

THOROUGHLY MODERN

PAI

BY M. ANNE SWANSON

FROM THE FIRST MONTH of his tenure as Federal Communications Commission chairman, Ajit Pai made it clear that he intends to pursue a deregulatory path for media companies. If this chairman has his way, it is highly likely that his term at the agency's helm will bring more media reform than the industry has seen for the last couple of decades.

Under his leadership, the commission has launched a comprehensive and broad-ranging proceeding to explore what it thinks of as a "modernization" of media regulations. At the same time, it has initiated a mix of specific deregulatory proposals and taken final action to approve some already pending rule liberalizations.

All these actions are consistent with the new chairman's tripartite commitment at the annual National Association of Broadcasters convention in April: a) to modernize FCC media rules; b) cut unnecessary red tape, and c) give broadcasters more flexibility to serve their audiences.

MONUMENTAL MAY

The most sweeping reforms will likely result from the "Modernization of Media" proceeding, which the chairman launched in May. A public notice kicked off the inquiry and sought stakeholder comments, which were due in August. It stated that the docket would address not just television and radio broadcasting, but also cable and satellite television operations. Its objective is to eliminate or modify regulations that are outdated, unnecessary or unduly burdensome.

In the 70 comments filed initially in the docket, stakeholders suggested hundreds of regulations worthy of liberalization or repeal – ranging from minor reporting and

FCC Chairman Ajit Pai has been on a rampage, changing regulations more dramatically than has been seen in decades. And he isn't done yet.

record-keeping issues to content-based requirements to licensing and technical matters. Several parties also used the opportunity to suggest structural, ownership-based reforms.

In his separate statement accompanying the public notice, Pai committed to using the broad-ranging proceeding to "clear a path for more competition, innovation and investment in the media sector."

INSPECTION REDIRECTION

Pai's rule-specific deregulatory initiatives for media reform began right out of the box with the first monthly commission meeting that he chaired on Jan. 31, 2017. In a Report and Order adopted on a 3-0 vote, the commission eliminated two

public inspection file requirements: a) the requirement that commercial broadcast stations retain in their public inspection files copies of all letters and e-mails from the public; and b) the requirement that cable operators maintain for public inspection the designation and location of the cable system's primary head-end.

Because of the potential privacy concerns associated with putting public correspondence online and because of the possible security issues related to the online posting of head-end information, companies previously had been allowed to keep these materials in locally retained paper records. Eliminating these requirements now enables stations and cable operators to make their entire public inspection file

available online.

At the beginning of February, Pai announced a number of internal FCC process reforms (see sidebar, page 16). They were first utilized for the FCC's Feb. 23, 2017 monthly meeting. Under the new procedures, the commission will now release advance texts of its decisions three weeks before monthly agenda meetings.

