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FTC Restarts COPPA Compliance, Revealing Settlement With Yelp, Mobile App Developer

The FTC said it settled with online review site Yelp and mobile app developer TinyCo over allegations they collected personal information about children under 13 without obtaining proper parental consent (<http://1.usa.gov/XhBAob>).

The FTC's long-awaited first public enforcement actions since the commission updated the Children's Online Privacy Protection Act (COPPA) rules (WID Dec 20/12 p1) don't much illuminate the commission's enforcement strategy for the updated rules, observers told us Wednesday. But they said the actions aren't without message and import. The agency is reinforcing its mobile focus and telling general audience sites and apps: COPPA applies to you, too, said observers. "These settlements will have a big impact on the public," said Tim Sparapani, vice president-law, policy and government affairs at the Application Developers Alliance. "Clearly they're making a statement: COPPA applies to mobile apps," said Dorsey & Whitney privacy lawyer Melissa Krasnow. Sparapani and others also saw another message. "They could go after any business," he said.

The complaints themselves are "classic COPPA enforcement," Krasnow said. They include allegations that would have violated the COPPA rules both pre- and post-July 1, 2013, when the new rules took effect, the FTC said. The Yelp complaint (<http://1.usa.gov/1uTAj1S>) discussed actions only between April 2009 and April 2013. Observers said this suggests the FTC has been working behind the scenes on several potential enforcement actions since its last publicly announced COPPA enforcement action in February 2013 against social networking site Path (<http://1.usa.gov/1pFnxTJ>). The commission might have more in the tank, they said. "Maybe they have a backlog of stuff they're working on," said Denise Tayloe, president of Privacy Vaults


Online (PRIVO), an FTC-certified COPPA safe harbor that tests clients' COPPA compliance. "Maybe the train just needed to leave the station." All involved told us in late August they were expecting renewed COPPA actions in the coming weeks (WID Aug 28 p1).

Yelp's improper data collection occurred on its Android and Apple iOS mobile app, the FTC said Wednesday. The app asked for users' dates of birth, but failed to exclude those below 13, the FTC said. As a result, the site collected names, email addresses and location information on users who may have been children without proper parental awareness, the FTC said. Yelp in a blog post said the mistake resulted from "a bug in our mobile registration process that allowed certain users to register with any birth date when it was supposed to disallow registrations from individuals under 13" (<http://bit.ly/1mflp6A>). Over this four-year span, Yelp said roughly .02 percent of users registered using an underage birth date. "We have good reason to believe that many of them were actually adults," Yelp said. The company fixed the problem when it was discovered in 2013, but agreed to settle the FTC complaint for a civil penalty of \$450,000.

The FTC's decision to move forward with enforcement puts general audience sites and apps "on notice," said Ifrah Law Internet privacy lawyer Michelle Cohen. FTC Bureau of Consumer Protection Director Jessica Rich said in a statement that "companies should take steps as they build and test their apps to make sure that children's information won't be collected without a parent's consent."

The complaint against TinyCo alleged COPPA infractions spanning the old and new rules (<http://1.usa.gov/1uGR3eG>). The commission alleged that although many of the company's apps are directed at children — Tiny Pets, Tiny Zoo, Tiny Monsters, Tiny Village and Mermaid Resort — the company encouraged users to provide email addresses in exchange for in-game currency without obtaining parental consent. TinyCo will pay a \$300,000 civil penalty under its settlement. The company didn't comment.

Even if TinyCo isn't solely focused on children, it's youth-themed apps and "brightly colored animated characters," mean it attracts children, the FTC said. The commission "attempted to show a difference between general audience and directed to kids," PRIVO's Tayloe said of the decision to pair the two

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actions. “TinyCo appears to send a warning to services that are reasonably attractive to children that are trying to avoid the more stringent obligations on children’s services by purporting to be for users 13 and over,” said Alan Friel, a privacy and consumer protection lawyer with BakerHostetler, in a client memo.

But “there is still great ambiguity about what the new rules require,” said Sparapani, whose alliance does not include TinyCo and Yelp. Now that the actions have signaled “a predicted renewal” of COPPA enforcement, the commission will likely move to complaints alleging infringement of the updated rules, Friel said. “The next round of FTC actions are likely to address more complex compliance issues, such as behavioral advertising, social media plug-ins, push notifications and the new category of ‘mixed use’ sites added by the 2013 rule revisions.” — *Cory Bennett* (cbennett@warren-news.com)

TWC Investigation

House Small Business Committee Presses Wheeler on Net Neutrality, Broadband Policies

FCC Chairman Tom Wheeler fielded a wide array of questions from House Small Business Committee lawmakers Wednesday. The committee held an oversight hearing with no fixed topic beyond how the FCC is serving small business and rural consumers, which turned into a discussion of everything from net neutrality to special access to broadband deployment policies.

House Small Business Committee ranking member Nydia Velazquez, D-N.Y., pressed Wheeler on net neutrality and the question of Title II reclassification. Title II is “very much a topic of conversation and on the table and something we asked for comment on in the proceeding,” Wheeler said.

Rep. Tom Rice, R-S.C., said he’s “concerned” about Title II and asked Wheeler about whether discrimination and blocking has happened. Wheeler tallied off a list of various instances. “Yes, there are indications of these kinds of problems having happened in the market,” Wheeler said, saying an open Internet is necessary for small businesses. “You will stifle” the Internet and innovation if the agency embraces Title II, Rice warned, suggesting the problems “could be dealt with through other laws.” Wheeler disagreed that antitrust law is sufficient in addressing broader open Internet concerns.

Rep. Janice Hahn, D-Calif., brought up the Los Angeles Dodgers and the recent TV blackout debate. Wheeler has opened an “investigation” into Time Warner Cable as a result, he said, noting he has talked to all the relevant CEOs involved in the dispute. “I want to know more about what’s going on here,” Wheeler said. “The reality here is a lot of money was put on the table to support an entity that’s doing all right itself economically and consumers ended up suffering. That’s not right, and I want to know more.”

In his testimony, Wheeler emphasized the importance of small business. Small-business life means “living on the edge,” he said. “Today our economy is all about nonphysical products.” He framed FCC goals as “direct” and focused on ensuring “21st-century connectivity,” including subsidization when needed. He emphasized the principles of what he has been calling “the network compact.”

