

Remarks of FCC Commissioner Michael O’Rielly
The Free State Foundation’s Policy Seminar:
“Thinking the Unthinkable: Imposing the ‘Utility Model’ on Internet Providers”
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(As prepared for delivery)

Introduction

Let me start by thanking Randy May and the Free State Foundation for inviting me to speak today. I appreciate the opportunity to follow Congressman Latta, a leader on communications issues on Capitol Hill, and of course my good friend at the FCC, Commissioner Pai.

Before I begin, let me be clear that my remarks should not be viewed or interpreted in any way as a response to President Obama’s Net Neutrality-related video and comments from Monday. The President has an important voice on the subject, as do my former employers on Capitol Hill. I appreciate the Administration’s clarified views and will consider them fully as we proceed. As the President reminded everyone, however, the FCC is an independent agency. We are required to make decisions based on a full and substantive record, not on the sole views of any particular elected official.

In preparing to discuss the issue of net neutrality, I couldn’t help but think back to a quote by one of our nation’s Founding Fathers, Thomas Paine, who wrote ever so poetically about the American Revolution, “These are the times that try men’s souls.”

My goal here today is to shed light on a few policy components relevant to the overall debate on net neutrality. During some of the recent hyperbole over differing proposals, a number of critical issues have not received sufficient attention or scrutiny, so I will attempt to do so.

Point #1: Forbearance Should not be Viewed as Easy

Many advocates in favor of reclassifying some or all of broadband Internet access service as a Title II common carrier service tend to concede that not all of Title II should be applicable to broadband offerings. Instead, they usually submit that the Commission can simply forbear from applying certain Title II requirements deemed unnecessary or unwarranted. That is, they would suggest the Commission can wave a magic wand and the offending provisions would disappear.

This view is either naïve or intended to purposely misrepresent how the forbearance process works, the historical use of forbearance, and the fevered pitch by which some interest groups will fight to retain each and every provision of Title II. There is nothing simple about it.

First, as a legal matter, the Commission has, over time, set the bar so high for forbearance that it is nearly impossible to meet, especially when the Commission deals with core common carrier provisions on a nationwide basis. In particular, the Commission’s use of its intensely granular product and geographic analyses, validated by the 10th Circuit in the Qwest-Phoenix application, requires such an extraordinary showing of insufficient market power backed by very specific market data, not easily attainable, that the forbearance process resembles little of its original intention. Just take a look at the

very detailed data request in the CenturyLink “Me Too” Forbearance proceeding. Does the Commission or any ISP--especially small ones--have access to extensive data to justify blanket forbearance in every market throughout the nation? Moreover, should we expect an opponent of a forbearance petition to accept anything less than the Qwest-Phoenix process?

Second, the findings that the Commission would have to make to justify forbearance run counter to the arguments for imposing net neutrality in the first place: broadband providers seemingly have the market power to discriminate against other providers and consumers. In other words, the Commission would be forced to argue that imposing Title II is necessary because of the discriminatory possibilities that broadband providers may inflict on the marketplace but somehow the same broadband providers would be required to show that imposition of parts of Title II are not necessary to ensure just, reasonable and non-discriminatory practices, which is the first part of the statutory test for Section 10 forbearance (as recently discussed by the U.S. Court of Appeals for the D.C. Circuit). Can a broadband provider be both guilty of having the power to discriminate and sufficiently innocent to ensure non-discriminatory practices in a competitive marketplace? Relatedly, findings that providers lack market power would contradict other statements about a lack of competition in the broadband market. The internal inconsistency and contradictory statements make your head spin, and it is questionable how it could survive a legal challenge.

Third, as a practical matter, forbearance petitions are rarely decided within a year. Even several “Me Too” petitions, which should be easier to resolve, have taken up to 15 months. Internet companies like to say that they operate in Internet time or at warp speed compared to the traditional gear-churning proceedings of a Federal agency like the FCC. Imagine a broadband provider waiting a year or more for the FCC to act and then another one to three years for the court process to conclude before knowing which portions of Title II actually apply to your business. Good luck trying to raise capital from financial markets to build-out to new areas or modernize existing facilities.

Fourth, there has been no common understanding of which parts of Title II should or would be deserving of forbearance. Parties have proposed to apply as many as two dozen provisions of Title II on broadband providers, including sections like 203 (tariffing) from which the Commission has previously forbore. Are we really going to contemplate imposing tariff requirements on all broadband providers? The lack of agreement over which parts of Title II should receive forbearance highlights the reality that every application will generate opposition and a protracted fight.

Fifth, even a slimmed down Title II would seriously impact the Internet. For instance, virtually all supporters of Title II advocate for retaining sections 201, 202, and 208, but even that pared down list would be problematic. I don't know what it means to forbear from rate regulation if 201 and 202 are left in place. Regulating charges, practices, and classifications, which are embedded in those provisions, is the very heart of rate regulation. And this is not a farfetched concern as the Commission has relied on sections 201 and 202 to impose a number of retail and wholesale common carrier regulations, including resale, recordkeeping, interconnection, and *rate regulation* requirements. Indeed, sections 201 and 202 are so vague that providers could be subject to a whole new of list of requirements antithetical to the Internet, and then they could be penalized under section 208 to boot.

