

**Remarks of FCC Commissioner Michael O’Rielly
Before the FCBA Young Lawyers Committee Universal Service Fund Seminar
October 2, 2019**

Thank you, Steve, for that kind introduction, and my thanks to Kelley Drye & Warren for hosting this event. It is a pleasure to join you on this lovely fall afternoon to discuss universal service, a principle that has been at the heart of American telecommunications policy since its earliest days. I am especially glad to appear before many members of the FCBA Young Lawyers Committee. I struggle to imagine a better way to bore its newer members than through a comprehensive introductory seminar on the Universal Service Fund (USF) and related issues currently facing the Commission. While my comments may tend to go into the weeds, I am hopeful that the basic concepts and fundamentals will come together by the end of the day.

In my role at the FCC, I have been incredibly focused on stretching scarce USF dollars as far as possible and protecting ratepayers’ hard-earned investments of approximately \$11 billion in authorized spending and \$8 billion in actual money out the door last year. As I have pointed out in advocating for an overall budgetary cap, regressive USF fees are disproportionately burdensome for lower-income households, since they pay far more into the Fund as a percentage of their income than their higher-income counterparts. Similarly, I have also pushed to exclude the ultra-rich from receiving our subsidies. While I do not begrudge anyone who has been financially successful, it makes no sense to allocate our USF dollars to those individuals who are fully capable of paying full freight.

All American consumers deserve an agency that is willing to defend their interests and operate its programs in a fiscally responsible manner. While the Commission has undoubtedly made strides in promoting fairness and efficiency in recent years, certain flaws in underlying program rules continue to constrain the potential effectiveness of our subsidies, and contribute to waste, fraud, and abuse. Further, our chief concern should be to connect those communities that remain unserved, and, too often, that goal has taken a backseat to other priorities. So, without further ado, I’d like to outline a few areas of our USF policy that I am currently focused on and address certain matters in need of attention.

Eliminating Duplicative Funding Among the USF Programs

As many of you know, I have been vocal in recent months about duplicative funding within the USF, and specifically, the use of E-Rate funding to overbuild high-cost program investments and to pay for fiber buildout to schools and libraries even where a fiber connection already exists. It’s awful enough when the government subsidizes network builds in areas where the private sector can or does provide service, but it’s a separate layer of hell when E-Rate money goes to an area already being subsidized by the FCC. Certain special interests have defended this type of duplicative funding on the basis that it creates “competition.” But, anyone with a rudimentary understanding of economics knows that government-funded overbuilding does nothing of the sort: it distorts real competition, discourages private investment, and undermines broadband funding for more difficult areas to serve. And, it is likely to interfere with the outcomes of the Commission’s future broadband funding auctions, while establishing a role for E-Rate that the program was never meant to have.

This waste of limited USF resources is by no means a new problem. In 2014, I expressed concern over the potential of E-Rate rule changes to produce this outcome, as did then-Commissioner Pai. It turned out that we were right. We now know of at least eight states where E-Rate funding was approved or requested to overbuild existing fiber networks, many of which were themselves built with high-cost support. In fact, a new project recently came to my attention involving a request for support to build a wide area network that would directly overbuild an incumbent provider’s own fiber facilities, even though the incumbent provider’s bid to serve the schools was exponentially lower than the cost of the self-

provisioned network. I have also corresponded with school superintendents and consortium leaders in Texas and Arizona over similar schemes, and despite consultants' efforts to defend their construction projects based on supposed cost-effectiveness, I have never been presented with credible evidence that E-Rate-funded overbuilding has been anything other than wasteful for the USF. Rather, I have seen copious evidence of bidding matrices designed to favor a particular outcome and schools buying far more bandwidth than they use or need. That is like someone consistently buying ten unused seats on an airplane just in case they may hypothetically want to bring extra baggage on a future flight. Existing providers, while willing to sell whatever speed of service is requested, are often left speechless to explain why a school district would pay for so much unused bandwidth, or why the government should be footing the bill for such excess.

We know from presentations and filings before the FCC that the E-Rate-funded overbuilding trend is the result of shortcomings in our rules and overly-permissive support for self-construction. Stricter safeguards and a better alignment of incentives are necessary, if the practice of self-construction is to be continued at all. While pleasing everyone will be a challenge, different ideas have been presented in the record, and we all need to put our heads together and come up with a solution that will simultaneously support the objectives of the E-Rate program, protect ratepayers, and not frustrate our work in bringing broadband to the millions of Americans who languish without any service at all.

Stretching New Broadband Buildout Funding as Far as Possible

We do, after all, already have a foundational broadband buildout program: the high-cost fund. And, in contrast to the E-Rate and the Rural Health Care programs, which distribute funding for buildout despite lacking adequate safeguards to prevent overbuilding, the Commission's high-cost program has historically adhered to the principle that funding in a given territory should only flow to a single provider and that only unserved areas should be deemed eligible for auction. Specifically, under the Connect America Fund Phase II (CAF II) auction, and the framework proposed for the first phase of the upcoming Rural Digital Opportunity Fund (RDOF) auction, only areas that are indisputably unserved pursuant to our Form 477 data are to be included.

