The FCC Threatens the Rule of Law: A Focus on Agency Enforcement and Merger Review Abuses

By Randolph J. May and Seth L. Cooper

Note from the Editor:

This article discusses enforcement and merger review activities of the Federal Communications Commission and argues that they undermine important rule of law principles.

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• FCC and United States' Respondents' Brief, U.S. Telecom Assoc. v. Fed. Commc'n Comm'n, No. 15-1063 (DC Cir. Sept. 14, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-335258A1.pdf.

• Statement of Chairman Tom Wheeler, Re: TerraCom, Inc. and YourTel America, Inc., Notice of Apparent Liability for Forfeiture, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A2.pdf.

• Remarks of Jon Sallet, Federal Communications Commission General Counsel, Telecommunications Policy Research Conference, *The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews* (Sept. 25, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-335494A1.pdf.

• Chairman Tom Wheeler, Press Conference Re: Open Internet Order (Feb. 26, 2015) (video), *available at* http://www.c-span.org/video/?324473-3/fcc-news-conference-open-internet-rules.

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Introduction

"The highest morality almost always is the morality of process," according to the late eminent Yale Law professor Alexander Bickel.[1] Professor Bickel's assertion offers a useful starting point for some thoughts on the relationship of proper process to commonly accepted rule of law norms. More specifically, the focus of this article is the handling of certain process issues by the Federal Communications Commission ("FCC" or "Commission") in the context of these accepted rule of law norms. There are many candidates from which to choose in thinking about FCC process reform and the rule of law. But the focus of this article is on the Commission's enforcement and merger review activities. It is hoped that this discussion will provide a further impetus for process reform at the agency.[2]

At the outset, it is useful to explain what this article means by "process" and "rule of law." By process, this article refers to the procedure or mechanics employed by the agency to reach a decision, as opposed to the decision's pure substance (although process often affects substance). For example, providing adequate notice so that the public has a meaningful opportunity to comment in a Commission rulemaking is a matter of process. Requiring relevant materials to be included in the record so that the public has an adequate opportunity to comment on them is a matter of process.

Maintenance of a rule of law regime requires adherence to certain process norms. In the context of constitutional and administrative law, these norms often are subsumed under the expression "due process of law." In his famous concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, Justice Robert Jackson explicitly invoked the Constitution's Due Process Clause and combined it with a famous adage when he declared, "there is a

1 Alexander M. Bickel, The Morality of Consent 123 (1975).

2 I (Randolph J. May) have published literally dozens of articles addressing FCC process reform. And I (May) have been privileged to have been invited to testify three times in recent years before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Communications and Technology, in hearings on FCC process reform. Some of the material in this article is drawn from ideas presented in testimony on these three occasions. *See* Testimony of Randolph J. May, Hearing on "Reforming FCC Process" before the Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives, June, 22, 2011, *available at* http://freestatefoundation.org/images/Testimony_of_Randolph_J._May_-_Hearing_on_FCC_Reform_-_June_22,_2011.pdf; Testimony of Randolph J. May, Hearing on "Improving FCC Process" before the Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives, July 11, 2013, *available at* http://freestatefoundation.org/images/Testimony_of_Randolph_J._May_-_FCC_Reform_-_071113.pdf; Testimony of Randolph J. May, Hearing on "FCC Reauthorization: Improving Commission Transparency – Part II" before the Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives, May 15, 2015, *available at* http://freestatefoundation.org/images/Testimony_of_Randolph_J._May_-_FCC_Process_Reform_-_May_2015_Final_051415.pdf.

principle that ours is a government of laws and not of men, and that we submit ourselves to rulers only if under rules."[3]

What does it really mean to have a government of laws, not of men? To submit to rulers only if under rules? In his instructive book, *The Rule of Law in America*, Ronald Cass defined the elements of the rule of law as: (1) a system of binding rules; (2) of sufficient clarity, predictability, and equal applicability; (3) adopted by a valid governing authority; and (4) applied by an independent authority.[4] In the same vein, Friedrich Hayek, in his famous work *The Road to Serfdom*, declared that the rule of law "means the government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to see with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[5] For the Federal Communications Commission to conform to the rule of law, it cannot regulate the affairs of private parties subject to its authority or sanction them for their conduct in the absence of rules that are fixed, predictable, and knowable in advance. By this standard, the FCC often falls short.

