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Press Release

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NEW PHOENIX CENTER STUDY DEMONSTRATES THAT “ISSUE BUNDLING” ALLOWS REGULATORY AGENCIES TO EXCEED CONGRESSIONAL AUTHORITY

Abrogation of Basic Due Process Erodes Rule of Law and Chills Investment

WASHINGTON, D.C. – Is the U.S. regulatory process evolving in ways that radically move away from the rule of law and due process? In a new study released today entitled *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC*, the Phoenix Center shows that the answer is “yes” and therefore recommends that it is time to rethink regulatory policy in the United States.

Using the Federal Communications Commission (“FCC”) as a case study (although the analysis could apply to all regulatory agencies), the Phoenix Center offers an innovative and fresh analysis that reveals the potentially corrupting nature of modern regulation. Combining game theory and empirics, the Phoenix Center’s paper reveals how the FCC exploits its power to grant or deny regulatory relief in exchange for political concessions from the entities it regulates. The Phoenix Center terms such action “issue bundling,” which amounts to the FCC “clearing the decks” of matters unrelated to the merits of the case it was reviewing. This trend dramatically expands the agency’s power beyond that granted by Congress and is outside the purview of judicial scrutiny.

For example, the Phoenix Center’s study shows that of the twenty-six of the largest telecommunications mergers and acquisitions reviewed by the FCC over the past ten years, in a staggering *three-fourths* of these transactions one or more of the merging firms was made a party to a settlement with the Commission on an enforcement issue during (or within two months of) the merger review window. Thus, rather than contest these alleged violations, the merging entities were willing to settle with the agency in order to smooth the approval process for their deal.

The Phoenix Center’s study also provides a series of case studies in which the Commission has engaged in “issue bundling” by approving transactions only if the merged entities agree to “voluntary commitments” or “merger conditions” necessary to remedy a merger-related harm. Using the bundling tactic in a variety of circumstances, the Phoenix Center’s study details how FCC has aggressively extracted non-merger specific concessions from regulated entities to satisfy select political constituencies that the agency could not otherwise have obtained through industry-wide rulemakings.

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In light of this practice of regulation in modern times, the Phoenix Center calls for a reformulation of how regulation is studied. Traditionally, the economic study of regulation assumes either a powerful public authority polices misconduct by passive private agents (the “command and control” or “Principal-Agent” approach) or that the regulator is merely a passive agent of the powerful regulated firm (“Capture Theory”). Recent U.S. regulatory practice reveals that neither the regulator nor the regulated are powerless or passive, but that both have power (even if unequal). Thus, the Phoenix Center breaks new ground by modeling the regulatory process as one of *cooperative bargaining* across multiple issues between the regulated firm and the public authority, asking and answering questions like: When is the bundling of issues desirable? Does the regulator or regulated firm benefit from the bundling of issues? What are the social welfare effects of issue bundling by regulatory agencies?

According to the Phoenix Center, this rise in cooperative bargaining and “issue bundling” raises troubling concerns about the nature of the modern regulatory state. As a consequence of “issue bundling,” each regulatory decision becomes a unique bargain and therefore does not produce reliable legal precedent for regulated firms. Moreover, the increasing prevalence of “issue bundling” by federal agencies greatly expands the agencies’ power beyond its statutory mandate and pushes decisions outside the realm of judicial review. This erosion of the rule of law has significant “good government” implications, and it sends a chilling message to investors.

“Traditionally, the economic study of regulation assumes either a powerful public authority regulating passive private agents or a powerful regulated firm manipulating a passive regulatory agent,” says Phoenix Center Chief Economist and study co-author Dr. George S. Ford. “Recent U.S. regulatory actions demonstrate that neither the regulator nor the regulated are powerless or passive, but that both have power (even if unequal). Our paper lays the groundwork for a new economic theory of regulation.”

“Regulators are crafty,” says Phoenix Center President and study co-author Lawrence J. Spiwak “Through issue bundling, the FCC has found a way to escape the limits on its power imposed by the Communications Act. While I believe the FCC, as the ‘expert agency,’ plays an important oversight role, our paper indicates that it is time for Congress to rethink its approach to regulation in the 21st Century.”

A full copy of the paper, PHOENIX CENTER POLICY PAPER NO. 49, *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC*, may be downloaded free from the Phoenix Center’s web page at: <http://www.phoenix-center.org/pcpp/PCPP49Final.pdf>.

The Phoenix Center is a non-profit 501(c)(3) organization that studies broad public-policy issues related to governance, social and economic conditions, with a particular emphasis on the law and economics of the digital age.