REMARKS OF COMMISSIONER AJIT PAI
BEFORE THE FEDERAL COMMUNICATIONS BAR ASSOCIATION

One of the great things about serving at the FCC, first as a staffer and now as a Commissioner, has been the opportunity to work with the communications bar. In addition to representing clients zealously and effectively, FCBA members give back through scholarship, mentoring, and professional education programs. Your efforts benefit not just our relatively small group of communications attorneys, but also the community at large. Thank you for your service.

I thought I might spend a few minutes this afternoon talking about FCC process reform. Because those in this room spend a fair amount of time practicing in front of the Commission, I hope at least a few of you might not fall asleep during a speech about the agency's procedures. To be candid, I can't promise in advance that you won't nod off, but I'll give it a shot nonetheless.

Since taking office last May, I've talked about the need for the FCC to be as nimble as the industry we oversee. As the pace of technological change accelerates, so too must the pace at the Commission. We can't let regulatory inertia stand in the way of technological progress or deter innovation.

My interest in this issue doesn't come just from the complaints I've heard from Congress, the communications industry, and public interest groups. It's also a direct result of my own years of experience in the General Counsel's office. I remember the frustration of working on an issue and then watching it languish in the agency, not going anywhere. And I recall how aggravating it was to see item after item go on circulation and just stall. At one point, in fact, the number of items on circulation at the FCC was more than one hundred! My concern about good government aside, this means a lot to me from an institutional perspective. How many staffers poured how many hours into those items, only to see them sit for months or even years before they were adopted?

So when I say that the FCC needs to act more quickly, I want to be crystal clear that I am not criticizing our staff. As those of you in this room know, they are exceptionally talented. They work incredibly hard. And in recent years, they have also been asked to do more even as their ranks have diminished. To the contrary: I say this because I know firsthand that they want and deserve for their work to see the light of day. They can become as frustrated as anybody else when proceedings drag on for years.

And proceedings *have* dragged on for years. Last July during a Congressional oversight hearing, two Representatives—one Republican and one Democrat—asked us about two separate petitions, each of which had been pending at the Commission for over eight years. Shortly after that hearing, an item addressing one of those petitions was placed on circulation and approved by the Commission. But it shouldn't take an inquiry from Congress to get us moving on a petition that has been pending since the 20th century. And it shouldn't take us almost twelve years to issue what turned out to be an eleven-paragraph order—ironically, an order chastising a private party for missing a deadline!

The same is true of the FCC's handling of the Martha Wright petition. Nine years ago, Ms. Wright complained to the Commission about the high long-distance rates she paid to speak with her then-incarcerated grandson. I was pleased to support action on her petition this past December. But to spur the FCC to act, it took the appeals of hundreds of inmates and their families, Members of Congress, the National Association of Regulatory Utility Commissioners, numerous civil rights organizations, the FCC's own Consumer Advisory Committee, and my colleague, Commissioner Mignon Clyburn. We can, we should, and we must do better.

These stories drive home the point that FCC responsiveness isn't a Republican or Democratic issue. It's not a conservative, moderate, or liberal issue. Whether the matter before us involves a Fortune 500 company, a small start-up, a public interest group, or an individual consumer, the Commission should

strive to respond promptly. Parties might not like the answer that we give them. But they deserve an answer. As one person said to me recently, "Tell me yes, tell me no, but just tell me."

None of this is to minimize the Commission's recent strides. Commissioners are voting on items more quickly after they are placed on circulation. The time between the adoption and the release of items has decreased. And we have reduced the FCC's backlog. Chairman Genachowski and the rest of my colleagues deserve credit for these accomplishments. But we still have room for improvement.

Let's talk about some things the FCC can do to speed up its work. Just to be clear, I don't pretend that all of these ideas are my own or that they are the only answers. In fact, that's precisely why I wanted to share them with you, the FCBA. I want *your* feedback and *your* ideas.

First, the Commission should streamline our internal processes where possible. To give one example, we should adopt a procedure for handling applications for review akin to the U.S. Supreme Court's *cert*. process. Under this proposal, if none of the Commissioners requests full consideration of an application for review within a certain period of time—say, 90 days—then the Bureau's decision would be automatically affirmed and the Commission would adopt the Bureau's reasoning as its own. This process would let the FCC dispose of pleadings that lack merit more efficiently. It also would allow an aggrieved party to seek redress in court rather than being held in purgatory for years on the eighth floor. I'd like to thank my friend Andy Schwartzman for not only sharing this idea but also allowing me to shamelessly steal it.

