The FCC's Expanding Use of Delegated Authority and the Dilemma of Appellate Jurisdiction

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The Federal Communications Commission (FCC) increasingly delegates decision-making authority to its various bureaus. These delegations encompass more than just routine matters such as license renewals, waivers, and enforcement decisions; bureaus today are often deciding important and novel questions in proceedings that broadly affect entire segments of the communications industry and have far-reaching policy implications. Even matters that the Commission used to handle itself are now often pushed down to bureaus to be decided by bureau-level staff, a practice to which the two Republican FCC Commissioners have objected.[1] As Commissioner Pai has lamented, "This is not how democracy works."[2]

The expanding use of delegated authority raises an important question for companies adversely affected by bureau decisions. Can bureau decisions be appealed in court, or must the full Commission be given an opportunity to correct a bureau decision as a prerequisite to judicial review? As a general rule, the Communications Act requires that a party appeal a bureau-level decision to the full Commission via an application for review before challenging the decision in court. But it often takes years for the Commission to act on an application for review. According to a 2011 congressional report, 62 percent of petitions for reconsideration and applications for review had been pending for more than two years, and 34 percent had been pending for more than five years.[3] While an application for review is pending, a bureau's decision remains effective unless a party can obtain a stay. And because there is no deadline by which the Commission must act, in practice, many of these decisions by the agency's politically unaccountable staff—often with significant financial and economic consequences—become, in effect, the FCC's final word.

Given this state of affairs, companies are often faced with a dilemma. Should they: (1) file an application for review at the Commission with the risk that the FCC might delay the application without generating an appealable final order for years; or (2) file an immediate appeal in court and risk dismissal? Many companies have been tempted to try to bypass the Commission by directly appealing bureau decisions in court. Two recent D.C. Circuit cases illustrate the difficulty of appealing bureau decisions without first seeking relief from the Commission. Yet, these cases also highlight strategies that may be successful for companies that wish to appeal adverse bureau decisions in the future.

The Statutory Bar

The statutory requirement to file an application for review of a bureau decision before going to court appears ironclad by its terms. "The filing of an application for review . . . shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation" of authority by the FCC.[4] In addition, the courts of appeals only have jurisdiction to hear appeals from final orders "of the Commission" under the Hobbs Act.[5] Courts have routinely rejected attempts to bypass "the Commission" by appealing bureau orders.[6]

Recent Cases

There were two noteworthy appeals of bureau decisions in the last year. Although neither was successful, these cases nevertheless suggest potential avenues for seeking judicial review of a bureau-level decision.

In March 2014, the FCC's Media Bureau issued a public notice announcing that it would "closely scrutinize" transactions involving certain "sharing arrangements" between broadcast television licensees to ensure compliance with the Commission's ownership rules.[7] The National Association of Broadcasters (NAB) filed an immediate appeal of the bureau's decision. The D.C. Circuit dismissed the appeal, holding that it lacked jurisdiction because NAB had not first filed an application for review with the Commission.[8] The court rejected NAB's arguments that: (1) the public notice should be considered a "de facto" rule because it had immediate effect; (2) the public objections of two commissioners supplied an inference that a majority of the Commission had implicitly approved the bureau's actions; (3) a "futility exception" to § 155(c)(7) applied; and (4) the court's refusal to decide the issue would permit the agency to evade judicial review.

In October 2014, the FCC's Media Bureau decided, during its review of the AT&T-DirecTV merger, that it would publicly disclose certain agreements between AT&T and content providers such as CBS and Viacom.[9] The content providers appealed to the full Commission. In early November, the Media Bureau issued four additional orders that, according to the providers, had the net effect of accelerating the date at which their confidential information would become public. The content providers filed a petition for review and a petition for mandamus in the D.C. Circuit to prevent the public disclosure of their contracts, as well as an emergency motion for a stay.[10] The day these petitions were filed, the Commission denied the application for review. The content providers then withdrew their original

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petitions and filed a new petition for review of the Commission's decision. The content providers' petition for review of the Commission's decision remains pending as of this writing.[11]