“What we want to do here today is ensure that the FCC gets the job done right when developing their regulatory policies,” House Small Business Committee Chairman Sam Graves, R-Mo., said in his opening statement. “This means ensuring an open and free Internet that will allow for the free flow of information and services, facilitating the build out of high speed Internet to rural and underserved areas, and

providing the needed spectrum to industry players both small and large to ensure that our tech companies continue to innovate and create jobs.”

Velazquez focused on broadband in her opening statement. “More small businesses are embracing broadband than ever before,” she said, citing the need for “adequate support for broadband deployment” to close the gaps that still exist. Velazquez asked how small businesses can smoothly transition through any technology changes. The agency is looking at trials that will be a “taste test” to see, Wheeler replied. “I think it’s a ‘try before you buy’ kind of situation.” He cited a wish for open proceedings and a desire to work with the Small Business Administration. Velazquez asked if the FCC has embraced flexibility required for small businesses, and Wheeler affirmed it has.

Rep. Ron Barber, D-Ariz., said there's a “desperate need” for more broadband access, wired and wireless, in his district. He asked for a broader description of how the FCC is looking to expand broadband access over the next five years and how it’s engaging the private sector. Wheeler said several major factors are worth considering, such as whether broadband speed is fast enough or whether satellite should be used to cover gaps. “It has to happen,” Wheeler said of addressing the need. “Ten Mbps should be the minimum,” Rep. Chris Collins, R-N.Y., said, wondering why the FCC is continuing to deal with special access at the lower level of 1.5 Mbps. The FCC is finally in the midst of collecting special access data, Wheeler said in response to another question. “I don’t want any more delays on this,” Wheeler said: “We’ve waited on special access long enough.”

Wheeler cited a range of actions the FCC has taken to further broadband connectivity, such as through the Connect America Fund and the agency’s E-rate order earlier this year. “While an important step, there are still far too many rural and Tribal schools and libraries that do not have sufficient broadband connectivity to the building and we are actively working on tackling this issue through the next steps of E-rate modernization and implementation of the next phase of the Connect America Fund,” Wheeler said in his written testimony (<http://1.usa.gov/1o3AHGY>). He described FCC efforts to enhance wireless connectivity and its August NPRM on competitive bidding rules, and its actions in the media sphere, limiting broadcaster sharing agreements.

Wheeler also mentioned the net neutrality comments and the first discussions the FCC has hosted on the topic. “As this process moves forward, we will continue to enforce our Open Internet Transparency rule, which was upheld in court and is an important tool to help small businesses make informed choices about the Internet access services they buy,” Wheeler said. “It is my goal to get final rules back on the books as quickly as possible to give consumers, businesses and innovators the Open Internet protections they currently lack.” — *John Hendel* (jhendel@warren-news.com)

'Scapel' or 'Sledgehammer'?

DMCA Section 1201 a Necessity for Curbing Piracy, Say Tech Industry Officials; EFF Disagrees

Digital Millennium Copyright Act (DMCA) Section 1201 on circumvention of copyright protection systems hasn’t eliminated piracy, but that doesn’t mean it should be overhauled, said DMCA advocates at a House Judiciary IP Subcommittee hearing Wednesday (<http://1.usa.gov/1uzxrYP>). Tech industry officials said Section 1201 (<http://1.usa.gov/1r1CPm0>) contributed to the success and innovation

within their respective fields. Section 1201's technological protection measures (TPMs) inhibit consumer innovation, said Corynne McSherry, Electronic Frontier Foundation intellectual property director. Businesses could help handicapped consumers avoid the DMCA exemption process if they made their products appropriately accessible at sale, said Mark Richert, American Foundation for the Blind (AFB) public policy director.

Some believe TPMs have been an "effective tool to thwart piracy," while others see TPMs as a "small speed bump to those who intend to steal copyrighted works regardless of the law," said House Judiciary Committee Chairman Bob Goodlatte, R-Va., in opening remarks (<http://1.usa.gov/1s6PWWJ>). "Copyright owners themselves have reevaluated the need for TPMs," he said, citing the decline of TPM use in the music industry. Some of the hearing's witnesses suggested modifications to Section 1201 by the "scalpel," while others offered "blunter instruments," said Goodlatte. Congress should "oppose efforts to weaken" the DMCA, said House Judiciary IP Subcommittee member John Conyers, D-Mich. The DMCA helps to curb piracy and keep the U.S. economy competitive in the global IP market, he said.

The "price" of Section 1201 is "too high," said McSherry. Section 1201 "takes legitimate competition out of the marketplace and into the courtroom," she said. Congress should abolish Section 1201, which would "dramatically" reduce the cost of the Copyright Office's triennial reviews for Section 1201, said McSherry. Receiving exemptions for Section 1201 is a "cumbersome process," she said, saying devices other than cellphones (WID Aug 26 p9) may require lawful circumvention. The scope of Section 1201 is too broad and should be amended to specifically address willful copyright infringement, assuming reform is the only option, said McSherry.

Most of EFF's documented cases of Section 1201's "chilling effects" are "old," said House Judiciary IP Subcommittee member Doug Collins, R-Ga. Just because TPMs haven't eliminated piracy doesn't mean Congress needs to abolish Section 1201, he said. "Why don't we take robbery off the books?" Collins asked. He cited the growth in the tech industry as proof of Section 1201's value to the economy. Innovation doesn't happen without a "profit motive," said Collins. This isn't a "utopia."

McSherry said that independent auto mechanics are concerned about their businesses because many cars have TPM protected software. Those mechanics can't legally access such software, she said.

The use of TPMs is a "sound business choice," said Christian Genetski, Entertainment Software Association general counsel. Because the DMCA establishes "normative behavior," consumers understand it's illegal to "hack" TPMs, he said. When the tech industry fails to prevent piracy, the DMCA serves a necessary "backstop," said Genetski. Personal computer consoles, which don't use TPMs, have piracy rates 80 percent to 85 percent higher than gaming consoles, which do employ TPMs, he said. Section 1201 has "worked," as evidenced by the success and innovation within the app industry, said Jonathan Zuck, ACT-The App Association president. Modifications to Section 1201 require a "scalpel," not a "sledgehammer," he said.

