

**REMARKS AT TAXWATCH 40<sup>TH</sup> ANNIVERSARY**  
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Thank you. I want to thank Marva for that kind introduction. I was privileged to speak at an event that TaxWatch co-hosted in Tallahassee about a year ago and I'm honored to be back here today as part of your 40<sup>th</sup> anniversary celebration. I admire the work that TaxWatch does to keep state government accountable and to bring to light the real-world impact of fiscal and economic policies on the American people.

I want to talk to you today about how my work as General Counsel at the Federal Communications Commission intersects with that important mission. The FCC is the federal agency in Washington, DC that since 1934 has been responsible for regulating the ever-evolving technologies that we all use to communicate (including radio, telephones, television, and more recently broadband Internet). One of the FCC's principal goals is to promote the efficient deployment of these technologies to all Americans. It may not surprise you to learn that, since the 1930s, the Commission has not always done the best job of fulfilling that mandate. Indeed, at times, the Commission has made horrible predictions about the future of technology in deciding how to allocate radio spectrum—the scarce public resource that facilitates wireless communication. As a result, the FCC may have delayed the advent of FM radio and commercial cellular phone service for decades, to name two prominent examples. Those sorts of mistakes come at a tremendous cost to the American economy, whether measured in jobs, consumer welfare, or GDP.

We're working hard to change that. Much like TaxWatch, one of the Commission's chief priorities under Chairman Pai has been to serve as a watchdog to identify and repeal bad regulations and learn from the lessons of the past. To that end, we've streamlined or repealed rules that are outdated, unduly burdensome, or reflect incorrect assumptions about how the market and technology works. For example, Chairman Pai has prioritized deploying more spectrum for “flexible use,” meaning that the public, rather than the Commission, can decide the best technological application for a particular band.

We're not doing this for its own sake. By eliminating regulations that impose unnecessary costs on the economy, our actions protect the American consumer, facilitate the deployment of new communications networks to connect distant communities, and help close the so-called “digital divide.” The digital divide is the phenomenon where densely populated and more prosperous urban areas have better access to modern communications networks than less affluent communities or sparsely populated rural areas. By reducing regulatory burdens and creating the right incentives, the Commission can help facilitate network buildout throughout the country to ensure that, as technology advances, no community is left behind.

Perhaps of particular interest to TaxWatch, one way we do this is by identifying state and local regulations that impose burdens on network deployment that are contrary to the public interest. Now, the Communications Act envisions an important role for the states and municipal actors (like local utility and zoning boards) in regulating local communications networks. That is consistent with our long American tradition of federalism (or what in Catholic social thought

might be called “subsidiarity”), namely that states and localities, being closer to the people, ought to have a say on those issues that uniquely affect their own communities. But there are some issues of a national character that, when state and local governments either exceed their authority or act in their own narrow self-interest, it can actually be detrimental to the people they represent. That is often true in the communications space, where providers need to deploy regional and national networks that can crisscross up to fifty state, and thousands of municipal, jurisdictions. Conflicting state requirements or excessive aggregate state and local fees can prove fatal to a provider’s effort to deploy a new network—particularly smaller businesses who can’t afford to take on additional regulatory and litigation risk.

Many state and local governments recognize this reality and have been helpful partners with the FCC in facilitating the nationwide deployment of next-generation (or “5G”) networks. Governors DeSantis and Scott, for example, both signed bills that cut municipal red tape to pave the way for providers to deploy 5G networks in Florida to help transform the Sunshine State into a “smart state.” But too often, state and local governments adopt regulations that resemble Cerberus, the fearsome three-headed dog of Greek mythology that guarded the gates of Hell.

Let me explain. There are three fearsome aspects to much state and local regulation in the communications space. First, these rules often impose hidden taxes. For example, a local zoning board might impose a substantial fee for processing an application. That cost is imposed on a provider who may, in turn, pass the cost down to the consumer in the form of a higher bill, making it harder for both voters and groups like TaxWatch to track the tax and hold government actors accountable. Second, and worse, these taxes are regressive, meaning that they increase the cost of phone or cable service equally for everybody, and therefore disproportionately hurt lower-income Americans. Third, like Cerberus, the taxes are often imposed simply because the government is a gatekeeper and has the power to impose rents in exchange for access—as opposed to furthering some legitimate public purpose.

The upshot of these state and local rules is a phenomenon that Steven Teles in *National Affairs* has called the “kludgeocracy”—the regressive redistribution of wealth caused by the sheer complexity of governmental regulations at the federal, state, and local level. Not only do these rules impose higher costs on lower-income Americans, but they also favor those wealthier individuals and entities with sufficient resources to navigate this complex system, defend against possible litigation, and exploit opportunities for arbitrage.

