Testimony of Randolph J. May

President, The Free State Foundation

Hearing on "The Administrative State: An Examination of Federal Rulemaking"

before the

Committee on Homeland Security and Governmental Affairs

United States Senate

April 20, 2016

Summary of the Testimony of Randolph J. May
President, The Free State Foundation

The Committee's identification of the Federal Communications Commission's net neutrality rule as deserving of examination is wise. The Commission's rulemaking is instructive regarding the ways in which a faulty rulemaking process enables the growth of the burgeoning administrative state and adversely impacts the economy – while, at the same time, compromising rule of law norms. I want to highlight four areas in which the FCC's net neutrality rulemaking is problematic.

First, the net neutrality rulemaking truly is a case of the proverbial "solution in search of a problem." Or as FCC Commissioner Ajit Pai put it recently, the rule "was a 313-page solution that wouldn't work to a problem that didn't exist." To put it bluntly, in this case there was no meaningful evidence of an existing market failure or consumer harm that required the Commission to adopt rules applying Ma Bell-era Title II public utility-like regulation to today's Internet service providers. The dynamic, competitive marketplace in which Internet service providers operate today is far removed from the staid monopolistic markets for which public utility-type regulation was devised.

Second, as a result of the direct and indirect costs and burdens imposed on Internet service providers, the rule's adoption most likely will have a deleterious economic impact by chilling investment and innovation. Indeed, there is some persuasive evidence that it is already doing so. Of course, diminished investment and innovation mean diminished jobs and consumer welfare.

Third, at a minimum, the manner of President Obama's direct involvement in the FCC's net neutrality rulemaking, and the aftermath of his involvement that resulted initially in confusion at the Commission and then, shortly afterward, in an abrupt change in course, raise questions about the FCC's supposed independence. The manner in which the rulemaking was conducted serves to undermine the notion that the FCC's decisions are primarily based on its specialized communications law and policy expertise rather than political considerations. And this, in turn, jeopardizes the public's confidence in the soundness of the Commission's decisions and the agency's institutional integrity. Just last week, the White House released a high-profile statement urging the FCC to adopt a specific course of action in the agency's controversial video navigation device rulemaking. Repeated high-profile presidential interventions like this further undermine the notion that the FCC acts independently and free from executive branch control.

Finally, aside from issues relating to President Obama's involvement, there are aspects of the net neutrality rule, specifically including the vague general conduct standard and the enforcement regime the rule creates, that call into question compliance with accepted rule of law and due process norms. These norms require that law be predictable and knowable in advance of the imposition of sanctions, which in the case of the net neutrality rule is not the case. Failing to adhere to these norms also threatens to undermine the public's confidence in the agency's institutional integrity.

Testimony of Randolph J. May

President, The Free State Foundation

Mr. Chairman, Ranking Member Carper, and Members of the Committee, thank you for inviting me to testify. I am President of The Free State Foundation, a non-profit, nonpartisan research and educational foundation located in Rockville, Maryland. The Free State Foundation is a think tank that, among other things, focuses its research in the communications law and policy and administrative law and regulatory practice areas. I have been involved for almost forty years in communications law and policy in various capacities, including having served as Associate General Counsel at the Federal Communications Commission. While I am not speaking on behalf of these organizations, by way of background I note that I am a past Chair of the American Bar Association's Section of Administrative Law and Regulatory Practice and its representative in the ABA House of Delegates. I am currently a Public Member of the Administrative Conference of the United States and a Fellow at the National Academy of Public Administration. So, today's hearing on the Administrative State and rulemaking, which includes a specific focus on the FCC, is at the core of my longstanding experience and expertise in communications law and policy and administrative law.

