

**REMARKS OF FCC COMMISSIONER MICHAEL O’RIELLY
BEFORE THE HUDSON INSTITUTE**

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(AS PREPARED FOR DELIVERY)

Introduction

Let me begin by thanking my good friend and former colleague, Harold Furchtgott-Roth, for arranging this event. Many years ago, at what is now called the House Energy and Commerce Committee, Harold and I worked together helping to craft the bipartisan Telecommunications Act of 1996. He went on to serve, with distinction, as a Commissioner at the Federal Communications Commission (FCC), and over the years, he has remained a thoughtful advisor to me on these issues.

I also want to thank the Hudson Institute and its exceptional scholars for their work, including my friend and predecessor, former FCC Commissioner Robert McDowell.

As has been previously mentioned, I am the newest FCC Commissioner. I was fortunate enough to be confirmed alongside our Chairman, Tom Wheeler. In our short tenures, we both have come to be known for certain taglines that have prompted further questioning. His has been “competition.” Mine has been “freedom.”

The Chairman has, on a number of occasions, articulated what he means by his term. Today, I would like to explain more about what I mean by mine.

Economic Freedom

I bring to this position a core belief that the most enduring value of America is freedom. Our nation began with the desire to be free from the paternalistic monarchy in Britain. To preserve these freedoms, our forefathers embedded into our Constitution certain protections to ensure that the government does not abuse its power or harmfully restrict individual liberty. These principles of a free society, such as the freedom of speech, religion, assembly, and so forth, are also inherent in the concept of free markets, which form the basis of our economy.

In our system of free-enterprise, we hold the belief that consumers and businesses should be able to freely buy and sell, without needing the permission of the government, and with minimal restrictions placed on business activities or asset ownership.

To illustrate why this economic freedom is so important, let me relate a story from my youth.

One hot summer day near Buffalo, New York, my younger brother, our good friend and I decided to start selling delicious lemonade to thirsty consumers. To be clear, this wasn’t your cute, adorable kids sitting on the front lawn selling juice. Rather, it was a brash effort to make some real money.

The three of us did what every business does. We obtained the necessary beverage supplies, designed and built a mobile stand, and did market research. We even reimbursed our capital provider—my dad.

At our major rollout, we hit the town's annual tennis tournament because who doesn't like a cold drink while watching a tennis match or after you've just completed a three setter? Initial success prompted us to dream of expansion possibilities and what we would do with our future millions.

But with all sweet stories comes a point. It just so happens that the vast number of tennis courts were in parks owned by the city. Our prime location was the local high school, also owned by the city.

It wasn't long before we hit a nerve. By the second weekend of the tournament, our business was effectively snuffed out when a local official informed us that we couldn't occupy the tiny corner next to the courts and the planetarium anymore. The world was deprived of our refreshing product.

Admittedly, we were kids, and I was able to focus on a paper route instead. But this provides a good example of the lost opportunity that occurs when government restricts entrepreneurs. There is a loss to the would-be seller, the would-be buyer, and society as a whole.

As a staffer on Capitol Hill, I saw this same theme play out again and again in a setting with far more serious consequences. The most absurd example that comes to mind was back in 1996 when the Federal Drug Administration (FDA) tried to tell Sunny Cloud, a single mother in Atlanta, Georgia, that she couldn't market at-home drug testing kits. These were the exact same kits that were available to employers.¹ The FDA's rationale for this prohibition? The belief that parents might not react appropriately if their children tested positive for drugs. Until public and Congressional outrage ended this rule, a federal agency was allowed to target a small business that was trying to empower parents.² Who knows how many young people have been saved from a life of addiction due to early detection through the use of these home tests?

More often, however, such constraints are more subtle or difficult to spot. Take for instance the failed merger of the top two video rental giants Blockbuster and Hollywood Video back in 2005. After the Federal Trade Commission signaled a likely rejection, the companies abandoned the deal.³ At the time, regulators were concerned about the anticompetitive effect of one company having a significant percentage of the home video market. But they failed to account for the rise of videos delivered through vending machines, mail, and Internet streaming such as Netflix.⁴ Both Blockbuster and Hollywood

¹ D. James Romero, *A Test of Love: Sunny Cloud was just a mom worried about her son's drug use—so she invented a home screening kit. Now she, and her creation, are at the center of a political tug of war*, L.A. TIMES, Oct. 14, 1996, http://articles.latimes.com/1996-10-14/news/ls-53723_1_drug-test-kits.