AFB wouldn't have needed Section 1201 exemptions had rights owners made their products accessible for the visually impaired, said AFB's Richert. While the Copyright Office has granted AFB its requested exemptions, the office has also threatened to revoke them, he said. Richert suggested a "comprehensive" approach to copyright reform, rather than a piecemeal strategy. The latter approach was the "origin" of the "troubles" surrounding Section 1201, he said. — **Joe McKnight** (jmcknight@warren-news.com)

Different Narratives

Partisan Divide on Net Neutrality on Display in Senate Judiciary Hearing

Senators showed a strong partisan split Wednesday at a Senate Judiciary Committee hearing in how they saw net neutrality. It's the second such hearing that Chairman Patrick Leahy, D-Vt., has held this year. Democrats urged net neutrality protections, while differing on what underlying authority should be relied on, while Republicans scoffed at the notion that any rules are necessary and pointed to antitrust law.

Democrats attacked paid prioritization deals, a key focus this year as the FCC has sought to write net neutrality rules. "Whether our bill passes or not, the FCC should act to block this kind of behavior" and "go beyond antitrust laws," Leahy said, referring to legislation he introduced that would ban such prioritization deals. "There's a fundamental misunderstanding here," said Sen. Al Franken, D-Minn. "Net neutrality isn't about regulating the Internet. Net neutrality is about preserving the Internet as it is. ... What the FCC has proposed — paid prioritization — represents a change. That's why three and a half million people have commented." (See separate report below in this issue.) Franken later held a news conference at the Capitol with Sen. Ed Markey, D-Mass., pressing for Communications Act Title II reclassification of broadband. Sen. Richard Blumenthal, D-Conn., pressed a witness on how startup pitches to investors would change in a world of prioritization deals.

Sen. Mazie Hirono, D-Hawaii, called Title II "not terribly applicable" to ISPs, suggesting it's "not where we want to go" in crafting new rules. "We regulate public utilities up the wazoo," she said, referring to the Title II classification. "Should we be talking about a new title?" The best scenario may be "a clear, new title," she said.

Republicans framed net neutrality rules as government interference. "Rules and regulations could just end up impeding" the development of networks, create uncertainty "and ultimately cost jobs, harming the economy," said Judiciary Committee ranking member Chuck Grassley, R-Iowa. Net neutrality regulation would "foul up the Internet," said Sen. Orrin Hatch, R-Utah. "Without government regulation, the Internet is growing. So what's the problem?" Sen. Jeff Flake, R-Ariz., scoffed at Franken's remarks about preserving the Internet as-is and argued that such talk of preservation is dangerous in a dynamic industry. Sen. Mike Lee, R-Utah, cited dangers of regulation designed to govern railroads and Ma Bell, a reference to the possibility of Title II reclassification. "Unwise regulation in this area would do nothing, I fear, but stifle much-needed innovation in Internet service and, in the process, make it harder in the long run for consumers to secure better service and ultimately have a real choice, more choices than they currently have, about who delivers their Internet service," Lee said.

Sen. Ted Cruz, R-Texas, said unelected FCC commissioners "should not be dictating how Internet service should be provided to millions of Americans." He accused the FCC rulemaking of leading to "nanny-state regulation from Washington" and called net neutrality "a wolf in sheep's clothing," a "set of government directives" poised, as in other cases of such regulation, to leave "the little guys" in a "fatally strangled" position.

Center for Democracy & Technology President Nuala O'Connor, actress Ruth Livier, who has developed a Web-delivered video series, and Union Square Ventures Managing Partner Brad Burnham testified for net neutrality protections, as expected (WID Sept 17 p10). Robert McDowell, a former Republican FCC commissioner now at Wiley Rein, and Jeff Eisenach, a visiting scholar with the American Enterprise Insti-

tute Center for Internet, Communications and Technology Policy, warned against them, saying they would harm the market and create long-term dangers. Consumers should rely on antitrust laws, they said.

Reclassify and “immediately forbear,” recommended Burnham, formerly with AT&T. He called the idea that broadband is not a Title II telecom service “a fiction.” Livier also backed reclassification. O’Connor called Title II “a very significant option” but urged the FCC to consider all options for new rules, potentially relying on a hybrid of Title II and Section 706 authority. But Title II reclassification could mean a return of rate proceedings and would not ban prioritization, Eisenach cautioned: Net neutrality rules “would legitimize the efforts of tyrants everywhere.”

Witnesses disagreed on the history of classification and regulation for the Internet. “It is a fallacy to say the Internet has not been regulated,” O’Connor shot back. McDowell had called the Internet “the greatest de-regulatory success story of all time” and lamented that net neutrality’s definition “keeps morphing by the day,” the equivalent of a “Rorschach inkblot.” He especially warned against Title II reclassification and against applying net neutrality rules to wireless companies. Burnham and O’Connor said rules would create needed market certainty, while McDowell told Grassley “the investment community has a variety of concerns” about Title II reclassification, citing analysts. McDowell also rejected Burnham’s characterization of when the FCC judged broadband an information service and how it was regulated before: “They’ve never, ever been classified under Title II, those services,” McDowell said. — *John Hendel (jhendel@warren-news.com)*

Basic Questions Unanswered

E-Rate Funding Increase Backed by Schools; Telcos Worry About CAF Cuts

Calls by education and library groups, and FCC Commissioner Jessica Rosenworcel in a speech Wednesday, to increase E-rate funding are running into opposition from telcos, in comments filed in the E-rate modernization Further NPRM. The Independent Telephone and Telecommunications Alliance and USTelecom said they worry expanding E-rate could cut into other USF programs like the Connect America Fund.

“It is premature for the Commission to discuss any changes in E-Rate Program funding,” USTelecom said in its filing (<http://bit.ly/XDEjJ5>), as the comment period closed Monday. Most filings were not yet posted at our deadline, but USTelecom and some key commenters made their comments available to us Wednesday as they dealt with issues left unresolved by July’s E-rate modernization reform (WID July 17 p8). Pending issues could “substantially impact” the amount that’s needed for the program, USTelecom said, including the agency’s data collection effort on the connection needs of schools and libraries. The commission should fund E-rate “within the current budget and defer funding size questions to a later date, until such time as it has a better grasp on the E-Rate Program’s actual needs,” USTelecom said.

The comments deal with some “basic questions,” including “what size should E-rate be?” said Michael Romano, NTCA senior vice president-policy, in an interview. NTCA sought more data on the needs of schools and libraries before further changes (<http://bit.ly/1qgdT6H>).

