

**Remarks of Commissioner Michael O’Rielly  
before the Free State Foundation  
“Implementing Regulatory Reform at the FCC”  
July 28, 2015**

Thank you, Randy, for those kind words. I want to thank the Free State Foundation, under Randy’s leadership, for continuing to share its thoughtful analysis and views on issues before the Commission.

The Free State Foundation has been a leading advocate for improving the Commission’s processes. That is what makes the focus of today’s event on implementing regulatory reform at the FCC both timely and pertinent. I humbly suggest that my current position provides a fresh perspective on this overall debate. Hopefully, the ideas I will discuss today will be seen as an earnest attempt to make the Commission procedures more efficient, effective and fair.

*Importance of Process Reform*

From a substantive perspective, there are sound reasons to seek FCC process reform. Very few people would dispute the importance of the communications sector in today’s global economy. Its direct contributions to employment, overall GDP, goods produced and services offered, taxes paid, and many other components rival the largest of sectors. In fact, one mechanism to help determine the well-being of the U.S. economy is to review the health of the communications industry. Additionally, the productivity gained by advances in information and communications technology provides a multiplier effect, meaning economic synergies that result from purchasing and deploying such technology at higher rates benefit all sectors.

If done correctly, improving the FCC’s procedures can lead to a demonstrable advancement in the information and communications sector, and thus the U.S. economy. Every vote that centers on the specifics of the policy – rather than the shortcomings of the process – improves overall confidence in the agency and its regulations. This impacts not only the affected companies and consumers, but also partner companies, the greater financial community, and even Capitol Hill. Clarity, predictability and fair play at the Commission matter very much to the outside world. Our process can lower costs for borrowing, impact deals and mergers, and improve company bottom lines, which can translate into advances in innovation, increased employment and a higher standard of living for all Americans.

*Definitions and the New Task Force*

To start, let me frame the discussion by broadly outlining what I see as process reform because the phrase can mean a lot of different things to different people. When I first arrived, the staff was diligently working on ways to improve the Commission’s “process.” That entailed examining how Bureaus within the Commission were tackling matters, improving interactions between the Bureaus, reducing paperwork, etc. Those are very important tasks that I generally supported but they are not as impactful to the larger purpose.

When I speak of process reform, I mean exposing the weaknesses and correcting the flaws in the mechanisms for decision-making at the Commissioner or “Eighth Floor” level. I do not intend to suggest that all wisdom and power comes from the Eighth Floor, but only that it has more bearing on the benefits of reform.

Perhaps it is equally important to address what FCC process reform is not. While it may surprise some, I do not view process reform as a revenge maneuver for Net Neutrality, nor have I had any conversations with the diligent and relevant Members and staff, regarding the interaction between process reform and the policy disagreements on that issue. As I have said before, many of the procedural concerns arose prior to the current Administration or Chairmanship. Therefore, there is no one specific process foul that has generated the need to improve the way the Commission advances its business.

The good news is that the agency has a new Process Review Task Force. This new ad-hoc group, established by Chairman Wheeler, is made up of representatives from each of the Commissioners' offices. As prior Congressional testimony by the Chairman indicated, a central reason for the task force is to consider "how to better the ability of Commissioners to govern together." That is a worthy goal and focuses attention on the heart of what I define as process reform: Eighth Floor decision-making.

Now, the bad news. While it is somewhat early to provide a report card, it appears that there are differing interpretations of that mission, combined with selective backtracking by some from the task force's purposes. If the five offices cannot agree on what it is to do, I am fairly certain that its ultimate ability to produce any tangible result will be in serious jeopardy. Instead, it will function as a mere diversion, or worse a time suck. In sum, such disagreements could ironically bury internal agency process reform in a death spiral of its own process.

### *Principles for Procedural Reform*

So, how should we approach process reform and what should be the governing principles for presented ideas? For me, I think it centers on four main factors.

**First, the reform proposal must improve the functionality of the Commission.** There is no reason to alter a current procedure if the replacement will cause more harm than good. But let's be clear: functionality does not mean speed, which can be both helpful and detrimental depending on the circumstances. For instance, consider if the Commission delegated every item to the Bureau staff. Admittedly, doing so might increase speed releasing initial decisions but would also be extremely problematic and harm functionality for final results.

**Second, any ideas should improve the Commission's legitimacy.** Procedural shortcuts may achieve short term wins, but they are unnecessary and do not make good precedent nor promote the sustainability of decisions. Too often, interested parties argue – with some justification – that their requests, petitions or views are being overrun by the Commission's process. This undermines the ability of the agency to act in other instances and undercuts the agency's reputation, which is an important consideration for Capitol Hill, the courts, consumers, regulated entities and our international partners.

