

**Statement of FCC Commissioner Michael O’Rielly**

**Before the  
Subcommittee on Communications and Technology  
Committee on Energy and Commerce  
U.S. House of Representatives**

**Hearing on  
“Accountability and Oversight of the Federal Communications Commission”  
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Good morning. It is a pleasure to appear before this Subcommittee once again as it conducts further oversight of the Federal Communications Commission. I appreciate the opportunity to be here and welcome any questions you may have.

One word that we will hear a lot today and in the coming months around D.C. is infrastructure, and, in the context of the FCC, there’s plenty to cover. The communications industry continues to change as technologies advance and as networks grow, and under Chairman Pai’s leadership the Commission has made a strong effort to modernize our regulations to keep up with innovation. Make no mistake, this is hard work. And, it’s made no easier by those with an interest in protecting the status quo. However, we have made progress despite the headwinds, and I am excited to see further growth and strengthening of our nation’s communications infrastructure.

The four areas of communications infrastructure that I will touch on today are: 1) the need to quickly deploy more mid-band spectrum; 2) the need to protect taxpayer money from being used to overbuild existing infrastructure; 3) the need to address robocalls; and finally, 4) the need to end theft of 9-1-1 fees by states for programs not related to 9-1-1 emergency communications infrastructure.

*Wireless Infrastructure: Freeing Additional Spectrum*

The Commission continues to make great strides to ensure U.S. leadership in 5G by allocating the necessary millimeter wave frequencies, but, over the past three years, I have focused most of my energy on crucial mid-band spectrum. There is now near universal realization that far more needs to be

done to free up additional mid-bands given its propagation characteristics and opportunities for global spectral harmonization.

Finding additional mid-band spectrum is extremely hard. There is no fallow spectrum, incumbent users are everywhere, and a multitude of interested parties exist with different visions, interests, and needs. I faced these very issues when, with the Chairman's blessing, I led the process to review and revise our 3.5 GHz rules. Today, 3.5 GHz is nearly ready to go to auction and will support many functions, including 5G deployment. Unfortunately, software reconfiguration, the testing process, and other reasons seem to delay our auctions, meaning the priority access licenses are probably not going to be auctioned until the second quarter of 2020, at best. And, while 3.5 GHz is a good start, this supply cannot meet overall demand, especially since providers are seeking 100 megahertz channels. Continuing what the Chairman has put in motion, the Commission must redouble its efforts to allocate additional mid-band frequencies for next-generation licensed services.

Highest on our priority list must be the 3.7 to 4.2 GHz band, or the C-band. The Commission continues a deliberative process to consider the market-based approach, along with other options presented in the record. One of my foremost concerns is to ensure that the mechanism selected allows for the quickest reallocation of the band. I believe that the majority of relevant stakeholders are working through how best to accommodate the current incumbents and provide a sufficiently transparent process. Further, I remain hopeful that the satellite incumbents recognize the great need for such frequencies and are willing to part with closer to 300 megahertz, assuming the requisite technology can accommodate this amount.

In addition to 3.5 GHz and C-band, there needs to be a greater effort to identify more federal agency holdings in the mid bands for reallocation. I suggest that the 3.45 to 3.55 GHz band can be made available for commercial use, and additional feasibility studies should be initiated to determine the extent of commercial offerings that can be introduced in 3.1 to 3.45 GHz. This spectrum can be

combined with spectrum at 3.5 and 3.7 to 4.2 GHz to create the channel sizes required for true 5G services. Further, we should also start looking to the 7.125 to 8.5 GHz band to ensure that there is sufficient spectrum for the many providers that want to offer 5G services.

At the same time, the Commission must also consider mid-band spectrum for unlicensed use, such as the 4.9, 5.9, and 6 GHz bands. The community serving this incredibly valuable function needs larger spectrum swaths to meet the speed, capacity, and latency expectations demanded of next-generation Wi-Fi and other unlicensed uses.

### *Broadband Infrastructure: Deployment & Overbuilding*

One of the many things my fellow colleagues and I agree on is the critical importance of broadband infrastructure to the American people. It is hard to imagine any part of our current society that hasn't been integrated with Internet connectivity: from education and information, to employment and health care, broadband serves as a key component to modern American life and has improved our standard of living in so many ways. This is true no matter the underlying characteristics of the technology used to provide digital access—wired or wireless. In fact, both serve interchangeable functions for increasing numbers of Americans and will likely continue to do so going forward.

