

ONE HUNDRED TWELFTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

MEMORANDUM

November 30, 2011

To: Subcommittee on Communications and Technology Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Markup on a Discussion Draft of the “Jumpstarting Opportunity with Broadband Spectrum (JOBS) Act of 2011.”

On Thursday, December 1, 2011, at 10:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Communications and Technology is scheduled to hold a business meeting to mark up a Republican discussion draft titled the “Jumpstarting Opportunity with Broadband Spectrum (JOBS) Act of 2011.” The legislation, which was released on November 29, 2011, would grant the Federal Communications Commission (FCC) authority to conduct incentive auctions, provide for the deployment of a public safety broadband network, and address spectrum usage by federal agencies. The Subcommittee has previously held four oversight hearings this year on these topics. The Subcommittee also held a legislative hearing on July 15, 2011, on a Republican discussion draft that was a precursor to the JOBS Act.

The new language is an improvement from previous proposals from Chairman Walden in one key area: its allocation of the D-block spectrum to public safety. The Republican draft is a step backward or retains significant flaws in three other areas: (1) its diffuse governance provisions for the public safety network; (2) its prohibition on allocating spectrum from the incentive auctions for unlicensed use; and (3) its limitations of the FCC’s authority to craft auction rules in the public interest. How funds are allocated in the Republican proposal also raises significant issues.

Reps. Waxman, Eshoo, Markey, Doyle, Matsui, Christensen, Pallone, DeGette, Engel, and Schakowsky introduced H.R. 3509, the “Wireless Innovation and Public Safety Act of 2011,” on November 29, 2011. H.R. 3509 is different from the Republican discussion draft in several important areas, most notably public safety network

governance, unlicensed spectrum, and limitations on FCC authority to develop auction rules.

Democratic Committee staff are still reviewing the text of the legislation, as are staff for the FCC and other stakeholders.

I. Allocation of the D Block to Public Safety

In Chairman Walden's July 2011 discussion draft, the D block spectrum would have remained subject to auction for commercial use. Public safety officials objected to this provision, arguing that they need the D Block to meet their current and future spectrum requirements.

In the new legislation, the D Block, consisting of 10 megahertz of spectrum, would be reallocated for public safety use. At the same time, the bill would require public safety to return 14 megahertz of 700 MHz spectrum for reassignment for commercial use through a future auction. This 14 megahertz presently consists of 12 megahertz of "narrowband" spectrum in use across the country for public safety voice communications, and 2 megahertz of associated guard bands. Public safety would have to return this spectrum five years after a private Administrator certifies the "availability of standards for public safety voice over broadband."

Public safety officials and state and local government organizations have expressed support for the provision allocating the D block as a step forward. However, these organizations have expressed serious concerns about the provision requiring public safety to return the narrowband and guard band spectrum. According to public safety officials and state and local governments, more than 11,000 state and local public safety licensees will be directly impacted, especially in major metropolitan areas where public safety spectrum is already highly congested. Further, they point to the significant state and local financial investments that would be put at risk by this requirement.¹

II. Governance of the Public Safety Broadband Network

Effective management and oversight of the public safety network is essential to the success of this complex venture. The Republican draft, however, creates a complex bureaucratic process that could result in a significant delay, amounting to over two years, before network deployment can even begin. It also envisions each of the 50 states building their own public safety networks with grants from the federal government. It is unclear that every state has the resources to undertake this responsibility, and this approach creates significant questions about whether nationwide interoperability will be achieved.

¹ Letter from United States Conference of Mayors to Chairman Greg Walden, House of Representatives Committee on Energy and Commerce (Nov. 30, 2011).

This approach is also contrary to the recommendations of public safety officials, the National Governors Association, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors. They have said that they want “a single national network” or “interconnected regional networks,” not a patchwork of 50 separate state networks. They further recommend that this national network be overseen by a “national body” to avoid the interoperability problems that would inevitably arise over time if each state were responsible for building and upgrading its own network.

In contrast, these groups have all endorsed the governance approach utilized in the Democratic bill, H.R. 3509. This approach establishes a strong, accountable, nonprofit national governance body, the Public Safety Broadband Corporation, that is charged with building a nationwide, interoperable public safety network. As the public safety officials and state and local governments recommend, state and local input is assured because of the significant representation of state and local governmental and public safety officials on the board of the Corporation, as well as the multiple opportunities required in H.R. 3509 for state and local input to the design and deployment of the public safety network. This approach also reduces costs because of the economies of scale achieved by having a single entity responsible for the network, as opposed to a patchwork of 50 separate state networks.

Another governance issue is whether it is wise to give a private company veto power over state public safety networks. The Republican bill directs that the FCC assign the license for the public safety broadband spectrum to a private contractor. Under this legislation, states would need to seek the approval of the private contractor before entering into their separate contracts with private industry partners to deploy the network within their respective states. The concept seems to be that the private contractor would be able to use this veto authority to ensure that the 50 separate state networks meet minimum interoperability requirements. Republican Committee staff explained to minority staff that this unusual model is based on the current 800 MHz public safety rebanding program, which is currently administered by a private consultant, Deloitte.

This approach raises significant concerns about the accountability of the private contractor and the costs to the taxpayer. Under the 800 MHz rebanding program, Sprint has been required to pay the costs of the contract with Deloitte, and they have been high. Although Deloitte’s responsibilities are not as extensive as those envisioned in the Republican bill, Deloitte (and its predecessor) has already been paid over \$140 million. That is nearly three times the amount the Administration has said a nonprofit corporation would need before it would become self-sustaining.

