

February 1, 2022

The Honorable Maria Cantwell
Chair
Committee on Commerce, Science, &
Transportation
United States Senate
511 Hart Senate Office Building
Washington, DC 20510

The Honorable Roger Wicker
Ranking Member
Committee on Commerce, Science, &
Transportation
United States Senate
555 Dirksen Senate Office Building
Washington, DC 20510

Dear Chair Cantwell and Ranking Member Wicker,

I write today in response to the unprecedented recusal offer made to the FCC by Gigi Sohn, a nominee to be an FCC Commissioner.¹ To be clear, we have not taken and are not taking a position on Ms. Sohn's nomination. However, the rationale for the recusal cited by Ms. Sohn raises several issues that we want to bring to your attention.

Based on her prior advocacy before the FCC as President and Co-Founder of Public Knowledge, Ms. Sohn states that, if confirmed, she will recuse herself from any proceeding involving retransmission consent or television broadcast copyright issues. Ms. Sohn states that she is making this commitment to avoid "any appearance of impropriety" and "in the interest of ensuring that the public has full confidence that policymakers will make decisions free of bias."² It appears highly irregular to recuse an official from any proceeding that addresses two broad, important issues because of a prior filing in a rulemaking more than a decade ago. In fact, the ethics rules generally state that prior participation in a rulemaking proceeding is not a basis for recusal.³ Thus, it appears that Ms. Sohn's reasoning for recusing herself would establish a new standard for FCC commissioners participating in proceedings in which they were previously active.

Alternatively, since participation in a general rulemaking proceeding does not typically require recusal, the reasoning for the proposed recusal suggests a broader concern that Ms. Sohn has with at least the appearance of her ability to act impartially on matters in which she has taken an advocacy position before the FCC. If there are broader concerns about Ms. Sohn's ability to act impartially based on her past advocacy, it is unclear to USTelecom why a recusal would only be limited to one topic that provides special treatment to only one industry. If Ms. Sohn's prior relationship with, and advocacy on behalf of, Public Knowledge warrants recusal from retransmission consent issues, it is unclear why this recusal standard would not be evenly applied to all issues in which she advocated on behalf of Public Knowledge.

¹ Letter from Gigi Sohn to P. Michelle Ellison, Acting General Counsel and Designated Agency Ethics Official, Jan. 27, 2022 (indicating that Ms. Sohn signed a Petition for Rulemaking that urged the Commission to amend and supplement the rules governing retransmission consent in several ways, which became the basis for FCC Docket 10-71 concerning retransmission consent) (Recusal Letter).

² *Id.*

³ The federal ethics rules governing recusal typically apply to a "particular matter involving specific parties" and not to rulemaking or other generally applicable proceedings. See e.g. 5 C.F.R. §§ 2635.502(a), 2641.201(h)(2), Examples 1 and 5 (developing a regulation applicable to entire industry is a particular matter of general applicability, not a matter involving specific parties; drafting a proposed rule would not be a particular matter involving specific parties).

Ms. Sohn's record as a well respected public interest advocate is widely known and well documented. During her time leading Public Knowledge, the organization filed over 1,100 public comments at the FCC and filed or opposed multiple petitions, many signed by Ms. Sohn. These filings took positions on many of the most important issues and areas that the FCC will be asked to address over the next few years — well beyond just the single retransmission consent petition referenced in the Recusal Letter.

While the recusal offer clearly has been made to address concerns voiced by the broadcast industry about Ms. Sohn's nomination, it raises at least four serious questions that are much broader than a single industry or a select portfolio of issues:

- (1) If Ms. Sohn is concerned about the appearance of impropriety based on a filing she submitted to the FCC on a particular topic, how will the Commission be confident that the same concerns will not arise for other issues where she has also submitted filings to the FCC? Can the FCC be confident that Ms. Sohn will not be perceived as being able to "act impartially and not give preferential treatment to any private organization or individual"⁴ based on her prior FCC advocacy if, as it appears from her letter, she is concerned may not be the case for certain issues?
- (2) What is the potential impact on future FCC decisions in which Ms. Sohn's vote is necessary to achieve the required three votes for adoption on any topics in which Ms. Sohn has previously participated as an advocate before the Commission? Will the unusual nature of the recusal open the Commission to potential legal challenges that votes were not made free of bias?
- (3) If Ms. Sohn does not recuse herself from other issues on which she advocated, will that create the appearance of benefitting one industry over others with no precedent or rational basis? Would this undermine the level playing field that is essential to the full and fair functioning of the FCC?
- (4) What might the impact be on current commissioners or future Commission nominees if a new standard is established that requires recusal in matters merely as a result of prior public FCC filings on topics that are still being addressed by the Commission?

To reiterate, we are not taking a position on Ms. Sohn's nomination. We nonetheless consider it important to identify these concerns now in order for you to assess their practical implications for the adjudicatory and rulemaking functions of the FCC as well as on the continued effectiveness and impartiality of the Commission. We look forward to working with you to determine if there are ways to address this matter so that there are not longer-term ramifications for the FCC or future nominees based on the unusual nature of the recusal offer.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Spalter", with a stylized flourish at the end.

Jonathan Spalter

⁴ See e.g. Exec. Order 12,731, 55 Fed. Reg. 42,547, Part 1, Sec. 101(h) (Oct. 17, 1990), (making clear that "[e]mployees shall act impartially and not give preferential treatment to any private organization or individual."); 5 C.F.R. § 2635.101(b)(8) ("Employees shall act impartially and not give preferential treatment to any private organization or individual.")