

**Remarks of FCC Commissioner Michael O’Rielly  
FreedomWorks and Small Business & Entrepreneurial Council Event  
April 26, 2017**

Let me start by extending my thanks to FreedomWorks and the Small Business & Entrepreneurial Council for hosting this event to discuss such an important topic.

Today, my colleague and I announce the beginning of a process to free the Internet from the terrible restraints of common carrier regulation now imposed on America’s broadband providers. After almost two years of experience, it is clear that this archaic regime never should have been imposed in the first place. Based on hyperbole, rent seeking, imaginary problems and liberal ideology, the previous FCC took Internet policy down into a dark and horrible abyss. Well, we are here to declare that those days are over; we are bringing sanity and evidence-based decision-making back to the Commission’s rules.

In releasing a new Notice of Proposed Rulemaking, the Commission initiates the necessary procedures to expunge net neutrality regulations from the Internet. Following a methodical and transparent path, which I commend the Chairman for pursuing, will help prevent opponents from complaining about procedural shortcuts and the like. Instead, we will follow the Administrative Procedure Act to the letter of the law. Hopefully, over the course of the next few months, we can move forward to a final order.

*Net Neutrality Generally*

I must smile when I hear proponents try to defend net neutrality’s enactment. They inevitably refer to the nearly four million comments the Commission received on the topic. Lost somehow is the simple truth that more than 1.6 million, or almost 40 percent, of those comments opposed the imposition of the rules. More importantly, Commission outcomes are not and cannot be decided by poll numbers or letter counts.

Net neutrality supporters also try to argue that the rules are causing no harm and therefore should be left in place. Beyond being inaccurate, the irony is that those of us who opposed the rules in the first place said the same thing prior to their adoption. More succinctly, I argued that there was no credible evidence of harms to businesses or consumers that warranted the intrusive net neutrality regulation. The handful of examples constantly trotted out as a basis for regulation were either dated or debunked after further investigation. Indeed, the Commission itself had conceded, and the courts agreed, that its net neutrality rules were intended to be prophylactic – to address hypothetical future harms as opposed to actual problems in the marketplace.

It is clear that the decision to regulate broadband companies like old telephone monopolies, despite the competitive choices available to most consumers, was a maneuver designed in part to resurrect a wish list of common carrier regulation. Once subject to Title II, and in particular the vague “just and reasonable” standard contained in section 201 of the Act, there is virtually no limit to what an agency with a vast regulatory imagination can do. Privacy was one of the first steps taken by the prior Commission and, if the November election had turned out differently, the Commission most certainly would have headed down the road to broadband price regulation, including in the areas of zero rating and interconnection.

Examining the specifics of the net neutrality rules takes us down a precarious route. While the concepts of “no blocking” and “no throttling” are relatively straightforward, paid prioritization and the general conduct standard are more amorphous topics. Beyond being unnecessary, their existence causes unintended problems. With your indulgence, I would like to focus the majority of the rest of my speech on those two elements of the *Net Neutrality Order*, as they are particularly problematic. Certainly with limited time I won't be able to fully go through each and every policy objection.

### *Ban on Paid Prioritization*

Starting with the ban on “paid prioritization,” it is startling to see some of the hypocrisy and weak legal foundation on which it rests. Even ardent supporters of net neutrality recognize, as I've said before, that some amount of traffic differentiation or “prioritization” must be allowed or even encouraged. Voice must be prioritized over email; video over plain data. Prioritization is not a bad word. It is a necessary component of reasonable network management. And this prioritization often is “either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity.”<sup>i</sup> But that's no reason for an outright ban.

Consider the fact that for all the high-minded bluster, companies that do business over the Internet, including some of the strongest supporters of net neutrality, routinely pay for a variety of services to ensure the best possible experience for their consumers. They've been doing it for years. In short, certain arrangements have even been viewed as “good for the Internet.” In fact, the *Net Neutrality Order* described in detail the arrangements that many large edge companies have with broadband providers or third party Content Delivery Networks (CDNs) to cache content on networks in order to provide a better experience for consumers.

Of course, some might say that is not actually what they mean by paid prioritization. The Order certainly avoided using that label. But as Judge Williams of the D.C. Court of Appeals explained, “Regardless of the name, [these arrangements] involve expenses ... to assure accelerated transmission of its content via a broadband provider.”<sup>ii</sup> In other words, it really is another form of paid prioritization, but one that was not banned outright by the *Net Neutrality Order*.