Futility

Futility is one of "the traditionally recognized exceptions to the exhaustion doctrine."[12] It is a demanding standard, requiring a "showing that an adverse decision [is] a certainty,"[13] such as where the agency is "wedded to" a particular outcome,[14] its position has "crystallized" to the point of becoming "firmly entrenched,"[15] or the agency has already "decisively" decided the issue in another proceeding.[16] Courts have recognized and applied the futility exception in the context of the Communications Act's primary exhaustion requirement, which requires a party to first afford the Commission an opportunity to pass on an issue before the party raises the issue on appeal.[17]

Courts have been less clear about whether the application for review requirement in § 155(c)(7) also contains a futility exception. At least one court of appeals has expressly held that it does not.[18] The D.C. Circuit, however, has not definitively answered this question. In the *NAB* case, the D.C. Circuit assumed "there is a futility exception" to § 155(c)(7)'s exhaustion requirement, but concluded that NAB had "shown 'nothing concrete to support its claim of futility.'"[19] Earlier D.C. Circuit decisions have speculated that "exceptional circumstances" "might warrant application of [an] exception to the requirement that [a petitioner] exhaust available administrative remedies."[20] Thus, at least in the D.C. Circuit, futility may provide an avenue to directly appeal a bureau decision.

Ultra Vires Bureau Action

Another traditionally recognized exception to the exhaustion doctrine is for ultra vires agency action. Some cases suggest this exception may be invoked in "challenges to agency action 'patently in excess of [the agency's] authority.'"[21] Accordingly, with the right facts, a litigant might successfully argue that the Commission and the relevant bureau acted in clear violation of the agency's statutory authority, obviating the need to file an application for review before filing a court appeal. For example, if the FCC's Wireline Competition Bureau had issued the "Open Internet" rules[22] instead of the Commission, such a case might present the right context in which to raise this argument.[23] Of course, this would be a rare case, and a litigant seeking to rely on this exception would have a steep hill to climb, as the D.C. Circuit has previously rejected claims of ultra vires action where it could not "say that the Commission's action . . . falls into the outer darkness of a 'patent' violation."[24]

De Facto Rules

Another potential avenue to appeal a bureau decision is to argue that a bureau decision functions as a final "order of the Commission"[25] because it adopts the equivalent of final rules. The D.C. Circuit rejected this argument in *NAB*, however, despite the compelling facts of that case. There, NAB argued that the Media Bureau's public notice imposed "de facto rules" on broadcasters "without the safeguards of a formal rulemaking."[26] NAB's argument drew added force from statements issued by two commissioners objecting to the actions of the Media Bureau on the grounds that they amounted to the institution of "new policy."[27] Nevertheless, the D.C. Circuit held that "the statutory grant of jurisdiction over orders 'of the Commission' and the clear statutory requirement that the FCC must review a staff decision before it is review in court" trumped the petitioners' concerns about the bureau making de facto rules.[28]

Mandamus

A final avenue for challenging a bureau order is mandamus. There may be several scenarios in which a petition for a writ of mandamus or prohibition under the All Writs Act could be the appropriate vehicle in which to directly appeal a bureau decision.

The All Writs Act permits federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[29] A writ of mandamus seldom issues, however, because mandamus is "a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'"[30] A petitioner's "right to issuance of the writ" must be "clear and indisputable"; it must have "no other adequate means to attain the relief" sought; and issuance of the writ must be "appropriate under the circumstances."[31]

The first scenario in which a writ of mandamus may issue is to cure unreasonable delay.[32] A court's authority to issue mandamus relief for unreasonable delay is reinforced by the Administrative Procedure Act's command that a "reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed."[33] The D.C. Circuit applies a six-factor standard to determine whether "the agency's delay is so egregious as to warrant mandamus."[34] In the event the FCC delays ruling on an application for review, a writ of mandamus may be the appropriate vehicle to seek judicial relief in court. The mere filing of a petition for a writ of mandamus in court will sometimes spur the FCC to act; however, if the FCC fails to resolve the application for review, courts will often require years of delay before issuing the writ.[35]

These cases suggest potential avenues for seeking judicial review of a bureau-level decision.

The second scenario for which mandamus may be appropriate is to avoid irreparable injury.[36] The facts of *CBS Corp. v. FCC*, discussed above, illustrate the sort of irreparable injury that might justify mandamus relief. Recall that the Media Bureau ordered disclosure of certain agreements between AT&T and various content providers that was to occur within weeks of the order. Prior to the Commission's (unusually prompt) denial of the application for review, the providers were faced with a dilemma: the expected harm was imminent and could not be undone, and yet there was no final order from which to seek judicial review. The providers filed a petition for mandamus along with

their petition for review and motion for a stay. The court did not need to decide the issue, however, because the Commission denied the application for review the day the petitions were filed.