The history of prior efforts to build a public safety network also raise questions about the diffuse governance model in the Republican bill. The Republican bill perpetuates the way that state and local public safety networks historically have been deployed. That seems likely to lead to the same problems – balkanized networks, disparate technologies, a lack of interoperability, high costs – that spectrum legislation should strive to avoid.

III. Unlicensed Spectrum

The FCC has long recognized the benefits of setting aside spectrum for multi-user, multi-purpose unlicensed access. Under such a model, consumers can purchase off-the-shelf retail devices to access wireless services, such as broadband Internet, without having to bid for spectrum licenses at an auction.

Unlicensed spectrum has given rise to countless wireless devices and services such as baby monitors, garage door openers, connected alarm systems, and smart grid monitoring. Most significant, the FCC's decision to open up spectrum in the 2.4 Gigahertz spectrum band for Wi-Fi connectivity has helped lead to an explosion of wireless broadband applications and services. Recent estimates show that over 20,000 different devices have been certified by the FCC for use in the Wi-Fi band, almost three times the amount of innovation found in any other frequency band.² Last year, the Wi-Fi industry shipped three quarters of a billion Wi-Fi enabled devices, a 29% increase from the year before.³

Unlicensed is also increasingly part of wireless carrier business models. Carriers use unlicensed spectrum today to offload traffic from their data networks. Studies have shown that mobile data offloaded to Wi-Fi from the networks of mobile operators is expected to reach almost 90% by 2015.⁴ AT&T alone operates 27,000 hotspots in the United States and 190,000 hotspots overseas through roaming agreements.⁵ Most of its smartphone customers can access the U.S. Wi-Fi network at no additional cost, and Wi-Fi doesn't count against their monthly data plans.

The Republican draft has the potential to impact this unprecedented innovation and economic growth by preventing the FCC from allocating any future spectrum reclaimed from incentive auctions for unlicensed use. This prohibition is especially troubling for an incentive auction of the broadcast television spectrum because of its superior propagation characteristics. Allowing unlicensed use of the broadcast television

² Comments of Key Bridge Global LLC, ET Docket No. 10-237, at 3 (February 1, 2011)(online at <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021027412>).

³ *Wi-Fi Expands As the Center of Leading-edge Technologies in 2011*, Wi-Fi Alliance (Jan. 6, 2011)(online at http://www.wi-fi.org/news_articles.php?f=media_news&news_id=1035).

⁴ *Relief Ahead for Mobile Data Networks as 63% of traffic to Move onto Fixed Networks via WiFi and Femtocells by 2015*, Juniper Research (Apr. 19, 2011)(online at <http://juniperresearch.com/viewpressrelease.php?pr=240>)

⁵ Maisie Ramsay, *AT&T Ups Ante on Android Wi-Fi Offload*, CED Magazine (Oct. 3, 2011)(online at <http://www.cedmagazine.com/news/2011/10/at%26t-ups-ante-on-android-wi-fi-offload>)

spectrum could lead to the creation of “super Wi-Fi,” with the ability to reach hard-to-penetrate areas, enhance rural coverage, and add capacity to carry more data traffic than traditional Wi-Fi services. Prohibiting unlicensed use of this spectrum, as the Republican bill does, is likely to foreclose this opportunity.

The Democratic bill, H.R. 3509, would preserve the FCC’s flexibility to allocate spectrum reclaimed from an incentive auction for unlicensed services so that the United States can continue to build on the innovation created by Wi-Fi and maintain its global leadership in this area. Contrary to some mischaracterizations, the Democratic bill does not require the FCC to allocate unlicensed spectrum; it simply permits the agency to do so if the FCC determines this would be in the public interest.

IV. Limitation on FCC Auction Authority

Under current law, the FCC has broad authority to craft auction rules in the public interest. The agency has used this authority to ensure that communications markets remain competitive and spectrum is not concentrated in the hands of only one or two providers.

The Republican draft appears to contain a significant limitation on the FCC’s future authority to design auctions. Specifically, it amends the Communications Act to prohibit the FCC from imposing any condition on eligibility for participation in all future spectrum auctions if such condition is not related to the qualifications of an applicant, such as its fitness to hold a license or financial status.

This provision raises concerns that the FCC would be prohibited from structuring auction rules that promote competition. By permanently altering the FCC’s auction authority, the Commission could be prohibited from assessing the state of competition and designing auction rules that take into account market conditions and the level of concentration at the time an auction is scheduled to take place. This would prevent the agency from structuring auction rules to protect consumers and guard against future monopolies.

The incorporation of such a prohibition into the Communications Act could also expose the FCC to legal challenges from parties dissatisfied with any condition the Commission might impose that has potential impact on a party’s ability to participate in the auction. For example, the FCC has structured auctions in the past in which one block of a spectrum auction may be set aside to promote entrepreneurial and small business access to spectrum licenses. The FCC has also imposed conditions in the past limiting the number of blocks for which licenses could be won in an auction by any one applicant. It is not clear under the current draft language whether the FCC may continue to impose such auction conditions.

V. Funding Levels

The Republican draft also raises a number of other issues. These include the size of the \$3 billion fund provided to broadcasters for reallocation expenses, which is three times the amount CBO says is necessary, as well as the adequacy of the \$5 billion provided to build the public safety network, which the Administration and public safety officials say is insufficient. In addition, the Republican bill does not fund research and development in public safety communications.

These funding choices in the Republican bill raise questions whether the proceeds of the spectrum auctions authorized in the bill will be used to maximize the national interest.