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**FCC Should Restore the Rule of Law in Its Enforcement Regime**

by

**Randolph J. May and Seth L. Cooper \***

**I. Introduction and Summary**

On May 1, several broadband-related trade associations filed a [petition](#) asking the FCC to initiate a rulemaking to reform the agency's enforcement processes and bring them in line with constitutional requirements. Reform is imperative after the Fifth Circuit's April decision in [AT&T v. FCC](#) (2025), holding that the agency's enforcement regime violates the Seventh Amendment. The trade associations' petition rightly seeks to reform agency enforcement practices that deprive regulated entities of advance notice and constitute unfair surprise under the Fifth Amendment's Due Process Clause. And it seeks reform in other important ways.

Because these reforms would, to a significant degree, remedy constitutional problems that characterize the way the Commission's enforcement regime currently operates, or has been implemented, the rulemaking sought by the petition should be initiated without delay.

The Commission should address Fifth Amendment concerns by expressly prohibiting what, in effect, amounts to "regulation by enforcement" – that is, agency imposition of new requirements on regulated entities in enforcement actions rather than through the conduct of

general rulemakings. Additionally, the Commission should revamp its rules for Letters of Inquiry (LOIs) by adopting reasonable discovery question limits and response times, timely sharing of government evidence, required issuance of closing letters, and an independent review mechanism for discovery. Also, the agency's rules for Notice of Apparent Liability for Forfeiture (NALs) should be revised to require an opportunity for initial responses before publication, specifying wrongdoing in orders, setting deadlines for agency action, itemizing penalties, and ensuring NALs are not used as precedents.

The need for FCC enforcement reform was widely anticipated following the Supreme Court's June 2024 decision in [\*SEC v. Jarkesy\*](#). In *Jarkesy*, the Court held that imposing civil penalties through agency enforcement proceedings for violations of agency antifraud rules that are similar to common law claims violates the right to a jury trial under the Seventh Amendment. The other shoe dropped when the Court of Appeals for the Fifth Circuit issued its April 2025 decision in [\*AT&T v. FCC\*](#), a case involving an administrative enforcement proceeding in which the Commission imposed \$57 million in civil penalties on the wireless provider for supposed negligence in safeguarding customers' location information. The Fifth Circuit applied *Jarkesy* and effectively determined that the FCC's enforcement regime is unconstitutional under the Seventh Amendment.

A glaring example of lack of advance notice and unfair surprise is the NAL for \$4.5 million issued against voice provider Telnix in February of this year. As described in the March *Perspectives from FSF Scholars*, "[The FCC's Proposed Forfeiture Against Telnix Raises Serious Rule of Law Concerns](#)." In its enforcement proceeding against Telnix, the Commission proposed civil penalties based on a sudden reinterpretation of a rule for preventing robocalls, from a rule that incorporated a flexibility standard to one based on strict liability. The agency's reinterpretation of the rule in the Telnix proceeding came without advanced notice and constituted an unfair surprise. This clearly violated due process of law.

It should be emphasized that it would be an injustice for the pendency of the petition for rulemaking to be used as an excuse for the Commission to not promptly rescind the forfeiture penalties that it proposed against Telnix. Similarly, a trio of forfeiture orders issued in April 2024 against AT&T, T-Mobile, and Verizon imposed a total of nearly \$200 million in civil penalties based on novel interpretations of Section 222 of the Communications Act. The Biden FCC made those new interpretations in the course of enforcement proceedings and without advance notice to the wireless providers. In light of the Supreme Court's *Jarkesy* decision and the Fifth Circuit's *AT&T v. FCC* decision, along with the underlying defects in the legal reasoning used to impose the forfeitures, the Commission also should rescind the forfeitures against AT&T, T-Mobile, and Verizon without further delay.

Conformity to the Constitution's rule of law requirements should always be the most important guide for agency action, including regulatory reform efforts such as those which are the subject of the rulemaking petition. Without delaying rescission of forfeitures that now appear to be unlawful, the Commission should open the requested rulemaking proceeding to adopt the types of reforms presented in the petition to make its enforcement regime fairer, less abusive, and more consistent with due process principles.

## II. FCC Enforcement Reform Is Required Under the Fifth Amendment

The Commission's enforcement framework also suffers from defects under the Fifth Amendment's Due Process Clause. The broadband trade associations' May 1 [petition](#) seeking a rulemaking for FCC enforcement reform rightly calls attention to this matter. The agency should act on the petition by making changes that will bring its enforcement procedures and practices into line with the Fifth Amendment's standard that "[n]o person shall... be deprived of life, liberty, or property without due process of law."