The commission should “under no circumstances deplete other funded programs to increase E-Rate Program funding levels,” USTelecom said. “Any reduction in CAF funds “would be contrary to the goals of the high-cost program, rural healthcare program and the E-Rate Program by detrimentally impacting broadband build-out in high-cost rural areas.”

Web services and service providers don't contribute to USF at the same level as others, ITTA said, increasing “the contribution burden on traditional services and providers, putting them at a competitive disadvantage.” The Federal-State Board on Universal Service is studying the issue. In a blog post (<http://fcc.us/1rZpfDr>) last week, Commissioner Mike O'Reilly, a critic of the growth in USF spending, backed a USF spending cap, but also said the increase in the contribution rate highlights “that contribution reform is necessary.” NCTA would oppose requiring broadband providers to pay into the USF, because it might slow deployment, said a spokesman.

“As Commissioner [Michael] O'Rielly noted, the increases in the contribution factor we have seen in recent years are not sustainable,” said Micah Caldwell, ITTA vice president—regulatory affairs. Rosenworcel, speaking Wednesday to Latinos in Tech Innovation & Social Media, said E-rate has suffered from a lack of funds. While the commission took steps earlier this year to make the program more efficient, she said in prepared remarks that “the bigger problem is that the E-rate fund ... has barely been adjusted for inflation since the program began. That's cruel. It has cut down the purchasing power of schools by roughly \$1 billion per year, cutting short the good that an updated E-Rate can do. We need to fix this—because we can't expect to out educate and out innovate the world if we do it on a budget frozen in the age of dial-up” (<http://fcc.us/1qZ2YTY>).

The commission's July order was a critical first step,” said Bob Wise, president of the Alliance for Excellent Education and former Democratic governor of West Virginia, in a news release about the group's filing (<http://bit.ly/1mbcwvb>). “But now it must permanently increase funding for E-rate so that at least 99 percent of the nation's students have access to high-speed broadband in their schools and libraries within the next five years.” The alliance said funding for internal connections went to only 4 to 11 percent of the schools each year between 2008 and 2012, and no more than 3 percent of the public library locations.

“The original designers of the E-rate program could not have envisioned the significant role that broadband services would play in today's society,” the Urban Libraries Council said in its comment, seeking more funding. ULC said “the original budget designs of the E-rate program no longer serve the needs of schools and libraries.” The group also submitted a study saying the program's funding formula for urban libraries is too low (WID Sept.17 p12).

“While other countries are racing ahead, America must act with a sense of urgency to bring gigabit broadband to every school, Wi-Fi to every classroom and digital learning opportunities to every child,” EducationSuperHighway said. The group focused on creating broadband connections to schools and libraries, saying 17 percent of schools with fiber connections meet the commission's goal of 100 kbps per student with Internet access. The cost of broadband needs to be reduced, the group said, saying the “key factor” preventing school districts from meeting the commission's bandwidth goals is the price of high-speed connections. For Wi-Fi connections inside schools, the program's \$150-per-student funding formula should be maintained, the group said. An American Association of School Administrators filing also backed increasing E-rate funding. — **Kery Murakami** (kmurakami@warren-news.com)

Aging IT Systems

FCC IG Says He Can't Hire Armed Agents, Despite Many Requests

FCC Inspector General David Hunt told a House Communications Subcommittee Wednesday that he has been unable to hire criminal investigators, despite recurring requests. Hunt said his office “initiated a discussion with management” on its need to hire investigators in early 2012, but has been unable to do

so. Hunt also questioned FCC Chairman Tom Wheeler's decision to set up a USF Strike Force under the Enforcement Bureau and whether its efforts duplicate work more properly handled by the Office of Inspector General (OIG).

The panel also focused on the crash of the agency's aging Electronic Comment Filing System (ECFS) after tens of thousands of net neutrality comments were filed (WID July 16 p1).

Criminal investigators are "a very much needed resource at this office" and would allow the OIG to do criminal investigations without help from the Department of Justice and the FBI, Hunt said, as expected based on prepared testimony. The FCC OIG has received "excellent support from FBI agents, particularly those in the Washington, D.C., Field Office," but there have been cases where "the lack of criminal investigative support has slowed and even derailed OIG investigations," he said. FBI agents and assistant U.S. attorneys "are in constant demand, and we have lost the services of both to other DOJ/FBI priorities," Hunt said.

Hunt said after long discussions with staff for former Chairman Julius Genachowski, the OIG received permission to post a job announcement seeking criminal investigators and received applications. But after Wheeler took office last year, Hunt said he was told he would not be allowed to hire criminal investigators.

Hiring armed agents poses specific problems for the FCC, an agency official said responding to Hunt's comments. Wheeler, "as the agency head responsible for the hire," has looked at the issue closely, the official said on behalf of the chairman's office. "The question of whether to permit armed employees in our buildings and field offices raises important and complicated questions regarding overall security, employee safety, training, and storage of weapons. The chairman's office has this matter under consideration, has discussed these concerns with the IG, is consulting other agencies on their practices, and will make his decision once these questions are resolved to his satisfaction."

Hunt also questioned whether the USF Strike Force Wheeler established duplicates work the OIG should be doing. Wheeler announced the launch of the Strike Force in July (<http://fcc.us/1qACHZl>). "The FCC should focus on changing their rules and closing loopholes and then we'll do the criminal enforcement part," said Hunt. DOJ has called his office expressing concerns about the establishment of the Strike Force, Hunt said. DOJ has asked "who's in charge here?" he said. Hunt said the Strike Force members were hired in a matter of months while it takes him "six months to a year" to make a hire.

Subcommittee Chairman Greg Walden, R-Ore., said that based on Hunt's testimony, it appears the FCC "has two teams doing substantially similar work."

"USF reform has created additional need for enhanced enforcement activities," an FCC official said responding to the criticism. "FCC is coordinating with the OIG to ensure proper distribution of agency resources and to avoid any duplicative efforts. The Enforcement Bureau already agreed with OIG recently to share whistle-blower case referrals."

'Like a Broken Record'

Panel ranking member Anna Eshoo, D-Calif., said Hunt was "like a broken record" in his comments on his need to hire armed investigators. "We have huge agencies that do criminal investigations," she said. "The DOJ is very well funded. The FBI is well funded." Eshoo asked why the IG's office can't partner with them. "I don't know if this is a well-sought avenue for you," she said.