Similarly, there is consensus among FCC Commissioners that all Americans—including those living in areas with challenging topography and sparse populations—should have the opportunity to access broadband Internet, if they wish to do so. While broadband availability has improved over the years, many unserved areas remain, and we must continue our efforts to expand access in an efficient and timely manner. That is why I have spent so much time over the years promoting better incentives and greater efficiency within our Universal Service Fund programs, and why I have repeatedly called for the implementation of the Remote Areas Fund (RAF) auction—in order to serve those Americans in the hardest to reach communities, which tend to be more rural and of lower economic status. I know that

Chairman Pai is committed to this goal as well, and I was very pleased to hear him announce that the Commission is moving forward on addressing the RAF—in some form—in the near future.

At the same time, I worry that the desire to expand broadband infrastructure will lead to wasteful and duplicative spending and adverse consequences for consumers. Recently, Congress allocated new funding for broadband programs at the Department of Agriculture, and there appears to be interest in funding broadband buildout via the Department of Commerce as well. While I would reiterate my humble request from previous testimony that Congress consider the FCC's Universal Service Fund (USF) as a primary means to distribute new funding, it is my foremost concern that any new funding go to unserved areas, rather than areas where broadband service already exists. Coordination among the various agencies and departments would be helpful, and there are new legislative efforts to help facilitate this. However, coordination can mean different things to different government agencies and their employees. Only through clear legislative direction and necessary oversight can Congress ensure that funding does not duplicate existing programs and goes only to those Americans without broadband today.

Failure to prevent overbuilding can undermine providers' existing and future investments and result in extremely problematic outcomes. In particular, providers serving hard to reach areas can face serious financial difficulties if a new government-subsidized provider "competes" to serve existing customers—or worse—takes only the most highly profitable customers. I have seen this situation firsthand within the Commission's own USF program. It recently came to my attention that new E-Rate-subsidized fiber networks were overbuilding local USF-funded Texas broadband providers and stealing their core anchor customers. By manipulating the contracting process to favor the bids of particular providers or self-provisioned service, some local school districts have been actively undermining local USF-supported providers' existing investments, and as a result, making it even more difficult to serve surrounding communities where some households may lack any Internet access at all.

*Consumer Telephone Infrastructure: Stopping Illegal Robocalls & Protecting Legal Calls*

The Commission has rightfully focused time and attention on addressing the surge of illegal robocalls in this country. These calls, many from overseas, are at best irritating; at worst, they serve to scam susceptible consumers out of their hard-earned money. Implementation of new technology should substantially reduce this menace, as will cooperation with foreign governments, but it is clear that eliminating such calls altogether is likely impossible.

In considering this issue, it is important to maintain a careful and nuanced approach. Not all robocalls are illegal or scams, and we must be precise in describing the actual problem at issue. Members of this Subcommittee deserve credit on this front, as efforts to engage in careful rhetoric were evident at your last robocall hearing. Many honest, legitimate businesses use automatic dialing technologies to communicate needed information to their customers and doing so is perfectly within the scope and intent of the TCPA. These legal and legitimate calls and texts share no part in the true robocall problem facing the nation's communications networks.

More fundamentally, any approach to illegal robocalls should not expose law-abiding and legitimate organizations to indeterminate and potentially crippling legal risk. Unfortunately, an aggressive few TCPA lawyers have taken advantage of the previous FCC's expansive and unclear rules to obtain unfair judgments and extract enormous, disproportionate settlements from businesses in virtually all industries.<sup>1</sup> This trend continues despite the U.S. Court of Appeals for the D.C. Circuit's rightful decision in *ACA Int'l v. FCC* to set aside the previous FCC's rules on the definition of an automatic telephone dialing system (ATDS) and one-call safe harbor in the reassigned numbers context. Rather than deferring to FCC expertise and staying TCPA cases pending the Commission's decision, various courts have issued a medley of confusing and conflicting rulings on the definition of ATDS in the

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<sup>1</sup> U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* (August 2017), [https://www.instituteforlegalreform.com/uploads/sites/1/TCPA\\_Paper\\_Final.pdf](https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf).

aftermath of *ACA Int'l*.<sup>2</sup> I would welcome any efforts to codify a more reasoned and clearer approach to these issues.

