

**REMARKS OF FCC COMMISSIONER AJIT PAI
BEFORE THE FREE STATE FOUNDATION'S POLICY SEMINAR**

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As many of you know, I wasn't Free State's first choice to deliver remarks this morning. I'm only here because Chairman Wheeler's Chief of Staff unexpectedly cancelled and the Chairman's Office was unable to provide a replacement. I'll admit that my ego was a bit bruised when I received Randy's invitation.

But then my thoughts turned to none other than Frank Sinatra. You see, when filming *The Manchurian Candidate*, Ol' Blue Eyes broke his wrist and had to pull out of his next film because he couldn't hold a gun properly. The movie's producers tried to find a replacement but were turned down by John Wayne, Robert Mitchum, and Burt Lancaster. Eventually, they offered the part to someone best known for his work in westerns. The actor was Clint Eastwood. The role was Dirty Harry. And the rest, as they say, is history. So when Randy asked me to come and deliver some brief introductory remarks this morning, I asked myself one question: Did I feel lucky? I did—and here I am.

Speaking of Clint Eastwood, I thought about following his example and delivering my presentation in the form of an imaginary conversation with someone from the Chairman's Office—represented, of course, by an empty chair. But given that Clint's performance at the 2012 Republican National Convention received somewhat mixed reviews, I've decided to stick to a more traditional format.

On a more serious note, it's great to be with you this morning, and I have to give credit to Randy for his impeccable timing. The title of this policy seminar is "Thinking the Unthinkable: Imposing the 'Utility Model' on Internet Providers." And after this week's developments, now is the time for all of us to think long and hard about what imposing public utility regulation on the Internet would really mean.

First, it would mean rejecting a successful, two-decades-old bipartisan consensus that the Internet thrives under minimal regulation. Public utility regulation hasn't been and shouldn't be a partisan issue. After all, it was the Clinton FCC's *Stevens Report* in 1998 that determined that Internet access services were information services. It was Senators John Kerry and Ron Wyden who told the FCC that same year that if the agency "suddenly subject[ed] some or all information service providers to telephone regulation, it seriously would chill the growth and development of advanced services."¹ And it was FCC chairmen of both parties—Bill Kennard, Michael Powell, Kevin Martin, and Julius Genachowski—who wisely rejected imposing yesterday's heavy-handed rules for monopolies onto the evolving, competitive Internet marketplace.

There is no mistake about what this bipartisan consensus has produced—and not just for those of us old enough to remember using 56k modems and getting AOL Internet access CDs in the mail. Our historic light-touch approach has yielded larger investment in broadband infrastructure, faster speeds, and broader deployment.

You might ask: larger, faster, and broader than what? Well, compare the broadband market in the United States to that in Europe, where broadband is generally treated as a public utility. 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. Similarly, American broadband companies are investing more than twice as much as their European counterparts (\$562 per household v. \$244). They deploy fiber

¹ Letter from Senators John Ashcroft, Wendell Ford, John Kerry, Spencer Abraham, and Ron Wyden to FCC Chairman William Kennard (Mar. 20, 1998).

to the premises about twice as often (23% v. 12%). And when it comes to wireless, the fastest mobile broadband technology in wide deployment, 4G LTE, now covers 86% of Americans; in Europe, that number is only 27%. Moreover, in the U.S., average mobile speeds are 30% faster than they are in Western Europe.

It's no wonder that just two weeks ago, *The New York Times* reported that "the lack of ultrafast Internet access in much of Europe has placed local companies at a disadvantage in the digital world compared with their rivals in North America and Asia." It's all too easy to bash American broadband when you don't have to seriously compare the overseas experience. But once you do make an apples-to-apples comparison, why would we want our broadband market to become more like Europe's?

Second, public utility regulation would mean less choice and competition for consumers. Title II was designed to regulate the old Ma Bell monopoly. And the surest way to discourage competition is to impose upon an industry with distinct competitors and rapidly evolving technologies a regulatory framework designed for a slow-moving monopoly. What company is going to enter the broadband market or expand its facilities if it is going to be tightly regulated as a public utility?

Just look at the example of Google Fiber. Today, Google Fiber does not offer voice service over its broadband network. Why? Because voice is a heavily regulated Title II service. Think about that: They have the network in place and it would cost virtually nothing to supply voice service, but they consciously decided not to do so because of Title II regulation.