I. The Administrative State Today: A Brief Overview

Given the increase in regulatory activity during the years of the Obama Administration, it is certainly fitting to examine the ongoing expansion of the administrative state, and the role that rulemaking and related regulatory activities play in

impacting our personal lives, our families, and, importantly, our nation's economy. As Chief Justice John Roberts declared in 2013 in his opinion in *City of Arlington v. Federal Communications Commission*, "[t]he administrative state 'wields vast power and touches almost every aspect of daily life.'"[1] He observed that the agencies which comprise today's administrative state typically combine legislative, executive, and judicial powers in one body, despite James Madison's warning in Federalist No. 47 that lodging these powers "in the same hands . . . may justly be pronounced the very definition of tyranny." Not all of the 440 agencies listed in the Federal Register possess the authority to promulgate rules that have the force of law – so-called legislative rules – but many do.[2] In any event, as Chief Justice Roberts recognized, the accumulation of powers in the nation's federal agencies is no longer an exception to the original constitutional plan, "it is a central feature of modern American government."[3]

There is a rich literature on the vast domain of today's administrative state and its expansion in recent years, and there is no need here to belabor the data.[4] But a few facts and figures are useful to provide context for today's hearing. In 2014, federal regulation and intervention cost American consumers and businesses an estimated $1.88 trillion in lost economic productivity and higher prices. This amounts to an average of $14,976 for each American household's share of the economy-wide regulatory costs assuming these costs are passed along to consumers.

---

[1] City of Arlington v. FCC, 133 S. Ct. 1863, 1878 (2013), quoting Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477 (2010).
[2] For a list of the 440 agencies, see the Federal Register, available at: https://www.federalregister.gov/agencies (accessed on April 9, 2016).
[3] City of Arlington, at 1878.
[4] The figures in this paragraph and the next are taken from Clyde Wayne Crews, *Ten Thousand Commandments 2015*, Competitive Enterprise Institute (2015). I gratefully acknowledge the contribution of his annual *Ten Thousand Commandments* series.

In 2014 alone, 3554 rules were issued by federal agencies. Of the 3415 regulations then in the pipeline, 200 were deemed "economically significant," meaning each of the 200 was estimated to have at least a $100 million impact on the economy; 674 were identified as affecting small businesses. As but one indication of the increase in regulatory activity during the Obama Administration years, of the six all-time highest Federal Register page counts, five have occurred, thus far, under President Obama.

II. The Federal Communications Commission: An Agency Bent on Maintaining and Expanding Its Regulatory Power

While there are other rich targets worthy of consideration in connection with an examination of the exercise of an agency's rulemaking authority, the Federal Communications Commission certainly deserves attention, and the remainder of my testimony will be focused on the FCC. Aside from the impact its actions may have, say, on non-economic matters such as First Amendment free speech rights and individual liberty, the communications and Internet sectors, which in one way or the other, are within the FCC's (asserted) regulatory ambit, comprise approximately one-sixth of the nation's annual economic output. This alone makes the FCC's actions worthy of review.

In hearings before the House Subcommittee on Communications and Technology in 2011 and 2013, concerning reform of the FCC's processes,[5] I set the stage for my testimony by quoting from a strategic plan entitled, "A New FCC for the 21st Century," released by then-FCC Chairman William Kennard in August 1999. The plan's first three sentences read:

[5] Reforming FCC Process: Hearing Before the Subcomm. on Commc'ns & Tech. of the H. Comm. on Energy & Commerce (2011)(statement of Randolph J. May); Improving FCC Process: Hearing Before the Subcomm. on Commc'ns & Tech. of the H. Comm. on Energy & Commerce (2013) (statement of Randolph J. May).

> In five years, we expect U.S communications markets to be characterized predominately by vigorous competition that will greatly reduce the need for direct regulation. The advent of Internet-based and other new technology-driven communications services will continue to erode the traditional regulatory distinctions between different sectors of the communications industry. As a result, over the next five years, the FCC must wisely manage the transition from an industry regulator to a market facilitator.[6]

Chairman Kennard was proved right. The communications marketplace incontrovertibly is characterized by much more marketplace competition and technological dynamism now than in 1999. Economists and regulatory experts universally agree that increased marketplace competition should, at least to some meaningful extent, supplant the need for regulation. This is because the marketplace competition serves to protect consumers and does so more efficiently and effectively – that is, by imposing less costs on the nation's economy – than regulation. But rather than transitioning to an agency fit for the 21st Century's competitive communications and Internet marketplace, as the 1999 strategic plan envisioned, the FCC, especially during the Obama Administration's years, has exercised its rulemaking authority in ways that make it every bit as much of an "industry regulator" now as it was in 1999.

