

**Statement of Michael O’Rielly, FCC Commissioner
Before the Senate Committee on Commerce, Science, and Transportation
“Oversight of the Federal Communications Commission”
March 2, 2016**

Thank you, Chairman Thune, Ranking Member Nelson, and Members of the Committee for the opportunity to participate in the Committee’s FCC oversight process. Since this time last year, a lot has occurred at the Commission, and more difficult issues are expected in the coming months. While fundamental differences remain on many matters, individual Commissioners still seek to find agreement on particular issues whenever possible.

Future Wireless Spectrum Demands

One instance where there has been general recognition at the Commission for the need to act is on wireless issues. Much of the recent dialogue pertaining to wireless communications has focused on next generation wireless networks, commonly referred to as “5G.” Early visions, architecture designs and equipment demonstrations indicate significant improvements in speed, latency and capacity. I’ve seen this technology firsthand during my travels in the U.S. and internationally, and expect to see more in the coming weeks. While early reports are exciting and promising, it is important to proceed with an open mind and an eye towards flexibility in order to promote innovation and investment, as many of the concepts and eventual standards may change in the years leading to wide scale deployment. To that end, everyone may want to be slightly careful not to over-hype the technology until it is further along a trajectory.

To realize private sector 5G deployments in the future, action is needed now to allocate additional spectrum. It is paramount that additional licensed and, where appropriate, unlicensed bands be made available in both the traditional sub-6 GHz frequencies and higher bands, including those above 24 GHz. The broadcast spectrum incentive auction, if successful, may provide one source of new low-band spectrum. Further, significant work has been done by the Commission on freeing millimeter bands, and I look forward to completing a final item in the summer and expanding the scope of bands in a further notice, per my request. On that note, the Commission should be willing to consider spectrum blocks that total less than 500 megahertz, and no high-band spectrum block should be automatically off the table, especially since we do not know where technological enhancements will take us.

The U.S. is the current world leader in 4G wireless communications, because our nation’s wireless providers endeavored to meet the insatiable consumer demand for new data services and have recognized the economic value in doing so. That leadership position will be challenged in the future, however, because other nations see the value in being the first to deploy 5G. Any unnecessary or artificial delay risks another nation setting the terms of the next 15 years of wireless communications, something we should make sure doesn’t happen.

Along the same lines, I find it necessary to express my concerns with the outcome of last November’s World Radiocommunication Conference (WRC-15). While the U.S. may have achieved certain stated goals on the non-commercial side, WRC-15 proved to exemplify a broken and outdated process. Although I only attended the first week of the conference, I can

report that some attending nations participated in parliamentary games for the sole purpose of protectionism. Lost in this process was a recognition of the need to meet the spectrum demands of wireless providers – here and abroad.

In a number of critical spectrum bands, the International Telecommunication Union (ITU)-led body was unable to agree to even study certain bands for potential harmful interference to incumbent users if new wireless services were to be permitted. This lack of collegiality and professionalism undermined the future of the organization. In particular, WRC-15's inability to permit a study of the 28 GHz band –highly favored for 5G use in the U.S. and other leading technology countries – means that the U.S. will move forward with our own studies and deployment, bypassing the ITU. As for those governments that may not share our forward-looking approach, they will be left on the sidelines.

Wireless Infrastructure

Going forward, the next generation of wireless networks also poses another challenge that must be addressed – infrastructure siting. To realize the promise of 5G, companies will need to expeditiously deploy facilities in a cost effective manner. Unnecessary siting expenditures substantially risk slowing 5G and broadband deployment. I look forward to working with the Committee on this issue going forward, and I offer a few ways in which burdens can be reduced for small cell and tower siting.

First and foremost, the Commission must abide by its commitment to expand upon the historic preservation and environmental process relief provided to small cell and DAS installations, in its October 2014 Infrastructure Order within the timeframe allotted, which is rapidly approaching 18 months. This process needs to be completed as quickly as possible and under no circumstances should it extend beyond this fall.