**Third, reform should lead to greater transparency of Commission actions and decisions.** The more I have explored reform ideas, the more amazed I have been by the disinterest of some in informing the public at large of exactly what the FCC is considering on any particular issue. There is almost an indignation that if the public really knew, it would generate more work and slow down our ability to reach decisions. The goal of our current procedures seems to be hide the ball and obfuscate, and on that we are doing a bang-up job. This is a backward perspective that dismisses our obligation to the American public, as well as our duty under the Administrative Procedure Act. It also ignores the benefits gained by welcoming more and diverse ideas to the Commission's proceedings.

**Fourth, any reform idea should not attempt to undermine the authority of the majority.** You may be surprised that I would include this in a framework, but I see this as a nod to reality. Absent any statutory change enacted by Congress, no sitting Chairman will voluntarily yield power or authority. Any reform proposal that attempts to do so provides an easy excuse for dismissal and can damage the entire reform effort. Instead, ideas should focus on ways to improve the process without disrupting the balance of power.

### *Substantive Reform Proposals & Ideas*

At this point, it may be appropriate to move from the theoretical and discuss some specifics. Over the last many months, I have penned nine blog posts outlining differing ideas. In addition, I have a number of other ideas that haven't been fully presented publically yet. With your permission, let me walk you through these ideas, and hopefully it will provide a basis for the following panel conversation. Admittedly, given the time restraints, I will attempt to shorten the presentations as best as possible.

#### 1. Posting Meeting Items in Advance

Under Commission rules, as soon as Bureau staff circulates draft items for the Open Meeting, typically 21 days in advance, Commissioners are not allowed to reveal the details with outside parties. This prevents the public from obtaining a complete picture of what is in pending proposals or orders, leads to routine confusion over what exactly is at stake, wastes time on irrelevant issues, and bars a fulsome exchange of ideas. My proposal is to publically release the text of Open Meeting items on the Commission's website at the same time they are circulated to Commissioners' offices. The few arguments against this proposal have been generally debunked as attempts to preserve the status quo. Thankfully, there has been receptivity for this idea on Capitol Hill from both authorizers and appropriators.

#### 2. Post Adoption Process & Editorial Privileges

One might assume, based on the name, that the scope of "editorial privileges," if they did actually exist in our rules, would be limited to non-substantive edits, such as correcting typos and updating cross-references in footnotes. In my former job, we called them technical and conforming edits. At the Commission, however, the Bureaus or Offices often do much more substantial editing, including adding substantive and significant rebuttals to Commissioners' dissents and providing sometimes lengthy responses to ex parte arguments that had not been incorporated into the draft prior to the vote. There is a very simple procedural reform that I put on the table to resolve this practice: narrow the scope of what can be done under editorial privileges and codify this refined list in the Commission's rules.

#### 3. Pre-Adoption Process

As I mentioned, Commissioners receive meeting items from staff not less than three weeks in advance of a planned vote. Unfortunately, the current practice allows incomplete and unfinished documents to circulate. These three weeks are being treated as bonus rounds to make significant substantive changes. The simple fix is to clarify that the circulation of Open Meeting items should mean that it has been transferred from staff to the Commissioners for consideration.

Similarly, the "official email chain", which is intended to provide accountability for and a record of all substantive changes to an item during the three week period, is not being used to reflect all substantive

changes. To improve accountability, I proposed that any changes suggested by Bureau staff should be made under the Chairman's name and posted on the official email chain. Moreover, we must codify in our rules that the ultimate text of a meeting item to be voted on at an Agenda Meeting must be provided to the Commissioner offices no later than 24 hours before the start of the meeting.

#### 4. Guest Speakers and Questions of "Witnesses"

In recent years, the Commission has attempted to enliven the scripted Open Meetings by bringing in special guests. While these witnesses may provide some insight into issues the Commission is considering, these views and presentations come far too late in the process to inform the outcome of an item. Worse yet, inviting guest speakers appears to be an attempt to further promote the viewpoint being championed and rebut or dilute dissenting opinions. I proposed that if guest witnesses are to be invited, three simple procedural reforms are in order: Commissioners should be informed of any guest speakers no later than two weeks in advance of the meeting; Commissioners in the minority on a particular issue, if any, should be offered the opportunity to help choose the speakers or be allowed to select their own; and any speakers should be required to provide their testimony to all Commissioners' offices no later than 48 hours in advance of the meeting.

