

**REMARKS OF FCC COMMISSIONER AJIT PAI
BEFORE THE FREE STATE FOUNDATION'S
TENTH ANNIVERSARY GALA LUNCHEON**

WASHINGTON, DC

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I am honored to be with you this afternoon to celebrate the Free State Foundation's Tenth Anniversary. It's hard to believe a decade has already passed! To put that in perspective, the number one song on the Billboard chart for 2006 was "Bad Day," by Daniel Powter. And serving in the minority at the Federal Communications Commission for the last few years, there have been many times when the song's lyrics have resonated with me: "'Cause you had a bad day. You're taking one down. You sing a sad song just to turn it around."

Of course, there have been many parts of the job that I have loved. And one of them has been the opportunity to work with the Free State Foundation. All of us should respect the organization that Randy May has built. The Free State Foundation is dedicated to promoting serious discussion about important public policy issues, particularly those involving the communications industry. And in a town where debates often end up shedding more heat than light, Free State is known for its respectful dialogue and focus on substance.

I must say, though, that I am troubled by one gap in Free State's mission. According to its website, "[i]ts purpose is to promote . . . understanding of free market, limited government, and rule of law principles at the federal level and in Maryland." Randy, as someone who lives in Arlington, I have to ask: What's your objection to bringing that understanding to Virginia?

In all seriousness, Free State is defined by a principled worldview. The organization "focuses on eliminating unnecessary and counterproductive regulatory mandates . . . and on reducing overly burdensome taxes, protecting individual and economic liberty, including property rights, and making government more effective, efficient, and accountable." This is a mission that I wholeheartedly endorse. And during my four-and-a-half years at the FCC, I have tried my best to play my small part in advancing it.

On issue after issue at the FCC, the Free State Foundation has spoken out forcefully and eloquently on behalf of limited government, the rule of law, and rigorous economic analysis. It has been a key voice fighting against the FCC's regulatory overreach in areas such as Title II, business data services, municipal broadband, set-top boxes, and broadband privacy.

Unfortunately, the FCC lately has been providing Free State's scholars with plenty of material to criticize. But I'm optimistic that last month's election will prove to be an inflection point—and that during the Trump Administration, we will shift from playing defense at the FCC to going on offense. Indeed, I believe the new year will bring the best opportunity in the Free State Foundation's existence for it to advance public policy that reflects our shared principles.

For example, Free State's Mike Horney has written, "When analyzing the cost-effectiveness of a regulation, the first questions that should be asked are: Does the regulation address a market failure or systemic problem? If it does, how does it correct the perceived market failure? And do the benefits of the regulatory solution outweigh the costs of imposing new regulatory requirements?"

Mike's questions came in the context of discussing the Commission's *Title II Order*, but they should apply much more broadly. Indeed, proof of market failure should guide the next Commission's consideration of new regulations. And the FCC should only adopt a regulation if it determines that its benefits outweigh its costs.

The *Title II Order*, of course, failed to respect these principles. There was no evidence of systemic failure in the Internet marketplace. As I said at the time, “One could read the entire document . . . without finding anything more than hypothesized harms.” Or, in other words, public-utility regulation was a solution that wouldn’t work for a problem that didn’t exist. And the *Title II Order* itself failed to include even a basic cost-benefit analysis.

But you don’t have to take my word for it. In a recent Free State Foundation publication, Tim Brennan, the FCC’s Chief Economist at the time the *Title II Order* was being developed, said that “a fair amount of the economics [in the Order] was wrong, unsupported, or irrelevant.”

On the day that the *Title II Order* was adopted, I said that “I don’t know whether this plan will be vacated by a court, reversed by Congress, or overturned by a future Commission. But I do believe that its days are numbered.” Today, I am more confident than ever that this prediction will come true. And I’m hopeful that beginning next year, our general regulatory approach will be a more sober one that is guided by evidence, sound economic analysis, and a good dose of humility.

