

**Remarks of FCC Commissioner Michael O’Rielly
Before the Mackinac Center for Public Policy
June 20, 2018**

“Smart Regs for Smart Tech: How Government Can Allow Next Gen Internet Networks to Flourish”

Thank you for having me here today to discuss such a timely and important topic. It is a distinct honor to visit the Mackinac Center. My hope is that these comments and the subsequent panel discussion will further the Center’s goal of equipping Michigan citizens and other decisionmakers with objective analysis to better evaluate policy options – a worthy function indeed.

Last week was a big week in communications policy. Two key principles that I have long believed to be true were reaffirmed. First, removing the heavy-handed Title II regulations from the Internet did not result in the Armageddon we were all led to believe. More specifically, the Federal Communications Commission’s (the FCC or Commission) harmful 2015 Net Neutrality rules officially expired, and consumers were able to access and enjoy the same exact Internet experience absent said rules. And, second, a monumental and headline grabbing judicial decision solidified that the video marketplace is exponentially broader than many in government can conceive or would like to admit. Today, I would like to spend my introductory remarks focused on this latter topic.

As many of you know, last Tuesday Judge Richard Leon of the U.S. District Court for the District of Columbia ruled against the U.S. government and in favor of AT&T’s application to merge with Time Warner, without the imposition of any conditions. Judge Leon began his 172-page analysis with an observation that, I believe, eloquently describes the current state of play between government bureaucrats and industry players: “If there ever were an antitrust case where the parties had a dramatically different assessment of the current state of the relevant market and a fundamentally different vision of the future development, this is the one.”

From the viewpoint of many, both the FCC and Department of Justice have been stuck in administrative molasses, seeking to apply sectoral market analysis, preserve questionable bright line tests, and continue the imposition of rigid restrictions as part of transactional reviews the same way now as in 2008, 1988, or 1958. I would posit that the entire foundation of how the government currently views the “communications” market – be it voice, video, or data – is outdated and misguided.

Consider that the Commission adopted in previous Quadrennial reports and transaction reviews, and continues to maintain, an extremely narrow definition and scope of the media marketplace. Case in point is the consideration of the Commission’s media ownership rules. The prevailing and outdated perspective is that individual communications sectors do not compete with one another. Under such siloed thinking, AM radio only competes with AM radio, FM radio only competes with FM radio, and local television broadcasters only compete with other local stations.

The problem with such an approach, of course, is that when you narrowly define a marketplace and narrowly recognize competition – far devoid from market realities – the result typically leads to the application of additional regulations or limitations beyond what is necessary to protect consumers. Perhaps that’s just the nature of the beast. But, as Judge Leon recognized in his decision, there has been a “veritable explosion” in the media marketplace in just the last five years. In the video space, Netflix, YouTube, Hulu, and so many other over-the-top providers now compete directly for consumer attention and the almighty advertising dollars. In the audio space, there is also satellite radio and a myriad of Internet offerings, including the ability to stream most radio stations from their own websites. This has an impact on the ability of traditional media providers to cover their costs, make capital investments, expand

operations to meet consumer needs, and so much more. Broadly, this means that, given the extensive competition from new technologies, the current generation of legacy media will only flourish, and perhaps survive, if the government recognizes this marketplace reality.

Accordingly, all relevant participants: newspapers, radio stations, broadcast television stations, cable companies, over-the-top providers, Internet sites, social media platforms, streaming music services, and satellite radio must be included in any media market definition. When I talk to existing providers in this space they explain quite clearly to me how their future plans are centered around competing against all of those operating in the market, especially given the development and scale of two large Internet companies: Facebook and Google. In not recognizing this in our rules, we shackle certain competitors, skewing the market in favor of the unregulated industries.

Having a dynamic understanding of where the marketplace stands at the current time, along with the agility to adapt as the market changes, allows either the FCC or DOJ to conduct a fair but accurate analysis, which should be of top priority. For example, one of the major reasons cited for the AT&T/Time Warner merger was the belief of the companies that the future rested in delivering content in the broadband space, and particularly to mobile devices.

Ironically, this very reasoning belies the similarly narrow mindset used when analyzing the current broadband marketplace. Regulators and some in the media have been fixated on fiber broadband, above consideration of any other technology. This myopic view ignores many other consumer broadband access methods and unfairly taints the overall market analysis for related administrative decisions. Consider the Comcast-Time Warner Cable merger application from 2014/2015 when many of us were told of FCC and DOJ consternation over the possible combination of wireline broadband assets, subsequently leading to the withdrawal of the application. But what about fixed wireless, mobile, or satellite broadband as consumer substitutes?

More recently, we have seen comments, including those by my fellow Commissioners, that the FCC's 2018 Broadband Deployment Report indicated that 24 million Americans do not have "broadband." However, this number represents those Americans without *wired* broadband. The real unserved population is 14 million, as 10 million households have satellite broadband of sufficient speed and functionality to meet our measurements. So why doesn't satellite broadband count in the minds of some, including certain regulators?

Equally troubling, the Commission, and perhaps DOJ, has been unable or unwilling to recognize mobile broadband as a sufficient substitute to fixed offerings. Look no further than the Commission's Deployment Report, which extols the virtues and growth of mobile broadband but then dismisses it as a full substitute, arguing there are "salient differences between the two technologies." But, if you spend one minute with actual consumers you will see the importance and in many cases preeminence of mobile broadband.

Although it is not lost on me that cost can be a factor for some, many consumers use mobile broadband, especially with existing unlimited pricing plans, as a replacement for wired broadband. A recent market report by Kleiner Perkins highlights this point well, showing that U.S. mobile usage per adult has been growing every year since 2009 and now accounts for 56 percent of daily hours spent online. Not surprisingly, desktop/laptop usage has flatlined or shrunk every year since 2011. Similarly, a summary of the National Telecommunications and Information Administration's recent survey on Internet use states, "Data from 2017 show that more households (88.9 million) had mobile data plans than wired broadband service (85.3 million), a reflection of changing patterns in Internet use." As I have stated previously, this trend will only increase as consumers have more experience with the benefits that mobile broadband brings and accept any potential drawbacks, in terms of price, data caps, screen size etc. And, we also

must acknowledge that next-generation, or 5G, networks, promising increased speeds and capacity, are on the horizon.

Thankfully, Congress recognized the importance of keeping the Commission and its regulations focused on market realities and provided relevant statutory provisions to address these situations and others. Specifically, the 1996 Telecom Act mandates that the Commission review, every four years, its media ownership rules to determine whether the rules are “necessary in the public interest as the result of competition.” At the same time, current law requires the Commission to conclude a biennial review of regulations imposed on telecommunications providers and remove those that are no longer in the public interest because of meaningful competition between service providers. And, the Commission has another statutorily required Broadband Deployment Report to reassess our past approaches and considerations of broadband substitutes.

On that note, the Commission will launch its 2018 Quadrennial Review of our Media Ownership rules later this year. In this review, I will seek an updated market definition that incorporates many of the findings in Judge Leon’s decision. For my part, and to quote Judge Leon yet again, “I simply cannot evaluate” our media ownership rules “without factoring in the dramatic changes that are transforming how consumers view video content.”

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I thank you for your attention and I’d be happy answer any questions you may have at the end of my colleagues’ comments and our upcoming panel.