

**Remarks of Michael O’Rielly, Commissioner
Before the New England Ratepayers Association (NERA)
December 6, 2016**

It is great honor to be invited by the New England Ratepayers Association to discuss important communications policy issues. I am also so pleased to be back in the Granite State and to see so many friends, and a deep thank you to my friend, mentor and former employer for that wonderful introduction. As mentioned by the Senator, in a past life, I spent considerable time with Senator Sununu seeking to preserve the independent spirit embodied in people of New Hampshire. Looking back, I firmly believe that we did all we could in the moments provided; we weren’t just marking time.

It only seems appropriate to thank NERA for all of its hard work, as Governor Douglas stated well, especially Marc Brown. Representing the true interests of ratepayers – and, in a larger sense, taxpayers – is a worthy and valuable function. As a member of a regulatory agency, I can attest to the simple fact that ratepayers, which are distinct from so-called ratepayer advocates, are often those least represented in our written record and in ex parte meetings. While there is no lack of liberal advocacy groups, private industry, state regulators, academics and think tanks in our proceedings, those individuals or organizations that represent the general interests of ratepayers are lacking. Ratepayers are often occupied by their everyday life problems and joys and do not focus on the actions of any one regulatory agency. This becomes most problematic in those proceedings in which industry can be indifferent as to whether any fees or charges are passed onto ratepayers, subscribers or users. It’s one of the reasons I pushed to include a taxpayer representative on the FCC’s Consumer Advisory Committee (to the extent that body actually provides independent advice and functions separately from the Commission staff).

Government Involvement in Communications

We are at an interesting time in communications policy these days, and I am not just talking about the ramifications of the recent election, which I will touch upon in a bit. Instead, I am suggesting that there are disagreements over basic fundamental principles that cannot be easily resolved or papered over. These are matters that challenge the core beliefs of Americans and what type of communications marketplace we would like or expect to see in the future. When examined closely, these tend to all flow from a universal difference of opinion over the proper role of government – whether as an overseer or as a participant. It’s a debate that is larger than the traditional wrangling within our two party political system.

To understand this fight, we must acknowledge that there is a fervent and well-funded activist community who sees it as its mission to reduce or eliminate the commercialization of communications services and products. They throw around words like “essential utilities.” Their vision seems to be based on the notion that communications are not necessarily a marketplace unto its own but merely an input or cog in pursuit of society’s larger goals. They expect communications companies to perform or provide certain features or functions in exchange for the right to serve the American citizenry, rather than companies putting private capital at risk with the hopes of financial return. To the extent that companies do not meet their approval, by doing such things as extracting one more dollar than they deem appropriate or offering service at a level less than their inflated aspirations, they demand more regulation and, in some instances, complete control via government sanctioned or initiated services or products.

The perils of government as an actor in the commercial communications area are well known. Governmental entities are naturally bestowed certain special benefits to aid their activities that are unavailable to other providers. These advantages distort the marketplace and negatively impact private enterprises. From favorable tax provisions, unfair access to rights of way, cheaper costs of capital, and bailout protections to a host of other problems, government entities providing communications products and services inevitably damage or impair those entities already in the market and can prevent new ones from entering. Moreover, these government providers can diminish capital formation for private companies and can lead to increased prices in other lines of businesses (i.e., electric, gas and water services).

It just so happens that our discussion today could not have been more timely. The recent death of Fidel Castro should be an opportunity for a case study of the socialistic dream. Modern day Cuba is in complete shambles. You know things are bad when the state has to put up billboards with “Socialism or Death” – an obvious bastardization of General Stark’s “Live Free or Die.” Its people are oppressed and its economy is putrid. Services are lacking or nonexistent, except in certain state sanctioned and heavily subsidized areas. And its communications industry is under the direct control of the government. Throw in some graft and corruption and you can see why services are poor, Internet access – to the extent it can be found – is beyond expensive, mobile devices are scarce, and its infrastructure is failing. Having seen the fates of Cuba and many other socialistic efforts, it seems surprising that some would want to pursue the same outcome for the U.S. communications industry. And yet, such pursuits continue.

Muni Broadband

Over the last decade, we have seen a concerted effort to convince communities to build and operate their own broadband networks. The current Administration even weighed in, touting the supposed benefits of government-owned networks. In addition, the FCC attempted to preempt state laws that placed what many consider to be reasonable limits on municipal broadband projects before the Sixth Circuit Court of Appeals declared the effort to be unlawful. That hasn’t stopped the FCC from continuing to promote municipal broadband, however. As a result of these efforts, many communities have heeded these siren calls and have attempted their own projects. Unfortunately for their citizens, the reality has not lived up to the hype and ratepayers in communities across the country have been left holding the bag when these foolhardy experiments fail.

