TESTIMONY OF FCC COMMISSIONER AJIT PAI
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"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 improving our nation's 911 system to revitalizing AM radio.

I would like to focus my testimony on two issues where this Subcommittee is leading and where, unfortunately, the FCC is falling behind. Those issues are FCC process reform and broadband deployment.

Process Reform.—I want to begin by thanking the Subcommittee for its long-standing focus on FCC process reform. Last February, for example, the House passed Representative Scalise's FCC Consolidated Reporting Act. That legislation would consolidate seven separate FCC reports into one and require the FCC to take a comprehensive, holistic view of the communications marketplace. And last November, the House passed Chairman Walden's FCC Process Reform Act. That legislation would require the FCC to regularly consider how to maximize opportunities for public participation and efficient decision-making—the hallmarks of good process. Both bills would improve FCC processes tremendously, and the House passed each with overwhelming, bipartisan majorities. I hope that they are enacted into law soon.

I firmly believe that the agency is at its best when it operates in a bipartisan, collaborative, and transparent manner. Unfortunately, the agency has not followed the Subcommittee's lead in this regard.

First, the FCC continues to be run in a partisan fashion. Since December 2013, there have been 20 separate party-line votes at our monthly meetings. That's twice as many as under Chairmen Martin, Copps, Genachowski, and Clyburn *combined*. Proposals from Republican Commissioners have been roundly rejected as crossing a "red line," even when an identical proposal from a Democratic Commissioner is accepted later on. And requests by Republican Commissioners to increase transparency or amend a proposal are routinely ignored, which means the Commission regularly adopts orders without any official response to our requests.

It wasn't always this way. It was once understood that no political party has a monopoly on wisdom. And we recognized that communications issues aren't necessarily partisan in nature. Commissioners will inevitably hold different viewpoints on important issues. But the FCC had a rich history of working across the aisle.

Second, collaboration has fallen by the wayside. During my first eighteen months on the job, every Commissioner worked to reach consensus. That maximized the chance that every Commissioner could vote for a proposal or order. Under Chairman Genachowski and Chairwoman Clyburn, we reached consensus 89.5% of the time on FCC meeting items. I can assure you that we did not always start out in the same place. But we worked hard to reach agreements that everyone could live with. And we usually succeeded.

It's far different now. All too often, softening the rough edges of an order to make it more palatable is off the table. Narrowing the scope of a decision to achieve unanimity is rejected outright. Indeed, consensus among the Commissioners no longer appears to be a goal. Instead, the "rule of three" is the new norm. Unsurprisingly, then, unanimity has precipitously dropped at the agency.

Commissioners have been able to reach consensus on only 56.4% of our monthly votes during Chairman Wheeler's tenure.

Reflecting this shift away from collaboration, the Commission's Office of Media Relations has been transformed from a shop of career staffers dedicated to representing the interests of the agency as a whole into a propaganda machine for the Chairman's Office. This trend is so pronounced that the press has taken note of it, along with the unprecedented nature of it all.

For instance, the Chairman's Office frequently shares non-public information with the press and select outside parties while other Commissioners are left in the dark. In this regard, the trade publication *Communications Daily* reports "the FCC stands out for its extensive use of events where officials speak on behalf of the agency to groups of reporters but the officials can't be identified by name or quoted verbatim." The publication further reported that "[m]any PR experts said they couldn't recall any agency other than the FCC that holds news events that aren't on the record so routinely on matters unrelated to national security."

The agency's media blitz often appears designed to exert pressure on other Commissioners, both Democrats and Republicans alike, to vote for the Chairman's proposals. For example, before the Commissioners had a copy of the Chairman's proposal to expand the Lifeline program, the Chairman's Office shared it with *The New York Times*, and FCC officials held a call with a large group of reporters to promote it. As Commissioner O'Rielly stated that day, we did not receive a copy of the 150-page document until "[h]ours after the Chairman launched his press campaign and multiple sources reported he had circulated [it]." That's hardly an opening for good-faith collaboration amongst colleagues. Yet it epitomizes how business is done at the agency these days.

Indeed, the longstanding process under which every Commissioner was provided 48-hours notice of a significant, bureau-level decision is now honored in the breach. One recent example involves the FCC's regulation of joint sales agreements, or JSAs. The Commission ordered parties to terminate a JSA that allowed Entravision, a Univision affiliate, to provide the only Spanish language news in my home state of Kansas.