² FDA: *Parents Can Buy Kit To Test Kids For Drugs*, ORLANDO SENTINEL, Jan. 22, 1997, http://articles.orlandosentinel.com/1997-01-22/news/9701211308_1_kit-home-test-fda-has-jurisdiction.

³ Tom Zeller, *Blockbuster Ends Bid for Rival*, N.Y. TIMES, Mar. 26, 2005, <http://www.nytimes.com/2005/03/26/business/media/26movie.html>.

⁴ Adam Thierer, *Blockbuster and Video Rental Industry, Part 3: The Beginning of the End?*, TECH. LIBERATION FRONT, Sept. 19, 2005, <http://techliberation.com/2005/09/19/blockbuster-and-video-rental-industry-part-3-the-beginning-of-the-end/>.

Video declared bankruptcy in 2010.⁵ Who knows how much longer a combined entity could have lasted or if their joint resources may have allowed it to innovate and better adapt to the changing market?

Policy-makers in Washington, D.C. should be constantly on guard against unnecessary restrictions that interfere with the freedoms of any willing buyer or seller in our economy because, just like the examples I have provided, we have no idea what types of products or services our regulations may discourage from coming to market.

Application to the FCC

Championing economic freedom will be my guiding principle when it comes to overseeing the communications industry. To inform my decisions, I will consider the following.

First, the Commission must consider whether it has the authority to regulate as well as realizing the confines of that authority. There is no place in the rules for policies—even ones that are well-meaning—that have no basis in the statute. The Commission exists to implement the statute—no less and certainly no more.

Second, the Commission must have verifiable and specific evidence that there is market failure before acting. In many cases, competition and industry self-regulation are sufficient to ensure that services are provided and consumers are protected. And it should only regulate when there's evidence—bona fide data—that an actual problem exists resulting in real harm to consumers that the Commission can solve.

Third, when the Commission does intervene, its solution should be carefully tailored and apply only to the relevant set of providers or services. We must guard against over-regulating by analogy.

Fourth, the benefit of regulation must outweigh the burdens. Even when rules are grounded in the statute, based on evidence, addressing a real harm, and targeted at a specific problem, there are still costs to intervening, and we must consider those costs as part of our analysis. Let's accept the reality that costs are always passed on to consumers one way or another.

We often hear it said that the Commission's rules have not kept pace with changes in technology and the marketplace, and that is true. The communications sector is in the midst of a digital revolution. Companies are innovating and thriving. They are investing billions each year in new networks and technologies. And consumers are benefitting from a vast array of services and devices not imagined years ago. But while some advocate automatically applying antiquated rules to new, cutting-edge technologies, I do not believe that legacy rules or constructs are entitled to live on after their usefulness.

When it comes to encouraging competition and consumer choice, I start from the premise that removing regulation where it is not needed will better serve these goals.

⁵ *Blockbuster Files for Bankruptcy*, N.Y. TIMES, Sept. 23, 2010, <http://dealbook.nytimes.com/2010/09/23/blockbuster-files-for-bankruptcy/>; Mike Spector & Peter Lattman, *Hollywood Video Closes Doors: Chain's Remaining U.S. Stores to Shutter as Consumers' Viewing Habits Change*, WALL ST. J., May 3, 2010, <http://online.wsj.com/news/articles/SB10001424052748704608104575220370429528864>.

To ensure that participants in the communications marketplace are as free as possible to meet consumer demand, I believe that the Commission must periodically re-examine its rules and the justifications that underlie those rules. Over time, those justifications may have eroded or changed. That is why I will consistently advocate for sunset provisions to force the Commission to make sure our rules are still relevant.

Now, you may be wondering, how does this thinking apply to specific communications issues? Let me share my thoughts about a few matters currently facing the Commission.