In addition, despite the best efforts of Congress, localities are still blocking far too many facilities siting attempts. The horror stories are endless: permitting problems, excessive fees and *de facto* moratoria, especially in obtaining the requisite site approvals in rights-of-way. Some options to deal with this include ending repetitive permit requirements when multiple small cells are sited in close vicinity, and preventing permits from being denied based on a locality's estimate of sufficient infrastructure and coverage. Everyone wants the benefits of wireless broadband services, but that cannot be accomplished without infrastructure.

For larger towers, collocation must be promoted. Process improvements could include reducing burdens for replacement towers and compound expansion. Oftentimes, it is cheaper to build a replacement tower directly next to an existing facility on land already zoned for that purpose than fortifying an old structure. Additionally, sometimes the area of a tower site has to be increased slightly to permit backup power facilities and provider backhaul equipment. Such changes should not require a repeat of the arduous siting review process.

Resolving the decades-old problem of twilight towers will also promote collocation and wireless deployment. Productive conversations with shareholders are occurring, but we need greater accommodation in order to develop a lasting resolution by this summer or fall. My goal here is

to solve this problem and any disputes in a quick but thoughtful way, not punish or subject wireless companies to our Enforcement Bureau and huge payouts.

Lastly, one of the most frequent complaints I hear about are problems with siting on federal lands. I appreciate this Committee's efforts to tackle this problem, among others, in the MOBILE NOW bill. Although the FCC does not have a role here, I offer to assist in any way possible.

Areas of Concern/Troubling Developments

Congress should be mindful of efforts by the Commission to expand its regulatory mission. For example, over the last couple of years, the Commission has expanded the scope of its reach to cover non-communications companies, like so-called "edge providers." This practice is exceptionally disturbing because these decisions often impact entities that are not familiar with or do not closely follow the Commission's activities. Beyond potentially subjecting these providers to yet another regulatory body or a conflicting set of new rules, the Commission is using the process to establish precedent under questionable procedures.

Take, for instance, the case of First National Bank, which was served a citation for possible violations of the Telephone Consumer Protection Act based solely on its terms of service, without even making a single so-called "robocall." Before First National was ever notified about the citation, the Commission had already tried the case through the press, harming the company's reputation. Interestingly, the citation was dismissed two months later without similar fanfare. The Commission has also negotiated settlements with providers under cloak of protected negotiations, meaning no other party was made aware or allowed to comment, and then tried to treat the terms of those agreements as some kind of precedent and apply them to other unsuspecting companies.

Separately, the Commission's creative license in regard to statutory interpretation is beyond measure. While an argument can be made that the Commission has always taken some latitude when interpreting the provisions in current law, a number of recent items have stretched the boundaries of logical reasoning. It's what late Justice Scalia might have referred to as "interpretive jiggery-pokery", and these newly "found" grants of authority have been used to initiate questionable proceedings and implement suspect policies. In essence, the FCC has been known to set aside the intent of Congress, deals struck at the time, reams of its own precedent, and sometimes even the English language itself to "reinterpret" a statute, all in a single-minded pursuit of a particular outcome.

Moreover, this disingenuous approach to statutory interpretation is being used as a means to force old statutory paradigms on to new innovations, over and over again. Wireless broadband networks are transformed into Title II wireline phone companies, over-the-top video providers are being shoehorned into Title VI as MVPDs, apps offered by video providers are magically set-top boxes, and "tech transitions" has become a rallying cry for saddling new fiber deployments and services with legacy obligations, instead of actually transitioning away from old technologies and the outdated rules that governed them.

Without attempting to re-litigate the Commission's Net Neutrality decision, it seems necessary to remind everyone of the implementation concerns expressed by many at the time. In particular, opponents of the Commission's rules highlighted how innovation would be subject to the whims of the Commission under the so-called "general conduct standard." Considering the Commission's approach to zero rating offerings, it is apparent that our concerns were warranted. Specifically, the Commission blessed such offerings one month, unleashed a regulatory inquisition the next month, and then seemingly dismissed concerns the following month. Along the way, the Commission has been unwilling to provide any closure, thus ensuring that the entities and their products remain under public suspicion. "Permissionless" innovation is being put through an unnecessary wringer, which threatens American economic output, employment, innovation, and other critical factors to our nation's success.