I’m also optimistic that the FCC will once again respect the limits that Congress has placed on our authority. We can’t simply enact whatever we think is good public policy. We also have to make sure that we have the power to do so. But the Commission hasn’t done a very good job of that recently.

In one rulemaking proceeding, for example, the D.C. Circuit has stayed the Commission not one, not two, not three, but four times in the last three-and-a-half years! I have never before heard of this happening to any agency. Every time, Commissioner O’Rielly and I warned our colleagues that the FCC was exceeding its legal authority. But every time, the Commission barreled ahead anyway on a party-line vote.

Another example is the FCC’s order attempting to preempt municipal broadband laws in North Carolina and Tennessee. In 2014, the Free State Foundation explained to the Commission why the FCC lacked the authority to preempt state regulation of municipal broadband projects. The legal analysis conducted by Randy and Seth Cooper was clear and persuasive. But the FCC’s leadership was more interested in making a political statement than respecting the rule of law. So it went ahead and tried to preempt those state laws on a party-line vote. Predictably, the Sixth Circuit rejected the Commission’s decision as unlawful.

Going forward, I hope that the Commission will do a much better job of respecting the rule of law. If we have a good idea that we don’t have the power to put into practice, then we should ask Congress to give us that power. The FCC is a creature of Congress, and it strains our legitimacy when we exceed the limits it’s placed on us. It’s also a waste of time and effort. For when a court invalidates a Commission order, as it did in the municipal broadband case, we end up accomplishing nothing.

In the months to come, we also need to remove outdated and unnecessary regulations. As anyone who has attempted to take a quick spin through Part 47 of the Code of Federal Regulations could tell you, the regulatory underbrush at the FCC is thick. We need to fire up the weed whacker and remove those rules that are holding back investment, innovation, and job creation. Free State and others have already identified many that should go. And one way the FCC can do this is through the biennial review, which we kicked off in early November. Under section 11, Congress specifically directed the FCC to repeal unnecessary regulations. We should follow that command.

Another area where the Free State Foundation has led the way has been FCC process reform. Here too, we’ll be able to make progress in the coming year. This afternoon, I want to focus briefly on one theme that links the many reform proposals advocated by Free State and others.

It is time to bring more openness and transparency to the FCC. Each Commissioner is nominated by the President and confirmed by the U.S. Senate, and each brings his or her unique talents and perspective to the job. Therefore, each Commissioner should be treated with respect and given a chance

to contribute to the FCC's work. And that means none should be kept in the dark about what is happening at the agency.

We also need to let the American people have more information about our agency's operations. From publicly releasing the text of documents we vote on at public meetings to establishing an FCC Dashboard with key performance metrics, we can better enable the public to know what and how we are doing.

This is important because right now, the FCC provides information selectively to favored insiders. To give one example, if you are in the good graces of the FCC's leadership, you can receive detailed information about the set-top box proposal. But if you aren't, you're left in the dark. To quote Victor Cerda of independent Spanish-language network Vme, "it's like negotiating with a mime." This isn't fair. It isn't how the regulatory process should work. It tilts the playing field in favor of well-connected lobbyists and against the American public. And it must change.

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Before concluding, I'd like to thank all of the staff and academic advisors who have contributed to giving the Free State Foundation such a powerful voice over the last ten years. It has been a pleasure to read their work and get to know so many of them during my time at the Commission. While there isn't time for me to mention each one of them here, I'd be remiss if I didn't specifically thank three of Free State's most prolific authors: Seth Cooper, Gus Hurwitz, and Daniel Lyons.

And, of course, I must offer a special thanks to Randy May. Randy is the father of this organization and has poured his heart and soul into it since its inception. And he's remained dedicated to the task through some difficult personal circumstances. His perseverance in the face of hardship should serve as an example to us all, inspiring us to face the road ahead with passion, determination, and good cheer. I have no doubt that Randy will continue to do so, and on the occasion of Free State's tenth anniversary, I look forward to seeing what the organization will achieve in its next decade.