

**Remarks of Michael O’Rielly, Commissioner
Federal Communications Commission
“FCC Enforcement: Questionable Priorities & Wrong Directions”
June 11, 2015**

Thank you for the privilege to speak before you today. I take it as a distinct honor to be personally invited by David Gross. He insisted that I was his first choice as speaker at his last official event as Chairman of the FCBA. That made me feel good for a moment, and then David followed it up ever so diplomatically in a way only he can, “Yes, after the Chairman and all of the other Commissioners and all Capitol Hill Senators and House Members declined, you were my first choice.” I joke, but I am happy to be here.

Distinguished guests and members of the FCBA Bar, I am before you today to discuss the state of FCC enforcement. My central premise is that the Commission’s overall approach to enforcement has gone astray over the last many months. In fact, let me go a step further to report that it has entered a territory that can only be described as dangerously misguided.

To understand the new approach to enforcement, it may be helpful to discuss the underpinnings of a sound mission and where I believe we have deviated. Fundamentally, the Commission’s enforcement activities serve three core functions. First, they seek to end practices, behaviors, or actions that violate the statute or FCC rules. Second, they consider the imposition of penalties on those found guilty of violations. Last, and perhaps over-emphasized, they serve to act as a deterrent to others operating in the space. Notice that I intentionally excluded policymaking from this list, but more on this in a bit.

As we examine the recent activities of the Enforcement Bureau, it is clear that these time-tested functions are now secondary to other goals. Specifically, the Commission seems more intent on obtaining newspaper headlines trumpeting accusations and eye-popping fines. In other words, self-aggrandizing fanfare is a major objective and often appears to be more important than case foundation, correcting the violation or establishing a reasonable deterrent. I like to refer to this as sizzle over substance. This is not uncommon in politics today. We see it often in state governments, such as New York, where activist Attorney Generals seek to become Governors. The line of thinking is rooted in the belief that appearing to be doing something is more important than actually performing the duties of the office.

Let’s put this activity in perspective. I recently heard from a couple of parties that were potentially subject to enforcement actions. Having the good sense to try to discuss their issues with the Enforcement Bureau, each was told that any potential settlement would generate a penalty in the multiple-hundreds of millions or billions and require an admission of guilt. To make the situation more outrageous, the Bureau indicated that there was little room to negotiate; it was a take it or leave it offer rather than the beginning of a process to come to a settlement position. Suffice it to say, no agreements were reached in these circumstances. In the few settlements that have occurred, parties have told me that settling for unfair terms was just a better option than years of prosecution and having their company name dragged through the mud. And, of course, there are those circumstances when entities have transactions before the Commission and are essentially forced to acquiesce to enforcement settlements to facilitate the approval process.

Without a settlement, a company is subjected to the whims of the Enforcement Bureau’s Notice of Apparent Liability process. For larger companies, especially, the Commission’s general approach has

been to call each and every alleged violation “egregious.” And in making such a determination, the Commission has been upwardly adjusting the proposed penalty beyond the original intent of the statute. In one case, a proposed penalty was increased by 400 percent -- I repeat, 400 percent -- based on an upward adjustment of 100 percent for each of four factors, including the violator’s ability to pay. We have also seen situations where the penalty amount is not based on the actual violation, but instead seems to be picked out of a hat, loosely based on a company’s revenues. In another case, the Commission attempted to impose a penalty comparable to the total amount imposed on another entity, which was subject to a multi-agency settlement. But, a Commission NAL cannot resolve other federal or state agency cases. Thus, the Commission, on its own behalf, was seeking a forfeiture that was approximately the same amount as was paid in the other case to settle all claims before multiple agencies.

We must question the benefit of the Commission collecting such substantial monetary penalties. A public pronouncement was made recently that a core purpose of enforcement actions is to compensate consumers for any harm caused by a violation. But, that is actually not part of the law, which is supposed to be our guiding light at the Commission. In fact, unlike those governing other federal agencies, the communications statute does not provide a mechanism to reimburse consumers for any loss. In reality, the only way to effectuate some type of consumer rebate is through a settlement, but the Bureau has indicated little interest in actually settling without unreasonable expectations, per my earlier point. This money also does not go towards expanding coverage or service quality. In fact, money paid to the Commission is likely to reduce available funds for capital expenditures, so consumers will also not benefit from providers improving their offerings.

More troubling, there seems to be a great disconnect on how enforcement success should be measured. In particular, the Commission’s enforcement effort, as mentioned in a number of comments by Commission leadership, seems mostly to be valued in terms of the total amount that can be extracted from fines and penalties. In other words, under this approach, if the dollar value of fines and penalties exceeds that from previous years, then it proves that enforcement is effective. Such thinking is not only backward, it is harmful. The true measurement of success should be whether our regulatees are complying with the law and the Commission’s rules. To equate financial penalties with success is like measuring the safety of a major city by the number of people arrested in a given year.

And this trend will only be exacerbated by the Enforcement Bureau’s new-found policymaking role. There is a clear pattern of enforcement actions being used as a means to stretch and reinterpret the Commission’s rules to expand its authority and ensnare more participants in the communications marketplace. The Bureau has also been bestowed, by certain actions of the Commission majority and against my wishes, with immeasurable and unconstrained delegated authority over areas once governed by thoughtful policymakers, not ex post facto law enforcement activity. The combination of the Bureau’s wayward approach with vast new powers should be of concern to everyone, even left-leaning activists.

