Cooley

A Discussion With FCC Commissioner Brendan Carr

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At a Cooley virtual town hall earlier today, former FCC Commissioner Robert McDowell, co-chair of Cooley's global communications practice, interviewed FCC Commissioner Brendan Carr in a wide-ranging discussion that touched on regulations affecting broadcasters, telecommunications service providers, social networks and numerous other technology companies. Commissioner Carr discussed the FCC's efforts to streamline its rules to promote investment and how his agency can continue to adopt forward-looking policies, like his proposals to foster deployment of 5G networks and Broadcast Internet, that will support the growth of the 21st century American economy. The interview, which is available to view here, is summarized below.

Executive order on social media

Carr supports the recent executive order on social media that asks the FCC to adopt rules interpreting the exemption under the Communications Decency Act (Section 230 of the Communications Act) that protects online publishers from liability for content posted on their sites. He said the order "really was welcome news" and that he has "a hard time seeing the status quo holding" in light of bipartisan calls for change.

Carr focused on the potential that the FCC could "provide some definition" of the line between "good faith" efforts to moderate comments or posts on online platforms that would be exempt from liability and "a category of things called bad faith conduct" that would not be exempt. He also suggested that an FTC inquiry into the extent to which social media platforms were violating their terms of service was appropriate because they "should be accountable to those terms of service just like any other business in the country."

Broadcast Internet

Commissioner Carr provided some color on the FCC's forthcoming declaratory ruling clarifying that traditional TV ownership rules will not apply to non-broadcast uses of the new ATSC 3.0 operating format. Noting that broadcasters are seeing advertising revenue share declines at the hands of unregulated internet competitors, Carr encouraged broadcasters to see the ATSC 3.0 conversion as an opportunity to offer "Broadcast Internet Services," by reconceptualizing their over-the-air signals as "another broadband download pipe." He noted the many pro-consumer benefits of ATSC 3.0, from improved video service to potential datacasting applications. The declaratory ruling, he said, is designed to "empower broadcasters to use this innovative Internet IP technology to increase their own investment and ability to serve" their communities. By allowing investment in spectrum use without the overhang of "old TV rules," the FCC hopes to provide broadcasters with the flexibility to pool their spectrum either to create a nationwide footprint for offering these innovative ATSC 3.0 data services or to "stack their rights" in local markets to provide robust data services locally. Carr agreed that this could lead to a third revenue stream to go with current revenue derived from advertising and retransmission consent fees.

FCC leadership on spectrum issues

Commissioner Carr delivered a clear message regarding the FCC's intentions with respect to repurposing and reallocating spectrum to 5G wireless services, saying "What's going on here is the FCC is moving forward with issues that prior FCCs didn't find a way to go forward and push across the finish line." Referring to disagreements with other federal agencies in recent actions like the FCC's decision to permit Ligado's terrestrial use of L-Band spectrum and 5.9 GHz Wi-Fi use, Commissioner Carr asserted that in spectrum policy, "this FCC is committed to putting the public interest first; US economic interests first; [and] national security interests first by securing US leadership in 5G." Indeed, Commissioner Carr stated that public disagreements between the FCC and other federal agencies over spectrum policy are evidence that the current FCC is "taking on the tough fights that others didn't have the courage to take on." He indicated that the current FCC will continue to make new spectrum available for 5G, regardless of pushback from incumbents and other federal agencies, by taking on and resolving disputes between incumbents and prospective 5G entrants that previous FCCs "didn't have the

stomach for."

TV white spaces

Commissioner Carr expressed enthusiasm for the inter-industry compromises that led to the FCC's proposed changes to the TV white spaces rules. He complimented the willingness of both white spaces users and the National Association of Broadcasters to "come to the table" with constructive proposals that led to a good result. "Spectrum policy is tough these days," he said of the need to balance the needs of incumbents and new users, but "white spaces is a great success story of people coming together and finding a way to take potentially fallow spectrum and put it to better use." Commissioner Carr did not offer any opinion regarding final FCC action on the current proposal.

5G infrastructure

Commissioner Carr stated that just a few years ago the United States was at a "pretty serious risk" of falling out of the lead in the provision of mobile wireless service. He touted the FCC's successful efforts since 2017 in streamlining federal infrastructure rules and curtailing state and local rules that significantly delayed or increased the cost of deploying 5G networks. Carr also discussed the FCC's 5G Upgrade Order that it will adopt next week. He said that the order "puts the accelerator down even further" on the 5G builds going on today and those in the future by making it easier for carriers to upgrade existing mobile wireless sites to include 5G service.

Other comments

Telehealth: Commissioner Carr discussed the importance of the FCC's recent support of telehealth initiatives. He explained that lessons learned in developing the Connected Care Pilot Program have been instrumental in implementing the COVID-19 Telehealth Program authorized by Congress in the CARES Act.

FCC media ownership rules: Commissioner Carr declined to comment on the future of the media ownership rules (chiefly the Duopoly Rule and Newspaper/Broadcast Cross-Ownership rule) currently subject to a pending petition for review at the US Supreme Court. He said the future of those rules would have to be determined after the courts are finished with the FCC's 2017 rules. With respect to AM and FM radio subcaps, however, Commissioner Carr stated that he thinks there is a real opportunity to reexamine those rules to promote high-quality local service, particularly in small and rural markets.

Future deregulatory efforts: Commissioner Carr stated the FCC should take a look at the many steps the agency has taken to increase connectivity during the pandemic and consider whether any of those actions "should be getting a hard look for staying in place" after the pandemic.

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