I only found out about this, after the fact, through a news article. The Chairman's Office provided no notice that it would be forcing the parties to eliminate that JSA, let alone the 48-hours notice customarily provided under FCC process.

To make matters worse, the FCC's action violated the law and flouted the bipartisan will of Congress. Soon after the FCC restricted JSAs in 2014, over my dissent, FCC leadership told Congress explicitly that there was nothing in what the FCC was doing that would make that Entravision JSA go away.

To ensure this would be the case, an overwhelming bipartisan majority in Congress passed a law ordering the FCC to grandfather existing JSAs—including Entravision's. How did the FCC respond? It ignored the law. It used its merger review authority to force the companies to unwind the very Entravision JSA that Commission leadership told Congress would not be affected.

A bipartisan group of Senators quickly responded, led by Senators Roy Blunt and Dick Durbin. They stated that the FCC "ignored bipartisan concerns raised by Congress" on JSAs and explained that they were "extremely disturbed" to learn that the FCC was requiring parties to unwind the agreements. It is telling that despite agreement on little else, a powerful, bipartisan group of lawmakers has found common cause in taking on the agency's lawlessness in this matter.

Third, the FCC continues to choose opacity over transparency. The decisions we make impact hundreds of millions of Americans and thousands of small businesses. And yet to the public, to Congress, and even to the Commissioners at the FCC, the agency's work remains a black box.

Take this simple proposition: The public should be able to see what we're voting on before we vote on it. That's how Congress works, as you know. Anyone can look up any pending bill right now by going to congress.gov. And that's how many state commissions work too. But not the FCC.

Instead, the public gets to see only what the Chairman's Office deigns to release, so controversial policy proposals can be (and typically are) hidden in a wave of media adulation. That happened just last month when the agency proposed changes to its set-top-box rules but tried to mislead content producers and the public about whether set-top box manufacturers would be permitted to insert their own advertisements into programming streams.

Or consider the Chairman's proposal to reform universal service programs in rural areas. We've heard from rural advocates that it's hard to understand what these reforms mean for rural broadband deployment without seeing all the details. And the head of NTCA—The Rural Broadband Association has said that "It is absolutely essential to see the written words on the page and review the specific terms of the order to understand the actual effectiveness of the reforms." But the Chairman's Office just last week denied a request from me and Commissioner O'Rielly (who played a leading role in creating the plan) to release that plan to the public before a vote. The Commission has already had to reconsider the *Universal Service Transformation Order* seven separate times because it adopted a plan without full input from stakeholders. We shouldn't repeat that mistake here. And more generally, rural Americans deserve to know what we're proposing to do before we do it.

Or take the idea of being more transparent with our enforcement process. Right now, consumers can see the headlines when the Commission launches an investigation, but they can't see if the FCC has followed through on its promises to crack down on bad actors. And I, for one, have repeatedly asked the Enforcement Bureau for a list of open investigations to facilitate oversight of their work, only to be denied time and again.

One reason may be the FCC's dismal record in recent years of collecting the fines it proposes. According to data FCC leadership provided in response to a letter led by Senator Roy Blunt, the Enforcement Bureau frequently does not follow through or pursue cases even where the facts and law warrant doing so. For example, the agency has proposed over $374 million in fines since 2011, but it has collected only $7.8 million, according to this data. That's a meager 2% recovery rate. Only with additional transparency—transparency that matters much more than glowing press headlines—can the public hold the FCC accountable for this colossal failure.

It doesn't have to be this way. Indeed, I had hope one year ago that things might change. After all, when I testified before this Subcommittee a year ago, there was widespread agreement that the FCC's process was broken. The Chairman himself acknowledged that "legitimate issues" had been raised. And during that hearing, he publicly announced that he was launching a process reform task force.

At the time, many were skeptical, wondering why it was necessary to set up a blue-ribbon panel to do things the right way—in some cases, simply the way they were done before. But my staff and I rolled up our sleeves and took the job seriously.

In particular, my office suggested substantive, noncontroversial reforms that would be easy to implement and improve the agency's operations. For example, I suggested that every Commissioner receive a final version of an order 48 hours before we vote on it at an open meeting. I'm flexible as to whether that time period should be longer or shorter, but it seems obvious to me that all Commissioners should know what we are voting on before we vote.