Here's another idea, one that builds on a practice that has already gotten results. In 2002, the FCC adopted a streamlined process to speed up our review of certain small transactions. That process has allowed us to approve hundreds of such transactions within about a month on average, an impressive achievement. We should consider expanding the categories of small transactions that qualify for streamlined treatment. For example, we should consider streamlined review for geographically adjacent rural carriers seeking to merge with one another. Such transactions allow them to consolidate operations and cut costs so that they can survive in today's economy. Reforms like this would focus our resources where they are really needed, enabling us to do more with less.

Second, we need to start taking statutory deadlines more seriously. For example, one deadline honored principally in the breach is the one-year deadline for the FCC to rule on forbearance petitions. Section 10 of the Communications Act established this deadline. It also authorized the Commission to extend that deadline "by an additional ninety days if the Commission finds that an extension is necessary to meet the requirements" of the statute. So what happens now? The Wireline Competition Bureau, on delegated authority, extends the one-year deadline about as often as Taylor Swift switches boyfriends. What Congress intended as an exception to the general rule has become our normal practice. We have not treated the one-year deadline as the end of the process, the checkered flag at the end of the race. Instead, we've acted like the deadline is the Indy 500 official who says: "Ladies and gentlemen, start your engines."

This needs to change. Typically, there isn't a good reason for the Commission to extend the statute's one-year deadline for ruling on forbearance petitions. It just isn't "necessary" in any meaningful sense of the word, and certainly not in the sense Congress intended it.

It's worth noting that we've reformed the forbearance process before. Former Chairman Michael Copps led the Commission in adopting rules to ensure that a draft order is circulated four weeks before the statutory deadline kicks in. But that circulation should always come before the one-year deadline, not the extended deadline. And 90-day extensions should require a vote of the full Commission. Commissioners should have to ask themselves on a case-by-case basis whether they really need more time before resolving a petition. In the vast majority of cases, I believe that the right answer to this question will be no.

This proactive approach can and should be applied to other deadlines Congress has set for us. It would enable us to live up to the demand that we "annually" report to Congress on the state of video competition. It would lead us to regularly make adjustments to our media ownership rules—to put the "quad" back in "quadrennial review," if you will. And it would give the American people more confidence that the law means what it says when it directs the FCC to do something within a certain time.

Third, in addition to statutory deadlines, we need to establish internal deadlines where we don't yet have them. Let's codify in our rules the 180-day shot-clock for transactional review. Let's institute a nine-month deadline for acting on petitions for reconsideration and applications for review. And let's set a six-month deadline for ruling on waiver requests. We are far more likely to act in a timely manner when we face a deadline than when we don't. As Nolan Bushnell once said, deadlines are "the ultimate inspiration." You can't tell me the founder of Atari *and* Chuck E. Cheese is wrong.

Now, the FCC doesn't always meet the deadlines we impose upon ourselves. For instance, the 90-day timeframe for reviewing actions of the Universal Service Administrative Company is rarely met because it doesn't give the Wireline Competition Bureau enough time to review the record. But if the deadlines we set for ourselves are unrealistic, we need to adjust them, not get rid of them or ignore them. So we may also have to tweak our existing deadlines.

And once we have all these deadlines, we should make it easier for the public to know how long we take to do our work and, if necessary, to hold our feet to the fire. When Michigan Governor Rick Snyder took office in 2011, he created a webpage known as the Michigan Dashboard. It measures the State of Michigan's performance on twenty-one key metrics and indicates whether each has become better or worse over the course of the past year. As a result, anyone can go to that dashboard right now and see that performance has improved in fifteen categories, declined in two, and stayed the same in four.

We at the FCC should do something similar. Let's create an FCC Dashboard on our website that collects in one place our key performance metrics. Let's keep track of how many petitions for reconsideration, applications for review, waiver requests, license renewal applications, and consumer complaints are pending at the Commission at any given time. And let's compare the current statistics in all these categories against those from a year ago, from five years ago, so everyone can see if we are headed in the right direction. If we make it easier for others to hold us accountable for our performance, I'm confident that we would act with more dispatch. I know that *I* for one would check the FCC Dashboard regularly to see how we were doing, and I bet my colleagues would as well.

* * *

As you can probably tell, I think there's a lot we can do at the FCC to help us act more efficiently and promptly. But in some areas, we could use help from Congress.

One area where Congress could be of assistance concerns our reporting obligations. Right now, we are required to submit to Congress seven annual reports and a triennial report covering different sectors of the communications marketplace. Compiling these reports consumes a lot of our staff's time, and to be frank, many of these reports never get read. Add to that the spotty record of meeting deadlines, as I discussed earlier, and you have what the British might call a dog's breakfast.

Last year, the House of Representatives passed legislation, the FCC Consolidated Reporting Act, with bipartisan support. This bill would consolidate these reporting mandates into a single document that the FCC would be required to issue every two years. This new report would require the Commission to make a holistic assessment of the state of competition in the communications industry.

