

**TESTIMONY OF FCC COMMISSIONER AJIT PAI
BEFORE THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION**

MARCH 18, 2015

Chairman Thune, Ranking Member Nelson, and Members of the Committee, thank you for giving me the opportunity to testify this afternoon. Over the last two-and-a-half years, it has been an honor to work with the Members of this Committee on a wide variety of issues, from encouraging broadband deployment in rural America to eliminating the sports blackout rule, from making available more spectrum for mobile broadband to better connecting our nation's schoolchildren with digital opportunities.

And it is a particular privilege to appear before you today now that Senator Moran of my home state of Kansas has joined the Committee. When this Committee held my confirmation hearing, Senator Moran was kind enough to introduce me, and I have since enjoyed appearing with him at events back in Kansas. I hope that his kindness will continue when he has the opportunity to question me later.

I last testified in front of this Committee two years ago. Since that hearing on March 12, 2013, things have changed dramatically at the FCC. I wish I could say that these changes, on balance, have been for the better. But unfortunately, that is not the case.

Net Neutrality.—The foremost example, of course, is the Commission's decision last month to apply Title II to the Internet. That party-line vote overturned a 20-year bipartisan consensus in favor of a free and open Internet. It was a consensus that a Republican Congress and a Democratic President enshrined in the Telecommunications Act of 1996 with the principle that the Internet should be a "vibrant and competitive free market . . . unfettered by Federal or State regulation." It was a consensus that every FCC Chairman—Republican and Democrat—had dutifully implemented for almost twenty years. And it was a consensus that led to a thriving, competitive Internet economy and more than a trillion dollars of investment in the broadband Internet marketplace—investments that have given Americans better access to faster Internet than our European allies, and mobile broadband speeds that are the envy of the world.

Here is the truth. The Internet is the greatest example of free-market innovation in history. The Internet empowers Americans to speak, to post, to rally, to learn, to listen, to watch, and to connect in ways our forefathers never could have imagined. The Internet is a powerful force for freedom, at home and abroad.

In short, the Internet is not broken. And it didn't need the FCC to fix it.

But last month, the FCC decided to try to fix it anyway. It reclassified broadband Internet access service as a Title II telecommunications service. It seized unilateral authority to regulate Internet conduct, to direct where Internet service providers put their investments, and to determine what service plans will be available to the American public. This was a radical departure from the bipartisan, market-oriented policies that have served us so well for the last two decades.

With the Title II decision, the FCC voted to give itself the power to micromanage virtually every aspect of how the Internet works. The FCC can now regulate broadband Internet rates and outlaw pro-consumer service plans. As the Electronic Frontier Foundation wrote us, the FCC has given itself "an awful lot of discretion, potentially giving an unfair advantage to parties with insider influence," which is "hardly the narrow, light-touch approach we need to protect the open Internet." Or as EFF's cofounder wrote after the decision, "Title II is for setting up monopolies, not tearing them apart. We need competition, not regulation. We need engineers not lawyers."

And that's precisely the problem. When I talk to people outside the Beltway, what they want—what they need—isn't more regulation but instead more broadband deployment and more competition.

But this “solution” takes us in precisely the opposite direction. It will result in less competition and a slower lane for all. What have our nation’s scrappiest Internet service providers told us? What did we hear from 142 wireless ISPs who’ve deployed broadband service using unlicensed spectrum without a dime from the taxpayer? What did we hear from 24 of the nation’s smallest ISPs, each with fewer than 1,000 residential customers? What did we hear from 43 municipal broadband providers, including Cedar Falls Utilities? What did we hear from the National Black Chamber of Commerce, the National Gay & Lesbian Chamber of Commerce, the U.S. Hispanic Chamber of Commerce, and the U.S. Pan Asian American Chamber of Commerce? That regulating the Internet under Title II is sure to reduce competition and drive smaller competitors out of the business. Monopoly rules from a monopoly era will move us toward a monopoly.

The FCC’s Title II decision is a raw deal for consumers. Broadband bills will go up—the plan explicitly opens the door to billions of dollars in new taxes on broadband. One estimate puts the total at \$11 billion a year—with \$4 billion a year on top of that if the Internet Tax Freedom Act isn’t extended (or better yet made permanent). And broadband speeds will be slower. The higher costs and regulatory uncertainty of utility-style regulation have stymied Europe’s broadband deployment, and America will follow suit. Just look at the data. Today, 82% of Americans, and 48% of rural Americans, have access to 25 Mbps broadband speeds. In Europe, those figures are only 54% and 12% respectively. In the U.S., average mobile broadband speeds are 30% faster than they are in Western Europe. And broadband providers in the U.S. are investing more than twice as much per person and per household as their European counterparts. Their model has not succeeded, as even leading European regulators and legislators concede. Indeed, neither big nor small providers will bring rural and low-income Americans online if it’s economically irrational for them to do so. In short, Title II’s utility-style regulation will simply broaden the digital divide.