Not coincidentally, the number of final rules issued by the FCC increased from 109 in 2012 to 144 in 2014 – and there has been no slowdown in rulemaking activity involving major matters in 2015 and this year. The FCC will spend an estimated $545 million on regulatory development and enforcement during FY 2016,[7] and the agency routinely accounts for several rules in the pipeline with an estimated $100 million in annual economic impact.

---

[6] FCC, "Strategic Plan, A New FCC for the 21st Century," August 1999, available at: https://transition.fcc.gov/21st_century/draft_strategic_plan.pdf (accessed April 9, 2016).

[7] Susan Dudley and Melinda Warren, Regulators' Budget No. 37, May 19, 2015, Table A-1, p. 17, available at: https://wc.wustl.edu/files/wc/imce/2016_regulators_budget_final.pdf (accessed April 9, 2016.)

III. The FCC's Net Neutrality Rule: A Case Study in a Faulty Rulemaking Process and the Consequences

Although there are many other FCC rulemakings worthy of study (for example, at present, the agency's set-top box video navigation device and privacy rulemakings deserve close scrutiny), as requested by the Committee, I will focus the remainder of my testimony on the Commission's net neutrality rule.[8] (The Commission refers to it as the "Open Internet" rule, but I prefer to call it, more properly I think, the "Internet Regulation" rule.) The Committee's identification of the net neutrality rule as deserving of examination is wise because the rulemaking is instructive regarding the ways in which a faulty rulemaking process enables the growth of burgeoning administrative state and adversely impacts the economy – while, at the same time, compromising rule of law norms.

First, the net neutrality rulemaking truly is a case of the proverbial "solution in search of a problem." Or as FCC Commissioner Ajit Pai put it recently, the rule "was a 313-page solution that wouldn't work to a problem that didn't exist."[9] To put it bluntly, in this case there was no meaningful evidence of an existing market failure or consumer harm that required the Commission to adopt rules applying Ma Bell-era public utility-like regulation to today's Internet service providers. The dynamic, competitive marketplace in which Internet service providers operate today is far removed from the staid monopolistic markets for which public utility-type regulation was devised.

[8] "Protecting and Promoting the Open Internet," Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, released March 12, 2015.
[9] "The FCC and Internet Regulation: A First-Year Report Card," Remarks of FCC Commissioner Ajit Pai before the Heritage Foundation, February 26, 2016.

Second, as a result of the direct and indirect costs and burdens imposed on Internet service providers, the rule's adoption most likely will have a deleterious economic impact by chilling investment and innovation. Indeed, there is some persuasive evidence that it is already doing so. Of course, diminished investment and innovation mean diminished jobs and consumer welfare.

Third, at a minimum, the manner of President Obama's direct involvement in the FCC's net neutrality rulemaking, and the aftermath of his involvement that resulted initially in confusion at the Commission and, shortly afterward, in an abrupt change in course, raise questions about the FCC's supposed independence. The manner in which the rulemaking was conducted serves to undermine the notion that the FCC's decisions are largely based on its specialized communications law and policy expertise rather than political considerations.[10] And this, in turn, jeopardizes the public's confidence in the soundness of the Commission's decisions and the agency's institutional integrity. Just last week, the White House released a high-profile statement urging the FCC to adopt a specific course of action in the Commission's controversial video device navigation rulemaking. Repeated high-profile presidential interventions like this further undermine the notion that the FCC acts independently and free from executive branch control.

Finally, entirely aside from issues relating to President Obama's involvement, there are aspects of the net neutrality rule, specifically including the vague general conduct standard and the enforcement regime the rule creates, that call into question compliance with accepted rule of law and due process norms that require that law be predictable and knowable in advance of the imposition of sanctions, which in the case of

[10] See "Regulating the Internet: How the White House Bowled Over FCC Independence," A Majority Staff Report of the Committee of Homeland Security and Governmental Affairs, United States Senate, February 29, 2016.

the net neutrality rule is not the case. This too threatens to undermine the public's confidence in the agency's institutional integrity.

I will now say more about each of these problematic areas in turn.

A. "A Solution in Search of a Problem"

In the net neutrality rulemaking, after President Obama's unusual involvement in the proceeding,[11] the FCC abandoned the primary approach it had outlined in its *Notice of Proposed Rulemaking*[12] and instead adopted rules that imposed a public utility-like regime on today's broadband Internet service providers ("ISPs"). In opting to classify broadband Internet service providers as "telecommunications carriers" rather than "information service" providers, the Commission subjected them to the same Title II[13] common carrier regulatory regime initially applied to railroads in 1887 by the Interstate Commerce Act and to monopolistic Ma Bell in 1934 by the Communications Act of 1934. At bottom, the most troublesome aspect of the FCC's net neutrality rulemaking is the fact that the Commission acted without any meaningful evidence of existing market failure in the Internet services marketplace or evidence of consumer harm. The Commission cited only three or four anecdotal instances throughout the 313-page order of ISP practices that might possibly have caused consumer harm. There certainly was no effort to conduct a meaningful cost-benefit analysis before adopting the rules.

Instead, the whole rulemaking exercise was premised on the existence of hypothetical harms that the Commission imagined "might" or "could" occur. Even a

---

[11] I will address President Obama's involvement in more detail below.
[12] "Protecting and Promoting the Open Internet," Notice of Proposed Rulemaking, GN Docket No. 14-28, released May 15, 2014.
[13] Title II ("Common Carriers") is the title of the Communications Act of 1934 that applies the traditional common carrier regulatory scheme to service providers classified as telecommunications carriers.

casual perusal of the order reveals hundreds of pure FCC conjectures about what *could* or *might* occur absent adoption of new regulations, not credible evidence of actions that actually had occurred.[14] The Commission failed to engage in any real market power analysis. Instead, it was content to rely on bandying about a "gatekeeper" label to the Internet providers based merely on the assertion that ISP customers might (but not necessarily would) experience some difficulties or incur some costs in switching from one ISP to another. Of course, this in true in many other functioning markets as well.

I don't want to address all of the arguments here concerning the Commission's asserted lack of legal authority to act as it did. The challenge to the FCC's action is pending before the D.C. Circuit Court of Appeals, and a decision may be issued at any time. I will just say here that, given the absence of meaningful evidence of any present market failure or consumer harm, the Commission's decision to reverse its previous policy of not applying Title II public utility regulation to ISPs – which it defended, successfully, all the way to the Supreme Court in 2005[15] – flouts Congress's declaration that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[16]

B. The Net Neutrality Rule's Deleterious Economic Impact

Of course, there are many rules, especially health and safety regulations, that admittedly impose costs on the economy but that nevertheless are justified by their asserted benefits. I do not want to be understood as arguing against all federal regulation,

[14] Indeed, as an indication of the conjectural nature of the Commission's reasoning regarding evidence of harm resulting from ISP practices, the majority's order employed the speculative "might" and "could" over 250 times in the order.
[15] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. 545 U.S. 967 (2005).
[16] Communications Act of 1934, as amended, Section 230(b)(2), 47 U.S.C. §230(b)(2).

or all FCC regulation. But in the case of the net neutrality rule, not only was there no evidence concerning the existence of an existing market failure, there was affirmative evidence that the costs imposed by the new regulations likely would impair investment and innovation. There are direct costs imposed by the net neutrality rule, such as increased operating expenses relating to compliance with additional regulatory obligations. And there are indirect costs related to less easily measurable, but nonetheless real, items such as foregone business opportunities attributable to the regulatory uncertainty created by many aspects of the new rule and the employment and consumer welfare losses stemming from the reductions in investment and innovation.[17]

Many commenters, including the Free State Foundation, asserted in the Commission's rulemaking proceeding, that the direct and indirect costs imposed by the burdensome new regulations likely would chill future facilities investment by broadband ISPs[18] – a contention consistent with the prevailing economic literature. While it may be some time before more definitive data become available, early indications are that the FCC's rule already is having a chilling impact on ISP capital investment. Hal Singer, a respected economist affiliated with the Progressive Policy Institute, has estimated that the capital expenditures of the twelve largest ISPs declined by $240 million in 2015 from the 2014 level, a 0.4% year-over-year reduction. Only twice before have the capex investments of broadband providers declined, once after the dot-com bust in 2000 and in 2008 at the beginning of the financial crisis. In his report on the 2015 investment results, Mr. Singer states:

[17] I will discuss below the problematic nature of one particular aspect of the uncertainty created by the net neutrality rule in relation to compromising rule of law norms.
[18] There is little or no dispute that in the fifteen years prior to the adoption of the FCC's net neutrality order the private sector invested approximately $1.3 trillion in building out broadband networks.

