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Delaying Deregulation: Forbearance at the FCC

by

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Requiring regulators to deregulate certainly cuts against the normal bureaucratic imperative. But the Telecommunications Act of 1996 obligates the Federal Communications Commission (FCC) to deregulate under certain circumstances. The Telecom Act's forbearance provision requires the FCC to forbear from applying any regulation or telecommunications law to a telecommunications carrier or service if it determines that enforcement is *not* necessary to ensure that charges are just and reasonable nor necessary to protect consumers, and if it determines that forbearance is consistent with the public interest.¹

Critically, Congress added teeth to the Telecom Act's forbearance provision by tying it to a shot clock. Should the FCC fail to respond to a petition seeking forbearance within one year's time, or fifteen months if the agency grants itself a three month extension, the petition "shall be deemed granted."²

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¹ 47 U.S.C. §160(a).

² 47 U.S.C. §160(c).

In its time on the books the forbearance provision has not been received enthusiastically by many FCC commissioners. Recent events at the FCC seem to present a case in point. A draft order now being considered at the FCC apparently would set first-of-its-kind rules relating to the agency's consideration of forbearance petitions.³ Press reports indicate the pending order might place a formal burden of proof on the parties filing forbearance petitions. We don't really know just how high of a hurdle the FCC is attempting to place in the way of forbearance petitioners, just that it seems a majority of commissioners want to ramp up resistance to the mandatory exercise of the forbearance obligation. If the FCC were to follow this course, it most likely will lead to a further marginalization of an important deregulatory tool that Congress intended the FCC be required to use to continually adjust its regulatory regime to the evolving, and increasingly competitive, telecommunications marketplace.

As Free State Foundation President Randolph May recounts in "*Why Forbearance History Matters*",⁴ before the passage of the 1996 Telecom Act, a handful of federal court rulings rejected the FCC's claim to have inherent forbearance authority.⁵ Against that backdrop, Congress granted the FCC express forbearance authority in the Telecom Act. The U.S. Court of Appeals for the District of Columbia has characterized the forbearance provision as "[c]ritical to Congress's deregulation strategy."⁶

In practice, however, operation of the forbearance provision has been hampered by less-than-enthusiastic compliance. The FCC previously has attempted to limit forbearance grants by setting up procedural hurdles to consideration of petitions on the merits. In the face of these attempts, the D.C. Circuit has shown some willingness to hold the FCC's feet to the fire. The court struck down an FCC procedural rule that all conditional forbearance requirements are contrary to the public interest and require no substantive consideration.⁷ Similarly, the D.C. Circuit has made clear that the FCC cannot disregard forbearance petitions merely by referencing other regulatory mechanisms through which petitioners might obtain relief.⁸

Forbearance rulings almost universally are rendered at the very end of the shot clock. This is strongly suggestive of the agency's general aversion to the exercise of its forbearance obligation. A year ago, a closely watched AT&T forbearance petition was finally granted in the late hours of the last day before the deadline. An earlier Qwest forbearance petition concerning unbundled network elements was denied under a similar down-to-the-wire scenario.⁹ Whatever the results, the lengths that it took to achieve them hardly seem the stuff of a reliably administered process.

³ See Notice of Proposed Rulemaking, *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act to 1934, as amended*, WC Docket No. 07-267 (November 30, 2007), available at:

http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-202A1.pdf

⁴ http://freestatefoundation.org/images/Why_Forbearance_s_History_Matters.pdf

⁵ See *id.*

⁶ *AT&T v. FCC*, 452 F.3d 830, 832 (D.C. Cir. 2006) (Tatel, J).

⁷ See *AT&T v. FCC*, 452 F.3d 830, 835 (D.C. Cir. 2006) (Tatel, J.).

⁸ *AT&T v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001) (Edwards, C.J.).

⁹ See *In re Petition of Question Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 F.C.C.R. 19415 (2005); *Qwest Corporation v.*

As the D.C. Circuit put it in yet another midnight forbearance order case:

Waiting until the eleventh hour to vote on a forbearance petition, and then waiting until the thirteenth hour to issue an explanatory order, is hardly an ideal procedure for notifying a party of the disposition of a petition. And relying on an informal press release and a back-dating regulation to satisfy a statutory deadline could unnecessarily place Commission policies at risk of judicial invalidation.¹⁰

Of course, some commissioners' have made their forbearance frustrations known through public statements.¹¹ Their displeasure at having to make sometimes hard choices as part of a heavy workload, while under the pressure of deadlines, is not totally surprising. But the availability of forbearance relief is *Congress's* policy, not the FCC's. The forbearance provision was included in the Telecom Act as a tool to be used to gradually remove regulatory barriers as competition continued to develop.

So, for example, when forbearance petitions pass the statutory deadline without FCC action and are "deemed granted," the deregulatory result obtains by an act of Congress.¹² The "deemed granted" provision is the deregulatory default decision established by Congress. It is an indication of the deregulatory presumption that inheres in the forbearance provision. Congress could have established a coin toss after fifteen months, rather than included the "deemed granted provision," had not intended for the agency's forbearance authority to be exercised with a deregulatory tilt.

If anything, the FCC's midnight rulings and backdated orders on forbearance petitions bring into sharper focus the importance of the forbearance provision's "deemed granted" clause. A forbearance provision stripped of a shot clock would likely prolong or delay indefinitely FCC decisions on future petitions.

Recent media accounts hint the FCC may be trying to address the midnight rulings phenomenon through its pending order on circulation. Apparently, the order would establish specific timelines for filings and prohibit late-filings in forbearance proceedings. If those reports are accurate, such timely pleading reforms are fine as far as they go. It is understandable that the FCC should not want to find itself buried with mounds of new arguments and data in the final hours before a decision must be made. And the agency has authority to adopt practice procedures that prevent this.

FCC, 482 F.3d 471 (D.C. Cir. 2007) (Williams, J.) (upholding FCC's vote to deny forbearance petition on last day of extended deadline, issued through press release and followed by back-dated written order issued more than two months later).

¹⁰ *In re: Core Communications, Inc.*, 455 F.3d 267, 277 (D.C. Cir. 2006) (Garland, J.).

¹¹ *See, e.g.*, Statement of Michael J. Copps, WC Docket No. 07-267 (November 30, 2007), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-202A2.pdf.

¹² *See, e.g., Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007) ("When the Commission failed to deny Verizon's forbearance petition within the statutory period, Congress's decision—not the agency's—took effect").

But there is an important difference between the adoption of pleading and practice reforms designed to ensure a deliberative and fair decisionmaking process and actions designed to alter the outcome of decisions in a manner inconsistent with the forbearance provision's deregulatory intent. For example, a rule that would shift the burden of proof to the party seeking forbearance is substantive, an outcome-determinative provision, rather than a practice reform designed to improve the deliberative process. It would be difficult to square such burden-shifting with the import of the "deemed granted" provision and the mandatory nature of the FCC's obligation.

The FCC's record to date on forbearance suggests it has not embraced the forbearance authority that it so earnestly sought to acquire prior to the Telecom Act of 1996. The fact that Congress conferred forbearance authority on the FCC through the Telecom Act and tied it to a shot clock suggests Congress wanted the FCC to actively remove outdated regulations that no longer necessary as a result of competition.

Unless and until the law is changed, the FCC should stop treating the forbearance provision more like a loophole to be closed rather than a legislative command to be carried out.