

**Remarks of FCC Commissioner Michael O’Rielly
before the Philadelphia Lawyers Chapter of The Federalist Society
June 12, 2018**

Thank you so very much for that kind introduction, Josh, and for the opportunity to speak before the Philadelphia Lawyers Chapter of The Federalist Society.

When the request to speak before this distinguished body came in, I jumped at the chance to be here in Philadelphia to discuss the latest twists and turns in communications policy. The City of Brotherly Love has acquired, and perhaps earned, a more rough and tumble reputation over the last many decades, and that’s just fine with me, as my own “brotherly love” was much more Irish Catholic and less English Quaker. Turns out that such an upbringing prepares one for certain thrust and parry activities occurring at the FCC these days.

I did a little research and found that this Chapter certainly has explored a very diverse set of policy and legal issues. From the moral hazard created by the National Flood Insurance Program and the proper procedure for judicial selection to the constitutionality of gerrymandering (or should I say garrymandering) and the excessiveness of occupational licensing. Quite the myriad of issues indeed.

Now, you get to hear me opine as some type of self-declared expert on communications policy. Former U.S. Attorney General and Federalist Society Board Member, the Honorable Ed Meese, probably said it best: “An expert is somebody who is more than 50 miles from home, has no responsibility for implementing the advice he gives, and shows slides.” And, I didn’t even bring any slides.

In keeping with this Chapter’s approach and with your indulgence, I would like to explore three rather divergent policy issues, unified by my views on what I see as being in the best interests of American consumers.

Regulatory Free Arena

Given that today is June 12, the day after what some call Internet Armageddon (more appropriately known as the day that the harmful 2015 Net Neutrality Rules officially expired), I am sure there is some interest in delving into its legal and practical implications. I’m happy to do so. As an initial starting point, however, I think it is helpful to provide a short examination of the Commission’s authority as it exists in today’s communications marketplace.

Does anyone want to tell me what Facebook, Twitter, Instagram, Skype, Snapchat, Amazon, Netflix, and Hulu have in common? Is it that they are all in a perpetual hell trying to comply with the European GDPR? Maybe. But what I was going for, and what is relevant for my talk today, is that none of these companies are regulated or overseen in any capacity by the FCC. That simple point helps demonstrate how little of a role the FCC has regarding what many refer to as the new app economy or gig environment.

Consider that almost every single consumer service offered by companies under our purview faces competition from those in the app stratosphere and, in almost every case, the traditional providers are having a difficult time. Take for example, the explosion of free instant messaging applications, like WhatsApp, which has served to shrink the popularity of SMS texting. In 2012, the ratio of instant

messaging to SMS was 1.1 to 1; in 2014, it was estimated to be 2 to 1.¹ Mark Zuckerberg stated two years ago that just Facebook Instant Messenger and WhatsApp combined processed three times more than that of the entire global SMS text offerings, 60 billion messages a day to 20 billion.² Do you think that delta has only widened since then? I certainly do. Moreover, the global revenue of SMS just three years ago was estimated at \$50 billion and is expected to drop by \$16 billion in 2021.³

And it's not just direct competition. These newer technologies offer a wide array of substitutability. Consumers who once had a preferred mode of communications are now willing to converse via other means. Those same free instant messaging applications have resulted in a decrease in traditional voice traffic.

This same "phenomenon" exists in the video services marketplace. I have met with small and medium sized cable providers who have seen their margin on video products shrink to low single digits, and some who have negative returns on investment but keep offering it as part of their consumer bundles. Since video is the most cost intensive offering of their shop, as it typically requires more truck rolls, consumer service personnel, and equipment investments, just to name a few, how much longer can they keep this up? I realize some of the over-the-top providers have low net video margins, but it doesn't impact their ability to raise funding or function. For smaller cable providers, it does.

Together, these two scenarios, which are replicated in other related sectors, help highlight that the basic economics of certain legacy services is dramatically changing before our very eyes. In sum, the app economy is stealing consumers by the millions, eviscerating operating and profit margins, attracting the best and brightest employees, and setting the entire marketplace on its head.

This is not to suggest that most or all legacy services will disappear anytime soon, as many are still profitable, but it does raise the issue of how the FCC should react to this reality. In my view, the only logical take-away from this information is to either support greater deregulation of FCC regulatees that must compete with these services or advocate for new Congressional powers to regulate these services, which would seem futile and unnecessary in a thriving market. At a minimum, people should realize that the Commission's role is much narrower than they may have originally assumed.

Thankfully, Congress has provided powerful tools in the form of forbearance and mandatory, periodic reviews that Chairman Pai and this Commission have rightly seized upon, but there is capacity to do more. If entities take the opportunity afforded in the law and make the proper showings, the Commission is prepared and, in some instances, obligated to process the petitions. Specifically, if an

¹ *Short Messaging Services Versus Instant Messaging: Value Versus Volume*, DELOITTE, <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/technology-media-telecommunications/deloitte-au-tmt-short-messaging-services-versus-instant-messaging-011014.pdf> (last visited June 11, 2018).

