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'Taking the FCC to Court:
An Adventurous Agency Faces Increasing Judicial Oversight'

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Thank you Glenn, and thanks to the Washington Legal Foundation for inviting me to participate in this timely event. I also want to thank my honorable co-panelists, Commissioner Pai and Commissioner Furtchtgott-Roth, for sharing their perspectives.

I'm pleased to share my perspective as one who has been in the trenches litigating against the FCC for many years, most recently in the net neutrality appeal, and I hope to bring a practical perspective to our discussion, although I'm speaking today on my own behalf and not on behalf of any of my firm's clients.

I'd like to share with you two problematic trends I see at the Commission and also try to put these trends into the larger context.

Jurisdiction

The first trend I see is that the Commission has been aggressively seeking to expand its jurisdiction into new areas.

As you know, this is not a phenomenon limited to just the FCC. It seems that every agency—from the EPA to HHS—is trying to regulate new aspects of the economy.

But I think the FCC has taken expanding its jurisdiction to a new level. Let me give just a few examples and then try to provide a theory as to why the FCC has been so aggressive in pushing the limits of its statutory and constitutional authority.

First, in the original Open Internet Order, in 2010, the FCC interpreted a policy statement in the 1996 Act as conferring authority to regulate the internet, even though the agency had interpreted section 706 for a dozen years as not conferring any authority at all.

Second, in the 2015 Open Internet Order, the FCC subjected ISPs to the most onerous common-carrier regulations in Title II of the Communications Act, even though the internet had flourished for decades under a bipartisan light-touch approach.

Third, the FCC is now proposing to reshape and extend a statute governing telephone privacy into a comprehensive internet privacy and cybersecurity regime, even though there's another agency – the FTC – that has a good track record of handling these issues.

There are probably many reasons why agencies are seeking to expand the limits of their authority. But I think the FCC is unique among federal agencies because it is fighting a battle for relevance in the 21st century. You see, in today's internet economy, unless the FCC expands its regulatory mission, it risks fading away like the old Interstate Commerce Commission.

Let me explain. In the 20th century, the FCC's job was pretty well defined. It was regulating radio. It was regulating telephone service. And it was regulating cable TV.

But now everything has changed because all forms of communications have converged on the internet. You don't have to buy a newspaper anymore. You don't have to go to the movies anymore. You don't even have to subscribe to cable anymore. The internet makes all of this possible, and there's no question these developments are a good thing for society.

But for the FCC these changes are an existential threat. The internet is replacing the traditional modes of communication regulated by the FCC. If everything is moving onto the internet, but the FCC has no authority over the internet, what regulatory role is there for the FCC to play?

That's why I think we are seeing the FCC so aggressively try to expand its role when it comes to the internet. That's where the action will be in the future, and the FCC wants to be the "cop on the beat" so it can stay relevant in the 21st century.

Unfortunately, neither Congress nor the courts have effectively restrained the FCC when it expands its legal authority. Although the D.C. Circuit twice struck down the FCC's attempts to adopt net neutrality rules, the Commission had the political will to persist, and so we ended up with net neutrality grounded in Title II of the Communications Act. As you all know, the D.C. Circuit upheld the FCC's Title II decision this past summer. That case is still pending on rehearing, and my hope is that the end of this story has not yet been written.

But I fear the D.C. Circuit's decision will have an emboldening effect on future FCC actions. Indeed, the Supreme Court's decision in *City of Arlington* requires courts to defer to the FCC when it interprets the scope of its own jurisdiction. To put things in perspective, the

Commission has an 81 percent win rate in the courts of appeals, and the D.C. Circuit applies Chevron deference 89 percent of the time. Those figures are from an upcoming Michigan Law Review article. When you're getting Chevron deference 89 percent of the time, judicial review is not much of a limiting factor. Because the D.C. Circuit so extensively deferred to the FCC in the net neutrality case, you're likely to see the FCC try to expand its authority over the internet into such areas as internet privacy, cybersecurity, data plans, and whatever else the Commission might view as the next domain for regulatory relevance in today's internet economy.

Process

The second trend I see is that process at the FCC seems to have been thrown out the window. If you are an agency and you need to expand your jurisdiction to stay relevant, you don't let a little thing like process stand in the way.

What I mean by process is not just the APA's notice and comment rulemaking procedures. I also mean a commitment to transparency and fairness that give the agency's policies a stamp of legitimacy. Remember, we are talking today about an independent agency that is not politically accountable to anyone. So I think it's imperative for this agency to follow procedures that allow the public to know precisely what it's up to and to provide a meaningful opportunity to comment on what the agency is actually planning to do.

