

**Remarks of
Commissioner Michael O’Rielly, Federal Communications Commission,
before the Association of National Advertisers
April 1, 2015**

Thank you for the opportunity to speak before you today. You’ve picked the right season to meet in our nation’s capitol to discuss issues of importance. No, it’s not the almost-budding cherry blossoms and warm weather but the close games and rating victories from the NCAA Basketball Tournament.

While it is not my role to defend the practice of advertising practices, let me respectfully suggest that I fully understand its importance to our economy. Without advertising and the benefits it brings, the cost of every product and service in America would be increased substantially. A threat to your industry also means risking significant job loss, innovation and competition in the many business sectors that are only able to survive and/or grow because of advertising revenues.

As I review the policy issues that your organization and members care most about, it is evident that a number of them closely intersect with activities at the Federal Communications Commission. These days that can be a very dangerous thing. From wireless and wireline Internet Service Providers to over-the-top video providers to traditional outlets and everywhere else, almost every media platform your companies use to advertise to consumers has come under assault recently at the Commission.

The people in this room understand better than almost anyone how rapidly our media environment is evolving, and how consumers are driving – and following – these trends. With online ad revenues now outpacing those of broadcast television,¹ and mobile ad revenues set to exceed desktop ad spending by early next year,² there are more ways than ever to reach consumers with advertising that is specifically tailored to their needs and interests. But many potential pitfalls lie ahead for all forms of media as the Commission tries to expand its authority into uncharted territory. And, be warned, FCC involvement occurs at the speed of regulation, not innovation.

On that point, you may be interested to know that broadband providers’ advertisements are garnering greater scrutiny and are even being used to justify FCC decisions to increase regulation. In January, the FCC changed the definition of what qualifies as broadband service, citing providers’ advertisements that, not surprisingly, encouraged customers to upgrade their plans to receive faster service. In February, the FCC used broadband providers’ advertisements regarding the speed and capacity of service as a key rationale for classifying broadband Internet access service as a telecommunication service.

It’s reasonable for advertisers to try to convince consumers that they need something better or different than what they already have. That’s your business. But I think we can agree that selling a product is a very different objective than setting technical benchmarks that have significant legal and regulatory consequences under the FCC majority’s reading of the statute or imposing new burdensome rules on broadband providers. Unfortunately, I would not be surprised if decisions like these begin to have an impact on how providers market their services.

¹ Robert Hof, *Online Ad Revenues Blow Past Broadcast TV, Thanks to Mobile and Video*, Forbes.com, April 10, 2014, <http://www.forbes.com/sites/roberthof/2014/04/10/online-ad-revenues-blow-past-broadcast-tv-thanks-to-mobile-and-video/>.

² Robert Hof, *Mobile Ad Revenues Will Blow Past Desktop Ad Spending by Early Next Year*, Forbes.com, March 25, 2015, <http://www.forbes.com/sites/roberthof/2015/03/25/mobile-ad-revenues-will-blow-past-desktop-ad-spend-by-early-next-year/>.

Net Neutrality

Since I alluded to the topic, let's talk a bit about net neutrality. I noticed that yesterday's schedule includes a panel entitled "The Brave New World at the FCC" focusing on net neutrality. Sadly, it's a fitting title. The FCC has imagined a dystopian future in which broadband providers block, throttle, and unreasonably interfere with Internet traffic to the detriment of edge providers and consumers. And it dealt with these non-existent problems by adopting a hyper-regulatory approach that will end up depressing investment and innovation. The FCC did much more than re-instate net neutrality rules; it also applied a set of arcane rules, known as Title II, that were meant to rein in monopoly telephone companies, not regulate broadband providers in a competitive marketplace.

Needless to say, I did not support the Commission's recent action for a host of reasons. In addition to the impact it will have on deployment, particularly among smaller ISPs, the FCC's decision will result in higher rates for consumers and businesses because it opens the door to new state and local taxes, including property taxes, and to new fees on broadband to support the federal universal service subsidy programs, all of which will be passed on to end users. This should be troubling to any company that uses the Internet to communicate with consumers.

The decision will also have a negative impact on innovation. The FCC adopted a vague catch-all rule that it will use to judge whether providers' practices are reasonable. For example, it will use that standard to decide the lawfulness of sponsored data plans that allow consumers to access content they prefer without counting against their data limits. Other attempts by providers to differentiate themselves through innovative partnerships and pricing models may also end up on the chopping block.

Perhaps the most important part of the decision, from your perspective, is the FCC's desire to edge into Internet privacy and security issues. The FCC previously indicated that, to the extent that consumer concerns about privacy and security are impacting broadband adoption, it has authority to act. In fact, the FCC has already taken an enforcement action against a carrier that failed to ensure that its partner kept subscriber information secure.

Now, the FCC has announced that it will be holding a workshop to discuss the privacy implications of the net neutrality decision, which appear to be quite broad. The decision states: "Absent appropriate privacy protections, use or disclosure of [personal and proprietary customer] information could be at odds with those customers' interests." Moreover, as lines continue to blur between broadband providers and edge companies, and given the majority's theory that it can regulate anything that impacts broadband adoption, the FCC's reach could ultimately extend to other companies that use consumers' online information.

What does that mean as a practical matter? It is hard to know for certain, but I could foresee the FCC trying to police how information is collected, used, shared, and stored, as well as disclosures to consumers about those practices. The net neutrality item takes the view that consumers need to know more about their service but are easily confused and might not make the right choices. On the one hand, the order mandates disclosures about all aspects of the broadband service and network performance. But on the other hand, the order does not permit consumers to direct how their own service should be prioritized because "the threats of consumer deception and confusion are simply too great." Therefore, it is likely that providers will be subject to detailed disclosures about privacy, but consumers will not be permitted the freedom to make their own decisions based on that information. Instead, it will be the FCC that decides how best to protect consumers.

Broadcasting

As your industry explores the rewards and challenges of the ongoing digital sea change, there is no doubt that traditional media such as TV and radio continue to play a strong role and bring in the lion's share of revenue. And as the broadcasting industry sits squarely within the Commission's jurisdiction, developments on this front should also be of interest to you.

While perhaps not the number one hot topic at the Commission recently, the broadcast incentive auction continues to rank very high on the list. From the media landscape standpoint, there will certainly be a reduction in the number of television broadcast stations as a result of the incentive auction. To put this in perspective, for the Commission to meet its spectrum clearing goals, we are talking about roughly 200 out of almost 1800 full power television stations turning in their licenses (or moving from UHF to VHF) and either exiting the business or pursuing a station combination (channel sharing). That's a little more than 10 percent. So changes are in the air for the broadcast media.

From a business perspective, television broadcasting has seen a slight financial rebound over the last few years, due to various reasons, including retransmission consent fees, political commercial revenues, and expanding demand for local programming. The view down the road is less clear. Some believe that broadcast television is dying, while others believe that it will continue to thrive and grow. The truth is that broadcasting still has a place in the communications environment, but it will probably continue to shrink, albeit not in an abrupt manner.

As you are all keenly aware, the expansion of consumers' time dedicated to other things, such as the Internet and over-the-top programming, means less direct attention on traditional broadcasting. But while the so-called millennials may not be a significant portion of the broadcasting audience today, people's preferences tend to change as they get older, get married and have families. Additionally, as the days of old, unsophisticated Nielsen ratings decline, technology will continue to improve allowing programmers to better analyze overall viewership and advertisers to better target audiences.

On the radio side, the marketplace is notably difficult. AM radio is facing a number of issues and a declining audience. The Commission has before it a number of proposals to help revitalize the industry by removing FCC barriers and restrictions, and I hope the FCC will act very soon on this item.

Over-the-Top Video

With so much content and so many consumers moving online, another very timely topic is the Commission's attempt to follow along by regulating online video services. Online video is proving to be the latest "killer app" driving rapid consumer adoption of cutting-edge devices and technologies. According to industry experts, video already accounts for two-thirds of U.S. Internet traffic today and is estimated to increase to approximately 80 percent in just three years. And while much of this nascent industry has relied on a subscription model so far, some services like Dish Network's Sling TV and Sony's PlayStation Vue are supported in part by ads, with Verizon now considering a mostly ad-supported revenue model for its upcoming online video service.

It's still unclear exactly what the Commission will end up doing in this space. I am worried that the December NPRM will lead to the Commission redefining some over-the-top video programming providers as Multichannel Video Programming Distributors, or MVPDs, a term originally created as shorthand to refer to both cable and satellite providers. One problem with this approach is that the law

doesn't seem to provide the Commission any authority to allow an opt-out. In other words, if the Commission declares an OTT video provider as an MVPD, it is so. And the limited benefits and many burdens of doing so will be applicable. It is difficult to tell what the end effects of such a course of action may ultimately be, but it is a safe bet that there will be significant unintended consequences on an emerging industry still trying to define itself, as it moves forward.

TCPA

While not on this year's agenda, I did want to draw your attention to an important issue that is impacting all sectors of the economy: litigation under the Telephone Consumer Protection Act (or TCPA). For those that might not be familiar, the TCPA was enacted in 1991 to address the issue of unwanted telephone marketing calls and faxes.

To be clear, I do not support companies hounding consumers with incessant or harassing calls. However, FCC decisions and court rulings have broadened the scope of the TCPA, creating uncertainty and litigation risk for legitimate businesses. As a result, businesses have to avoid making calls to their existing customers or clients even if the purpose of the call could directly and immediately help the customer.

For instance, should it be a violation of TCPA – subjecting entities to huge penalties and damages – for a health care provider to contact individuals to provide them with important lab results or post-operative follow-up information intended to prevent hospital readmission? Should we make it harder for a bank to notify consumers of likely fraudulent activity on their credit card? What about if the company is willing to offer ways to mitigate a potential upcoming student loan or mortgage default? These are just some of the issues pending in petitions before the Commission for action and resolution, and there are still more being litigated in courts throughout the country.

We have begun to hear from certain consumer groups that they are afraid that the FCC will “gut the TCPA” and lead us down a slippery slope of more robocalls. Nothing could be further from the truth, and I am concerned that catering to this unfounded fear will end up hurting the people they are trying to help. We have also heard that consumers *appreciate* receiving information as long as it is both *timely* and *relevant*. For example, people want to know that power has been restored after a storm so that they can return to their homes.

Some consumer groups like to make the point that companies can simply manually dial each and every telephone number rather than use electronic means. That's just unrealistic. The companies are trying to provide a useful service and if we make it too burdensome or costly for them to do so, then they won't make the calls. It's that simple.

We can't paint all legitimate companies with the brush that every call from a private company is a form of harassment. It is time for the FCC to act to provide clear rules of the road that will benefit everyone, and that means acting on TCPA petitions before us.

In closing, let me thank you for your attention. I also thank you in advance for being willing to defend your industry and practices before the FCC. As I like to say to groups I speak before, take the time and effort to explain your positions before an issue or item reaches crisis stage. By the time an issue reaches my desk, you are probably already cooked.