Internet Protocol (IP) Transitions

I'll begin with a topic that is not only of immediate importance, but also a long-standing interest of mine: IP transitions. Our nation is quickly moving from analog "POTS" or "plain old telephone service," to digital Voice over Internet Protocol (VoIP). We are also relying more and more on wireless voice, texting, and broadband. As we leave the traditional phone network behind, there are some unanswered questions about the potential implications of an all-IP world. The Commission is poised to embark on IP trials to help answer some of these questions.

When it comes to IP transitions, I believe that the Commission must ensure that its policies and regulations do not impede this innovation so that providers are free to implement the latest technologies and services. When it comes to governing the forthcoming IP trials specifically, I suggest the following criteria.

First, any trials should not interfere with the choices that consumers are making every day to go with IP services. Let me give you an idea of the magnitude of these choices: by the end of 2008, when the Commission began certain tracking of residential VoIP connections, subscribers had already topped 19 million—or 20 percent of the residential wireline market.⁶ Just four years later, that figure grew to over 34 million—representing over 43 percent.⁷ VoIP growth is even more notable when you consider that total wireline connections went down by 24 million during that same period.⁸

In other words, the IP transitions are well underway and the Commission should not allow these trials to obstruct industry innovation or consumer adoption.

Second, trials should not delay the Commission's work. The trials won't resolve many important legal and policy issues. Therefore, they should not serve as an excuse for delaying appropriate decisions. Separate from the trials, I doubt that many of the old rules will be necessary going forward. We should take this opportunity to see how many regulations we can do without, such as arcane regulatory accounting and jurisdictional separations.

⁶ Industry Analysis & Technology Division, Wireline Competition Bureau, *Local Telephone Competition: Status as of December 31, 2012*, at 14 (Nov. 2013), http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db1126/DOC-324413A1.pdf.

⁷ *Id.*

⁸ *Id.* at 12, 14.

Finally, it should be made clear that any rules the Commission establishes in the trials will be non-binding on what is happening outside of the trials or for future decisions. These trials should be exactly that: trials, not stalking horses for new regulations.

Universal Service

Next, the Commission must continue updating its universal service programs. Universal service is a fundamental and longstanding principle of communications policy. It should be approached in a thoughtful manner and with recognition to the differences in our vast nation. Some regions already have access to modern communications services—sometimes as a result of universal service funding. Others remain unserved. The challenge we face is taking finite ratepayer funding and targeting it effectively to preserve and advance universal service.

I am encouraged by some of the reforms already adopted. Subsidizing multiple competitors, especially in areas that already received significant funding, is declining. High-cost support that was not well targeted or serving the intended purposes is being phased out. And the Link-Up program has been eliminated in most areas.

I also support the Chairman's commitment to revisit the "Quantile Regression Analysis (QRA) benchmarks." When rules like the QRA benchmarks are not operating as intended, then those rules should be replaced.

As we move forward, we should consider a variety of approaches to complete USF reform consistent with the 2011 order. For example, I am interested in deploying the Remote Areas Fund, which was intended to bring basic voice and broadband service to extremely high-cost areas through various technology platforms, including satellite and fixed wireless. We must fully explore all ideas, again consistent with the 2011 order, to ensure that consumers in hard to serve parts of the country do not get left behind.

We also must remain mindful of the size of the Fund, because the burden of paying for these programs ultimately falls on ratepayers. While the size of the Fund may be down from last year, there is no overall cap. As we continue to reform the various programs, we should look for ways to offset the costs of modernization within the existing budgets. Budgets make for hard choices. But those hard choices will force efficiency, encourage innovation, and benefit ratepayers.

To put this in perspective, the contribution factor this quarter is already an incredible 16.4 percent and is likely to increase further in the coming years. Therefore, contribution reform is long overdue. However, it must be addressed in a manner that is fair for everyone—providers, recipients, and American consumers. And it should not be reformed in a way that dampens Internet usage or increases overall consumer costs.

