

**Remarks of FCC Commissioner Michael O’Rielly
Before the Hudson Institute
February 6, 2018**

“A Conservative Perspective”

It is an honor to return to the Hudson Institute, the site of my first speech as Commissioner just over four years ago and which my good friend, Dr. Harold Furchtgott-Roth, helps lead so ably. The Hudson Institute provides an intellectual voice on many communications policy issues of our day — sadly, a function that is regularly bypassed by the instant chatter of social media congratulations and critiques by the anonymous and often unknowing.

Quite honestly, after the last few months, it’s a real pleasure to speak before an audience that is willing to listen, comprehend the content, and debate points of disagreement, if any, in a respectful way. Not surprisingly, it has been hard to discern any strategy from those who have disagreed with recent Commission actions. On one hand, these individuals have begged for support for their particular positions; on the other hand, these same people willingly said, and continue to say, the vilest things about my colleagues and me. While distracting, as I have repeatedly stated, my obligation has been — and continues to be — to follow the statute and the substantive comments submitted in the record of a proceeding.

In any event, today I would like to discuss how my approach to select communications policies is informed by certain conservative principles, with a fair hint of libertarianism. Some may try to argue that conservatism and libertarianism are contradictory perspectives. But I disagree. Former President Ronald Reagan probably said it best, “if you analyze it I believe the very heart and soul of conservatism is libertarianism.” From my perspective, the two concepts are not in conflict but follow a similar pattern to the love-hate relationship between brothers of close age. From my own childhood, I recall the days when my brother and I stood arm and arm in support of this or that; on other days, I schemed to knock his block off.

In reality, anyone can call themselves a conservative. There is no secret handshake or written test to prove your bona fides. But the true conservative reaches outcomes by respecting and heeding to well-developed, sound principles. Conservative beliefs are not based on personal whims or feelings or polls but rather anchored in defensible core, time-tested positions. It’s what makes a conservative somewhat boring compared to the liberal, independent, or populist. On any given issue, one can predict without haste what the conservative position is likely to be.

In my first visit to Hudson, I declared preserving and advancing economic freedom to be my primary goal and the paramount lens by which I would examine issues at the Commission. That speech has served me well, as it encapsulated so much of my thinking about the issues that would arise and the difficult policy calls I would need to make. Fast forward four years and economic freedom has generated some subcomponents worthy of discussion, thereby allowing a more fulsome examination of certain policy matters.

So, with your indulgence, I’d like to explore some of these this afternoon.

- *Promotion of a Smaller Government* – Arguably, the application of complete libertarianism leads one towards anarchy. I don’t support the absence of government, but like Reagan, instead seek a small

one that is lean and capable but doesn't try to protect people from themselves. Unfortunately, constraining the size and scope of the FCC is a constant struggle. As consumer markets evolve to include competition from technologies far outside the bounds of our authority, the Commission's budget and staff levels haven't adjusted downward proportionally to reflect the need for reduced regulation.

- *Focus on Core Mission* – On an almost daily basis, someone calls for the Commission to do something it wasn't meant to do, pay for something it doesn't have the money for, or intervene when a provider feels uncomfortable with the effects of the competitive marketplace. But the Commission is rarely able to timely do the things that it must do or the things that it really wants to do. In fact, we have historically missed statutory deadlines with no better justification than we were busy elsewhere.
- *Funding Comes from Consumers* – As I have stated on numerous occasions, whether it's funding for the agency or mandates imposed by it, the ultimate costs are paid by consumers. While some may wish otherwise, such costs are always passed on in one form or another to hard-working Americans, who have little voice in our proceedings as they are too busy with their other life responsibilities.

To explore these subcomponents further, I'd like to apply them to two policy measures I have long advocated at the Commission: a renewed focus on sound cost-benefit analysis throughout the agency's decision-making process and USF contribution reform. If done right, both can lead to a smaller government, a focus on our core mission, and most of all, they serve as reminders that funding ultimately comes from consumers.

Sound Cost-Benefit Analysis

When I last presented before this organization, I spoke at length about the notice obligations of the Administrative Procedure Act. Those requirements ensure that the process followed by the Commission allows the public the opportunity to comment on our proceedings. A very important concept indeed.

At the same time, the law also requires that the Commission ensure that any decisions it makes are reasoned and justified. Quite honestly, that cannot occur if the Commission doesn't know or understand the economic costs and benefits of its decisions. And, we cannot adhere to the conservative principle of minimizing costs to consumers if we continue to rely on the Commission's past approach to cost-benefit analysis, which ranged somewhere between shoddy and incomplete. That's why I am so pleased that the Commission adopted an item at our January meeting to establish an Office of Economics and Analytics (OEA).

