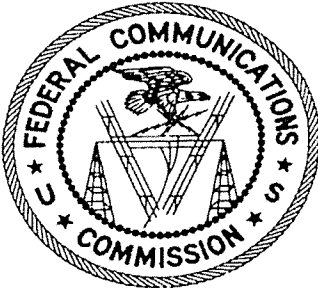



UNITED STATES GOVERNMENT
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF INSPECTOR GENERAL



MEMORANDUM

DATE: September 23, 2016

TO: David L. Hunt
Inspector General

FROM: Jay C. Keithley 
Assistant Inspector General – Investigation and Counsel

SUBJECT: Lifeline Disclosure

I. Introduction

In a letter dated April 15, 2016, to Federal Communications Commission (“FCC”) Chairman Tom Wheeler (“Wheeler” or “the Chairman”), Senator John Thune, Chairman of the Senate Committee on Commerce, Science and Transportation, asked that the FCC address concerns raised by him regarding the potential violation of 47 C.F.R. § 19.735-203, pertaining to disclosure of “nonpublic information . . . directly or indirectly, to any person outside the Commission,” as a complaint requiring an investigation pursuant to 47 C.F.R. § 19.735-107(b). Specifically, Chairman Thune expressed concern that information regarding the *2016 Lifeline Modernization Order*, 31 FCC Rcd 3962 (2016) (*Lifeline Order*), specifically news of an agreement among FCC Commissioners O’Rielly, Pai and Clyburn to vote for a hard cap on Lifeline spending set at \$2 billion (the “deal” or “compromise”), appeared in the news media publications Politico and Broadcasting & Cable prior to the FCC’s vote on the *Lifeline Order*.¹

¹ Chairman Thune’s letter also raised concerns about potential violations of the FCC’s *ex parte* rules. The

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Subsequently, in a letter from Senator Bill Nelson, Ranking Member of the Senate Committee on Commerce, Science and Transportation to David Hunt, Inspector General, FCC, dated May 12, 2016, Senator Nelson requested the FCC Office of Inspector General (OIG) to conduct a fulsome investigation of all potential sources of leaked information pertaining to the *Lifeline Order*.

II. Applicable FCC Rules

Section 19.735-203(a) of the FCC rules states

[e]xcept as authorized in writing by the Chairman pursuant to paragraph (b) of this section, or otherwise as authorized by the Commission or its rules, nonpublic information shall not be disclosed, directly or indirectly to any person outside of the Commission. Such information includes, but is not limited to, the following: (1) [t]he content of agenda items

47 C.F.R. § 19.735-203(a).² Section 19.735-107 of the FCC rules states that employees may face disciplinary action if they violate any Part 19 rules. 47 C.F.R. § 19.735-107(a). Section 19.735-107(b) requires the Chairman to initiate an investigation when a complaint is brought to his attention and to notify the OIG. 47 C.F.R. § 19.735-107(b) and (c).

III. Investigation

On April 18, 2016, Ruth Milkman (“Milkman”), FCC Chief of Staff, contacted Jay Keithley (“Keithley”), Assistant Inspector General – Investigations and Counsel, regarding Chairman Thune’s April 15th letter. In response, OIG commenced an investigation into the potential violation of section 19.735.203 of the FCC’s rules.

Starting on April 20, 2016, OIG’s Computer Forensics Investigator requested current Outlook Mailboxes and Office 365 Online Archives for FCC staff determined most relevant to

Chairman’s response to this concern addressed this matter, finding that a number of interactions occurred among Members of Congress or their staffs and FCC employees, which are exempt under the FCC’s *ex parte* rules, and noting one reported violation, which was unrelated to Chairman Thune’s concerns. Letter from Tom Wheeler to Chairman John Thune, dated May 2, 2016. The OIG has found no additional evidence in this regard.

² Paragraph (b) of this rule prohibits an employee engaged in certain outside activities from using nonpublic information obtained as a result of the employee’s government employment in connection with such outside activities unless the Chairman gives written authorization. 47 C.F.R. § 19.735-203(b).

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the investigation from the [REDACTED]). Subsequently, on May 6, 2016, OIG requested the landline and mobile phone call detail records of the same FCC employees. All records requested were provided by the end of May 2016.

