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The FCC Should Conform to Rule of Law Norms

by

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The Federal Communications Commission has been criticized often over the last half century for being a dysfunctional agency.

For example, in 1963, Newton Minow, President Kennedy's FCC Chairman said the agency was filled with "jungles of red tape" and that it existed in "a never-never land which we call quasi-legislative and quasi-judicial" that produced results that were "often quasi-solutions." And Reed Hundt, President Clinton's FCC Chairman, declared the FCC suffers from "a reputation for agency capture by special interests, mind-boggling delay, internal strife, lack of competence, and a dreadful record on judicial review."

So, no doubt the FCC is an agency ripe for reform.

A key element of such reform should be a commitment to adherence to basic rule of law principles.

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A good starting point for appreciating what I mean by adherence to rule of law norms is to consider last month's unanimous Supreme Court decision in the [FCC v. Fox Television Stations, Inc.](#) case. The Court overturned FCC decisions sanctioning the Fox and ABC broadcast networks for violating the agency's new policy regarding "indecent" broadcasts. The Court ruled the Commission failed to give the broadcasters fair notice, prior to the broadcasts in question, that mere "fleeting" expletives and "momentary" nudity could be found indecent.

As the Court explained, this lack of notice violates the Fifth Amendment's Due Process Clause:

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.... This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.... Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.... When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."

It is easy enough to see the close connection between the Due Process Clause's protections articulated in Fox and a proper rule of law regime under which regulated parties have fair notice concerning what is required of them.

And it is pretty easy to discern why so many of the FCC's regulatory actions are problematic from a rule of law perspective. A high percentage of them take place under either the "public interest" standard or various "non-discrimination" prohibitions. You don't need to be a lawyer or a linguist to know that both of these terms are vague and, hence, inherently malleable in the hands of government bureaucrats. This necessarily means parties subject to the FCC's regulatory grip often don't know what is required of them.

Here are four examples that illustrate the point:

- *The transaction review process.* Because the Commission reviews proposed mergers and other transactions, such as the transfer of spectrum licenses, under the "public interest" standard, parties don't know what the agency will require in order to approve the transaction. The standard's vagueness allows the Commission to abuse the review process by extracting "voluntary" concessions from firms that have little choice but to comply – or else see their transaction consigned to "never-never land." Often these "voluntary" concessions are completely unrelated even to alleged, much less proven, competitive or other harms.

- *The net neutrality rules.* The FCC's new net neutrality regulations, which prohibit "discrimination" by broadband Internet providers in transmitting network traffic, are inherently subject to arbitrary enforcement. Because the regulations require no showing of market failure or the exercise of market power, or even a showing of any consumer harm, the vagueness inherent in the non-discrimination prohibition is even more problematic than it otherwise might be.
- *The use of spectrum caps.* The FCC has let it be known that, in reviewing proposed transactions, it will consider as a decisional factor the amount of spectrum a provider already holds. It applies certain spectrum "caps" that have never been adopted as rules. There have been instances in which the agency has changed the way it applies these caps in the midst of a proceeding, without giving notice to interested parties of the change or inviting public comment.
- *The program carriage mandates.* An agency administrative law judge recently ruled Comcast violated another non-discrimination mandate by not acceding to the Tennis Channel's demand that it be moved to the same program tier as two of Comcast's affiliated sports channels. The agency judge determined the Tennis Channel is sufficiently "similar" to the Golf and Versus channels so that they all must be located in the same "program neighborhood." To make this determination, the agency examined the intricacies of program genres, program ratings, target audiences, and the like. In light of the lack of clarity inherent in applying the non-discrimination prohibition, the FCC's actions raise due process concerns. And intrusive examination of program content raises free speech concerns as well. This is why the Court in Fox emphasized: "When speech is involved, rigorous adherence to those [fair notice] requirements is necessary to ensure that ambiguity does not chill protected speech."

This catalog of disturbing agency actions is not intended to be exhaustive. It merely highlights a variety of ways in which the FCC's regulatory activities raise serious questions concerning compliance with rule of law norms.

Sooner or later – sooner I hope – Congress will take it upon itself to reform the FCC in a meaningful fashion. In the meantime, the FCC could speed the reformation process along by working harder to conform its regulatory actions to accepted rule of law norms, especially those derived from the Constitution such as due process and free speech protections.

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