Getting other agencies to work with the FCC is “very rare,” Hunt responded. “We have much more fraud and waste that we can tackle.” Often, the FCC can’t get help from the FBI on USF fraud investigations because it doesn’t have enough agents in the field available to help, he said. DOJ and the FBI “won’t touch” cases aimed at fraud of less than \$1 million, he said.

Eshoo said IT problems at the FCC appear to be a bigger issue than whether the IG can hire armed investigators. “I mean, for a whole system to crash, an IT system at an agency that is in charge of communications?” she said.

“We’re trying to get as much help as we possibly can,” Hunt replied. Sometimes, the OIG has to rely on local enforcement for help as it does field investigations, he said. “There’s \$20 billion involved here and we don’t have a single criminal investigator.”

FCC Managing Director Jon Wilkins was the hearing's only other witness. Rep. Marsha Blackburn, R-Tenn., asked him why the agency needs a USF Strike Force when it has OIG. “We don’t view the Strike Force as an either/or with the IG,” Wilkins replied. There has always been “an overlapping mission” between OIG and the Enforcement Bureau, he said. Wheeler wants the bureau “to do more,” he said. He said the Strike Force has only three employees.

Blackburn asked Wilkins whether in a time of tight budgets, the Strike Force should be eliminated. “Does Chairman Wheeler have a lack of confidence in the IG’s Office?” she asked. “To the contrary,” Wilkins replied, saying there’s plenty of work for both. “Universal Service is going through so many changes, we think the challenges are going to grow.”

Walden opened the hearing by commenting on the ECFS crash. “According to the FCC’s responses to our data requests, it has spent more than \$352 million in the last five years on IT,” he said. “How much of that was wasted on the FCC’s disastrous revamp of its website?” Walden asked how much was spent “to consolidate aging licensing systems, only to have the project simply disappear, years of work apparently abandoned?”

Wilkins said all filers who wanted to so were able to file comments in the net neutrality docket. Replies were due Monday. (See separate report below in this issue.) Wilkins said the number of comments now is 3.7 million. ECFS is “an 18-year-old system,” Wilkins said. “The technologies that underlie it are sort of long gone from the commercial world.” Updating ECFS is a “key focus” of an FCC IT modernization proposal, he said. — **Howard Buskirk** (hbuskirk@warren-news.com)

PEG U-Verse Worries

Petitions Against AT&T/DirecTV Claim Harms to Competition, PEG

Three petitions to deny AT&T's plan to buy DirecTV cite implications for public, educational and government (PEG) channels, competition and the public interest. The petitions by public interest groups and groups representing the PEG community were filed in docket 14-90. AT&T again said the new company would create a stronger competitor to the cable bundle. Comments in the proceeding were due Tuesday.

Free Press and Public Knowledge each filed petitions to deny, claiming public interest harms and harms to the video market. “The most straightforward way for the FCC to protect TV viewers and Internet

users from the harm this merger would cause would be to block it," said John Bergmayer, Public Knowledge senior staff attorney. He cautioned against granting the deal request without proper conditions: In the event the commission elects to grant this deal with conditions, "it must make sure those conditions are verifiable and enforceable," he said in a news release (<http://bit.ly/XCwV0g>). "The FCC has enough experience with this to know by now that it takes more than promises to protect the public interest."

The public interest benefits are unverifiable, said the Institute for Local Self-Reliance and Public Knowledge in a joint petition (<http://bit.ly/1s70QMn>). AT&T's case for the public interest benefits relates primarily to its claim that the deal would result in it upgrading its existing networks at a faster pace, the petition said. The commission can't recognize claims of this sort as benefits "unless the proposed upgrades are merger-specific and can be publicly tracked and verified," it said. If AT&T becomes a larger player in the pay-TV market, "its incentive to discriminate against online video services would increase," it said: The FCC must block this transaction "if it cannot be assured that it can alleviate these harms."

Free Press backed outright denial of the deal and claimed the alleged harms can't be fixed with conditions. The deal echoes promises AT&T made from its failed takeover of T-Mobile, it said. AT&T appeals to the commission again making the case that, if permitted to eliminate a competitor, "only then can it make what amounts to small and incremental broadband deployment increases," it said. The supposed benefits are actions AT&T would take in the absence of the deal, "and do not come close to offsetting the harms of the transaction," it said.

Regulators have become lax and "a bit enamored with their ability to fix harms that they identify as being likely to occur with temporary short term conditions," said Free Press Research Director Derek Turner in an interview. When facing a direct horizontal merger and the elimination of a competitor, "conditions just don't work to address the harms that the commission will identify," he said. The proposal is "eerily similar" to AT&T/T-Mobile, Turner said. There's a reduction in competitors, a concentration in the market that far exceeds Justice Department merger guidelines, "and the only tangible benefit that AT&T is suggesting will arise from this is that it will enable them to build out more broadband," he said. AT&T wanted to cover 97 percent of the country with LTE by 2018, he said. "They've already done that in 2014 without T-Mobile."

AT&T Defends Deal

The would-be-acquirer continued to defend the deal, and also addressed PEG concerns. The combined AT&T/DirecTV will be able to offer new and better service bundles, and unites two companies "with uniquely complementary assets to deliver consumers broadband, video and wireless services," an AT&T spokesman said.

Past merger attempts will be considered to the extent that they contribute to the FCC's overall competition policy, said Georgetown Law Institute for Public Representation senior counselor Andrew Schwartzman. In the broadest terms, AT&T/T-Mobile was affected by a policy "that said four is better than three," he said. "To some considerable extent, AT&T/DirecTV is the same question." The previous attempt informs the overall competition analysis, but that's all, he said.

The lesson from the AT&T/T-Mobile attempt is that "if these companies can't buy their way to growth, they'll build their way to growth," Turner said. Both AT&T and T-Mobile went off independently and invested and competed, and the market is better for it, he said. The FCC had no comment.

Commitments made in the current proposed deal may be of a different nature than those made in the previous attempt, and therefore, the AT&T/DirecTV deal shouldn't be influenced by it, said David Honig, executive director of Minority & Media Telecom Council. In questioning whether AT&T and T-Mobile would have met commitments without combining, one also could question that "if that deal had been granted, would AT&T have done more?" he said in an interview. "We don't know." It may be that "one can't use the fact that commitments made in an application later came into fruition or effectuated anyway as an indication that commitments made in 2014 would be effectuated anyway as well," he said. The trajectory may be different, and other independent factors may determine whether, and to what extent, the commitments would be observed then and now, he added.