OIG used [REDACTED] to process the Outlook mailboxes and Office 365 Online Archives. After processing, OIG staff manually reviewed email correspondence for the period from 3/30/2016 through 4/1/2016, [REDACTED]. Subsequently, staff used keywords identified by the investigative team to search email correspondence for the period from 4/2/2016 through 5/2/2016, [REDACTED]. Both [REDACTED] reports were provided to the investigative team for further review.

OIG Special Counsel, Deputy Assistant Inspector General-Investigations (“Investigators”) and the Assistant Inspector General-Investigations reviewed the [REDACTED] reports containing email correspondence, and the Special Counsel reviewed the landline and mobile phone call detail records. In total, the investigative team reviewed four-thousand eight-hundred and thirty-seven (4,837) email messages, including one-thousand four-hundred and thirty-four (1,434) attachments and eighty (80) voice mail messages.³ This project was completed by June 22, 2016.

Beginning on July 2, 2016, Investigators conducted ten in-person interviews of FCC employees regarding the disclosure of information reported in the Politico and Broadcasting and Cable articles and conducted additional telephone interviews. Some interviews were delayed due to witness unavailability in August.

IV. Findings

(A) FCC Interpretation of 47 C.F.R. § 19.735-203

Investigators interviewed Suzanne Tetreault (“Tetreault”), former Deputy General Counsel, on July 19, 2016.⁴ Tetreault, having served as Deputy General Counsel responsible for

³ [REDACTED]
[REDACTED]
[REDACTED]

⁴ At the time of the interview, Tetreault had just moved to a new position at the FCC; she is now a Deputy Bureau

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all non-litigation legal matters arising in the Office of General Counsel (OGC) for approximately four years, was very familiar with section 19.735-203 of the FCC's rules. She recalled analyzing and interpreting the rule approximately two years ago and revisiting the rule after Commissioner Pai raised it in the context of the March 31st *Lifeline Order* vote.

As an initial matter, Tetreault stated that the requirement that permission to disclose nonpublic information be in writing, *i.e.*, subsection (b) of 19.735-203, only applies when an FCC employee wishes to disclose nonpublic information as part of any writing or teaching outside of the FCC. Section (a)(1) tells Commission staff (including the Commissioners) when they may disclose information. However, it does not describe what disclosures are permitted. Rather, the authority to determine what nonpublic information may become public information derives from section 5 of the Communications Act of 1934, as amended, 47 U.S.C. § 155(a), which provides that the Chairman is Chief Executive Officer of the FCC, and sections 0.3 and 0.211 of the FCC's rules, 47 C.F.R. §§ 0.3(4) and 0.211, which define and provide the Chairman's general authority over the affairs of the FCC. Under these provisions, the Chairman has general authority to change the character of information from previously non-public information to information that would be available for public disclosure. That the Chairman has the authority to decide when/what nonpublic information may become public information to be available for public disclosure has been the long-standing position at the FCC.

In addition, Tetreault stated section 19.735-203 does not prohibit a Commissioner from stating his/her position on a particular issue in an FCC Order not yet made public. However, if the Chairman had not authorized it, an FCC employee would violate section 19.735-203 if he/she disclosed to a non-FCC employee information in an FCC Order not yet released. Finally, Tetreault stated that, in her opinion as the former Deputy General Counsel, an FCC employee who disclosed information in an FCC Order not yet released, even if the information had previously been disclosed by someone else, violated section 19.735-203 if the Chairman had not authorized the disclosure.

(B) Disclosure of the Clyburn, Pai and O'Rielly Compromise

Who Disclosed Compromise Lifeline Order Information to Politico

Chief in the FCC's Wireless Bureau. However, during the time period covered by this investigation, Tetreault was the Deputy General Counsel and was the person in OGC who would have provided legal advice on the FCC's interpretation of the FCC rules relevant to this investigation.

