

DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Improving Outage Reporting for Submarine Cables and Enhanced Submarine Cable Outage Data*, GN Docket No. 15-206.

On July 8, 2015, the undersea cable that served the Commonwealth of the Northern Mariana Islands failed. It was damaged when a typhoon blew past the U.S. territory. The outage left tens of thousands of residents in a communications blackout. It prevented them from accessing the Internet, making credit card purchases, withdrawing money from ATMs, or even placing phone calls, including calls to 911.

Consumers suffered because the cable licensee had no backup plan. It did not have a redundant pathway. It did not automatically re-route the traffic. And it did not even notify the FCC that it suffered a complete loss of communications.

Cable failures like this may be rare, but they are precisely the types of outages that the FCC should target in this proceeding. We should focus on outages that impact consumers. We should incentivize providers to set up and maintain redundant pathways. And we should cut through the regulatory red tape that only makes it harder for providers to deploy, maintain, and repair undersea cables. These measures would help people stay connected and promote our economic and national security interests.

Unfortunately, today the FCC does none of this. It simply stumbles down the same misguided trail it blazed last month when it revised another portion of our outage reporting rules. Once again, the Commission refuses to focus on outages that actually affect consumers. Instead, it mandates that companies file reports when there is no loss in communications. Once again, it declines to request targeted outage information that would help us identify trends and threats. Instead, it demands a haystack of paperwork that will only make it more difficult for us to find any needles. Once again, the Commission decides not to encourage providers to construct facilities with automatic and built-in redundancies. Instead, it penalizes those investments by requiring providers to file multiple reports every time they use a redundant pathway. And once again, the Commission decides to divert resources away from critical repair and restoration efforts and toward needless paperwork.

Meanwhile, there are genuine problems with the undersea cable regime that we can and should solve. Indeed, when we launched this rulemaking, I suggested that the *NPRM* seek input on how we can make it easier to deploy, restore, and maintain undersea cables. Commenters responded in spades, identifying very specific and necessary reforms. They identified the need for coordination among the many agencies that play a role in this space—including the Army Corps of Engineers, the Bureau of Ocean Energy Management, the Coast Guard, the Department of Defense, the Federal Energy Regulatory Commission, the National Marine Fisheries Service, and the National Oceanic and Atmospheric Administration. Commenters explained that the government's left hand often works at cross-purposes with its right: For instance, one agency might authorize a dredging or hydrokinetic project without recognizing that an undersea cable lies right under it. Commenters urged the FCC to operate as a point of contact—a clearinghouse for these efforts—and to enact other simple reforms plainly within our power. Indeed, the Commission's advisory committee on communications security and reliability—CSRIC—outlined these and a host of other steps the FCC should take to improve our undersea cable regime.¹ But having been confronted with actual problems and real solutions, the *Order* simply says . . . we will keep thinking deep thoughts about all this. But this promise is shallow.

Another major problem is the agency's refusal to grapple in a serious way with the costs its regulatory wish list will impose.

¹ Report of the Submarine Cable Resiliency Working Group of CSRIC V (June 2016), <http://go.usa.gov/xqdF5>.

What are those costs, which will ultimately be borne by consumers? The section of the *Order* titled “Cost-Benefit Analysis” makes it clear that the agency itself has no idea. Indeed, even in an era when the FCC regularly offers the textual equivalent of an eye-roll² to cost-benefit analysis, the discussion here is embarrassingly deficient.

The *Order* asserts that its new regulatory regime will cost the industry \$152,500 per year.³ But as the record and a rudimentary fact check show, the FCC gets both the math and the analysis wrong. The actual costs are going to be orders of magnitude higher.

First, the FCC uses the wrong number of licensees when calculating its industry-wide cost estimate. Its analysis assumes that there are 61 undersea cable licensees.⁴ So the *Order* multiplies \$2,500 (which it asserts is the annual burden per licensee) by 61 to arrive at the \$152,500 estimate.⁵ The problem is that there are up to 161 undersea cable licensees—not 61.⁶ So the FCC’s estimate lowballs the actual cost by a significant margin.⁷

Second, even if the FCC corrected for this error, its analysis would fare no better because it uses an arbitrary number for the annual burden per licensee. The *Order* asserts that the new reporting requirements will impose a 50-hour burden per licensee per year.⁸ But the FCC offers no rational basis

² Cf. Lucille Bluth, *Arrested Development*, <http://gph.is/28Vvaq8> (last visited June 24, 2016).

³ See *Order* at paras. 81–88.