> This is not to conclude that Title II solely caused capital expenditures to stagnate. Several factors could be at play. But when investment theory is corroborated by evidence, as it is here, it is reasonable to infer that reclassification of ISPs as Title II common carriers was not a good thing for investments. The theory provides a crisp prediction: Reclassification is a prerequisite for price regulation and mandatory unbundling, both of which are recognized in the economics literature…to cause capital flight.[19]

Of course, the disincentive to investment extends far beyond the twelve largest ISPs, although they admittedly account for a large portion of total ISP capital expenditures. FCC Commissioner Ajit Pai has detailed the adverse impact on some smaller ISPs around the country. There are documented instances of these smaller ISPs scaling back facilities investment and discontinuing plans to extend broadband service to unserved communities.[20] At the Free State Foundation's Eighth Annual Telecom Policy Conference held on March 23, 2016, Glenn Lurie, President & CEO, AT&T Mobility and Consumer Operations, stated that the FCC's net neutrality rule negatively impacted AT&T's investment plans for its broadband network in the United States. In answering a question, Mr. Lurie explained that, in light of the FCC's net neutrality order, AT&T has "invested in a whole bunch of other things," such as DIRECTV and overseas businesses, such as in Mexico.[21]

It bears emphasis that it is difficult to measure with any precision the adverse economic impact of foregone business opportunities by the ISPs and foregone productivity increases that are lost as a result diminished investment and innovation. But

---

[19] Hal Singer, "ISP Capital Expenditures in the Title II Era," available at: -the-title-ii-era-4q-edition/" https://haljsinger.wordpress.com/2016/02/24/isp-capital-expenditures-in-the-title-ii-era-4q-edition/ (accessed April 11, 2016.)

[20] See "The FCC and Internet Regulation: A First-Year Report Card," Remarks of FCC Commissioner Ajit Pai before the Heritage Foundation, February 26, 2016, at page 2.

[21] "Something Isn't Right – Wheeler Wrong on AT&T Investment Post-Net Neutrality Order," Communications Daily, March 24, 2016.

it already looks like the decline in ISP investment is measurable. And even if it turns out to be only a decline in the rate of investment that otherwise would occur, the loss to the nation's economy will amount to tens of billions of dollars over the next few years. Of course, this loss to the economy translates into a real loss in jobs.

C. The FCC's Supposed Independence Was Compromised by President Obama's Involvement and the Agency's Abrupt Change of Course

At a minimum, the manner of President Obama's involvement in the FCC's net neutrality rulemaking and the aftermath at the agency of his involvement raise questions about the FCC's supposed independence and serve to undermine the notion that its decisions are largely based on it specialized expertise regarding communications law and policy. I want to state at the outset of this discussion that it is not my position that it is improper or inappropriate for executive branch officials, including the President, to present their views to the FCC in a rulemaking proceeding. The problem in this case arises from the timing and overall context of the manner in which the President's involvement occurred.

The FCC, like the Securities Exchange Commission and the Federal Trade Commission and other similar multimember agencies, are commonly considered independent agencies. They are comprised of commissioners who serve fixed, staggered terms. Significantly, there may be no more than a bare majority of commissioners from the same political party, which, for the FCC, means that no more than three of the five commissioners may be from the same party. These are the primary indicia intended to

give the FCC and similarly structured agencies a measure of independence and insulation from political control that differs from that accorded to executive branch agencies.[22]

