

**TESTIMONY OF COMMISSIONER AJIT PAI,
FEDERAL COMMUNICATIONS COMMISSION**

**BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY
OF THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE**

“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. Over the last three and a half years, it has been an honor to work with the Members of this Subcommittee on a wide variety of issues, from streamlining the permitting process for small cells and other wireless infrastructure to improving the availability of 911 at hotels, universities, and office buildings, from speeding the deployment of broadband to rural America to freeing up new, high-band spectrum for unlicensed use. I look forward to continuing that work.

This morning, I'd like to share my perspective on three important issues on which Members of this Subcommittee have recently focused.

Broadband Investment.—The Internet isn't an abstraction. It's a physical network of networks that requires massive investment to deploy and constant adjustment to manage. Telephone companies, cable operators, wireless providers, and others have invested more than \$1.4 trillion over the last 18 years to trench conduit, lay fiber, erect towers, install equipment, and build out those networks that connect us all.

Before shovels even hit the dirt, Internet service providers must navigate a dizzying array of federal, state, and municipal obstacles. This comes at a cost: Every week spent negotiating with a municipality for access to local rights of way is another week that consumers must wait for faster service and another week that work crews must sit idle. Every dollar spent complying with outdated regulations is a dollar that could have been better spent deploying next-generation technologies.

Let me give an example I encountered last week. Southern Light is a competitive fiber builder all along the Gulf Coast, with plant stretching from Jacksonville, Florida to the bayous of Louisiana. They use boring rigs to burrow through hundreds of feet of mud to install conduit. They push high-pressure air to snake cables through that conduit. And they use fiber optic technology as backhaul, to connect wireless small cells to the network. But in many cities, Southern Light is stuck, waiting. That's because some municipalities take months to grant a local franchise. Others have imposed moratoriums on the construction of new small cells. Regulatory hurdles like these slow down deployment and sometimes deter Southern Light from building in an area altogether.

If we want faster broadband, if we want lower prices, and if we want more competition, we need to remove barriers to infrastructure investment and technological innovation. That's been my priority since I got to the FCC.

I applaud the work of the Subcommittee on this front. Just last month, you held a hearing on breaking down barriers to broadband infrastructure deployment. In particular, you examined six bills that could boost deployment. You 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 discussed the Broadband Conduit Deployment Act of 2015, which could turn every new highway into a road toward more fiber and better broadband in a community.

These might not be headline-grabbing topics—but they should be. And that’s because this work in the weeds is exactly what’s needed if we’re going to spur private sector investment.

Unfortunately, the Federal Communications Commission has not been as focused on promoting the digital revolution. The decision to regulate Internet service providers like Ma Bell of yore is a case in point. But that’s not the only problematic decision. The FCC has also impeded the IP Transition, making it harder for carriers to leave behind the copper networks of yesterday and focus on building next-generation networks. Last year, the Commission gave itself the authority to micromanage broadband networks, requiring carriers to seek permission before discontinuing almost every network feature no matter how little used or old fashioned. This summer, the Commission decided to slow copper retirement and let our staff flyspeck every change a carrier makes to its business model in the name of enhancing competition in the already competitive *voice* market. And it looks like we’re headed in the same direction with the special access market: Even though we haven’t analyzed the troves of marketplace data we’ve collected, the Commission has already singled out four carriers for re-regulation. That will divert even more capital away from next-generation networks and back toward 1.5 Mbps special access services that are 17 times slower than the FCC’s definition of broadband.

And then there are the decisions that the Commission has simply refused to make. Under Chairman Genachowski, we unanimously sought public input on eliminating the legacy regulations contained in the 1980s-era *Computer Inquiry* proceedings. But so far, there has been no follow through. Last year, we unanimously proposed to streamline our accounting rules, which require some carriers (but not others) to maintain 148 accounts and subaccounts designed for TDM-based telephone service. But again, no follow through. And as Commissioner O’Rielly blogged about last week, we are sitting on a petition to recognize what should be obvious: The traditional incumbents no more dominate today’s residential market than the cellphone companies, cable operators, and over-the-top VoIP providers they compete with, and should not be regulated as if they did.