⁴ See *Order* at para. 87. The *Order* pulls the 61 licensee number from a 2014 supporting statement the FCC provided to the Office of Management and Budget for the purpose of renewing the information collection associated with a mostly voluntary cable reporting regime the FCC first implemented in 2008. See OMB Control Number 3060-1116, ICR Ref. No. 201409-3060-017 (2014) (2014 Supporting Statement), available at <http://go.usa.gov/x3qsT>.

⁵ *Order* at para. 87.

⁶ See, e.g., Federal Communications Commission, Public Notice, FY 2015 Regulatory Fees Submarine Cable Systems (2015), available at <http://go.usa.gov/x3kKj>. The fact that the 2014 Supporting Statement indicates that there are 61 licensees makes no difference; the FCC’s own data and the record in this proceeding show that 61 is neither the current nor correct number.

⁷ The *Order* does not claim that it uses the correct number of licensees. Instead, in a footnote, the *Order* says that it is multiplying its per-licensee figure by 61 because the FCC’s 2014 Supporting Statement says that there were “61 cables licensed in 2014.” *Order* at note 276. But this claim only underscores the arbitrary nature of the *Order*’s analysis. *First*, the FCC’s 2014 Supporting Statement says no such thing: It uses a different figure for the number of cable systems. The number “61” is found in that document, but it is used in one place to refer to the number of “licensees” and in another place to the number of “respondents.” *Second*, even if you assume that the 2014 document said that there were 61 cable systems, and if you further assume that this figure is the correct one today, the *Order*’s analysis would still miss the mark. This is because the *Order* does not adopt a per-cable-system regime. It adopts rules that apply on a per-licensee basis. See, e.g., *Order* at para. 37 (“We adopt a requirement that all licensees . . . must comply with license conditions, including the outage reporting rules we now adopt.”). Indeed, that is why the *Order* is multiplying 61 by what it says is a “per licensee per year” figure, rather than a per cable system per year figure. To be sure, the *Order* allows multiple licensees on a single cable system to designate one entity that will file outage reports with the Commission. But this does not aid the Commission’s analysis because the *Order* makes no showing that 100% of cable systems have or will have consortium agreements. Moreover, the *Order* does not analyze the costs of entering into such agreements or otherwise show that having a consortium agreement will mean that only a single entity will be expending hours compiling the information necessary for the FCC’s required reports.

⁸ *Order* at para. 87.

for selecting this figure. It simply takes the 40-hour figure associated with the distinct reporting regime implemented by the FCC in 2008 and adds a 25% premium, yielding 50 hours.⁹

There are two independent problems with this. The first is that the 2008 regime is so drastically different from the one the *Order* adopts that any reliance on the former cost estimate as a baseline is bound to be arbitrary. This is so for a number of reasons. *For one*, the 2008 rules stated that licensees “would not be required to generate new information in order to comply.”¹⁰ The exact opposite is true here. Today’s *Order* expressly requires providers to generate new information that they would not otherwise produce in the normal course of business. *For another*, the 2008 regime did not require that even a single “formal report be produced.”¹¹ Here, the *Order* mandates that licensees produce not one, but three separate and formal reports for every single event. *For yet another*, the *Order* adopts a far more expansive definition of “outage” than the FCC used in 2008.¹² This alone will significantly increase the number of reportable events.

The other problem is that the *Order* offers no basis for adding 25% (or, more accurately, only 25%) to the burden hours associated with that regime. It’s a wholly arbitrary adjustment that “suggest[s] the agency is either uncertain about why it made its decision, or else is simply making it up as it goes along.”¹³

Third, the FCC drives down the cost estimate by waving a magic wand and making some costs arbitrarily shrink or disappear altogether. For instance, the *Order* assumes a labor cost of \$80 per hour.¹⁴ Now, many commenters told us that this figure is far too low given the personnel who will be responsible for complying with the FCC’s new rules. But putting that to the side, one would at least expect the FCC

⁹ See *Order* at para. 87 (arriving at the 50-hour figure by adding 25% to the 40-hour estimate contained in the 2014 Supporting Statement, which sought to extend the information collection authorization for the 2008 reporting regime).

¹⁰ 2014 Supporting Statement at 1.

¹¹ *Id.* at 2.

¹² As discussed below, the *Order* requires licensees to report incidents that do not involve any loss of communications.