Supreme Court jurisprudence recognizes that the Fifth Amendment's Due Process Clause requires the government to give regulated parties fair notice of what is required of them, and it prohibits penalizing parties in ways that constitute unfair surprise. According to the Court in *FCC v. Fox Television Stations, Inc.* (2012): "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." That is, a law or regulation must provide parties a reasonable opportunity to know what conduct is prohibited so that they may act accordingly. And as the Court emphasized in *Kisor v. Wilkie* (2019), judicial deference should not be given to new interpretations of agency rules, including those introduced in litigation, that create "unfair surprise" to regulated parties.

A stark example of an FCC enforcement proceeding characterized by lack of advance notice and unfair surprise involves the NAL for \$4.5 million issued against voice provider Telnyx in February of this year. The background of the NAL and dubious aspects are described in detail in my March 12 *Perspectives from FSF Scholars*, "[The FCC's Proposed Forfeiture Against Telnyx Raises Serious Rule of Law Concerns](#)."

The matter involves 1,800 illegal calls made over 17 hours by a bad actor called "MarioCop" using Telnyx's one-way VoIP service. Although MarioCop acted with deliberate, malicious intent, the Commission proposed to fine Telnyx under the agency's "Effective Measures" rule. By changing the agency's 2020 rule for blocking illegal robocalls from a flexible standard that did not require perfection into a strict liability standard in the 2025 NAL, the Commission inflicts unfair surprise on Telnyx, which could not have known in advance of the new requirements that it is charged with violating. If the NAL's reasoning were adopted in a forfeiture order, it would constitute "regulation by enforcement" because the agency sprung the new requirement in an enforcement proceeding instead of proposing and adopting it through a general rulemaking.

It should be emphasized that it would be an injustice for the pendency of the petition for rulemaking to be used as an excuse for the Commission to promptly rescind the forfeiture penalties that it proposed against Telnyx. Similarly, in light of the Fifth Circuit's decision in *AT&T v. FCC* based on the Supreme Court's *Jarkesy* decision, and the underlying defects in the legal reasoning used to impose the forfeitures, the Commission should rescind the nearly \$200 million in fines imposed on AT&T, T-Mobile, and Verizon regarding sharing of customers' location information.

When the Commission issued its now-vacated forfeiture order imposing \$57 million in civil penalties on AT&T, it issued separate orders penalizing wireless providers T-Mobile and Verizon for the same supposed violations of Section 222 of the Communications Act. However, the Commission's imposition of those penalties violated due process principles. As the broadband providers' rulemaking [petition](#) explained: "In those enforcement actions, the Commission posited a novel and plainly incorrect theory that the statutory term 'customer proprietary network information' includes a device's location without regard to whether a customer is placing a voice call or also using wireless data services on that same device." In his April 2024 [dissenting statement](#), then-Commissioner Brendan Carr concluded that "[t]he massive forfeitures imposed in these Orders offend basic principles of fair notice" because "even if we could proscribe the conduct at issue here through a rulemaking (and I am dubious that we could), it would be inappropriate and unlawful to impose the retroactive liability that these Orders do."

Another recent example of the FCC failing to give fair notice involves the agency's legal defeat before the Eleventh Circuit in its March 2025 decision in *Gray Television, Inc. v. FCC*. At issue in the case was a forfeiture order in which the Commission imposed a civil penalty for Gray TV's acquisition of a local TV station. The penalty is based in part on a finding of egregious conduct by the regulated party. But the Commission included no finding of egregiousness in the NAL that preceded the forfeiture order, thereby depriving Gray of notice and opportunity to explain or address the matter of egregiousness. The court acknowledged that "[a]n agency's failure to provide a party notice of the basis (or bases) for a proposed civil penalty can present due process problems." Ultimately, the court held the lack of notice and opportunity to address the finding of egregiousness violated the applicable civil penalty statute and was "not in accordance with law" under the Administrative Procedure Act. (FSF filed an *amicus curiae* [brief](#) in the case.)

### **III. Proposed Reforms Would Curb Lack of Fair Notice and Unfair Surprise in FCC Enforcement**

The broadband trade associations' petition aims to curb the same type of due process issues – lack of fair notice and unfair surprise – plaguing the enforcement actions in the Telnix NAL and *Gray Television Inc. v. FCC*. The petition proposes that the Commission codify a rule prohibiting the agency from issuing new interpretations of statutes or regulations or imposing other new obligations through the enforcement process in NALs, Consent Decrees, Forfeiture Orders, or other enforcement decisions. As the petition explains, "[c]odifying a rule prohibiting this practice would serve to underscore that enforcement penalties may be based only on existing requirements and interpretations that are 'ascertainably certain.'"

The Commission should initiate a rulemaking and propose the requested rule, which likely would curb agency impositions of new substantive requirements without adequate notice or result in an unfair surprise. Such reform may also prompt the Commission to rely more on general rulemaking as the proper process for establishing new interpretations and imposing obligations. Also, courts may be more willing to disregard dubious agency interpretations that are based on "regulation by enforcement" than agency interpretations based on the APA or the Fifth Amendment's Due Process Clause.

