

**REMARKS OF COMMISSIONER AJIT PAI
AT THE PLI/FCBA 33RD ANNUAL INSTITUTE ON
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Thank you for inviting me to take part in this year's Institute on Telecommunications Policy & Regulation. During this two-day program, you will hear a distinguished lineup of speakers from the public and private sectors address some of the hottest issues in communications law and policy. That having been said, I'm an attorney myself, so I know the main reason why many of you are probably here: CLE.

Let me announce at the outset that yes, you can receive CLE credit for attending this speech so long as you pay sufficient attention to what I have to say. But be warned: The PLI and FCBA have graciously delegated to me the sole power to certify whether audience members closely listened to my remarks. So if you want CLE credit, please remember to pay attention rather than surf on your smartphone.

But on a more serious note, I wanted to discuss this afternoon a topic of substantial importance to members of the FCBA and others who practice communications law. It's also one that's received attention of late in the press and on Capitol Hill. And that topic is the FCC's enforcement process.

Last month, I told the Subcommittee on Communications and Technology of the House Energy and Commerce Committee that the FCC's enforcement process had gone off the rails. It gave me no pleasure to say this. During my time working in the Office of General Counsel and as a Commissioner, I've had a positive and productive relationship with the Enforcement Bureau. The Bureau is filled with talented and dedicated staff. And its mission is critically important.

But given all that has happened over the last couple of years, the inescapable conclusion is that things have gone seriously awry. And this isn't my view alone. My office has heard expressions of concern from widely respected members of the bar, Capitol Hill, staff in other Bureaus and Offices at the Commission, and even numerous people within the Enforcement Bureau itself.

To cure the problem, we have to accurately diagnose what exactly has gone wrong. From my perspective, there are three main issues.

First, instead of applying the law to the facts, the Commission's enforcement process has shifted to issuing headline-grabbing fines regardless of the law.

My approach to the enforcement process is pretty simple. We establish rules in advance; we analyze all facts relevant to an allegation; we determine liability; we fix a penalty. When we follow that approach, the Commission will generally be able to reach consensus. To be sure, Commissioners of different political parties will sometimes have different views on what our rules should be. But once we decide what the rules are, we should be driven by facts, not divided by factions, when determining whether someone has violated those rules.

Traditionally, that's been how things have worked. Just look at recent history. 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 14 months, I have voted against 10 of them.

And consider this: Under the leadership of Acting Chairwoman Clyburn, Chairman Genachowski, Acting Chairman Copps, and Chairman Martin, there was not a single party-line vote on a

Notice of Apparent Liability (NAL) or forfeiture order. Let me put that another way. For nearly a decade, there were no party-line votes *at all* on these matters.

What about before that? Well, I have a challenge for you. When you're back in the office, try to find as many party-line enforcement votes involving monetary penalties as you can. It's not easy. Indeed, all I could find were two items from 2004 and one from way back in 1963.

This history makes it all the more remarkable we've had nine party-line votes at the FCC on NALs and forfeiture orders in the last 14 months. So unless I've missed something, it appears that, in just over a year, we have had many more strictly partisan divisions on enforcement matters than we had in the prior 43 years!

Why? Why is there suddenly so much discord at the Commission on enforcement matters? The answer is simple. Instead of maintaining the sober, "just the facts, ma'am" enforcement approach embodied by *Dragnet's* Joe Friday, our main goal now seems to be keeping up with the Kardashians when it comes to press coverage.

Examples abound. Take the \$100 million fine the FCC proposed against AT&T this summer. The FCC alleged that AT&T didn't disclose that unlimited-data-plan customers could have their data speeds reduced temporarily as part of the company's approach to managing network congestion. But AT&T had posted disclosures on its website. It made disclosures at the point of sale. It publicized its program through the national press. It informed 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 started the 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 didn't matter—all because they got in the way of a \$100 million headline.

Or take last year's proposal to fine a company called TerraCom \$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 problems? 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.

Or consider just last month, when the agency accused M.C. Dean of using an unlicensed Part 15 device to intentionally disrupt the operation of another Part 15 device. The Commission had never interpreted the Communications Act to prohibit this. And our own rules expressly allow it. Now, in my view, the FCC *should* have rules that limit 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. I'll just say this: The litigation mess to come didn't have to be.

Second, the FCC's current enforcement process sets the wrong priorities and is less productive than it used to be. Some have tried to frame any criticism in this area as reflecting opposition to any strong enforcement. Indeed, in response to my criticisms at last month's congressional hearing, it was said that the FCC under Chairman Martin had issued far more NALs and forfeiture orders than it has recently.

