

**Remarks of FCC Commissioner Michael O’Rielly
Before the Free State Foundation
June 28, 2018**

Thank you, Randy, for that kind introduction and for inviting me to, once again, be part of your event. I think it is safe to say that I have presented more remarks at the Free State Foundation than at any other venue. I consider this quite an honor, but I remain somewhat surprised every time you invite me back. I guess I have not diminished the reputation of this scholarly, free market-championing foundation too badly.

Today’s lunch has been billed as a “twofer” seminar covering an update on FCC process reform and next steps, along with a discussion of the latest municipal broadband developments with special attention to net neutrality and First Amendment implications. Not surprisingly, I have some rather strong feelings about both topics. But, I will focus my remarks on Commission process reform, and reserve my thoughts on muni broadband for another day.

Shakespeare wrote that “to climb steep hills requires a slow pace at first.” Who knew Shakespeare was familiar with the glacial pace of change at the FCC. I have often said that everything at the Commission takes about two years longer than you would expect, but apparently it takes even longer to change the decades-old inner workings of the Commission.

Improving the procedures at the Commission has been a mission of mine since early in my tenure. In fact, I first spoke about process reform at the Free State Foundation in July of 2015. At that time, I set out my principles that reform ideas must improve the functionality, legitimacy, and transparency of the Commission. All proposals that I have supported, either at adoption or in concept, have enhanced these goals. Now that almost three years have gone by, an update seems most appropriate.

Recent Improvements

The most groundbreaking reform recently adopted and implemented has been the online posting of items three weeks in advance of their consideration at monthly Commission meetings. When I first proposed the idea, I knew that providing information to all, instead of to the few with pricey D.C. representation, would enhance the transparency and legitimacy of the agency. But, the response from many was that it would bring the FCC’s work to a halt, Commissioners would be hesitant to negotiate, and some sort of regulatory chaos would ensue. None of this has come to pass. Instead, the Commission’s process has become far more efficient. Meetings are targeted to specific issues, unnecessary discussions of non-existent issues have been eliminated, conversations are more productive, Commissioners are still speaking their minds, and work product has greatly improved. Since being enacted, I have also seen comments from all Commissioner offices — Republican and Democrats — in favor of the practice. Not bad for an idea from someone who hadn’t worked at the Commission before. If this is regulatory Apocalypse, I am all for it. Now, if we can only get this policy change extended to non-adjudicatory Circulation items, which tend to be technical in nature and could benefit from public input.

Making the drafts public has also helped with other process fouls. For instance, drafts are now more complete and polished prior to the public reveal, so edits prior to the meeting are coming from Commissioners, as opposed to there being last minute changes – or rewrites – from staff or the Office of General Counsel (OGC). It was always fun to read one item, just to get a different draft to review and negotiate one – or sometimes even two – weeks later. Similarly, ensuring a better draft upfront has also reduced the need for substantive post-adoption edits, a practice that Chairman Pai thankfully eliminated.

The Commission is also in the process of implementing reforms to fix certain substantive shortfalls. One of the first concerns I raised was the woeful cost-benefit analyses (CBA) that were being performed to justify burdensome regulations. The Chairman is in the process of setting up the Office of Economics and Analytics, which will spearhead the CBA reform efforts. I worked with the Chairman to ensure that the new office has the ability and power to institute drastic and long-lasting change to how we consider the economic impact of the rules we adopt. These include requiring a rigorous, economically-grounded analysis for any rulemaking that will have an annual cost to the economy of \$100 million or more; sign-off from the new office prior to release of an item, placing it on equal footing with OGC; and a separate, future proceeding to consider and adopt readily-accepted government CBA guidelines that will ensure a thorough economic review of any new rules.¹

Next steps

So much progress on process has been made under my friend, Chairman Pai, but our work remains. Let's accept a certain reality: Commission process reform is neither splashy nor does it generate huge headlines. Instead, working on the nitty-gritty, nuts and bolts of the internal organization allows for fundamental reform elsewhere. For the agency to accomplish the big-ticket items, it must have a process that is efficient and one that is respected internally and externally. Otherwise, the Commission leaves itself open for both process complaints and substantive objections. Additionally, it should be acknowledged that critiques of current procedures and suggestions for improving them are not an indictment of current Commission staff. In general, we have very well-meaning staff that work exceptionally hard trying to effectuate the ideas and measures of Commissioners under the processes established or ignored by prior Commissions. Any process failures must rest at the feet of Commissioners.

So where do we go from here? As many of you know, I have written several blogs, speeches, and statements about possible process improvements. Many of these are still ripe for action. At last count, I have approximately 50 ideas – both old and new – that I plan to discuss with the Chairman. No need for anyone here to run for the doors; I am only going to highlight some of these ideas today.