These regulatory roadblocks are bad for consumers, bad for infrastructure investment, and bad for our nation’s economic competitiveness. After all, networks don’t have to be built. Risks don’t have to be taken. Capital doesn’t have to be invested. When the FCC makes it less attractive for companies to connect the American people, those companies will find other places to put their money.

And that’s exactly what has happened. Capital expenditures by major wireline broadband providers plunged 12% in the first half of 2015 compared to the first half of 2014. The decline among all major providers was 8%. This decrease represents billions of dollars in lost investment and tens of thousands of lost jobs. And it is quite atypical. Only twice before have broadband service providers’ capital expenditures fallen on a year-over-year basis: following the dot.com bust in 2001 and the Great Recession in 2008.

Where has this money gone? One major broadband provider that cut back on capital investments by 29% in the first half of 2015 announced this summer that it would be spending an additional \$3 billion to build out its network—in Mexico. Another major broadband provider spent \$4.4 billion earlier this year to buy a content provider, AOL.

It is time for the Commission to change course. We should recognize that competition is a much better guarantor of consumer welfare than pervasive regulation. We should embrace the IP Transition and clear out the regulatory underbrush that has slowed down the rollout of new services. And we should work with this Subcommittee to further our shared goal of breaking down the barriers to infrastructure investment.

Over-the-Top Video.—Speaking of changing course, I hope the Commission will soon abandon its quest to regulate the over-the-top video market.

So far, U.S. regulators have largely left Internet-based video alone. We don’t regulate the content that over-the-top providers offer. We don’t regulate prices. And we don’t regulate business models. We

leave those decisions to the market—to the aggregated choices of millions of Internet-savvy consumers. And that, in my view, has been a tremendously wise approach.

Almost every day, there seems to be another market-driven, over-the-top offering that benefits online providers, content creators, and most importantly, consumers. Just look at how diverse the marketplace is. Do you want a bundle similar to what cable and satellite companies offer? Try PlayStation Vue, which carries over 80 networks such as FOX, TBS, and Comedy Central, and will soon include ESPN, ABC, and The Disney Channel. Or YipTV, which offers Spanish speakers more than 50 networks for about \$15 a month. Want a premium channel on your iPad? HBO and Showtime now offer stand-alone apps. Prefer your movies or television shows *à la carte*? Check out iTunes, Google Play, and M-GO. Okay with ads? Check out Crackle, which lets consumers watch over-the-top content—like Jerry Seinfeld’s *Comedians in Cars Getting Coffee*—for free. If you’re willing to spend a bit of money, there’s always Netflix and Amazon Instant Video, where you can binge watch an entire season of “Master of None” or “Transparent” while your children sleep. And don’t forget user-generated platforms like YouTube, which add over 300 hours of new content every minute.

It’s the free market that’s incentivized all this competition. The Digital Media Association, which represents over-the-top providers including Apple, Microsoft, and Sony, put it well: “Excessive or ill-advised regulation at this point could deter continued investment. The tremendous developments in [over-the-top] services have emerged in an environment that permits innovators to be flexible and unencumbered. . . . [T]he addition of regulation could alter the foundation that has supported these developments and that has encouraged investment for continued growth.” As a result, the Commission’s proposal “could [] end up back-firing, reducing resources and opportunities for these innovators rather than expanding them.” Obviously, this would be bad for consumers.

Last month, Ranking Member Pallone called on the FCC “to hit the pause button on regulating streaming video.” I wholeheartedly agree with him. He pointed out that he has “not been hearing from constituents so far that they can’t find the shows they want.” Nor have I. Rather, he said that “consumers are beginning to have more programs to choose from, more ways to get them, and more options on prices.”

For me, both as a regulator and an online video consumer, the way forward is simple. There is no market failure. There is no problem to be solved. Therefore, there is no need for the U.S. government to impose regulations on over-the-top video designed for markets and technologies as they existed over 20 years ago.

Enforcement Process.—One last concern I raise for the Subcommittee’s consideration is the agency’s enforcement process. Chairman Upton, Subcommittee Chairman Walden, and Subcommittee Vice Chairman Latta wrote the Comptroller General last month to request an investigation into the management of the Commission’s largest subdivision, the Enforcement Bureau. They were right to do so.

To be blunt, the FCC’s enforcement process has gone off the rails. Instead of dispensing justice by applying the law to the facts, the Commission has focused on issuing headline-grabbing fines, regardless of the legality of its actions.