Now, it turns out that this is right. For example, in 2007 under Chairman Martin, the seventh year of the Bush Administration, the Commission issued 106 NALs and 89 forfeiture orders. And with one month left in 2015, the seventh year of the Obama Administration, the Commission has issued only 22 NALs and 44 forfeiture orders. But these statistics indict, not acquit, the FCC's current enforcement process.

Let me be clear. Just as the FCC's role model when it comes to enforcement shouldn't be Inspector Javert from *Les Miserables*, neither should it be *The Pink Panther's* Inspector Clouseau or *The Naked Gun's* Frank Drebin. I want effective and firm enforcement. If we don't enforce our rules, they become little more than dead letters on a printed page. So when there is a clear violation of our regulations, we should impose a penalty. I'll admit that many rule violations won't inspire massive amounts of press coverage. And the investigations are far from glamorous. But the work is nonetheless important.

Right now, however, much of that work isn't getting done. With visions of *New York Times* headlines dancing in its head, the FCC currently has little interest in doing bread-and-butter enforcement work. This became clear to me during the Commission's consideration of the Enforcement Bureau's field reorganization plan. The plan that was initially presented to the Commission would have gutted the field. Many people, including from within the Bureau itself, told me that the Commission simply did not think that field agents did important work. Tower inspections didn't generate excitement. Ensuring that broadcast stations operated in a manner consistent with their licenses was passé. Pirate radio was a distraction.

Indeed, a whistleblower within the Enforcement Bureau gave me an October 28, 2014 email from the Bureau's Northeast Regional Director to field agents that included the following instructions: "We are scaling back on our response to pirate operations. Barring interference to a safety service, pirates should NOT be given a high priority (If there's interference to a safety service, it's not a 'pirate case' but instead a 'safety case.')" The email went on to state that "[w]e will NOT be issuing NALs to the majority of pirate operators."

Thanks to bipartisan concerns within the Commission and in Congress, we improved the worst aspects of the field reorganization plan. But I nonetheless fear that current trends will continue. With fewer cops on the beat across the country and more employees in the Enforcement Bureau's front office than has traditionally been the case, my prediction is that we'll continue to see a less effective enforcement process and fewer enforcement actions.

Another area where the Commission has dropped the ball involves telemarketing. So far this year, we have received over 118,000 complaints from consumers about unlawful telemarketing. This is what Americans complain about the most to us, by far. But what have we actually done through our enforcement process to go after those who violate our longstanding do-not-call and other telemarketing rules? When you put aside the tough talk and misguided FCC action designed to expose businesses to class-action lawsuits for engaging in legitimate communication with their customers, the answer is—not much. Indeed, this year, we have issued just one forfeiture order and not a single NAL for violations of our do-not-call regulations.

This is powerful evidence of the FCC's misguided enforcement priorities. Instead of going after companies for conduct that Americans actually complain about and that could actually violate our rules, we're chasing press. Instead of setting the table with meat and potatoes, we're foraging for truffles.

Another example of misguided priorities relates to timing. On occasion, I've been told that the FCC must act by a date certain because a statutory deadline is approaching, only to be told later that there is no such deadline. In some cases, it seems like we are given deadlines simply because the FCC is primarily concerned that another federal authority might beat it to the punch. But I can think of few worse reasons for an agency to take an enforcement action than a desire to preempt another agency.

Third, the Enforcement Bureau is no longer accountable to FCC Commissioners. We have reached the point at which Commissioners themselves can't oversee the enforcement process.

Over the last couple of years, I've received many complaints about the Enforcement Bureau. For example, some allege that the Bureau engages in selective prosecution, targeting disfavored companies while letting favored companies off the hook. Others maintain that the Bureau conducts abusive and

frivolous investigations. In order to understand for myself the Bureau's priorities and processes, I made a simple request of the Bureau on June 24: Could you please provide me a list of your open investigations? My office has followed up on this request 13 separate times. Almost half a year later, I still haven't received any information. This is astonishing. At this point, I'm only hoping, in the spirit of soap actress Susan Lucci's battle to win an Emmy, that the nineteenth time will be the charm.

When I raised this matter at a congressional oversight hearing last month, it was suggested that I wasn't entitled to this information because it pertained to law enforcement activities rather than policymaking. But this doesn't hold water.

For one thing, the Enforcement Bureau sure does seem to be in the policymaking business these days. Additionally, and in any case, under the Communications Act, FCC Commissioners have the same responsibilities with respect to law enforcement that we do for policymaking. Or, to put it another way, the Enforcement Bureau is not an independent agency within an independent agency. And if the suggestion is that information about investigations is too sensitive for FCC Commissioners to know, I'd point out that Commissioners have top-secret security clearances. In short, there's no excuse for agency leadership not to make this information available. And if the problem is actually that the leadership itself can't get this information from the Enforcement Bureau, then the FCC is confronting greater challenges than even I would have imagined!