Getting the right staff into a new, conducive organizational structure gets you partway to home, but more is required. Specifically, we needed to make sure that this new office receives the same stature and importance in our deliberative process as similar entities have at the Federal Trade Commission or Environmental Protection Agency. To accomplish this, I worked with Chairman Pai to adopt several additional requirements that, I believe, will ensure OEA is successful from the outset and fully ingrained into our agency procedures, guaranteeing it outlasts the current Commission and remains effective for years to come.

First, we added a new requirement for rigorous, economically-grounded cost-benefit analysis for any rulemaking deemed to have an annual effect on the economy of \$100 million or more. Just how do we

define rigorous? Thankfully, we already had an existing model to follow that governs the rest of the Federal government's cost-benefit analysis. It's something innocuously referred to as OMB Circular A-4, which standardizes the way benefits and costs are measured and reported across executive agencies. However, due to the resources this may involve, I was convinced that it may be more prudent to get OEA established and operational before taking this next step. Accordingly, we are going to move to adopt OMB Circular A-4 through a new proceeding within the next two years.

In the meantime, we must improve the way we conduct cost-benefit analysis at the agency. One example of this issue arises in the public safety context. What I find so unacceptable is when the Commission, or any agency, uses the so-called "value of a statistical life" to justify *any* costs, simply by assuming x many lives will be saved – typically whatever magic number is needed to outweigh the costs. If this calculation is based on fact and there is actual proof or a high probability that the stated benefits (i.e. a saved life) will actually accrue from the burdens we impose, fine. Too often, however, it's been like the 1970's movie, "The Jerk," in which the Steve Martin character, in a way only he could do, implores everyone to "Stay away from the oil cans" as if they, and not him, were the target of a lunatic shooting up the local gas station. Going forward, expect to see OEA prepare a framework in which any proposed rule must be shown to have a statistically significant likelihood of correlation or causation to any suggested benefit.

Second, we needed to make sure that OEA's work is not ignored by this Commission or Commissions to come. To do this, we adopted a requirement that OEA would be given the same prominence as the Office of General Counsel. From now on, each Commission rulemaking will need OEA's sign off prior to being released to the public.

In the end, the new office will play a major role on the front end in the original drafting of all cost-benefit analysis and be completely engaged on the back end by signing off on each item. I believe that this heightened level of participation will help ensure that OEA gets quickly ingrained into the Commission's processes and that future Chairmen less interested in economic analysis will be unable to turn a blind eye to the real burdens that many of our rules impose. This should be a proud victory no matter your political leanings.

USF Contribution Reform

Switching topics, I'd also like to take this opportunity to dive a bit deeper on a subject that I've thought a great deal about, especially now that I serve as Chair of the Federal-State Joint Board on Universal Service (Joint Board).

Back in 2014, I issued a blog post highlighting the upward trend in the "contribution factor." That is, the percentage of interstate and international end-user telecommunications revenues that carriers contribute to support the federal universal service fund (USF) – an amount they generally pass through to consumers in the form of fees on their phone bills. Since that time, USF spending has continued to increase while traditional telecommunications revenues have declined, causing the factor to reach as high as 19.5 percent. With that upward trend, there has been a heightened push in some quarters to revise the methodology for assessing contributions.

The most vocal proponents have urged the Commission to expand the contribution base by requiring broadband companies – and ultimately their consumers – to pay new fees to support USF. This is at the heart of a proposal by State representatives to the Joint Board. They and others argue that current law

requires telecommunications carriers to contribute to USF, but also gives the FCC authority to require “[a]ny other provider of interstate telecommunications” to contribute as well. While the “other provider” language was intended to preserve the ability of the agency to assess private telecommunications providers who bypass the public switched telephone network, many have interpreted this so-called “permissive” authority to extend to broadband and have urged the Commission to levy fees on broadband providers. But, even if the Commission *could do* this, and I am not granting that point, it is equally important to ask whether it *should* do it.

I have long opposed the idea of enacting fees on broadband for several reasons. Fundamentally, taxing broadband deters its adoption and use. Both the Commission and certain consumer groups have recognized this in the past. Moreover, having worked on the Internet Tax Moratorium for numerous years, now enshrined in the Permanent Internet Tax Freedom Act, I know that there is a near unanimous agreement in Congress that state or local taxes on Internet access would directly deter the ability of consumers to obtain and utilize the Internet. Federal taxes or fees would have the same effect.