¹³ *Resolute Forest Products, Inc. v. U.S. Dep’t of Agriculture*, ___ F.Supp.2d ___, Civil Action No. 14-2103 (JEB) at 38 (D.D.C. May 17, 2016). Indeed, the most that the *Order* says on this score is that the cost estimate associated with the earlier reporting regime—the one to which the FCC adds 25% today—contained “two conservative assumptions.” *Order* at note 276. But the *Order* only reaches this conclusion by misreading the agency’s earlier analysis. According to the *Order*, the 2014 cost estimate associated with that prior regime was “conservative” because it assumed “that a single set of outage reports would involve as many as 40 hours, rather than only the two hours that we estimate above.” *Order* at note 276. But the FCC’s 2014 cost estimate says no such thing. Indeed, it does not contain *any* estimate of the number of hours that it will take to prepare a report or set of reports. The “40 hours” figure contained therein is the estimate of the annual burden hours per licensee; it does not correlate that figure in any way to a number of reports or set of reports. See, e.g., 2014 Supporting Statement at 8. Additionally, the *Order* asserts that the agency’s earlier cost estimate was “conservative” because it assumed that “all 61 cables licensed in 2014 would experience an outage every year.” *Order* at note 276. Once again, the FCC misreads the 2014 document. As previously noted, it does not say that “61” is the number of cable systems, nor does the document contain any estimate about the number of outages per system per year. But perhaps most fundamentally, whatever the assumptions—conservative or otherwise—that serve as the foundation of the FCC’s 2014 cost estimate, those assumptions simply are not relevant to determining whether the FCC acted reasonably in adding 25% to that estimate when purporting to determine the costs associated with this very different and far more onerous reporting regime.

¹⁴ See, e.g., *Order* at para. 81; see also *Improving Outage Reporting for Submarine Cables and Enhancing Submarine Cable Outage Data*, GN Docket No. 15-206, Notice of Proposed Rulemaking, 30 FCC Rcd 10492, 10508, para. 44 (2015) (*NPRM*).

to use its own \$80 figure when it turns to crunch the numbers. It doesn't. Without providing any justification or notice, the FCC uses a substantially lower, \$50 per hour figure.¹⁵

Likewise, the *Order* determines that there will be a whole host of one-time "implementation costs" associated with this new regulatory regime—those are the up-front costs providers must bear that are in addition to all of the recurring, annual expenses.¹⁶ But when it comes time to put pen to paper, the *Order* assigns a value of exactly \$0 to those actual and recognized costs. It doesn't even make a passing effort to justify this glaring omission.

Similarly, the *Order* recognizes that there may be a whole range of additional costs that it simply does not analyze.¹⁷ It dismisses those by saying that the FCC will consider them when it seeks approval from the Office of Management and Budget for this information collection. But kicking this can down the road makes no sense. If there are additional costs associated with the rules we are adopting today, shouldn't we figure those out before we adopt the rule? Carts shouldn't pull horses.

The errors simply compound from there. For instance, the FCC estimated that there will be 50 reportable events a year.¹⁸ But the *Order's* analysis (or lack thereof) makes it clear that the agency has no idea how many events will qualify as "reportable events" under its new regime, and thus what the compliance costs will be. The *Order* says that the 50-reportable-events figure was a "conservative estimate based upon" documents that indicate that there were between 100 and 200 cable faults per year.¹⁹ But there's a fundamental problem with this: The 100-to-200 estimate is one of *actual* "faults," and the *Order's* new rules don't limit themselves in the least in this regard. Indeed, the *Order* treats as reportable incidents all sorts of ordinary network events that are not and have never been treated as "faults." So, if the *Order* were to estimate the number of reportable events, it should be starting with a figure that is significantly higher than the number of actual faults, not a fraction of it.

There are other mistakes—both large and small—but you get the point.

The bottom line is this: The FCC simply does not care about cost-benefit analysis, let alone getting it right. That is how you end up with a section blithely asserting that compliance costs for the entire undersea cable industry and its 161 licensees will be no more than the price of a tiny studio apartment in Arlington, Virginia.

This is not the way it should be. Whether you view it as a requirement of reasoned decision-making under the Administrative Procedure Act, as the courts do,²⁰ or simply as a matter of good government, as we all should, a federal agency has an obligation to ensure in advance that its decisions will be beneficial on net to the American public. The benefits of a regulation may well outweigh its costs, but with the mailed-in analysis that this agency routinely conducts, we will never know.

For all of these reasons, I dissent.

¹⁵ Compare *Order* at paras. 81–82 (discussing an "assumed \$80/hour labor rate"), and *NPRM*, 30 FCC Rcd at 10508, para. 44 (using "an assumed labor cost of \$80/hour"), with *Order* at para. 87 (calculating the \$152,500 cost estimate based on the \$50 per hour labor rate the FCC used when it estimated the costs for the 2008 regime).

¹⁶ *Order* at para. 86.

¹⁷ *Order* at para. 88.

¹⁸ See *Order* at para. 81 (citing *NPRM*, 30 FCC Rcd at 10508, para. 43 & nn.80–81).

¹⁹ See *id.*

²⁰ See, e.g., *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) ("[W]hen an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable."); see also *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (noting that "we will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses").