

**Statement of Michael O’Rielly, FCC Commissioner  
Before the Subcommittee on Communications and Technology  
House Energy and Commerce Committee  
“Oversight and Reauthorization of the Federal Communications Commission”  
July 25, 2017**

Thank you, Mr. Chairman, Ranking Member Doyle and the Members of the Subcommittee for the opportunity to discuss the important topic before you today. I commend the Subcommittee for its continued focus on the Federal Communications Commission, and I recommit to making myself available as a resource if I can be of any assistance to the Subcommittee in any matter in the future.

*FCC Reauthorization*

I sincerely appreciate the efforts of the Subcommittee to examine issues relevant to reauthorizing the Commission. I believe that it is incredibly valuable and important anytime Congress articulates its views, via legislation, on the Commission’s work, including its funding levels, procedures, and substantive issues. We take our direction from the Congress and our authority to act derives solely from the powers granted and provided by this institution.

On that note, let me lend my strong support for the draft reauthorization bill circulated for consideration. Beyond outlining the Commission’s future authorization levels, it includes previous standalone efforts led by Representatives Latta and Kinzinger to address the Commission’s use of delegated authority and to publicize both Open Meeting and circulation items to be considered by the Commission, respectively. I also applaud the Subcommittee’s inclusion of strong cost-benefit analysis requirements for the FCC in the draft proposal. I believe that these reforms and the many others contained within, if enacted, would improve the decisions and functionality of the Commission.

To be clear, this is not to suggest that the current Chairman is utilizing questionable procedures. On the contrary, Chairman Pai has pushed the Commission to be more transparent and accountable to the American people. For example, his pilot project, based on our previous advocacy, to make Commission Open Meeting items public at the same time they are shared with Commissioner offices has proven a smashing success in my opinion, by reducing uncertainty and angst over item contents and promoting targeted comments and edits from interested parties (without leading to the parade of horrors some people suggested). I appreciate that the draft reauthorization legislation would make this practice permanent and extend it to our circulation items.

As an aid to the Subcommittee's examination of pertinent issues, let me humbly suggest additional process improvements that could be included in any reauthorization legislation. Many of these ideas, some of which I have discussed before while others are new, would benefit from being included in the statute so that future commissions continue Chairman Pai's process reform direction.

- Delegated Authority – In addition to the draft proposal, there should be a procedure for Commissioners to elevate an item scheduled for decision under delegated authority without disrupting timely disposal of items.<sup>1</sup>
- Meeting Item Deadlines – Any edits to an Open Meeting item should be available to Commissioners at least 24 hours prior to the meeting.
- Mandatory Sunsets – Decisions made by the Commission should include mandatory sunsets to force a reexamination of their value and effectiveness.
- Predictive Judgments – While the Commission should only regulate if there are facts demonstrating market failure, if “best guesses” are used by the Commission in promulgating rules, they should be reexamined periodically to ensure that they still have merit. Over time, Commission

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<sup>1</sup> See Michael O’Rielly, *A Modified Delegate Authority Proposal*, FCC BLOG (Feb. 22, 2017), <https://www.fcc.gov/news-events/blog/2017/02/22/modified-delegated-authority-proposal>.

prognostications of the future are prone to error, especially those pertaining to the dynamic communications marketplace.

- Interim Rules Lifespan – Use of interim rules should be time limited to force the Commission to either abandon the temporary policy or enact permanent rules. Our use of interim rules prevents affected parties from exercising their rights to challenge the Commission’s direction and burdens imposed.
- Own Your Edits – Not too dissimilar to putting a Representative’s name atop an amendment, edits being adopted to our items should be identified by Commissioner(s) seeking a change.
- Editorial Privileges – Eliminate the practice of allowing staff to make substantive (and substantial) changes to items already voted by Commissioners.
- Tracking NALs & Forfeiture Orders – While the Commission is fond of adopting Notices of Apparent Liability and Forfeiture Orders, there seems to be no accounting of whether these enforcement actions are resolved or ever paid.
- Circulation Process – There should be a time limit on how long an item can sit on the circulation list, without being adopted or receiving three affirmative votes, before it must be withdrawn for review or redrafting.
- Guest Witnesses – No witness should be invited to a Commission meeting without the full knowledge of all Commissioners and advance submission of any witness testimony.
- Dormant Proceedings – The Commission should be required to automatically close proceedings that are no longer active or in which action is not expected in a set timeframe.
- Commission Internal Rules – The Commission’s internal working procedures should be updated not less than once each new Chairmanship and codified in our rules, like how each Congressional committees’ rules are considered and approved each Congress. This may be sufficiently addressed by new section 13(e) of the draft proposal.

- Administrative Law Judge – Establish alternative means to dispose of many, if not all, of the matters currently considered by the ALJ.
- Threats of Hearing Designation Order – Establish deadlines and a procedure for any application that the Commission believes should be designated for hearing. This will prevent the Commission from using the mere threat of sending an application into the hearing abyss as a backdoor mechanism to reject the application or terminate the underlying transaction.
- Real Shot Clocks – The use of “aspirational” shot clocks in Commission proceedings should be replaced with hard deadlines consisting of narrowly-designed, statutorily-set exemptions or waiver authority.

Additionally, I would be remiss if I didn’t include a request for modifications to our enforcement authority in order to address the consistent problem of pirate radio broadcasting. Make no mistake, those conducting pirate radio broadcasts, which are more prevalent in New York City, Northern New Jersey, Boston and Miami, have generally laughed at past enforcement efforts by the Commission.