Moreover, I suggested that every Commissioner respond when one of us proposes changes to a draft order. Again, this doesn't seem controversial. If I or one of my colleagues comes up with an idea that might improve an order, both good government and common courtesy suggest that we should take the time to respond. Just say yes or say no. That's not too much to ask.

Likewise, I suggested that every Commissioner provide input on draft orders by a date certain. This way, every Commissioner would have time to respond to others' suggestions and offer their own, and FCC staff would have time to prepare the final version of an order well before our vote.

These are pretty basic ideas. They are not Republican or Democratic ideas. They are simply good process. So: what did the task force do with them? Where are we one year later?

Unfortunately, after participating in dozens of meetings and spending even more time coming up with proposals, the evidence suggests that the skeptics were right. The Chairman's task force has accomplished—nothing. Not a single reform has been made. This has proven to be nothing more than a Potemkin village designed to persuade Congress that the agency is "doing something" on process reform, and hence that legislation and oversight aren't needed.

But perhaps none of this should come as a surprise. After all, the Chairman stated earlier this year that "[t]he refuge for [those who do] not like a decision is to complain about process." I disagree. And I am sure the Members of this Subcommittee do as well.

No matter the issue, the FCC should always play by the right rules. At this point, the only way to ensure that outcome is the enactment of process reform legislation and vigorous oversight.

Broadband Deployment.—I want to turn next to the topic of broadband deployment. I salute the Subcommittee for its leadership in this area. When it comes to both infrastructure and spectrum, Members of this Subcommittee are leading the way.

In particular, you have examined six bills that could boost broadband deployment. You have discussed broadening access to poles and conduits for Internet service providers, streamlining the historic review process for broadband facilities, developing common forms for siting wireless facilities, and tracking the application process for building broadband on federal lands. And you examined the Broadband Conduit Deployment Act, which could turn every new highway into a road toward more fiber and better broadband in our communities.

In my view, the FCC should play its part, too. And I believe there is much more that the agency can and should be doing to spur broadband deployment. That means facilitating infrastructure investment to make sure that wireless and wireline networks are strong and scalable in the digital age. And that means opening up new swaths of spectrum for commercial use.

First, we need to make it easier for wireless providers large and small to deploy the antennas, small cells, and base stations necessary to meet consumer demand.

Thankfully, we took some steps in the right direction in 2014. We reformed our environmental and historic preservation rules to make it easier to deploy small cells and collocate antennas on existing structures. We made it clear that our shot-clock rules apply to small cells and distributed antenna systems (DAS). And we adopted a bright-line test for determining which equipment modifications qualify for section 6409's deemed-grant remedy.

But there is more work to be done. Our 2014 order called on the FCC to work with historic preservation officers and other stakeholders to develop what is known as a "program alternative" that could further streamline and expedite the process for deploying small cell technologies. Agency staff is currently working on that program alternative with the goal of completing the process within the 18–24 month deadline set out in the 2014 order. I'm optimistic that we will have good news to report on those efforts in a few more weeks or months. I also hope that the Commission will revisit my suggestion that we adopt a deemed granted remedy when local governments do not meet the 90-/150-day shot clock we adopted and that the Supreme Court has approved. The state of California just did that. Doing the same at the FCC would help expedite the siting process nationwide.

Second, the Commission must continue to find ways to streamline the process of deploying wireline infrastructure. Over the last few years, our infrastructure proceedings have focused primarily on

the wireless side: on antennas, base stations, and the like. But wireline infrastructure is a linchpin of communications networks—even wireless communications spend the majority of their trip along the thousands of miles of fiber that connect our country. And high-speed wireline infrastructure foretells economic growth. Just look at the entrepreneurs flocking to places like Kansas City to start businesses that take advantage of gigabit fiber.

To make it easier for the private sector to deploy fiber, let's reform our rules for stringing fiber optics, coaxial cables, and other wires on utility poles and through underground conduit. First and foremost, we should reduce the costs that utilities may charge Internet service providers for preparing poles, ducts, conduits, and rights-of-way for pole attachments. These "make-ready" costs, as they are known, are a major barrier to competitive entry, and the Subcommittee rightly targeted them as ripe for reform. But from the perspective of legal authority, there's no need for congressional action—the FCC already has the power to act and can start a rulemaking on the subject.

There's even more the FCC can do. For example, Congress has prescribed the formula for calculating pole attachment rates and given the FCC discretion to include or exclude a pole owner's capital expenses in that calculation. Today, we choose to include capital costs—even when the pole owner has already recovered those costs separately. Excluding those costs would reduce broadband prices and spur deployment.