I. The FCC's Enforcement Activities

The FCC often contravenes rule of law norms in making and enforcing its rules. Recently, the Commission has assumed the power to impose sanctions on private parties for actions these parties could not have known in advance to be unlawful. This conduct by the agency violates fundamental rule of law principles because the agency is penalizing regulated parties without adopting knowable, predictable rules in advance.

A. The FCC's Open Internet Order

The most consequential and controversial action taken by the FCC in 2015 was its adoption of the *Open Internet Order*.[6] The *Open Internet Order* imposed internet regulations, often referred to as "net neutrality" regulations.[7] At the time the order was adopted, FCC Chairman Tom Wheeler stated that it would give consumers, innovators, and entrepreneurs the protections they deserve, "while providing certainty for broadband providers and the online marketplace."[8] There are many substantive problems with the *Open Internet Order* as a matter of policy and law, but this paper is not intended to rehearse them all here.[9] Rather, this paper will show that one key aspect of the agency's order is particularly troublesome from a rule of law perspective. Contrary to Chairman Wheeler's assertion, the order does not provide certainty in this key respect. Indeed, it generates uncertainty by its very nature, which creates a rule of law problem with regard to the order's enforcement.

After establishing what the Commission calls three "bright-line" rules,[10] the *Open Internet Order* sets forth a general conduct standard that the Commission itself calls a "catch-all" standard.[11] This catch-all standard provides that an internet service provider "shall not unreasonably interfere with or unreasonably disadvantage" end users or edge content or application providers.[12] The elastic nature of this catch-all gives FCC officials nearly unbounded discretion to determine whether an internet provider should be punished for violating the rule. The problem, of course, is that the catch-all provision—grounded as it is only in "reasonableness"—does not provide, in advance, a knowable, predictable rule consistent with due process and rule of law norms.[13] The operation of broadband networks involves intricate design trade-offs and meticulous engineering decisions, the details of which cannot be easily subsumed within a general "reasonableness" standard. The FCC has no common-law of broadband network management to draw upon in order to establish clear, knowable, predictable, and equally applied rules of conduct. And the fact that the entire internet ecosystem is so dynamic, with business models changing at a fast-paced rate in response to quickly evolving consumer demands and technological developments, compounds the difficulty confronting internet service providers. As they contemplate new services and features to distinguish their offerings from their competitors, internet providers are put in the position of guessing whether the Commission's view of reason-

3 343 U.S. 579, 646 (1952). *See also* Constitution of Massachusetts, Declaration of Rights, Article 30 (1780); David Hume, Essays, Moral, Political, and Literary, reprinted in Eugene F. Miller (ed.) 94 (1985).

4 Ronald A. Cass, The Rule of Law in America 4 (2001).

5 Friedrich A. Hayek, The Road to Serfdom 80 (1944).

6 Protecting and Promoting the Open Internet, *Report and Order on Remand and Declaratory Ruling and Order* ("*Open Internet Order*"), FCC 15-24, 30 FCC Rcd 17905 (2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.

7 *See Open Internet Order*. Even though the FCC decided a few years ago to switch terminology from "net neutrality" to "Open Internet," many observers continue to refer to the object of the Commission's regulatory desires in the *Open Internet* proceeding as "net neutrality" regulation.

8 Statement of Chairman Tom Wheeler, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, released February 26, 2015, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A2.pdf.

9 For a critique of the order as a matter of policy, see Randolph J. May, *Thinking the Unthinkable: Imposing the 'Utility Model' on Internet Providers*, Perspectives from FSF Scholars (Sept. 29, 2014), *available at* http://freestatefoundation.org/images/Thinking_the_Unthinkable_092914.pdf. For a critique of the order as a matter of law, see Randolph J. May, *Why Chevron Deference May Not Save the FCC's Open Internet Order – Part 1*, Perspectives from FSF Scholars (April 23, 2015), *available at* http://freestatefoundation.org/images/Why_Chevron_Deference_May_Not_Save_the_FCC_s_Open_Internet_Order_-_Part_I_042315.pdf.

10 *Open Internet Order*, at paras. 14-19 (These rules prohibit broadband internet service providers from "blocking" or "throttling" internet traffic or engaging in "paid prioritization."). Even these supposed bright-line prohibitions will not be free from ambiguities as to their meaning. Over time, the boundaries of the bright-line rules most likely will be tested and defined—and redefined—in litigation. But for the sake of argument, let's assume that the three prohibitions will promote certainty. This is definitely not the case for the fourth prohibition, as this paper intends to explain.