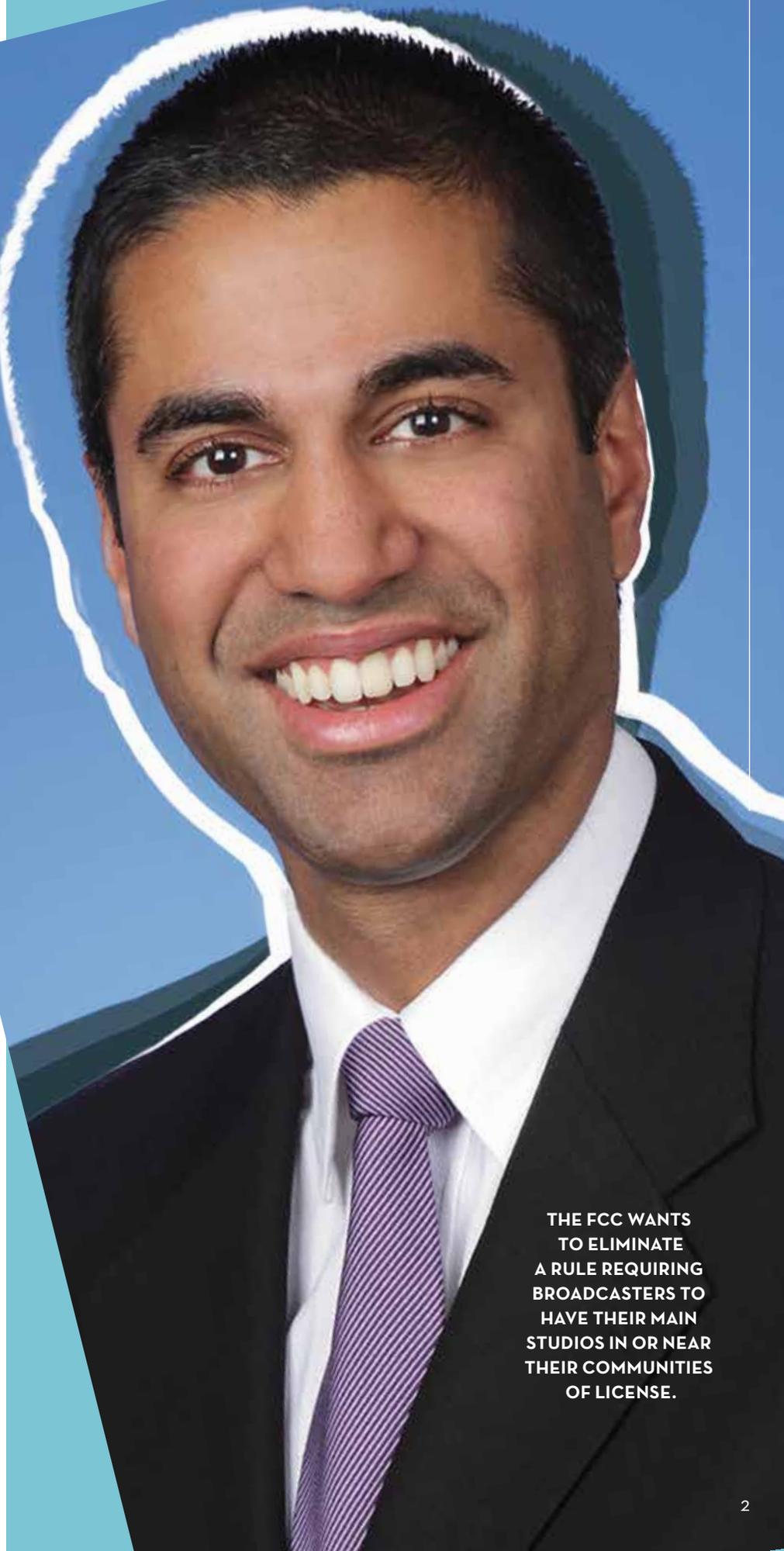
At its February meeting, the FCC took action benefitting AM broadcasters, continuing chairman Pai's interest in "AM revitalization," by voting to expand the area in which FM translators can be used to rebroadcast AM signals.

Under the old rule, an AM station could only place an FM translator rebroadcasting the AM signal within the AM's daytime service contour or within a 25-mile radius of its transmitter, whichever distance was less. Under the new standard, the broadcasters can now choose to put the FM translators anywhere within the AM station's daytime service contour or anywhere within a 25-mile radius of the transmitter, whichever is greater.

SHARING CHANNELS

At its March monthly agenda meeting, the FCC continued its deregulatory push for media, broadening the situations in which broadcast television stations may channel share outside the incentive-auction context.

The action permits primary stations to enter into new sharing agreements, either with the same sharing partner proposed in the auction or a new one, once their auction-related agreements terminate or



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otherwise expire. The decision also allows Class A stations that were not partners to auction-related sharing agreements to channel share outside the auction context.

In addition, it permits all secondary stations – low-power stations and television translators – to share channels outside the auction context not only with another secondary station, but with a primary station as well. As Pai noted in his separate statement on the decision, the action will help ensure that secondary stations displaced by the post-auction repack can continue to operate after auction-related changes conclude.

Moreover, Pai said that the increased channel options could potentially reduce construction and operating costs for resource-constrained secondary stations,

including small, minority-owned and niche stations.

At its April monthly meeting, the new chairman focused on noncommercial educational (NCE) stations in two ways. First, the FCC voted to allow NCE stations, except those that receive funding from the Corporation for Public Broadcasting, to devote up to 1% of their annual fundraising airtime for the benefit of other third-party, nonprofit organizations.

This relaxation will make it easier for NCE stations to partner with disaster relief groups, local charities and other nonprofits to raise funds for worthy causes.

Secondly, the commission relaxed ownership reporting burdens for individuals who volunteer as officers or board members of public radio and television stations.

Before Pai became chairman, the FCC had voted to require such volunteers to provide the agency with sensitive personally identifiable information, such as Social Security numbers, in order to meet the stations' ownership reporting requirements.

In the latest action, the FCC voted to undo that requirement before it became effective. While the volunteers will still need to provide diversity-related information such as gender, race and ethnicity, they will no longer need to provide more sensitive information.

RELAXING JOB NOTICES

The day after the April meeting, the FCC released a Declaratory Order making it much easier for broadcasters and MVPDs

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REVISING THE FCC'S 'HOUSE' RULES

IN ADDITION TO shepherding through a number of substantive deregulatory media reforms since becoming FCC chairman, Ajit Pai has instituted changes to the commission's own internal decision-making processes. While the chairman initiated most of these changes, a couple reflect the input from the other commissioners.

