

**Remarks Before The Media Institute
Communications Forum
By Michael O’Rielly
June 22, 2023
[as prepared for delivery]**

Thank you, Rick, for that very kind introduction and Chairman Wiley for all you have done to promote The Media Institute over the years. I was a welcomed guest to these lunches during my Commission days, and now I guess this is the proverbial singing for your supper, or in this case, singing for your salmon. My deep appreciation to all of you who were able to be here today as I was concerned the nomination hearing on the Hill would have forced a lot of empty seats and cancellations. Who doesn’t like a good, old-fashioned nominations hearing?

When I say I’m pleased to be here, I mean it. Two weeks ago, my first kidney stone decided to generate excruciating pain in my abdomen. And yesterday, I had the privilege of my first colonoscopy. Whoever said getting old sucked was right on the mark. That’s probably more information than you wanted, but it should help explain why I found that salmon to be one of the tastiest dishes ever made.

In all seriousness, I am so very proud to be associated with The Media Institute. After my departure from the Commission, Rick approached me, e-mailed me actually as it was the heart of Covid, and asked about joining as a Senior Fellow, and I jumped at the chance. It was not for the exorbitant salary and health benefits, but because of its mission: defending the First Amendment and the rights of America’s content and distribution communities.

When I think of this organization, I am reminded of the movie “American President” starring Michael Douglas, which I tended to quote liberally in the past. In one of its climactic scenes, Douglas makes a grandiose speech and asks a poignant question, and I’m paraphrasing: “Now, this is an organization whose sole purpose is to defend the Bill of Rights, so it naturally begs the question: Why would my opponent choose to reject upholding the Constitution?” Unfortunately, it’s a question that arises all too often these days as we are repeatedly presented with some of the most blatantly unconstitutional bills ever brought before Congress.

For those seeking a little direction, I’m going to break my comments down into three parts. A bit about me, a bit about the Commission, and a bit about digital regulation.

On top of many minds is what have I been up to for the last couple of years. For those unfamiliar, I have not left the communications policy space. In fact, it is quite enjoyable focusing on issues I really care about rather than spending two-thirds on mundane, albeit important, matters. I have my little consulting practice that is flourishing – but not so much that it can’t take on new clients or projects. Call me. This lets me be an advocate and seek to change the current narrative or the mindset of decision makers. It’s not too different from the role I played on Capitol Hill or at the Commission. I also spend a good deal of time shedding light on communications matters for the investor community, which is often perplexed by the twists and turns of Washington. And I provide select advice to company boards.

In all honesty, I spend a great deal of energy and mental capacity focused on the FCC. Some days it is all I can think about, sitting at my computer hitting refresh every few minutes. I have also been known to drive by the building, wait for a few, and then drive back home. Right about now, you’re probably asking

yourself, “what kind of psycho is this guy?” Does it help to learn that in my current universe, FCC stands for Falls Church City, which is just down the road from where I live, and that I have had more panic moments about getting my daughter into the right day camp than I ever did at the Commission?

My after-Commission life has also forced me to become a more engaged father. Every commissioner beats his or her own path, yet I always thought it was my obligation to get out into the field and talk with those entities that the agency regulated whether at their particular companies or at the requisite trade shows. That meant quite a bit of travel; two to three trips a month was not uncommon, leaving my wife to pick up the pieces with two young daughters. Today, the roles are reversed, in the sense that I am now a fully participating parent. In fact, I have taken over primary parenting responsibilities for housework and chores and kid raising and the like. If before I faltered and failed at trying to deliver 40 percent of the overall parenting work, today’s 80-percent parenting is far different. All this extra effort still fits without interfering with my business, but it comes with its own challenges and rewards. I pray regularly that my girls will appreciate this time together some day.

With that introspection completed, let’s get to a policy discussion, as I like to do.

Agencies Rejecting the Marketplace

After two and a half years removed from the FCC, I am more convinced than ever that the Agency and its mission are a generation behind. It survives to fight many of the same old fights that it has had for decades. And yet, the marketplace has significantly changed due to technological developments and consumer tastes.