I am hopeful that the FCC won’t get the chance. The FCC has already gone to court twice with attempts to regulate the Internet. Both times, the courts have rejected the agency’s efforts. And I doubt the third time will be the charm. As detailed in my written dissent, the Title II order has glaring legal flaws that are sure to keep the Commission mired in litigation for a long, long time.

Finally, the Title II order was not the result of a transparent notice-and-comment rulemaking process. For one thing, the FCC didn’t actually propose Title II. In the May 2014 *Notice of Proposed Rulemaking*, the agency’s plan was quite different; it was premised on section 706 of the Telecommunications Act and the *Verizon* court’s admonitions on how to avoid Title II. Only in early February did the public learn that the FCC would pursue this course. And even then, the FCC did not make the plan public (despite the fact that an overwhelming majority of Americans—79%—said they wanted to see it). Nor did it make public the critical last-minute changes to the *Order* that were sought by a particular company and special interest group. Only two weeks after the FCC voted on the *Order* were Americans *finally* allowed to see it. Whatever the normal practice at the agency, net neutrality was anything but normal. We should have published the plan before we voted on it and given the public a chance to comment on its many novel details. Going forward, I join Commissioner O’Rielly’s call for the FCC to make public three weeks beforehand the matters scheduled for a vote at public meetings.

The Designated Entity Program.—The FCC must take immediate action to end abuse of our designated entity program. What was once a well-intentioned program designed to help small businesses has become a playpen for corporate giants.

Here’s how the program was supposed to work. When Congress first granted the FCC auction authority in 1993, its goal was to help small businesses—“designated entities” in FCC parlance—compete for spectrum licenses with large, established companies. A small business that lacked the funding to outspend a large corporation could bid, say, \$100,000 for a license but end up paying only \$75,000. In effect, a federal subsidy would cover the remaining \$25,000.

Perversely, this well-intentioned program now helps Goliath at David's expense. Small business discounts are now being used to give billions of dollars in taxpayer-funded subsidies to Fortune 500 companies and to make it harder for legitimate small businesses to compete in the wireless market. Bipartisan concern about this state of affairs has emerged from this Committee. And a chorus is growing among the public as well. For instance, both the Communications Workers of America and the NAACP made this point recently, explaining that big businesses are now abusing the program and driving out legitimate small and minority-owned businesses.

The FCC's recent AWS-3 spectrum auction is a shocking case in point. Last month, the FCC disclosed that two companies, each of which claimed it was a "very small business" with less than \$15 million in revenues, together won over \$13 *billion* in spectrum licenses and are now claiming over \$3 billion in taxpayer-funded discounts. How could this be? DISH Network Corp. has an 85% ownership stake in each (not to mention highly intricate contractual controls over each). Allowing DISH, which has annual revenues of approximately \$14 billion and a market capitalization of over \$32 billion, to obtain over \$3 billion in taxpayer-funded discounts makes a mockery of the small business program. Indeed, DISH has now disclosed that it made approximately \$8.504 billion in loans and \$1.274 billion in equity contributions to those two companies—hardly a sign that they were small businesses that lacked access to deep pockets.

DISH's abuse of the program during the AWS-3 auction had an enormous impact on small businesses. Here are just a few examples:

