

Chairman John Thune
Questions for the Record
Commerce Committee Hearing on the Nomination of
Jessica Rosenworcel to be FCC Commissioner
October 28, 2015

- 1. I'd like to ask you about the FCC's October announcement that it would launch an investigation into four telecom companies over special access tariffs. Despite this announcement, it is my understanding that the Commission has not completed its analysis of the extensive special access data it has already compiled.**

Considering the FCC's limited resources, how is it prudent for the FCC to launch full-scale investigations when it hasn't even completed its own due diligence on the topic? And what happens now to the unfinished analysis of the previously collected data?

As you note, on October 16, the Commission's Wireline Competition Bureau initiated an investigation of the terms and conditions of select incumbent local exchange carrier tariff pricing plans of AT&T, CenturyLink, Frontier and Verizon for business data services. The Bureau's investigation arises out of allegations from some parties that certain terms and conditions in business data services tariffs are unreasonable and lock up demand for TDM-based business services, which may harm competition and innovation. These allegations are disputed by incumbent LECs. The Bureau's order initiating the investigation makes clear that "[n]othing has yet been decided on the merits." Rather, the Bureau is "seek[ing] additional data from the incumbent LECs on which to base an objective evaluation of the reasonableness of the tariff pricing plan terms and conditions that are designated for investigation." To this end, the tariffs remain lawfully in place during the investigation.

Meanwhile, the Commission has a separate rulemaking related to special access services that is ongoing. That rulemaking focuses on the current state of competition in the special access market and how best to measure competition in the future. The Commission has undertaken a data collection as part of that rulemaking and, in September, the data was made available for public review subject to the terms of a protective order to safeguard competitively sensitive information. Public comments relating to the rulemaking are presently due on January 6, 2016 and reply comments are due on February 5, 2016.

Although the Commission's investigation into tariff terms and conditions "is based on the record generated" in its rulemaking proceeding, it "is being initiated and will be conducted as a separate proceeding." I believe both the investigation and rulemaking are lawful under the Communications Act. However, I recognize that it is important to harmonize our policies across proceedings, including those involving special access.

- 2. As you know, authorizing the FCC has been a stated priority for me this Congress. This is an area where I believe Republicans and Democrats of this Committee should come together to ensure the FCC is responsive to the needs of our constituents. As a former Senior Communications Counsel on this committee, you understand our committee's role and jurisdiction as well as anyone.**

Setting aside the debate over certain “process reforms,” would you welcome legislation to reinstitute regular oversight and authorization of the Federal Communications Commission by the Congress?

Yes.

Senator Jerry Moran
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- 1. Regarding the Commission’s designated 100% overlap areas: You stated that the commission has a defined challenge process for price cap carriers, and that the commission is working on a similar process for rate-of-return carriers. Please provide more information about the commission’s plans for allowing incumbent rate-of-return carriers to dispute their designation as a 100% overlap area.**

In the 2011 Universal Service/Intercarrier Compensation Transformation Order, the Commission adopted a rule to eliminate high-cost universal service support in incumbent local exchange carrier (ILEC) study areas where an unsubsidized competitor or a combination of unsubsidized competitors offers voice and broadband services that meet the Commission’s service obligations throughout the study area. The Commission subsequently codified this rule in April 2014. In December 2014, the Commission directed its Wireline Competition Bureau (Bureau) to “publish its preliminary determination of those areas subject to 100 percent overlap and then provide an opportunity for comment on those preliminary determinations.”

On July 29, 2015, the Bureau published its preliminary list of fifteen rate-of-return study areas that it tentatively found were subject to 100 percent overlap by an unsubsidized competitor or combination of unsubsidized competitors. The Bureau sought public comment on its findings, in particular inviting feedback from affected parties. Comments were due on August 28, 2015 and reply comments were due on September 28, 2015.