PEG Concerns

PEG advocates argued in a petition that AT&T would better serve consumers by improving the quality of its U-Verse video service or by investing in broadband buildout rather than further reducing video competition. AT&T has resisted any meaningful accommodation of PEG access on its U-Verse platform, said the Alliance for Community Media, Alliance for Communications Democracy and Common Cause (<http://bit.ly/ZpRuhS>). Joining AT&T and DirecTV, which doesn't provide for any PEG programming on its platform, "would lead to a localism race-to-the-bottom and threaten the continued availability and viability of all local independent programming and content," it said.

A satellite-TV operator doesn't use the public rights of way, which is how PEG channels are transmitted, but there will be an issue if AT&T decides to get rid of U-Verse, said Bunnie Reidel, executive director of American Community Television. ACT won't comment in the docket, she said. If AT&T walks away from U-Verse, the problem is that it leaves Comcast, Charter Communications and other cable operators alone as direct competitors via wireline, she said. "This puts PEG communities in a tougher position for bargaining with the cable operator." When there are monopolies in the wireline business, PEG fares far worse, she said.

AT&T customers will be able to keep their U-Verse video service within the U-Verse video footprint, the AT&T spokesman said. That service will be enhanced "by better content offerings and an improved user experience," he said.

The PEG petition argues that if AT&T took the money that it's spending on DirecTV and used it for buildout of U-Verse, "it would be deploying a broadband service and providing a competitive pay-TV service to more people," said Schwartzman. U-Verse has PEG obligations, he said. PEG advocates can argue that if AT&T "switches all its emphasis to DirecTV, they'd lose PEG channels," he said. If AT&T, instead deploys U-Verse, there'll be more PEG channels, he said. — *Kamala Lane* (klane@warren-news.com)

FTC Seeking Authority

FCC's Simpson References 911 Reliability Order in Warning for Voluntary Industry Work on Cybersecurity

The FCC is confident the communications industry will voluntarily lead commission-facilitated efforts to improve the industry's cybersecurity risk management practices, but could look to its recent

911 annual reliability audit order as a model for regulatory action if the industry doesn't "pull it together," said Public Safety Bureau Chief David Simpson Wednesday. Simpson's remarks at a Center for Strategic and International Studies event echoed the FCC's message all year on the need for a voluntary industry-led effort on cybersecurity risk management. FCC Chairman Tom Wheeler said in June that the FCC's vision of a "new paradigm" on cybersecurity would include readiness to act if voluntary efforts failed (WID June 13 p1).

Representatives from other federal agencies at the CSIS event said their agencies are also seeking voluntary efforts in connection with President Barack Obama's 2013 cybersecurity executive order, which emphasized voluntary private sector improvements in cybersecurity risk management with regulation as a backup. The FTC is continuing to press Congress for additional authority to take enforcement action on consumer data security issues in light of recent data breaches, but is confident it can also increase enforcement under its existing authority under Section 5 of the FTC Act, said Commissioner Julie Brill.

The private sector voluntarily works with the FCC 95 percent of the time to avoid regulation, and is best suited to lead on cybersecurity because they're better able to keep pace with rapid changes in technology, Simpson said. The "five percent of the time when that fails" has included carriers' failure to follow voluntary best practices on 911 reliability, leading to widespread 911 connectivity issues for multiple days after the June 2012 derecho windstorm, he said. That led the FCC to adopt the 911 reliability order, requiring carriers to adopt industry best practices for auditing circuit diversity, to install backup power at central offices that serve 911 call centers and to provide diverse network monitoring. The order also requires carriers to notify 911 call centers within 30 minutes when outages occur.

The FCC may have to consider similar accountability standards if industry fails to voluntarily organize around FCC-facilitated cybersecurity efforts through the Communications Security, Reliability & Interoperability Council's (CSRIC) Working Group 4 and the Technological Advisory Committee (TAC), Simpson said. "CSRIC Working Group 4's work is now shifting from identifying guidance on how the industry can incorporate the National Institute of Standards and Technology's Cybersecurity Framework into its risk management processes toward developing metrics for measuring the effectiveness of risk management," Simpson said. CSRIC's Sept. 24 meeting is set to include a report on Working Group 4's cybersecurity best practices work (WID Sept 15 p8).

The FTC continues to believe Congress must "strengthen" the commission's authority to take enforcement action on data security issues "by giving us new tools to address these issues," but is also intent on using its Section 5 authority to enforce data security on mobile apps, the Internet of Things and health information, Brill said during the CSIS event. The FTC has brought 53 cases on data security under Section 5, with enforcement typically coming against companies with "systemic failures" in their data security policies, she said. Brill's call for additional authority on data security repeated the FTC's March recommendation to Congress for a civil penalty authority, rulemaking authority and jurisdiction over non-profits (WID March 27 p2). — **Jimm Phillips** (jphillips@warren-news.com)

Capitol Hill

The House Judiciary IP Subcommittee plans a hearing on oversight of the Copyright Office Thursday at 2 p.m. in Rayburn 2141 (<http://1.usa.gov/1AHlscs>). The subcommittee will "examine the practices and organization of the Copyright Office to ensure it is equipped to keep pace with the digital age and has what it needs to serve the American people in the 21st century," said a joint statement Wednesday from

House Judiciary Committee Chairman Bob Goodlatte, R-Va., and subcommittee Chairman Howard Coble, R-N.C. Register of Copyrights Maria Pallante is to testify at the hearing, it said.

Sen. Ed Markey, D-Mass., wants FCC Chairman Tom Wheeler to leave Washington to hear other U.S. voices speak about net neutrality. Markey said during a Wednesday news conference at the Capitol the FCC should "reach beyond the D.C. Beltway, and tour the country to hear from consumers and stakeholders about the importance of a free and open Internet," according to a text of his prepared remarks. "It's time for the Chairman to hold net neutrality roundtables throughout the nation." He appeared with Sen. Al Franken, D-Minn., and several industry representatives, speaking on net neutrality and the need for Title II reclassification.

