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Why Forbearance History Matters

by

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The Communications Act presently requires the Federal Communications Commission to forbear from applying any regulatory or statutory provision to a telecommunications carrier or service when it determines that enforcement is not necessary to ensure just and reasonable charges, to protect consumers, and forbearance is consistent with the public interest.¹ Forbearance issues have been prominent on the FCC's agenda this year. This is not surprising. As markets become more competitive, it is only natural that companies subject to regulations put in place in an earlier, less competitive environment would seek regulatory relief through the forbearance process. And it is not surprising that petitions seeking forbearance relief would be contentious. Once regulations are in place, there are always interests, almost always including competitors of those seeking regulatory relief, which want to see the existing regulations remain in place.

Within the past couple of months, I wrote two blogs titled, "*Bearing in*

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¹ See 47 U.S.C. §160(a)(1)-(3) (2006).

Mind Forbearance's Purpose." They are [here](#) and [here](#).² Both of these pieces discuss forbearance relief primarily in the context of AT&T's then-pending request asking the FCC to forbear from applying certain cost-assignment rules that AT&T contended no longer made any sense when cost-of-service ratemaking no longer applied at the federal or state level. I agreed that applying the outdated rules, adopted in a radically different monopoly environment in which rates were tied closely to costs, no longer made sense. So did the Commission, which granted AT&T's forbearance petition in late April.³

There are already petitions filed asking the FCC to reconsider its order forbearing from applying the cost allocation rules. Verizon and Qwest have petitions pending asking the agency to forbear from applying loop and transport unbundling rules in certain geographic markets in which they maintain sufficient competition exists to justify relief. And AT&T has a forbearance petition pending asking the Commission to forbear from some service quality and infrastructure growth reporting requirements for common carriers that were adopted long ago. So forbearance determinations are sure to remain an important issue for the Commission for the foreseeable future.

With this background in mind, and without focusing here on any particular petition or controversy, it seems useful to put the issue of forbearance relief in some further historical context. Because the question of the FCC's forbearance authority first arose nearly three decades ago, this historical context is not known to many who have come to communications law and policy issues more recently and may have been forgotten by others.

Before the Communications Act was amended in 1996 to give the FCC statutory forbearance authority, the agency long claimed an inherent authority to forbear, which the courts consistently held that it lacked. Given such court decisions, Congress's inclusion of statutory forbearance authority in the 1996 Telecommunications Act should be viewed as highly consequential. Having in mind the FCC's history of frustrated attempts to forbear, Congress surely intended that forbearance be employed by the Commission in appropriate circumstances to effectuate what Congress described as the 1996 Act's "pro-competitive, de-regulatory" framework.⁴ This is especially so as Congress made forbearance mandatory — the FCC "*shall* forbear" — if certain tests were met. Another indication that Congress did not intend the forbearance authority to suffer from desuetude is the fact that no other regulatory agency apparently has been granted forbearance authority such as that possessed by the FCC.

² See: <http://freestatefoundation.blogspot.com/2008/03/for-bearing-in-mind-forbearances.html>; <http://freestatefoundation.blogspot.com/2008/04/bearing-in-mind-forbearances-purpose.html>.

³ Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules, FCC 08-120, WC Docket No. 07-21, April 28, 2008, available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-120A1.pdf.

⁴ Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

The FCC's Claims of Inherent Authority to Forbear

The FCC most clearly articulated its claim of inherent forbearance authority in the Second Report in its long-running Competitive Carrier proceeding.⁵ In this Report, the agency explored ways to exempt telephone service providers, other than the still-monopolistic AT&T, from filing rate schedules with the FCC. Tariff filing, of course, has always been considered at the heart of a common carrier regime.⁶ Although the language of Section 203(a) stated that “every common carrier . . . shall . . . file schedules,”⁷ the FCC had found in its First Report that it was in the public interest to relieve competitive carriers of such tariff filing obligations.⁸ Its Second Report explored as possible justifications the legal bases for doing so, and the Commission focused both on redefining “common carriers” (thus relieving the service providers of all common carrier obligations) and claiming inherent authority to forbear from applying regulations even to acknowledged common carriers.

The FCC decided it did possess inherent forbearance authority. The agency’s rationale for claiming inherent forbearance authority was three-fold: (1) the Communications Act granted broad authority, circumscribed only by the Act’s purpose;⁹ (2) court cases had approved agency decisions not to exercise statutory powers;¹⁰ and (3) various statutory provisions supported forbearance.¹¹ The Second Report was not, however, the FCC’s first exercise of its purported inherent authority to forbear. Even prior to the Second Report, the FCC had relied on inherent forbearance authority in declining to assert authority over data processing services.¹²

The Courts Reject the Claim of Inherent Authority to Forbear

In a series of cases between 1985 and 1994, the Court of Appeals and the Supreme Court rejected the FCC’s arguments for such authority. First, in 1985, in *MCI v. FCC*, the D.C. Circuit held that the FCC lacked inherent forbearance authority and that the FCC’s action in its Sixth Report in the Competitive Carrier proceeding, prohibiting competitive carriers from filing tariffs, was unlawful.¹³ In so holding, the court distinguished all four precedents upon which the FCC relied, as well as noting that a statute’s text prevails over its purpose.¹⁴ Then, in *AT&T v. FCC* in 1992, the D.C. Circuit struck down merely permissive detariffing as also

⁵ See 84 F.C.C.2d 445 (1981).