11 *Id.* at para. 21.

12 *Id.*

13 The Commission provided what it called a "non-exhaustive" list of seven factors that it said it would use to assess the reasonableness of internet provider practices. But highlighting the inherent elasticity of the catch-all provision, the Commission emphasized that, in addition to the non-exhaustive list, "there may be other considerations relevant to determining whether a particular practice violates the no-unreasonable interference/disadvantage standard." *Id.* at para. 138.

ableness will comport with their own. This surely is not a recipe for the "permissionless innovation" regime that FCC Chairman Wheeler claims to be supporting.[14]

Compounding these rule of law problems, the Commission delegated authority to enforce the catch-all general conduct standard, at least in the first instance, to its Enforcement Bureau staff. Of late, this staff has been especially aggressive in imposing large fines on regulated parties for actions that arguably were not known in advance to be unlawful.[15] The Commission also delegated authority to the Enforcement Bureau staff to establish a cumbersome, complex process by which private parties can seek "advisory opinions" that may not be binding in any event.[16]

Because of the open-ended nature of the *Open Internet Order* and the enforcement plan, it is difficult to accept at face value Chairman Wheeler's claim that the FCC promotes certainty. Instead, the new rules, especially the catch-all provision, likely will make it difficult for regulated parties to know in advance whether their business practices or technical operations subsequently will be determined to violate the agency's regulations and whether they will be penalized. In this respect, the *Open Internet Order* is inconsistent with accepted due process and rule of law principles.

B. Individual Enforcement Actions

Recently, several of the FCC's enforcement actions have posed similar rule of law issues in that regulated parties could not reasonably have known in advance that Commission officials would subsequently determine that they had acted unlawfully. In June 2015, the Commission proposed imposing a $100 million fine on AT&T[17] for allegedly violating a "transparency" rule adopted as part of the agency's 2010 *Open Internet Order*.[18] The Commission claims that AT&T Mobility violated the 2010 transparency rule by (1) using the allegedly misleading and inaccurate term "unlimited" in the description of its mobile data plan even though subscribers were subjected to speed reductions after using a set amount of data; and (2) failing to disclose that the speed reductions applied to the "unlimited" data plan once customers reached the data threshold.[19] On the surface, the Commission's claim seems plausible, but closer examination reveals otherwise. The agency was aware of AT&T's targeted speed-reducing measures, which AT&T asserts were permissible and reasonable network management practices to address network congestion. And the company had advised its subscribers of its speed-throttling practices through various means of disclosure. Even though the Commission was aware of AT&T's practices, it had given no indication that reducing speeds for network management purposes was inconsistent with offering an "unlimited" data plan under the 2010 transparency rule.

The 2015 *Open Internet Order*, presently subject to challenge in the D.C. Circuit,[20] adopted a bright-line prohibition on throttling as well as a broad and stringent transparency rule. But the 2010 transparency rule under which the FCC is seeking to fine AT&T did not. The FCC appears not to have given AT&T fair notice that, by reducing customers' speeds the way it did, or by describing its data plan as "unlimited," the company would be violating the 2010 rule. Fair notice, provided by the terms contained in a statute or regulation, is a critical aspect of knowable, clear, and predictable rules. To conform to the rule of law, the Commission cannot penalize AT&T for not predicting that the Commission would seek to enforce its 2010 *Open Internet* rules in a more stringent way, akin to the regulations it later adopted in 2015.

In October 2014, the Commission's Enforcement Bureau proposed a $10 million fine on TerraCom, Inc. and YourTel America, Inc., two relatively small telephone companies, for a data breach that exposed certain personally identifiable information to unauthorized access.[21] The Commission proposed the fines relying on Communications Act Section 222(a) provisions and agency regulations involving proprietary information specifically tied to telephone service.[22] Those provisions of the Act and regulations had never been construed to provide for sanctions for failing to employ "reasonable data security practices" to protect consumers' personally identifiable information.[23] Although breaches are matters of real concern, neither the Communications Act nor the Commission's rules specifically imposes such a duty con-

14 Statement of Chairman Tom Wheeler, *Open Internet Order*, Gen Docket No. 14-28, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A2.pdf ("These enforceable, bright-line rules assure the rights of Internet users to go where they want, when they want, and the rights of innovators to introduce new products without asking anyone's permission."); John Eggerton, *FCC's Wheeler and the 'Common Good' Standard*, Broadcasting & Cable (Nov. 4, 2015) ("Wheeler said the new rules were all about stimulating 'permissionless innovation.'").