Adding to the confusion is the long-standing category of “specialized services,” which was also exempted from the rules. Recognizing this potentially large loophole, the Commission tried to limit its use, stating that “non-broadband Internet access service data services ... provided in a manner that undermines the purpose of the open Internet rules ... will not be permitted” and could be subject to further action in the future.<sup>iii</sup> That is, unless the service is something the Commission wanted to encourage, such as telehealth, in which case parties were expressly invited to use the loophole to put the service “beyond the reach of the open Internet rules.”<sup>iv</sup>

In short, far from banning all so-called “fast lanes,” the Commission sanctioned a system of good fast lanes and bad fast lanes and set itself up as the arbiter. The difficulty the Commission had in drawing these lines of its own creation should be a lesson that this is far from a bright line rule.

Indeed, some proponents of the ban argued it meant that all traffic must be treated exactly the same and any commercial relationship to alter this edict is to be rejected. That could include enhanced quality of service or other favorable treatment, such as zero rating. What started as an outcry over

hypothetical “fast lanes” transformed into an even more radical idea that no bit can ever be treated any differently than any other bit.

In addition to these line drawing problems, many commenters pointed out the inefficiencies that could be created by a ban on paid prioritization. Judge Williams’ analysis is on point here as well, arguing that it would result in either (1) a requirement of identical speeds, which would be suboptimal for some packet senders; or (2) a system of unpaid prioritization where packet senders that require faster speeds free ride on other senders and have less incentive to reduce their transmission capacity.<sup>v</sup>

### *General Conduct Standard*

Turning to the general conduct standard, the *Net Neutrality Order* set forth a process that the former FCC Chairman described as a referee throwing flags – except nobody knew which game was being played, what the rules were, or how long the game would last.

I hope that the zero-rating fiasco has disabused everyone of the notion that this could ever be a process compatible with innovation. For a year, companies’ business plans were put in limbo as Commission staff sent a series of letters to a few major providers endeavoring to find something wrong with offerings that consumers actually tend to like. This process also confirmed that any general conduct standard will be driven solely by the personal beliefs and whims of the man or woman driving the process absent any real limitations or guidance. It creates a king of the Internet, bestowed with more authority than a third world dictator.

Another aspect of the general conduct standard was the theoretical option for companies to obtain advisory opinions on planned offerings. But it made little sense because the offerings couldn't be either hypothetical or currently available. Add to that the fact that the opinions weren't binding on the Commission and would be decided in the first instance by the Enforcement Bureau, and it should come as no surprise that this was not a popular option.

Even if these substantial flaws could be fixed, however, I still would object to the Commission maintaining a catchall type of authority. It injects significant, unwarranted uncertainty into the marketplace. Companies are afraid to innovate given the risk that they might be called to task after the fact by FCC staff. There is no need for roving enforcement authority.

### *Congressional Action*

The only way to bring resolution to the net neutrality debate once and for all is for Congress to consider and enact legislation on the subject matter, as it deems appropriate. There can be no lasting peace until that happens. Without a statutory resolution, each election could bring large swings in net neutrality positions, preserving uncertainty and confusion for both consumers and industry alike. As duly elected representatives of the American people, only Congress is in the position to balance all of the relevant concerns and make appropriate trade offs as necessary to bring this matter to a rightful close. In some respects, our action in the coming weeks and months will deliver this debate squarely to Congress’ doorstep. May God bless them with wisdom, patience and inner strength to find the right outcome.

At the same time, let me reiterate that the concepts of banning paid prioritization and creating a general conduct standard should not be part of any discussion. Even with the best of intentions, clearest wording, and tightest definitions, a future Commission with a more regulatory focus will abuse any such provisions to do great harm. Just look at the prior Commission's ability in numerous examples to ignore the plain language of the statute or reinterpret decades of well-settled Commission precedent with little to no explanation.

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<sup>i</sup> See *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, para. 125 (2015) (*2015 Net Neutrality Order*).

<sup>ii</sup> *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 767 (D.C. Cir. 2016) (Williams, J., concurring in part and dissenting in part).

<sup>iii</sup> *2015 Net Neutrality Order*, para. 35.

<sup>iv</sup> *Id.*, para. 132 & n. 315.

<sup>v</sup> *U.S. Telecom Ass'n v. FCC*, 825 F.3d at 764 (Williams, J., concurring in part and dissenting in part) (generalizing comments filed by Professor Hurwitz).