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Can a federal agency declare "regulatory bankruptcy"?

By David Post

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I've been doing some more thinking about the FCC's "Net Neutrality" initiative, and I was talking recently with a friend and colleague who was involved in the DC Circuit case, decided last January, overturning the FCC's net neutrality rules as inconsistent with the Communications Act and the FCC's prior readings of the statutory requirements. One of the agency's problems, I suggested, was that it was completely boxed in by prior commitments and decisions and precedents, some dating back to the early 1980s, and that its ability to take a fresh look at the cable/wireless broadband Internet access market was completely and thoroughly constrained by the need to be consistent with all of its earlier efforts, dozens of which were cited/quoted in the opinion - In re Amendment of Section 64.702 of the Commission's Rules and Regulations, (1980) ("Second Computer Inquiry"), In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, (1998) ("Advanced Services Order"), In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,(2002) ("Cable Broadband Order"), In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, (2010) ("Sixth Broadband Deployment Report"), In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, (2002), In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities (2005) ("2005 Wireline Broadband Order"); In re United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service (2006), In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks (2007) ("Wireless Broadband Order") . . . just to give you the prior precedent appearing in one of the court's paragraphs, and on and on and on it goes. . . .

It's a dazzling web of constraints, and it's hard to believe the FCC can do anything at all when it's stuck inside. Maybe that's a good thing – personally, I have never been convinced that over the 80 years or so of its existence the FCC has actually been a net plus for the U.S. – but that's an awfully odd way of accomplishing the goal. It made me wish, somewhat offhandedly (not being a true administrative lawyer who has thought deeply about these things), for some sort of "regulatory bankruptcy" proceeding – some way for federal agencies to sweep aside prior rulings and decisions and to get a "fresh start" with regulatory action; surely the public would be well served by such a thing, especially in a market (like the broadband Internet access market) that is

rapidly changing and in which decisions made 20 or 30 years ago seem so quaint and out-of-date.

To my surprise, my friend said: “There is such a thing!” It turns out – who knew?! – that the Communications Act (and, as far as he knew or I have been able to determine, only the Communications Act) provides that the FCC

“. . . shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service. . . if the Commission determines that– (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.” 47 USC 160(a).

It goes on, in subsection (b): In considering whether forbearance is “consistent with the public interest”, the Commission “shall consider whether forbearance will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.”

Now that, to my eyes, is a strange beast, indeed. Put aside questions about its application (if any) to the net neutrality rules for the moment; is this provision constitutional? It requires (“the Commission shall . . .”) the FCC to refrain from enforcing statutory provisions when it determines that it is not consistent with the public interest to do so. I am, admittedly, not up on the latest developments regarding the notorious “non-delegation doctrine” in constitutional law – but requiring an executive agency to refrain from enforcing express statutory commands because it doesn’t think it’s good policy . . .? Hard for me to believe that can pass constitutional muster; it’s like a repeal process, but one not involving Congressional action.

[I can't find, after a quick search, any constitutional challenge to the forbearance provision - so maybe I'm missing something. As it happens, there's a proceeding now in front of the DC Circuit involving forbearance - Verizon and AT&T v FCC - involving the FCC's continued enforcement of various accounting rules and requirements on certain telephone service providers (but not others); plaintiffs are asserting that the rules, which were adopted decades ago, when the FCC was in the telephone-rate-setting business, are no longer consistent with the public interest now that Ma Bell has been broken up (30 years ago!). Not surprisingly, the plaintiffs - who want the FCC to exercise its forbearance power, and indeed are arguing that it must do so in this context - don't raise any questions about the constitutionality of that particular delegation of power, but I'm surprised no one else has done so]

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