

Statement of Michael O’Rielly, FCC Commissioner
Before the Subcommittee on Communications and Technology
House Energy and Commerce Committee
“Oversight of the Federal Communications Commission”
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Thank you for the honor to appear before you today. My thanks to the Chairman, the Ranking Member, and all the members of this Subcommittee for the opportunity to engage with you on many important issues and answer any questions you may have about the decisions and workings of the Federal Communications Commission.

The Chairman has outlined a number of issues on which the hearing is intended to focus. Accordingly, my statement below follows these issue areas. In addition, I have added a discussion on the need for authority to enact spectrum fees in particular circumstances.

Lifeline Fraud, Waste & Abuse

To start, it is not a surprise that when extensive federal money is made available, some people will take advantage and exploit the system. Accordingly, I continue to be troubled by waste, fraud, and abuse in the Lifeline program and worry that it is not on sufficiently sound footing. In retrospect, I had urged the Commission to address these concerns *before* expanding Lifeline to include broadband. Unfortunately, the goal of expansion became a greater priority than tightening its exposure points. When it became clear that the Commission was on a different track, I recommended that, at a minimum, any reforms be paired with adequate measures to safeguard the program and protect consumers that pay fees to support the fund. I suggested ten, readily achievable principles, including setting a cap or firm budget, targeting subsidies to consumers that do not have broadband service, and establishing procedures to stop new payments to a provider if certain metrics were exceeded, a concept I have referred to as creating circuit breakers.

These ideas were ultimately rejected, in part because the Lifeline Order took the position that the reforms put in place since 2012, including the creation of the National Lifeline Accountability Database, were “highly effective”. Sadly, that has not been the case, as highlighted by a number of recent enforcement actions, anecdotal evidence and the work of my colleague, Commissioner Pai. If the Commission had circuit breakers in place to detect problematic practices and stop payments pending Commission review, this might have been avoided. But it is not too late to change course and make a serious effort to remedy these ongoing issues and head off future abuses. Simply adding a new National Lifeline Eligibility Verifier, whenever that ultimately occurs, will not be sufficient to stamp out underlying problems. If more is not done to correct the situation, everyone should expect more incidences of waste, fraud and abuse.

Set-Top Boxes

I have a long history and involvement in the current debate over set-top boxes, as my prior boss, former Chairman Tom Bliley, was the author of the statutory provision governing this issue. Thus, I was present in all of the meetings and discussions leading up to the passage of the provision, and have observed the many efforts in the years since then to implement it. Moreover, within the last couple of years, I have discussed at length with all relevant industry participants the future of the set-top box industry, and more importantly, the future of technology to deliver video programming in the ever changing media marketplace.

With this background, I share the concerns that many members of this Committee have expressed about the Commission's proposed set-top box technology mandate, as contained in its NPRM. In my dissent to that item, I argued, as many have, that the proposal could significantly impede innovation in video delivery and put at risk valuable content as well as consumer privacy, without assurances that anyone would save one thin dime. If the Commission's concern is for the consumer expense of set-top boxes, I have taken the position that it would make more sense to get rid of them altogether.

A common-sense, technology-friendly replacement for set-top boxes already exists in the form of downloadable apps, which can serve as the basis for a consensus approach to the set-top box quandary. Various video providers have strengthened the argument for this approach recently with firm commitments on timing and price, and I hope that Commission leadership is giving serious consideration to an apps-based solution for video distribution. I will continue to engage on this issue in the hope of coming to an acceptable resolution.

Media Ownership

The Commission's long-awaited attempt at the required Quadrennial Review of media ownership rules brings with it the opportunity to recognize and account for the sea changes that have taken place in the American media marketplace since the rules were last effectively overhauled in 1999. Here, in 2016, social media giants are openly moving into news provider territory, Internet content is moving over-the-top into American living rooms, and personalized streaming stations accompany us on our morning drives. But while American consumers embrace players, such as MVPDs, over-the-top video providers, websites, streaming music services, and satellite radio as part of their daily lives, broadcasters and newspapers alone are saddled with rules from a bygone era. I believe the Commission can better promote localism, competition, and diversity – and be consistent with the public interest – by thoughtfully removing outdated restrictions to media combinations.

