giving consumers access to timely health information while ensuring they are not overburdened with unwanted calls or texts.

³Staff conversation with New Jersey State Library.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TAMMY DUCKWORTH TO
HON. MIGNON L. CLYBURN

Question 1. As Commissioner Clyburn noted in her testimony, I authored the *Video Visitation in Prisons Act* last Congress to increase oversight of telecommunications in prisons and permit prisoners who demonstrate good behavior to stay in touch with their family through video conferencing. Because the vast majority of prisoners will eventually be released, it is not a matter of *if* we need to prepare these individuals to rejoin society, but rather, a matter of *how well* we do it. And the FCC has a critical role to play in this important national challenge. Across the country, jails and prisons have begun implementing a new way for families and friends to stay in touch with their incarcerated loved ones: *video conferencing*.

In Illinois, remote video conferences have provided the only way for some families to stay in touch, one example is the Menard Correctional Center, which is more than 300 miles from Chicago, where many of its prisoners come from and still have family who live there.

Studies show that prisoners who remain in close contact with family members achieve better post-release outcomes and lower rates of recidivism. Yet, too often, prisoners and their families struggle to maintain regular contact, whether through in-person visits, calls or “video visitation.”

Would you agree that the prison video visitation service industry remains a largely unregulated area of commerce, which has led to low-quality service paired with exorbitant, cost-prohibitive fees that prisoners and their families cannot afford?

Answer. Yes.

Question 2. As technology changes and more prisons start using video conferencing, what are some of your recommendations for the future of this technology?

Answer. My ultimate recommendation is that the availability of video visitation be a complement, not a substitute, for in-person visitation. We have seen instances in which a facility bans in-person visitation once video visitation becomes available. This is wholly unacceptable.

The FCC should address this failed market as well, and has the authority to do so. However, the additional clarity provided by your bill would be welcomed as the Commission works to ensure families can communicate with incarcerated loved ones at just and reasonable rates.

Question 3. Why is it important that video visitation supplement—not supplant—in-person visitation?

Answer. It is important for two reasons. First, the quality of in-person visitation far surpasses video visitation: ask any child who has been denied the opportunity to get a hug from their incarcerated mother. Second, some institutions use video visitation as an additional revenue stream, and banning in-person visitation enhances that revenue stream at increased cost to an inmate’s loved ones.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CATHERINE CORTEZ MASTO
TO HON. MIGNON L. CLYBURN

Question 1. While I asked this question of Commissioner O’Rielly at the hearing, I would like to receive you thoughts in writing as well. Given that the FCC’s “Cybersecurity and Communications Reliability Division (CCR) works with the communications industry to develop and implement improvements that help ensure the reliability, redundancy and security of the Nation’s communications infrastructure,” what else specifically can the FCC be doing to aid in the concern and challenge of cyber security and identify theft?

Answer. Thank you for the question, Senator. I believe that the Commission has a fundamental responsibility to promote security and reliability in communications networks. This has become even more important in an increasingly IP environment. Communications providers operate critical infrastructure upon which individuals, communities and the Nation depends, and the Commission should ensure that providers protect that service appropriately. Under the prior Administration, the Commission’s policy was to encourage industry to take the lead in developing and implementing effective, industry-driven security risk management practices and policies. Earlier this year, however, Chairman Pai rescinded two cybersecurity items released by the prior Administration, and pulled a third item from circulation. In order to do our part to ensure the reliability, redundancy and security of the Nation’s communications infrastructure, I would support reinstatement of the cybersecurity items jettisoned under this Administration.

Question 2. I have reviewed the Equal Employment Opportunity Commission’s (EEOC) 2016 report on “Diversity in High Tech,” and it contains some frustrating

and concerning observations regarding minority and female employment and leadership representation.

Namely:

- “Compared to overall private industry, the high tech sector employed a smaller share of African Americans (14.4 percent to 7.4 percent), Hispanics (13.9 percent to 8 percent), and women (48 percent to 36 percent).”
- “Of those in the Executives category in high tech, about 80 percent are men and 20 percent are women. Within the overall private sector, 71 percent of Executive positions are men and about 29 percent are women.”
- 2014 data of the labor force participation rate at select leading “Silicon Valley tech firms,” with similarly upsetting trends: “Among Executives, 1.6 percent were Hispanic and less than 1 percent were African American.”

From your perspective, what can we do to make this a more inviting sector to diversity of staff and leadership?

Answer. Thank you for the question, Senator. I, too, am troubled by the lack of diversity in the technology sector. This concern was reflected in our office’s recently released #Solutions2020 Call to Action Plan. There are many ways to address this issue at different points in the pipeline, from introducing our elementary school aged students to STEM, to ensuring our middle and high schoolers have opportunities to intern and be exposed to technology careers, to making certain that our graduating college seniors have the opportunity to even interview for technology positions.