The Commission has experienced renewed vigor under Chairman Pai in tracking down and imposing penalties against pirate radio broadcasters. At the same time, the following targeted changes would, in my opinion, greatly assist the Commission and our field officers in ending this illegal practice:

- Increased Penalties – While perpetrators of other insidious and illegal practices receive millions or hundreds of millions in fines, pirate radio operators face a pittance in comparison, even for years or decades of disruptive and harmful activities.
- Aiding & Abetting – Those individuals that *knowingly and intentionally* assist pirate radio broadcasters, such as landlords, building owners, building supervisors, and advertisers, should be subject to Commission penalties.

- Confiscation of Equipment – After extensive work to locate pirate radio “stations,” Commission staff is often forced to issue a warning and leave, only to know that the very equipment likely will be used again to commit the same offense in the future. While many pirate radio broadcasters operate with shoestring equipment, including cheap laptops and transmitters, there are several pirate broadcasters that maintain quite sophisticated “station” operations. Commission staff should have a process to confiscate such equipment, especially as it relates to common areas not under the control or ownership of the equipment owner.
- Sweeps – Once existing pirates are eliminated, the Commission should be required to conduct biannual or yearly targeted enforcement efforts to ensure pirates do not sprout again. While this may not be a problem under the current chairman, protection of our nation’s airwaves must remain a priority and not left to the whims of any chairmanship.
- Elimination of Warnings – Similarly, it is incredibly frustrating and demoralizing to have Commission staff leave warning after warning informing the same individuals to stop pirate broadcasts to no avail. Like has been done in other areas, the Commission should be authorized to suspend the warning process and go directly to the issuance of NALs in appropriate cases.

### Infrastructure Deployment

#### *Direct Federal Spending*

There appears to be great interest by many policymakers, including Members of the Subcommittee, to provide additional federal funding for purposes of expanding broadband capabilities to more Americans. One option that has been discussed is to include such funding within a potential larger infrastructure bill. If this were to occur, I hope that the Subcommittee would adopt the Commission’s high-cost program as a mechanism to distribute such funding, as opposed to using other existing federal programs or creating a new program. While our high cost program is not perfect, it far and away exceeds other

past efforts. Further, it attempts to install, to the greatest extent possible, market principles to minimize any support to that which is absolutely needed, by using reverse auctions and targeting funding to unserved rather than underserved locations. This ensures the greatest impact per dollar invested. Moreover, there is a differential between demand for the program and our current budgetary allocation, meaning that additional funding can be added without causing much disruption.

Advocates for other distribution mechanisms argue that our program is not directly overseen by the Administration, therefore there is no assurance that funding will go out pursuant to any preconceived outcome. But that is precisely one of the benefits of the program: it is not designed to pick winners or losers arbitrarily by well-meaning government employees.

#### *Barriers to Deployment*

U.S. wireless providers are currently leading the world in the offering of advanced wireless services. That position did not come without significant hard work, advanced planning, innovation and fortunate circumstances. But we stand at the next pivotal moment in the future of wireless technology: the deployment of small cell networks and the next generation of wireless services, commonly referred to as 5G.

To succeed at this next challenge, wireless providers are going to need two important ingredients: access to a sufficient mix of spectrum bands and reduced barriers to the installation of wireless equipment. While the Commission has been actively reallocating existing bands for mobile purposes -- with hopefully more to come -- there remains obstacles imposed by state, local and tribal governments that are hampering the ability of providers to serve Americans. It ultimately comes down to whether one believes that preservation of misguided governmental power is more important than bringing the

benefits of broadband to all interested Americans. For example, some governmental entities are delaying approval of wireless siting based on illegitimate reasons, such as aesthetics and RF, and using their powers to ensure maximum revenue generation.

#### Broadcast Incentive Auction Repack

The Commission is in the early stages of “repacking” broadcasters that either didn’t participate or weren’t selected as part of our generally successful process to reallocate broadcaster spectrum for new wireless services. A few weeks ago, cost estimates submitted by remaining broadcasters and cable operators exceeded the statutorily set cap of \$1.75 billion. In addition, the statute, as a potential oversight, didn’t include reimbursement for the small number of local radio broadcasters that will be affected by the repack.

While the Commission will need to review and scrub the broadcaster cost estimates to ensure only legitimate charges are reimbursed, it does appear that there may be a need for additional financial resources from Congress. As someone who was integrally involved in the drafting process of the “Spectrum Act” contained within the Middle Class Tax Relief and Job Creation Act of 2012, I am certain that Congress intended to hold harmless repacked broadcasters. More explicitly, staff had the clear assignment to ensure that American full-power television viewers (or radio listeners) would not face the loss of programming due to the repack’s respective budget. While funding levels for various spending priorities contained in the Spectrum Act were of significant contention, this area was less so, as the goal was to ensure repacked broadcasters were neither shortchanged nor over compensated.

Although it may be premature to declare that additional funding will be necessary, I suggest that it is likely to be the case. Accordingly, the Subcommittee should keep a close eye on the repacking cost

estimates as our process continues and may want to initiate a related legislative drafting process soon.

Certainly, if it is determined that additional, limited funding is needed to complete a successful repack, I would fully support such action and would gladly help the Subcommittee and Congress in any way.

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Again, I appreciate the opportunity to appear before the Subcommittee. I stand ready to answer any questions you may have of me.