So, let’s analyze the current questionable policymaking function of the Enforcement Bureau in the area of privacy and security to examine closely how far it has gone afield.

Privacy

As many of you know, in the FCC’s recent Net Neutrality decision, the Commission decided that section 222 of the Act – the provision on Customer Proprietary Network Information, or “CPNI” – would apply to

broadband providers. However, the Commission granted forbearance (at this time) from the rules implementing section 222. The Commission reasoned that the existing CPNI rules were not designed for Broadband Internet Access Service (BIAS), and so it determined that it would adopt new rules in a separate rulemaking proceeding.

Therefore, it may have come as a surprise to see the recent Enforcement Advisory announcing that the Bureau “intends to enforce [s]ection 222 in connection with BIAS” during the pendency of the rulemaking proceeding. This will include examining whether broadband providers’ actions or practices are “reasonable” and whether they are “acting in good faith” to comply with section 222. The Bureau also stated that it “will provide informal as well as formal guidance to broadband providers as they consider how best to comply with [s]ection 222.”

I have deep concerns about the Enforcement Bureau taking the lead on privacy before the substantive Bureaus have had a chance to consider the subject and seek comment from stakeholders and the public. A rulemaking is essential when the Commission embarks on a brand new policy initiative that could have far-reaching consequences for an entire industry and beyond. Companies need to know the rules of the road before they are subject to penalties.

Sadly, this is not an idle concern. Just last year I dissented from a Notice of Apparent Liability issued against TerraCom and YourTel where the Commission declared, for the first time, that sections 222(a) and 201(b) cover data security. The Commission did so despite the fact that it had never issued a single order, rule, or guidance to that effect. In fact, prior statements by the Commission contradict this new claim. While the Commission has asserted that it may announce new policies through adjudications, it is also required to give “fair notice” of conduct that will be prohibited. It did not do so in that case, and the parties have no recourse but to respond to the NAL to challenge the claims against them.

What’s more, companies that are not parties to an enforcement action have to pay close attention to these NALs and consent decrees to determine whether these novel interpretations might apply to them. Indeed, the Commission has treated NALs as having precedential value even though they are not final decisions. But because these are not rulemaking proceedings, other companies have no ability to comment on or challenge the findings themselves. In fact, responses to NALs are frequently non-public, so other parties are left to hope that specious NALs are being challenged and that the arguments advanced in the responses are good ones.

While some have suggested that the Advisory was intended to calm fears about privacy enforcement, I fail to see how such open-ended standards will provide any comfort to anyone. How are providers supposed to know what will be considered “reasonable” when there is no precedent in this area? Moreover, the Commission has taken the position in several enforcement items that any missteps are proof that a practice is not reasonable. In other words, parties are strictly liable for any mistakes—even if they were isolated and unforeseeable—and regardless of what measures were in place to try to avoid such errors. In addition, I doubt the prospect of guidance will be of much comfort given that staff guidance is not binding.

Net Neutrality Generally

Now, I ask you to think about this enforcement approach and mindset being applied to the many other complex and subjective issues raised by the other parts of the Net Neutrality decision. The

Commission's order, which is being challenged in court as we speak, provided extensive and unprecedented authority to the Enforcement Bureau to essentially act as the Internet traffic cop.

As it stands today, the Enforcement Bureau does not currently have the funding or authority to hire the additional attorneys and Internet experts to conduct the copious amount of work delegated to it under the Net Neutrality decision. And assuming it is to get no reprieve from the Field Modernization effort – or Project Operational Excellence as some like to refer to it – the Bureau will have to get by and operate with the personnel it currently has, plus those policy staff that are being “borrowed” from other Bureaus. Accordingly, its ability and expertise to make sound policy decisions for the future of the Internet is highly dubious. Making policy decisions – especially based on vague rules regarding complex matters – is not and should not be within the purview of the enforcement arm of FCC. It's like asking TSA agents to also set immigration policy in addition to continuing their mastery of the airport screening process.

Add to this the unwillingness – either by intentional direction or hubris – to work with and engage the subject-matter experts in the Wireline, Wireless, Media and International Bureaus and you set the stage for umpteen miscues and flawed outcomes. And this isn't some unsubstantiated charge: I have done due diligence by repeatedly seeking out the level of involvement by these other bureaus to gauge their knowledge of the Enforcement Bureau's activities, whether net neutrality-related or otherwise. The answers have always indicated a polite familiarity of the Enforcement Bureau's work but at no time did it seem to rise to actual involvement by other bureaus in shaping the outcomes. In other words, they generally knew what was going on but had no ability to shape the direction or ultimate outcome of an item.

If the Commission's Net Neutrality decision survives court scrutiny, and I pray that it does not as there are so many obvious flaws with its reasoning and underlying jurisdictional arguments, significant decisions and policy cuts must be made in the near future. What is meant by “reasonable network management”? How will the so-called “general conduct rule” be applied and to whom? What is a specialized service and how will that differ from a paid prioritization service that is banned? Like the debate over privacy I previously mentioned, I will let you guess who will get the first crack at answering these questions and many more.

I appreciate your attention and seek your continued involvement, advice and friendship. Thank you for your time.