

**Remarks of FCC Commissioner Michael O’Rielly**  
**TPRC 44: Research Conference on Communications, Information and Internet Policy**  
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Thank you for inviting me to join you at this conference, although I feel a bit out of place as a lowly policymaker amongst such distinguished scholars. It reminds me an old Chinese proverb: “The great scholar forgets about fame, the average scholar works for it, and the unworthy scholar steals it.” So, I look forward to appropriating your good work to further my causes and arguments!

For years, TPRC has brought together leading researchers and policymakers to explore key issues in communications, information, and Internet policy. From privacy to spectrum policy to zero-rating, this year’s papers tackle some of the most important topics being considered and debated at this moment in time, and demonstrate that they can be studied with the same academic rigor that is used to test ideas and hypotheses in other important fields.

The basic idea that federal agencies should use data to inform and evaluate programs and policies to make them more effective has generally been embraced in a bipartisan manner over the past several decades. Most recently, it has taken form in the push for evidence-based policymaking. Putting this ideal into practice, however, is not an easy undertaking, and such an approach is often not welcome.

Instead, Federal agencies, even so-called “expert” agencies, tend to focus on what has worked in the past, continuing to view current trends in light of old regulatory paradigms, even if available data suggests that a new approach is warranted. Therefore, it is not uncommon to witness backward-looking solutions proposed for forward-looking issues, without serious consideration of whether alternative approaches would produce more efficient outcomes, or whether regulation is necessary or useful at all. At the same time, there is a rush to “complete” items to meet arbitrary agendas and deadlines. So, slowing down to consider a different path violates the overall demand for policy “victories.”

In recent years, the Federal Communications Commission too has avoided engaging in this type of serious analysis and reflection. FCC Notices and Orders rarely contain a detailed discussion or rebuttal of opposing legal or policy arguments, data that does not support the desired outcome, or realistic assessments of the benefits. At most, alternative arguments and data are relegated to footnotes where they are summarily dismissed, often en masse and without any corresponding data or fact-based response.

To combat this general tendency and help ensure that agency regulations are data-driven and justified, Congress and successive Administrations have directed agencies to perform more quantitative analyses of their regulations. These efforts have taken a number of formats, including a series of Executive Orders directing agencies to conduct cost-benefit analyses of proposed regulations, the Paperwork Reduction Act,<sup>1</sup> the Regulatory Flexibility Act,<sup>2</sup> peer review requirements,<sup>3</sup> and statutory mandates to periodically review agency rules.

If you will indulge me, I would like to be a bit more “wonkish” than normal by focusing on the first critical point. Cost-benefit analysis or “CBA” is a well-understood concept that has been the subject of significant economic literature for decades. I start from the premise that all regulations carry costs, which are inevitably passed on to consumers in one form or another. Therefore, it is incumbent on every federal agency to determine whether the rules it proposes will result in costs to providers, consumers or society as a whole that outweigh the purported benefits.

An Executive Order, signed by President Clinton, states: “In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider.”<sup>4</sup>

The Obama Administration reiterated these principles in its own Executive Order, stating that agencies must “propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs” and that, in doing so, they should “use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.”<sup>5</sup> While some argue that independent agencies are not subject to these requirements, President Obama called upon independent agencies, such as the FCC, to follow the same provisions, even setting forth an expectation for retroactive reviews.<sup>6</sup>

While other agencies seem to take seriously their obligation to evaluate objectively the consequences of their actions, the FCC consistently falls short. OMB’s 2015 Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, showed that out of 14 major rules issued by the FCC from 2005 to 2014, none included information on benefits or costs.<sup>7</sup>

The FCC is aware of these requirements. In a 2014 letter to a member of Congress, Commission leadership actually stated: “[T]he Commission has endeavored to act consistently with the cost-benefit analysis principles articulated in those [Executive] orders in its rulemaking proceedings. This includes consideration of quantifiable, monetized costs and benefits associated with a proposed regulatory approach, as well as careful consideration of those costs and benefits that are not as easily quantifiable or monetized.”<sup>8</sup> If only that were true.

In reality, the Commission rarely does anything remotely close to a detailed cost-benefit analysis. More often than not, all that is contained within items is a couple of sweeping assertions that the costs will be minimal but the benefits considerable. They are the kind of statements that you would expect to 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. Moreover, I have yet to see an item that assessed the costs and benefits of regulatory alternatives, including the alternative of not regulating.

I have heard a few excuses regarding the failure to conduct substantive cost-benefit analyses, but they are not persuasive.

First, FCC leadership recently stated that notice and comment proceedings are equivalent to a CBA because parties have the opportunity to provide information on costs and benefits of proposed rules.<sup>9</sup> You only have to look at the CBA obligations placed on other agencies and departments to realize how monumentally flawed this argument is. Does the FCC really believe that its work is more significant than that of the Food and Drug Administration, Homeland Security Department, Federal Aviation Administration, or countless other agencies required to conduct CBA, in addition to its APA procedures? Are we so foolhardy to assume that regulations developed by the FCC are so benevolent and indisputable to justify being outside of CBA but other agencies are not?

In addition, the texts of the various Executive Orders make clear that the responsibility is on each agency, not the commenting public as part of the APA, to conduct the analyses for its proposals, as well as alternative options. While data filed by parties can help refine the Commission's own estimates, an important function that gets too little attention, it is not supposed to take their place.

Putting the burden on the agency makes sense because it is the only entity that has the complete picture. The text of Commission items can and frequently does change right up until a vote, and outside parties have no opportunity to read the text in advance.