1. Codify Commission Procedures

First and foremost, the Commission must establish a more formal structure for our procedures. Most of you would probably be shocked to learn that few of our internal workings are written down anywhere. They are merely passed down through the years under the guise of “how we’ve always done it.” How does one disagree with a current practice when the practice doesn’t technically exist? I ran into this exact problem when objecting to staff making substantive revisions after an item’s adoption.

By my rough estimates — because that’s all we have — less than 25 percent of our working procedures are in our current rules. Separate from that, each new Commissioner is given a piddly little three-ring binder containing outdated loose-leaf pages that provide, at best, guidance on what may or may not happen at certain junctures in Commission activities. And that is it. There is no extensive handbook or manual that can be referenced if procedural questions arise. How can that be? As an agency tied to the Administrative Procedure Act, how can our procedures be less formalized than those of a middle school PTA? Consider the fact that we have essentially adopted most of my proposal to fix the delegated authority problem, that is if two or more Commissioners have concerns and want to consider the item, they can bring an item to a full Commission vote under a specific deadline. Alas, this new “policy” exists only in informal email declarations. Why can’t this be formalized?

¹ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS (2003).

The solution here is rather simple but would be quite powerful. We should direct staff to start from the top and put our working practices down in written word. Then, we should incorporate this document into the Code of Federal Regulations for the entire world to see. That doesn't prevent changes or amendments, which we make all the time via the adoption of a Commission item. It just puts our procedures on a solid foundation.

2. Formalize Timeframes & Timelines

Since I have been in my position, I have noticed that Commission proceedings can get stuck in regulatory quicksand. The Commission should take the necessary steps to ensure that all work is concluded expeditiously, and that the public has an opportunity to challenge a decision promptly. Appropriate timeframes should be placed on all FCC proceedings, the 180-day merger shot clock should not be aspirational, and clear deadlines need to be placed on Team Telecom's review of the foreign ownership implications of certain applications before the FCC. Consider that a reconsideration petition can sit dormant for upwards of a decade without anyone blinking an eye or getting a court to grant a mandamus petition. That's nonsense. Let's establish appropriate deadlines and timeframes for every step of Commission proceedings.

I do not find this to be a radical idea by any stretch of the imagination. In fact, the House of Representatives has, at least, on two occasions passed legislation requiring exactly this. Combine this with Chairman Pai's repeated support for these bills and we have something that should move quite easily. I am sure someone will scream something about potential downsides, but I honestly cannot think of any.

3. Eliminate the Administrative Law Judge Process

The process for when issues are sent to administrative hearing must be revised and the role of the Administrative Law Judge (ALJ) should be eliminated. To the extent that fact-finding missions are needed, paper hearings can be conducted to obtain the requisite information.² We should not continue the practice of prolonged proceedings to determine that a hearing is needed, to then transfer the issue to an ALJ for a drawn-out hearing, just for the matter to come back to be fully considered yet again and voted on by the Commission. What a waste of time and resources. We know from recent items, where the Commission has overturned the ALJ, that some of these proceedings go on for many years,³ and I am

² *Family Voice Communications, LLC*, MB Docket 18-139, Hearing Designation Order, FCC 18-56 (rel. May 7, 2018).

³ *Game Show Network, LLC, Complainant v. Cablevision Systems Corp., Defendant*, MB Docket No. 12-122, Memorandum Opinion & Order, 32 FCC Rcd 6160 (2017) (stating that GSN filed a program carriage complaint on October 12, 2011, the hearing designation order was released on May 9, 2012, an abeyance was put into place due to the Tennis Channel case that was decided in 2013, the ALJ made his decision on November 23, 2016, and the Commission overturned his decision on July 14, 2017). See also *David Titus Amateur Radio Operator and Licensee of Amateur Radio Station KB7ILD*, EB Docket No. 07-13, Decision, 29 FCC Rcd 14066 (2014) (stating EB issued an order to show cause in 2007 and the ALJ's decision was reversed in November 6, 2014); *Tennis Channel, Inc., Complainant, v. Comcast Cable Communications, L.L.C., Defendant*, MB Docket No. 10-204, Order, 30 FCC Rcd 849 (2015) (reversing the ALJ's decision).

aware of cases that have been pending for a decade or more.⁴ For instance, one proceeding involving Media Bureau applications, which were filed in 1999 and set for hearing in 2003, still remains.⁵ Completely unacceptable.

And, beyond wasteful, devious Chairmen can unilaterally use the threat of the ALJ to kill proposed mergers. Parties would rather abandon a deal than experience endless delays and the possibility of having to separately battle both the DOJ and the FCC. I saw this very threat in action when former Chairman Wheeler ended the proposed Comcast-Time Warner Cable merger by simply informing the parties that it would be designated for hearing.⁶ Actually, I am not aware of anyone pursuing a merger that was set for or threatened to go to hearing.