Each month, the FCC holds a scheduled monthly meeting, open to the public, at which the commissioners vote on an agenda of rulemaking proposals and orders drafted by the agency's various bureaus and offices. At least three weeks before the meeting, the text of a document upon which the commissioners are to vote at the meeting circulates internally to the commissioners and their staffs. These texts weren't released to the public in the past.

Less than a month after assuming his new position, Pai started a "pilot program" under which the texts would also be publicly available three weeks before each monthly meeting. This change became effective for items voted upon at the commission's February meeting. From all accounts, the pilot program appears to be moving toward permanency.

Within a week of announcing the pre-meeting availability of agenda texts, Pai ordered five additional process reforms. First, in a break with previous Administrations' practices, he pledged that every item to be considered at a monthly meeting would be shared with the other commissioners before any advance discussion of the item's content with the press or the public.

Over the years, commissioners had grumbled that chairmen were sharing ideas publicly before the other commissioners knew the broad outlines of what was under consideration.

The second and third reforms came at the behest of the other sitting commissioners. Based on a suggestion from Commissioner

Mignon Clyburn, Pai pledged to release a one-page fact sheet summarizing draft texts of agenda items at the same time that the FCC puts the full texts online. At the suggestion of Commissioner Michael O'Rielly, Pai announced that, between the time an advance text is released and the meeting when a vote is taken, only commissioners will be able to propose substantive edits. In the past, other commission personnel had been able to suggest changes.

A fourth reform gave new instructions to the commission's Enforcement Bureau. Under the new rules, any consent decree settling a Notice of Apparent Liability or a Forfeiture Order that had previously been issued by the full commission would need to be approved by a vote of the full commission.

In the past, consent decrees were often signed by the Enforcement Bureau chief, at the direction of the chairman's office, and not shared in advance with the other commissioners.

The fifth reform affects the handling of commission decisions after they have received a vote at a monthly meeting. In the past, after approving an item, the commission had routinely voted to grant the staff of the relevant FCC bureau or office "editorial privileges" – that is, the power to make changes to the documents upon which the commissioners had just voted.

Under the new reform, editorial privileges granted to bureaus and offices will extend only to technical and conforming edits to items. Any substantive changes made to items following a meeting may be proposed only by a commissioner, and the chairman noted that they will be made only in cases in which such edits are necessary, pursuant to the Administrative Procedure Act, to respond to new arguments made in another commissioner's dissenting statement.

So far, all the reforms have garnered the new chairman positive reviews both within and outside the agency.



Ajit Pai (center) has worked with two commissioners in the early days of his reign: Mignon Clyburn (left) and Michael O'Rielly (right).

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(multichannel video programming distributors) to meet their EEO (equal employment opportunity) recruiting obligation. The relevant rule requires these businesses to widely disseminate information on job openings in a manner expected to reach members of all community groups in the area where potential employees are likely to be found.

For the last 15 years, the FCC has expected stations to conduct such recruiting through numerous sources – such as newspaper classified advertising, and employment agencies. While online sources could be included in the mix, they could not be used exclusively.

In this latest action, the FCC made clear that disseminating notices solely through online services would be sufficient, saving stations staff hours for every full-time hire.

At its May monthly meeting, the FCC voted on a deregulatory proposal that so far has garnered perhaps the most attention and kudos in broadcasting circles: a

proposed elimination of the main-studio rule. As most broadcasting professionals know, the main studio rule requires every station to maintain a main studio located within or near its community of license.

This rule, which was adopted originally before World War II, enabled the public to provide input directly to broadcasters and personally review stations' public inspection files. With technological changes, station visits by the public have become rare, if not nonexistent. Social media, e-mail and phone calls – not in-person visits – are the main ways listeners communicate with stations, and public inspection files are currently available online or soon will be.

Given these modern realities, the commission has proposed to eliminate the rule and sought public comment on the change. The comment cycle closed over the summer, and the commission will likely issue a decision early next year.

The new chairman has hinted that significant media ownership structural reform will also be on his agenda,

specifically noting that one rule adopted in 1975 – the newspaper/broadcast cross-ownership prohibition – is ripe for reform.

As of press time, the FCC had not yet released the list of items on which it plans to vote at its Sept. 28, 2017 meeting, but many stakeholders expect that agenda will include proposals to change a number of the media ownership rules.

In early August, the Senate confirmed the appointment of two new commissioners – Republican Brendan Carr and Democrat Jessica Rosenworcel. The agency now has its full complement of five commissioners. In the fall, if Chairman Pai is able to lead the commission in approving significant changes to the TV duopoly rule and repealing the newspaper/broadcast cross-ownership rule, he will have accomplished what several of his predecessors could not.

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