Finally, we need to take a close look at program management. Projected requirements—which drive contributions—are consistently much higher than the actual disbursements. While it makes some sense to plan for specific future expenses, the reserves should not be more than absolutely necessary at any given time. We also should review administration expenses, which have been trending upward.

Incentive Auctions

One of the last pieces of legislation I worked on as a Congressional staffer that was enacted into law was the Middle Class Tax Relief and Job Creation Act of 2012. It directed the Commission to hold a broadcast spectrum incentive auction. Providing this platform to transfer spectrum from willing broadcasters to wireless service providers is a great example of further injecting market forces into spectrum policy. As Congress directed, the resulting revenue will pay for the First Responder Network Authority (FirstNet), the Next Generation 911 program, and deficit reduction, among others.

This will be the most complicated spectrum auction in our history. Technically, we will need to simultaneously integrate the reverse auction to obtain spectrum, with the forward auction to allocate the spectrum for wireless use, while “repacking” the remaining broadcasters. In order to be successful, we need many things to fall into place, including broadcaster participation because without them, the auction simply fails.

Educating broadcasters about their options—whether it be selling spectrum, channel sharing or moving from UHF to VHF—will be an enormous challenge. It will be an even greater uphill climb if the auction rules and processes are complex or confusing. Similarly, we must remain attentive to the concerns of those broadcasters interested in being repacked. Simplicity and transparency are paramount to providing broadcasters the certainty needed to decide to participate or continue to serve their communities. Failure to do so may deter broadcaster participation or lead to legal challenges that could significantly delay the auction.

I also feel strongly that the Commission must not implement rules designed to preordain auction results or place undue restrictions on licenses. Such efforts have failed in the past. And now, more than ever, we cannot afford to diminish participation or revenues. Instead, the Commission must allow licenses to go to their highest valued use and ensure spectrum flexibility.

If, as I hope, the auctions are successful, consumers will benefit enormously as wireless providers use the new spectrum to build next generation networks and provide faster and better service throughout the nation.

Media Ownership

Last, but not least, media ownership is also an area where the Commission needs to take action. Section 202(h) of the Telecommunications Act of 1996 mandates that the Commission review its media ownership rules every four years—or quadrennially—to determine whether they are still necessary due to competition. If they are not, we must modify or eliminate rules that are no longer in the public interest. We have failed to comply with this Congressional directive. Specifically, the Commission hasn’t released the 2010 order and is arguably behind on its 2014 review.

When Congress extended the media ownership review from a two year to four year requirement, the intention was to ensure a thorough, competitive analysis of this space. Instead, what has resulted is regulatory paralysis. I am aware of the difficulties in completing this task and the corresponding legal challenges, including the 3rd Circuit’s ruling. Nevertheless, we are required to comply with the statute.

Let's face it, the media landscape has changed dramatically. We no longer live in a world where Americans obtain information solely from local broadcasters and newspapers. We have satellite providers, cable networks, the Internet, and mobile platforms. I am open to thoughtfully updating the Commission's rules to reflect the realities of today's media marketplace.

Conclusion

Today, I have shared with you some of my thoughts about what freedom is and how it applies to the work of the Commission. In closing, I would like to acknowledge the simple fact that there will be differences of opinion over how this principle will be applied.

When I use the word freedom, I do not mean to imply that I hold a monopoly or trademark on this value. I have seen throughout my professional career that the robust exchange of ideas and bipartisan compromises can bring about the best policy results.

Already, I have found my colleagues to be incredibly thoughtful and dedicated public servants. Everyone has a different background and perspective that can help balance decision-making. The same goes for the career staff. I have been most impressed by the depth of knowledge, expertise, and work ethic that they demonstrate on a daily basis.

Finally, I also believe that input from thinkers inside and outside of the communications industry is essential. So, I want to hear from everyone on the issues currently facing the Commission and those issues that will confront us in the future.

Please know that my door is always open. My contact information, as well as the contact information of my staff, is publicly available on the FCC's website. My Twitter handle is @mikeofcc. And I stand ready and willing, as time permits, to participate in public forums and policy discussions.

Thank you very much for your time. It has been such an honor to speak before you this afternoon. I look forward to answering your questions.