

**DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Protecting and Promoting the Open Internet*, GN Docket No. 14-28.

It should come as no surprise that I cannot support today's Notice. As I've said before, the premise for imposing net neutrality rules is fundamentally flawed and rests on a faulty foundation of make-believe statutory authority. I have serious concerns that this ill-advised item will create damaging uncertainty and head the Commission down a slippery slope of regulation.

As anticipated, the Notice proposes to ground the net neutrality rules in section 706 of the Telecommunications Act of 1996. I have already expressed my views that Congress never intended section 706 to be an affirmative grant of authority to the Commission to regulate the Internet. At most, it could be used to trigger *deregulation*.

But the Notice doesn't stop there. It seeks comment on ways to construe additional language in section 706 and even suggests using section 230(b) to broaden the scope of the Commission's usurped authority. This is absurd. I was worried enough that the Commission's current reading of section 706 could be used to justify any number of regulatory interventions and could ultimately impact not just broadband providers, but also edge providers. Now that the Commission is trying to cast an even wider net of authority, I fear that other services and providers could become ensnared in the future.

And just in case section 706 proves to be inadequate for this regulatory boondoggle, the Notice explores upending years of precedent and investment by reclassifying broadband Internet access as a Title II service. That is, the Commission examines applying monopoly era telephone rules to modern broadband services solely to impose unnecessary and defective net neutrality regulations. I cannot support such a backward-looking, ends-driven approach—not in a Notice and certainly not in final rules.

While courts can recognize that an agency may *legally* reverse course as long as it adequately explains the reasons for changing its position, I am concerned about the *real world impact* that such a decision could have on the communications industry and the economy as a whole. The current framework has provided a climate of certainty and stability for broadband investment and Internet innovation. Upending that framework could disrupt the tremendous progress that has been made over the last decade. I also worry about the credibility of an agency that consistently fails to meet statutory deadlines to review and eliminate old rules, but is supposedly open to reapplying obsolete provisions.

The Notice suggests that reclassification could be accompanied by substantial forbearance from the Title II requirements. But the need to forbear from a significant number of provisions in Title II proves the point that Title II is an inappropriate framework for today's dynamic technologies. Indeed, Title II includes a host of arcane provisions on topics like interlocking directorates, valuation of carrier property, uniform system of accounts and depreciation charges, telephone operator services, telemessaging service, Bell Operating Company entry into interLATA services, manufacturing of telecommunications equipment and customer premises equipment, and electronic publishing. Even if the Commission granted forbearance from all of the provisions that it has eliminated for incumbent telephone companies—and then some—advocates are ignoring that broadband providers and services would still be subject to a host of unnecessary rules. The idea that the Commission can magically impose or sprinkle just the right amount of Title II on broadband providers is giving the Commission more credit than it ever deserves.

Additionally, before taking any action on any issue, the Commission should have specific and verifiable evidence that there is a market failure. The Notice does not examine the broadband market much less identify any failures. A true and accurate review of the U.S. broadband market—which must

include wireless broadband—would show how dynamic it is. The Notice does acknowledge that innovation and investment have flourished, although it implausibly ascribes those successes to the vacated net neutrality rules.

Moreover, the Notice fails to make the case that there's an actual problem resulting in real harm to consumers. The Notice identifies, at most, two additional examples of alleged harm. And in one instance, the Commission concedes it did not find a violation. The Notice tries to explain away the absence of net neutrality complaints, but the unpersuasive excuses cannot mask a lack of evidence. In a last ditch attempt to find problems, the Notice points to supposed bad conduct occurring outside of the United States without explaining how that is relevant to a very different U.S. broadband market and regulatory structure.

Having come up empty handed, the Notice proceeds to explore hypothetical concerns. At the top of the list is prioritization. But even ardent supporters of net neutrality recognize that some amount of traffic differentiation or "prioritization" must be allowed or even encouraged. Voice must be prioritized over email; video over plain data. Prioritization is not a bad word. It is a necessary component of reasonable network management.

The Notice is particularly skeptical of paid prioritization and contemplates banning some or all such arrangements outright. Yet companies that do business over the Internet, including some of the strongest supporters of net neutrality, routinely pay for a variety of services to ensure the best possible experience for their consumers. They've been doing it for years. And certain arrangements have even been viewed as "good for the Internet." In short, fears that paid prioritization will automatically degrade service for other users, relegating them to a so-called "slow lane," have been disproven by years of experience.

Because there's no evidence of actual harm that could help inform the proposed rules, they are not narrowly tailored but hopelessly vague and unclear. We are left to puzzle over what it means to provide a "minimum level of access" or what constitutes a "commercially unreasonable" practice, especially in the absence of contractual relationships. The Notice suggests that providers could seek non-binding staff guidance or prospective reviews of their practices. But it is very troubling when legitimate companies are put in the position of having to ask the government for its blessing every time they need to make a business decision in order to avoid costly enforcement or litigation. It is even more telling that the Commission is suggesting new layers of enforcement options for which it has no experience. For instance, where are ombudsmen mentioned in the statute and what are they to do exactly?

Finally, to say the cost-benefit "analysis" is woefully inadequate is an understatement. The Notice devotes several pages to a wish list of disclosures, reporting requirements, and certifications that will impose new burdens and carry real costs, but may not even be meaningful to end users. For example, what will the average consumer do with information on packet corruption and jitter? However, there is no attempt to quantify and compare the costs of the proposed new requirements against the supposed benefits—just a single paragraph seeking comment on ways to reduce the burdens. Proposed rules should be accompanied by a fulsome cost-benefit analysis that includes a detailed and extensive review of current law, especially as it applies to other federal agencies that we seek to imitate. The Commission's short-shrift approach to cost-benefit analysis cannot continue, and I intend to spend time improving this important function.

In sum, the proposed net neutrality rules and legal theories will stifle innovation and investment by the private sector, provide no help to consumers, and thrust the Commission into a place it shouldn't be. I respectfully dissent.