

**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”

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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

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).

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 interfere 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.

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).

⁸ Letter from Senator Bill Nelson to the Honorable Tom Wheeler, Chairman, FCC (Feb. 12, 2016).

⁹ Jesse 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/853013081>.

¹⁰ *Id.*

¹¹ Letter from Representative Yvette Clarke et al. to the Honorable Tom Wheeler, Chairman, FCC (Apr. 22, 2016).

¹² See 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).

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 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

¹³ *ACA 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).

¹⁴ *See generally* NTCA–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).

¹⁵ Letter from Representative Kevin Cramer et al. to the Honorable Tom Wheeler, Chairman, FCC (May 5, 2016).

¹⁶ Letter from Senator Steve Daines et al. to the Honorable Tom Wheeler, Chairman, FCC (May 26, 2016).

¹⁷ *Supra* note 6.

¹⁸ Letter from Senator Patrick Leahy to the Honorable Tom Wheeler, Chairman, FCC (May 26, 2016).

¹⁹ *Supra* note 8.

“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%, 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% 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?

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% 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% 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.

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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.