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Based on Investigators' review of phone records, email messages and interviews, Gigi Sohn ("Sohn"), Counselor to the Chairman, provided some of the information revealed in the Politico story that appeared at approximately 10:49 am on March 31, 2016. In an interview, Sohn revealed that Shannon Gilson ("Gilson"), FCC Communications Director, requested that Sohn call Politico reporter Margaret McGill ("McGill") and inform McGill that the Commission meeting was delayed from 10:30 until 12:00 and that there was a compromise on Lifeline, including the fact that there would be an annual cap on the amount of money available in the Lifeline program. Sohn was instructed not to tell McGill the amount of the agreed-upon cap. In an interview, Gilson explained that throughout the morning of March 31st, the FCC Office of Media Relations had been inundated with calls from the press and that it was clear many reporters and stakeholders were already aware a deal was being crafted by Commissioner Clyburn and the Republican commissioners. Thus, because she felt it would be beneficial to get the story out accurately, Gilson sought and received authorization from Wheeler and Milkman to provide the press with high level details. Gilson exercised her discretion in choosing both Politico and McGill as the appropriate recipients of this information, and instructed Sohn to make the call.

At 10:13 am, Sohn called McGill. Sohn believed that, at the time of the call, McGill may have already known about the deal. Indeed, at the time she made the call to McGill, Sohn knew of at least two Lifeline advocates who had knowledge of the deal on the morning of March 31st – [REDACTED], and [REDACTED]. Sohn did not tell McGill the amount of the agreed-upon cap.

Although OIG staff has discovered who provided much of the information to McGill for the 10:49 am Politico story referenced in Senator Thune's letter, we have been unable to determine with certainty who provided McGill with the information on the amount of the agreed-upon cap.⁵ The facts we have been able to ascertain are:

- (1) Phone records show that Robin Colwell ("Colwell"), Chief of Staff to Commissioner O'Rielly, received a phone call from McGill at approximately 10:31 am on March 31st. That call lasted approximately 2 ½ minutes. In her interview, Colwell did recall speaking with reporters several times on March 31st, however, she did not recall speaking with Margaret McGill at 10:31 am. Colwell also stated, if she had spoken with McGill, she would not have provided detailed information regarding the compromise to her.

⁵ In a phone interview McGill exercised her right not to reveal her sources.

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- (2) Phone records show McGill called Sohn at approximately 10:34 am. That call lasted approximately 1 minute. As stated above, Sohn maintains that, although she told McGill about the compromise, she did not divulge the cap amount.
- (3) During this critical time period, McGill also contacted David Grossman ("Grossman"), Chief of Staff to Commissioner Clyburn via email, but there is no evidence that Grossman responded to McGill's email.

Significantly, because our investigation has not revealed with any certainty that anyone within the FCC disclosed the amount of the cap to the media, we cannot discount the possibility that the disclosure of that information to the media came from outside the FCC.

Who Disclosed Compromise Lifeline Order Information to Broadcasting and Cable

We have been unable to ascertain with certainty who disclosed the *Lifeline Order* compromise to Broadcasting and Cable reporter John Eggerton ("Eggerton").⁶ However, we have discovered the following information:

- (1) At 9:37 am, Eggerton called Nicholas Degani ("Degani"), Legal Advisor to Commissioner Pai. That call lasted approximately 6 minutes. Degani does not recall the nature of the conversation.
- (2) At 10:31 am, Robert Bukowski, Staff Assistant to Commissioner O'Rielly sent an email message to Colwell, stating that Eggerton had called and wanted to speak with Colwell.
- (3) At 10:36 am, Colwell called Eggerton. The call lasted approximately 10 minutes. Again, although Colwell recalls speaking to reporters several times on March 31st, she does not recall specifically speaking to Eggerton at that time.

Again, because our investigation has not revealed with any certainty that anyone within the FCC disclosed the *Lifeline Order* compromise to Eggerton, we cannot discount the possibility that the disclosure of that information came from outside the FCC.

⁶ In a phone interview Eggerton exercised his right not to reveal his sources.

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Who Disclosed Compromise Lifeline Order Information in Other Fora

At approximately 11:37 am, Matthew Berry ("Berry"), Chief of Staff to Commissioner Pai, confirmed the compromise, including the agreed-upon cap amount of \$2 billion, to [REDACTED], reporter for [REDACTED], via email message.⁷ In addition, between 1:00 pm and 1:07 pm, Berry appeared in the FCC Commission meeting room and stated that Commissioners Clyburn, O'Rielly and Pai had reached a compromise on the *Lifeline Order*, including an annual cap of \$2 billion on the Lifeline program and that Commissioner Clyburn had backed out of the compromise.