Second, on multiple occasions, the FCC stated that it would rely on the Paperwork Reduction Act process—i.e., something that occurs after Commissioners have voted—to sort out the costs and benefits. As an initial matter, OMB's guidance on CBA makes clear that any analysis that is required to be conducted to satisfy the PRA is *in addition* to what is required for CBA. That makes sense because PRA is focused on the costs of information collections, which is just one category of costs imposed by agency regulations.

Fundamentally, adopting rules without any estimate of the impact is the height of arbitrary decision-making. In order to produce sound and sustainable policies, the FCC must make decisions based on complete estimates of costs and benefits, not ones that are to be determined, and not in a process that looks at only one aspect of the costs. Conducting the analysis after the fact also risks needless delay because the FCC may have to change its rules should the burdens prove to be too great. Shouldn't Commissioners have the knowledge of these data points, even if limited, prior to deciding the outcome of an item?

Third, I have heard the claim that CBA is only required for "major" decisions. While it is true that OMB is required to report annually to Congress on the costs and benefits of "major" regulations, there is no support in the text of the Executive Orders for such a broad carve out.

Fourth, there seems to be a general sense that because, in some instances, it may be difficult to quantify – much less monetize – the costs and benefits, there is no point in trying to do an analysis at all. But, OMB has provided guidance on how to handle these situations,<sup>10</sup> clarifying that if the non-quantified benefits and costs are likely to be important, then the agency should conduct a threshold analysis to evaluate their significance. That is, it should determine how small the value of the non-quantified benefits could be, or how large the value of the non-quantified costs would need to be, before the rule would yield zero net benefits. While it's not perfect, it would still be a significant improvement as the FCC would have to be transparent about its assumptions.

Fifth, the FCC has come to view its mission in terms of the broad generalities of section 1 of the Communications Act, coupled with a vague "public interest" test, even when rulemakings are initiated pursuant to specific statutory authority and requirements. This has become a further excuse to eschew data-driven analyses in favor of whatever a majority of the Commission feels is right or popular at any given time. And without an objective standard, there is little opportunity to challenge what is deemed to be in the public interest.

In rare instances, usually involving public safety items, the Commission does attempt to quantify the costs and benefits of a proposed rule change. However, these analyses make a mockery of the exercise. If a Commission item can be linked in any perceived way to improving overall public safety, the CBA is immediately quantified based on the Economic Value of a Statistical Life as previously calculated and

determined by the Department of Transportation. The FCC currently estimates that to be \$9.5 million per individual. Accordingly, the Commission's work becomes simple arithmetic: multiply \$9.5 million by the number of people some FCC employee guesses could have a health impact from a particular rule change, and the millions or billions of purported benefits can justify nearly any regulations. There you have it, a made-up calculation that is essentially worthless. In most circumstances, the FCC cannot determine – and shouldn't therefore include in an imaginary spreadsheet – a proposed regulation actually resulting in the potential benefit. And, I am not talking about the lack of causation, but worse, the lack of even a correlation. Using the same flawed theories, I am surprised that the Commission doesn't argue its regulations produce celestial alignment, which can easily counterbalance any supposed costs.

To sum it all up, I agree with OMB's assessment that the absence of information on costs and benefits from independent agencies "is a continued obstacle to transparency" that can "have adverse effects on public policy" and "lead to inferior decisions."<sup>11</sup> My ongoing push for CBA in FCC items, like my efforts for process reforms, is not intended to diminish the ability of the agency to accomplish the agenda set forth by its Chairman. I fully acknowledge and accept that the Commission will still adopt policies that I may not agree with. But if it does so after a full and fair consideration of the costs and benefits, the policies are likely to be better tailored to solve the problem at hand and less burdensome to companies and consumers. That's still an improvement and, more importantly, it is a necessary and prudent thing for an agency to do.

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<sup>1</sup> The PRA requires agencies to seek approval from the Office of Management and Budget before asking entities to fill out forms, maintain records, or disclose information to others. As part of the process, agencies must estimate the burdens on entities to comply with such requirements.

<sup>2</sup> The RFA requires federal agencies to review regulations for their impact on small businesses and consider less burdensome alternatives. As part of the review, agencies are supposed to estimate the number of entities impacted and provide a quantifiable or numerical description of the effects of a proposed rule.

<sup>3</sup> OMB requires federal agencies to conduct peer reviews of "influential" information in certain proceedings to assure the quality of published information.

<sup>4</sup> Executive Order 12866 (Sept. 30, 1993),

[https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866\\_10041993.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf).

<sup>5</sup> Executive Order 13563 (Jan. 18, 2011), <https://www.whitehouse.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

<sup>6</sup> Executive Order 13579 (July 11, 2011), <https://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-13579-regulation-and-independent-regulatory-agencies>.

<sup>7</sup> Office of Management and Budget, Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act, at 97-98 (2015) (2015 CBA Report), [https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015\\_cb/2015-cost-benefit-report.pdf](https://www.whitehouse.gov/sites/default/files/omb/inforeg/2015_cb/2015-cost-benefit-report.pdf).

<sup>8</sup> See Letter from Chairman Thomas Wheeler to Representative Marsha Blackburn (May 19, 2014), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-327470A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-327470A1.pdf).

<sup>9</sup> The U.S. Senate Committee on Commerce, Science, and Transportation, Oversight of the Federal Communications Commission (Sept. 15, 2016), <http://www.commerce.senate.gov/public/index.cfm/hearings?ID=7AEC5792-41D2-4FD2-A894-B54B1CFFE31C>.

<sup>10</sup> OMB Circular A-4, at 2 (Sept. 17, 2003),

<https://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf>.

<sup>11</sup> 2015 CBA Report at 32.