

Keynote Address of Michael O’Rielly, FCC Commissioner
Before American Action Forum
Shining the Spotlight: How FCC Rules Impact Consumers and Industries
March 29, 2016

Thank you for that exceptionally kind introduction and for the opportunity to be here today. If it's all right with everyone, I plan to speak for about ten minutes and take any questions that the audience may have.

I am so pleased to precede such a distinguished panel hosted by the American Action Forum. In such a short time, AAF has distinguished itself as a leading voice in many policy areas, including key communications and technology debates. These activities flow from its overall mission statement, which reads: “AAF injects forward-thinking ideas into the public debate that will build a better economic future, promoting innovative, free-market solutions to create a smaller, smarter government.” A worthy function indeed, given the oversupply of organizations that push far, far different agendas centered on government growth and intrusion. Moreover, AAF’s guiding views correspond fairly well with my overall approach to issues and items before the Commission.

The subject matter of the upcoming panel - “Shining the Spotlight on the FCC: How Rules Impact Consumers and Industries” – is fitting given all of the activity at the FCC over the last two plus years. While I had always hoped that coming into this job the policy direction wouldn't be so slanted towards the left, I always expected it to be busy and never dull. Maybe the late David Bowie captured my expectations best in stating, “I don't know where I'm going from here, but I promise it won't be boring.”

As many of you know, the FCC is a regulatory body. Its business is regulation, and business is booming. By reinterpreting outdated law and precedent in creative (and destructive) ways, there is little doubt that the Commission’s leadership has attempted to assert its prominence above that of the private sector. In the current formulation, there seem to be few, if any, practical limits to the Commission’s power over its regulatees, a class that seems to be expanding at an alarming pace. We are just starting to witness the implications of the catch-all regulatory approach exemplified by the “general Internet conduct standard,” which will force every Internet service provider to secure the agency’s tacit or explicit permission for any new offering going forward. Ultimately, the cost will be borne by the consumer in terms of higher prices and more limited choices.

The Commission seems determined to prove the assessment of Milton Friedman that “[m]any people want the government to protect the consumer. A much more urgent problem is to protect the consumer from the government.” I will briefly discuss two current examples: the move to expand the Lifeline program without instituting any real cost control, and the regulatory tunnel vision that allowed Netflix to downgrade its services to certain consumers while crying wolf about the potential for ISPs to do the same thing and demanding an overhaul of the entire communications landscape to stop them.

Lifeline

Later this week, the Commission is poised to approve a vast expansion of the Lifeline program, which currently subsidizes voice phone service (mostly wireless subscriptions) for low-income consumers, to include subsidies for broadband. This program, along with programs subsidizing services for high-cost rural areas, schools, and libraries, is funded by Universal Service fees on consumers' phone bills, but it is the only Universal Service program that does not operate under a budget, and it appears it will so remain despite my best efforts.

I have long argued that Lifeline should have a budget, and I believe that the program can be reformed to include broadband while staying within reasonable fiscal limits. Given the lingering concerns about waste, fraud, and abuse in the program, reiterated by the GAO as recently as last summer, this seems like the least that should be done to ensure effective stewardship of the Universal Service dollars being harvested directly from consumers each month. However, the Commission majority appears determined to barrel ahead with a fig-leaf mechanism that doesn't resemble any reasonable definition of the word "budget." If the stated spending figure (a 50 percent increase over 2015 spending) is approached, there's an expectation that the Commission would take some unspecified appropriate action, which could be to increase the budget by another 50 percent. In fact, if the Commission agrees to change the proposal to accommodate concerns expressed by outside parties and some members of Congress, it may very well need to do so. Or it could choose not to act and, presumably, the spending could just continue unimpeded. This is not a budget, but rather the closest thing I have seen yet to openly treating American consumers as a bottomless piggy bank.

Net Neutrality and Netflix

Given the developments of last week, I want to share with you my thoughts on the revelation that Netflix has been actively downgrading the video quality of its service delivered over certain wireless networks. Netflix has attempted to paint a picture of altruism whereby it virtuously sought to save these consumers from bumping up against or exceeding their data caps. There is no way to sugarcoat it: the news is deeply disturbing and justly generates calls for government – and maybe even Congressional – investigation.

While the Federal Trade Commission may have grounds to scrutinize Netflix's video throttling, let's accept the factual point that Netflix never violated the Commission's net neutrality rules enacted last February. The company and net neutrality advocates have been vehement in stressing that the net neutrality rules only apply to ISPs, not standalone edge providers, such as Netflix. This is completely correct as all of the prohibitive practices, costs and obligations of those rules only apply to broadband providers. So there is no net neutrality violation to explore.

Moreover, I would strongly oppose any efforts to capture edge providers in the Commission's net neutrality rules or a similar regime. It is not surprising to hear calls for the equal application of these rules to all Internet companies. In fact, I predicted this would occur sooner or later. It

is only human nature for some ISPs to want the burdens imposed on them to apply to all Internet companies. But that would be a colossal mistake. The solution to unnecessary regulatory burdens and overreach is not to subject everyone to them, but to reduce them for all. In other words, use the parity argument to help companies and consumers alike, rather than dragging everyone into the abyss.

While we must absolutely resist any effort to subject Netflix and other edge providers to net neutrality rules, its admission and activities raise at least two critical areas that demand Commission attention. First, a company cannot knowingly make misrepresentations and inaccurate statements before the Commission. In fact, doing so violates Commission rules intended to protect the integrity of the Commission and our decisions. We need to closely examine filings that were made for potential violations in light of this new information. It appears that Netflix made accusations of wrongdoing by ISPs, all the while knowing that its own practices were one of the causes of consumer video downgrading.

Second, we must all acknowledge that Netflix was not some passive participant when it came to the formation of the Commission's Title II mandates for net neutrality. It was a key representative of the supposed marketplace the rules were designed to protect: the over-the-top video distribution business. Many rules were based on the representations made by Netflix and other similarly situated entities, including Google. Certainly, the entire interconnection regime was predicated on the fears of anti-competitive peering and gatekeeper status concocted by Netflix. And yet, at the same time it was making these claims, Netflix, itself, was engaged in highly suspect behavior. These revelations call into question the entire foundation and rationale of the net neutrality decision.

In closing, I would leave you with the thought that the interests of consumers should be viewed more broadly than the policy wish list of the moment being pushed by those who market themselves as consumer advocates. We owe it to consumers to treat their dollars with respect and to double- and triple-check our assumptions about complex marketplaces rather than getting locked into a regulatory tunnel vision that will ultimately leave consumers with fewer, more expensive choices.