Now, none of this should be interpreted as blaming the current Chair, commissioners, or the Congress, for that matter – each having different goals, mandates, and obligations. It is not glamorous to cede power and responsibility. My goal today is to add another voice and provide momentum to a new and improved communications regulatory environment.

Certainly, there are forward activities that the Commission is addressing. I don’t mean to suggest otherwise. And where these occur, I have said nice things. A modern approach to satellite regulation makes a lot of sense, given the expansion of LEO satellite constellations and their promising offerings. Affirmatively moving – with congressional prodding – to a more relevant and coherent satellite scheme given the changes in the industry and marketplace is commendable.

But the bulk of the Agency’s work is far behind the times. Consider how the Commission regulates the industries represented by the individuals in this room. The media marketplace has gone through a transformation unseen in the history of time. At any given moment, consumers have access on a subscription or individual program basis to almost every current program made since color television, and many black-and-white shows as well. But with all of that content available, the Commission still regulates broadcast and cable providers as if there were no Internet.

How can that be? Almost every audio or video provider offers its programming in some form on the Internet. It can be used to expand to new markets, reach new people, attract greater advertising, be perceived as advanced to financial backers (including Wall Street analysts), and so much more. In fact, several companies are using broadband as the primary release platform, allowing broadcast/cable channels to be either secondary or test platforms. That’s something fairly new in this “Plus” sized

universe, but it's been a long time coming. It was evident when I was at the Commission. It should be more evident now.

I suggest to you that every statutory burden and regulatory restriction in the media space should be scrutinized to the Nth degree and discarded if not absolutely essential, which humbly they are not. This prescription has been promised and attempted before but never fully completed. And it's a much higher bar than that required by Section 202 of the Telecom Act. I certainly don't want to leave any of you without employment, but there will be plenty of good work remaining without the often-tedious environment in which you are forced to live today.

Nowhere is the dichotomy between burden and reality more apparent than with our media ownership prohibitions. The supposition is that a fully constituted Democratic majority at the FCC will soon seek to impose, reimpose, or sustain restrictions on who may hold licenses for multiple broadcast properties within a market and perhaps nationwide. I am hard-pressed to think of a more backward policy position than attempting to limit America's broadcast and cable providers at the most dynamic content moment.

Ask yourself: Is the Commission really going to reinstate the broadcast newspaper prohibition, for instance? The notion is ludicrous on its face as America's newspaper industry continues to dwindle to nothing more than weekly pennysavers full of Associated Press stories. If newspapers were passe 20 years ago, the depths to which they have sunk is astonishing. Only a couple actually make money, which is not the best measurement per se but does matter if their employees want to feed their families. And it seems unclear whether promises to influx new funding gained by taxing high-tech platforms in the name of journalism will ultimately pass or ultimately succeed. The one truism that absolutely must be remembered is that the market waits for no one. You cannot put the Genie back into the bottle.

Right about now someone in D.C. is screaming "UHF discount." I wholeheartedly agree that the UHF discount should be scrapped. Rightfully, it should be accompanied by an expansion of the national ownership cap to 100 percent. Most of this audience may not care as your companies aren't seeking to grow via buying more station, yet you must agree that the status quo makes no sense. And it will likely require congressional action, but that shouldn't be a deterrent. The communications bar must stop looking at Congress as an enemy. An appropriate package of reforms could move or be attached to another vehicle.

If we truly examine the breadth of the last Commission's activities on media ownership, I suggest that it actually is quite modest. Tweaks here and there – meaningful ones indeed – but narrow in scope even under the best spin. Consider the new incubator for minority ownership improvements that will probably never see the light of day. Nothing earth shattering was enacted to respond to what is happening around us with the advent and expansion of "content platforms."

And these new platforms – which are immensely popular with consumers – correctly operate with limited restrictions (thankfully). Failure to remove ownership limitations on broadcasters and cable operators (make no mistake that this Administration sees its role to block any significant broadcast or cable merger) will perpetuate the two-tiered system of holding back the old and intentionally or unintentionally favoring the new. Even when the content is identical. Even when the management is identical. Even when consumers see little difference for purposes of their consumption habits.

