**DISSENTING STATEMENT OF**
**COMMISSIONER AJIT PAI**

Re: *Improving Outage Reporting for Submarine Cables and Enhanced Submarine Cable Outage Data*, GN Docket No. 15-206, Report and Order.

On July 8, 2015, the undersea cable that served the Commonwealth of the Northern Mariana Islands failed. It was damaged when a typhoon blew past the U.S. territory. The outage left tens of thousands of residents in a communications blackout. It prevented them from accessing the Internet, making credit card purchases, withdrawing money from ATMs, or even placing phone calls, including calls to 911.

Consumers suffered because the cable licensee had no backup plan. It did not have a redundant pathway. It did not automatically re-route the traffic. And it did not even notify the FCC that it suffered a complete loss of communications.

Cable failures like this may be rare, but they are precisely the types of outages that the FCC should target in this proceeding. We should focus on outages that impact consumers. We should incentivize providers to set up and maintain redundant pathways. And we should cut through the regulatory red tape that only makes it harder for providers to deploy, maintain, and repair undersea cables. These measures would help people stay connected and promote our economic and national security interests.

Unfortunately, today the FCC does none of this. It simply stumbles down the same misguided trail it blazed last month when it revised another portion of our outage reporting rules. Once again, the Commission refuses to focus on outages that actually affect consumers. Instead, it mandates that companies file reports when there is no loss in communications. Once again, it declines to request targeted outage information that would help us identify trends and threats. Instead, it demands a haystack of paperwork that will only make it more difficult for us to find any needles. Once again, the Commission decides not to encourage providers to construct facilities with automatic and built-in redundancies. Instead, it penalizes those investments by requiring providers to file multiple reports every time they use a redundant pathway. And once again, the Commission decides to divert resources away from critical repair and restoration efforts and toward needless paperwork.

Meanwhile, there are genuine problems with the undersea cable regime that we can and should solve. Indeed, when we launched this rulemaking, I suggested that the *NPRM* seek input on how we can make it easier to deploy, restore, and maintain undersea cables. Commenters responded in spades, identifying very specific and necessary reforms. They identified the need for coordination among the many agencies that play a role in this space—including the Army Corps of Engineers, the Bureau of Ocean Energy Management, the Coast Guard, the Department of Defense, the Federal Energy Regulatory Commission, the National Marine Fisheries Service, and the National Oceanic and Atmospheric Administration. Commenters explained that the government's left hand often works at cross-purposes with its right: For instance, one agency might authorize a dredging or hydrokinetic project without recognizing that an undersea cable lies right under it. Commenters urged the FCC to operate as a point of contact—a clearinghouse for these efforts—and to enact other simple reforms plainly within our power. Indeed, the Commission's advisory committee on communications security and reliability—CSRIC—outlined these and a host of other steps the FCC should take to improve our undersea cable regime.[1] But

[1] Report of the Submarine Cable Resiliency Working Group of CSRIC V (June 2016), http://go.usa.gov/xqdF5.

having been confronted with actual problems and real solutions, the *Order* simply says . . . we will keep thinking deep thoughts about all this. But this promise is shallow.

Another major problem is the agency's refusal to grapple in a serious way with the costs its regulatory wish list will impose.

What are those costs, which will ultimately be borne by consumers? The section of the *Order* titled "Cost-Benefit Analysis" makes it clear that the agency itself has no idea. Indeed, even in an era when the FCC regularly offers the textual equivalent of an eye-roll[2] to cost-benefit analysis, the discussion here is embarrassingly deficient.

The *Order* asserts that its new regulatory regime will cost the industry $146,000 per year.[3] But as the record and a rudimentary fact check show, the FCC gets both the math and the analysis wrong. The actual costs are going to be orders of magnitude higher.

Bear with me a minute as I explain why. Let's start where the *Order* ends—the $146,000 estimate. It turns out that the FCC pulled this figure from an analysis the agency prepared for a different set of regulations. And there are more than a few problems with that decision.

*First*, the FCC pulled the wrong document. It uses a 2008 cost estimate that expired the better part of a decade ago.[4] Indeed, the FCC replaced it in 2011 and then again in 2014.[5] Needless to say, the correct version features a dollar figure that is higher than the out-of-date one the *Order* uses.