It is important that each student is exposed to robust science, technology, engineering and math (STEM) curricula at an early age and throughout their educational careers. To get there of course, we need to make sure there is access to broadband at school and in the home. The FCC’s E-rate program, for example, has been key to ensuring that all schools in our Nation have access to fast broadband to unleash world-class education. We recently reformed E-rate so that the program not only supports robust broadband connectivity to the school but Wi-Fi within the school buildings. I was pleased to support these reforms and look forward to seeing the reverberating benefits to our children and society. I was also pleased to support updating the Commission’s Lifeline program. For too many in our society, the price of broadband service is out of reach. This is why the FCC’s Lifeline program and similar public-private partnerships are key to ensuring that broadband including mobile broadband is both accessible and affordable for all Americans.

Students also need to be exposed to the jobs and opportunities that could be afforded with a STEM degree. Private-public and public-public partnerships can be instrumental in that regard. For example, technology companies could partner with local governments, organizations and schools to provide free classes and learning opportunities to interested community members and students. Moreover, local governments and community organizations could work together with broadband providers to provide recycled or refurbished smartphone devices and tablets. Federal agencies and Congress can also implement internship and mentorship opportunities to introduce young people to opportunities in the technology sector.

In addition to ensuring that there is a strong pipeline of diverse candidates for technology positions, we must also promote opportunities for those who are already in the industry or trying to enter it. I have read many articles and studies on the affirmative steps some technology companies are doing in order to address the lack of diversity in the industry and I applaud their efforts. But of course, we can and should do more, as the statistics glaringly attest.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARIA CANTWELL TO
HON. MICHAEL O’RIELLY

Question 1. At a time when the need for funds to support broadband deployment and adoption are at their highest, the universal service contribution factor is approaching its highest levels due to the declines in the interstate revenue that serves as its funding base. There is wide consensus that the current contribution methodology model is unsustainable.

The demand for more money for rural broadband is causing some industry stakeholders suggest reducing the amount of USF committed to support broadband service for our Nation’s schools, libraries and low income consumers.

We should not be “robbing Peter to pay Paul.” Instead as good stewards of the universal service fund and the mandate for universal service found in the Telecommunications Act, we should be figuring out the best way to create a sustainable universal service ecosystem.

Do you agree that the current contribution methodology framework is unsustainable?

Answer. I would like to make it clear that, as the newly appointed chair of the Federal State Joint Board on Universal Service, I am speaking only for myself in answering this question. I agree that the contribution methodology framework is unsustainable, as currently structured, and have said so publicly many times.

Question 2. Do you advocate lowering the amount of USF committed to the E-Rate and Lifeline/Link up programs and shifting those monies to support the USF mechanisms that support rural broadband?

Answer. I believe that in order to properly assess how to allocate spending among the four USF programs the Commission should determine the appropriate sum to take from telecommunications consumers, recognizing that doing so raises the price for service and leads to lower adoption rates. Accordingly, I strongly support having firm budgetary caps on all USF spending.

To be clear, I did not support expanding the E-Rate budget and spending in the December 2014 order. I argued that such expenditures would come at the cost of other programs or lead to a ballooning of overall USF spending, which seems to have come to fruition. Likewise, I raised objections to and opposed the unwillingness of a majority of my colleagues to adopt a proper budget for the Lifeline program when it was last considered by the Commission in March 2016. I support efforts to correct these decisions and to make other improvements.

Question 3. Over the years, the FCC has reviewed several different proposals to reform contribution methodology to shore up the contributions base.

Among the proposals made to reform contribution methodology are:

Numbers Plan—all communications service providers with working, “in use” telephone numbers (or equivalents) would be assessed a flat, per number fee;

Connections Plan—all connections to an interstate public or private network would be assessed a flat, per number fee;

Numbers/Hybrid Plan—would assess residential users a fee based on working numbers and business users a fee based on working connections; and

Modified Revenue—expanding the contribution base to maintain current system, require broadband providers and other communications service providers to contribute.

Has the Commission done any study of how any of the previously proposed contribution methodology reforms would impact the contribution factor or the universal service fund? If so what did those studies reveal?

Answer. My understanding is that Commission staff previously studied various reform options as part of their work for the previous USF Joint Board. I was not on the USF Joint Board at that time, so I have asked Commission staff to brief me on their analyses in the near future.

Question 4. Does the Commission have plans to reform contribution methodology? If so when? If not, why not?

