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See *MCI v. FCC*, 515 F.2d 385 (D.C. Cir. 1974).

FOR IMMEDIATE RELEASE
February 10, 2015

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PRESS STATEMENT OF FCC COMMISSIONER AJIT PAI ON PRESIDENT OBAMA'S PLAN TO REGULATE THE INTERNET

The American people are being misled about President Obama's plan to regulate the Internet. Last week's carefully stage-managed rollout was designed to downplay the plan's massive intrusion into the Internet economy and to shield many critical details from the public. Indeed, Chairman Wheeler has made it clear that he will not release the document to the public even though federal law authorizes him to do so.

I believe the public has a right to know what its government is doing, particularly when it comes to something as important as Internet regulation. I have studied the 332-page plan in detail, and it is worse than I had imagined. So today, I want to correct the record and explain key aspects of what President Obama's plan will actually do.

First, the claim that President Obama's plan to regulate the Internet does not include rate regulation is flat-out false. The plan clearly states that the FCC can regulate the rates that Internet service providers charge for broadband Internet access, for interconnection, for transit—in short, for the core aspects of Internet services. To be sure, the plan says that the FCC will not engage in what it calls *ex ante* rate regulation. But this only means that the FCC won't set rates ahead of time. The plan repeatedly states that the FCC will apply sections 201 and 202 of the Communications Act, including their rate regulation provisions, to determine whether the prices charged by broadband providers are "unjust or unreasonable." The plan also repeatedly invites complaints about section 201 and 202 violations from end-users and edge providers alike. Thus, for the first time, the FCC would claim the power to declare broadband Internet rates and charges unreasonable after the fact. Indeed, the only limit on the FCC's discretion to regulate rates is its own determination of whether rates are "just and reasonable," which isn't much of a restriction at all.

Lest anyone take comfort in the notion that the FCC will allow the market to set prices through competition, the plan goes out of its way to reiterate its view that competition is limited. And it uses the FCC's new 25 Mbps yardstick for broadband to claim that competition doesn't exist for a majority of Americans. To think that rate regulation and other utility-style regulation will not happen in the face of such findings is naïve.

Second, President Obama's plan targets pro-competitive broadband service offerings, both actual and potential, that benefit consumers. The plan expressly states that usage-based pricing, data allowances—really, *any* offers other than an unlimited, all-you-can-eat data plan—are now subject to regulation. Indeed, the plan finds that these practices will be subject to case-by-case review under the plan's new "Internet conduct" standard. That standard evaluates at least seven vaguely defined factors in determining whether a practice is allowed. The plan makes clear that these practices are now on the chopping block, with those of mobile operators under special scrutiny. This means that consumers who use less data may end up subsidizing consumers who use more data. Moreover, the President's plan goes

out of its way to say that sponsored-data plans and zero-rating programs, like T-Mobile's Music Freedom offering, may violate the new standard for Internet conduct. Preventing companies from differentiating themselves from the competition by giving consumers a wide variety of options will mean less choice and less free data for consumers. If you like your current service plan, you should be able to keep your current service plan. The FCC shouldn't take it away from you.

Third, President Obama's plan gives the FCC broad and unprecedented discretion to micromanage the Internet. The plan gives a Washington bureaucracy a blank check to decide how Internet service providers deploy and manage their networks, from the last mile all the way through the Internet backbone. Take interconnection as just one example. The plan states that the FCC can determine when a broadband provider must establish physical interconnection points, where they must locate those points, how much they can charge for the provision of that infrastructure, and how they will route traffic over those connections. That is anything but light touch regulation. And the plan extends the FCC's interventionist gaze well beyond this part of the network. Small wonder that some pro-regulation activists are already deeming the FCC the "Department of the Internet."

Fourth, the President's plan is a gift to trial lawyers. The plan allows class-action lawsuits—with attorneys' fees—should any trial lawyer want to challenge an Internet service provider's network management practices or rates. Indeed, the plan expressly declines to forbear from sections 206 and 207 of the Act, which authorize such private rights of action. And it adopts a theory of broadband subscriber access services—that is, services that broadband providers supply to edge providers—that would allow anyone online to file a complaint or go to court. The end result will be more litigation and less innovation.

Fifth, the President's plan makes clear that more utility-style regulation is coming. In discussing additional rate regulation, tariffs, last-mile unbundling, burdensome administrative filing requirements, accounting standards, and entry and exit regulation, the plan repeatedly states that it is only forbearing at this time. The plan is quite clear about the limited duration of its forbearance determinations, stating that the FCC will revisit the forbearance determinations in the future and proceed in an incremental manner with respect to additional regulation. In other words, over time, expect regulation to ratchet up and forbearance to fade.

Sixth, President Obama's plan to regulate the Internet explicitly opens the door to billions of dollars in new taxes on broadband. The plan repeatedly states that it is only deferring a decision on new broadband taxes (such as Universal Service Fund fees and Telecommunications Relay Service fees, among others)—not prohibiting them. And it takes pains to make clear that nothing in the draft is intended to foreclose future state or federal tax increases. Indeed, the plan engages in the same two-step we saw last year with respect to the E-Rate program: Lay the groundwork to increase taxes in the first order, and then raise them in the second. One independent estimate puts the price tag of these and other fees at \$11 billion.

In the end, when you compare what the American public is being told about President Obama's plan to regulate the Internet with the actual text of that plan, these and other discrepancies become apparent. That makes it all the more important for the FCC to let the American public see the plan before the FCC makes it the law. We should be able to have an open, transparent debate about the President's plan.