There are plenty of factual and policy reasons why government-owned networks are a terrible idea. A key data point is the long track record of projects overpromising and underperforming. Commenters in the FCC proceeding pointed to failed or floundering projects in Louisiana, Utah, Georgia, and North Carolina, among other places.¹ Indeed, that is why some states have enacted laws to protect ratepayers. For instance, a number of states require localities to get a referendum passed before committing taxpayer resources.

It is not surprising that many municipal broadband networks have been unsuccessful. Running networks demands specialized expertise. Indeed, many electric utilities that have a long history of serving their communities have found it difficult to expand into the communications business. In addition, other

¹ See, e.g., Comments of ITTA, WC Docket Nos. 14-115, 14-116, at 8-9 (filed Aug. 29, 2014); Comments of Free State Foundation, WC Docket Nos. 14-115, 14-116, at 6-9 (filed Aug. 29, 2014).

large companies that have attempted to expand fiber deployment have also had to scale back or rethink their plans.

Moreover, building and operating a communications network is expensive. Even government operators that benefited from stimulus funding and the ability to cross-subsidize, have found themselves significantly underwater. Community networks have to attempt to recover high fixed costs over a small customer base, contend with shorter than expected upgrade cycles, and deal with larger than anticipated operating costs, including video program access fees.² These problems are compounded when there's another provider operating that continues to compete and hold market share.

Additionally, many localities have found that their service offerings have not been as attractive or provided as much revenue as initially anticipated. For example, one town in Alabama spent \$43 million to build a broadband network capable of providing gigabit service.³ Four years later, it has only one gigabit customer. Not surprisingly, the most popular tiers are those offering speeds of 10/5 Mbps and 30/15 Mbps.

The consistent takeaway is that consumers are only willing to pay so much more for faster broadband service, especially when there's another provider already offering service that meets their current needs. In addition, we've seen localities struggle with bundled offerings. Municipal broadband customers typically get fewer channels at higher cost, affecting the overall value proposition for consumers.

I am especially troubled that so many of the municipal broadband projects are inefficient overbuilds of existing broadband infrastructure.⁴ Current providers still have costs to recoup, but, with less available revenue, they may not be able to lower prices in response to artificial government competition, as many communities hope. Overbuilding can also undermine the ability of the existing providers to offer service in the broader geographical areas that they may be obligated to serve. For example, high-cost universal service recipients are required to serve not only the towns, but also consumers living in more remote areas where costs are much higher. If a municipal provider comes in to serve the town, it changes the dynamics for more remote customers.

Serving Difficult Areas

Opposing municipal broadband networks does not suggest that the current state of broadband deployment and availability nationwide is acceptable. I recognize that broadband deployment continues to lag in certain communities, particularly in rural areas. You can be against municipal- or government-owned networks and still seek to improve our nation's broadband situation.

Before taking action, it is important to make clear that picture of U.S. broadband availability is not as bleak as some would like us to believe. The FCC's 2016 Broadband Progress Report notes that 90 percent of Americans have access to fixed broadband at speeds of 25 Mbps/3 Mbps, and 94 percent

² See, e.g., ITIF Comments, WC Docket Nos. 14-115, 14-116, at 9 (filed Aug. 29, 2014) (ITIF Comments); Steven Titch, Reason Foundation, Lessons in Municipal Broadband from Lafayette, Louisiana (Nov. 1, 2013), <http://reason.org/news/show/lessons-in-municipal-broadband>.

³ Johnny Kampis, The American Spectator, Alabama's 'Gig City' Has One Gigabit Broadband Subscriber (Sept. 12, 2016), <https://spectator.org/alabamas-gig-city-has-one-gigabit-broadband-subscriber/>.

⁴ ITIF Comments at 6-8.

have access at speeds of 10 Mbps /1 Mbps.⁵ Moreover, the number of unserved Americans dropped significantly since the prior year's report.⁶ That progress has been made possible by substantial investment by private companies. If the Commission were to step away from its single-minded focus on broadband speeds of 25/3 Mbps or more, which are politically-driven thresholds divorced from what most consumers actually use, the picture is quite different. For instance, the FCC recently reported that there are two or more providers of residential fixed broadband service in approximately 90 percent of relevant census blocks.⁷ And that does not take into account broadband offerings by mobile wireless providers.