Things did not use to be that way. Under Chairman Genachowski’s leadership, I only dissented on one Enforcement Bureau action. That was a partial dissent based on my belief that the forfeiture proposed by the Commission was too low. Under Acting Chairwoman Clyburn’s leadership, I did not dissent on any Enforcement Bureau actions—not one. But in the last thirteen months, I have voted against ten such items.

To be clear, I haven’t changed my approach to enforcement. It’s pretty simple: we establish rules in advance; we analyze all facts relevant to an allegation; we determine liability; we fix a penalty. But the agency’s enforcement approach has changed dramatically.

Consider the \$100 million fine the FCC issued against AT&T this summer for allegedly failing to disclose that unlimited-data-plan customers could have their data speeds reduced temporarily as part of the company's approach to managing network congestion. In that case, AT&T posted disclosures on its website and at the point of sale. It publicized its program through the national press. It disclosed the program to every single unlimited-data-plan customer. And it sent targeted disclosures to every single customer actually affected by the program. All of this fit the FCC's previous interpretation of its transparency rule to a T. And AT&T had implemented its program after the FCC had explicitly approved similar programs on at least three separate occasions as innovative ways to manage network congestion. But these facts and precedents did not matter—all because they got in the way of a \$100 million headline.

Or consider the \$30 million in fines the FCC recently issued to six prepaid calling card providers. Although the companies' conduct was shameful, the agency's authority to impose forfeitures was fatally compromised by its own inadequate and incomplete investigation—one that failed, among other things, to specifically identify even a single purchase of a prepaid calling card, as required by the Communications Act.

Sadly, these cases are not even the most egregious violations of due process. A fundamental tenet of the American legal system is that the government cannot sanction you for violating the law unless it has told you what the law is. In the regulatory context, that means that rules must exist before the FCC can enforce them.

But TerraCom didn't break the FCC's rules. Last year, the FCC proposed to fine that company \$10 million for failing to protect personally identifiable information (also known as PII) and failing to notify certain customers of a PII data breach. The problem? The Commission had never interpreted the Communications Act to require the protection of PII. The Commission had never obligated carriers to notify consumers of a data breach of PII. The Commission had never adopted rules regarding the misappropriation, breach, or unlawful disclosure of PII. Indeed, the Commission could not point to a single rule that TerraCom had violated.

And M.C. Dean didn't violate any FCC rules either. Earlier this month, the agency accused the company of using an unlicensed Part 15 device to intentionally disrupt the operation of another. But the Commission had never interpreted the Communications Act to prohibit this. And our own rules expressly *allow* that conduct. They hold that, by definition, a Part 15 device cannot cause harmful interference to another Part 15 device. The litigation mess to come didn't have to be. In my view, the FCC *should* have rules that prohibit Wi-Fi blocking, but we don't. And it's not for the lack of any opportunity. Over a year ago, parties asked the Commission to adopt regulations on Wi-Fi blocking, and a broad cross-section of stakeholders urged the FCC to clarify the rules of the road. But instead, Commission leadership made it clear that no such guidance would be provided and the agency ultimately dismissed the petition.

One more problem traces through the Commission's recent enforcement actions: The penalties prescribed regularly appear to be plucked from thin air. The FCC offered no basis for fining AT&T \$100 million, only asserting that applying the statutory maximum would lead to an "astronomical figure." In TerraCom's case, the Commission calculated the base penalty to be \$9 billion—with a *b*—but decided without further explanation that \$10 million was sufficient. With such an implausibly large range of forfeitures, the agency has arrogated for itself the roles of judge, jury, and executioner. For what company can risk exposure to virtually limitless liability?

Congress never intended the FCC to assert that a company has violated never-adopted rules, to ignore facts that get in the way of good press, or to calculate potential forfeitures so implausibly large that any rough justice penalty will do.

When Congress adopted the Administrative Procedure Act, it laid out clear guideposts for how agencies should carry out their statutory duties. We are supposed to provide fair notice to parties of what the law requires. Next, we are supposed to investigate conduct, taking into account all of the evidence.

And third, we calculate forfeitures based on discrete and concrete violations of the law. The FCC faithfully followed that formula for the first 80 years of its existence. There's no good reason why it's become such a problem of late.

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Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee, thank you once 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.