Statement of Michael O'Rielly, FCC Commissioner
Before the Subcommittee on Communications and Technology
House Energy and Commerce Committee
"Oversight of the Federal Communications Commission"
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Thank you for the honor to be before this Subcommittee to help further its oversight over the Federal Communications Commission. I thank the Chairman, the Ranking Member, and all the members of this Subcommittee for the opportunity to engage with you on many important issues and answer any questions you may have.

Planning For the Future of Wireless

On a substantive topic of interest to this Subcommittee, the Commission has generally been in agreement regarding the need to ensure that the U.S. remains the world leader in wireless communications by taking steps to release needed spectrum into the marketplace and reducing barriers to facilities siting. Currently, I am focused, as are many of my colleagues, on opening up millimeter waves for next generation networks. All potential bands should be considered, and simple and proven licensing frameworks should be adopted to ensure maximum investment and innovation.

The Commission also appears on track to meet its commitment to provide further relief for small cell siting. But more can be done to increase infrastructure deployment. The Commission can start by concluding the decades-old twilight tower review. I have also been drawing attention to the continuing complaints that, despite Congress's intention, localities continue to hinder facilities siting. We must ensure expeditious and cost-effective network deployment to keep pace with America's demand for wireless offerings.

In this same vein, we must increase our efforts to open the 5.9 GHz band for unlicensed use. Combining these frequencies with adjacent 5 GHz spectrum would permit increased throughput, speed and capacity. It is not my intention to prevent or undermine dedicated short range communications (DSRC) deployment. Let me be clear that the sharing of this band needs to be accomplished without causing harmful interference to safety-of-life applications. So what needs to be done?

First, the Commission must conduct testing based on a sound test plan and bona fide science. The Commission, as opposed to any other agency, has the expertise to determine whether there is risk for harmful interference, and it is our duty to ensure that the band is used efficiently and as intended. Shortly, the Commission plans on refreshing the record and calling for manufacturer prototypes for testing. Everyone has been on notice for some time that we are moving forward – manufacturers and the auto industry should be prepared to supply any equipment necessary to enable the Commission to test all industry plans.

Second, protections should be limited to DSRC functions that protect safety-of-life, which must be reasonably, but narrowly, defined. Applications – such as social media, advertising and e-commerce, or locating parking spots – that are neither time nor safety-critical, can be provided using unlicensed spectrum, or are better suited for other bands or partnerships with commercial providers.

Third, the Commission must proceed promptly to resolve this issue as it represents the greatest opportunity to expand unlicensed use, particularly Wi-Fi, for the near future. This needs to be done regardless of the WRC-15 decision to study this band. As is the case with other spectrum, such as the 28 GHz band, the U.S. must move forward despite what other countries or international bodies may decide in the future.

Ongoing Process Concerns

Today, Commissioners do work together on certain issues – and I hopefully play some role in our bipartisan agreements. However, the Commission is often fragmented, which is especially noticeable for the larger ticket items. For instance, while I maintain a voting record of approximately 90 percent with the Chairman for circulated items, the percentage of open meeting items on which I have agreed is only approximately 65 percent. That is up slightly from 62 percent a year ago, likely due to a recent effort to include one non-controversial item on each month's agenda. A significant reason for disagreements can be traced to procedural fouls that are unnecessary, unwise and harmful, which I will discuss in detail below.

Further, the overall direction of the items often push the boundaries of what can or should be asked of the minority members, seeking to undermine our fundamental principles. This too could be simply avoided by moderating the scope of items to accomplish what is necessary without including needless legal and policy rationales with which we cannot agree. The current situation at the Commission reminds me of a saying by a wise former employer of mine, who often defined the art of the possible as something along the lines of: if I don't ask you to bend on your principles and you don't ask me to do the same, there is a lot of room remaining in the middle in which to find agreement. The Commission would do well to follow that advice rather than constantly pushing the envelope into questionable directions, at the expense of collegiality, staff morale, and soundness of decisions. Indeed, the fact that Congress has begun to intervene on a bipartisan basis to overrule certain FCC decisions shows the extent of the Commission's overreach.