*Second*, the FCC simply misreads that 2008 analysis. For example, it says that the 2008 statement estimated that the industry would submit a total of 40 outage reports a year.[6] But the 2008 document says nothing of the sort. The "40" in its analysis references the burden hours per year per licensee—not the number of reports.[7] And it certainly was not an industry-wide estimate. Indeed, you would need to multiply that figure by the total number of licensees—in other words, up to 161 times—to get a number that could begin to correspond to an industry-wide figure.

*Third*, the 2008 document on which the *Order* relies analyzed a very different and far less burdensome outage regime. Thus, the costs associated with the *Order*'s new regulations are lowballed—in several additional ways. *For one*, the 2008 rules stated that licensees "would not be required to generate new information in order to comply."[8] The exact opposite is true here. Today's *Order* expressly requires providers to generate new information that they would not otherwise produce in the normal course of business. *For another*, the 2008 regime did not require that even a single "formal report be

---

[2] *Cf.* Lucille Bluth, *Arrested Development*, http://gph.is/28Vvaq8 (last visited June 24, 2016).

[3] *See Order* at paras. 81–88.

[4] *See* OMB Control Number 3060-1116, ICR Ref. No. 200810-3060-003, FCC Supporting Statement at 9 (2008) (2008 Supporting Statement), *available at* http://go.usa.gov/xqvD3.

[5] *See* OMB Control Number History, OMB Control Number: 3060-1116, http://go.usa.gov/xqvjR (last visited June 24, 2016) (identifying the FCC's 2011 and 2014 filings).

[6] *Order* at para. 81 ("To derive this annual burden, we estimated that there will be 50 reportable events, a conservative estimate based upon the UCIS Supporting Statement's estimate of 40 annual reportable events."); *see also id*. at para 87.

[7] 2008 Supporting Statement at 9, *available at* http://go.usa.gov/xqvD3.

[8] *Id.* at 1.

produced."[9] Here, the *Order* mandates that providers produce not one, but three separate and formal reports for every single event. *For yet another*, the *Order* adopts a far more expansive definition of "outage" than the FCC used in 2008. This alone will significantly increase the number of reportable events.

The errors simply compound from there. For instance, the *Order* assumes a labor cost of $80 per hour. Now, many commenters told us that this figure is far too low given the personnel who will be responsible for complying with the FCC's new rules. But putting that to the side, one would at least expect the FCC to use its own $80 figure when it turns to crunch the numbers. It doesn't. Without any discussion or justification, the FCC uses a substantially lower, $55 per hour figure.

Likewise, the *Order* determines that there will be a whole host of one-time "implementation costs" associated with this new regulatory regime—that is, the up-front costs providers must bear that are in addition to all of the recurring, annual expenses.[10] But when it comes time to put pen to paper, the *Order* assigns a value of exactly $0 to those actual and recognized costs. It doesn't even make a passing effort to justify this glaring omission.

Similarly, the *Order* recognizes that there may be a whole range of additional costs that it simply does not analyze.[11] It dismisses those by saying that the FCC will consider them when it seeks approval from the Office of Management and Budget for this information collection. But kicking this can down the road makes no sense. If there are additional costs associated with the rules we are adopting today, shouldn't we figure those out before we adopt the rule? Carts shouldn't pull horses.

There are other mistakes—both large and small—but you get the point.

The bottom line is this: The FCC simply does not care about cost-benefit analysis, let alone getting it right. That is how you end up with a section blithely asserting that compliance costs for the entire undersea cable industry and its 161 licensees will be no more than the price of a tiny studio apartment in Arlington, Virginia.

This is not the way it should be. Whether you view it as a requirement of reasoned decision-making under the Administrative Procedure Act, as the courts do,[12] or simply as a matter of good government, as we all should, a federal agency has an obligation to ensure in advance that its decisions will be beneficial on net to the American public. The benefits of a regulation may well outweigh its costs, but with the mailed-in analysis that this agency routinely conducts, we will never know.

For all of these reasons, I dissent.

---

[9] *Id.* at 2.

[10] *Order* at para. 86.

[11] *Order* at para. 88 ("Many of NASCA's concerns are directly related to the Paperwork Reduction Act and OMB approval. As noted below, we seek comment on Paperwork Reduction Act implications separately, however NASCA's comments will inform our burden estimates." (footnotes omitted)).

[12] *See, e.g.*, *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) ("[W]hen an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable."); *see also City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (noting that "we will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses").