

**Remarks of Commissioner Michael O’Rielly  
International Bar Association Conference  
Communication Committee Session  
September 20, 2016**

Thank you to the International Bar Association for inviting me to speak with you today as a lead-in to your two informative panels. Unfortunately, I will not be able to stay, but the following discussion of net neutrality, cybersecurity, privacy, encryption and the right to be forgotten boils down to an overarching, fundamental debate: how do we ensure the continued functionality and growth of the Internet. Everyone accepts that the Internet has transformed everyday life, but people – both domestically and internationally – do not always agree on the best means to preserve such an important global resource.

*Zero-Rating Offerings*

Admittedly, my views on the Commission’s net neutrality rules are well known, so there is no need to rehash them at length here. But, I would like to focus on one sub-issue, which I know is also being contemplated around the world, and that is zero-rating or sponsored data offerings.

As many of you may know, we now review these innovative means to attract consumers in an exceedingly competitive marketplace under a vague, catch-all rule called the “general conduct standard.”<sup>1</sup> As drafted, this rule is “designed to prevent the deployment of new practices that would harm Internet openness.”<sup>2</sup> The Chairman equates the Commission’s role to that of a referee who can throw a flag when it sees behavior it does not like.

On the bright side, I guess this scheme is somewhat better than a total ban on zero-rating offerings, but from its inception, I warned that such a mother-may-I approach to regulation was, at best, going to cause marketplace uncertainty and delays and, at worst, result in new and innovative offerings never seeing the light of day. Clearly, it’s impossible for companies to keep in compliance and avoid regulatory “flags” when the overall game is not explained in advance.

Let me tell you how this has played out so far. Last November, one wireless company announced a zero-rating plan,<sup>3</sup> which the Chairman declared to be “highly innovative and highly competitive”,<sup>4</sup> only to reverse his position a month later, and then start a very public investigation into this offering, along with three others.<sup>5</sup> At this point in time, the FCC has been investigating for ten months, and there appears to

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<sup>1</sup> *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5659-69 (2015).

<sup>2</sup> *Id.* at 5603.

<sup>3</sup> Press Release, T-Mobile, T-Mobile Unleashes Mobile Video with Binge On (Nov. 10, 2015), <https://newsroom.t-mobile.com/media-kits/un-carrier-x.htm>.

<sup>4</sup> See, e.g., Todd Shields, *T-Mobile Offering is ‘Highly Innovative,’ FCC Chief Wheeler Says*, BLOOMBERG, Nov. 19, 2015, <http://www.bloomberg.com/news/articles/2015-11-19/t-mobile-offering-is-highly-innovative-fcc-chief-wheeler-says>.

<sup>5</sup> See, e.g., Marguerite Reardon, *AT&T, Comcast and T-Mobile Questioned over Streaming Freebies*, CNET, Dec. 16, 2015, <https://www.cnet.com/news/at-t-comcast-and-t-mobile-questioned-over-streaming-freebies/>; John Eggerton, *Verizon Told FCC about FreeBee*, MULTICHANNEL NEWS, Jan. 20, 2016, <http://www.multichannel.com/news/content/verizon-told-fcc-about-freebee/396698>.

be no end in sight. While I disagree with this type of inquisition, the Commission should have the obligation to quickly review these services and inform these providers in writing the status of their offerings, including those that are in the clear.

Instead, these services live under a perpetual cloud of doubt where the Commission can dictate – apparently at any time – that the provider terminate the offering and, adding insult to injury, potentially be sent to the FCC’s Enforcement Bureau for staggering penalties. What may be even worse is that these companies would have to turn to their consumers to explain that the offering that they use is no longer available to them. So much for protecting the interests of consumers and their choices.

This is clearly not a structure that leads to experimentation and innovation. In fact, I have had conversations with industry participants that withheld new offerings because it isn’t worth being caught up in an FCC investigation. One company told me that their engineers came up with some new interesting ideas that were shot down almost immediately by their general counsel because of this rule. It is never a good thing when lawyers are dictating technology winners and losers, no offense to the lawyers in the room.