At approximately 1:06 pm, Colwell responded via email message to Margaret McGill stating "the deal is off." In addition, Colwell sent an email message at approximately 1:14 pm to [REDACTED], a reporter with [REDACTED], stating that the FCC meeting had been delayed "because our D vote flipped back. No budget."

Finally, at the FCC press conference after the March 31st commission meeting, Commissioner Ajit Pai read from the official Lifeline email chain. He also disclosed the details of the compromise *Lifeline Order*.

(C) Authorization to Disclose Compromise to Media

As previously stated, the FCC has determined that the Chairman has general authority to change the character of information from previously non-public information to information that would be available for public disclosure. *See supra* at p. 4. That the Chairman has the authority to decide when/what nonpublic information may become public information to be available for public disclosure has been the long-standing position at the FCC. Thus, as soon as the Chairman authorized Gilson to confirm to the press that a compromise order with a cap on Lifeline may be on the agenda, pursuant to 47 C.F.R. § 19.735-203(a), the character of information changed from previously non-public information to information that would be available for public disclosure. Therefore, neither Sohn's disclosure to Politico, nor the disclosure to Broadcast & Cable (if it was in fact made by someone within the FCC) or Berry's disclosure to [REDACTED] about the existence of a compromise violated §19.735-203.⁸ However, disclosure of the cap amount was

⁷ Berry also confirmed this information to [REDACTED], reporter for [REDACTED], at approximately 2:00 pm.

⁸ Although less clear, the disclosures of the fact that Commissioner Clyburn reversed her position on the compromise likely did not violate §19.735-203 because the nature of the information underlying the disclosures had already been provided to the media by the Commission in its March 8, 2016, Fact Sheet regarding the original draft

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not specifically authorized by the Chairman.

(D) Intent and Impact of Meeting Delay and Disclosure

Chairman Thune's letter raises concern, not only about the delay in starting the Commission meeting, but also about the purpose of disclosure of the compromise to media outlets.⁹

The compromise *Lifeline Order* was posted on the *Lifeline Order* email chain at 9:29 am by Commissioner Pai's office. Commissioners O'Rielly and Clyburn's offices weighed in favorably on that *Lifeline Order* at 9:32 am and 9:49 am, respectively. Given that the compromise *Lifeline Order* was posted so close to the start of the meeting, Milkman explained that the meeting was postponed via email from 10:30 am to 12:00 pm to provide all the commissioners time to review the new final order. Milkman stated that the second delay -- from 12:00 pm to 1:30 pm -- occurred, in part, to allow Commissioner Clyburn to redraft her statement after she decided she would not vote in favor of the compromise *Lifeline Order*.¹⁰ Evidence suggests that Commissioner Clyburn spoke with Commissioners O'Rielly and Pai between 12:00 pm and 1:00 pm. At 1:11 pm, Rebekah Goodheart, Legal Advisor to Commissioner Clyburn, posted on the email chain that Commissioner Clyburn, after further reflection on the impact of the potential changes, was unable to support the compromise *Lifeline Order*. Immediately thereafter, the previously posted non-compromise *Lifeline Order* was re-posted to the Lifeline email chain. The Commission meeting began at approximately 2:00 pm.

As stated above, Gilson told Investigators that she was the person who recommended to the Chairman that the FCC provide the press with information about the compromise *Lifeline Order* to address the confusion that was already surrounding the item in the media. We have found no evidence that contradicts this statement.

order.

⁹ See e.g., Chairman Thune's April 15, 2016 letter at 3 ("[t]he disclosure of nonpublic information in the 10:47 am *Politico* article appeared designed to engage outside interest groups to disrupt the deal struck between the Republican Commissioners and Commissioner Clyburn.").

¹⁰ Although Milkman does not know exactly when Commissioner Clyburn changed her decision to vote for the *Lifeline Order* compromise, she knows that Commissioner Clyburn sought to have the Order removed from the agenda meeting. The Chairman would not agree to remove the Order, but instead, he further delayed the meeting.

