

**REMARKS OF MATTHEW BERRY,
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AT THE AMERICAN ENTERPRISE INSTITUTE
“TECH POLICY 2015: THE YEAR AHEAD”**

WASHINGTON, DC

JANUARY 28, 2015

I was a bit surprised when the American Enterprise Institute asked me to speak about the FCC’s agenda for 2015. After all, I work in an office that doesn’t set the agenda for the Commission. There is only one man who does that now, and his name, of course, is Barack Obama. Yes, these days *Orange Is the New Black* and Presidential YouTube videos are the new FCC Sunshine Notices.

Nevertheless, it’s an honor to be with you today to discuss the FCC’s activities for the upcoming year. I wish I could predict that in 2015 the FCC will move forward in a bipartisan fashion, that we will seek consensus, and that the input of every Commissioner’s office will be valued. This, after all, is how the FCC has traditionally operated.

But that hasn’t been the case lately. Instead, the Commission is being run in an extremely partisan and divisive manner. Consider the following statistic. In the last fifteen months, there have been more party-line votes at FCC meetings than there were under Chairmen Martin, Copps, Genachowski, and Clyburn combined. Time and time again, Republican offices have been willing to meet the Chairman’s Office more than halfway to reach consensus. But time and time again, our outstretched hand of compromise has been slapped away.

The partisanship has manifested itself in other ways as well. The Chairman’s Office has rejected edits from Republican Commissioners, saying they would cross redlines, only to turn around and accept those very same edits when offered by Democratic Commissioners. Draft items have been circulated exclusively to Democratic Commissioners. And oftentimes, Republican Commissioners have been denied the opportunity to vote on important items altogether as they instead have been released on delegated authority at the Chairman’s direction.

But it doesn’t have to be this way at the Commission, and it shouldn’t. For example, I had the privilege of serving as the Commission’s General Counsel under Kevin Martin. And while he, like any Chairman, was subject to his share of criticism, no one can dispute that Chairman Martin was willing to look past party labels. On high-profile items, he was willing to vote with members of the minority party and against members of his own party. In fact, the Comcast-BitTorrent case that propelled us along the path of net neutrality litigation was adopted by the Chairman and the two Democrats. (It’s hard to imagine *any* vote nowadays with a similar breakdown.) And Chairman Martin made a strong effort to get a unanimous vote where possible. Indeed, some of you can probably remember the start of some meetings being delayed for hours as the Commissioners sought to reach a bipartisan consensus.

As partisanship at the FCC has been on the rise, our independence has been in decline; you might say it’s like a see-saw. And that brings me to the most high-profile item on the FCC’s agenda for 2015. Unfortunately, it appears likely that the Commission will vote next month to impose heavy-handed Title II regulation on our nation’s broadband providers. But it should be obvious that most members of the FCC don’t actually believe that Title II regulation is a good idea. Rather, the FCC is heading down the Title II path because of inappropriate interference by the White House in the Commission’s deliberations.

Indeed, the FCC’s flip-flop on Title II following the President’s announcement brings to mind France’s Henry IV. To secure his throne in 1593, Henry renounced his Protestant faith and converted to Catholicism. He explained his rationale with a line that since became famous: “Paris is well worth a

Mass.” Now, to be sure, “the Portals is well worth Title II” doesn’t have quite the same ring to it. But the underlying point is the same.

The flip-flops aren’t limited to the FCC. It’s not much of a secret that the FCC has been trying to convince companies to abandon their opposition to Title II. And we all know that the Commission has a wide range of carrots and sticks at its disposal.

That’s just one reason why Commissioner Pai strongly supports the request made by Chairman Thune, Chairman Upton, and Chairman Walden for the FCC to release publicly the text of the Title II order that will be circulated on February 5th. The American people should know whether the item doles out any special regulatory favors to companies that have succumbed to the FCC’s pressure. If there are any Cornhusker Kickbacks or Louisiana Purchases in the order, that should come to light before, not after, the vote. Indeed, the American people and the press should be able to examine every aspect of the proposed rules in unvarnished form before the vote. They shouldn’t have to rely on press releases and blog posts written solely to whip up support for the item.

It is also important to emphasize that the Commission’s vote in February will not be the end of the fight over Title II. To paraphrase Winston Churchill, it will not even be the beginning of the end. Rather, it will just be the end of the beginning. While advocates for free markets, the rule of law, and common sense will likely lose at the Commission’s February meeting, I believe that we are likely to prevail in our long-run effort to preserve our nation’s successful and bipartisan light-touch regulatory approach to the Internet.