#### ICANN

But the problems of poor or disturbing Internet policy do not stop at the FCC’s doorstep or even at this country’s borders. At the end of this month, the Administration is preparing for the unprecedented transition of the Internet domain name system (DNS), known as the Internet Assigned Number Authority (IANA) functions, to the Internet Corporation for Assigned Names and Numbers (ICANN). This would formally end the successful structure of limited U.S. oversight in place since 1998.<sup>6</sup>

Let me be clear: I believe in true multi-stakeholder models. The global Internet community is in the best position to make important decisions about the inner-workings of the Internet. But, this transition is a serious undertaking, and once done, it cannot be undone.<sup>7</sup>

At the outset, I have grave concerns that one or more foreign governments would be able to unduly influence or control the new ICANN. Early on in the process, it was clear that NTIA’s criteria to relinquish its ICANN stewardship did not preclude the possibility of foreign government participation.<sup>8</sup>

Unfortunately, this concern has not been resolved and, in fact, the new structure provides foreign governments a larger role. Governments will continue to have an advisory role as part of a restructured Government Advisory Committee (GAC) that provides some ability to influence board decisions. But,

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<sup>6</sup> See Press Release, NTIA, NTIA Finds IANA Stewardship Transition Proposal Meets Criteria to Complete Privatization, (June 9, 2016), <http://www.ntia.doc.gov/press-release/2016/iana-stewardship-transition-proposal-meets-criteria-complete-privatization>; Lennard G. Kruger, Congressional Research Service, *The Future of Internet Governance: Should the United States Relinquish Its Authority over ICANN?*, at 1-3 (Sept. 1, 2016), <https://www.fas.org/sgp/crs/misc/R44022.pdf>.

<sup>7</sup> See, e.g., Marco Rubio, *It’s Essential That We Keep the Internet Secure, Free and Open*, FOXNEWS.COM (Sept. 16, 2016), <http://www.foxnews.com/opinion/2016/09/16/marco-rubio-its-essential-that-keep-internet-secure-free-and-open.html>.

<sup>8</sup> See Kieren McCarthy, *What the Government Said about IANA in Singapore*, CIRCLEID, Mar. 26, 2014, [http://www.circleid.com/posts/print/20140327\\_what\\_the\\_us\\_government\\_said\\_about\\_iana\\_in\\_singapore](http://www.circleid.com/posts/print/20140327_what_the_us_government_said_about_iana_in_singapore).

post transition, if allowed to proceed, they will also have a new decisional role through the GAC's presence on the Empowered Community, which will inherit the oversight role from the U.S.<sup>9</sup> This will provide the GAC with votes over such fundamental decisions as dismissing the board and individual directors and bylaw changes.<sup>10</sup>

We all know the countries that are most likely to take advantage of such a structure are the authoritarian regimes that do not hold our freedom of speech beliefs. Today, these countries block websites and blogs to mute the voices of dissenters and protect their positions. For instance, one country proposed rules, in March, that Internet domain names offering service in that country would have to apply to their ministry to operate, allowing the government to ban websites not approved by local authorities, censor content, and monitor citizens' activities.<sup>11</sup> And there are countless examples from other nations.

Government influence is particularly troubling because ICANN's bylaws incorporate a vague commitment to "internationally recognized human rights."<sup>12</sup> There is no common definition of human rights<sup>13</sup>: one country's censored hate speech is another country's protected freedom of expression. Therefore, such a requirement could enhance the ability of authoritarian regimes to use ICANN's functions to control and censor content. Certain domain names and IP addresses could be refused, turned off or traffic diverted if the websites contain content that some find objectionable.

We should also dispense with the notion that the IANA functions are merely perfunctory or meaningless. If that is the case, then why is there even a dispute or a demand that the U.S. "relinquish control"? Why exactly should we disrupt the current highly-successful functioning of the Internet as it exists today if the IANA functions are meaningless? Whether it's actually technically important or just psychosomatic to the international community, the IANA functions and maintaining oversight over them are a valuable tool to leverage proper behavior, thereby preventing rogue regimes from harming the operations and oversight of the Internet.

There is also no reason to believe that terminating U.S. stewardship of ICANN will end, or even diminish, the calls for the international regulation of the Internet. These countries are persistent and nothing

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<sup>9</sup> See, e.g., Letter from Ted Cruz, U.S. Senator, *et al.*, to Penny Pritzker, Secretary, U.S. Department of Commerce & Lawrence Strickling, Assistant Secretary for Communication and Information, NTIA, U.S. Department of Commerce, at 1-2 (May 19, 2016) ("May 19, 2016 Senate Letter"), [https://www.cruz.senate.gov/?p=press\\_release&id=2646](https://www.cruz.senate.gov/?p=press_release&id=2646); Brett D. Schaefer & Paul Rosenzweig, Heritage Foundation, *ICANN Transition Proposal: The U.S. Should Proceed with Caution*, at 6, 8-9 (Apr. 4, 2016), <http://thf-reports.s3.amazonaws.com/2016/BG3110.pdf>.