The FCC—as well as Congress and other federal agencies—has a tool that can help to minimize some of this complexity and unfairness. It is preemption—the ability of the federal government to create a national rule to displace state laws when doing so would be in the public interest. No less a conservative legal giant than Justice Antonin Scalia—who earlier in his career served as an advisor in the White House on communications issues—argued in 1982 that conservatives ought to be prepared to use preemption to effectuate national policy goals when those goals are stymied by state and local regulation. He wrote that “inaction has less to do with the merits than with the unfortunate tendency of conservatives to regard the federal government, at least in its purely domestic activities, as something to be resisted, or better yet (when conservatives are in power) undone, rather than as a legitimate and useful instrument of policy.” His point was that while federal power is often misused, there are areas where conservatives can effectively wield it to promote the common good.

One example the Justice used that we are still dealing with today is cable franchise regulation. Under the Communications Act, municipalities are entitled to charge fees in exchange for a franchise that gives cable operators the privilege of providing cable service to residents. As the Justice pointed out, even in the early 1980s, that system resulted in competing applicants promising “free” and discounted service and other favors to state and local governments in exchange for the franchise.

While Congress has capped the fee that municipalities can charge providers at five percent of total cable revenue, local governments would often try to evade this limit by disregarding so-called “in-kind” contributions (like free cable service to government buildings) when calculating the cap. In his article, Justice Scalia noted it was curious that conservatives had not acted at the federal level to try to rein in these practices.

This past August, the Commission adopted a rule interpreting the Communications Act that required local franchising authorities (or LFAs) to include many of these in-kind contributions toward the statutory five-percent cap, thus reducing the total regulatory or tax burden on cable providers. This is good news for consumers. It’s simple economics: The costs imposed by LFAs ultimately get passed on to cable viewers. As Chairman Pai put it in his statement adopting our reforms, LFAs “have not cracked the secret to a free lunch.” In addition, every dollar paid in excessive fees is a dollar that could otherwise be invested in upgrading and expanding networks. That means that cable operators could be deterred from deploying new services like faster home broadband or better Wi-Fi or emerging Internet of Things networks (the types of networks that could power smart homes, precision agriculture, drone delivery, or autonomous cars). The Commission’s rule will help prevent these unnecessary lost opportunity costs.

The Commission has also tried to cut through the kludge with respect to infrastructure policy—our rules that affect the incentives that providers have to deploy the network facilities that will support 5G and Internet of Things services. At least 28 states, including Florida, have enacted model legislation to protect and promote the deployment of “small cells”—the backpack-sized antennas that transmit the high-frequency spectrum that will help deliver 5G services. But other localities, particularly some large cities, have chosen to exact rents from providers rather than join in furthering the national interest and winning the race to 5G. So last September, we exercised our authority to prevent state and local governments from charging excessive fees—which we defined as fees greater than a reasonable approximation of the locality’s costs for processing zoning applications and for managing deployments in the rights-of-way. We also established “shot clocks” for state and local zoning approvals of the placement of new deployments in order to ensure that construction crews can get to work in months, not years.

We predicted that this streamlining would lead to major benefits for the public: According to one report, speeding 5G infrastructure deployment by even one year would unleash an additional \$100 billion for the U.S. economy. According to another study, our rulemaking could eliminate around \$2 billion in unnecessary costs, which would stimulate around \$2.5 billion of additional buildouts. And that new service will be deployed where it is needed most: We estimated that 97 percent of new deployments would be in rural and suburban communities that would otherwise be on the wrong side of the digital divide.

I will offer one more example of how the Commission has reduced costs associated with state and local rulemaking—what became known as California’s infamous “text tax.” In 2018, the California Public Utilities Commission considered charging a tax for text messaging of about 70 cents for every \$10 of text revenues. Studies showed that this tax could cost California texters up to \$44.5 million per year, with a particularly negative effect on lower-income taxpayers. Luckily, in late 2018, the FCC acted on a petition by mass texting service Twilio, in which we affirmed the regulatory classification of text messaging as an “information service” under Title I of the Communications Act, not a “telecommunications service” under Title II. Now, that’s a technical legal conclusion, but it has important real-world implications. In essence, state utility commissions have a lot less authority to regulate information services than they do traditional telecommunications service like the landline telephone network. So right after the FCC confirmed that texting was, in fact, an information service, California responded by pulling the text tax proposal from consideration, which was a huge win for Californians, especially those in lower-income brackets.

While texts may be safe from taxes for now, none of these victories has come easy. States and localities have litigated heavily against the FCC whenever it has attempted to streamline regulations. Indeed, we are currently facing lawsuits from a number of localities in the federal court of appeals for the Sixth Circuit to the cable franchise reforms I mentioned. And with respect to our infrastructure reforms on excessive local fees and “shot clocks,” those are currently under review by the federal court of appeals in the Ninth Circuit.

We feel confident that our actions are well supported by the law. But as we prepare for an ever more connected future, there is a lot more work to do. I plan to spend much of 2020 making sure that the Commission’s hard-fought reforms are upheld in court and continue to deliver value to Americans. I also look forward to continuing to work in good faith with our state and local partners and with groups like TaxWatch to identify areas in which we can make regulation simpler and smarter, for the benefit of everyone.

Thank you. With that, I will take your questions.