

**Remarks of FCC Commissioner Michael O’Rielly
Before the Media Institute’s Luncheon Series
July 29, 2020**

Thank you, Rick, for that very kind introduction, and to the Media Institute, with whom I share so many common values and beliefs, for its efforts over the years to promote First Amendment principles and a free marketplace of ideas. Hearing Rick scroll through my past work is just another reminder of how old I’ve become and how quickly the years have flown by. I must, though, make only one clarification so as not to impinge upon the prerogatives of the U.S. Senate. With deep appreciation, my nomination was approved last week by the Senate Commerce Committee. While this is great news, I still have another significant step ahead — consideration by the full Senate — before I can serve a new FCC term.

Suffice it to say, when I accepted the Media Institute’s gracious invitation to join you as luncheon speaker many months ago, the state of the world was very different. After multiple postponements, hoping for a reprieve and a fully open Washington, D.C., it became clear that an in-person event was not meant to be. So, I gladly join you virtually from the confines of my own home. And, by confines, I really mean confinement, and anyone who has been quarantined twenty weeks straight with a toddler and a five-year old can probably relate.

In all seriousness, I realize no one is looking to me, a wonkish Commissioner of a small federal agency, for sage words of comfort during this difficult time. That being said, my heart goes out to all who have experienced illness or loss, and I extend my deepest appreciation to everyone on the front lines battling the pandemic. In the absence of delusions of grandeur, I thought it more appropriate to share some wisdom from someone more experienced on the subject of leadership during trying times. My father-in-law is a longtime fan of Sir Winston Churchill, and often sends me quotes attributed to him, one of which I found quite relevant to our current situation. In 1940, as the Nazis shifted from bombing England’s air bases to attacking its people, the great statesman gave a speech with the following memorable line, “[B]ut we shall rather draw from the heart of suffering itself the means of inspiration and survival.” The American people’s strength and resourcefulness during this hideous pandemic has been amazing to behold.

As long as I’m quoting Churchill, he also said, “If you have an important point to make, don’t try to be subtle or clever. Use a pile driver. Hit the point once. Then come back and hit it again. Then hit it a third time—a tremendous whack.” Taking this advice to heart, let’s turn now to some important policy matters that I may have discussed once or twice before, but hopefully remain of interest to this audience.

State of Broadcast and Cable Media Industries

Let me start with what is likely an eye-popping data point even for those watching: Variety Magazine recently reported that last year a leading high-tech company known for streaming over-the-top (OTT) video content launched more original content in one year than had been released in a single year a decade ago by the whole cable industry combined. At the same time, in recent months, we’ve witnessed multiple major cable and broadcast networks launch their own OTT platforms to deliver programming directly to consumers, rightfully bypassing stodgy, outdated FCC regulations. If you’re a consumer who likes video content, there’s never been a better time. The upheaval of the last several years is redefining what it means to be a media company, and while many are straddling both the legacy

and high-tech, unregulated worlds as hybrid operators for the time being, we should expect to see continued restructuring in the near term, and a declining role for the FCC in the long run.

The changing times are not necessarily bad for legacy providers. True, it is disconcerting for any company, whether new or old, to feel the ground constantly shifting beneath its feet. But, many of these changes have come about so quickly that the consumer benefits have been widely accepted long before myopic, self-preserving regulators have had a chance to regulate away innovation. In the OTT context, we are getting a rare look into an almost completely unregulated free market, bound only by general consumer protection laws and private negotiations. Although I'm not insensitive to the fact that the market will cause short-term pain for some companies and their employees, what we have generally seen so far is that less regulation breeds innovation and expands the overall market for content production and distribution, while increasing access and lowering prices for consumers—a far more beneficial outcome than forcing incumbents to fight for shares of a static pie.

Not to be outdone by the invisible hand, though, certain regulators nonetheless won't acknowledge today's reality and continue to hang on to conventional wisdom that hasn't been relevant since the days of the fictional *Mad Men*, when television advertising was in its nascent stages. For example, in reviewing mergers, the Department of Justice (DOJ) has repeatedly and inexplicably failed to properly identify relevant advertising market participants. We have seen the data. There is no question that in DMAs across the country, urban and rural, certain high-tech companies are taking an increasing share of local advertising. Yet, when, God forbid, two television or two radio stations in a market seek to combine, DOJ absolutely refuses to consider the existence of non-broadcast ad sales in its overall analysis.

That's not to say there isn't any good news for legacy media despite these challenges. The COVID-19 pandemic has revealed that local journalism is as important as ever, and while the specter of lower ad sales lingers, the strength of local television news has remained steady. For example, as I wrote about in a recent blog post, in Sioux Falls we've seen continued expansion of local news due to the combination of two stations that can now more efficiently share resources. This outcome offers a clear illustration of what is possible if regulators, such as the FCC and DOJ, would update their view of appropriate market definitions.