And remember, that's Google—a company whose market capitalization is equivalent to Comcast, Verizon, and T-Mobile *combined*. So what will happen if we turn broadband into a Title II service as well? Less deployment, less innovation, and less competition. Indeed, we're already seeing that, as one of our nation's largest broadband providers just announced that they are hitting the pause button on fiber deployment. And small companies like wireless ISPs, rural phone companies, and small cable companies might have to exit the business altogether under a Title II regime.

This critical issue, in my view, has received too little attention. Last month, when I went outside the Beltway and held a field hearing in Texas, one thing struck me above all else. The people with whom I spoke, both during and after the event, weren't most concerned about how broadband providers managed their networks. Instead, they wanted more choice and competition in the broadband market. If that's our goal—and I think it should be—utility regulation isn't the solution. To the contrary, it would be a big problem.

Third, public utility regulation would mean higher broadband prices for consumers. Once broadband service is classified as a telecommunications service, universal service charges will be assessed on carriers' broadband revenues. And many state and local taxes will automatically kick in. The net result is that every single American broadband customer will have to pay a new tax or taxes to access the Internet. That translates into less broadband adoption, especially among the millions of families that still struggle to make ends meet in this lackluster economy.

Fourth, public utility regulation would embolden those foreign governments around the world that want to impose greater international regulation upon the Internet. If we declare at home that the government has the right to regulate broadband networks as a utility, we'll be less able to combat repressive foreign governments that view the Internet as a threat. "Do as I say and not as I do" isn't a compelling message on the world stage.

In sum, the problems produced by public utility regulation are clear: reduced investment in broadband infrastructure, slower speeds, less deployment, fewer competitive choices, higher prices, more international regulation of the Internet. But what about the other side of the ledger?

Title II proponents have focused their argument on a single point: the need to prohibit broadband providers from establishing fast lanes and slow lanes; that is, the need to prohibit a practice that has come to be known as “paid prioritization.”

But here’s the basic truth that everyone who labors in this legal vineyard knows: Title II doesn’t allow the FCC to ban so-called fast lanes. Testifying in front of the House of Representatives in May, Chairman Wheeler stated that “[t]here is nothing in Title II that prohibits paid prioritization.”² And he’s right. In fact, fundamental to Title II is the idea that carriers may tariff faster or more reliable services for those customers willing to pay higher prices.

So where should the Commission go from here? Well, I’m not naïve. The President’s explicit endorsement of public utility regulation earlier this week has changed the political climate considerably. But the FCC is an independent agency. I hope that we will safeguard that independence, a concept that dates back to our creation in 1934. We must base our decisions on the law as established by Congress and the facts contained in the record. And the President’s announcement doesn’t change the law or the facts. All of the reasons why Title II wasn’t the Commission’s lead proposal back in May still exist today.

On Monday, Chairman Wheeler said that the President’s proposal “raise[s] substantive legal questions.” “For instance,” he continued, “whether in the context of a hybrid or reclassification approach, Title II brings with it policy issues that run the gamut from privacy to universal service to the ability of federal agencies to protect consumers, as well as legal issues ranging from the ability of Title II to cover mobile services to the concept of applying forbearance on services under Title II.” He therefore said that “we must take the time to get the job done correctly.”

I agree. We are not confronted by an immediate crisis that demands immediate action. We shouldn’t be pressured into making precipitous changes that could endanger the future of the Internet. The stakes are enormous, and it is far more important for us to get this right than to get this done right now.

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In *Magnum Force*, Dirty Harry wisely advised that “[a] man’s got to know his limitations.” The same is true with the FCC. If the Commission goes down the path of public utility regulation, we will devote countless resources to deciding which of the hundreds of pages of Title II regulations will apply to broadband service. We will embroil ourselves in years of litigation in the courts. And we will provoke a knock-down-drag-out fight with Congress.

The end result will be years of regulatory uncertainty, serious damage to our nation’s broadband market, and a weakened FCC. These consequences in many ways are unimaginable. But unfortunately, to pivot back to the title of today’s seminar, they are no longer unthinkable.

² Hearing 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,” Video at 44:56 (May 20, 2014), *available at* <http://energycommerce.house.gov/hearing/oversight-federal-communications-commission-0>.