Ever since the Supreme Court in 1935 held in *Humphrey's Executor v. United States* that at least certain "good cause" limitations on the President's power to remove a member of the Federal Trade Commission ("FTC") were constitutional, agencies such as the FTC and the FCC have been considered, in at least some good measure, as a matter of law and established practice, "free from executive control."[23] According *Humphrey's Executor*, as a predominantly quasi-legislative and quasi-judicial body, the FTC "is charged with the enforcement of no policy except the policy of the law"[24] and "[i]ts duties are neither political nor executive."[25] As such, the agency "cannot in any proper sense be characterized as an arm or an eye of the executive."[26] Rather, Congress intended "to create a body of experts who shall gain experience by length of service - a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government."[27]

---

[22] The independents are sometimes characterized as the "headless fourth branch" of government The original reference to the "headless fourth branch" usage is from THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT (1937), reprinted in SUBCOMMITTEE ON SEPARATION OF POWERS, COMMITTEE ON THE JUDICIARY, U.S. SENATE, SEPARATION OF POWERS AND THE INDEPENDENT AGENCIES: CASES AND SELECTED READINGS, 91st Cong., 1st Sess. 345 (1969). For a useful scholarly study containing information on almost all independent agencies, see Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111 (2000).
[23] Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).
[24] Id., at 624.
[25] Id.
[26] Id., at 628.
[27] Id., at 625-26 (emphasis in original.) For further reading, I discussed *Humphrey's Executor* and the independent agencies at much greater length in Randolph J. May, *Defining Deference Down: Independent Agencies and Chevron Deference*, 58 ADMIN. L. REV. 429 (2006), and Randolph J. May, *Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox*, 62

The Court's analysis, based primarily on the characteristics of the multimember agencies set forth above – fixed, staggered terms and bipartisan membership – should apply to the FCC as well. Indeed, when the Federal Radio Commission was created in 1927, the direct predecessor agency of the FCC that was created with the same structure, the Senate Committee on Interstate Commerce's report declared that the agency's regulatory authority should be placed in the hands of "one independent body"[28] that would become "an expert authority."[29]

In the net neutrality rulemaking, as the *Wall Street Journal* reported in a lengthy investigative story, the President's open involvement in the proceeding came "after an unusual, secretive effort inside the White House, led by two aides who built a case for the principle known as 'net neutrality' through dozens of meetings" with online activists and others favoring the Title II public utility approach. The *Journal* reported that the White House acted "like a parallel version of the FCC itself."[30] After the secretive White House process, on November 10, 2014, President Obama issued a public announcement and accompany video urging the FCC to adopt the Title II regulatory approach.[31] He ended his statement by "ask[ing] them [the Commissioners] to adopt the policies I have outlined here."[32] At the Commission meeting in February 2016, the three Democrat commissioners did exactly what the President asked them to do in his statement, while the two Republicans dissented.

ADMIN. L. REV. 433 (2010).
[28] S. REP. NO. 69-772, at 2 (1926)
[29] S. REP. NO. 69-772, at 2-3 (1926).
[30] Gautham Nagesh & Brody Mullins, How White House Thwarted FCC Chief on Internet Rules, WALL ST. J., Feb. 4, 2015.
[31] WHITE HOUSE, November 2014 The President's message on net neutrality, https://www.wh itehouse.gov/net- neutrality.
[32] Id.

On February 29, 2016, the majority staff of this Committee released a report detailing the secret White House meetings; the briefing FCC Chairman Wheeler received from Jeffrey Zients, President Obama's economic advisor, shortly before President Obama's public announcement; President Obama's announcement; and the ensuing FCC staff confusion followed soon thereafter by an abrupt change of direction in the draft proposal to conform it to President Obama's "ask."[33] Relying on the discovery of Commission emails and other documents, the majority staff report sets forth what transpired, and I see no need to burden my testimony by repeating here the information contained in the report. Rather, I want to offer some brief observations, based on my decades of experience observing the FCC, in conjunction with my administrative law expertise, regarding the troublesome nature of the process as it unfolded.