Answer. I cannot speak to the Commission’s ultimate plans, but, as the new chair of the USF Joint Board, it is my goal to address our overall USF spending and the contribution methodology in order to provide a recommendation to the Commission for its consideration as soon as feasible. I do not have a firm timeline to provide at this moment, as I need to gather more information about potential reforms and consult with FCC staff and the USF Joint Board, but I plan to work as expeditiously as possible on the matter.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. CORY BOOKER TO
HON. MICHAEL O’RIELLY

Question 1. I understand that on July 28, 2016, a group of managed care providers petitioned the FCC seeking declaratory ruling and/or clarification of the TCPA to reconcile the regulation of a health plan member’s telephone number under the TCPA with the regulation of the same use under the Health Insurance Portability and Accountability Act (“HIPAA”).

The Petitioners argue that a clarification is necessary to harmonize the TCPA, HIPAA, and prior Commission rulings to protect member health care communications. The calls covered by these clarifications fall within categories recognized by the Department of Health and Human Services as covered by HIPAA to enhance the individual’s access to quality health care. HIPAA, as you know, regulates the privacy practices of covered entities and expressly encourages and permits such calls to be made. Congress passed HIPAA in 1996 and the HITECH Act in 2009, well

after the TCPA, which was enacted in 1991. HIPAA and the HITECH Act, therefore, represent the more recent intent of Congress in regulating these specific types of communications.

What is the Commission's view on protecting non-telemarketing calls allowed under HIPAA in light of their unique value to and acceptance by consumers?

Answer. Speaking only for myself, I am sympathetic to the unfortunate quandary faced by health care companies that must comply with competing statutes while also trying to provide the best overall care to patients. Unfortunately, the Commission has pursued an extensive (and misguided) reading of TCPA that has harmed the ability of health care companies—and many other legitimate industries—to serve their customers. I would be supportive of an overall effort to exempt these types of calls from TCPA.

Question 2. What is the Commission's view on acting to protect these calls expeditiously so that beneficiaries' access to health care is not jeopardized, rather than waiting for a larger "omnibus" TCPA ruling that could take much longer?

Answer. I would be supportive of efforts to move smaller items in quick order. The FCC Chairman, however, is in the best position to answer questions on the timing of moving such protections and whether to do so individually or collectively.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. TOM UDALL TO
HON. MICHAEL O'RIELLY

Question 1. At a September 15, 2016 hearing of this Committee, you pledged to me that you would work with then Chairman Tom Wheeler to take action by the end of the year to help address the digital divide on tribal lands. The New Mexico Congressional delegation wrote you on January 9, 2017 to urge swift action on a tribal broadband item circulated by Chairman Wheeler on December 15, 2016 that has not been acted on. Why have you not responded to our letter?

Answer. If there was any miscommunication or if I erred in not personally responding to the New Mexico Congressional delegation, I offer my sincere apology. I have great reverence for the Congress and believe it is my obligation to answer any specific issues, questions or concerns you have to the best of my ability. In this instance, it appears that similar letters were sent to the Chairman and Commissioners, in which case it is common practice to allow the Chairman to respond. To the extent that you were seeking my independent views, I did not realize this.

Substantively, I remain committed to working on bringing broadband access to all Americans that wish to have it, including those on tribal lands. Former Chairman Wheeler's draft item raised a host of critical issues and problems that were not sufficiently addressed prior to his departure. As you note, Chairman Pai has since circulated his own proposal for the Commission's consideration.

Question 2. FCC Chairman Pai wrote me on March 7 that he circulated an order that "would assist carriers serving Tribal lands in deploying, upgrading, and maintaining modern high-speed networks." The order would also "allow carriers serving Tribal lands a greater ability to recover operating expenses, thus improving the financial viability of operating a broadband network serving Tribal lands." Will you support this order?

Answer. I am in the process of reviewing the text of the item and have sought to get a full and accurate picture of the effect that the policies will have on potential beneficiaries in order to render the best decision possible. This process has raised a number of further questions regarding expenses incurred by some of the applicable companies. In order to be good stewards of the funding provided by American consumers, I want these questions answered before casting my vote. On a more fundamental note, I am not sure that exempting certain companies providing service on tribal lands from our operating expense limits is the best way to increase broadband availability to these areas, which is the primary concern and objective.

Question 3. Do you believe the media is the "enemy" of the American people?

Answer. No. However, having worked on public policy matters in Washington, D.C., for over two and a half decades, I believe that a number of media outlets maintain biases that were and remain reflected in their reporting to the detriment of projects and views of my former employers or myself. Thankfully, the communications beat tends to avoid many larger politically-charged issues.