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Moreover, with regard to the impact of the disclosure on Commissioner Clyburn's decision to reverse her support for the deal, Milkman told Investigators that when Chairman Wheeler first called Milkman at approximately 9:30 pm on March 30, 2016 to inform her about the compromise, he stated he planned to follow Commissioner Clyburn's lead on the compromise *Lifeline Order*. An email sent by Milkman, at approximately 5:50 am on March 31, 2016, to certain senior FCC staff corroborates Milkman's statement.¹¹ Both Milkman and Sohn stated the Chairman indicated he would vote with Commissioner Clyburn, whatever her decision.

In two separate interviews with Investigators, Commissioner Clyburn explained her decision-making process with regard to the compromise. Specifically, she understood there was draft legislation that, if enacted, would decimate the Lifeline program, and she believed capping the Lifeline program's budget could lead Congress to feel legislation was unnecessary. Therefore, on March 30th, she proposed a compromise to Commissioners Pai and O'Rielly, including imposing a hard cap on the Lifeline program's budget, with the intent to obtain a unanimous vote on the *Lifeline Order*.¹² She explained that throughout this process she informed the Chairman of her intentions and kept him apprised of events.

Commissioner Clyburn also stated that, although her conversations over the course of March 30th and 31st with the Chairman regarding the compromise were at times heated, she did not feel pressure from him to change her position on the compromise.¹³ Although she never asked him directly as to whether he would vote in favor of the compromise *Lifeline Order*, she took his silence on the vote to mean he would vote with her. Commissioner Clyburn declared that the Chairman is candid, and he would have been candid enough to say he would not vote

¹¹ Specifically, the email stated: "[a]lot happened with Lifeline last night, to wit MC, AP and MO agreed on a hard cap of \$2B. TW told MC he would go along." The email was sent to Jonathan Sallet, then FCC General Counsel, and Philip Verveer, Senior Counselor to the Chairman, with a cc to Louisa Terrell, Advisor to the Chairman.

¹² Commissioner Clyburn also spoke with [REDACTED] of the [REDACTED] late on March 30th, but does not recall the conversation with any certainty. Commissioner Clyburn provided [REDACTED] a general preview of the compromise to see how grassroots organizations would react to a cap on Lifeline.

¹³ Notwithstanding conflicting reports regarding what was said in a meeting between Commissioner Pai and Commissioner Clyburn regarding her decision to change her position on the compromise – with Commissioner Pai's staff stating that Commissioner Clyburn told Commissioner Pai that the Chairman had put pressure on her to change her decision and Commissioner Clyburn stating that she did not make such a specific statement – Commissioner Clyburn was consistently and steadfastly firm that she was not pressured by the Chairman to change her decision regarding the compromise.

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with her, if that were his plan.¹⁴ Commissioner Clyburn's belief in this regard was rooted in the fact that she generally took the lead on Lifeline issues.

Commissioner Clyburn ultimately came to the conclusion that she would reverse her support for the deal by midday on March 31st, based on several factors, including the concerns expressed by congressional members and their staffs. The tipping point came when she heard rumors she deemed reliable that Commissioner Rosenworcel would not vote for the compromise on the Lifeline cap. The failure to obtain a unanimous vote, especially when the dissenting commissioner would be a member of her own party, led Commissioner Clyburn to conclude she was in "a no win situation" and had to choose "the cooler hell," which was forgoing the compromise.

V. Conclusion

The events surrounding the March 31st Commission vote adopting the *Lifeline Order*, while not unprecedented in their entirety, were certainly unusual. Typically, commissioners do not engage in negotiations resulting in significant policy shifts in the final hours prior to a Commission vote. Thus, while such activity is not improper or illegal, the rarity of the occurrence explains in large measure the interest, speculation and concern the matter has generated. Our investigation has enabled us (1) to reconstruct with a fair degree of precision exactly how information was obtained by the press in advance of the vote and (2) to understand the motivations of key FCC officials relative to significant actions taken with respect to the Order. As explained above, when the Chairman authorized release of the fact that a compromise order with a cap on Lifeline may be on the agenda, pursuant to 47 C.F.R. § 19.735-203(a), the character of information changed from previously non-public information to information that would be available for public disclosure. However, disclosure of the cap amount was not specifically authorized by the Chairman.

Further, we found no evidence that the information was provided to the press in an attempt to unduly influence the outcome of the vote.

¹⁴ See also *supra* at n. 11.

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