And Finally, no one can provide assurances that any forbearance decision will be able to survive court scrutiny or future Commissions willing to overturn or undermine previous Commissions. If this occurs, providers would be stuck with full blown Title II.

Point #2: Wireless Broadband Networks are Different

As a consumer and in my role at the Commission, I have marveled at the advances in mobile technology and the explosive growth in wireless devices and services. In particular, wireless broadband has experienced tremendous adoption by American consumers. Accordingly, U.S. wireless providers are building out their networks to handle greater data traffic as demanded by the marketplace.

These developments have not been completely lost on the Commission. Just two months ago, we unanimously approved a major wireless infrastructure item to reduce the ability of state and local governments to unnecessarily stall deployment of new wireless towers, antennas and other equipment, and bring certainty to the process.

Wireless companies are also limited by their complement of spectrum holdings. For many years, both Republicans and Democrats have worked to make additional spectrum available for wireless broadband offerings. Spectrum is a necessary business input for a wireless provider that is not required of its wired brethren. Until such time that spectrum scarcity has been eliminated, net neutrality risks complicating this picture even further. In fairness, I don't worry as much about the dynamic of larger providers, as I do about the small business WISPs seeking to bring broadband to the more rural parts of America and trying to survive on tiny splices of spectrum, mostly unlicensed allocations.

Given this backdrop, I have yet to be convinced by arguments that wireless broadband services need to be treated (i.e., regulated) exactly the same as wired offerings. While I generally agree that like services should be treated the same way for purposes of the FCC rules, this tectonic shift in policy would ignore fundamental differences in the operations and capabilities of wireless networks.

More specifically, the basic architecture of a wireless network does not lend itself to constrictive rules. The mobility of wireless users, whether walking, riding or traveling in a moving car, forces providers to deploy extensive network management on a nanosecond by nanosecond basis. Whether on a scheduled pattern (i.e., daily rush hour) or by random occurrence, network congestion can occur instantaneously in a particular cell tower or area of towers. Freeing up capacity in certain areas, or adjusting the totality of users' experiences at that time, means that providers need flexibility to adjust to the appropriate circumstances.

Even if proponents of net neutrality are willing to cede this argument, the conversation generally turns to how to define "reasonable network management" in order to provide some type of exemption for Title II. Reasonable network management is practically undefinable, as it would have to incorporate perhaps a hundred intertwined elements, including network congestion, network integrity, and wireless personnel available, all dependent on the underlying circumstances. An action to relieve congestion one day may seem like unreasonable discrimination, whereas on another day it may not. But viewed in a vacuum without the luxury of knowing the precise reasons for any particular behavior or having expertise

in network architecture, I loathe giving such discretion and authority to any bureau staff for purposes of enforcement.

Moreover, we have already seen problems with interpreting the Commission's net neutrality transparency rule. Just look at the recent disagreement between Verizon and the FCC over the so-called throttling of high-data users at certain wireless towers under specific conditions. It is clear from the letters submitted that Verizon thought they were in full compliance and yet the Commission had a different interpretation. How is it possible that a transparency rule can be so non-transparent?

Point #3: Title II Results in New Fees on Broadband Services

Here is one practical effect of imposing Title II that you probably haven't focused on yet: under Title II all Internet services by an Internet Service Provider (i.e., telecommunications services) would be required to contribute to the universal service fund. This means that consumers of these services would face an immediate increase in their Internet bills. To put such an increase in perspective note that today's USF Contribution Factor stands at 16.1 percent and is expected to rise to at least 16.3 percent in the first quarter of 2015.

Moreover, before anyone tries to convince you otherwise, let's accept a truism: consumers pay for USF, not companies. Every so-called USF "contribution" by a telecommunications carrier is passed onto the consumer in rates or fees in some way. Even Net Neutrality guru, Tim Wu, said at a recent FCC legal roundtable and I quote: "Ultimately consumers always pay for everything anyways no matter what we say otherwise."

I am sure someone will try to suggest that by capturing all of the revenue from ISPs, the contribution factor will actually decrease. I understand the argument that by absorbing more USF payers, the amount of each contribution should decrease. But—and this is a big BUT—this only applies if you assume that spending for USF is going to stay constant. It is not. Look at our records in open proceedings: outside parties want more money from consumers to spend on E-Rate and Lifeline programs. And I am very confident that, based on my conversations, the Commission intends to go on a spending spree with regards to USF; in particular, on its E-Rate and Lifeline programs. Those programs are expected to be expanded by many billions of dollars and shatter the USF collection and spending levels of this year.

In sum, Title II would require Internet access consumers to pay into USF at a level that will not be trivial because the Commission already has for plans that money.

Separately, wouldn't it be ironic if the Congress is able to extend the Internet Tax Moratorium to prevent Internet access taxes and fees by states and localities in the coming weeks, only to have the Commission's net neutrality decision impose a fee on Internet access potentially in excess of any state or local sales taxes? Having worked on the Internet Tax Moratorium for numerous years, there is near unanimity in Congress that state or local taxes on Internet access would directly deter the ability of consumers to obtain and utilize the Internet. If that is an accepted premise, the same concept should apply to the net neutrality debate and its certainty to increase consumer bills.

Thank you for your time and attention. I suspect this won't be the last time I am asked to speak on the topic of net neutrality.