- Glenwood Telephone Membership Corp. provides communications services to rural parts of Nebraska. Glenwood was the provisionally winning bidder for two licenses that would have allowed it to serve parts of Nebraska, but it was outbid by a DISH entity claiming a taxpayer subsidy. As a result, it did not win a single license in the auction. Glenwood has gross annual revenues of just over \$13 million, which are **1,052 times less than DISH's**.
- Rainbow Telecommunications Association, Inc. provides communications services to rural parts of Kansas. Rainbow was the provisionally winning bidder for one license that would have allowed it to serve parts of Kansas, but it was outbid by a DISH entity claiming a taxpayer subsidy. As a result, it did not win a single license in the auction. Rainbow has gross annual revenues under \$14 million, which are **1,025 times less than DISH's**.
- Pioneer Telephone Cooperative, Inc. provides communications services in rural parts of Oklahoma. Although Pioneer won three licenses in Oklahoma and Kansas, it was outbid by a DISH entity claiming a taxpayer subsidy for another license that it could have used to serve other parts of Oklahoma. Pioneer has gross annual revenues under \$15 million, which are **933 times less than DISH's**.
- Geneseo Communications Services, Inc. provides communications services to rural parts of Illinois. Although Geneseo won two licenses in Illinois, it was outbid by DISH entities claiming taxpayer subsidies for four other licenses that Geneseo could have used to serve different parts of Illinois. Geneseo has annual gross revenues under \$16 million, which are **894 times less than DISH's**.
- VTel Wireless, Inc. provides communications services to consumers in rural parts of Vermont. VTel was the provisionally winning bidder for one license that would have allowed it to serve parts of Vermont, but it was outbid by a DISH entity claiming a taxpayer subsidy. As a result, it did not win a single license in the auction. VTel has gross annual revenues under \$27 million, which are **515 times less than DISH's**.

In every one of these cases, the small businesses that the DISH entities outbid either claimed no taxpayer-funded discounts or ones that were far smaller than those claimed by DISH.

These examples are just a small part of a much broader story. Analysis shows that there were over 440 licenses in the auction for which the DISH entities outbid smaller companies or ones that were not providers of nationwide service that had been winning the licenses. That's more than three times as often as those providers were outbid by AT&T, Verizon, and T-Mobile *combined*.

I am appalled that a corporate giant which itself does not have a single wireless customer has attempted to use small business discounts to box out the very companies that Congress intended the program to benefit and to rip off American taxpayers to the tune of more than \$3 billion. And I am certainly not alone in feeling this way. The Communications Workers of America, the NAACP, and many others have already called on the FCC to reject DISH's attempt to claim these discounts.

This \$3.3 billion is money that otherwise would have been deposited into the U.S. Treasury. This is money that could be used to fund 581,475 Pell Grants, pay for the school lunches of 6,317,512 children for an entire school year, or extend tax credits for the hiring of 138,827 veterans for the next 10 years. This is real money.

And it is certainly not too late to ensure that the Treasury gets it. The DISH entities' applications are pending before the FCC. If it turns out that DISH did not comply with the FCC's rules, the agency must, at a minimum, deny them these discounts. The American people deserve no less.

But regardless of whether DISH violated our rules, the FCC must take immediate action to ensure that this abuse never happens again. DISH is certainly not the only entity that has attempted to game the system. Remarkably, the Commission is currently moving in the wrong direction. Instead of tightening our rules to prevent Fortune 500 companies from abusing the designated entity program, the FCC adopted a Notice of Proposed Rulemaking (NPRM) in October 2014 that would actually *loosen* our rules and make it easier for large companies to benefit from the program. I dissented from those parts of the NPRM. Unfortunately, the Commission's adoption of those proposals as well as an arbitrage-enabling waiver it granted on a party-line vote prior to the AWS-3 auction sent precisely the wrong signal to large companies. Instead of strictly enforcing our rules to protect American taxpayers and small businesses, the FCC sent an "anything goes" message to those inclined to game the system.

The FCC must reverse course. To start, it should quickly adopt a Further Notice of Proposed Rulemaking that would allow the agency to consider a full range of options before our next auction to close loopholes in our rules. The proposals teed up in the October NPRM simply do not give the Commission that degree of flexibility. And, as I am well aware from my experience in the Office of General Counsel, the Commission has lost on notice grounds before when trying to change our designated entity rules.

If, in the face of recent experience, the FCC is not willing to crack down on abuse of the designated entity program, then Congress must act.

In that vein, I applaud the bipartisan leadership of Senators Ayotte and McCaskill on this issue and stand ready to work with this Committee to ensure that the designated entity program benefits legitimate small businesses rather than large corporate interests.

Process.—I firmly believe that the FCC is at its best when it acts in a bipartisan, collaborative manner. Commissioners will inevitably hold different viewpoints on important issues. But traditionally, there has been a willingness to compromise, to negotiate in good faith, and to reach consensus. I witnessed this firsthand during my years as an agency staffer. And I directly participated in such negotiations and compromises during the first year-and-a-half of my tenure as a Commissioner.

For example, during my service as a Commissioner under Chairman Genachowski and Chairwoman Clyburn, 89% of votes on FCC meeting items were unanimous. We didn't always start out in the same place. But we worked hard to reach agreements that everyone could live with and we usually

succeeded. We understood that no political party has a monopoly on wisdom, and we recognized that communications issues historically have not been partisan in nature.