² Lauren Goode, *Messenger and WhatsApp Process 60 Billion Messages a Day, Three Times More Than SMS*, THE VERGE (Apr. 12, 2016), <https://www.theverge.com/2016/4/12/11415198/facebook-messenger-whatsapp-number-messages-vs-sms-f8-2016>.

³ *Mobile Messaging Revenue Worldwide by Carrier Standard from 2015 to 2021*, STATISTA, <https://www.statista.com/statistics/736007/mobile-messaging-revenue-worldwide-by-carrier-standard/> (last visited June 11, 2018).

existing FCC regulatee is in the voice, video, or data business, I would argue that they should be knocking down our doors to demand fundamental and colossal relief.

Critiques of the central points I just raised with you have been swift. One commenter argued that I was conflating regulation of basic communications platform with services offered over it. Another insisted that this merely proved why a neutral platform was necessary. Let me dissect these in order.

Assuming we can or should divide the network into transmission and service components, which makes neither legal nor regulatory sense, those who follow communications policy at the FCC should be well aware that the Commission does, in fact, still regulate consumer services on many levels. For numerous communications services, our rules impose price, functionality, and quality regulations for legacy providers. For example, we impose burdens on SMS texting providers to offer text-to-9-1-1. In the video context, FCC rules require legacy providers to set aside capacity for third parties and subject them to limitations on how consumer data is collected, used, and handled. To be clear, I wasn't conflating the issues but recognizing and comparing realities.

On the second point, which serves as a decent segue into the Net Neutrality debate, there has never been a disagreement over whether Internet Service Providers should be allowed to do bad things; they should not. Instead, the controversy has always been over the Commission's legal authority to regulate them, whether there needs to be evidence of actual harm versus hypothetical fearmongering, defining what should qualify as a "harmful" practice, the validity of any remedies to be imposed, and many other issues.

Net Neutrality

Turning to the topic du jour, it's not often that a communications policy issue is featured not only in scholarly literature, including your own Federalist Society Review, but also on late night comedy shows. But for those who managed to avoid the debate for the last decade, the basic question is whether poorly-defined, excessive government mandates are required to ensure that consumers can access the lawful online content of their choosing. In December, the FCC answered that question with a resounding no. Because there was no previous evidence of harm to consumers requiring government intervention, we reversed the harmful and unnecessary rules adopted by the prior FCC.

What is relatively new this time around is the degree of state interest in the matter. Today, I'd like to focus my comments to that aspect of the debate. While net neutrality has always been controversial, that controversy has played out at the federal level time and again. Regardless of one's views on whether broadband is a "telecommunications service" or an "information service," it has been widely accepted, even amongst the ardent defenders of federalism, to be an interstate service, as Internet traffic is not confined to state boundaries. Thanks to billions of dollars in private investment, the networks of our nation's wireline and wireless broadband providers crisscross the country, and consumers who access them expect to reach services and content from all parts of the globe. The Communications Act gives the FCC authority over interstate services, and even the prior FCC directed that inconsistent state regulations would be preempted.

Therefore, it should come as no surprise that the FCC's latest order also stated that broadband will be subject to a uniform, national framework, and contained a robust preemption analysis. Although the FCC acknowledged an extremely limited state role in enforcing traditional police powers, any requirements akin to common carrier regulation are barred. Moreover, states may not adopt their own

transparency requirements, whether labeled as such or under the guise of “consumer protection.” In short, because the FCC order restored a light-touch approach through deregulation, any action by states to increase regulatory burdens on broadband providers would run directly counter to our efforts.

Nonetheless, some states have been pursuing a range of net neutrality laws. And, the manner in which they are choosing to address the issue varies greatly across borders. Some are attempting to embed net neutrality into procurement law, which might only impact certain companies, while others are pursuing laws applicable to all broadband providers operating in the state. Furthermore, the scope of these efforts differs substantially. Some focus on the old “bright line” rules of no blocking, no throttling, and no paid prioritization. Others throw in the general conduct standard as a catch all for policing conduct that someone in the state might find objectionable. Another goes so far as to address the interconnection of broadband networks.

These efforts are extremely problematic, not only because they run afoul of the Commerce Clause, the Communications Act, and clear FCC preemption, but because complying with different rules imposes even greater compliance costs and liability risk for providers, which will be passed onto consumers in one form or another. Further, the disparate rules that are in the works by wayward states would make compliance almost impossible. As frightening as it would have been to have a powerful FCC staffer deciding which business practices failed the general conduct standard, the prospect of several state actors doing so, and with potentially conflicting outcomes, is even worse. Yet, even if states were to stick with the so-called bright line rules, there would still be differing interpretations and enforcement to contend with. The no blocking and no throttling rules contained an exemption for reasonable network management, but what’s reasonable in one state might not pass muster in another. And there are many competing views on what constitutes paid prioritization. For instance, the FCC did not include zero rating in its paid prioritization ban, but others might.

