Statement of Commissioner Michael O'Rielly
Approving in part, Dissenting in part

Re: Amendment of the Schedule of Application Fees Set Forth In Sections 1.1102 through 1.1109 of the Commission's Rules GEN No. 86-285

I do not have an objection to this item per se, especially since I voted for a near identical one in 2014. In essence, it serves to execute a specific requirement mandated by law. As such, the Commission has little discretion to do otherwise and I have no substantive disagreements with the item's short content. I do object and dissent on the Commission's procedural gamesmanship to implement this requirement. Specifically, the authority cited within the item far exceeds the bounds of rationality, necessity or good government.

To be clear, there is little dispute, and the item makes clear, that Section 8 of the Communications Act is the operative statutory authority requiring this action. In fact, Section 8 establishes the overall requirement to assess fees, mandates Commission review on a biennial basis, outlines the schedule of charges for the application categories, and requires fee adjustment to reflect economic inflation. Paragraph 2 of the item states "application fees are prescribed by statute at 47 U.S.C. 158(b). . . implementing the statute leaves us no discretion, prior notice and comment is unnecessary. . ." If the item ended here, I would be in a fine place.

Unfortunately, the Commission's Office of General Counsel (OGC) has interceded to cite unrelated sections (1, 4(i), and 4(j)) as providing authority to issue the item. This can't be to protect its legal footing to make changes to the application fees, because Section 8 specifically prohibits any judicial review for increases or decreases made pursuant to subsection (b). Instead, this repeated practice should be seen for what it is: offensive to those lawmakers who write our governing statute. In particular, section 8 is so clear that citing any additional "authority" seems to indicate a belief that Congress doesn't know the difference between issuing direct requirements to the Commission, appropriately delegating authority as it sees fit, and expressing policy positions without requisite authority. That is untrue. In this universe, some must believe that only OGC can save Congress from itself and court review, through the addition of make-believe authorizing provisions. Phooey. If Congress provides direct requirements pursuant to a particular provision, as the item acknowledges, that should be sufficient to complete the task at hand.

It is also clear that the Commission's reliance on these unrelated provisions as either direct or ancillary authority to issue this item is absurd. I disagree with current interpretations of these sections, even if approved by a lower court. For Section 4(j), the only possibly relevant sentence is the first, "The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Similarly, Section 4(i), which I have previously raised, states "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Then the item cites the profoundly misinterpreted Section 1, which reads in part, "there is hereby created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act." These provisions hardly induce anyone to think the Congress bestowed the Commission with direct authority to issue the requisite provisions to implement application fees.

In addition, the fact that some court may have previously ruled that these provisions provide ancillary authority does not erase the fact that explicit, direct authority was provided in this instance, thereby eliminating the need for any ancillary authority here. Moreover, ancillary authority, to the extent it exists, still requires the identification of direct authority, which exists in the form of Section 8. This roundabout exercise helps prove its absurdity: OGC feels the need to cite imaginary ancillary authority to bolster the primary authority which must exist to provide a hint of rationalization for ancillary authority. It's belts and suspenders on a baby onesie.

Given the Commission's overreliance on this practice, it becomes tedious to raise it for each and every instance. Instead, I will continue to raise it periodically, especially in the most obvious of abuses.

Accordingly, I dissent on this misuse of OGC's role and function, while approving the rest of the item.