As was common knowledge based on press reports at the time, and as this Committee's majority staff report confirms based on an examination of Commission emails, the FCC staff, at Chairman Wheeler's direction, already had produced a draft order, which was about to be circulated to the other commissioners, that opted for the less stringent, more flexible "commercially reasonable" approach under Section 706 of the Communications Act rather than the Title II common carrier approach ultimately adopted. While not absolutely foreclosing consideration of Title II regulation, the Commission had tentatively concluded in the May 2014 *Notice of Proposed Rulemaking* that it would rely on the less rigid Section 706. The *Notice* gave short shift to the Title II option.

[33] See "Regulating the Internet: How the White House Bowled Over FCC Independence," A Majority Staff Report of the Committee of Homeland Security and Governmental Affairs, United States Senate, February 29, 2016.

In my view, as a matter of sound process and to in order to maintain its credibility as an independent agency, the Commission should have issued a *Further Notice* calling for another round of public comments after President Obama's announcement before abruptly abandoning the approach already embodied in the nearly completed draft order. Chairman Wheeler rejected allowing another comment round, although interested parties continued to offer views through *ex parte* meetings. Unfortunately for the Commission and the public, the manner in which the rulemaking was conducted created the widespread impression of an agency ultimately relying on political considerations rather than on its own presumed expertise. This impression diminishes public confidence in the integrity of the Commission's process and the soundness of its decisions.

In a *Perspectives from FSF Scholars*, Enrique Armijo, a law school professor and member of the Free State Foundation's Board of Academic Advisors, summed up what had occurred this way:

> [Y]ou should find this level of politicization of an independent agency rulemaking deeply troubling. The rulemaking process is expressly intended to insulate federal agencies from the political winds, and designed to give agency deliberations and interested parties' positions an open airing. And secretly held, off-the-record meetings in another part of the Executive Branch concerning pending agency action, the results of which are adopted by the agency itself as its final rule, are in headlong conflict with that approach.[34]

Professor Armijo concluded that if evidence developed in the rulemaking process regarding investment incentives, technologically feasibility, or the like "can be trumped

[34] Enrique Armijo, Net Neutrality, "Administrative Procedure, and Presidential Overreach," Perspectives from FSF Scholars, Vol. 10, No. 39, November 19, 2015, at 2, available at: http://freestatefoundation.org/images/Net_Neutrality,_Administrative_Procedure,_and_Presidential_Overreach_111915.pdf (accessed April 10, 2016). It's worth noting that Professor Armijo stated that he "personally would likely conclude some form of net neutrality rules are a net benefit for Internet users." Nevertheless, as he explains, he finds the process employed in adopting the net neutrality rule highly problematic.

or cancelled out by a presidential statement delivered at the 11th hour of a years-long rulemaking proceeding, any decent administrative law attorney would have to consider advising the client to save its money – or to spend it on lobbying the White House instead."[35] This is a sad commentary on the FCC's net neutrality rulemaking process with which I concur.[36]

D. The Net Neutrality Rule Compromises Basic Rule of Law Principles

There are many substantive reasons why the Commission's net neutrality order is problematic as a matter of policy and law, too many to rehearse them all here.[37] Rather, in this final section, I intend to highlight one key aspect of the agency's order that is particularly troublesome from a rule of law perspective. Contrary to Chairman Wheeler's assertion, the FCC's order does not provide certainty. Indeed, by its very nature, it necessarily generates uncertainty. And this built-in uncertainty – apart from the economic harms it creates by chilling investment and innovation – creates a rule of law problem with regard to the order's enforcement.

---

[35] Id., at 3.

[36] It is worth noting that the form of the President's intervention, with the publicized video, was in and of itself unusual. In the past, the executive branch typically made its views known to the FCC through formal comments and letters submitted by the Department of Commerce's National Telecommunications and Information Administration during the course of the public comment process. Confirming to this traditional, less sensational manner of making the President's views known is likely to be more conducive to maintaining a rulemaking environment in which the agency's independence does not appear to be compromised or the role of its presumed expertise diminished.

[37] As a matter of policy, but for one example, see Randolph J. May, "Thinking the Unthinkable: Imposing the 'Utility Model' on Internet Providers," Perspectives from FSF Scholars, September 29, 2014, available at: http://freestatefoundation.org/images/Thinking_the_Unthinkable_092914.pdf (accessed April 14, 2016). And, as a matter of law, but for one example, 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 (accessed April 14, 2016).