15 *See infra* at I.B. *See also* Margaret Harding McGill, *GOP Criticism Unlikely to Deter Aggressive FCC Enforcement*, Law 360 (Nov. 25, 2015).

16 *Id*. at paras. 228-239. The establishment of the elaborate new regime for seeking advisory opinions regarding the lawfulness of proposals for new services is a good indication that, at the end of the day, "permissionless innovation" won't prevail.

17 Notice of Apparent Liability for Forfeiture and Order, AT&T Mobility, LLC, File No. EB-IHD-14-000117505, released June 17, 2015, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-63A1.pdf.

18 Most of the regulations adopted as part of the FCC's 2010 *Open Internet Order* were invalidated by the U.S. Court of Appeals for the D.C. Circuit. *See* Preserving the Open Internet, Report and Order, 25 FCC Rcd 17905 (2010) (2010 *Open Internet Order*), *aff'd in part, vacated and remanded in part sub nom.* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014). But the transparency rule in the 2010 order was affirmed. The 2015 *Open Internet Order* adopted an even more expansive transparency rule than the 2010 rule.

19 Notice of Apparent Liability, AT&T Mobility, LLC, at para. 2

20 United States Telecom Ass'n v. FCC, No. 15-1063 (D.C. Cir. filed Mar. 23, 2015).

21 Notice of Apparent Liability for Forfeiture, TerraCom, Inc. and YourTel America, Inc., File No. EB-TCD-13-00009175, released October 24, 2014, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A1_Rcd.pdf. Rather than litigate, the companies ultimately settled the matter in July 2015 by agreeing to pay a $3.5 million fine. *See TerraCom and YourTel to Pay $3.5 to Resolve Consumer Privacy & Lifeline Investigations*, FCC News (July 9, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-334286A1.pdf.

22 *See* 47 U.S.C. §222(a); Notice of Apparent Liability for Forfeiture, TerraCom, Inc. and YourTel America, Inc., at paras. 14-28.

23 *Id*. at para 2. *See also* Seth L. Cooper, *FCC's Internet Privacy Grab Unsupported by Law*, FSF Blog (Oct. 23, 2015), *available at* http://freestatefoundation.blogspot.com/2015/10/fccs-internet-privacy-power-grab.html.

cerning personally identifiable information. In dissenting from the proposed fine, Commissioner Ajit Pai aptly declared, "The government cannot sanction you for violating the law unless it has told you what the law is."[24] More recently, the Commission imposed a $595,000 fine on Cox Communications for failing to prevent a data breach by a third-party hacker.[25] The Enforcement Bureau order stated that "at the time of the breach, Cox's relevant data security systems did not include readily available measures for all of its employees or contractors that might have prevented the use of the compromised credentials."[26] Like TerraCom, YourTel, and others, Cox settled the case rather than litigate, even though it was not obvious that the Communications Act and agency regulations allegedly violated are intended to authorize the agency to sanction firms that are themselves victims of third-party hack attacks.[27]

It is not surprising that companies closely regulated by the FCC choose to settle cases based on questionable assertions of agency enforcement authority rather than endure lengthy costly litigation that risks incurring the disfavor of their regulator. And it may not be surprising that government officials have shown such eagerness to exercise enforcement authority in instances in which regulated parties have not been provided fair warning that their conduct violates any law or regulation. What *is* surprising is that so little public attention has been paid to these FCC actions that contravene basic rule of law principles.

II. The FCC's Merger Review Process

The way the Commission conducts its reviews of proposed mergers presents serious process and rule of law problems akin to those presented by its enforcement activities. These problems are grounded in the Commission's abuse of nearly unbounded administrative discretion to impose conditions on transactions proposing transfers or assignments of Commission-issued licenses or authorizations that are not knowable or predictable.[28] The way the Commission exercises its discretion in reviewing merger proposals frequently leads to a form of "regulation by condition" that results in merger applicants being subjected to regulatory mandates that apply uniquely to them and not to similarly situated parties. The conditions attached to the agency's approval of the proposed merger are said to be proffered "voluntarily" by the applicants as part of the review process. This often unseemly merger review process is ripe for reform.[29]

Under the Communications Act, the Commission reviews mergers to determine whether the proposed transactions are consistent with the "public interest."[30] A component of this public interest review usually involves examination of the competitive impacts of the proposed transaction.[31] But, as the Commission often makes clear, the public interest analysis is not limited to examining the proposal's competitive effects. In the agency's view, it necessarily encompasses the "broad aims of the Communications Act."[32] By construing the vague public interest standard so broadly, the Commission assumes largely unconstrained power to approve or disapprove mergers—or, more to the point here, to approve the transaction subject to conditions.

