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Perspectives from FSF Scholars
August 11, 2015
Vol. 10, No. 27

The FCC Flouts the Rule of Law

by

Randolph J. May *

[Washington Examiner](#)

August 11, 2015

There is widespread agreement that overly broad, unduly burdensome regulations by overzealous administrative agency bureaucrats are harmful to the nation's economy. But less attention is paid to the way in which such regulatory overreach impinges upon — and thus devalues — fundamental rule of law norms.

While the adverse economic impact resulting from excessive bureaucratic zeal may be more immediately evident, and even quantifiable, the steady erosion of respect for the rule of law resulting from the exercise of unconstrained bureaucratic power is just as real.

Here I want to focus on recent actions of the Obama administration's Federal Communications Commission. The agency increasingly is acting in a lawless manner by imposing sanctions on parties subject to its regulations for alleged rule violations that the regulated entities could not reasonably have known constituted violations. This practice ignores fundamental rule of law requirements because the agency is asserting authority to punish those it regulates without adopting, in advance, knowable, predictable rules.

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

For example, last October, in the TerraCom/YourTel America case, the FCC proposed a \$10 million fine claiming that two telecommunications carriers had failed adequately to secure customers' sensitive personal information, such as birth dates and driver license numbers.

Of course, any data breach is no cause for celebration. But the alleged "violation," the breach of data security, was not addressed by any law or regulation cited by the agency. As Commissioner Ajit Pai put it in dissenting from the fine, "The government cannot sanction you for violating the law unless it has told you what the law is."

Then, this past June, the FCC proposed imposing a whopping \$100 million fine on AT&T for allegedly violating the "transparency" rule contained in the agency's 2010 Net Neutrality regulations. According to the commission, AT&T violated the rule by reducing the speeds of customers subscribed to "unlimited" data plans during times of network congestion.

However, the agency previously had not given any indication that reducing speeds for purposes of network management during periods of congestion is inconsistent with the offering of an "unlimited" data plan, which generally was understood to refer to the amount of allowable data usage, not to speed. Indeed, for many years prior to the proposed fine, the FCC had been made aware of AT&T's targeted speed-reducing practices and of its various disclosures advising "unlimited" plan customers of such practices.

It may be that the commission could adopt a rule that would provide fair notice that reducing speeds in the way AT&T did is prohibited. Perhaps AT&T's conduct conceivably might even violate the much more onerous revised Net Neutrality transparency rule adopted by the FCC in March 2015. But that in no way justifies sanctioning AT&T under the 2010 transparency rule for practices that not only were not clearly proscribed under that rule, but which apparently were condoned.

To conform to rule-of-law norms, the commission can't expect parties subject to its jurisdiction to be mind readers.

Unfortunately, mind-reading may be just what is expected — or at least what will be required — from Internet service providers if they are not to run afoul of the agency's 2015 Net Neutrality order, now subject to challenge in court. What the FCC calls a "catch-all" general conduct standard in the net neutrality regulations makes it unlawful for Internet providers to "unreasonably interfere with or unreasonably disadvantage" end users or content providers like Google or Facebook.

This self-described amorphous "catch-all" provision leaves commission enforcement officials with virtually unbridled discretion to sanction conduct that regulated parties have no way of knowing in advance is prohibited.

In other words, to go back to the first principles, with the adoption of its latest Net Neutrality mandates, the FCC has gone out of its way to eschew knowable, predictable, rule-based decision-making.

Aside from the fact that, in today's dynamic digital age, when marketplace competition abounds, many of the FCC's regulations are unnecessary — indeed, affirmatively harmful — the agency's bureaucratic practices are inconsistent with fundamental rule-of-law requirements. By acting in this way, the agency undermines its own institutional legitimacy and whatever legitimacy its exercise of governmental power otherwise would possess.

* Randolph J. May is President of the Free State Foundation, an independent free market-oriented think tank located in Rockville, Maryland. *The FCC Flouts the Rule of Law* was published in the *Washington Examiner* on August 11, 2015.