Things weren't always this way. Under Chairman Genachowski, when I asked about the Enforcement Bureau's pending indecency investigations, Bureau Chief Michele Ellison supplied my office with all of the information that I wanted. And under Acting Chairwoman Clyburn, when I sought an update on the Enforcement Bureau's open Lifeline investigations, Acting Bureau Chief Bob Ratcliffe sat down with my staff and went over all the requested information in detail. It is only recently that the Bureau has started stonewalling.

Commissioners are also kept in the dark about other important enforcement-related activities. Recently, for example, the Chief of the Enforcement Bureau and Acting Chief of the Consumer & Governmental Affairs Bureau signed a Memorandum of Understanding regarding consumer protection with the Chief of the Federal Trade Commission's Bureau of Consumer Protection. Commissioners Clyburn, Rosenworcel, O'Rielly, and I were not aware of this document, let alone shown it, until the day it was released. Yet agency leadership had been working on it for 18 months!

Or consider enforcement proceedings involving the Lifeline program. Between September 2013 and February 2014, the FCC proposed fines against 11 carriers totaling over \$89 million. In each case, the company allegedly received duplicative subsidies for the same customer in the same month. For over a year, I have been pressing, publicly and privately, for the Commission to move forward with these cases and hold up-or-down votes on forfeiture orders. But nothing's happened. And I've never received a satisfactory explanation of what is going on.

Last week, however, I learned from an Enforcement Bureau blog entry that these cases had been referred to the Office of the Inspector General. No one consulted me before this decision was made. No one even bothered to notify me about it. It was only disclosed once the Commission's lack of progress on these cases started generating bad press.

Another area where the Bureau is unaccountable involves consent decrees. Under the FCC's rules, the Enforcement Bureau can only issue NALs or forfeiture orders involving fines of \$100,000 or less for common carriers and \$25,000 or less for all other entities. NALs or forfeiture orders proposing or imposing larger fines must be approved by Commissioners. But there is no similar restriction on monetary penalties or so-called "voluntary payments" associated with consent decrees.

So the Enforcement Bureau can (and does) unilaterally enter into consent decrees with companies. In some cases, hundreds of thousands or even millions of dollars change hands, yet

Commissioners aren't given any chance to weigh in. That's if we even know what's going on; the press generally finds out about these consent decrees before I do.

In my view, this practice is highly problematic. If conduct is serious enough to warrant a large monetary penalty, then it should be Commissioners nominated by the President and confirmed by the Senate who decide whether the amount set forth in a consent decree is appropriate.

Here's why this matters. Take a recent case involving a nationwide wireless carrier. Earlier this year, the Enforcement Bureau circulated a proposal to fine that carrier \$100 million for alleged cramming violations. And I voted for it. But then, before it was adopted, the Enforcement Bureau entered into a consent decree that called for the payment of only \$6 million to the U.S. Treasury. I had no opportunity to vote on this sudden 94% reduction, the negotiations about which were behind doors closed even to me. Bypassing Commissioners on a question of this magnitude is completely unacceptable.

In other instances, I am concerned that consent decrees are being used to avoid judicial and Commission scrutiny of dubious cases. Most companies are risk-averse and will reluctantly sign on the dotted line if the alternative could be virtually limitless liability or if they are repeat players at the Commission. I therefore understand why some companies have entered into consent decrees and agreed to pay penalties in cases that appear to lack merit. But we should all acknowledge that those decisions come at a price. They make it more likely that in future investigations, the law and facts will be stretched even further in a quest for favorable media coverage.

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These three issues—the quest for headlines, the wrong priorities, and the lack of accountability—are the main problems that I see currently plaguing the FCC's enforcement process. What can be done? The good news is that these problems aren't difficult to solve. And we can make a lot of progress without any changes to the FCC's rules or the Communications Act.

Most importantly, we at the FCC need to make a renewed commitment to a bipartisan and responsible enforcement process. To be sure, the enforcement process wasn't perfect prior to the last couple of years. But I know from personal experience that it did meet this basic standard under the leadership of Acting Chairwoman Clyburn, Chairman Genachowski, Acting Chairman Copps, and Chairman Martin. And my voting record in 2012 and 2013 demonstrates that I'm willing to do my part to forge consensus and support a firm and fair enforcement approach.