Unfortunately, the environment at the Commission is now much different. Since November 2013, only 50% of votes at FCC meetings have been unanimous. This level of discord is unprecedented. Indeed, **there have been 40% more party-line votes at FCC meetings in the last seventeen months than there were under Chairmen Martin, Copps, Genachowski, and Clyburn combined.**

On issue after issue, the Commission's Republicans have been willing to compromise. But time and time again, our overtures have been rebuffed. Last December, for instance, I offered twelve proposed edits to the Incentive Auction Procedures Public Notice. I did not expect that all of them would be accepted. And indeed, even if all of them had been accepted, the document certainly would not have been what I would have drafted if my office had the pen. But I was willing to meet the Chairman's Office more than halfway.

So what happened? Eleven of my suggestions were rejected outright, and the response was "maybe" on the twelfth. For each proposal but one, there was no willingness to talk, no willingness to negotiate, no willingness to compromise. It was just one red line after another, or so I was told. What were some of those proposals that were viewed as too extreme? One was my suggestion to extend the comment deadlines for these exceedingly complex procedures. But I was told that we could not do so without risking a delay in the auction. You might say I was a little amused when the FCC later ended up extending the deadlines *twice* after receiving complaints from stakeholders. Then again, this wasn't the first time that an idea offered by a Republican Commissioner has been rejected only to be accepted when proposed by someone else. Last summer for instance, the Chairman's Office rejected some of my proposed changes to the E-Rate order (including such "radical" proposals as allowing schools and libraries to use E-Rate funds for caching servers) only to accept them when they were offered by one of the Democratic Commissioners.

This isn't how the FCC used to operate. And it's certainly not how it should function. Our work product is far better when every member of the Commission is allowed to contribute. And our orders have far more legitimacy when they are the product of consensus rather than raw political power.

The divisive manner in which the Commission is being run extends to other areas as well. In particular, the Commission's longstanding procedures and norms have repeatedly been abused in order to freeze out Commissioners and subvert the deliberative process. Here are just three examples:

- In a dispute about whether third parties should be given access to sensitive programming contracts in the Comcast-Time Warner Cable and AT&T/DIRECTV merger proceedings, the Chairman's Office circulated an order at 1:39 PM on November 10, 2014 (the afternoon before Veterans Day) and told Commissioners that they had to cast their votes by the end of that day or else the programming contracts would be released. What was the emergency requiring hurried consideration of such an important and complex issue? There was none. Given this process, I wasn't surprised that the D.C. Circuit later stayed the disclosure order the Commission adopted on a party-line vote.
- The Chairman's Office circulated an item last July that, among other things, changed the coordination zones previously adopted by the Commission in the AWS-3 band. When I asked the Wireless Telecommunications Bureau to show me what the new coordination zones would be, the Bureau said that it could not do so. After I indicated that I would be unable to cast a vote on new coordination zones without knowing what those zones were, the Chairman's Office pulled the item from circulation and directed the Bureau to issue it on delegated authority.
- It has long been customary at the FCC for Bureaus planning to issue significant orders on delegated authority to provide those items to Commissioners 48 hours prior to their scheduled release. Then, if any one Commissioner asked for the order to be brought up to the Commission

level for a vote, that request would be honored. I can tell you from my time as a staffer in the Office of General Counsel that we consistently advised Bureaus about this practice. Recently, however, the Chairman's Office has refused to let the Commission vote on items where *two* Commissioners have made such a request. Moreover, on many occasions significant matters have not even been provided to the Commission 48 hours prior to their release. Often, we only receive them a couple of hours in advance. Other times, we learn about them from the press after they are released.

Given these abuses as well as others, I commend this Committee and the House Energy and Commerce Committee for addressing the issue of FCC process reform. In particular, I would urge you to consider taking steps to ensure that important policy decisions are made by the Commission as a whole rather than staff acting at the direction of the Chairman's Office. Congress established the FCC as a multimember agency and gave each of its five members an equal vote. Had Congress wanted to make the agency a sole proprietorship or to make some Commissioners more equal than others, it would have structured the Commission in a dramatically different way. I believe that action should be taken to restore the FCC to its collaborative and bipartisan tradition.

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Chairman Thune, Ranking Member Nelson, and Members of the Committee, thank you once again for holding this hearing and allowing me the opportunity to speak. I look forward to answering your questions, listening to your views, and continuing to work with you and your staff in the days ahead.