The third scenario in which mandamus may be an option is where postponing judicial review until after the agency's decision may render it moot and deprive the court of the opportunity to review the litigant's claims.[37] "The authority granted in section 1651(a) also apprehends instances where future review may be jeopardized, empowering a federal court to issue a writ of mandamus to protect its future jurisdiction."[38] Because the statutory obligation of a court of appeals to review on the merits may be defeated if the appeal becomes moot, a circuit court may issue a writ to protect its future appellate jurisdiction and preserve its ability to provide an effective remedy for litigants injured by agency action. For example, if the Commission had not acted in the *CBS* case, mandamus may have been appropriate because the appeal would have been moot if the Media Bureau disclosed the agreements before the providers could obtain judicial review.

Conclusion

Litigants face a high bar in trying to bypass the full Commission by directly appealing a bureau decision. Although the most straightforward course will always be filing an application for review to the full Commission and awaiting a Commission decision, there may circumstances in which a bureau decision can be challenged directly. Each avenue presents its own risks.

Ongoing efforts to reform the FCC's procedures could address part of this dilemma.[39] For example, Commissioner Pai has advocated the adoption of a procedure for handling applications for review similar to the U.S. Supreme Court's certiorari process.

Under this proposal, if none of the Commissioners requests full consideration of an application for review within a certain period of time—say, 90 days—then the Bureau's decision would be automatically affirmed and the Commission would adopt the Bureau's reasoning as its own. This process would let the FCC dispose of pleadings that lack merit more efficiently. It also would allow an aggrieved party to seek redress in court rather than being held in purgatory for years on the eighth floor.[40]

Perhaps a better solution would be for Congress to step in and resolve the problem. Besides repealing § 155(c)(7), Congress could amend § 155(c)(7) to enact a deadline by which the Commission is required to act on applications for review, similar to the "shot clock" imposed on forbearance petitions.[41] Because inaction by the Commission does not result in a reviewable order,[42] the amendment would also need to expressly state that the Commission will be deemed to have issued a final order affirming the bureau's decision if the Commission fails to act on an application for review within a designated period of time. The adversely affected party could then appeal the "order of the Commission" without having to risk appealing a nonfinal bureau order.[43] In the alternative, Congress could amend the Hobbs Act to allow judicial review of bureau orders where the Commission fails to act on an application for review within a designated period of time.

Any of these solutions would be preferable to the situation as it currently stands. Today, with no deadline by which the Commission must act and with courts reluctant to intervene, entities subject to unfavorable bureau orders remain subject to those orders for many years and effectively lose their right to judicial review.

Endnotes

1. *See* Press Release, FCC, Joint Statement of Commissioners Ajit Pai and Michael O'Rielly on the Abandonment of Consensus-Based Decision-Making at the FCC (Dec. 18, 2014), http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1218/DOC-331140A1.pdf.

2. *Id.*

3. Staff of H.R. Energy & Commerce Comm., Subcomm. on Commc'ns & Tech., 112th Cong., Workload of the Federal Communications Commission 1 (Nov. 15, 2011), *available at* http://archives.republicans.energycommerce.house.gov/Media/file/PDFs/111511_FCC_Workload_Staff_Report.pdf.

4. 47 U.S.C. § 155(c)(7); *see also* 47 C.F.R. § 1.115(k).

5. 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a).

6. *See, e.g.*, Int'l Telecard Ass'n v. FCC, 166 F.3d 387, 388 (D.C. Cir. 1999).

7. *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, 29 FCC Rcd. 2647 (2014).

8. NAB v. FCC, No. 14-1072 (D.C. Cir. Sept. 9, 2014).

9. *In re* Applications of Comcast Corp. & Time Warner Cable Inc., 29 FCC Rcd. 11,864 (2014).

10. *See* CBS Corp. v. FCC, No. 14-1237 (D.C. Cir. Nov. 12, 2014); *In re* CBS Corp., No. 14-1236 (D.C. Cir. Nov. 12, 2014).