There are at least three routes to success. First, the Commission’s Title II order could be vacated in court. Second, Congress could pass legislation overturning the Commission’s Title II regulation and replacing it with compromise language for protecting the Open Internet. Or third, after the 2016 elections, a new FCC majority could reverse the Commission’s decision. Notably, Title II opponents need to win only one of these fights while Title II supporters must prevail in all three.

Furthermore, the longer that Title II regulation is in effect, the greater support there will be for ending it. Title II supporters now have the luxury of being able to blithely claim that Title II regulation won’t depress investment in maintaining, improving, or expanding broadband networks, that it won’t raise costs, that it won’t drive smaller providers out of business. To put it another way, they are claiming that if you like your Internet, you can keep your Internet. But that assertion is about as credible as it was for health care. So as the negative impacts of Title II mount, support for Title II will decline. Again, envision a see-saw.

Now if Title II is the most important item on the Commission’s agenda this year, our work on the broadcast incentive auction is probably the second most important. And on that subject, too, there is substantial cause for concern.

When it comes to spectrum auctions, we know what works. Keep the rules simple and don’t restrict participation. Let the market function. Just look at the success of the AWS-3 auction. There, the Commission worked together in a bipartisan manner. We adopted simple rules. We didn’t restrict participation. And as Commissioner Pai has pointed out, the results speak for themselves. Over \$44.8 billion in bids so far, an amount that far surpasses the most optimistic pre-auction projections.

Contrast that approach with how the Commission has handled the incentive auction. By necessity, the incentive auction was always going to be more complicated than past auctions. But the Commission has repeatedly made decisions that will make the auction far more complicated than it needs to be. While some have analogized the incentive auction to a Rubik’s Cube, the Commission is turning it into a Rube Goldberg contraption. Why? The FCC is trying to pick winners and losers in the forward auction. It is trying to pressure broadcasters into accepting below-market prices in the reverse auction. And the proceeding is being handled in a nakedly partisan manner, with Republican input on matters great and small rejected at every turn.

Fortunately, it is not too late for the Commission to get back on the right track, and the conclusion of the AWS-3 auction gives us the chance to do just that. We have heard bipartisan calls recently for the Commission to take a pause, to consider delaying the incentive auction, and to reexamine some of our rules. This makes good sense for at least two reasons.

First, wireless carriers spent far more money than anticipated in the AWS-3 auction, and they will need time to replenish capital prior to the start of the incentive auction. Having carriers bring plenty of money to the table isn't a luxury; it's a necessity. If they don't, the auction will fail. And there are no mulligans; the law only gives the FCC one chance to get this right.

Second, a pause will give us the opportunity to apply lessons from the AWS-3 auction to the incentive auction. It's not too late to simplify the rules. It's not too late to open up participation. And it's not too late to work together in a bipartisan manner rather than saying no to almost every suggestion offered by a Republican Commissioner.

As Commissioner Pai has stated, a delay is in virtually everyone's interest. But I want to take a minute to explain in particular why broadcasters interested in participating should support a pause. It's simple. If broadcasters want to receive top dollar for their spectrum, then they are going to need wireless carriers to come to the auction with as much money as possible. And that means providing carriers with enough time in between the AWS-3 auction and the incentive auction to raise capital.

Moreover, I can't understand why broadcasters would want the auction to proceed under rules designed to obtain their spectrum at below-market prices. If broadcasters don't mind being nickel-and-dimed, then by all means they should want the Commission to continue full speed ahead. But if they want the Commission to change course on such anti-broadcaster policies as dynamic reserve pricing, then they should support a pause.

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Net neutrality and the incentive auction are just two of the important items the FCC will be addressing in 2015. From the IP Transition to municipal broadband, from the 5 GHz band to the Universal Service Fund, the Commission's plate is more than full. And our office stands ready to work on all of these issues in a constructive, bipartisan manner. But as the saying goes, it takes two to tango.

Given recent experience, I can't say that I'm expecting the Commission to suddenly stop pursuing a narrow, partisan agenda and return to the center. But there are benefits to having low expectations. As George Will put it, "The nice part of being a pessimist is that you are constantly either being proven right or pleasantly surprised." I, for one, would certainly rather be pleasantly surprised by the FCC in 2015.