

**Remarks of Michael O'Rielly, Federal Communications Commission
Before the Prosperity Caucus
September 21, 2015**

(AS PREPARED FOR DELIVERY)

Thank you for that very kind introduction, Ike. Hopefully, you all agree with me that Ike has done a wonderful job revitalizing the Prosperity Caucus. Having spent a considerable part of my career working on Capitol Hill, I can state unequivocally that we need more organizations like this one. It is absolutely necessary for sound economics to have a greater role in our policymaking, both in the Congress and at Federal agencies. One way to do that is to make sure leading economists get together and discuss issues of the day, both short- and long-term ideas, as you do here at the Prosperity Caucus.

Being before you tonight allows me to combine two of my favorite things: I get to talk about myself, well more specifically my view on communications policy, while enjoying a good, frosty cold beer. The FCC should consider adopting a similar style. Imagine if our monthly meetings, which tend to be staged events, were to occur after a nice happy hour. I suspect it might allow us to find common ground more often.

If you might indulge me, I thought I would use this valuable platform to talk about a couple of issues relevant to the communications world that you may find of interest.

Economic Freedom

The very first speech I gave as a Commissioner was before the Hudson Institute in February of last year. It should come as no surprise, given my conservative bent, that the views I expressed at that time are still the ones I maintain today. Practitioners before the Commission are certainly free to score my consistency. In that speech, I discussed my approach to issues at the FCC. I'd like to share with you some of those thoughts and update them based on my almost two years of experience at the Commission.

It is my strongly held belief that the most enduring value of America is freedom. Our nation began with the desire to be free from the paternalistic monarchy in Britain. To preserve our overarching freedom, our forefathers embedded into our Constitution certain protections to ensure that the government does not abuse its power or harmfully restrict individual liberty. These principles of a free society, such as the freedom of speech, religion, assembly, and so forth, are also inherent in the concept of free markets, which form the basis of our economy.

In our system of free enterprise, we hold the belief that consumers and businesses should be able to freely buy and sell, without needing the permission of the government, and with minimal restrictions placed on business activities or asset ownership. And although these days it may seem as though profit is a being treated as a bad word, know that for me I see profit, not as harmful, but as a shorthand for

employer, dividend payer, taxpayer, community participant and many other things. Policymakers in Washington, D.C. should be constantly on guard against unnecessary restrictions that interfere with the freedoms of any willing buyer or seller in our economy, because we have no idea what types of products or services our regulations may discourage from coming to market.

Along those lines, Commission staff should not advocate for local governments, like cities and towns, to enter the marketplace by creating communications services to directly compete with private companies. Such a practice should be characterized for what it is: borderline socialism. Have we not seen how government entrants use unfair advantages not available to private companies? Haven't the technology companies' experiences internationally, such as in China, shown how government players can dangerously distort the market?

Championing economic freedom is my guiding principle when it comes to overseeing the communications industry. To inform my decisions, I consider the following.

First, the Commission must consider whether it has the authority to regulate, as well as realizing the confines of that authority. There is no place for us to implement rules that have no basis in the statute, even in a well-intentioned effort to further a supposedly desirable policy. The Commission exists to implement the statute—no less and certainly no more.

Second, the Commission must have verifiable and specific evidence that there is a market failure before acting. In many cases, competition and industry self-regulation are sufficient to ensure that services are provided and consumers are protected. And it should only regulate when there's evidence—bona fide data— that an actual problem exists resulting in real harm to consumers that the Commission can solve.

Third, when the Commission does intervene, its solution should be carefully tailored and apply only to the relevant set of providers or services. We must guard against over-regulating by analogy.

Fourth, the benefit of regulation must outweigh the burdens. Even when rules are grounded in the statute, based on evidence, address a real harm, and target a specific problem, there are still costs to intervening, and we must consider those costs as part of our analysis.

Cost-Benefit Analysis

Speaking of cost-benefit analysis, this gets me to my second topic: the Commission's unwillingness to conduct and consider proper cost-benefit analyses. If we start from the premise that all regulations carry costs, which are inevitably passed on to consumers in one form or another, then there is an obligation on every federal agency to determine whether the actions it proposes will result in costs to providers, consumers or society as a whole that outweigh the purported benefits. This simple concept is the basis of significant economic literature and has generally gained considerable traction with modern policymakers (and has generated fortuitous lines of work for many of you, as someone has to crunch all those numbers).

Presidents Clinton and Obama have both concurred with this line of thinking and issued executive orders requiring agencies to conduct comprehensive cost-benefit analyses to ensure that rules are warranted and narrowly tailored to address the problem at hand. In Executive Order 13563, President Obama reaffirmed that executive agencies should “propose or adopt a regulation only upon a reasoned determination that its benefits justify its cost” and must “use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” He also called upon independent agencies, such as the FCC, to follow the same principles. But despite promises and commitments to do so, the Commission rarely does anything remotely close to the detailed cost-benefit analysis required.