NextGen TV

This year, we are also seeing the fruits of the private sector's efforts to facilitate NextGen TV. Several markets have come online and more are expected this year, despite the pandemic briefly slowing progress. As someone who has been on the forefront of facilitating the Commission's piece of this effort, it is certainly exciting to think about how the implementation of ATSC 3.0 can significantly update over-the-air (OTA) products and services. To date, we have seen just over half a dozen markets light up, with a handful in the pipeline, and by the end of the year we could possibly double these numbers, just in time for the first consumer equipment to reach the neighborhood Best Buy or a shopper's Amazon cart. Notably, the NextGen TV process has been one of the few opportunities for broadcasters to make their own decisions about deployment without constantly looking to the regulator for permission. In limited and targeted ways, the Commission has considered where rule updates were needed, such as in our recent Second Report and Order. I'm pleased that our actions in this effort have, by and large, stayed true to the principles I laid out from the very beginning, including my commitment to a consumer-driven, market-centered, flexible, and voluntary process.

In effect, this means we don't yet know which NextGen business models will ultimately prevail. On the one hand, perhaps this is a chance for broadcasters to go on offense with their own targeted advertising, or maybe it will lead to a more general application of OTT-like functionality within OTA systems. Dynamic audio and visual features and, of course, advanced emergency alerting are in the mix, alongside next-generation datacasting, which our nation's public television stations are already starting to deploy. The point is, here's a real chance to let the market decide how a flexible standard can be utilized, based on what consumers prefer. Let's dispense with distracted efforts at "rebranding"—or any other superfluous, regulator-centric approaches—and allow already robust product offerings to carve their own path for consumer attention.

Media Modernization Docket & Realigning the Industries

While NextGen TV has been an example of where we've managed to simulate a "freer market" approach to media regulation, much work remains to deregulate legacy industries. I remain hopeful we can close out all open media modernization proceedings by the end of the year. In particular, I have written extensively about dispensing with the cable attributable interest record keeping requirement and fixing a loophole in the timing of program carriage complaints. However, from my conversations with members of the industry, these types of changes merely help around the edges and do not significantly reform the underlying regulatory framework. Notwithstanding this, even such modest proposals receive pushback within and outside the agency. What does this say about the mindset of so many when, despite all the changes in the marketplace that are widely agreed upon, we still have great difficulty making even the smallest of reforms? Grasping for relevance, backward looking officials and stakeholders refuse to lessen their grip on the remaining regulated industries. It's hard to believe how little some have learned over the last many decades of a dynamically changing communications industry.

Take, for example, the cable industry, where many companies have compensated for lost video subscribers through their added broadband subscriptions, and in some cases, their OTT offerings or other intellectual property that maintains strong, existing brands. It should come as no surprise that Title I services and lightly or unregulated offerings are doing reasonably well. The answer to leveling the playing field with unregulated, high-tech companies is not to start subjecting the latter to more regulations, as even some purported conservatives have suggested, but to eliminate rules that are hampering legacy providers. And, make no mistake: massive changes are needed if we're going to avoid sending legacy providers the way of the woolly mammoth.

For starters, we should blow up the franchise model for cable regulation. Under the thinly veiled guise of "local control," franchisors have subjected cable companies to discriminatory burdens in order to extract undue bounties from them. Amazingly, in some cases, local officials have even campaigned on promises of mandated network builds, additional tax revenues, and higher franchise fees, superficially promising the "preservation" of local jobs. It seems obvious to any student of basic economics that the money taken from these businesses for extraneous purposes prevents them from using those funds to lower consumer bills and deploy new services. This is completely contrary to promoting network efficiencies and economies of scale, both of which are features that high-tech companies possess and use to compete head-to-head with legacy providers. It's time to get local officials out of the business of harassing cable companies. While I acknowledge that doing away with the entire system is probably too heavy a lift for now, certain targeted reforms could be made to ease these burdens, such as ending local review of transactions, requiring common accounting practices, preventing rights-of-way discrimination, reducing PEG and INET mandates, and standardizing customer service requirements.