That is not to suggest in any way that I favor regulating the new platforms. Please don't put words in my mouth that these differences must be discontinued and the way to do so is to regulate the new. No Sir.

The solution to different treatment is to free the overburdened broadcast and cable industries. The markets are screaming for this to occur, and policymakers would be foolish not to recognize this.

Rejecting a New Regulator

On that note, all communications practitioners should reject the frenzy to capture digital platforms in some type of regulatory web. First, we all must have pause at any suggestion that Congress is appropriately judging the weight, scope, and concerns from differing platforms. In fact, it appears that leading policymakers are either intentionally or unintentionally casting a far wider net in proposed bills than is logical. It's almost as if they don't see the difference between passive and active platforms. That's like trying to equate a vending machine with Tysons Corner mall. To scoop up passive platforms – those that have a curated catalog of items, like many of the programming platforms that exist in the media world – in some public policy goal, be it for kids or whatever, is illogical and detrimental. While such attempts may be accidental, I suspect it's more about leverage and politics. But this is unnecessary ballast, jeopardizing the standing of these good platforms in the eyes of investors and some users. Political motives do have an impact in the real world.

More importantly, I reject the notion that digital platforms must be subjected to new regulation, except in perhaps the most specific instances. There is a new piece in *Politico* magazine where the author, a professor at Vanderbilt, makes a case to treat high-tech platforms as utilities like railroads and banking, using TikTok as the main excuse. But the whole utility notion is premised on the existence of their being near- or actual monopolies. This is devoid of reality. Almost every digital platform today has numerous competitors – many of them from China with billions of followers – seeking to eat a portion of its market share for a segment of their business – or their entire business.

And if anything has been proven recently, it's how fragile a supposed lock on consumer market share can be. Ask Bud Light about its last couple of months. In the digital world, as near as I can tell, Twitter has the unique business model – unprofitable as it is – compared to others. Yet in the last year we've seen a rise in multiple competitors, including one being run by the former president, with a new one expected to be launched soon by Meta. Doesn't sound like a monopoly to me.

I won't dispose of all the arguments here why this entire effort is misguided or at least premature. I do think it's worth a moment to examine the complexities of agency structure, if one were to subscribe or be committed to such a mindset. Even if digital platforms were worthy of regulation, the inevitable debate will be "who should do it?" One of the craziest ideas that has been proposed in quite a while is to create an entirely new regulator. Randy May of Free State Foundation has a recent piece wonderfully critiquing this idea led by Senators Bennet and Welch. I'd like to add my thoughts to this escalating set of raspberries.

The least efficient and effective idea is always to create a new government entity for some special purpose. AI is a popular topic in D.C. these days. Somehow that means we need a new agency to regulate it? Of course not. New governmental structures inevitably grow government and fail mightily at their mission. Look at the Homeland Security Department as a prime example. Think of the logistics of creating such an agency. CFPB comes to mind. It took years just to make it semi-functional – and if that was desirable from your perspective, it certainly wasn't from mine.

On top of this, the proposal adopts the undefined and subjective public interest standard as its mantra. Everyone here knows that results in basically whatever the majority members of the Commission want it

to be. In other words, there is no standard at all. I directly lived with this standard in many instances – sometimes to my benefit and sometimes to my detriment. From that vantage point, I can safely say it tends to tilt the regulatory field in favor of a level far in excess than reasonably justified. And because it is so subjective, courts can have their own view of what the public interest is, creating more uncertainty.

In essence, supporters of this approach are copying the early 20th-century vision of regulation and stapling it to a new board. Under this formula, an umpteen number of things can and would go wrong – all to the detriment of platform users, the American people. Even those who hate these platforms should be able to recognize that this course of action is nonsensical.

Conclusion

I know I have exceeded my time. I thank you for listening and look forward to many more Media Institute events.