

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Restoring Internet Freedom*, WC Docket No. 17-108; *Bridging the Digital Divide for Low-Income Consumers*, WC Docket No. 17-287; *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42.

In the Restoring Internet Freedom (RIF) Order, the Commission reclassified broadband as an information service and restored it to the light-touch regulatory treatment that helped allow the Internet to flourish. As a matter of law, economics, and public policy this decision was undoubtedly correct. Similarly, today's order addressing the various remands from the U.S. Court of Appeals for the D.C. Circuit does a sufficient job reinforcing the Commission's sound approach and showing why our previous action should stand.

Though this Order would ideally provide certainty and finality to this matter, the truth is that some will always seek to return to the broken Title II regime, including its misguided approach to paid prioritization, which I have discussed elsewhere at length. We must, therefore, be careful not to take actions that would undermine the RIF Order or make it vulnerable. Rather, we need to apply its legal and economic underpinnings consistently across our proceedings.

One of the many attributes of the RIF Order was its text-based reading of and adherence to the Communications Act. According to the Commission, not only did broadband access unambiguously fit the definition of "information service" outlined in section 3 of the Act, as confirmed by the Supreme Court in *Brand X*, but this approach was also consistent with other provisions of the statute. Congress sought "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation"<sup>1</sup> and an internally consistent reading of the Act necessitated a deregulatory policy for the Internet marketplace and broadband providers. The RIF Order also relied on the plain text of the Act in rejecting the previous Commission's legal basis for the bright line and general conduct rules. The Commission's determination that the relevant provisions in section 706 of the 1996 Telecommunications Act were best read to be hortatory, rather than affirmative grants of regulatory authority, was by far the more persuasive interpretation, both in terms of the language of those provisions and in light of provisions elsewhere in the Act.

The law means what it says, and the Commission must stay true to the ideal, exemplified in the RIF Order, of striving to follow the statutory text as closely as possible. When it comes to information services, it's one thing to interpret, pursuant to Congressional authorization, an "ambiguous" provision in the statute to provide guidance to the courts in the face of legal uncertainty. (Indeed, that's a principle I have long championed in the context of the TCPA, where, despite the presence of a nationwide circuit split on the definition of an autodialer, this Commission has not provided clarity.) But, finding ways to regulate Title I or non-regulated services by stretching the statute to find "ambiguities" and introducing a new regulatory framework couched as interpretive guidance or otherwise, seriously undermines the careful analysis the Commission took in the RIF Order and jeopardizes its legal underpinnings. I also reject the prospect of a different FCC breathing new life into section 706 on the basis that, so long as it's in the statute, it's fair game as grounds for regulation. Just because the Commission *can* do something or might arguably receive deference for it under flawed judicial precedent, doesn't mean that it's acting faithfully with respect to the statutory text. And, that's certainly true when such efforts directly contradict the provisions of law crafted by those elected representatives for whom I worked.

Another bedrock principle of the RIF Order was the view that policymaking must be guided by rigorous economic analysis and that we must beware of unintended perverse consequences when we make changes to longstanding legal and policy frameworks. In the case of the RIF Order, the Commission

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<sup>1</sup> 47 U.S.C. § 230(b)(2).

rejected the need for heavy-handed regulation to address hypothetical harms and found that Title II classification would have net negative benefits for consumer welfare. And, the success of Commission's evidence-based approach has certainly been borne out: the parade of horrors cited by the pro-Title II advocates has turned out to be completely bogus. Indeed, the impressive performance of our networks in the midst of the COVID-19 pandemic should be convincing even to the biggest skeptic of the Commission's approach.

At the same time, economic analysis is just as crucial when it comes to addressing harms that *aren't* merely hypothetical. The solution to a problem shouldn't produce worse consequences or harms than the problem itself. There is a tendency by some to reflexively react to the latest fire, based on the impulse to "do something," without first considering whether the solution may lead to perverse unforeseen consequences down the road. Rather, an appropriate regulatory response to a problem should be based on a thorough accounting of the tradeoffs, avoiding at all costs the "economics free zone" of certain previous Commissions.

Finally, our previous work was an exemplar of regulatory humility. Regulators are notoriously bad at predicting the future and their interventions can undermine innovation and the free market in ways that are hard to anticipate, especially in the face of a dynamic and constantly evolving communications industry. This inherent limitation, coupled with the fact that Congress should guide major questions of policy and determine the contours of an agency's authority, undergirded the Commission's decision to reject its predecessor's radical policy changes and assertion of virtually unbounded power to make up rules for providers. I hope the Commission will make every effort to remain on this correct path.

I approve.