Remarks of Michael O'Rielly, FCC Commissioner
Before the 2017 Wireless Infrastructure Show, Orlando, FL
May 23, 2017

I appreciate that very warm welcome, and I am so pleased that Jonathan has invited me to join you once again. Before I get to the substance of my remarks, let me take a moment to thank you for all that you do to bring wireless service, especially broadband Internet, to American families throughout our nation. You probably don't hear that often enough, but the companies that many of you represent actually build things. Infrastructure may be a current buzz word in Washington, D.C., but you grapple with the facets of infrastructure each and every day.

As a government official and a glorified paper pusher, I am in awe, and somewhat envious, of those in the construction and building industries, such as yours. Watching construction professionals at work makes you feel like a kid again. The end result of your work is tangible, physical structures that bring benefits to the residents of the respective communities. In your case, tens of millions of Americans will have the wonders of wireless communications due to your hard work. So, thank you.

It's been just over two years since my last visit with you all and sadly the overall picture of issues of importance hasn't changed all that much. A few things have changed in this time: a new administration, a new Chairman, and a refreshing new outlook on communications policy. Not to mention, overnight older less nimble PCIA morphed into wiz-bang, modern WIA. While I have had success moving some policy initiatives at the Commission, I certainly wouldn't use the terms "quick" or "efficient" to label our current processes. Every once in a while, a well-timed blog or speech resulted in an item, progress or a worthwhile discussion. But, immense progress has been unfortunately slow afoot in the infrastructure world.

Twilight Towers

There was one issue in particular that I had great hopes for when I last spoke to this group. I had the speech, the substance, and the facts were on my side. It was getting done. Alas, I will start my speech today by talking about how we *still* have to conclude "twilight towers."

It defies explanation that we have not resolved an issue that we have known about for twelve years. I was hopeful when I spoke to staff after my last visit with you. The Commission was finally ready to act, but action turned into stakeholder discussions, and discussions turned into…nothing.

Regardless, I hope you know that I appreciated your efforts to talk to interested parties and willingness to negotiate a solution for the estimated 4,300 twilight towers.[1] Your work provided a compelling data point. Clearly, the Commission's lack of action to address the regulatory uncertainty around these towers is prohibiting approximately 6,500 antenna collocations.[2] You know better than anyone that we need these antennas to meet consumer expectations of increased capacity and speed.

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[1] Letter from Brian Josef, Assistant Vice President, Regulatory Affairs, CTIA, and D. Zachary Champ, Director, Government Affairs, PCIA, to Chad Breckinridge, Associate Chief, Wireless Telecommunications Bureau, Federal Communications Commission, June 4, 2015.

[2] *Id*.

But, there may finally be light at the end of this long tunnel, as the Commission formally issued an item last month seeking official comment on how this issue should be resolved.[3] While the notice tees up the notion of grandfathering or making corrective filings as towers are identified, which I doubt the necessity of, I am willing to hear any and all suggestions. My goal is to ensure that we put an end to the twilight towers issue once and for all. Further, the notice includes, at my request, a definitive statement that there will be no enforcement action taken on legitimate twilight towers, meaning companies caught in this quagmire will not be subject to any penalties by the Commission.[4] That's good news!

Tower Marking

When discussing infrastructure issues, it also seems that some instances follow a consistent pattern of taking one step forward only to then take two steps back. In 2014, the Commission eliminated unnecessary tower marking and lighting burdens on industry while ensuring the safety of aircraft.[5] Ironically enough, I discussed this very achievement the last time I addressed you all. At that time, the picture seemed to be getting better. However, last year, Congress passed the FAA Extension, Safety and Security Act of 2016, which included a provision that basically mandates that all towers ranging between 50 to 200 feet meet certain paint and lighting requirements.[6] And two steps backward we go.

The underlying reason for the provision, while admirable, appears to be based on incidents where crop dusters and other low altitude planes hit temporary meteorological testing towers. The actual language in the statute, however, can be seen to have broad applicability with narrow exceptions, which do not extend to permanent communications towers.

While no one disputes the desire to protect human life for those aviators whizzing planes inches from the ground, we must also recognize the real world effects of this new mandate. Carrying out the burden as written will be an extremely expensive undertaking due to the cost of the specialized labor that climbs these towers. The appropriate paint is also needed. You can't just run into your local Home Depot and grab a can of Benjamin Moore on sale. Together, I hear that it runs an estimated $12,000 to $15,000 to paint and light a tower. Not to mention, the law captures approximately 25,000 communications towers and another 25,000 broadcast towers. In total, it's an estimated $750 million every five to seven years.[7] I am sure others have potentially more costly estimates than this.