Armed with such an indeterminate standard, the Commission holds a proverbial Sword of Damocles over the merger applicants—and the agency has not been shy about using this powerful weapon to extract so-called "voluntary" conditions from merger applicants before finally ruling on the merger. Often these voluntary conditions are not closely related to any specific competitive concerns raised by the proposed transaction, but instead involve extraneous matters. For example, in prior transaction reviews, merger applicants have volunteered the following commitments, which were then incorporated into the Commission's orders as conditions: to offer discounted rates

24 Dissenting Statement of Commissioner Ajit Pai, TerraCom, Inc. and YourTel America, Inc., *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A4.pdf.

25 *Cox Communications to Pay $595,000 to Settle Data Breach Investigation*, FCC News (Nov. 5, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-336222A1.pdf.

26 *Id.*

27 It is worth noting that the Federal Trade Commission, which possesses general jurisdiction under the Federal Trade Act, *see* 15 U.S.C. § 45(a), to prevent businesses from engaging in deceptive or unfair business practices, has taken an active role in investigating the recent spate of data security breaches perpetrated by hackers and acted to hold companies accountable for such breaches when it determines such action is warranted. *See, e.g.*, FTC v. Wyndham Worldwide Corp., 799 F.3d 236 (3d Cir. 2015); *see also* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 598-606 (2014) (discussing FTC's expanding role in privacy and data security regulation).

28 Technically, the FCC does not review mergers per se; rather it reviews proposals in which applicants are seeking to transfer or assign licenses or authorizations held by the parties to a proposed merger or other form of business transaction that may not be assigned or transferred without prior Commission approval. Typically, when media companies are parties to the transaction, the agency is asked to approve the transfer of broadcast licenses pursuant to Section 310(d) of the Communications Act, 47 U.S.C. §310(d), and when telecommunications companies are involved, the agency is asked to approve the transfer of facilities authorizations pursuant to Section 214(a) of the Communications Act, 47 U.S.C. §214(a). Although the FCC is reviewing the proposed license or authorization transfer and not the merger per se, in common parlance the FCC's action is referred to as a merger review, and we will use the same convention.

29 For a call for reform of the FCC's merger review process written sixteen years ago, see Randolph J. May, *Any Volunteers?*, Legal Times (March 6, 2000). With regard to the Commission's process, the problems discussed in that essay still remain.

30 *See* 47 U.S.C. §§214(a) and 310(d).

31 To a large extent, the FCC's review of a transaction's competitive impacts duplicates the review undertaken by the antitrust authorities, whether the Department of Justice or the Federal Trade Commission. These antitrust authorities, carrying out their reviews pursuant to statutes specifically focused on competitive impacts, generally apply a rigorous economic analysis in evaluating the transaction. Thus, apart from the rule of law concerns raised here, the FCC's duplication of the DOJ's or FTC's competitive analysis raises questions concerning efficient expenditure of government and private resources.

32 Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348,12364, para. 31 (2008); News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3277-78, para. 23 (2008).

to low-income households for certain services;[33] to advertise the availability of low-cost broadband service to low-income families through specific media channels and outreach efforts;[34] to freeze prices for certain services for a period of time;[35] to carry ten new independent program channels in a cable channel lineup;[36] to repatriate a specific number of jobs to the U.S.;[37] and to donate a specific amount of money to a non-profit or public entity which promotes public safety.[38]

However worthy such commitments may be as a matter of policy, the process used by the Commission to carry out such "regulation by condition" poses rule of law issues. First, the conditions apply only to the merger applicants and not generally or equally to similarly situated market participants. To the extent the Commission wishes to impose requirements that are not related to specific concerns raised by the merger, as a matter of equity it should do so through a generic rulemaking proceeding that would apply the requirements on an industry-wide basis. Second, the "voluntary" conditions are usually offered very late in the review process after "midnight" negotiations between Commission officials and the parties take place out of the public view,[39] and then only after the parties often have waited a year or more for Commission action. As then-FCC Commissioner Michael Powell said in connection with the FCC's review of the SBC Communications/Ameritech merger, which itself was subject to a fifteen-month review: "I do not subscribe to…the idea that a regulated party can 'voluntarily' offer and commit to broad-ranging legal obligations and penalties. There is never anything voluntary about the regulatory relationship."[40]