This approach makes sense. It reflects the convergence that has taken place in the market. It also balances the need of policymakers to receive information required to make data-driven decisions with the need to minimize the burdens that reporting obligations place on the FCC. I commend Representative Scalise for his leadership on this issue and hope that his legislation soon will be enacted into law.

Congress could also help us break some of our bad habits. Occasionally, the FCC has adopted rules based on stale Notices of Proposed Rulemaking. Last year, we suspended our pricing flexibility rules in the special access docket based on a 2005 NPRM. And right now, we are considering in the media ownership proceeding whether to effectively prohibit joint sales agreements among television stations based on a 2004 NPRM.

This is not how notice-and-comment rulemaking should work. Especially in a dynamic industry like this one, the record becomes outdated pretty quickly. Could you imagine a high-tech firm moving ahead with a business plan based on feedback it had received almost a decade ago? Or course not. Neither should we.

The FCC Process Reform Act, which passed the House last year, included a proposal to fix this. It set the shelf life of an NPRM at three years. If the Commission hasn't acted within that time, the NPRM would turn into a pumpkin, and we would be required to issue a new one before adopting rules on a particular subject. With this staleness provision, we would have an incentive to resolve NPRMs in a reasonable period of time and to do so based on fresh information.

Additionally, we could use legislative help in updating the Government in the Sunshine Act ("Sunshine Act"). The Sunshine Act has a worthy goal: to expose the workings of the federal government to the light of day. Who can be against sunshine? That's like opposing motherhood, apple pie, or the Kansas City Chiefs.

Well, with some trepidation, I'll raise my hand. If the purpose of the Sunshine Act was to bring our deliberations out into the open, it hasn't worked. This is obvious to anyone who has ever watched an FCC open meeting. Now, don't get me wrong. I enjoy our monthly open meetings. Among other things, it's a good chance to see my colleagues and thank the staff for their hard work. Lately, we've also heard some informative presentations, such as last month's briefing on telemedicine and mobile health.

But if anyone ever came to an open meeting expecting to see FCC Commissioners actually deliberate, he or she would be sorely disappointed. The outcome is always preordained. And aside from some ad-libbed one-liners, the statements are mostly scripted. The real deliberations take place beforehand.

Due to the Sunshine Act, those deliberations can't take the form of a simple conversation or meeting involving more than two Commissioners. Instead, our staffers meet to negotiate or they exchange proposals over e-mail. Or the Commissioners hold a string of one-on-one meetings or phone conversations that come to resemble the childhood game of Telephone. This is what the Sunshine Act has wrought, and it leaves you wondering what purpose the statute is serving.

In fact, the Sunshine Act may impede effective, efficient, and collaborative decision-making. Consider our pending media ownership proceeding. Recently, I've wondered what would happen if my four colleagues and I could all get together in a room and try to hammer out a deal. (Yes, I know that may sound like a quaint notion to some.) Maybe we'd make some progress; maybe we wouldn't. But it couldn't be any worse than the current process, which is so opaque that it is difficult for even Commissioners to see what is going on.

Fortunately, Representatives Eshoo, Shimkus, and Doyle, along with Senators Klobuchar and Heller, have introduced bipartisan legislation to reform the Sunshine Act and let a bipartisan majority of Commissioners meet and discuss issues face-to-face. These are the same common-sense reforms that the House passed last year. I stand ready to aid these and other congressional efforts to improve the Commission's processes.

Finally, I would support Congress taking a look at another part of our process: application fees. To be clear, these aren't the fees that fund our operations—those are Section 9 regulatory fees. Instead, I am referring to the Section 8 fees we charge various parties for certain filings. These fees have been

hard-wired into the statute for almost two decades, and the Commission can't adjust them except for inflation. So even as the industry has evolved, the types of fees we charge remain the same, often resulting in unequal treatment of old and new types of services. And if we err—as we did last year when we placed our universal service waiver provisions in the wrong part of our rules—we have no discretion to refund the fees once we collect them. As my colleague, Commissioner Robert McDowell, has told the FCBA before: This makes no sense. I hope we can change it soon.

* * *

I've gone on long enough sharing my views on how we can improve decision-making at the FCC. Given the wealth of experience in this room, I'm sure that you have many proposals as well, and I'd love to hear them. Since taking office, I've been struck by how many good ideas I've received during meetings, over e-mail, and even via Twitter. I hope that they will keep coming. And I'll try to lend my support to as many of them as I can. After all, I'll need content for my remarks at future FCBA events, if I'm ever invited back after today's performance.

Thank you once again for the opportunity to speak with you this afternoon. I look forward to working with the members of the FCBA in the months and years to come.