

Statement of Michael O’Rielly, FCC Commissioner
Before the Senate Committee on Commerce, Science, and Transportation
“Oversight of the Federal Communications Commission”
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Thank you, Chairman Thune, Ranking Member Nelson, and Members of the Committee for the opportunity to participate in the Committee’s FCC oversight process. Since our last visit in March, a lot has occurred at the Commission and more difficult issues are expected in the coming months. As I have stated somewhat before, while fundamental differences remain on many matters, individual Commissioners still seek to find some areas of agreement. Today, I will focus on just three issues, but look forward to answering all of your questions.

5G and Wireless Infrastructure

The enormous functionality of worldwide wireless services has helped cultivate an insatiable demand for even more. Consumers want increased mobility and now expect to be able to use their wireless devices for additional purposes, meaning the applicable industries and governments cannot rest on their respective laurels. This development has helped produce a global race among certain countries to be the world leader in the market for the next iteration of wireless services, commonly referred to as 5G. If successful, it could effectively produce a type of “wireless fiber” with amazing speeds, enormous capacity and infinitesimal latency.

Thankfully, the United States is on an accelerated pace to bring 5G to American consumers and help shape the global marketplace for these services for the next decade or two. My colleagues deserve credit for an expedited, bipartisan effort to make the requisite bandwidth available. My effort was to push to successfully conclude adoption of four spectrum bands and to expand the spectrum review to new, additional bands. In short order, the Commission was able to move from draft proposal to relatively reasonable final rules, including the framework for the upcoming spectrum auctions to be held in the near future, but more issues are being considered as part of the further notice.

Despite this, the Commission can only create a climate for future success and deployment of 5G. The real work, and ultimate overall success of this effort, will depend on the private sector participants – our nation’s wireless providers. And they seem ready to do their part to champion this opportunity. They have done the research, conducted the testing, established pilot markets and are on the verge of commercially deploying 5G services in the years ahead. Hopefully, these efforts will not be waylaid by other Commission actions.

One area that the Commission, and perhaps Congress, can provide greater assistance is removing barriers to the wireless infrastructure necessary to deploy 5G. As I have previously outlined, experts estimate that the propagation capabilities (short distances) will require a ten-fold or greater siting of wireless towers and antennas. Some have argued that we may see a million new small cells and DAS antennas deployed in the next five years. All of this infrastructure can’t be sited without approval of decision makers, including private land owners and municipal managers.

Standing in the way of progress, however, are some localities, Tribal governments and states seeking to extract enormous fees from providers and operating siting review processes that are not conducive to a quick and successful deployment schedule. At some point, the Commission may need to exert authority provided by Congress to preempt the activities of those delaying 5G deployment without justifiable reasons.

Set-Top Boxes

Seven months ago, on a 3-2 vote, the Commission stretched our statutory authority beyond recognition to produce a troubled NPRM in the name of “unlocking the box.” Since then, significant concerns and fundamental objections to the Commission’s approach were raised almost daily. Not surprisingly, the proposal previously circulated was exposed as unworkable and inadvisable. Accordingly, Chairman Wheeler has circulated an order based on a new apps-centric alternative, an approach that I have advocated for as a realization of the direction of the current marketplace. I should state that I appreciate that the Chairman and his team jettisoned the failed NPRM model, but the new effort comes with its own baggage. Instead of embracing the video distributors’ filed proposal, the latest version adds complicated and flawed provisions to that offer, effectively threatening and undermining the viability of the entire apps-based approach.

Fundamentally, the video marketplace has expanded radically since Congress enacted section 629. Innovation spurred by fierce competition is bringing many new options to the table, and prompting pay-TV providers to develop their own mobile apps, all without a set-top box anywhere to be seen. But as the market innovates past the Commission’s limited section 629 jurisdiction, my colleagues have reinterpreted that provision to shut down all this experimentation and force the modern video marketplace into a mandatory new framework that is likely both illegal and infeasible.

The proposed rule would ultimately set the Commission up as arbiter of a compulsory license, which the Copyright Office confirmed we have no authority to do under current law. Though the Commission has stated that the one-size-fits-all Model License would be developed by an outside licensing body established by MVPDs and content providers, the proposed language is clear that the job of this licensing body is merely to develop recommendations for a consensus license, recommendations that the Commission may accept, micromanage, or retool at will. Actually, since the authority is delegated to the Media Bureau, it is not even the Commissioners that will make the decisions. And although the proposal is touted to leave programming contracts between MVPDs and programmers intact, MVPDs would be prohibited from signing contracts with programmers that would create “unreasonable” limits on consumer access, complete with a convenient starter list of terms that would be allowed, some that would be “unquestionably unreasonable,” and of course a wide gray space in between.

Meanwhile, when you look at the magnitude and the constraints of the actual project being demanded, it is highly unlikely that it can even be accomplished, given unlimited time and resources, let alone in two years and with the resource demands of a highly competitive industry. The proposal requires that every MVPD create a separate working app for every widely deployed operating system that receives or displays video programming. How many would that be just to

start? Roku, Amazon, Google, Android, AppleTV and Apple iOS, Windows, TiVo... Blackberry? Linux? And here is the key: each of these apps must provide the exact same functionality as a set-top box provided by the MVPD. Given the differences in standards and capabilities among different devices, not to mention among different set-top box options provided by each MVPD, this seems like a heavy lift to say the least.

I look forward to continuing the dialogue with my colleagues on this issue, but I remain skeptical, given my experiences with the NPRM, that my views will be welcome or fully considered.

Process Reform

During my time at the Commission, I have highlighted certain shortcomings in the Commission's processes. I simply believe that there are better ways to operate the Commission that would not jeopardize the prerogative or power of the Chairman, whoever that may be. To facilitate this, I have given speeches, testified, written blogs and discussed at length many steps the Commission can take to correct bad practices and improve general operations. Unfortunately, little has been accomplished to make these or other changes, notwithstanding Chairman Wheeler's public comments in favor of many of my suggestions. In sum, the Process Review Task Force, created by the Chairman, has failed to deliver and practically no procedural changes have been permitted.

The lack of action on these improvements runs counter to a process reform just issued last week by the Chairman pertaining to the disposal of personnel matters. Without getting into the substance, the Chairman contemplated, decided and declared a new procedure for addressing personnel changes that he believes are taking too long. Specifically, the Commission will now vote on these items at its monthly Open Meetings, without discussion or comment.

One telling thing from this new procedural decree is how fast it was issued and without any input from my colleagues or me. The Chairman issued the new memorandum that established the new procedures. There was no internal review task force where Commissioners were asked their opinion and debate was allowed. It begs the question, why can't the Chairman adopt the many process review ideas I have proposed – at least the ones that he is in agreement with – as quickly? In other words, if the Chairman has such unilateral power to change the Commission's rules at will, why can't this be used to implement the process review changes I have suggested?

Thank you, and I look forward to engaging with you on these issues and others.