<sup>10</sup> Kruger, *supra* note 6, at 7-8 (stating that GAC will not participate in this group when the board is considering a GAC advisory).

<sup>11</sup> See, e.g., Josh Chin & Eva Dou, *China Seeks More Legal Muscle to Block Foreign Websites*, WALL ST. J., Mar. 29, 2016, <http://www.wsj.com/articles/china-seeks-more-legal-muscle-to-block-foreign-websites-1459230128>; Shai Oster & Lulu Yilun Chen, *China Considers Tightening Control Over Internet Websites*, BLOOMBERG, Mar. 29, 2016, <http://www.bloomberg.com/news/articles/2016-03-29/china-considers-tightening-control-over-internet-websites>

<sup>12</sup> Bylaws for Internet Corporation for Assigned Names and Numbers at 5, 137 (Adopted May 27, 2016), <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf> (stating that the implementation of this language will be determined in the future as part of Work Stream 2 to be completed after the transition is scheduled to be completed).

<sup>13</sup> See, e.g., Schaefer & Rosenzweig, *supra* note 9, at 7-8.

ensures that U.S. relinquishment of its ICANN role will stop their campaign. This won't be the end of the debate. Once they gain control over the IANA functions, the push will be for more international influence in other venues. And nothing would stop them from handing the IANA functions over to the ITU, the U.N., or some dysfunctional organization at a future date.

There are also reasons to doubt that the ICANN board is prepared to take on this responsibility and if it is accountable to its members.<sup>14</sup> Is the global Internet community able to discipline the board to prevent abuse or undue influence? And this is just a start of the concerns – many accountability measures are still under consideration and several legal issues have been raised.<sup>15</sup> Left unresolved, this entire Jenga-like structure could easily crumble, bolstering efforts for additional government involvement in Internet operations.

While some may assert that opponents of the transition are individuals who don't understand fundamentally what is at issue, this is far from the truth. We understand that the underpinnings of the Internet are being put at risk because of other global policy debates and a desire to conclude this process prior to the election. Many consider it a small price to pay for other government activities, like those revealed by Edward Snowden. But, the Internet isn't something that should be compromised as a means to assuage critics or meet artificial deadlines. All details of the transition must be worked out, fully considered and all questions answered before this transition goes any further.

So there you have it. I hope this helps frame some of the debate or provokes discussion for purposes of the upcoming panels, and I wish you well for the rest of the conference.

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<sup>14</sup> See, e.g., Letter from John Thune, Chairman, Senate Committee on Commerce, Science & Transportation *et al.*, to Loretta E. Lynch, Attorney General, U.S. Department of Justice & Penny Pritzker, Secretary, U.S. Department of Commerce, Sept. 8, 2016, at 2, [https://www.commerce.senate.gov/public/\\_cache/files/9b6b37a9-e5a4-4695-931e-73d54b32f768/D453845EFDC860DCC3161346BBCA9C63.20160908-doj-lynch-doc-pritzker-joint-letter-on-iana-transition.pdf](https://www.commerce.senate.gov/public/_cache/files/9b6b37a9-e5a4-4695-931e-73d54b32f768/D453845EFDC860DCC3161346BBCA9C63.20160908-doj-lynch-doc-pritzker-joint-letter-on-iana-transition.pdf) ("Sept. 8 2016 Congressional Letter"); Berin Szoka *et al.*, Tech Freedom, *ICANN Transition is Premature: Unanswered Questions Require and Extension*, at 6, 8 (Sept. 8, 2016), [http://docs.techfreedom.org/TF\\_White\\_Paper\\_IANA\\_Transition.pdf](http://docs.techfreedom.org/TF_White_Paper_IANA_Transition.pdf); John D. McKinnon, *Deals Stoke Criticism Over U.S.'s Plan to end Internet Oversight*, WALL ST. J., Aug. 31, 2016, <http://www.wsj.com/articles/deals-stoke-criticism-over-u-s-s-plan-to-end-internet-oversight-1472658344>.

<sup>15</sup> See, e.g., Sept. 8, 2016 Congressional Letter, *supra* note 14, at 2-4; May 19, 2016 Senate Letter, *supra* note 9, at 2-3; Szoka *et al.*, *supra* note 14, at 13-23 (Apr. 4, 2016); L. Gordon Crovitz, *Congress Can Save the Internet*, WALL ST. J., Sept. 11, 2016, <http://www.wsj.com/articles/congress-can-save-the-internet-1473630838>.