As this Subcommittee and indeed, the full House of Representatives, have recognized, systemic problems with FCC processes have harmed the agency's ability to fully and fairly consider important policy proposals. Transparency continues to be treated as merely a buzzword, parties engaging with the Commission are treated unfairly, and the agency minimizes accountability in many instances by

delegating decisions to the Bureaus that should be made by the Commissioners. The FCC Process Reform Act currently awaiting Senate action would be a step in the right direction, more probably needs to be done on the legislative side, because it is becoming clear that no one should expect the current Commission to take any initiative on its own in this regard.

Chairman's Task Force

When the Commission testified before this Subcommittee last March, the Chairman said that I was asking "some really good questions about longstanding processes," and announced the formation of a new task force that would "move forward to address what I think are some of the legitimate issues that Commissioner O'Rielly has raised."[1] A month later at a hearing specifically directed at improving Commission transparency, the Chairman reiterated that "[w]e are moving ahead without legislation,"[2] and argued the Commission should be given a chance to do its job. And in another Subcommittee appearance in November, the Chairman reported that process reform was a priority and that, through the task force, he would work with his colleagues to make further improvements to the agency's operations.[3]

While I was happy to engage in this internal effort, I said at the time that the task force should complement – not substitute for – Congressional efforts to move process reform legislation. A year later, I believe this assessment is more germane than ever. My staff remains fully engaged, but nothing has

[1] *FCC Reauthorization: Oversight of the Commission, Hearing Before the Subcomm. on Communications and Technology of the H. Comm. on Energy and Commerce,* 114th Cong. (March 19, 2015) (preliminary transcript). http://docs.house.gov/meetings/IF/IF16/20150319/103182/HHRG-114-IF16-20150319-SD003.pdf

[2] *FCC Reauthorization: Improving Commission Transparency, Hearing Before the Subcomm. on Communications and Technology of the H. Comm. on Energy and Commerce,* 114th Cong. (April 30, 2015) (statement of Federal Communications Commission Chairman Tom Wheeler). http://docs.house.gov/meetings/IF/IF16/20150430/103399/HHRG-114-IF16-Wstate-WheelerT-20150430.pdf

[3] *Oversight of the Federal Communications Commission, Hearing Before the Subcomm. on Communications and Technology of the H. Comm. on Energy and Commerce,* 114th Cong. (November 17, 2015) (statement of Federal Communications Commission Chairman Tom Wheeler). http://docs.house.gov/meetings/IF/IF16/20151117/104195/HHRG-114-IF16-Wstate-WheelerT-20151117.pdf

emerged nor is anything meaningful likely to develop from the seemingly endless task force meetings. On its one-year anniversary, it seems appropriate for the question to be asked: what *is* the "task" of this force?

Harmful Practices

Meanwhile, the Commission continues doing business as usual with all the corresponding difficulties. We continue to see problems month after month stemming from the fact that the proposals we vote on are hidden from the public until it is too late for meaningful input. In order to address this concern, it has now become a ritual for the Chairman's office to release a one- or two-page, often inaccurate or misleading, "fact" sheet purporting to describe the details of each major proposal, along with one or more prose versions of the same talking points in the form of a press statement or blog post.

These hand-selected tidbits comprise all the information stakeholders, including the American people, are given every month when attempting to engage with the Commission on complex issues from expanding Lifeline to setting the rules for the upcoming spectrum incentive auction. The predictable result is confusion and misdirection, frustrating all involved, sometimes including the Chairman himself. For instance, during last month's meeting to consider the set-top box proposal, the Chairman alleged that, "there have been lots of wild assertions about this proposal before anybody saw it." The source of the wild assertions may be up for debate, but the need for more transparency shouldn't be. This need could be simply resolved by ensuring the public availability of the documents prior to Commission vote.

The obvious transparency problem is compounded by the unfair application of an FCC rule that prohibits all the Commissioners (but not the Chairman) from discussing the substantive contents of a proposal, outside of the limited universe set by the one-pager, with anyone. I am unable to correct or give any context to the assertions made, and unable to point out areas of concern that are conveniently left

unmentioned. Often the only answer I can give to questions I am asked is "you'll find out after the vote." Just this month, I formally requested written authorization to discuss the Lifeline and Broadband Privacy items. With Sunshine two days away, the failure to respond to my requests means that they have been effectively denied. Unfortunately, I am not surprised as my repeated calls to unlock the documents or at the very least to allow Commissioners to discuss all the terms of proposals openly and honestly have gone unanswered.