By any measurement, the FCC appears not to view CBA as a priority or worthy of rigorous attention. If you were to examine the items considered and approved during my time there, you would be hard-pressed to find anything that even remotely lives up to the requirements. It's generally just not included. Instead, contained within items will be a couple of sentences asserting that the costs will be minimal but the benefits considerable. They resemble throw away lines that you could typically find in a press release, not the work of a so-called expert agency that has oversight over one of the most dynamic markets in the U.S. economy. More troubling, in those rare instances where the Commission does attempt to quantify the costs and benefits of a proposed rule change, the costs are typically underestimated while the benefits are wildly exaggerated.

Let me walk you through how this practice works as it relates to items involving public safety. If a Commission item can be linked in any perceived way to improving overall public safety then the cost-benefit analysis is immediately quantified by the Economic Value of a Statistical Life as previously calculated and determined by the Department of Transportation. For those unfamiliar, that's \$9.2 million per individual. Accordingly, the Commission's work becomes simple arithmetic: multiply \$9.2 million by the number of people some study guesses could have a health impact from a particular telecommunications policy, and presto, you have millions or even billions of dollars in benefits. Who could ever say no to that?

Take, for example, changes to the Commission's obligations on providers pertaining to 9-1-1. In the Commission's Text-to-911 item from August 2014, it used the number of cardiac arrest emergency calls that may be made by hearing impaired and deaf individuals, discounted it by half and then multiplied it by the then-DoT value of a life of \$9.2 million. Hence, a figure of \$63.7 million on the benefits side. The cost ledger was minimized and then dismissed.

The overall CBA process is also broken. While I described the type of information that is typically provided to Commissioners, there is often a more in-depth analysis done after an item is adopted in order to comply with the Paperwork Reduction Act. At that point, the Commission staff prepares certain items for the scrutiny of the White House's Office of Information and Regulatory Affairs. Think about that for a moment: despite any pleading I do or requests for information I seek, the real CBA, when necessary to justify document submissions or information requests, is routinely done completely

separate from the approval process. How much more backwards can it be? In essence, we are keeping the intended decision makers—as outlined in the law—in the dark and allowing staff to skirt any real cost-benefit analysis until it is too late to matter.

The lack of thoughtful cost-benefit analysis will have even greater impact as the Commission expands the boundaries of its mission. For example, under the Commission's 2015 Net Neutrality Order, broadband providers are expected to report on just about every aspect of their practices and services, including metrics like jitter and packet corruption, which are highly unlikely to be meaningful to the average consumer. These expensive and burdensome reports that add no measurable consumer benefit are exactly the type of regulatory overreach that cost-benefit analysis is meant to prevent.

Therefore, I seek your assistance. You didn't think that beer was free, did you? Many of you are in the economic field in one capacity or another, and the Commission desperately needs to be challenged on all of its cost-benefit analysis assumptions and underlying work. Whether it is you or someone you know, please be willing to consider taking up the mantle and critiquing the Commission's work, either as a whole or on an individual item basis. There is little that I can do to force more rigorous analysis at the FCC without sound data to raise in response. In addition, we need private economists to file their own analyses in our proceedings. Our record filed by outside parties on any typical item, outside of Net Neutrality or merger applications, is generally abysmal when it comes to economic analysis and any type of CBA – and if it's not in the record it's very hard for me to persuade my colleagues of the real costs of a particular action.

FCC Economists

My last subject for tonight's discussion is the dearth of economists at the Commission. To be fair, we have wonderful people at the agency and they work exceptionally hard, although not *always* on the things I would like. But the fact of the matter is that we have a lot more lawyers than economists. One difficulty is that federal hiring practices make it easier to hire lawyers. The playing field is tilted towards JDs over PhDs or masters degrees. That unbalanced structure does have an impact on the approach taken by staff and eventual outcome of items.

You can see this reality on any high-profile issue before the Commission. One of the first things the Commission does in those instances is to sign a contract or contracts with outside economists to perform certain functions. While the Commission has a number of economists and probably even some this crowd might find philosophically acceptable, staffing levels are regularly found to be insufficient for Commission tasks, a sure sign of misplaced priorities.

* * *

So, I appreciate your attention as I outlined three areas relevant to the Commission's work: my overall approach to communications issues, our sad story of CBA compliance, and the need for more economists at the Commission. I hope you found that interesting and somewhat pertinent. And as I

often do at events such as these, let me extend my open door policy to any of you that may want or need to see the Commission. And I would love to hear your thoughts on any ways you may see to improve the functioning or the work product of the Commission.