Moreover, adopting a rule prohibiting agency impositions of new substantive requirements in enforcement proceedings would further the FCC's compliance with [Executive Order 13892](#), "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication." Restored by President Donald Trump in January 2025, EO 13892 reinforces fair notice and "no unfair surprise" imperatives articulated in Supreme Court precedents and goes even further by stating that "agencies shall afford regulated parties the safeguards described in this order, *above and beyond* those that the courts have interpreted the Due Process Clause of the Fifth Amendment to the Constitution to impose."

#### **IV. Proposed Reforms Would Improve Fairness and Certainty in FCC Enforcement**

The broadband trade associations' petition also requests the Commission to reform and improve processes of two of its key enforcement tools: Letters of Inquiry (LOIs) and Notices of Apparent Liability (NALs). Regarding LOIs, the petition requests rule changes that include:

- Setting reasonable limits on discovery demands that track with the federal rules of civil procedure, including realistic standardized response times of at least 30 days for LOIs with a presumptive standard of 25 written questions (or 60-day response times for LOIs with additional questions), a requirement that the agency grant response deadline extensions on showing of good cause, and limits on interrogatories and document requests in LOIs to areas directly related to the subject matter of the inquiry.
- Requiring that the Commission promptly share its evidence with the party under investigation.
- Providing enforcement subjects a right to object to LOI questions on grounds such as relevance, vagueness, and burden, using the Federal Rules of Civil Procedure as a guide, and to object to unreasonable deadlines.
- Requiring the agency to issue closing letters to LOI recipients so that investigated parties have knowledge and finality when an investigation is concluded.
- Establishing an independent review mechanism for LOIs (that mirrors the FTC's (Civil Investigative Demand oversight process) via the selection of a discovery ombudsman who is outside of the Enforcement Bureau to address discovery disputes, including objections relating to relevance, vagueness, burdensomeness, and new substantive interpretations of a rule in an LOI, along with a right of appeal of ombudsman decisions in LOI disputes to the full Commission and opportunity for judicial review.

Regarding NALs (and Forfeiture Orders based on NALs), the petition requests rule changes that include:

- Allowing opportunity for NAL recipients to provide the Commission with initial responses to NAL drafts before NALs are finalized and publicly released, thereby providing fairness to NAL recipients and early input that can better inform the Commission in finalizing NALs.
- Requiring NALs and Forfeiture Orders to state whether and the degree to which the subject entity engaged in intentional wrongdoing or failed to exercise a reasonable duty of care.
- Setting deadlines for the Commission to act on NALs by issuing Forfeiture Orders or the NALs will expire.
- Require NALs and Forfeiture Orders to itemize the penalties proposed or imposed, including each apparent rule violation or finding of rule violation with the specific penalty for each violation.
- Specify that a statutory or agency rule violation is not continuing merely because it has continuing effects.
- Prohibit Commission reliance on NALs as precedent and as bases for delaying or determining outcomes in other proceedings, since NALs are only preliminary documents, not the embodiment of full adjudications on the merits following a full, adversarial fact-finding process.

The petitioners' proposals to provide rules regarding LOIs and NALs that more clearly define the process due to regulated entities appear reasonable on their face. If adopted, these reform proposals would provide regulated parties with more regulatory certainty and reduce the potential for abuse or arbitrary use of LOIs and NALs. The proposed reforms for LOIs and NALs also are consistent with EO 13892's directive that agencies provide regulated parties due process safeguards that exceed the requirements recognized by courts. Accordingly, the Commission should accept those ideas and put them into a rulemaking to reform the FCC's enforcement regime.

## **V. Conclusion: It's Time for the FCC to Reform Its Enforcement Regime**

Conformity to the Constitution's rule of law requirements should always be the most important guide for agency action, including regulatory reform efforts such as those which are the subject of the rulemaking petition. Without delaying rescission of forfeitures that now appear to be unlawful, the Commission should open the requested rulemaking proceeding to adopt the types of reforms presented in the petition to make its enforcement regime fairer, less abusive, and more consistent with due process principles.

Restoring the Constitution's rule of law to the FCC's enforcement process should be a high priority for the agency. The Commission should open the requested rulemaking proceeding to adopt the types of reforms presented in the petition to make its enforcement regime fairer, less abusive, and more consistent with due process principles. In the meantime, the pendency of

any rulemaking proceeding should not be used as an excuse to delay rescission of proposed forfeitures that now appear to be unlawful.

\* Randolph J. May is President and Seth L. Cooper is Director of Policy Studies and a Senior Fellow of the Free State Foundation, a free market-oriented think tank in Potomac, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.