

**Remarks of FCC Commissioner Michael O’Rielly  
before the Cloud Comms Summit  
June 26, 2018**

Thank you for that very kind introduction. It is a true honor to have the chance to speak before members of the relatively new Cloud Communications Alliance, especially at such a lovely setting. Visiting Stone Tower Winery reminds me of the Earnest Hemingway quote where he wrote, “Wine is one of the most civilized things in the world and one of the most natural things of the world that has been brought to the greatest perfection, and it offers a greater range for enjoyment and appreciation than, possibly, any other purely sensory thing.” I am fairly certain that after a few minutes of me delving deeply into the weeds of communications policy, your minds will wander to the wonders of wine. I tend to have that effect.

*Old Regulatory Mindsets*

As competitive entrants and providers of innovative offerings, I understand that you are wary of FCC regulation of communications services. Let me suggest to all of you that is probably not a sufficient level of consternation or concern. The reality is that you should argue with all your might against any effort to capture your businesses within the clutches of the FCC.

One of the things I have focused on during my time at the Commission is challenging obsolete regulatory assumptions in light of the rapid technological and marketplace changes occurring around us. I have found that it can be incredibly hard to break out of old mindsets. The old adage that, if the only tool you have is a hammer then every problem looks like a nail, is certainly true when it comes to regulation. Your job is to make sure everyone, including regulators, properly recognizes that you are a screw, bolt, or quick drying cement; be anything but a nail.

As new technologies or competitors emerge, the temptation — or dare I say the deep desire — of a regulatory agency is to take rules that apply to pre-existing technologies and carry them forward to new offerings and providers, regardless of the intervening changes in the marketplace. That’s certainly one way to level the regulatory playing field and preserve a role for regulators, but it is fundamentally misguided.

During times of change, an agency must refrain from subjecting new technologies to old regulatory structures. At a minimum, an agency should not act unless it is clear that the agency has authority, that there is evidence of a market failure warranting intervention, and that the benefits of acting outweigh the costs. Otherwise, regulators risk suppressing further entry, innovation, and investment. Companies that have options for how they allocate their capital will naturally avoid areas that have added regulatory exposure. That’s why I have consistently fought to halt, or at least mitigate, the prior Commission’s mission creep as it tried to extend its reach to edge providers or other new entrants.

Consider, for example, the previous Commission’s attempt to regulate business data services. Not only did the agency consider increasing regulation of legacy providers, but it also floated the idea of extending the rules to new entrants – something I vehemently opposed. For a decade, the hope had been that emerging competition would reduce the need for government intervention. When the Commission suddenly changed course and viewed new entrants as additional, potential regulatees, those very companies made clear to us that they would shift their investment dollars elsewhere as a direct result. In short, expanded regulation would have deterred further high-capacity broadband deployment and reduced competition. Fortunately, under the leadership of our current FCC Chairman, we reversed this flawed approach.

*VoIP & Text as Interstate, Information Services*

It is also why I have been so outspoken on the need to declare other services, including VoIP and text messaging, to be interstate, information services, freeing them from unnecessary federal and state requirements. Both services are extremely popular with consumers and businesses, and there is abundant competition both from legacy providers and new over-the-top players to meet the market's needs. Nonetheless, both services continue to be the target of what I've called regulation by analogy.

Take, for instance, the agency's historically convoluted approach to VoIP. When the service was first introduced over a decade and half ago, the agency's first instinct, which was completely wrong, was to compare it to traditional telephone service, even though it was provided in a fundamentally different manner. Offerings that were deemed to be sufficiently "interconnected" with the Public Switched Telephone Network (PSTN) were deemed just like standard voice services, and plastered with similar regulations, such as CALEA and CPNI. However, the Commission declined to classify the service, placing it in regulatory limbo ever since.

The Commission's failure to classify the service, and its decision to apply certain legacy regulations irrespective of the potential classification, only served to encourage mission creep by prior Commissions and regulatory ambitious states. It was the worst of both worlds: all the burdens and none of the clarity. In hindsight, it was a good lesson of unprincipled Commission leadership being allowed to dictate the direction of technology via regulatory fiat.

All that uncertainty was allowed to fester and has recently come back full circle, as some states have renewed their own efforts to regulate VoIP. Minnesota is one example. Although its prior attempts to regulate Vonage in the early 2000s were rejected by the FCC and the courts, it now seeks to impose telephone regulations on a new VoIP offering. The case is being litigated in the courts, and I appreciate that the Chairman and Office of General Counsel were willing to work with me on an amicus filing explaining the legal and practical problems with Minnesota's approach. It is unfortunate that the Commission must divert staff resources to stamp out efforts that are contrary to the law and common sense.

On that point, you may have heard something or saw a stray story that the Commission took decisive action on the issue of Net Neutrality. It was probably accompanied by the words "Armageddon" or the phrase "death to the Internet." But, that item from last December also contained a declaration reaffirming that underlying broadband is an interstate, information service. That should be a great development for many of the companies you represent because the same thinking must hold true for services that ride over it, including VoIP -- not that we should separate transmissions from applications. In other words, if broadband is an interstate, information service, how can VoIP not be the same? Furthermore, the idea that we would attempt to jurisdictionalize traffic that flows freely over the Internet, paying no heed to local, state, or international borders, is nonsensical. By any rational analysis, VoIP is just an application that is barely subject to FCC jurisdiction if at all, much less that of individual states.

For these very same reasons, I have urged the agency to declare text messaging to be an interstate, information service. It, too, has sat in a regulatory no-man's-land while the world has changed around it. As with VoIP, some have argued that messaging services that touch the PSTN or use phone numbers should be regulated as telecommunications services. Pure gibberish. In the meantime, consumers have been shifting from traditional SMS texting to a wide array of instant messaging apps and other forms of communication, such as social media. It violates any logical thinking to subject one segment of a robust market to common carrier regulation, hampering providers' ability to compete for a shrinking number of consumers that use it on a regular basis. I appreciate that Chairman Pai is willing to work with me to resolve this issue once and for all.

### *More Deregulation Needed*

While it is important to halt the spread of costly regulation to new services and businesses, the Commission cannot stop there. An agency also must be vigilant about removing unnecessary regulation on legacy services. Ideally, regulators would view innovative offerings as evidence that rules are no longer needed. But, we've seen that consumers are much faster at cutting the cord than regulators are at cutting red tape.

For example, the previous Commission's so-called "Tech Transitions" proceeding was one of the greatest mislabeling efforts in all of communications policy. Looking back, it highlights just one instance where the Commission should have reviewed and eliminated burdens on providers shifting to new technologies and services that consumers and businesses increasingly seek. Under prior FCC leadership, however, it became an opportunity to impose new obstacles. Even though most consumers had already willingly migrated to new services, the rules would have forced legacy providers to maintain aging and underutilized copper networks at the same time they were racing to deploy IP networks to keep up with modern demand.

The current FCC has taken steps to reverse a number of these requirements, and I hope we can do even more in the future. For instance, under one option to receive streamlined treatment to discontinue legacy voice service, a carrier must show that it provides a standalone interconnected VoIP service and that at least one other standalone facilities-based voice service is available from another provider throughout the affected service area. In my view, as long as a provider in the affected area offers voice service, which could include wireless or interconnected VoIP, then our obligation to ensure that consumers are not left without service should be met.

In addition to the Tech Transitions proceeding, the Commission will have other chances to remove legacy regulations. Later this year, the Commission must initiate the next biennial review of telecommunications regulations. I have urged staff and outside parties to use these opportunities to scour our rule books and identify provisions that ought to be discarded. Prior efforts have been tepid at best. Removing a reporting requirement here or there is a good start, but surely, we can all do better.

Some might be tempted to view this as a task best suited for legacy providers subject to the rules. Additionally, in the past, competitive providers shied away from making or supporting suggestions to remove legacy regulations on the notion that burdens imposed on incumbent providers benefit competitors. However, I would encourage you and other competitive entrants to take a careful look and submit suggestions as well. As we learned from the business data service example I referenced earlier, any regulation that remains on the Commission's books can eventually be turned against you.

## *Positive Commission Actions*

While I have spent a fair amount of time tonight discussing ways to shrink the Commission's regulatory portfolio, there are several areas where Commission action remains essential to ensure that consumers and businesses have access to modern communications.

One area where the FCC is playing a very positive role is the freeing up of spectrum bands. This process has involved reallocating high-band, millimeter wave frequencies for flexible use, including mobile. Due to recent Commission action, almost 5,000 Gigahertz of spectrum has been made available for this purpose. I have also taken a leading role in setting rules for a large swath of mid-band spectrum, a likely sweet spot for global 5G services. My focus has not only been on concluding the so-called Citizens Band Radio Service at 3.5 GHz, but also reallocating the C-Band spectrum for additional wireless uses. This will provide large slices of spectrum for licensed services at 3.7 to 4.2 GHz, while permitting us to allow unlicensed services at 6 GHz. After some initial resistance internally and externally, it is great to see everyone come around to this line of thinking. This is a great example where, if you do the hard work and show people it's a principled path, they will eventually jump onboard.

Moreover, in those instances where there is no business case to extend broadband, particularly in the most rural parts of the country, the Commission uses its universal service fund (USF) to incentivize providers to offer broadband to unserved communities. Support provided through the high-cost program, or Connect America Fund, helps providers deploy broadband in these areas; support from the E-rate and Rural Healthcare programs fund discounted service for schools, libraries, and health care facilities; and the Lifeline program helps make service more affordable for low-income consumers.

Those of you who provide interconnected VoIP service are required to contribute to support USF, and likely pass those fees on to your customers. Therefore, I imagine that you have kept an eye on the overall size of USF, which has grown to over \$11 billion, and the quarterly contribution factor, which will be 17.9 percent for the third quarter but topped 19 percent earlier this year. And, you should expect this number to go up as the Commission is expanding funding for its Rural Healthcare Program and is likely to do the same for the High Cost Program and has approved new spending to rebuild communications in Puerto Rico.

Although it's always easier to give money away or pretend that the dollars needed to cover new spending comes from magical fairies, I have been a voice for recognizing and constraining the burdens placed on contributors and their customers. I firmly believe that each Commission spending program must be as efficient and cost-effective as possible. It is why I have advocated for the use of reverse auctions wherever feasible to ensure that we do not pay more than necessary for quality service. It is why I have opposed providing funding to more than one provider in an area or funding any area where a provider already offers service without government subsidies. And, it is why I believe that all funding recipients need to put forth some of their own dollars as a way to deter waste, fraud, and abuse.

Notwithstanding these efforts, the universal service fund has continued to grow. Some have asked the Commission to expand the contribution base to broadband providers as a means to generate more funding. Not on my watch. Adding fees to broadband will discourage its use and potential deployment — directly against our overall goals. Instead, I have urged the Commission to adopt an overall cap on USF and manage the four programs within that figure. Doing so would provide much needed certainty both for recipients as well as contributors like yourselves.

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So, in conclusion, how many of you are thinking about wine now? At the risk of overstaying my welcome, I would be pleased to answer any questions that you may have or, alternatively, leave you free to explore this fine property. Thank you again for inviting me to speak and for your attention this beautiful evening. I wish you a successful rest of the conference.