Again, I don't want to see anyone hurt or, even worse, lose their lives. It is without question that there have been accidents involving crop dusters. But, it doesn't appear that communications towers are to blame one iota. According to the requisite data,[8] there is a good chance that, had the new provision of

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[3] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79, FCC 17-38 (Apr. 21, 2017) ("*Wireless Infrastructure Notice*").

[4] *Id*. ¶ 84.

[5] *2004 and 2006 Biennial Regulatory Reviews – Streamlining and Other Revisions of Parts 1 and 17 of the Commission's Rules Governing Construction, Marking and Lighting of Antenna Structures*, WT Docket No. 10-88, Report and Order, 29 FCC Rcd 9787 (2014).

[6] FAA Extension, Safety and Security Act of 2016, Pub. L. No. 114-190, § 2110, 130 Stat. 615, 623-25 (2016).

[7] It is estimated that a tower needs to be repainted every five to seven years.

[8] *See, e.g.,* Special Investigation Report on the Safety of Agricultural Aircraft Operations, https://www.ntsb.gov/safety/safety-studies/Pages/SIR1401.aspx (last visited May 22, 2017) (stating that, in 2013,

law been in effect, it would not have saved any pilot lives or prevented any crashes or incidents. And as you are well aware, we also must consider the lives of those that will climb and paint these communications towers.

Then there are the truly unintended consequences of this law. Here is just one: if companies have limited dollars to spend, why would they build out in rural America where profits are lower, but expenses would skyrocket due to this mandate? Rural America will lose out because these dollars will instead go to urban and suburban communities where these specific tower marking requirements are not in effect. Overall, this will seriously reduce the chances of 5G deployments in rural America, stymie smart agriculture, and hamper our efforts to extend broadband to the most remote areas.

I suggest improvements to this provision are in order. One way to do this is to clarify that communications towers are exempt. There are, of course, other ways to fix this situation but the key is to get it addressed properly and quickly, especially as we approach certain deadlines in the statute.

Tower Crews and the Repack

We also have to keep in mind that tower crews are in high demand these days. Wireless companies will be building out AWS-3 and 600 MHz spectrum; hopefully we will auction millimeter wave and 3.5 GHz in the not too distant future; and providers are generally densifying their networks. Then, there are the approximately 987 stations in the next 39-months that are part of the broadcast spectrum incentive auction repack.[9]

While I am on the subject, I understand that tower companies have responded to the call and are ready to take on this challenge. I also have heard from broadcasters who admit that it is in their best interest to conclude the repack as quickly as possible, and obviously the winners of the 600 MHz auction are seeking the same. Kudos to those wireless carriers who have invested in tower companies to increase tower and antenna construction, and expedite installation and deployment efforts. While some are rightfully concerned about the ability to meet the current deadlines, I think it is not irrational that we wait to see how the first stages go before jumping to any premature conclusions. If it looks like we cannot meet the 39-month timeframe, at some point, we can reassess. In the meantime, I suggest that everyone should take a deep breath as we head down the repack path together.

Facilities Siting

Finally, as you know, the Commission and Congress have taken steps to minimize barriers to infrastructure deployment,[10] but problems still abound. In two separate but related proceedings,[11] the

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there were 78 small aircraft accidents of which only 16 involved an in-flight collision with an obstacle; only 2 were with communications towers, but these numbers include obstacles known to the pilot).

[9] This number includes 30 stations that are changing bands, along with the 957 that are being repacked. See, e.g., Incentive Auction by the Numbers, https://apps.fcc.gov/edocs_public/attachmatch/DOC-344398A1.pdf (stating 30 stations will be moving to high- or low-VHF); FCC Announces Results of World's First Broadcast Incentive Auction, Press Release (Apr. 13, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344397A1.pdf.

[10] See, e.g., *Wireless Telecommunications Bureau Announces Execution of Amendment to Nationwide Programmatic Agreement for the Collocation of Wireless Antennas*, WT Docket No. 15-180, Public Notice, 31 FCC Rcd 8824 (WTB 2016); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies; Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by*

Commission is finally expanding our review and involvement to look at this problem holistically. Let me talk today about the two issues I hear about most – access to the public rights of way and the tribal approval process.

Despite efforts to curb such behavior, industry is still experiencing excessive delays and moratoria when filing siting applications for access to locality rights of way. The record is replete with reports of long pre-application processes before an application can be filed or is deemed complete and applications going through two years or more of review before a decision is actually made.[12] These long, intentional delays are also turning into de facto moratoria, with endless tolling agreements and excuses about insufficient resources or the need for new local laws. Verizon, for instance, has reported that at least 34 communities either have explicit moratoria or just refuse to process applications or engage with applicants.[13] This is blatantly illegal.