Similarly, on the broadcasting front, the entire regulatory model needs to be shredded. The level of overregulation is mind boggling. Ask yourself: Why does the FCC regulate where a broadcast tower is placed so long as it doesn't cause interference with an adjacent market? Or, why does the FCC prescribe how a station should maximize OTA listeners or viewers when it is already in the broadcaster's best interest to do so? Until we have the temerity to do the heavy lifting, we'll have to settle for more moderate reform. For instance, now that the Incentive Auction repack has proven to be successful, with only a few stations needing additional time to complete their transitions, we can end the license modification freezes. In some cases, old equipment has been repeatedly patched over the last decade and is in need of replacement. Further, it's time to vastly update the failing station waiver analysis. As with so many rules, the current structure is outdated and doesn't account for certain mergers that are in the public interest and would provide increased local and live programming. In both instances, these changes to our rules could shift the focus to what truly matters to consumers: more and better locally focused programming.

Diversity

Before I close on the topic of media marketplace reform, it is important to address recent societal calls for more inclusion by African Americans in media business opportunities. The renewed focus on this issue is not lost on me and has appropriately forced us all to examine the current situation and what can be done to improve the paltry representation of minority owners. And, make no mistake: the dearth of African American ownership of local broadcast properties is beyond embarrassing, resting in the low single digits.

To alter this, we must first acknowledge that the current state of affairs has occurred *with* FCC ownership limitations in place for decade, after decade...after decade. No one should be able to say with a straight face that our rules meant to promote diversity have been anything but a complete failure. In fact, a very compelling case can be made that removing our limitations, in fact, would set the stage for more minority investment and ownership. Consider radio ownership, where allowing bigger clusters within a market could help stabilize, and alternately, enhance minority-owned stations in that market. Similarly, the same outcome could occur if the newspaper-broadcast limitations were struck as well, something the courts have approved numerous times, only to be foiled by claims of missing analysis.

For those of us unwilling to accept the current situation, we have pushed to change the regulatory paradigm. As part of our last biennial—I mean quadrennial—review, Chairman Pai honorably led the effort to adopt a radio incubator program that would entice existing broadcast owners to partner with minority small business entrepreneurs. It addressed the most significant elements preventing greater minority ownership: financing and access to capital, requisite training in station operations and management, and practical experience leading to enhanced business reputations derived from involvement in successful organizations. While supporting this initiative, I was unfortunately unsuccessful in my effort to extend the program to television as well.

Alas, the entire effort was upended by a few squabbling industry participants and then captured by the legal morass that is the quadrennial. Now, we effectively have returned to the broken status quo. Absent Supreme Court intervention, it will be years before any action is even considered again at the Commission. This represents a huge disappointment for the agency and a lost opportunity for society.

The First Amendment

For my last few moments, I want to discuss one of the primary missions of the Media Institute: the exercise and defense of the First Amendment, specifically the freedom of speech clause. Many of you have heard my past passionate criticism, in speeches or statements, of instances in which the First Amendment was being violated or was at the risk of being undermined. Naysayers have, of course, attacked me over the years, often in bad faith and without directly engaging my arguments. That is par for the course for those in public life who seek to protect one of the core tenets of American democracy and society.

Today, I would like to address a particularly ominous development in this space. From the outset, I should be clear that my critique is not about President Trump or those in the White House, who are fully within their rights to call for the review of any federal statute and to call into question whether changes should be made. Their activities are subject to review by the judicial process for consistency with the Constitution. Instead, my concern is about certain opportunists outside that realm who have tried to redefine the very protections we hold dear. In particular, I think it is high time to recognize and identify the harm caused by those claiming to be the First Amendment's biggest advocates but who are only willing to defend it when convenient and constantly shift its meaning to fit their current political objectives. These false prophets depict themselves as First Amendment heroes while turning it on its head in defense of their questionable views. The inconsistencies and contradictions presented by such individuals would make James Madison's head spin, were he alive to witness them.

The First Amendment protects us from limits on speech imposed by the government—not private actors—and we should all reject demands, in the name of the First Amendment, for private actors to curate or publish speech in a certain way. I shudder to think of a day in which the Fairness Doctrine could be reincarnated by some other name, especially at the ironic behest of so-called speech “defenders.” Further, like it or not, the First Amendment's protections apply to corporate entities, especially when they engage in editorial decision making. It is time to stop allowing purveyors of First Amendment gibberish to claim they support more speech, when their actions make clear that they would actually curtail it through government action. These individuals demean and denigrate the values of our Constitution and must be held accountable for their doublespeak and dishonesty. This institution and its members have long supported this view, and it is the duty of each of us to continue to uphold these values.

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So, there are my thoughts on some of the issues of the day. I've enjoyed speaking with you, even under this format. What's even more enjoyable, however, is the interesting give and take that arises through question and answer time. I promise to stay until the last question is posed or until my wife tells me time's up, whichever comes first.

I extend my thanks again to Rick, the Media Institute, and all of you who have joined today.