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The FCC, Still Lawless

by

Randolph J. May *

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On the second day of this now nearly gone year, I published an essay, "A Question for 2015: Is the FCC Unlawful?" In it, I stated that "there are reasons why this year will be a propitious time to examine – even more intensely than in the past – the FCC and its actions through just such a lawfulness frame of reference."

Sadly, upon examination, the tendencies of the Obama administration's Federal Communications Commission (FCC) to exercise power in a lawless manner have become more manifest as the year has progressed.

The long and short of it is that, this year, the agency increasingly has arrogated to itself the power to impose sanctions upon those it regulates for actions the regulated parties could not have known in advance to be unlawful. This conduct ignores fundamental rule of law and due process norms because the agency is asserting authority to penalize regulated parties without adopting, in advance, knowable, predictable rules.

These rule of law norms weren't invented yesterday. Indeed, it is especially useful to recall this year – the 800th anniversary of Magna Carta – that our Constitution's conception of "due process of law" is generally acknowledged to be an inheritance from the Great Charter.

While other examples might be discussed, here I want to highlight the way the FCC is exercising its administrative power through its "enforcement" regime. In its most consequential action of the year, the agency adopted new rules it claims are necessary to preserve what is already an "Open Internet." These new "Open Internet Order" regulations prohibit certain specific practices by Internet service providers, such as blocking access to lawful websites, throttling traffic or engaging in paid prioritization of traffic. Although the commission characterizes these as "bright line" rules, no doubt they will engender much future litigation as the ambiguities inherent in their parameters are tested.

But these ambiguities pale in comparison to the "Open Internet Order" prohibition in what the FCC calls a "catch-all" general conduct standard. This so-called catch-all provision makes it unlawful for Internet service providers to "unreasonably interfere with or unreasonably disadvantage" subscribers or content providers like, say, Internet giants Google or Facebook.

The commission delegated authority in the "Open Internet Order" to its Enforcement Bureau staff to enforce the new general conduct rule. This open-ended provision leaves agency bureaucrats with virtually unbridled discretion to penalize regulated parties for conduct the parties have no way of knowing in advance is prohibited. It doesn't take an expert steeped in the Magna Carta's history or our American rule of law norms to understand the problematic nature of this essentially standardless rule, which by its very nature invites arbitrariness and favoritism in its exercise.

Throughout the year, there have been other questionable exercises of the FCC's enforcement power — all involving cases in which the parties punished reasonably could not have been expected to know they had acted unlawfully. In June, the commission proposed a $100 million fine on AT&T for allegedly violating an agency "transparency" rule by reducing the data speeds of customers subscribed to "unlimited" data plans. The problem is the agency was aware of AT&T's targeted speed-reducing measures, which AT&T claims were reasonable network management practices during times of network congestion, and the company's various disclosures advising its subscribers of such practices. Knowing of such practices, the agency had not given any indication that reducing speeds for purposes of network management is inconsistent with offering an "unlimited" data plan.

It may be that the commission has authority to proscribe such throttling practices, or to require disclosure of them by Internet providers. But in the AT&T case, the FCC appears not to have given fair notice that reducing customers' speeds the way AT&T did, or describing its data plan as "unlimited," was prohibited by any existing agency rule.

In July, the FCC imposed substantial fines on the telephone companies TerraCom, Inc. and YourTel America, Inc., for a data breach that exposed certain personally identifiable information to unauthorized access. No one suggests that data breaches are not matters of real concern. But the commission proposed the fines based on Communications Act provisions and agency

regulations that previously had not been construed to provide fair notice that companies would be sanctioned for unauthorized access to the kind of information subject to the hack.

And just this month, the agency imposed a substantial fine on Cox Communications, Inc. for failing to prevent a data breach by a third-party hacker. Like TerraCom and YourTel, Cox settled the case rather than litigate, even though it was not obvious that the Communications Act and regulatory provisions allegedly violated are intended to allow the agency to sanction firms that are victims of hack attacks.

It may not be surprising that companies regulated by the FCC — in other words, firms whose businesses are subject to the agency's favor or not – choose to settle cases based on questionable assertions of agency enforcement authority. And it is not surprising that government officials relish exercising such unbridled authority. What may be surprising is that, as the Obama administration resorts to expanding administrative agency power across the board to achieve regulatory objectives it otherwise could not achieve, is that so little attention is paid to what is happening at the FCC.

A government of laws, not of men, requires a rule of law regime in which the rules are knowable and predictable – not one in which those subject to the government's enforcement authority are expected to be mind readers.

* Randolph J. May is President of the Free State Foundation, an independent free market-oriented think tank located in Rockville, Maryland. *The FCC, Still Lawless* was published in *The Hill* on November 23, 2015.