To derive the preliminary list of areas subject to 100 percent competitive overlap, the Bureau utilized FCC Form 477 data. Form 477 filers must truthfully certify that they offer service in a particular census block, however, filers may not offer service to all locations in the census block. As a result, the Bureau concluded that it “cannot finalize the [100% overlap] list... without knowing whether the unsubsidized competitor is offering fixed broadband and voice service in accordance with the Commission’s service obligations for universal to all locations within the blocks reported on Form 477 and which overlap the study area.” (emphasis in original)

Thus, similar to the challenge process it had used in the past, the Bureau invited competitors to address in their comments whether they currently offer, to all locations within the blocks reported on Form 477 and which overlap the incumbent’s study area, service that meets the Commission’s service obligations for universal service (e.g., rates, speeds, latency, usage capacity). Significantly, the Bureau also invited rate-of-return carriers that were identified on the preliminary list of 100 percent overlapped study areas “to submit evidence that an unsubsidized competitor does not offer service to all locations in the [relevant] census block... and/or that the competitor is not offering service to all locations within those blocks.” The Bureau noted that “the type of evidence that we found persuasive in the ... [price cap] challenge process to establish that service was not being offered in an area was evidence that a provider’s online service availability tool showed ‘no service available’ for particular addresses in the relevant area.” The Bureau stated that

“such information would be relevant to our final determination.” I believe that this process provides a fair opportunity for rate-of-return carriers to challenge the determination that they are in fact subject to 100 percent competitive overlap, but the agency should always remain open to ideas to improve its procedures.

- 2. Regarding the Commission’s designated 100% overlap areas: Should a mere claim of service capability by an interested competitive provider be regarded as more or less persuasive than physical measurements showing signal strength at specific household locations?**

More information, including concrete and verifiable evidence, is always preferable to assist the Commission in assessing whether service is being provided to a given location.

Senator Deb Fischer
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1. Commissioner Rosenworcel, in June 2015 the FCC adopted an order that imposed new requirements on businesses pursuant to the Telephone Consumer Protection Act (TCPA). I have heard from several business owners in Nebraska who are concerned about the burdens that the TCPA will impose on them, including the threat of class action lawsuits. You actually dissented from part of the decision because it permitted certain industries to obtain waivers of the TCPA rules. Please address the following concerns raised by business owners regarding the new TCPA rules:

A. Businesses need to have to have prior express consent to contact consumers on their cell phones using an autodialer. Some businesses, however, are concerned that the FCC has expanded the definition of “autodialer” to include smartphones. Is this the case? What certainty can you give businesses about this new definition?

The TCPA defines an “automatic telephone dialing system” as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” In the June 2015 Declaratory Ruling and Order, the Commission did not “address the exact contours of the ‘autodialer’ definition or seek to determine comprehensively each type of equipment that falls within that definition that would be administrable industry-wide.” Rather, the 2015 Declaratory Ruling and Order maintained the Commission’s conclusion in a 2003 order that to be considered an “automatic telephone dialing system” the “equipment need only have the ‘capacity to store or produce telephone numbers,’” as the statute dictates. In that regard, the 2015 Declaratory Ruling and Order noted that the Commission has “interpreted ‘capacity’ broadly since well before consumers’ widespread use of smartphones” and stated that “there is no evidence in the record that individual consumers have been sued based on typical use of smartphone technology” or that there are “scenarios under which unwanted calls are likely to result from consumers’ typical use of smartphones.” Instead, the Commission committed to “monitor our consumer complaints and other feedback, as well as private litigation, regarding atypical uses of smartphones, and provide additional clarification if necessary.”

In any event, the use of an autodialer is only prohibited when a caller is using it to dial wireless numbers without prior express consent from the called party. They can be used to dial residential wireline numbers unless it is a prerecorded or artificial voice telemarketing call which then would require prior express consent.

I recognize that this is complex and technology has changed considerably since passage of the TCPA. If Congress chooses to revisit the TCPA, updating the definition of autodialer could help provide greater certainty for consumers and businesses.

B. I have also heard from companies who are concerned that, under the new rules, they could be subject to litigation if they attempt to contact a consumer whose phone number has been changed. One company, for example, sent text messages to an employee, who never informed the company that the employee's phone number had changed. The company did not find out about the change until it was brought to court. As an FCC commissioner, what guidance can you give to businesses to ensure they can call and text customers – or even employees – without fear of legal action?

