

**Remarks of FCC Commissioner Michael O’Rielly
Before the American Legislative Exchange Council’s
Spring Task Force Summit Annual Summit, Charlotte, NC
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Thank you so much for that kind introduction; it’s a pleasure to be here. Having known ALEC’s CEO, Lisa Nelson, for more than twenty years and its General Counsel, Bartlett Cleland, almost as long, I am well aware that ALEC’s distinguished group of state legislators is committed to the fundamental beliefs of limited government, free markets, and federalism. I have been looking to find the right event to join you all, and here in Charlotte, talking to ALEC’s Communications & Technology Task Force, seems to be the perfect opportunity given all that is happening at the Federal Communications Commission (FCC). Like ALEC, the new Commission is facing its share of unwarranted and inappropriate criticism.

Until recently, my tenure at the FCC was both interesting and fairly predictable. For three years, I viewed my role of minority Commissioner as the following: agree with the majority when I could, point out flaws in their arguments when they were wrong, and fight like hell when they were really wrong, which happened quite a bit. Then, the November election happened and everyone’s world turned upside down. I now get the opportunity to help shape the agenda, including striking down items adopted by the last Commission. This has made for a busy couple of months so far and helps set the stage for the issues I want to discuss with you today.

Net Neutrality

A top priority of the Commission’s new leadership is addressing the issue of Net Neutrality. For those of you unfamiliar – is there really anyone in this group? – it’s the concept by which the federal government dictates and constrains how broadband Internet services are offered by private sector companies. While that’s my cynical spin, the reality is not that far off. Consider that a former Clinton Commerce official just recently described that under Net Neutrality, “[E]verything that travels on the Internet moves at the same speed and on the same terms and conditions.”¹ That’s a truly frightening definition.

What started as a debate over a decade ago about the need for some consumer principles for Internet operations has morphed into something entirely different. It’s now a discussion over some new and supposedly undeniable right that all Internet packets be treated and handled identically, despite the fact that doing so would obliterate how the Internet operates today and cause overall harm to the consumer experience. Although the Commission’s 2015 *Net Neutrality Order* didn’t go quite this far, the operative provisions of that item have proven extremely harmful to broadband providers and the entire Internet marketplace.

At the core of the Commission’s 2015 misguided order were three new “bright line” rules and a self-admitted catch-all provision. These new burdens, which proponents roll off the tongue as no blocking, no throttling, no paid prioritization and a general conduct standard, have stalled innovation and hindered the deployment of new services by providers – without helping consumers one bit (no pun intended). Moreover, all of the propaganda in the world cannot paper over the fact that these new burdens were not in response to actual marketplace events but hypothetical concerns dreamt up by

¹ Ev Ehrlich, *Democrats Must Have a Better Response on Net Neutrality Than Simply ‘No,’* THEHILL.COM (Apr. 27, 2017), <http://thehill.com/blogs/pundits-blog/technology/330922-democrats-must-have-a-better-response-on-net-neutrality-than>

radical activists. Especially problematic are the ban on paid prioritization and the roving enforcement authority embedded in the general conduct standard, both of which serve to provide the Commission unlimited and unchecked power to dictate every facet of America's broadband offerings. Add to this the simple fact that the Commission preserved the right – despite the many opportunities to declare otherwise – to impose full-blown rate regulation, and you have the makings for how to kill the private sector broadband market. This cannot be allowed to stand.

Accordingly, the Commission now has before it a Notice of Proposed Rulemaking to reopen our previous Net Neutrality decision and pursue a different path, one based on its previous approach to broadband that enabled staggering innovation, creativity, competition, disruption and consumer benefit. Specifically, the item, which will be considered at our May 18 meeting and is available for review on our website, would initiate the process to undo the Title II common carrier designation for broadband Internet access service and treat it once again as an information service. This distinction is so important in determining the burdens and mandates imposed on applicable providers.

The members of ALEC can serve an important role as the new Commission seeks to restore free market principles to broadband offerings. Many of you know all too well of the pressure on us to buckle and acquiesce to the whims of the misinformed screaming for Net Neutrality. You likely face it at your respective statehouses as you debate the various matters before you. The “progressive agenda” being pushed in so many settings is really an effort to use government as a means to redistribute hard earned assets from one group of people to favored interests. Do not let your voices go unheard as Net Neutrality advocates slowly, but surely, seek to drag the U.S. economy toward socialism. This debate is just one component in a larger and much more pernicious effort to vanquish capitalism and economic liberty.

Municipal Broadband

On a related note, I must commend ALEC for taking such a principled stance on the issue of municipal broadband networks. It would be easy, as some have done, to blindly support any means necessary to get more and faster broadband to people they represent. Let's not kid ourselves, telling people what they think they want to hear is a sure way to get short term kudos and applause. But doing the right thing, even if unpopular, requires more fortitude.

This situation reminds me of a similar circumstance that occurred during my time working for a U.S. Senator. Heating prices were high and, as the cold weather approached, pressure built to endorse the effort by CITGO to provide discounted heating oil from the “gracious people of Venezuela”. Former Congressman Joe Kennedy even was running folksy television ads trying to convince everyone that a gift is a gift, no matter where it comes from. My boss rejected that notion and opposed the entire sham. It meant that people faced higher heating bills and criticism abounded that he ignored people in need, especially those with reduced incomes. He took the hit and defended his position. Looking back, how does that decision look? Should we have accepted the short term gift of discounted oil and appeased a radical government? Would it have been wise to allow the Venezuela government to use the situation as a means to attack capitalism? Venezuela is in the news recently as their economy is no longer riding high on oil dollars and the government has seized private assets. In fact, the country appears near total collapse, in part, because of the socialistic path it embraced.