While the merger applicants typically submit the proffered conditions in an ex parte letter that is included in the public file, by the time the proposed conditions are made public, frequently there is little, if any, time for the public to comment. Typically, the proposed conditions are made public as an appendix to the FCC's order when the latter is publicly released. The lack of transparency associated with commitments "volunteered" at the end of a long drawn-out process is unseemly. This lack of transparency makes the merger review process a far cry from rule of law concepts of knowability, predictability, and certainty.

Furthermore, the conditions may have nothing to to do with competitive effects of the merger. The FCC has, on occasion, imposed conditions that are not "transaction-specific." The Commission's order approving Charter Communications' merger with Time Warner Cable and Bright House Networks is the latest, starkest example of this process problem. The Commission made a finding that "Charter's proposed low-income broadband program is not a transaction-specific benefit."[41] Since agency precedent forbids the Commission from imposing conditions unrelated to the effects of mergers,[42] that finding should have ended the matter. Nonetheless, the Commission "impose[d] a modified version of Charter's proposal as a condition to the transaction."[43] Although it admitted that the condition was not merger-specific, the Commission claimed "the public would benefit from programs designed to bridge the digital divide."[44] The agency-modified program is subject to Commission-imposed performance goals and agency enforcement mechanisms.[45] Commissioner Michael O'Rielly said

33 Applications of Ameritech Corp. and SBC Communications Inc., For Consent to Transfer Control of Corporations Holding Commission Licenses and Line Pursuant to 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, Memorandum Opinion and Order, CC Docket No. 98-141, released October 8, 1999, *available at* https://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1999/fcc99279.txt.

34 Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, FCC 15-94, MB Docket No. 14-90, released July 28, 2015, Appendix B, at page 165; *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-94A1.pdf.

35 Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order, FCC 11-4, MB Docket No. 10-56, released January 20, 2011, Appendix A, Section IV, D, para. 1, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf.

36 *Id.* at Appendix A, page 121.

37 AT&T Inc. and BellSouth Corporation Application for Transfer of Control, Memorandum Opinion and Order, FCC 06-189, WC Docket No. 06-74, released March 26, 2007, Appendix F, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-06-189A1.pdf.

38 *Id.* at Appendix F, page 148.

39 *See, e.g.*, *supra* note 29, May, *Any Volunteers?*; Randolph J. May, *FCC's Secret Meetings Raise Significant Process Concerns*, FSF Blog (Sept. 5, 2014), *available at* http://freestatefoundation.blogspot.com/2014/09/fccs-secret-meetings-raise-significant.html.

40 Press Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part, Re: Memorandum Opinion and Order, Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and Section 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules (CC Docket No. 98-141), released October 6, 1999, *available at* https://transition.fcc.gov/Speeches/Powell/Statements/stmkp929.html.

41 Applications of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations ("*Charter-Time Warner Cable Order*"), Memorandum Opinion and Order, FCC 16-59, MB Docket No. 15-149, released May 10, 2017, at 203, para. 452, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-15-784A1.pdf.

42 *See, e.g.*, Applications of AT&T Inc. and Centennial Communications Corporation for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements, FCC 09-97, WT Docket No. 08-246, Memorandum Opinion and Order, released November 5, 2009, at 55, para. 133 ("AT&T-Centennial Order") (The Commission will "impose conditions only to remedy harms that arise from the transaction (i.e., transaction-specific harms)...."), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-09-97A1.pdf; Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses and De Facto Transfer Leasing Arrangements, FCC 08-258, WT Docket No. 08-95, released November 10, 2008, at 19, para. 29 (The Commission "will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction."), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-258A1.pdf.

43 *Charter-Time Warner Cable Order*, at 203, para. 453.

44 *Id.* at 203, para. 452.