In the June 2015 Declaratory Ruling and Order, the Commission identified a number of options that, over time, may permit callers to learn of reassigned numbers. First, the Commission recognized that there is at least one database that can help to determine whether a number has been reassigned. Second, callers can ask consumers to notify them when they switch from a number for which they have given prior express consent. Third, the Declaratory Ruling and Order made clear that there is “[n]othing in the TCPA or our rules [that] prevents parties from creating, through a contract or other private agreement, an obligation for the person giving consent to notify the caller when the number has been relinquished.” And, fourth, the record in the proceeding suggests that callers seeking to find reassignments can: “(1) include an interactive opt-out mechanism in all artificial- or prerecorded-voice calls so that recipients may easily report a reassigned or wrong number; (2) implement procedures for recording wrong number reports received by customer service representatives placing outbound calls; (3) implement processes for allowing customer service agents to record new phone numbers when receiving calls from customers; (4) periodically send an email or mail request to the consumer to update his or her contact information; (5) utilize an autodialer’s and/or a live caller’s ability to recognize ‘triple-tones’ that identify and record disconnected numbers; (6) establish policies for determining whether a number has been reassigned if there has been no response to a ‘two-way’ call after a period of attempting to contact a consumer; and (7) enable customers to update contact information by responding to any text message they receive, which may increase a customer’s likelihood of reporting phone number changes and reduce the likelihood of a caller dialing a reassigned number.”

In addition, the Declaratory Ruling and Order established a one-phone call safe-haven for callers placing calls to numbers that have been reassigned without the caller’s knowledge. In sum, the Commission concluded that “the existence of phone number database tools combined with other best practices, along with one additional post-reassignment call, together make compliance [with the TCPA] feasible.”

2. Commissioner Rosenworcel, do you believe that the TCPA is in need of modernization? For example, some businesses argue that the growth in wireless phones has made the TCPA out of date. In your opinion, what parts of the existing law should Congress update?

Yes. Our communications technology is changing quickly. The TCPA was passed when there were less than 10 million cellphone subscriptions in the United States and the smartphone was a concept straight out of science fiction. By contrast, today, Americans are cutting the cord in increasing numbers and there are well over 350 million wireless subscriptions in the United

States. As a result, I believe it would be helpful to take a fresh look at the way the TCPA treats wired and wireless calls differently. This distinction may have made sense at the time of passage, but it no longer reflects the ways consumers and businesses use communications technology. In addition, as noted above, Congress could consider updating the Act's definition of autodialer to account for changes in technology since the TCPA was enacted.

Senator Dan Sullivan
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- 1. Commissioner Rosenwercel, I know you previously worked with Senator Inouye, who was a friend to Senator Ted Stevens and often advocated for Alaskans as if he was the State's third Senator. You also come highly recommended by our Alaskan carriers. You have been to our state, including some remote communities, a number of times. You have come not only in the summer, but also in the winter, which tells us a lot about your character and commitment. As you saw firsthand, Alaska still has communities without mobile or broadband service, and in many places trails the Lower 48 in deployment of modern telecommunications infrastructure. At the direction of the previous Chairman, the Commission adopted a plan that destabilized funding to Alaska, hindering our carriers' ability to close this gap. Our rate-of-return and wireless carriers have worked together to put forward a plan that would stabilize funding for our rate-of-return carriers, providing them the certainty they need to invest in their networks. Will you continue to work with my office and our delegation to put this plan to work as soon as possible, and no later than Commission action addressing the national rate-of-return carrier program? I understand you, along with the Chairman and your fellow Commissioners, are committed to addressing the national program by the end of the year.**

I have been to many communities in Alaska, including Anchorage, Homer, Dillingham, Manokotak, Aniak, Kotzebue, Kiana, and Nome. As a result, I know firsthand the difficulties carriers face serving our 49th state. That is why, as the Commission contemplates high-cost universal service reform for rate-of-return carriers, I believe that it is important for us to account for Alaska's unique traits and consider the merits of the plan put forward by the majority of Alaska carriers. I commit to working with your office as we do so.

- 2. In your testimony, you highlight universal access as one of the four essential values that has informed our communications laws. If re-confirmed, will you continue to support the Universal Service Fund Program and its principals as envisioned by this Committee in the 1996 Act?**

Yes.

- 3. In your testimony, you said that, if re-confirmed, you will "continue to be guided by the fundamental values in the law" and that you will "continue to respect the priorities of this Committee." Do you agree that if this Committee produces a legislative solution regarding the Open Internet Order, it is your responsibility as Commissioner to execute this solution as directed by Congress?**

Yes.