In sum, state efforts to enact net neutrality rules are legally flawed and would impose substantial and unnecessary compliance burdens on providers. The rules and the costs they impose could chill innovation and curtail the broadband deployment we’ve all been working so hard to promote. Expect to hear more about this in the coming months.

9-1-1 Fee Diversion

Finally, I’d like to spend a few moments discussing a public safety issue I’ve been actively engaging on to improve service to those in need at some of the most difficult moments of their lives. As some of you may know, this year we celebrated the 50th anniversary of the first 9-1-1 telephone call. That call morphed into what is today a nationwide emergency calling system, which is largely run collectively by state and local governments. Despite the number to reach emergency services being the same across the country, individual states and localities approach both the funding and services provided very differently.

To fund 9-1-1, states typically charge a fee on their residents’ phone bills. On average, states collect \$1 per line, per month from people with landline phone service and 92 cents per line per month from people with wireless service. Some states collect fees from people with prepaid wireless phones, while others collect from VoIP consumers. These fees are meant to support emergency calling services. But, unfortunately, some states have viewed these fees as a part of a slush fund to redistribute for other purposes. This is a disgraceful practice that must end.

Take New York, New Jersey, Rhode Island, and Puerto Rico, for example. Each of these states has passed laws *requiring* the state to divert a certain amount of their 9-1-1 fees to other purposes, such as for the state's general fund. New York law requires at least 41 percent be diverted. While visiting Niagara County, New York, earlier this year, the Niagara County Sheriff explained to me that their citizens with wireless devices paid \$10.2 million in 9-1-1 fees over the last five years, but only \$2.2 million of those fees were returned to the county to fund the 9-1-1 call center. New Jersey is even worse, diverting 89 percent to its general fund. According to New Jersey, it has no choice but to continue diverting absent a constitutional amendment to prevent it from doing so. Until then, it has proposed covering its estimated 9-1-1 investment shortfall by taxing prepaid wireless phones. This is problematic, however, as 89 percent of that new tax will go to the state's general fund, not to 9-1-1 services.

There are more positive stories to tell in Rhode Island and Puerto Rico. In Rhode Island, corrective legislation has been submitted by the legislature and appears to be supported on a bipartisan basis, including by the Governor. Further, in Puerto Rico, we were able to get a commitment that the territory would fully end its diversion practices by the end of 2018. Of course, as the saying goes, progress is neither automatic nor inevitable, and we must continue the pressure to see this to the end. Other states the Commission found to be diverters in 2016 included West Virginia, New Mexico, and Illinois. However, this data is based on information provided to the Commission by the states themselves. The problem is likely to be far more pervasive than what is actually being reported to the Commission.

Why is this all so important? Isn't there a Federalism point or Libertarian perspective that if the people of those states want to prevent politicians from stealing 9-1-1 fees for whatever devilish reason, then their recourse is the ballot box? I think that is correct to some degree to the extent that they even know this practice exists. But, where this viewpoint breaks down is when individual states agree to participate in a national network – by utilizing the 9-1-1 number and apparatus – but then fail to live within the totality of its requirements. If a state wants to live in the public safety wilderness by divorcing itself of the 9-1-1 system, then I suspect we could have a more complex debate. But, it is unacceptable to take all the benefits and then slack off on the responsibilities.

Moreover, I have reached out to stakeholders in each of the 2016 diverting states, to begin a dialogue explaining why this practice is harmful. What has been interesting is each time the public learns about this issue in their state, they tend to immediately agree that such practices must end. Unfortunately, these practices span decades and lawmakers from both parties, so the ballot box doesn't necessarily guarantee change.

From a Commission perspective, we have the obligation to migrate the entire 9-1-1 system to what is known as NG9-1-1 or next generation 9-1-1 technologies, which will include integrated pictures and multimedia, as well as accurate location information. However, this does little good if the 9-1-1 call center is unable to receive such information. Beyond threatening the preparation for – and funding – of these future technologies, fee diversion practices can have tragic consequences. For example, investigative reporting in Rhode Island revealed that underfunding led to an understaffed call center, longer wait times, and low morale.

With the responsibility for funding and operating 9-1-1 chiefly being a state-level responsibility, a concerted effort is going to be required against recalcitrant states and territories. For now, naming and shaming is one of my best tools against this practice but I could certainly use more voices in utilizing this to its fullest potential. Of course, the other recourse is official action taken by the Commission or a new

federal law passed by Congress, either in the form of limiting grants to only those states that do not engage in fee diversion, or in a federal prohibition against fee diversion altogether. Legislation, of course, is a heavier lift, but may need to be considered, especially when states like New York completely refuse to even consider ending their fee diversion practices.

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Thank you for your attention this morning. I am, of course, more than happy to answer any questions on these or other topics you may have.