It has been argued that now is a bad time to introduce any disruption in the existing media ownership regime, due to the potential changes likely to result from the broadcast incentive auction that is currently under way. However, this argument does nothing to excuse the retention of all the stale rules regarding radio and newspapers, industries which will see little to no impact from the auction. Moreover, Congress was well aware of the Quadrennial Review requirement set out in section 202(h) when it authorized the auction, and no special “pending auction results” or “during the auction” exemption was discussed or provided at that time. Further, nothing in section 202(h) precludes the Commission from reviewing and changing or eliminating any one of its media ownership rules at any time, outside of the Quadrennial Review process, if that rule is no longer of value. So the incentive auction cannot and does not let the Commission off the hook regarding its responsibility to modify the rules in response to the marketplace conditions that actually exist today.

Unfortunately, this proceeding seems to be moving away from the goal of tailoring our rules to the reality of today's diverse, competitive media marketplace. I will continue to work with my colleagues in the hope that my concerns will be addressed.

Broadband Privacy

The Commission seems intent on adopting broadband privacy rules this year, but if the current proposal, as contained in our Notice of Proposed Rulemaking, is adopted it will affect the consumer Internet experience and reverberate throughout the technology industry for years to come. In addition to the legal problems I have previously articulated, the Commission has not justified imposing dramatically higher burdens on one segment of the Internet economy. By most accounts, current privacy structures, including the FTC's framework, have provided ample and appropriate protections for consumers. The FCC's proposal, however, goes much further. Instead of creating privacy rules based on consumer

expectations and the sensitivity of the data, the FCC's proposal would require heightened consent for many common activities and could even prohibit certain practices that many consumers find beneficial. This disconnect may be due, in part, to a misunderstanding about ISPs' abilities to access and use consumer data.

The record is full of many thoughtful comments from a wide range of participants, and I can only hope that the Commission will take them into account when crafting the final rules.

Mutual Exclusivity and Spectrum Fees in a Spectrum Sharing Environment

With all due respect to this Subcommittee, it has been my goal that, when testifying, I provide suggestions on issues that need to be addressed or may be of interest. Accordingly, let me raise, for your consideration, the issue of authorizing spectrum fees in very narrow circumstances. While I previously discussed the need to impose spectrum fees – or a cost aspect – on *federal government* spectrum license holders in order to improve spectrum efficiency, the component I hope to generate interest in today involves the imposition of fees in a spectrum sharing environment where mutual exclusivity, which is needed to trigger an auction, is not obtained. Specifically, as spectrum sharing becomes more prevalent and establishing mutual exclusivity becomes more difficult or undesired, the Commission is without a mechanism to prevent licenses from being awarded for free.

To put this into context, consider the Commission's action in our 3.5 GHz proceeding. In that item, the Commission established a process by which federal government users, licensed commercial users (who can bid on Priority Access Licenses or PALs) and unlicensed commercial users could all operate within the band with protections afforded to incumbents first and then licensees second. One problem that arose – and still exists today – was defining mutual exclusivity for PALs and determining when spectrum auctions would be imposed. Under the approach taken in the Commission's Report and Order, if only one entity seeks a PAL for a specific census tract, mutually exclusivity does not exist, no auction is held, and no PAL can be awarded. But those who see value in the protections availed to licensed spectrum will be reluctant to invest in the development and deployment of a spectrum band – and frankly may not even be able to acquire the needed capital – without the certainty provided by exclusive licenses. Recognizing the problem but unwilling to solve it completely, the Commission actually decided to give one PAL away for free only in certain rural markets.

I would argue that the Commission should seek to define mutual exclusivity in a broader sense than has been done traditionally.¹ The Commission has taken such an approach in the incentive auction, but in the 3.5 GHz proceeding such an interpretation was found to be inconsistent with our obligations under current statutory provisions. If this definitional problem cannot be resolved, in those instances where licenses are to be awarded – such as the PALs in 3.5 GHz – but there is only one applicant, then the Commission should be authorized to charge some type of spectrum fee, rather than not awarding the license or giving it away for free. That, too, would require Congressional action.

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Thank you for the opportunity to testify and I stand ready to answer any questions you may have.

¹ Michael O'Rielly, Commissioner, Federal Communications Commission, Keynote Speech at "Broadband for All Seminar" in Stockholm, Sweden (June 27, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0627/DOC-340030A1.pdf (discussing the need to reconsider mutual exclusivity in the context of spectrum sharing).