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**Process Matters – and Inaccurate Characterizations of Process Matter**

by

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Ever since the Federal Communications Commission unanimously approved an order on April 19, 2020, authorizing Ligado Networks to deploy a new next-generation wireless network in currently unused L-Band spectrum, opponents of the agency's action have been on the attack. Whenever the Commission takes any significant action nowadays, it is not unusual for those opposed to seek recourse by asking the agency to reconsider its decision or by seeking judicial review.

In the case of granting Ligado's license applications, the opponents, somewhat more unusually, have mounted a vociferous campaign to get Congress, in one way or another, to overturn the FCC's decision. They are within their rights in doing so, of course.

What is disturbing, however, is the lengths to which opponents have gone to distort important substantive aspects of the Commission's reasoning, detailed at length in the agency's [72-page order](#). They have also distorted the reality of the process employed by the agency in reaching its decision. In a May 21 [Perspectives from FSF Scholars](#), my colleague, Seth Cooper, and I rebutted many of the opponents' contentions. Nevertheless, they continue asserting them.

Here I want to rebut once again a repeated wrongful claim put forth by the opponents – the claim that the FCC's unanimous decision somehow came out of the blue, somehow surprising those,

including the Department of Defense and other government agencies, that now oppose the agency's action.

In one of the latest salvos, a new coalition of interests opposed to the Commission's order declares in a June 23 press release that: "The FCC also failed to conduct an open and comprehensive rulemaking process before issuing the Ligado order, instead circulating a final decision only among FCC commissioners while major stakeholders grappled with the COVID-19 pandemic." This false claim should not continue to be repeated.

In our May 21 [FSF Perspectives](#), Seth Cooper and I detailed the years-long deliberative process, including the submission of much public comment, which was employed by the Commission in reaching its decision. And we pointed out that the Commission shared its draft order with NTIA (acting on behalf of the Department of Defense and other executive branch agencies) in the fall of 2019.

I have always contended that agency process matters because a sound process is integral to reaching reasoned and rational decisions that warrant public respect, even among those who may disagree with the outcome of the decision. The other side of the coin is that inaccurate characterizations regarding agency process matter too, because they have the effect of wrongly and unjustifiably subverting the integrity of agency decisions.

In an effort, once again, to set the record straight, in the hope that Ligado's opponents will cease impugning the integrity of the FCC's decision-making process, I quote at some length from [FCC Chairman Ajit Pai's letter to Representative Don Bacon](#), dated May 26:

"It is indisputable that the Department of Defense was provided with numerous opportunities over nearly a decade to provide the Commission with any relevant evidence it wished to submit.

Like other administrative agencies, the FCC makes its decisions based on the record before it. As such, the Commission maintained an open and transparent process in considering Ligado's proposed terrestrial network. In 2011, the Commission created a Technical Working Group to address concerns raised by federal agencies, including the Department of Defense, about the alleged impacts on GPS of Ligado's proposed network. Over the next two years, the Commission then sought comment four separate times on issues related to Ligado's proposal. After Ligado submitted revised license modification applications in December 2015, the Commission yet again sought comment through an April 2016 Public Notice. When Ligado amended those applications in May 2018, the Commission yet again issued a Public Notice seeking comment in June 2018. In response to each of these notices, federal agencies like the Department of Defense were free to submit to the Commission any information they believed necessary and appropriate.

But that is not all. In October 2019, the Commission sent a draft decision proposing to grant Ligado's application to the National Telecommunications and Information Administration for coordination through the Interdepartment Radio Advisory Committee (which includes the Department of Defense). The Department of Defense and other federal agencies then had a chance to provide feedback on that draft decision. In the typical situation, there is a three-

week period for that feedback to be provided. But in order to give the Department of Defense and other agencies more time to formulate comments on the FCC's draft decision, the Commission agreed to extend that three-week period for an additional month. And after receiving input from federal agencies in December 2019, when the Department of Defense informed the Commission that it had additional information that it wanted to submit into the public record, the FCC paused further work on the application until March so that Department would have yet another opportunity to share its views with the Commission. To put all this another way: The Department of Defense had actual possession of the draft that the FCC was poised to adopt – and thus an opportunity to comment on it – for almost half a year before the FCC finally adopted it.

Moreover, prior to the Commission's decision in this matter, I personally spoke with Secretary of Defense Mark Esper, Under Secretary of Defense for Research and Engineering Michael Griffin, and Deputy Under Secretary of Defense for Research and Engineering Lisa Porter to ensure that the Department had every possible opportunity to make its case to the Commission."

In light of the above, it is difficult, if not impossible, to understand how the opponents can claim that "the FCC failed to conduct an open and comprehensive rulemaking process." For one thing, the FCC technically was not conducting a "rulemaking process," but rather an adjudicative process resulting in an order involving specific license applications. Nevertheless, and be that as it may, the Commission, after public notice, solicited public comment in the proceeding, despite the fact it was an adjudicative process. And more to the point, the Commission had no obligation to share its "final decision" with anyone outside the Commission immediately before the order was released, and there is no precedent for the agency doing so. As Chairman Pai relates without contradiction, NTIA, the Department of Defense, and others had ample opportunity to provide input after the Commission made available to them its draft decision.

What the opponents really mean to suggest is that the FCC should never have issued any "final decision" unless and until the agency received NTIA's, and the Department of Defense's, sign off. But, of course, this would have prevented the FCC from ever concluding a decade-old proceeding. Had the FCC shirked its responsibility to finally act on Ligado's license applications – that would have been a matter of process worth decrying.

It's one thing for those opposed to the FCC's Ligado order to continue to debate the substantive merits of the agency's decision regarding the potential for harmful interference to GPS systems and the measures that the FCC adopted to prevent such interference. It is another thing altogether – and wrong – for opponents to continue hawking misguided process claims.

Inaccurate characterizations of process matter.

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