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Is the FCC Lawless?

by

Randolph J. May *

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This Thursday, Feb. 26, will be a fateful day for the future of the Internet. In the nearly 40 years that I have been involved in communications law and policy, including serving as the Federal Communications Commission's (FCC) associate general counsel, this action, without a doubt, is one of the agency's most misguided.

The sad reality is that, without any convincing evidence of market failure and consumer harm, the FCC is poised, on a 3-2 party-line vote, to expand its control over Internet providers in ways that threaten the Internet's future growth and vibrancy.

Here is the nub of the matter: By choosing to regulate Internet providers as old-fashioned public utilities in order to enforce "neutrality" mandates, the commission will discourage private-sector investment and innovation for many years to come, if only as a result of the litigation that will be spawned and the uncertainty that will be created. And the new government mandates inevitably will lead to even more than the usual special interest pleading at the FCC, as Internet companies try to advantage themselves and disadvantage their competitors by seeking favored regulatory treatment.

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

From all indications, the FCC contemplates that the new rules will be sufficiently burdensome and costly — and sufficiently ambiguous — that affected parties will be invited to seek exemptions from the new mandates through "waiver" requests or other administrative mechanisms.

But this likely flood of waiver requests should raise serious questions concerning the lawfulness of the agency's mode of operating. As Philip Hamburger discusses in his book, *Is Administrative Law Unlawful?*, one of our Founders' objectives was to control, if not eliminate, what in England was known as the "dispensing" power. Simply put, the dispensing power — which is much discussed in English constitutional history — was a form of exercise of royal prerogative under which the king could excuse himself or his favored subjects from complying with particular laws enacted by Parliament. As Hamburger explains, today's administrative agencies, in essence, have resurrected the dispensing power by the way they so often use waivers to grant favored treatment.

Here is the way Hamburger puts it:

After administrators adopt a burdensome rule, they sometimes write letters to favored persons telling them that, notwithstanding the rule, they need not comply. In other words, the return of extralegal legislation has been accompanied by the return of the dispensing power, this time under the rubric of 'waivers.'

And then he goes to the heart of the matter:

Like dispensations, waivers go far beyond the usual administrative usurpation of legislative or judicial power, for they do not involve lawmaking or adjudication, let alone executive force. On the contrary, they are a fourth power — one carefully not recognized by the Constitution.

Now, seeking and receiving waivers of FCC rules (regardless of the precise name applied to such administrative dispensations) is an established part of the commission's practice. In some instances, such waivers, in light of unique circumstances or special hardships, are no doubt justified. But I am convinced that under the new Internet regulations about to be adopted by the commission, we are likely to witness the exercise of the agency's dispensing power — this power the Founders wished to eliminate — in ways, and to an extent, that accepted rule of law norms will be called into serious question.

As the agency gains even more control over various participants in the Internet marketplace, pressures will increase for it to use its dispensing power to grant this or that company (or particular market segment) favored treatment. The commission already has announced it will adopt a so-called "good conduct" rule to assess Internet providers' practices. Under such an inherently vague standard, the agency necessarily will be granting dispensations to some firms and not others based on the exercise of discretion untethered to any intelligible standard in any law enacted by Congress.

Unless the FCC's new Internet regulations are reversed by Congress or the courts, I predict that soon enough, channeling Professor Hamburger, more and more of us will be asking: "Is the FCC lawless?"

* Randolph J. May is President of the Free State Foundation, an independent free market-oriented think tank located in Rockville, Maryland. *Is the FCC Lawless?* was published in *The Hill* on February 25, 2015.