Further, the timing of when Commissioners actually get documents is problematic as it has become standard procedure for the Chairman's staff to provide off-the-record briefings to favored reporters days before an item is circulated to Commissioners. The day of circulation, a major press rollout occurs complete with press releases, blogs and "fact" sheets, but the actual document under consideration doesn't hit my inbox until hours later, sometimes late at night. Meanwhile the press is reporting that the item has circulated and asking for comment. Consider this: two weeks ago when the Lifeline item was rolled out, but not yet actually circulated, I was asked for comment about the "budget mechanism" being proposed. The need for a hard budget is an issue I have been outspoken on for quite some time, so it made sense that I would be asked for a reaction, but my response had to be that all I had seen was the publically available one-pager, from which it was impossible to tell what was meant by the term "budget mechanism" and more specifically, what would happen if the proposed figure was exceeded. Would the full Commission need to vote to increase the amount? Later, after I was sent the full document, the specifics became clear to me, but unfortunately, as previously discussed, I am prohibited from making them clear to anyone else.

Citation Process

The tendency to cut corners unnecessarily and subordinate fairness in the pursuit of headlines appears in other contexts as well. In September, the Enforcement Bureau made a big splash by issuing

citations, including to First National Bank, on the basis of a novel and controversial TCPA theory. Conceived as an avenue to give a "heads up" to an entity we don't traditionally regulate before starting an enforcement procedure, the citation process was never meant to be used to blindside an unsuspecting party with a damaging press offensive, but that is exactly what happened here. The CEO and other high level employees of First National found out about the situation from widespread press reports that gave the impression the FCC had already determined guilt based on an accusation no one at First National had ever heard of. The bank's copy of the actual citation document arrived via snail mail days later. I am deeply troubled that the citation process is being used not as a warning but as a mechanism to trigger an instant trial and verdict by public opinion, and so I have proposed that going forward no citation should be publicized until the target has been notified and given adequate opportunity to respond. While I suspect we may not see this practice used again in the immediate future given the reaction, no change or fix in our procedures has been adopted to address the possibility.

Real Threats to "Permissionless Innovation"

When we were here a year ago, the Commission had just adopted a deeply divisive item on net neutrality, likely one of the more significant decisions ever made by the FCC. One year later, consumers, providers and the Commission can see some of the tangible negative effects previously anticipated from that decision.

More specifically, a major concern at the time was the decision's impact on innovation and the ability or willingness of providers to deploy new services to meet the needs of consumers. Many of us argued at the time that the end result of that decision would be a need for providers to play an expensive game of "Mother May I" with the Commission to secure tacit or explicit approval of any new offerings going forward. With the agency tacking a maximally vague "general Internet conduct standard" onto the full range of regulatory options under Title II, it was hard to see how it could it be otherwise.

Despite protestations that the order would keep the environment safe for "permissionless innovation," we are already seeing startling interference by the Commission in providers' decision making. For example, one provider's new zero-rating offering was seemingly given a green light by the Chairman in November, only to have the rug pulled out a month later when the Chairman announced that he was "inviting" this provider, along with two others, to meet with Commission staff to explain themselves before a deadline set within a few weeks. Why the change of heart and how is this considered an invitation? According to the Chairman, it was not an enforcement proceeding, not an investigation, but merely an information gathering effort.

Along with my colleague Commissioner Pai, I asked that representatives from each Commissioner's office be allowed to attend these meetings. After all, whatever the outcome, it was likely that each of us would receive multiple, possibly conflicting, accounts, and possibly be asked to intervene somehow. Wouldn't it be better if everyone was at least on the same page about what was said and by whom? Our request was denied by Bureau Chiefs based on the argument that the Chairman's staff would not be attending either. But since they themselves report to the Chairman, this is an empty distinction.

Today, more than three months after a shadow of suspicion was cast over three major broadband providers in the most public way possible, many questions remain about Commission internal procedures on such matters and no answers are forthcoming. Further, since there is no real proceeding, all of these meetings are being conducted without the benefit of ex parte filings. The targeted providers have no way of knowing who else has been questioned about the effects of their offerings, or what was said. The fates of consequential business plans are being left in limbo with no way for any of the targets to clear their names and start the slow work of regaining public confidence. Consumers and investors alike have to live with a big question mark about popular current and future offerings that may or may not survive. It's not a public proceeding, it's an inquisition. And it is showing, much more quickly and clearly than even I

thought possible, that "permissionless innovation" is far from what the FCC has in mind under this new regime.