#### 5. Establishing Time Limits & Sunsets

All too often, the FCC imposes rules, placing new burdens on companies and affecting the marketplace, without any plan to revisit whether those rules remain necessary or relevant in the future. These decisions, and their attendant costs, can linger for years on autopilot while the FCC turns its attention to other policy matters. While the FCC has statutory obligations to periodically review certain aspects of its rules, such as section 11 of the Communications Act, these requirements are generally given short shrift, when they are adhered to at all. As a remedy, I propose that the Commission add sunset provisions to agency orders. The length may depend on a number of factors, including the state of the market, how detailed the rules are, and the resources needed to update the regulations. Let's face it: nothing produces an honest assessment of a rule or program like its pending expiration.

#### 6. Delegation of Matters to Staff

At times, the Commission has, by order, given additional authority to the Bureaus and Offices, beyond what is already provided for in the rules. While such ad hoc delegation can sometimes be permissible, why am I hamstrung by a decision to delegate an issue to staff made by a Commission years ago or contained in a partisan order which I opposed for substantive reasons? Additionally, it now appears that there is a renewed effort to push even more of the Commission's work to its staff, which is detrimental to the Commission and only delays a final outcome. Accordingly, I suggest changing our delegation practices as follows: a Commissioner should have the right to request any item be bumped up to the full Commission for resolution; a notification of an item issued by delegated authority should be provided to Commissioners 48 hours in advance of its release; we should codify this 48-hour rule with appropriate modifications; and lastly, the scope of any delegation should be limited to narrowly-defined circumstances.

#### 7. Predictive Judgment & Interim Rules

The Commission sometimes makes predictions about how markets will evolve and about the impact of its rules or policies on the industry and stakeholders. A "predictive judgment" is supposed to be an

educated and reasoned estimate of the most logical and likely outcome in a particular situation. It shouldn't come as a surprise that predictions made years ago about how technology, especially the Internet, may develop aren't always on target. Just yesterday, I proposed that any use of a predictive judgment should include a timeframe for revisiting the prediction, not to exceed three to five years without affirmative review.

Likewise, it is not uncommon for the Commission to establish "interim" rules when it is attempting to preserve the status quo or avoid a market disruption pending the completion of a broader rulemaking. Adopting "interim" regulation can be useful, but it has also been used to lock in policy preferences for an extensive period of time, free from significant legal challenge. I proposed that any interim rule should be accompanied by a timeframe for completing the final rules, not more than 18 months.

#### 8. The Commission's Advisory Committees

The current workings of the non-statutorily set advisory committees exclude Commissioners from having any involvement in the membership, selection of the committee chairs, timing of any reports and/or recommendations, or other aspects of their operations. Further, participation by some outside parties isn't truly voluntary and the independence of the advisory committees is questionable, given that the outcome of their work seems preordained. I propose that we need to approach the assignments to advisory committees in a more neutral way and any recommendations be fully balanced.

#### 9. Enforcement Accountability for Fines and Penalties

You may be unaware that the Commission has no idea whether parties are actually satisfying the terms of its enforcement actions, including whether entities actually pay the fines or penalties assessed. Once a Forfeiture Order is finalized, it somehow seems to drop off the FCC's radar. Tracking such information is important to ensure that the American people are compensated as required under the law, to improve the likelihood the actions are a deterrent to others, to ensure that any precedent set is sound and lasting. The simple fix is to build a sufficient relationship with the Departments of Treasury and Justice, without undermining our independence as an agency, to receive ongoing updates on the status of our forfeitures. How hard can it be for the Commission to agree to this?

#### *New Ideas*

While I am before this distinguished audience, I thought I would provide some insight on those items that will be forthcoming in upcoming speeches and blog posts.

First, if you haven't noticed, the Commission provides little to no justification for the use of various statutory provisions in items. Instead, it commonly adds sections 1, 2, 4(i) and 303(r) as a laundry list of authority to most items. I suggest that the Commission should be obligated to justify why and how each statutory provision is used in an item. Second, as long as the Process Review Task Force is going to examine other agency practices, we should give a hard look to one used by the Federal Trade Commission, which can vote to bar staff from working on a subject if three Commissioners vote to do so. Third, we should publish any rules adopted at an Open Meeting on the same day. Last and not least, the Commission should establish formal rules for all of its internal procedures contained in the Code of Federal Regulations, not just an informal and out-of-date internal handbook. Let's provide a little more sunlight so everyone knows the process by which items will be considered.

*Closing*

I appreciate the opportunity and platform to discuss what can be improved with the Commission's internal procedures and my ideas for doing so. Thank you very much for your attention.