Many localities are also imposing zoning-like procedures for facilities on rights of way, causing extensive delays and some ridiculous outcomes. For instance, localities are contemplating such things as network design and performance, including inserting their judgment as to whether a macro or small cell should be used to cover an area; equipment placement; and radiofrequency (RF) exposure issues.[14] I have heard of localities denying applications for infrastructure upgrades, because the provider offers existing service and, therefore, additional facilities are deemed unnecessary. Some even go so far as saying that the infrastructure should be located underground, as if that would ever work for wireless services. Localities should not be making such decisions, and, in fact, they are expressly prohibited, under the law, from basing decisions on RF exposure.

These are not acceptable responses to new small cell technologies that need to be deployed for the U.S. to maintain its position as the leader in wireless communications. The Commission should clarify that such behavior is not consistent with the Communications Act, which clearly reads that state and local regulations may not "have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[15] It should also be clear that dictating providers' technologies and network design does not fall within their authority to manage their public rights of way. And if this is not resolved quickly and satisfactorily, the Commission must be willing to use its preemption authority.[16]

Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting; 2012 Biennial Review of Telecommunications Regulations, WT Docket No. 13-238, Report and Order, 29 FCC Rcd 12865 (2014).

[11] *Wireless Infrastructure Notice*, FCC 17-38; *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, Public Notice, 31 FCC Rcd 13360 (2016).

[12] *See, e.g.,* T-Mobile Comments, WT Docket No. 16-421, at 6 (Mar. 8, 2017) (discussing prolonged pre-application agreement negotiations); WIA Reply Comments, WT Docket No. 16-421, at 5-6 (Apr. 7, 2017).

[13] *See, e.g.,* Verizon Comments, WT Docket No. 16-421, at Exhibit A (Mar. 8, 2017).

[14] *See, e.g.,* WIA Reply Comments at 6, 11-12.

[15] 47 U.S.C. § 253(a). Section 332 similarly states that regulations "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. §332(c)(7)(B)(i)(II).

[16] *Id*. § 253(d).

It is also hard to argue that the excessive fees charged are fair and reasonable compensation for the use of the public rights of way.[17] Fees typically include an exorbitant one-time payment – we have seen some localities charge as much as $5,000 or $10,000 per site – to review antenna structure applications and agreements.[18] Some localities also charge for the consultants reviewing siting applications, which can be $8,500 per pole with additional inspection fees after installation.[19] Some also charge recurring yearly fees of $6000 per pole, while others take a percentage of gross revenues.[20] But this entire fee structure does not add up for small cell systems that can require a site every few blocks. There needs to be a declaration that fees similar to those imposed on macro towers are not appropriate or sustainable for small cell networks.

Tribal Review Process

The problems I just discussed are compounded by the escalating costs of the tribal approval process. One provider reports that, in 2011, they were paying an average of $439 in tribal review fees per site, and now they pay on average $6754. That's almost a 1500 percent increase. And, more tribes have been expressing interest. For instance, 19 tribes responded to an application to add an antenna to a building in Cleveland and 39 tribes, of which 27 demanded fees, wanted to review sites in suburban Chicago. This is not economically sustainable. Further, tribes are receiving the payments, but then never respond as to whether there is actual concern, causing endless delays.

Once again, I understand that the majority of tribes are acting in good faith but, if the others do not act reasonably, the Commission will need to look at more drastic alternatives. I have a number of ideas on how best to effectuate change if needed, and I plan to review recent comments in the record and forge a proposal, in consultation with the Chairman on the topic, in the very near future. I will certainly welcome your thoughts on the matter.

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So, there you have my take on a number of critical issues at the FCC. While I may not have mentioned your favorite policy issue or topic, please do not take it as an indication that I am not supportive of fixing those as well, whatever they may be. But, I've only been provided so much time!

Before I exit, I think it is important to acknowledge the excellent participants for your next panel for all of their hard work within WIA and to bring wireless broadband to our nation: Stephen Marshall from American Tower, Jay Brown from Crown Castle, Jeffrey Stoops from SBA Communications, Alexander Gellman from Vertical Bridge, and David Weisman from InSite Wireless.

Thank you very much to the upcoming panel. And, thank you so much for having me join your conference today. I'm happy to take a few questions, time permitting.

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[17] *Id*. § 253(c).

[18] *See, e.g.,* WIA Comments, WT Docket No. 16-421, at 18-19 (Mar. 8, 2017).

[19] *See, e.g., id*. at 13.

[20] *See, e.g., id*. at 18-19.