While I have criticized our reliance on that data set for the purpose of distributing universal service subsidies, that's not because it has led to overbuilding, but on account of its *under*-inclusiveness. In other words, while we undoubtedly need more accurate maps, shortcomings in the Form 477 data haven't up to this point led to Commission-funded overbuilding. That's not to say that type of inaccuracy isn't a major problem, just that it hasn't created waste in the high-cost program. Further, I am optimistic about the potential of our upcoming Digital Opportunity Data Collection to help improve our maps and give us a much better idea of where broadband is still lacking.

Speaking of which, I applaud Chairman Pai for his action on the mapping front and for his work in establishing the RDOF auction, our largest broadband subsidy auction to date. While I would have liked the implementation of the Remote Areas Fund auction to have occurred sooner, I was grateful for the Chairman's willingness to work with my office to propose an added incentive to bid on those areas that totally lack service and have *never* received USF funding—i.e., those areas that were excluded from price cap carriers' CAF II mandate.

Of course, that isn't to say that all the areas included in price cap carriers' statewide commitments are in a great position with respect to broadband availability. I have long-argued that the decision from 2011 to provide price cap carriers a right of first refusal was flawed and that deployment in their territories should be much further along given the billions of dollars that have already been spent. By including CAF II price cap areas in the auction, the RDOF represents a promising shift away from an outdated regulatory approach to one that fulfills consumer needs much more efficiently.

At the same time, to the extent that price cap carriers lose funding as a result of the auction, it is equally crucial that we relieve them of certain legacy obligations, under both state and federal laws, that bind them to carrier-of-last-resort obligations and prevent them from exiting markets. It seems extremely unfair to maintain this unfunded mandate, especially to the extent that a competitor is receiving funding to serve the same territory.

Shedding ourselves of an outdated legacy mindset also requires acknowledging the marketplace reality that ever-increasing numbers of consumers treat mobile and fixed broadband as substitutes.¹ Therefore, in implementing the RDOF auction, another principle that will be front and center for me is that of technological neutrality. Stretching scarce USF dollars as far as possible means to me being inclusive of different technologies and treating them agnostically. While it would be wonderful if every American had access to fiber to the home, we simply cannot afford to unduly favor fiber-based solutions, especially given increasing preferences for mobility and the new and exciting possibilities that alternative technologies, including satellite, can offer. And, this issue becomes even more acute as new wireless offerings, especially 5G, begin to offer fiber-like capabilities.

One final point on the RDOF: truly protecting our high-cost investments requires ensuring that other agencies are not undermining our efforts by promoting overbuilding. I would, of course, prefer that any new funding for broadband go to the FCC and be allocated via market-based mechanisms. Let's not ignore the fact that other federal agencies have had questionable results in churning through hundreds of millions of dollars. Nonetheless, I realize that there are strong competing interests for funding to go elsewhere. That's why I have urged Congress to implement clear and strong rules regarding inter-agency coordination and oversight and specifically provide an outright ban on overbuilding. Improved broadband maps will help but are by no means sufficient, especially if there aren't corresponding rules on how they're used, or if they don't reflect where long-term funding has been committed.

Better Administration of the USF

While I don't want to pontificate longer than necessary, I can't possibly deliver a speech on the USF without mentioning the elephant in the room: the Universal Service Administrative Company (USAC). As many of you know, I have long been critical of USAC's performance and transparency, having referred to that entity as a "black hole." Hence, I have been quite apprehensive about the Commission's recent decisions to hand USAC the administration of three new major projects: the Digital Opportunity Data Collection, the RDOF auction, and the new Rural Health Care rate databases. I have expressed skepticism as to USAC's ability to handle these new roles and would have much preferred to put them out for bid—along with USAC's entire contract, for that matter.

Since that seems unlikely in the short-term, we should at least make sure not to exacerbate USAC's institutional problems. For example, we should take great pains to ensure that USAC's role in our mapping effort is purely ministerial and avoid USAC's inappropriate assumption of an adjudicatory role in any challenge process we adopt. Further, I would encourage all of you to consider some of the basic process improvements I have previously recommended. For example, reforming the USAC Board of Directors to include more individuals who are fully committed to the mission of universal service and do not inherently harbor conflicts of interest would go a long way in improving oversight and accountability.

¹ Monica Anderson, *Mobile Technology and Home Broadband 2019*, Pew Research Center (June 13, 2019), <https://www.pewinternet.org/2019/06/13/mobile-technology-and-home-broadband-2019/>.

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In closing, while there's many ways we can improve our policy and administration of the USF, we have a lot to be optimistic about in the near-term, and I look forward to doing my part to ensure that our next initiatives are as successful as possible. Hopefully, I haven't bored you too much and you are still willing to hear from today's esteemed lineup of USF experts and think critically about the different policy views presented. And, I very much look forward to answering your questions.