The net neutrality rule establishes what the Commission calls three "bright-line" rules prohibiting broadband Internet service providers from "blocking" or "throttling" Internet traffic or engaging in "paid prioritization."[38] I very seriously doubt that even these supposed bright-line prohibitions will be free, over time, from ambiguities as to their meaning. In any event, this definitely is not the case for another prohibition, a "general conduct standard" that the Commission itself calls a "catch all."[39] This conceded "catch all" standard provides that an ISP "shall not unreasonably interfere with or unreasonably disadvantage" end users or "edge" content or application providers.[40]

The elastic nature of the inherently vague "no unreasonable interference/disadvantage" catch-all gives agency officials nearly unbounded discretion to determine that 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.[41] And the fact that the entire Internet ecosystem is so dynamic, with both technology and business models changing at a fast-paced rate in response to quickly evolving consumer demands, compounds the difficulty confronting Internet service providers. As they contemplate new services and features to distinguish

[38] Open Internet Order, at paras. 14-19.
[39] Id., at para. 21.
[40] Id.
[41] 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 elasticity and vagueness 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.

their offerings from their competitors,[42] Internet providers are put in the position of guessing whether the Commission's view of reasonableness will comport with their own. This surely is not a recipe for the "permissionless innovation" regime that FCC Chairman Wheeler likes to tout.[43] Rather, to put it in standard administrative law terms, it is an invitation for arbitrary and capricious rulings by government officials who may be disposed to exercise their "catch all" discretion to favor some regulated parties over others. This is the opposite of "permissionless innovation."

To compound matters even further, the Commission delegated authority to enforce the "catch all" general conduct standard in the first instance to the agency's Enforcement Bureau staff.[44] As if to concede the inherent vagueness built into the new general conduct standard, the Commission delegated authority to the Enforcement Bureau staff to establish a cumbersome, complex process by which private parties can seek "advisory opinions" that may not even be binding in any event.[45] The establishment of the elaborate new regime for seeking advisory opinions regarding the lawfulness of

---

[42] The Commission is investigating various new zero-rating and sponsored data plans offered by wireless carriers under the general conduct standard, even though these new offerings, such as T-Mobile's Binge On plan, appear to be very popular with consumers. The zero-rating and sponsored data plans, in one way or another, allow consumers to access various content and applications without such usage counting towards data limits or incurrence of otherw ise applicable data charges.

[43] Statement of Chairman Tom Wheeler, Protecting and Promoting the Open Internet, Gen Docket No. 14-28, available at: c/attachmatch/FCC-15-24A2.pdf, 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, November 4, 2015. ("Wheeler said the new rules were all about stimulating 'permissionless innovation.'").

[44] Of late, the staff has proven to be especially aggressive in imposing large fines on regulated parties for actions that (as shown below) arguably were not known in advance to be unlawful. Margaret Harding McGill, "GOP Criticism Unlikely to Deter Aggressive FCC Enforcement," Law 360, November 25, 2015.

[45] Open Internet Order, at paras. 228-239.

proposals for new services is a good indication that "permissionless innovation" won't prevail.

In short, the amorphous "general conduct standard," which it at the heart of the net neutrality rule, implicates fundamental rule of law norms and leads to arbitrary and capricious decisions. Friedrich Hayek, in his famous work, The *Road to Serfdom*, declared 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."[46] *Federalist No. 62* (probably authored by James Madison) addresses the "calamitous" effects of mutable policy resulting from incoherent laws. The author declares: "Law is defined to be a rule of action; but how can that be a rule, which is little known and less fixed?" According to *Federalist No. 62*, this little known/less fixed conception of law "poisons the blessings of liberty itself."

So, aside from the other problematic aspects of the net neutrality rule – the FCC's acting in the absence of evidence of market failure or consumer harm, the likely adverse economic effects, and the undermining of the agency's independence – the net neutrality rule also calls into question the FCC's adherence to fundamental rule of law norms.

Thank you for giving me the opportunity to testify today. I will be pleased to answer any questions.

[46] Friedrich A. Hayek, The Road to Serfdom 80 (1944).