Unrestricted global data flows are critical to the health of e-commerce, said eBay Executive Director-Global Public Policy Lab Brian Bieron, testifying Wednesday before the House Subcommittee on Commerce, Manufacturing and Trade (<http://1.usa.gov/1qZmcZr>). "Government restrictions on where companies can process data "would greatly limit the many benefits of the Internet," Bieron said, in prepared remarks. "Imposing data localization requirements on Internet-enabled businesses is problematic from both an economic and security perspective." Bieron said the problem is not remote. "Localization barriers are actually proliferating most among some of the larger and more developed countries," he said. "G20 countries are responsible for 65 percent of the protectionist measures, and at the same time, they are also the countries which are the worst affected by protectionism." Subcommittee Chairman Lee Terry, R-Neb., said in his opening statement "the European Commission, for example, has argued that localization of data could be a way to promote domestic industry and create jobs" (<http://1.usa.gov/1uHO4T7>). The hearing was to discuss the role of cross-border data flows in the ongoing negotiations for the Trans-Pacific Partnership, Trade in Services Agreement, Transatlantic Trade and Investment Partnership and U.S.-EU safe harbor agreement, said a background memo (<http://1.usa.gov/1r1GJLJ>). "I am hopeful that Congress can send a unified message to current and future trading partners that trade barriers will not be tolerated, and that we will protect our economic interest in data flows," Terry said.

Several minority-related organizations implored the Senate in a Wednesday letter (<http://bit.ly/1BNgkpF>) to pass the Internet Tax Freedom Act to extend the moratorium on Internet access taxes (WID Sept 9 p6). The U.S. Hispanic Chamber of Commerce and the National Black Chamber of Commerce were among the letter's signers. "As minority communities continue to struggle economically, it is critical that no new taxes be levied on Internet access," it said. House Joint Resolution 124 (<http://1.usa.gov/1qFpBNo>), which would temporarily extend the ban on Internet access taxes through Dec. 11, was debated on the House floor Tuesday. Congress has four legislative days to pass any legislation before the moratorium expires Nov. 1.

The FCC is not relying on secret meetings to make decide on proposed industry acquisitions, Chairman Tom Wheeler told Sen. Dean Heller, R-Nev., in a letter Wednesday. Heller asked Wheeler about the ex parte exemptions and what those really mean in light of two major deals the agency is considering: Comcast/Time Warner Cable and AT&T/DirecTV. "I fully endorse the core principles you describe," Wheeler told Heller, referring to Heller's statement in a letter that any major orders crafted in part on secret information can be undermined due to process concerns. Wheeler cited the court cases that give the agency "flexibility" in how it reviews such transactions. The FCC, "in accord with the Administrative Procedure Act and applicable precedent, uses only information that is placed on the record when it renders a decision on whether to allow a transaction to proceed, with or without conditions," Wheeler said. While the agency can't rely on information given in secret, those meetings "could be used, however, to help the Commission formulate appropriate questions to applicants or other parties," questions that can be placed on the record, he said.

Agencies

Online retailers must ship purchases within 30 days or give customers a refund option, the FTC said in a final rule in Wednesday's *Federal Register* (<http://bit.ly/1Dkenml>). "The Rule prohibits sellers from soliciting mail, Internet, or telephone order sales unless they have a reasonable basis to expect that they can ship the ordered merchandise within the time stated on the solicitation or, if no time is stated, within 30 days," the rule said. It said a seller must seek "the buyer's consent to the delayed shipment when the seller learns that it cannot ship within the time stated or, if no time is stated, within 30 days." Without consent, the seller must offer a refund, the FTC said. The updated rule is an amendment to the trade regulation that the agency said has been revised to be called the "Mail, Internet, or Telephone Order Merchandise" rule.

Access to archived court documents must be fully restored, said the Electronic Frontier Foundation in a Tuesday blog post (<http://bit.ly/1BMJJjX>). The Administrative Office of the Courts (AO) recently removed historic documents for five federal courts — including four federal appeals courts — from PACER (Public Access to Court Electronic Records) (<http://1.usa.gov/1p64Ap4>). Lawyers, think tanks, media outlets and nonprofits frequently access court records through PACER, a government-run, fee-based system, EFF said. Sen. Patrick Leahy, D-Vt. sent a letter to AO last week, pressing the agency to restore access to the removed documents (<http://bit.ly/1uTVpgx>). "Senator Leahy's letter implies something that really should be explicit: the removal of these historic documents should be seen as a blow to access to democracy," EFF said. "That a PACER account is required to view court records is already an unacceptable obstruction of access to public information." AO did not comment.

International

The French government will soon hire its first chief data officer, it said in a Wednesday news release (<http://bit.ly/1BKZCar>). The government didn't say who would be hired. The chief data officer will be responsible for improving the "use" and "circulation" of government data, "while respecting the protection of personal data ... including the confidentiality of national defense secrets," said a translation of the release.

Security

Internet Security Alliance President Larry Clinton praised White House Cybersecurity Coordinator Michael Daniel Tuesday for saying the U.S. needs to take a more economics-based approach to cybersecurity, but added that there hasn't been "adequate" follow-through on President Barack Obama's 2013 cybersecurity executive order. Daniel had said during a Billington cybersecurity event Tuesday that improving cybersecurity is difficult in the U.S. because people still don't fully understand the economics and psychology of cybersecurity. Daniel said the U.S. has improved its cybersecurity through its implementation of the executive order, particularly via the National Institute of Standards and Technology's Cybersecurity Framework (WID Sept 17 p7). There's "no evidence that using the Framework is cost effective and there has been no obvious work to develop the market incentives called for by the President," Clinton said in a statement. "Without these critical pieces the simple existence of the Framework is unlikely to generate significantly improved cyber security." A similar process to the one NIST used to develop the framework could be used to "address the economic issues surrounding use of the Framework, such as cost-effectiveness and incentives," he said.

Industry Notes

The FCC should craft net neutrality rules that “encourage investment in abundant bandwidth,” but allowing paid prioritization could “create incentives for providers to maintain scarcity and congestion on their networks, in order to sell services,” Google executives told Commissioner Jessica Rosenworcel and aide David Goldman. Google Fiber’s deployment “suggests that it is both workable and economically desirable to manage a broadband network without prioritization and consistent with open Internet principles,” Google said at the meeting in Mountain View, California, where the company is based, recounted a filing posted Tuesday to docket 14-28 (<http://bit.ly/1u1bHY4>). Company attendees included Craig Barratt, senior vice president-access and energy. Communications Act Title II is a “flexible, light-touch approach for the preservation of open communications networks,” Free Press said in net neutrality reply comments (<http://bit.ly/1ASdX2E>). Common-carrier principles are “perfectly suited and absolutely necessary to maintaining nondiscrimination principles and nondiscriminatory outcomes” for all telecom services, “not just those delivered on copper telephone wires,” the group said. The FCC has “tremendous ability to tailor Title II,” and “extraordinary power to forbear not only from its own rules, but even from statutes and congressional acts themselves.” Section 706 “will not work for the protections contemplated,” Free Press said. Some want a Section 706 approach, as other replies to the net neutrality NPRM showed (WID Sept 17 p4).