⁶ *Maislin Indus. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990).

⁷ 47 U.S.C. § 203 (a).

⁸ See 77 F.C.C.2d 308 (1979).

⁹ See 84 F.C.C.2d at ¶ 73.

¹⁰ See, e.g., *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976); *Pan Am. World Airways, Inc. v. CAB*, 392 F.2d 483 (D.C. Cir. 1968).

¹¹ See 47 U.S.C. § 201, 203, 205, & 214.

¹² See, e.g., 72 F.C.C.2d 358 (1979).

¹³ See 765 F.2d 1186 (D.C. Cir. 1985).

¹⁴ See *id.* at 1193.

beyond the FCC's authority.¹⁵

Finally, in 1994, in *MCI v. AT&T*, the Supreme Court rejected the FCC's last attempt to preserve competitive carriers' exemption from tariff filings. After *MCI v. FCC*'s ruling that the FCC lacked inherent forbearance authority, the FCC had attempted to exempt competitive carriers from tariff filing by relying on its authority in Section 203(b) to "modify any requirement" of the statutory provision governing tariffs.¹⁶ The Court's majority also rejected this approach to detariffing, holding that the "modification" referred to in the provision did not extend to forbearance.¹⁷

This series of decisions rejecting the Commission's claims to possess inherent forbearance authority paved the way for the grant of statutory forbearance authority to the FCC. The courts, including the Supreme Court, emphasized that the FCC *could* legally exercise forbearance if it had "congressional sanction."¹⁸

The 1996 Act's Creation of Statutory Forbearance Authority

The 1996 Act finally provided the necessary "congressional sanction" for FCC forbearance by adding the language presently codified at 47 U.S.C. § 160(a). In doing so, the Act's drafters were reacting specifically to the court decisions in *MCI v. FCC*, *AT&T v. FCC*, and *MCI v. AT&T*.¹⁹ Following these judicial decisions, in 1993, former FCC Chairman Alfred Sikes had begun urging lawmakers to grant the FCC statutory forbearance authority.²⁰ Chairman Sikes argued that increased competition made it "critical for the FCC to have . . . flexibility" and that lack of flexibility had "real and immediate consequences" for the telecommunications industry.²¹ Sikes further suggested that ability to forbear was key to flexibility.²² Congress accepted the view of Chairman Sikes and other proponents of forbearance authority when crafting the 1996 Act.

Moreover, given its drafters' beliefs that (1) "competition is the best regulator of the marketplace"²³ and (2) "existing 'rules of the road' [should be preserved] while market forces . . . develop, but . . . cease to have effect when

¹⁵ See 978 F.2d 727, 735-36 (D.C. Cir. 1992).

¹⁶ See 512 U.S. 218 (1994).

¹⁷ See *id.* at 234.

¹⁸ *AT&T v. FCC*, 978 F.2d at 736; see also *MCI v. AT&T*, 512 U.S. at 234 (noting that Congress could establish a "whole new regime of regulation (or of free market competition)" granting the FCC forbearance and similar authority); *MCI v. FCC*, 765 F.2d 1195 ("[I]f the Commission is to have authority . . . , authorization must come from Congress.").

¹⁹ Cf. Scott M. Schoenwald, *Regulating Competition in the Interexchange Telecommunications Market: The Dominant/Nondominant Carrier Approach and the Evolution of Forbearance*, 49 Fed. Comm. L.J. 367, 452-53 (1997) (discussing the legislative history of the 1996 Act's forbearance provisions).

²⁰ See David A. Irwin & Kevin Walsh, *Understanding the FCC's Forbearance Policy*, 27 Telecomm. 41 (1993).

²¹ *Id.* at 42.

²² See *id.*

²³ 142 Cong. Rec. S688 (daily ed. Feb. 1, 1996) (statement of Senator Hollings).

those forces have developed [sufficiently] to protect consumers,”²⁴ the 1996 Act did more than *authorize* FCC forbearance as a matter of discretion. Rather, it *requires* FCC forbearance when enforcement of a regulation or statutory provision is unnecessary to ensure just and reasonable charges, or to protect consumers, and forbearance is consistent with the public interest. This mandatory statutory command indicates that the FCC’s generally sparing exercise of this authority likely would come as a surprise to the 1996 Act’s drafters — especially when understood in the context of the Commission’s pre-1996 history of trying repeatedly to use forbearance as a means of reducing regulation in the face of increasingly competitive conditions.

²⁴ H.R. Rep. No. 204(I), 104th Cong., 1st Sess. 495 (July 24, 1995) (quoting Rep. Tom Bliley, Chair of the Commerce Committee).