Suggestions for Possible Legislative Changes

1. USF Penalties and Fines Redistributed

With your indulgence, I would also like to bring to your attention an issue where a change in law could benefit all consumers that pay to support the federal universal service fund (USF or Fund). Under current law, payments made in response to FCC or Enforcement Bureau forfeiture orders or consent decrees – including those involving failure to contribute to USF or outright fraud against the Fund – are remitted to the U.S. Treasury. While this makes sense in many contexts, different treatment may be warranted for USF actions. In those instances, consumers have paid extra on their monthly phone bills to support USF while companies have shirked their legal responsibilities or abused USF programs to the detriment of consumers. Under those circumstances, it would seem that an appropriate remedy would be to remit the USF portion of the fines or "voluntary contributions" back to the Fund, thereby returning at least a portion of the money that should have gone to USF in the first place.

In the past, arguments have been made that it would be hard to track down which consumers overpaid and reimburse them. But it doesn't have to be that complicated. Payments that are made to the Fund in a given quarter as a result of enforcement actions can be used to offset overall program spending in the next quarter, thereby reducing the amount that consumers need to pay on their phone bills that next quarter. While this may not provide full compensation to each individual consumer that was harmed, it is better than the current situation where no money is returned to USF and no ratepayer receives any offset. And with USF spending trending higher each year, I imagine that even a modest reduction in fees on consumer phone bills would be a welcome change. Further, by dedicating such collected monies to the Fund, it should decrease concerns in this instance that the Commission's enforcement activities could be driven by its desire for additional budgetary resources.

2. Pirate Radio

In the last year, I have been drawing attention to the problem of pirate radio. It may not be a huge concern nationwide, but it's expanding at an alarming rate in places like Florida, New York, New Jersey, and California. And as the equipment needed for high-powered broadcasting

is becoming less expensive and more widely available, we can anticipate that the pirate problem will spread to more cities if current trends continue. Far from the amateurish operations that some may be picturing, modern pirate radio stations can be very sophisticated, established and lucrative.

Pirate stations drain resources from legitimate broadcasters and cut off the public from critical emergency information. That they are allowed to flourish and expand uninterrupted is a major failing on the Commission's part. It is a fundamental responsibility of the FCC to defend the radio band and *all* of our licensed spectrum from illegal interference, regardless of who is doing the interfering, or why.

We need to increase enforcement activity in the field, first and foremost. I also believe the fight to eliminate pirate radio could get a significant boost from a concurrent outreach and education effort. Legitimate building owners, advertisers, political campaigns, concert promoters and the like want nothing to do with facilitating illegal activities. But they may not be aware of the pervasiveness and seriousness of the problem. So I'm working with the Chairman and my colleagues to clearly outline the Commission's pirate radio policies and enforcement goals in an advisory document we can use to spread the word. Legislation in this area could be helpful as well, to give the Commission more enforcement tools and better focus its efforts. Such an undertaking would need to be fairly and carefully balanced so as not to unnecessarily threaten legitimate businesses that find themselves caught in the web of a pirate radio station's lies and deceit.

3. Process Reform

Finally, as I have often highlighted shortcomings in the Commission's processes, I would be remiss if I failed to acknowledge Senator Heller's continuing reform efforts, and note any developments on internal reforms contemplated on our end. Unfortunately, there is no update on this front, and the same failures of transparency and fairness continue to impact the quality of both public input and Commission decisions.

To discuss just one example, documents circulated to the Commissioners for a decision are still not available for public review at the same time, and far from being isolated to one particular issue, the pitfalls of this approach are seen regularly. Stakeholders in Commission proceedings often have incorrect or incomplete information about what is being considered, and Commissioners are not even permitted to discuss the substance beyond what the Chairman has chosen to make public. So our *ex parte* meetings are far less productive than they could and should be, and there are sometimes nasty surprises when an item is finally released. Several people who met with me or my staff last month regarding the set-top box proceeding noted the fact that they were at a disadvantage, not having been able to read such a complex document packed with novel statutory interpretations and proposals before attempting to engage with the Commission on the substance. And the problem will be exacerbated later this year when the Commission heads into even more uncharted territory like privacy. There is no need for this predicament, and it is easily remedied. The issues may be up for debate, but transparency should never be.