Improving the state of broadband nationwide remains one of my top priorities and consumes a considerable amount of my time. While the private sector has done much to improve the situation and

continues to extend its networks to meet reasonable demand, I am very aware that many homes in America do not have acceptable broadband today. It's the reason that I have put so much effort to stand-up and modernize the Commission's universal service programs, which admittedly do veer somewhat from an absolute free market approach. The program's high-cost portion provides subsidies, generated from consumer fees, to private sector companies to invest and buildout broadband networks in areas of America that are unserved today. This, I believe is a defensible program and one that we seek to inject with as many market driven aspects as possible, including operating reverse auctions to minimize and narrow the amount of subsidy provided.

What I am unwilling to do and will never support is allowing government-sponsored networks to use their unfair advantages to offer broadband services. Doing so would be the quickest way to destroy the private broadband market and reassure creation of a market monopoly position by these networks. In addition, in instances where they have been attempted, the success rate is highly suspect. Clearly, building and operating a broadband network is the opposite of easy.

The fact that some states in our nation have enacted protections prior to allowing localities to pursue government-sponsored networks should be celebrated, not criticized or attacked. Upon close examination, the protections are, in fact, quite reasonable. They tend to include requirements that potential networks conduct a right-of-first refusal process to see if the private sector is capable and interested in offering service, perform referendums of the local people to determine whether there is a desire to put taxpayer monies at risk, limit the use of cross-subsidies and government advantages to rights-of-way, and present business plans before becoming operational. Far from being radical, these are common sense requirements.

Preemption & Federalism in Communications Policy

Changing topics, it would be impolite for me to give you all the impression that we are simpatico on all matters. While I have spent a great deal of time and energy seeking to preserve federalism as it pertains to many important non-telecom matters, I just do not agree with its application as it comes to the Internet. Technically, it is nearly impossible to try to contain or control the Internet at the local or state level or, in fact, nationally by any government. At any given moment, a portion of an email, video, or text can be separated by thousands of miles or traverse numerous countries. IP packets do not respect political boundaries, and any efforts to try to ensure that they should would be problematic from my point of view.

On a larger scale, the U.S. government has sought and supported the free flow of digital information across national borders for some time. It is sound policy to advocate that each foreign nation does not get to impose its own laws on electronic commerce and information exchanges. We have seen what happens when nations try to "pull the plug" on the Internet to control their people in times of political upheaval. Chaos. A friction-less environment – at least one to the greatest extent possible – respects the reality of the network, reduces costs of network operations and ensures transactions and communications can be completed. To argue internationally for a seamless transfer of information and prohibition on fees on one hand, but to suggest that federalism still applies domestically on the other is inconsistent and dangerous. It's also the surest way to jeopardize the future of the Internet.

Seeing that perspective, I hope you can see why I have difficulty when states or even localities try to insert themselves into Internet activities, such as IP voice calls. Voice over Internet Protocol, or VoIP as it is commonly called, is currently stuck in the no-man's land of regulatory treatment. For numerous

reasons, the FCC has not provided a thorough answer, giving some states the impression that they retain certain authority. The FCC previously declared that certain forms of VoIP were jurisdictionally mixed but mostly within the province of the FCC. But this was quite a while ago and even the resolution at the time did not sufficiently resolve the situation, at least in my opinion. The Commission should have just declared VoIP to be an interstate information service. This would certainly be consistent as I don't see any possible way that the Commission can find the underlying broadband network to be an information service, per my earlier point, but not find the same to be true for VoIP. Arguably, VoIP is just an application not even subject to FCC jurisdiction much less that of individual states.

Until lately, VoIP's jurisdiction hasn't resurfaced as an issue. But that situation has changed recently as a number of state regulatory commissions have sought to reopen the debate. Take Minnesota for instance. Having been rejected by the FCC and the courts for its previous attempts to regulate Vonage in the early 2000s, it now seeks to impose telephone regulations on Charter's VoIP offering. The case is being litigated in the courts as I speak, but it is totally nonsensical and unnecessary. Such inappropriate jurisdictional overreaches by states should be nipped in the bud, and I have talked to the Commission's new Chairman about doing just that.

Similarly, a number of states have tried recently to rush in to enact privacy regimes for broadband providers. These actions seem to be in response to Congress' passage and the President's signing into law of the Congressional Review Act (CRA) legislation pertaining to the previous Commission's broadband privacy rules. While I don't see a need to revisit the CRA arguments here, suffice it to say that I believe states should be similarly barred from enacting their own privacy burdens on what is by all means an interstate information service. Substantively, it is both impractical and very harmful for each state to enact differing and conflicting privacy burdens on broadband providers, many of which serve multiple states, if not the entire country. If necessary, the Commission should be willing to issue the requisite decision to clarify the jurisdictional aspects of this issue. I will be discussing this matter with the Chairman as well.

In a third category are a host of barriers to broadband deployment that have been enacted by some states over the years. In some cases, it is the interpretation of older statutes and regulations to apply to new communications technologies, such as small cell wireless, and, in other cases, it is the imposition of new fees and extended approval processes. Together, these barriers are preventing the deployment of broadband to the American people and, therefore, are targets for preemptive actions by the Commission unless sufficiently addressed in the meantime.

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In closing, I trust that I've painted an accurate picture of the extensive and important work ahead at the FCC. Obviously, it appears that we share common positions on many issues, and you can be sure I'll be pushing these positions in the coming months. Of course, I only have so much say in which and how issues will be addressed in the foreseeable future. The American people, including outside organizations, like ALEC, certainly have the ability to influence our decisions and are welcome to participate in our proceedings. Hopefully, you will consider taking advantage of this opportunity.

I thank you very much for your attention and wish you well for the rest of your Summit.