Instead of rushing to build networks, localities would be wise to consider what other steps a community might take to encourage more private sector investment. Commenters in the FCC proceeding offered several suggestions.⁸ Communities could ease access to rights of way, facilitate tower siting, and cut other red tape and requirements, such as demanding that providers donate equipment or provide free service to government buildings. By removing barriers, private companies have more incentives to enter and serve particular areas. A perfect example of this is Google Fiber and its competition by which localities bid to remove barriers to entry. Notwithstanding Google Fiber's shift in priorities and realization of the challenges to provide service, localities should be willing to make similar offers and take the same steps for other broadband providers.

At the same time, the FCC is still trying to make more progress on broadband deployment by reforming the universal service program, which is funded by fees on consumers' phone bills, to complement and expand deployment by private companies into truly unserved areas. The job is not yet done. Indeed, the federal high-cost universal service program spends billions each year to subsidize private sector voice and broadband providers to help ensure that these communities have access at all. To do so effectively, the Commission's policy is not to subsidize further competition in these funded areas, as that would waste scarce ratepayer dollars.

In addition, the Commission has begun using cost models and to the greatest extent possible, reverse auctions, to provide more efficient levels of support. Moreover, the funding comes with oversight and concrete deployment obligations to ensure that the funding is being used as intended and so that the Commissions, states, communities, and consumers will be able to track the progress that is being made throughout the country. The next steps are to finalize the remaining auctions, called the Connect America Fund Phase II auction, the Mobility Fund Phase II auction, and Remote Areas Fund. Done correctly, these programs will help ensure that consumers have access to broadband, including in some of the hardest to serve communities.

⁵ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 15-191, 2016 Broadband Progress Report, at 33 (2016) (*2016 Broadband Progress Report*), https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-6A1.pdf. The report is based on data as of December 31, 2014, so the current figures are likely higher.

⁶ *Id.* at 52.

⁷ FCC, *Internet Access Services: Status as of December 31, 2015*, at 6 (released Nov. 30, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1130/DOC-342358A1.pdf. In fact, there are even three or more providers of residential fixed broadband service at speeds of at least 10/1 Mbps in 66 percent of those blocks.

⁸ See, e.g., Reply Comments of TechFreedom and the International Center for Law and Economics, WC Docket Nos. 14-115, 14-116, at 3-6 (filed Sept. 29, 2014).

Of course, with billions of dollars at stake, we often get requests to spend funding on particular technologies or to dedicate support to specific states or communities. However, the Commission's role, as a federal agency, is to look at the state of broadband deployment nationwide and adopt rules that maximize coverage within our limited budget. While these requests may be well-intentioned, they are generally not the most efficient use of consumer dollars overall.

Future FCC Activities

Turning topics, I thought I would discuss for a moment what the election outcome means for the future of the FCC. It should be noted that I do not speak for the Administration-to-be. President-elect Trump and his team get to make the requisite decisions regarding the new Chairperson, any Commissioner openings and the direction of the Commission going forward. He has earned that right via the resounding election results.

I plan to fully cooperate and work to execute the decisions that are made. In reality, this is made easier knowing that we come from the same political party and share many views about the over-regulatory activities of the current Commission. Suffice it to say, I am very excited to be part of the opportunities and responsibilities of the new majority.

In the humblest sense, I have been thinking of the very roughest of frameworks to guide the future Commission's work. Again, the new President gets to make these decisions, but to the extent this is helpful, here are four areas in which I think we could best spend our time in the coming months:

- One, enact fixes to our internal process and reorganize the Commission structure;
- Two, remove regulatory underbrush (i.e., those rules and regulations that have outlived their usefulness and cause burdens, in terms of costs, compliance time and lost opportunities, on regulated entities);
- Three, undo inappropriate and partisan decisions made by the prior Commission;
- And four, pursue a pro-growth, pro-innovation agenda that allows providers to spend more time serving consumers and less time worrying about being trapped by the Commission's latest harebrained regulatory scheme.

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In closing, let me restate a point I have made before: broadband deployment challenges need to be examined holistically. As the FCC, states, and localities consider particular actions to address existing challenges, everyone needs to assess both the individual and additive impact of their actions on the competitive environment. In any event, government entering the marketplace as a participant should not be part of any solution.