Erasing the ALJ process, even if it takes legislation, will not deny any individual due process, generate added litigation risk, or substantially increase the workload for Commissioners or staff. In fact, it is my understanding that, out of the thousands of proceedings and applications that come before the Commission, there are currently only six active cases designated for hearing,⁷ and there is no reason why paper hearings would not permit the same factual discovery in these instances. On the contrary, in many cases it will provide better due process, by expediting finality to an item, and opening up the pathway for judicial review.

4. Deregulatory Presumption

In light of the vibrant competition in the various sectors of the communications marketplace, not only should the Commission review all proceedings with a deregulatory eye, but it should also use available tools, such as forbearance and mandatory reviews, to eliminate unnecessary regulation.⁸ This idea is aligned with those put forth by the wise Randy May, who has repeatedly advocated for a presumption that regulation is not necessary due to the presence of meaningful competition starting in 2011. This presumption could only be overcome by clear and convincing evidence to the contrary.⁹ In context, he was arguing that deregulatory presumptions should be added by Congress to sections 10 and 11 of the Communications Act, but there is no reason why the Commission, on its own accord, could not use such an approach when considering forbearance petitions or reviewing rules. And, if for some reason

⁴ See, e.g., *William F. Crowell*, WT Docket No. 08-20, Memorandum Opinion and Order, FCC 18-52 (rel. Apr. 26, 2018) (stating that the application was filed on February 28, 2007, the hearing designation order was released on February 12, 2008, and the proceeding is still before the ALJ); *William L. Zawila*, EB Docket No. 03-152, Order to Show Cause, Notice of Opportunity for Hearing, and Hearing Designation Order, 18 FCC Rcd 14938 (2003).

⁵ *Zawila*, 18 FCC Rcd at 14938. The ALJ granted a motion for summary decision in August 2017, returning the issues to Commission staff. See *William L. Zawila*, EB Docket No. 03-152, Summary Decision of Chief Administrative Law Judge Richard L. Sippel, FCC 17M-28 (rel. ALJ Aug. 10, 2017). An appeal of this motion is currently pending with the Commission.

⁶ Shalini Ramachandran, Joe Flint and Brent Kendall, *FCC Staff Recommends Hearing on Comcast-Time Warner Cable Merger*, WALL ST. J., Apr. 23, 2015, <https://www.wsj.com/articles/fcc-staff-recommends-hearing-on-comcast-time-warner-cable-merger-1429751499>; Shalini Ramachandran, *Comcast to Drop Bid for Time Warner Cable*, WALL ST. J., Apr. 23, 2015, <https://www.wsj.com/articles/comcast-to-drop-bid-for-time-warner-cable-1429824755>.

⁷ The ALJ only has two active proceedings, and there are four others that were before the ALJ that are now back with Commission staff.

⁸ 47 U.S.C §§ 160, 161.

⁹ Randolph J. May, *A Modest Proposal for FCC Regulatory Reform: Making Forbearance and Regulatory Review Decisions More Deregulatory* (Apr. 7, 2011), http://www.freestatefoundation.org/images/A_Modest_Proposal_for_FCC_Regulatory_Reform.pdf.

regulation is found to be necessary, the Commission should impose sunset provisions or require periodic reviews for any new or retained rules.

5. Fixing Enforcement

Last on my list for purposes of today's speech is the Commission's enforcement process. Not only is there a need to track the forfeiture collection process to confirm that our actions are carried through, but there is a need to revisit the forfeiture guidelines to ensure that our penalties are an effective deterrent. If we update our base penalties, reliance on upward adjustments will be reduced, increasing the transparency and legitimacy of our enforcement actions. During this review, the Commission should also consider how forfeitures are generally calculated – for instance, by day, by call or device sold, by rule violation, and so on. We should also consider what constitutes a continuous violation, so we have clear policies in place to determine when the statute of limitations expire.

From what I have seen, our policies are a moving target. And, when a Notice of Apparent Liability (NAL) is issued, like other proceedings, the Commission should have to resolve the investigation within a certain timeframe, such as 180 days. And, most importantly perhaps, we need to ensure that this process is never again abused like it was by the previous Commission. Enforcement proceedings should never be used to set policy or precedent that will apply to multiple parties without the opportunity for basic notice and comment.

* * *

In closing, I recognize that some of my reform ideas are easier to implement, while others may be more difficult, or, perhaps, controversial. If necessary, as was done with posting meeting items online, I propose that they can start as trials. While I think trial periods are mostly unnecessary, at least it is a small step up Shakespeare's steep hill towards effectuating change and trying something new. And, it must be a good idea because Randy May wrote a blog on this very idea back in January 2017.¹⁰

¹⁰ Randolph J. May, *A Proposal for Trialing FCC Process Reforms*, FREE STATE FOUNDATION (Jan. 9, 2017, 11:19 AM), <http://freestatefoundation.blogspot.com/2017/01/a-proposal-for-trialing-fcc-process.html>.