Congressional oversight can also play an important role in helping to remedy this broken process. I therefore applaud the leaders of the Subcommittee on Communications and Technology of the House Energy and Commerce Committee for recently asking the Government Accountability Office to investigate the management of the Enforcement Bureau. And I hope that the GAO has more luck than I've had in getting information about Bureau operations.

In addition to these suggestions, here are three specific ideas that could get us back on track, a couple of which would involve modifying the Commission's regulations or the Communications Act.

First, let's have the same rule for consent decrees that we have for NALs and forfeiture orders. If a consent decree involves a monetary payment of more than \$100,000 for common carriers or \$25,000 for any other entity, Commissioners should have to approve it. This would improve accountability and lead to more responsible decision-making. And Commissioners have voted on consent decrees in the past, so there's plenty of precedent. Rationalizing our rules in this way would plug a major loophole.

Second, let's speed up the Commission's resolution of enforcement cases by setting a meaningful deadline for final action. Right now, the Commission often issues an NAL and waits for years before deciding whether to follow up with a forfeiture order. We should put an end to this practice. If someone has violated our rules, then we should say so promptly and impose a swift, sure punishment. But if

someone hasn't violated our rules, then what follows should be exoneration, not the indefinite cloud of a possible enforcement action.

Our approach should be simple. A forfeiture order must be issued within one year of an NAL. And if no such forfeiture order is adopted within this timeframe, the NAL is automatically nullified. It shouldn't take the Commission more than a year to fish or cut bait, as we say back in Kansas.

A one-year deadline is eminently reasonable from an administrative standpoint. Responses to NALs are generally due 30 days after they are issued. Therefore, under a one-year deadline, the Commission would have a full 11 months to evaluate a party's response and issue a forfeiture order if it believes one is warranted.

In addition to expediting the enforcement process and making it more efficient, a one-year deadline would improve the quality of NALs. Currently, the Commission issues NALs even when it recognizes internally that they have serious problems. Major holes in the Commission's theory are often left unaddressed. And the Commission that issues an NAL doesn't necessarily have to follow through with a forfeiture order, which would let aggrieved parties challenge the agency in court. That decision can be punted to a future Commission. The outcome: all of the benefits of glowing press coverage, and none of the downsides of actually delivering results.

But if forfeiture orders had to be issued within one year of an NAL, those who are in office today would be far more likely to feel responsible for the decision on whether to issue a forfeiture order. And that, I believe, would encourage more sober and responsible consideration of NALs.

Third, we need to bring more transparency to the enforcement process. Transparency is critical to restoring accountability. That certainly applies internally; it's an elementary truth that if a Commissioner wants information from the Bureau, he or she should be able to get it.

But the enforcement process also needs to be more transparent to those outside the agency. For example, on the FCC's website, the Enforcement Bureau should give the public a simple way to understand and pinpoint the progress of any case involving an NAL. It should list whether the FCC has followed up on that NAL with a forfeiture order, and if so, whether that forfeiture has been collected.

Currently, even as a Commissioner, it is extremely hard to track these cases and find out just how much money is actually being collected after the media headlines fade into the rear-view mirror. Recently, POLITICO published what can only be described as a less than flattering story with the headline "FCC proposes millions in fines, collects \$0." In response, the Enforcement Bureau published a blog entry attempting to rebut the article.

When I read it, I was perplexed. To give just one example, it claims that the Commission has collected \$98 million in fines during 2015 and that this amount accounts for 88.6% of the money owed for issued fines. Doing the math, that would mean that there was only about \$12.6 million in uncollected fines for 2015. But this cannot possibly be true. For example, on October 21, the Commission imposed forfeitures totaling \$30 million dollars on six prepaid calling card providers. As of today, that money has not been collected.

Ironically, the Commission imposed that \$30 million in forfeitures because it claimed that the prepaid calling card providers had violated section 201 of the Communications Act by engaging in misleading and deceptive marketing. I cannot help but observe that it is a good thing for the Enforcement Bureau that it cannot be fined for making misleading statements.

And it is not just what the blog says that I found interesting. The agency is facing bipartisan criticism from Capitol Hill for proposing headline-grabbing fines in NALs and then, when the press coverage fades, failing to move to an order that actually imposes a fine. The blog is curiously silent on this score.

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The bottom line is this: I sincerely hope that we can work together in a bipartisan manner to fix the problems plaguing the FCC's enforcement process. But to do that, we have to recognize that the Enforcement Bureau's purpose is not to pursue media coverage as vigorously as Roxie Hart from the musical *Chicago*. Nor is it to make policy on a whim. Rather, it is to firmly but fairly enforce rules that are already on the books. If we embrace once again the Bureau's proper mission, we will go a long way towards promoting public confidence that the Commission is focused on the facts and laboring within the law.