While the economy has been improving by some measurements, there are still many families and small businesses trying to regain their footing, and I am worried about imposing additional burdens on them. Some have suggested that this should not be a concern because the Commission has a program to help low-income consumers obtain broadband. That argument misses the mark. As I’ve said, one of my primary concerns is for lower-income, working-class Americans who do not qualify for Lifeline discounts. For these consumers, having to pay extra monthly fees could make a difference in whether to purchase or retain service.

It is also wrong to assume that assessing broadband will cause the current contribution factor to drop dramatically, resulting in lower fees for consumers. I find such arguments to be disingenuous at best. Broadening the base may reduce the fees on currently assessed services, but new fees will be applied to more parts of the same consumers’ bills. In other words, it would just spread the pain in the hopes that people will not notice or care enough to object. Moreover, the notion that broadening the base would result in a lower contribution factor assumes that spending remains constant, which brings me to my next point.

Many advocates in support of broadening the base intend it to be used as a back door means to increase the USF budget. Specifically, some hope that by spreading fees over a broader set of consumers and services the Commission could actually bring in more revenue to pay for higher program budgets.

That is not an unrealistic scenario albeit it is dark. Back in 2000, USF spending was just over \$4 billion, and the contribution factor was 5.7 percent. Mere pennies on phone bills. However, when the FCC discovered that adding a few pennies now and then did not set off alarm bells, spending took off.

Now, the Commission has authorized spending of approximately \$11 billion for universal service. That’s \$4.5 billion for High-Cost, \$3.94 billion (plus annual inflation) for E-rate, \$2.25 billion or more for Lifeline, and \$400 million for Rural Healthcare. The Commission is currently considering additional increases for High-Cost and Rural Healthcare, and E-rate commenters have requested additional dollars to further expand that program, which, by the way, was doubled under the last Commission. Additionally, as program budgets are increasingly tied to inflation, some additional growth will happen automatically. Therefore, it is not surprising that it may be tempting for some to try to rejigger the base so that the assessment on each segment drops somewhat but is still set at a level to generate more total funding than before.

I have also heard that the contribution base needs to be broadened as a matter of “fairness.” That is, if USF dollars are spent to support broadband, then broadband providers should have to contribute. As a program built on redistribution, there will always be net payors and net recipients, so that argument only carries so much weight. But, unfortunately, this argument seems to be more about ratcheting up burdens on competitors. In fact, I’ve even heard proposals to install new fees on edge providers.

As I’ve said in other contexts, if burdens are too high on one segment of the industry, then we should look for ways to reduce those burdens, rather than imposing them on others. To be sure, there are some who are concerned about arbitrage and gamesmanship within the current contribution system, but taking the broad step of expanding the base is not necessary or appropriate for fixing discrete problems with how certain providers classify their revenues.

Instead of broadening the base, I want to get overall spending under control. I would start by making a real effort to find efficiencies and savings within and across all USF programs. That analysis should be done before even broaching the idea of taking more dollars from consumers.

With the total budget at record levels, it is time to consider how much we are willing to take from over taxed and fee extracted Americans. If the total budget cannot be increased further, and I don’t think it should be, we may be required to make some hard choices about the relative sizes of each of the programs. During prior reform efforts, budget increases were considered in a vacuum. That was intentional. It can be hard to argue against funding for schools, for example, especially when incremental increases are compared to things like cups of coffee and cans of soda while intentionally ignoring the total cost to ratepayers. As some of us know all too well, paying for one cup of coffee or soda can is one thing; paying for soda every day (or in my case, multiple sodas) can put a dent in one’s monthly expenses. Going forward the Commission should set a topline budget and then ensure that spending increases are paired with offsets elsewhere.

Finally, before leaving this topic, I want to make clear that states have no authority to impose contribution requirements on broadband service. Since 2015, the FCC has specifically preempted states from imposing state USF contributions on broadband. Additionally, at my urging, the FCC has declared that broadband is an interstate information service. In my view, there is no severable intrastate component for states to assess. Therefore, any state that proceeds down that path is acting in a manner that is inconsistent with our rules and is subject to a possible preemption order or other challenges. Instead, states that wish to fund broadband are free to do so through separate programs using their general revenues. That is an option that several states have already exercised when establishing their own broadband grant programs.

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So, there you have my viewpoint on a couple key policy matters before the Commission. In doing so, I hope I have provided some more context for what encompasses economic freedom to help explain my views toward the creation of a new Office of Economics and Analytics and USF contribution reform. And like any conservative, I am open to being convinced otherwise via sound, logical arguments and defensible facts.