Additionally, the Commission has a special enforcement docket for pole attachment cases, but complaints therein tend to languish. It's March of 2016, and yet we still have three cases from 2014 and two from 2015 pending. Companies investing in fiber deployment deserve answers in weeks, not years. We need to start adjudicating pole attachment disputes promptly to send a message to pole owners that the FCC is serious about facilitating deployment.

Third, let's open up the 5 GHz band. Four years ago, this Subcommittee drew attention to the 5 GHz band as one ideally suited for unlicensed use. The Spectrum Act, which was signed into law in 2012, called on the FCC to begin the administrative process for opening up the 5 GHz band. The FCC did that in 2013.

Since then, Ranking Member Eshoo, Vice Chairman Latta, Representative Matsui, and others have introduced the Wi-Fi Innovation Act. As Ranking Member Eshoo and I explained in a joint op-ed, that bill would require the FCC to test the feasibility of opening the upper portion of the 5 GHz band to unlicensed use—a portion of the band known as U-NII-4. Chairman Walden and others have also played key roles in helping to move the ball forward on this part of the 5 GHz band. I applaud those efforts.

Taken together, in the U-NII-4 band as well as the lower, U-NII-2B band, there are up to 195 MHz of spectrum that could open up for consumer use. This will mean more robust and ubiquitous wireless coverage for consumers, more manageable networks for providers, more test beds for innovative application developers, and other benefits we can't even conceive today.

The FCC needs to get this done. But progress hasn't been fast enough. I've been calling on the FCC to open up these bands up since 2012. Both Qualcomm, through its re-channelization approach, and Cisco, through its detect-and-avoid proposal, have identified paths forward. I hope the agency gets this proceeding across the finish line, and soon.

Fourth, if we want to lead on 5G, we need to talk about spectrum above 24 GHz—in what are known as our spectrum frontiers. Not long ago, most would have thought of the millimeter wave bands as dead zones when it came to mobile services. After all, nearly all commercial mobile networks operate in frequencies below 3 GHz. But as has been the hallmark of the communications sector, engineers are finding a way and technology is advancing.

Companies are now investing heavily in mobile technologies that rely on spectrum above 24 GHz as part of their work on 5G mobile technologies. Over a year ago, I visited Samsung's 5G research lab

near Dallas, Texas. There, engineers are hard at work developing base stations and mobile technologies that are crossing into these spectrum frontiers. Their experiments with multiple-input, multiple-output antennas no bigger than a Post-it note have already demonstrated that 5G technologies can use millimeter wave bands to deliver mobile speeds in excess of 1 gigabit per second.

What is the FCC's role when it comes to 5G? In my view, we should put a framework in place that will allow it to develop in the United States as quickly as the technology and consumer demand allow. The U.S. has led the world in 4G, and there is certainly a lot of running room left with LTE and LTE-Advanced. But we must continue to lead as mobile technologies transition to 5G. The key is to make sure that the FCC does not become a regulatory bottleneck or send signals that would lead companies to focus their research and investments abroad.

On that score, there's plenty of work to do. On the plus side, we unanimously inquired about opening up numerous millimeter-wave bands in 2014, and the record contained robust support for moving forward on them.

But our rulemaking only proposes moving forward with some of the bands above 24 GHz. There's another 12,500 MHz of spectrum in the 24 GHz band, 32 GHz band, 42 GHz band, and the 70 and 80 GHz bands that might be used for mobile services. I called on the FCC to include those bands as well in our rulemaking. That didn't happen, but I remain hopeful that those bands won't stay on the cutting room floor for long.

We should not stop there, however. We must continue to expand our spectrum frontiers. That includes spectrum above 95 GHz. Given the path-breaking research and development going on around the world, the FCC should look at allowing greater innovation and experimentation in those bands. There's a long-dormant petition pending before the Commission right now that seeks to do just that. Consistent with that petition, I propose that the FCC launch a rulemaking to study those bands. The spectrum above 95 GHz illustrates well the principle that regulation should neither impede nor lag behind advances in engineering.

As the National Broadband Plan put it half a decade ago, "It is time again to reduce talk to practical results." Advancing a real broadband deployment agenda is my top priority. I look forward to talking more about it in the months to come, and working with my colleagues at the FCC and with the Members of this Subcommittee to make it happen.

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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.