But these days the FCC doesn't seem too concerned about transparency, fairness, or the requirements of the APA. Let me share one example: The FCC is continuing to use "fact sheets" as a substitute for a notice of proposed rulemaking. Don't be fooled by the Chairman's fact sheets. They are not your friend. They are a trap. Let me explain.

Here's how the APA says a rulemaking should work: The FCC starts by issuing a notice of proposed rulemaking that seeks comment on the actual rules the Commission intends to adopt. The Commission reviews the comments, and then adopts final rules. So long as the final rules are a logical outgrowth of the proposed rules, then there is no APA process problem, because everyone had a chance to comment on them.

By contrast, here's what the FCC is now doing in rulemakings: The FCC starts by issuing a notice of proposed rulemaking that looks a lot like a notice of inquiry (for those of you that don't know, an NOI solicits input on possible approaches but doesn't actually propose rules). More often than not the Commission will just ask broad questions in its NPRMs: how should we regulate the internet, or how should we protect internet privacy? Commenters do their best to answer those questions, but they can't possibly offer informed comments because the agency hasn't actually proposed where it intends to go. After reviewing the comments, the Chairman will then issue a 3 page "fact sheet" saying he has proposed new rules to his fellow commissioners.

Let's be clear: The fact sheet is really nothing more than a PR statement for the media. It's not a substitute for an NPRM. It doesn't give regulated businesses enough detail to know what the final rules will be. And even if it did, the Commission doesn't provide enough time to comment on it. The next step in the process is that the other commissioners vote on the Chairman's new rules. Nobody outside the Commission gets to see the rules until after the Commission actually releases the order adopting the final rules.

Now, let me explain why the fact sheets are a trap and not your friend. You might think that the fact sheets are an example of open government; the FCC going above and beyond what the APA requires. Wrong. The FCC is going to take your reaction to the fact sheets and try to use it against you in court.

The natural reaction to a fact sheet proposing new rules is to complain about it; write a letter to Commission complaining about the lack of notice and comment and arguing that the new rules are unlawful, arbitrary and capricious, or whatever. Indeed, litigants are required to exhaust their arguments at the FCC before they go to court, so if you don't complain about what's in the fact sheet, then you might be barred from challenging the final rules in court.

But if you do complain about the fact sheet, the Commission has got you there too. Here's how. If you go to court arguing that the FCC violated the APA by failing to notice the final rules in the NPRM, the FCC will say that any error was harmless because your complaints about the fact sheet show you had actual notice of the final rules.

The D.C. Circuit bought this argument in the net neutrality appeal. You might remember that the NPRM proposed to adopt net neutrality rules under section 706, and the FCC sought comment on Title II as an alternative source of authority. The FCC later issued a fact sheet a few weeks before the commissioners voted making clear that it was now focused on Title II, and there were multiple filings complaining about the reclassification of mobile broadband under Title II. The FCC argued—and the court agreed—that any APA violation was harmless because the petitioners had actual notice of what the Commission was planning to do, since they had complained about it on the record after the Commission released the fact sheet.

Earlier this month, the Chairman issued another fact sheet in its controversial internet privacy proceeding. The fact sheet is a 4 page summary of new rules. It does not indicate how the Commission is resolving more than 500 questions it asked in the NPRM, and it does not contain the text of the final rules. I have no doubt that we will be seeing many surprises in that order when the Commission releases the final rules after the vote. The entire rulemaking is a waste of time if the Commission hides the ball at the outset of the proceeding, and then uses a fact sheet as a substitute for a real NPRM at the close of the proceeding.

Solutions

So, where do we go from here? I certainly don't have all the answers, but let me offer three prescriptions.

First, the people's elected representatives need to have a say in the important questions that the Commission is now deciding by itself. The Commission shouldn't be expanding its mission without input from Congress. Whether the Commission should be regulating the internet—and if so, to what extent—is too important to be answered by an independent agency that is not politically accountable to anyone.

Second, the FCC needs to reform the way it conducts its business. It's often said that sunlight is the best disinfectant, and Commissioners Pai and O'Rielly should be commended for their efforts to press the Commission to be more transparent.

Third, the courts need to hold the Commission's feet to the fire when it exceeds its delegated authority or ignores the APA. If the courts excuse the Commission when it oversteps its bounds, then there's really no incentive for the agency to follow the rules that Congress designed to ensure open government and transparent policymaking. I think it's noteworthy that the FCC's most significant losses this past year came outside the D.C. Circuit in the Sixth Circuit and the Third Circuit where judges may be less inclined to defer to the FCC. I think you'll see more challenges to the FCC brought outside of D.C.

Thank you.