11. CBS Corp. v. FCC, No. 14-1242 (D.C. Cir.).

12. Globalstar, Inc. v. FCC, 564 F.3d 476, 484 (D.C. Cir. 2009).

13. Nat'l Sci. & Tech. Network, Inc. v. FCC, 397 F.3d 1013, 1014 (D.C. Cir. 2005).

14. Omnipoint Corp. v. FCC, 78 F.3d 620, 635 (D.C. Cir. 1996).

15. Tribune Co. v. FCC, 133 F.3d 61, 67 (D.C. Cir. 1998).

16. Verizon v. FCC, 770 F.3d 961, 967 n.6 (D.C. Cir. 2014).

17. *See* 47 U.S.C. § 405.

18. *See* Ga. Power Co. v. Teleport Commc'ns Atlanta, Inc., 346 F.3d 1047, 1050 (11th Cir. 2003).

19. NAB v. FCC, No. 14-1072, slip op. at 2 (D.C. Cir. Sept. 9, 2014) (quoting Star Wireless, LLC v. FCC, 522 F.3d 469, 476 (D.C. Cir. 2008)).

20. White v. FCC, No. 93-1419, 1993 WL 460028, at *1 (D.C. Cir. Oct. 27, 1993); *cf.* Richman Bros. Records, Inc. v. FCC, 124 F.3d 1302, 1304 (D.C. Cir. 1997) (finding that petitioner "present[ed] no valid reason" why failure "to exhaust its administrative remedies . . . should be excused").

21. Qwest Corp. v. FCC, 482 F.3d 471, 476 (D.C. Cir. 2007) (alteration in original) (quoting Wash. Ass'n for Television & Children v. FCC, 712 F.2d 677, 682 (D.C. Cir. 1983)).

22. *In re* Preserving the Open Internet, 25 FCC Rcd. 17,905 (2010).

23. *See* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

24. *Qwest Corp.*, 482 F.3d at 476.

25. 47 U.S.C. § 402(a).

26. NAB v. FCC, No. 14-1072, NABs' Opposition to Motion to Dismiss at 5-6 (D.C. Cir. Sept. 9, 2014).

27. *See* Press Release, FCC, Statement of FCC Commissioner Ajit Pai on the Media Bureau's New Guidance

on Sharing Arrangements and Contingent Interests (Mar. 12, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-326037A1.pdf; Press Release, FCC, Statement of Commissioner Michael O'Rielly on the Media Bureau's New Guidance on Sharing Arrangements and Contingent Interests (Mar. 12, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-326036A1.pdf

28. NAB v. FCC, No. 14-1072, slip op. at 2 (D.C. Cir. Sept. 9, 2014).

29. 28 U.S.C. § 1651(a).

30. Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 380 (2004) (quoting *Ex parte* Fahey, 332 U.S. 258, 259–260 (1947)).

31. *Id.* at 380–81; *In re* Kellogg Brown & Root, Inc., 756 F.3d 754, 760 (D.C. Cir. 2014).

32. *See* Telecomms. Research & Action Ctr. (TRAC) v. FCC, 750 F.2d 70 (D.C. Cir. 1984).

33. 5 U.S.C. § 706(1).

34. *TRAC*, 750 F.2d at 79.

35. *See In re* Core Commc'ns, Inc., 531 F.3d 849, 858 (D.C. Cir. 2008).

36. *See* Cmty. Broad. of Bos., Inc. v. FCC, 546 F.2d 1022, 1028 (D.C. Cir. 1976) ("In the exceptional case, where irreparable harm would indeed result, the movant may petition this court for a writ of mandamus under 28 U.S.C. § 1651 (1970), the All Writs Act." (footnote omitted)).

37. *See* Potomac Elec. Power Co. v. I.C.C., 702 F.2d 1026, 1032 (D.C. Cir. 1983).

38. *Id.*

39. *See* Diane Cornell, *An Update on Process Reform Streamlining Initiatives*, FCC Blog (Dec. 22, 2014), http://www.fcc.gov/blog/update-process-reform-streamlining-initiatives.

40. Ajit Pai, Comm'r, FCC, Remarks Before the Federal Communications Bar Association 2 (Feb. 21, 2013), https://apps.fcc.gov/edocs_public/attachmatch/DOC-319045A1.pdf.

41. *See* 47 U.S.C. § 160(c).

42. *See* Sprint Nextel Corp. v. FCC, 508 F.3d 1129 (D.C. Cir. 2007).

43. 47 U.S.C. § 402.