Returning to the problem of *illegal* calls, I applaud those innovative companies and carriers that have offered or are in the process of offering free call authentication and call blocking services to their customers. To protect and encourage these initiatives, I strongly support the adoption of a safe harbor to protect carriers from Communications Act liability in their call blocking efforts, as well as the one the FCC authorized for a reassigned numbers database. At the same time, carriers must adopt expeditious processes for correcting false-positives and ensuring that legal and legitimate calls are not incorrectly labeled or blocked.

#### *Emergency Communications Infrastructure: Ending 9-1-1 Fee Diversion by States & Territories*

The last issue that I will touch upon today is one that I've been very vocal about for the past several years, and that is 9-1-1 fee diversion. This is a very significant problem in terms of importance, though not as widespread as it once was, thankfully. Every month, millions of consumers pay their phone bills and if they look closely enough, they'll see a line item that generally refers to 9-1-1 emergency services, though the exact wording varies by jurisdiction. In accordance with the line item, consumers appropriately expect that those funds will go toward maintaining and upgrading 9-1-1 emergency calling systems. In some states and territories, however, this money flows into the general treasury and, as a result, only some portion of the collected fees ends up going toward emergency services. On top of being downright deceptive, this is a serious public safety matter that directly affects emergency call centers and personnel, not to mention all the people who live in or visit these states who expect that when they call 9-1-1 the system is up to date. Following the FCC's December report,<sup>3</sup> the

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<sup>2</sup> Eric Troutman, *Waiting Game: Taking Stock of the TCPA One-Year Removed from ACA Int'l*, National Law review (March 26, 2019), <https://www.natlawreview.com/article/waiting-game-taking-stock-tcpa-one-year-removed-aca-int-l>.

<sup>3</sup> Tenth Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges for the Period of January 1, 2017 to December 31, 2017 (Dec. 17, 2018), <https://www.fcc.gov/files/10thannual911feereporttocongresspdf>.

states and territories guilty of diverting these critical funds for 2017 were: New York, New Jersey, Rhode Island, Montana, Nevada, West Virginia, and the U.S. Virgin Islands.

Several Members of this Committee have been outspoken on this issue as well, in particular Representatives Eshoo and Shimkus as leaders of the Congressional NextGen 9-1-1 Caucus, and I thank them for their efforts. For the new members of the Committee or Members who are less familiar with this issue, the Commission has been issuing an annual report for the last decade, pursuant to federal law, that measures the amount of money that gets diverted, if any, by each state on a total funding and a percentage basis. The report also provides an assessment of whether the diverted funds were used for purposes related in some capacity to public safety or completely unrelated. You may find it shocking that the diversion rate was as high as 90 percent in one state (New York).

Beyond creating a problem of public confidence in the fee system itself, fee diversion also shortchanges the budgets of emergency call centers and has prevented much needed upgrades. I've been to public safety answering points (PSAP) and I've met with the dedicated emergency communications professionals in many of the states subject to diversion. I can assure you that they are continually frustrated by their state politicians who do not have the will to do the right thing. However, I would be remiss if I didn't also address the positive side of our report. There are many states and territories that have made a concerted effort to get off the list, especially in some cases where the problem was an accounting technicality, and in others where public officials simply did the right thing and rectified their state budget practices. West Virginia has committed to do just this. To those states and their leaders, I tip my cap, and I know that in the long run the people in their states will be better off and their emergency communications systems will be stronger and more reliable.

It is also important to remind those states and territories that continue this despicable practice: they remain ineligible for new federal funding to modernize their call centers as the shift to Next Generation 9-1-1 occurs. NG911 will be costly, but its effectiveness and the resulting improvements to

the system will be vital to saving lives. In the Middle Class Tax Relief and Job Creation Act of 2012, this Subcommittee helped create a new grant program for 9-1-1, E9-1-1, and NG911, and the law specifically excluded states and territories that divert fees from receiving these grants.

In closing on this topic, I respectfully request the Subcommittee's assistance. The "name and shame" process generated by our annual report has only been so helpful. The state leaders of certain recalcitrant states—New York, New Jersey, and Rhode Island—don't seem to care about the shaming part. Moreover, other states and territories seem to spring up after seeing a lack of substantial penalties and decide to divert for a few years to address a budget shortfall or provide new spending for a pet project. I believe new legislation is needed, in addition to that already introduced on the topic, and that it will take a more forceful approach to end diversion once and for all. I would be pleased to work with any Members who are interested in this issue.

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Thank you to the Chairmen and Republican Leaders for inviting me to testify today. I welcome the questions of any members of the Committee related to the topics I have covered or any others that are important to you and your constituents.