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Reforming the FCC's Processes for Digital Age Effectiveness and Efficiency

by

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On January 17, 2013, at [the Minority Media and Telecom Council's annual Broadband and Social Justice Summit](#) in Washington, DC, I had the honor of moderating a [panel](#) with two FCC Commissioners, Mignon L. Clyburn and Ajit Pai. While the panel centered on issues regarding minorities and women in both broadcasting and newer platforms, I wanted to take advantage of another important line of discussion focused on the mechanics of the FCC itself.

The fact that there are more than seventy pending items regarding diversity that have been languishing at the Commission for a number of years is symptomatic of larger bureaucratic constraints left over from the FCC's utility-centric regulatory mind-set. The FCC should reorient its processes to reflect the nimble, competitive, cross-platform convergence characterizing the marketplace today. Whether or not there will be a new "Communications Act" or even updates to the present myriad of titles applying a mish-mash of regulations to our current telecommunications, cable, wireless, and even broadband providers is unknown. However, there are very real and very effective reforms the FCC could undertake on its own behalf, which, in the words of Commissioner Ajit Pai, would "provide a great service to the American people."

With thanks to Commissioner Clyburn for her contributions to the Commission, especially with respect to issues regarding minorities and women, and to Commissioner Pai for further spurring my thinking on various administrative process reform issues discussed during the panel, I have compiled a list of some of the reforms that should be

considered and implemented by the Commission (or, where necessary, by Congress). In my view, they could find bipartisan support from the current Commissioners and would be greeted with widespread enthusiasm.

1. Closed Meeting Act

Former Commissioner Copps always refers to the "Sunshine Act" quite correctly as the "Closed Meeting Act." I love this moniker, as the Sunshine Act indeed ensures that decisions are made behind closed doors. The majority of former Senate Commerce Committee members, as well as the former Chairman and Ranking Member, have publicly supported allowing the FCC to meet and work in a more collaborative manner. While the FCC will need congressional approval to implement this change, surely someone can promote this initiative given that this reform will enable the Commission to function in a more collegial manner, and more efficiently and effectively.

2. Sunset Requirements

Commissioner Pai mentioned an interesting twist to an approach adopted long ago by most states: sunset requirements. Under this scheme, every rule or regulation would have a date when the rule would automatically "expire" unless and until the FCC affirmatively takes action to continue the rule. While the 1996 Act set up a deregulatory goal, which I believe should have been embraced in a more pronounced way by the FCC, implementing sunset provisions would further move the needle in that direction.

3. Consolidated Reports

The law should be changed to allow the Commission to produce a single consolidated marketplace competition report, given the current era of convergence and competition. This action would consolidate and streamline the separate reports on different communications market segments currently prepared by various FCC bureaus. The "Federal Communications Commission Consolidated Reporting Act of 2011" ([H.R. 3310](#)), as its name implies, would require consolidation of various separate annual reports the FCC is now required to produce. This consolidated biennial report would focus, in a comprehensive fashion, on the state of intermodal (cross-technology platform) competition, the deployment of communications to unserved communities, and the elimination of unnecessary regulatory barriers.

4. Trials and Experiments

As stated in [comments](#) submitted by the Free State Foundation in the FCC's IP transition proceeding, the Commission should exercise its forbearance and waiver authority to permit trials and experiments to test the transition to next-generation services. AT&T's [petition](#) requesting that the FCC allow "trial runs" of its new services asserts that trials will "inform the FCC as to the limited and competitively neutral regulation that might be warranted in the IP-only world toward which we're headed." In conjunction with its consideration of AT&T's petition, the FCC should also be open to

considering other similar type trials and experiments involving the agency's forbearance and waiver authority that might more readily spur the elimination of legacy regulatory requirements. This could be a way, if done properly with an eye towards achieving real reform on a prompt basis, for the Commission to collect valuable, real-world data that can inform future deregulatory actions.

5. Specific Timetables for FCC Action

As another way to institutionalize what has long been an "internal clock," Commissioner Pai suggested that dockets be assigned a specific time period within which the relevant FCC bureau would be required to review the item and the full Commission would be required to act. Commissioner Pai recognized this timeframe would need to be workable relative to the complexity, volume, and nature of each docket. Additionally, the Commission could provide criteria or directives to enable the Bureau Chiefs to dispose of many more issues without full FCC review. However, recent FCC chairmen seem to have moved farther and farther away from such delegation of authority. If this proposed measure were undertaken, the Commission would permit parties to appeal to the full Commission, but the appeals process would move at a quicker pace than would full Commission review. Commissioner Pai noted that parties are unable to certify their appeal until the full FCC acts, which could be months or even years. Thus, if a specific time period was assigned to a docket and the relevant bureau failed to take action, the petition would be automatically dismissed and a party could seek judicial review in a more timely manner. Imposing this proposed timetable would provide more certainty to interested parties, which, for a variety of reasons, would be beneficial, both to consumers and regulated entities.

6. Rocket Dockets

Certain categories of issues could be combined into "rocket dockets" in order to enable parties to request expedited treatment. The subject matter appropriate for such "rocket dockets" would have to be based on precise criteria. Additionally, specific staff members might even be assigned to these issue-specific, expedited dockets. In this way, review of the "rocket docket" would resemble an approach similar to that taken by a General Sessions court; a Commissioner at the state level often would serve somewhat as "presiding" or "chief judge" and actually "rides herd" on a particular docket or set of issues. Many of these issues could then be considered through circulation. This reform would require a Chairman who welcomes offers to help move the work of the agency and Commissioners willing to wade through mountains of filings to ensure that the proper issues are given this special expedited assignment.

7. Mediation/Conflict Resolution Process

As a trained and accredited mediator, I have always believed that mediation could be a useful instrument in the FCC's tool chest. While not every item, petition, or issue is ripe, or even appropriate, for mediation, many are. And, interestingly, most cases that employ mediation actually do settle, even after formal negotiations may be over.

However, in any case, as I often told parties when encouraging them toward some type of conflict resolution outside the FCC process, "wouldn't you rather be in control of the outcome than five people who have never run a business like yours?" And, probably the best reason for utilizing mediation is the ability to agree upon a specific time period for the mediation process itself. States as well as courts are finding that by "institutionalizing" mediation – or even requiring mediation prior to agency or judicial consideration – they are reducing the time required to resolve issues and thus reducing costs to the taxpayers as well. Various conflict resolution processes could ensure the parties more efficient, effective, and timely decisionmaking and without the possibility of so-called "voluntary" conditions often attached as a *quid pro quo* by one or more Commissioners in order to obtain a favorable outcome.

8. Biennial Review

Biennial review of statutes every two years, especially in the telecommunications sector, is a meaningful process that can potentially promote innovation and investment by enabling regulations to keep pace with the industry. However, in practice, bureaus submit reports, the Office of General Counsel compiles those reports, and yet no real changes or results occur. In order to ensure truly "productive" biennial reviews that eliminate costly regulations that are no longer necessary, the Commission should undertake a comprehensive look at the compiled reports, bring pressing issues to a vote, and submit rulemaking notices addressing those issues in order to ensure that unnecessary regulations are repealed in a timely manner. Implementing these new procedures will ensure that the Commission identifies rules that will better adapt the current regulatory framework to match current marketplace realities.

There are other measures that might be considered, of course, to improve the Commission's processes. But I'm confident that if some or all of the above suggestions are adopted – and, again, I appreciate and acknowledge Commissioner Pai's suggestions at the MMTC conference – the Federal Communications Commission will be in a position to carry out its responsibilities in a more efficient and effective manner.

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