The U.S. software industry employed 2.5 million people in 2014, or 2.2 percent of the country’s overall private workforce, said the Software and Information Industry Association (SIIA) in a report released Wednesday (<http://bit.ly/1wE4Swy>). SIIA said the software industry “contributes greatly to rising output and productivity in other industries and sectors.” From 2004 to 2012, the software industry accounted for 15.4 percent of the country’s labor productivity gains, SIIA said. “Software has become an enormous driving force, creating significant economic output and jobs as an industry and serving as an economic catalyst across almost the entire U.S. economy,” said Vice President-Public Policy Mark MacCarthy. “Every 10 software jobs support five jobs in other industries.”

Online and mobile video platform JW Player raised \$20 million in a Series C funding round led by Greycroft Growth and Greenspring Associates, said a news release Wednesday (<http://bit.ly/1pjtfXF>). The new financing will be used to expand JW Player’s marketing and sales, among other efforts, it said. The company wants to leverage its “network of connected [video] players that provides publishers with unique insights around how people are engaging with video,” said CEO Dave Otten.

T-Mobile unveiled its Personal CellSpot service and launched a free Gogo in-flight texting service. Personal CellSpot is “like a T-Mobile tower in your house,” T-Mobile said Wednesday in a news release (<http://t-mo.co/1qZsb0r>). It lets users get “full bars” experience “wherever you choose even beyond the reach of any cellular network,” it said. The in-flight service lets T-Mobile customers send and receive unlimited text and picture messages on any Gogo-equipped flight on U.S. airlines, it said.

Gogo partnered with Virgin Atlantic to offer in-flight connectivity services on Virgin Atlantic’s aircraft. The companies expect Gogo’s global connectivity solution, 2Ku, to deliver “unprecedented bandwidth to the aircraft,” Gogo said Wednesday in a news release (<http://bit.ly/1wEfImo>). The companies agreed on principal terms and are working to finalize a definitive agreement, Gogo said. All of Virgin Atlantic’s aircraft “will be retrofitted with Gogo’s 2Ku solution,” it said.

The FCC should have its Diversity Committee study “troubling” employment practices in the technology sector, said the Minority Media and Telecommunications Council (MMTC) in a letter to FCC Chairman Tom Wheeler and all four FCC members Wednesday. The tech industry’s “abysmal failure” to employ African-Americans, Hispanics and women hurts the FCC’s ability to follow congressional directives to

“regulate EEO and promote employment and ownership diversity,” said the MMTC of equal employment opportunity. “Industry convergence and stark employment gaps” should merit a technology sector investigation by the Diversity Committee, and a follow-up by the FCC, another federal agency or Congress, the letter said. The FCC should focus on the tech sector because with the rise of over-the-top video, cord cutters and streaming apps, “the media jobs of the future will look more like technology jobs than traditional TV/radio production, advertising sales, and on-air occupations,” MMTC said. The tech sector has addressed this change in the past by asking for lowered restrictions on bringing in overseas workers through H-1B visas, a move MMTC said may be premature without a stronger effort to recruit domestic minorities and women. “An inquiry by the Diversity Committee would shed light on the extent to which technology companies recruit on campuses with high minority enrollments, actively mentor minorities for careers in the technology sector, and select diverse candidates who are U.S. citizens or residents,” MMTC said. Because of media convergence, diversity within the tech sector will increasingly fall within FCC EEO authority, MMTC said. “The digital divide cannot be closed when a sixth of the economy so profoundly and uniformly excludes African Americans, Latinos and women from equal employment opportunity.”

The market for power sources used in the Internet of Things will grow from \$57 million in 2014 to \$590 million in four years and to more than \$2.4 billion by 2021, said a report from NanoMarkets (<http://bit.ly/1wEkHDu>). Products that have had niche success so far — thin-film and printed batteries, energy harvesting modules, flexible photovoltaic panels and thermoelectric sources — could generate “hundreds of millions of dollars” in revenue annually through IoT, it said. Mobile phones currently account for most of the \$57.1 million thin-film and printed battery market, but smart cards, semiconductors/computing and wearables are each expected to grow into hundred-million-dollar battery markets by the end of the decade, NanoMarkets said. Other growth opportunities in IoT power include inductive power sources — used almost exclusively in wireless chargers now — which approach \$5 million in current annual revenue but are forecast to pass \$100 million revenue by 2018, jumping to \$760 million by 2021, it said. The growth driver will be increased adoption of RFID tags, a segment forecast to hit a \$100 million market by 2019 and \$583 million by 2021, it said. While energy-harvesting power sources are a \$7 million market through 2015, they’re expected to spike to \$41.5 million in 2016 on “rapid uptake” for sensors and networks, NanoMarkets said. Growth for energy-harvesting devices will pick up, increasing to \$161 million by 2018 and \$557 million by 2021, it said. Revenue for wearables power sources is forecast to accelerate from “next to nothing” today to \$82 million in 2018 and \$200 million by 2021, it said.

A new standard that allows users of the IEEE 802 set of wireless standards from the IEEE Standards Association to effectively use the “TV white space” is available. IEEE 802.19.1 “is intended to help achieve fair and efficient spectrum sharing,” said the IEEE Standards Association Wednesday in a news release (<http://bit.ly/1yi0Qvv>). The standard is intended to specify a coexistence discovery and information server, specify a coexistence manager, and “define common coexistence architecture and protocols,” it said.

Internet People

Google picks **Dennis Kish**, ex-Qualcomm, to run Google Fiber, replacing **Milo Medin**, who still advises on that initiative and remains Google vice president-access services ... CSC promotes **Michael Sweeney** to interim corporate controller and principal accounting officer, as **Thomas Colan**, vice president, controller and principal accounting officer, steps down for personal reasons ... Lobbyist registrations: InterDigital, wireless firm, **King & Spalding**, effective Aug. 1 ... Lyft, **Gephardt Group Government Affairs**, effective Sept. 1.