45 *Id.* at Appendix B, at 221-223.

in dissent with respect to conditions like this: "Once delinked from the transaction itself, such conditions reside somewhere in the space between absurdity and corruption."[46]

There is no doubt that the FCC's process is ripe for reform. The FCC itself could reform its process by announcing that it will henceforth refrain from imposing merger conditions that are not closely related to specific concerns raised by the particular transaction under consideration.[47] In a further exercise of regulatory modesty, the Commission could announce that, instead of conducting its own largely duplicative competitive analysis of the proposed transaction, to avoid unnecessary effort and a wasteful expenditure of resources by both the government and interested private parties, it normally will rely on the competitive impact assessments performed by the Department of Justice and the Federal Trade Commission. If the Commission followed this course by narrowing the current expansive application of the public interest standard, the public still would be protected because the agency's attention then could be devoted primarily to ensuring that the merger, if approved, is consistent with all existing Communications Act provisions and regulatory requirements.[48]

The reality, however, is that the FCC is not likely to undertake these reforms itself. Consistent with the recommendations set forth above, I (Randolph J. May) testified at a June 2011 hearing on "Reforming the FCC Process" before the House of Representatives Subcommittee on Communications and Technology of the Committee on Energy and Commerce that:

> [T]he provision [in the bill under consideration] reforming the Commission's transaction review process is as important as any other in the bill in light of the abuse of the process for many years now. The agency often imposes extraneous conditions—that is, conditions not related to any alleged harms caused by the proposed transaction—after they are "volunteered" at the last-minute by transaction applicants anxious to get their deal done. The bill's requirement that any condition imposed be narrowly tailored to remedy a transaction-specific harm, coupled with the provision that the Commission may not consider a voluntary commitment offered by a transaction applicant unless the agency could adopt a rule to the same effect, would go a long way to reforming the review process.[49]

And to address the duplication of effort and unnecessary expenditure of government and private resources that now routinely occurs, I (May) testified:

> I would place primary responsibility for assessing the competitive impact of proposed transactions in the hands of the Department of Justice and the Federal Trade Commission, the agencies with the most expertise in the area. The FCC's primary responsibility then would be to ensure the applicants are in compliance with all rules and statutory requirements.[50]

While Congress has yet to pass any comprehensive FCC reform legislation that includes merger review reform provisions, the House Communications and Technology Subcommittee has laid a solid foundation for future efforts through its recent work. If the FCC fails to act on its own, then Congress should reform the merger review process. By reducing the Commission's unconstrained latitude to "regulate by condition" in a way that imposes different regulatory mandates on similarly situated market participants, this is one of the more meaningful communications policy reform measures that Congress could adopt.

III. Conclusion

There are many worthy candidates from which to choose in evaluating FCC process reform. This article focuses on two areas that are especially in need of reform because they materially affect not only the parties subject to the Commission's regulatory edicts, but public confidence in the integrity and fairness of the Commission's processes. Absent changes that bring the agency's actions in line with rule of law norms, the agency's institutional legitimacy is undermined, rendering its actions less deserving of public respect—and, in fact, less respected.

Federalist Paper No. 62 addresses the "calamitous" effects of mutable and inscrutable laws "so incoherent that they cannot be understood." The *Federalist* concludes, "Law is defined to be a rule of action; *but how can that be a rule, which is little known and less fixed*."[51] The author did not have the FCC in mind when that admonishment was written, but the FCC and the public it was created to serve would benefit if its officials would heed the *Federalist*'s injunction. At the end of the day, appreciating what Alexander Bickel called the "morality of process" will not only uphold the rule of law, but it also will lead to better communications policy.

46 *Id*. at 348 (Statement of Commissioner Michael P. O'Reilly Approving in Part, Concurring in Part, and Dissenting in Part).

47 *See* Randolph J. May, *A Modest Plea for FCC Modesty Regarding the Public Interest Standard*, 60 Admin. L. Rev. 895, 904-905 (2008).

48 *Id*. at 995.

49 Testimony of Randolph J. May, Hearing on "Reforming FCC Process" before the Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives, June, 22, 2011, at 4, *available at* http://freestatefoundation.org/images/Testimony_of_Randolph_J._May_-_Hearing_on_FCC_Reform_-_June_22,_2011.pdf.

50 *Id*. at 5. *See also* Testimony of Randolph J. May, Hearing on "Improving FCC Process" before the Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives, July 11, 2013, at 7-8, *available at* http://freestatefoundation.org/images/Testimony_of_Randolph_J._May_-_FCC_Reform_-_071113.pdf.

51 *The Federalist* No. 62 (probably James Madison) (emphasis added).