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Congressional Review Act Cannot Restore Net Neutrality

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By Bennett L. Ross

In their zeal to undo the Federal Communication Commission's Restoring Internet Freedom Order,[1] some members of Congress have seized upon the Congressional Review Act (CRA), a seldom-used tool that permits Congress to overturn a rule issued by a federal agency. However, the CRA would not achieve the objectives its proponents purportedly seek to accomplish, even assuming the resolution to disapprove were passed by Congress and signed by the president.

The CRA would not undo the FCC's decision to classify broadband internet access service as an information service. That classification decision was the result of an adjudication and is embodied in an order, not a "rule" subject to the CRA. Nor would the CRA permit Congress to restore the net neutrality rules that the FCC eliminated in the Restoring Internet Freedom Order.

Thus, the CRA joint resolutions of disapproval recently introduced in the Senate (S.J.Res.52) and House (H.J.Res.129) can neither return broadband Internet access service providers to Title II regulation nor restore prohibitions on blocking, throttling, and paid prioritization. In fact, the result of an enacted CRA resolution in this case would be to disapprove the FCC's transparency rule — the only substantive rule adopted in the Restoring Internet Freedom Order — and prevent the FCC from adopting substantially similar transparency requirements in the future. In short, the CRA resolution exercise represents nothing more than empty political theater rather than a serious legislative

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effort to preserve Internet openness.

Overview of the CRA

Enacted in 1996 as part of the Small Business Regulatory Enforcement Fairness Act, the CRA requires that an agency submit a rule to Congress and the Government Accountability Office before that rule may take effect.[2] Under the CRA, Congress has specified time periods to act on a joint resolution of disapproval after the rule is submitted.[3] If both the Senate and the House pass the resolution, it goes to the president for signature or veto. If the president signs the joint resolution of disapproval, or the Congress overrides the president's veto, the "rule shall not take effect (or continue)."[4] Furthermore, if a joint resolution of disapproval is enacted, the CRA prohibits the agency from promulgating a new rule that is "substantially the same" as the invalidated rule unless it is specifically authorized by a subsequent law.[5]

The CRA Applies to "Rules," Not Adjudicatory "Orders"

Congress enacted the CRA as "a method of conducting oversight of agency rulemaking."[6] The CRA embodies an expansive definition of the term "rule," including rules not subject to notice and comment rulemaking under the Administrative Procedure Act (APA).[7] However, by incorporating the definition of a "rule" under the APA (with three exceptions not relevant here), the CRA embraces the APA's distinction between "rules" and "orders."[8] While "rules" are subject to the CRA, "orders" that are the product of an adjudication are not.[9]

Here, the Restoring Internet Freedom Order eliminated net neutrality rules adopted in 2015, conformed the FCC's rules to implement its decisions, and adopted a modified transparency rule. It also reclassified broadband internet access service — both mobile and fixed — as an information service. This reclassification decision was embodied in a declaratory ruling, which generally is "a form of adjudication."[10] Indeed, the commission rule that authorizes the agency to issue declaratory rulings specifically cites the adjudication provision of the APA as its source of authority.[11]

That the FCC conducted a dual proceeding that involved both a rulemaking and an adjudication is neither a new nor novel approach.[12] As the D.C. Circuit has observed, such a dual proceeding is not "inherently improper" as there is "nothing in the Administrative Procedure Act or Communications Act that bars such a bifurcation."[13]

Because the FCC's decision to reclassify broadband internet access service is not a "rule" subject to the CRA, any attempt by Congress to nullify that decision would be contrary to the language and structure of the CRA. It also could be constitutionally problematic because Congress arguably would usurp the role of an Article III court if it were to use the CRA to overturn an agency adjudication.[14]

The CRA Allows Congress to Invalidate, But Not Resuscitate, a Rule

Enactment of a joint resolution of disapproval under the CRA "invalidates the rule in question."[15] Rule invalidation effectuates the purpose of the CRA to establish "a fast-track procedure that enables Congress to set aside any rule that it finds unwise before the rule can go into effect."[16] However, the CRA does not let Congress function like an administrative agency; to the extent Congress seeks to impose substantive legal obligations, it must follow its Article I process and enact legislation.

Assuming Congress passes and the president signs a joint resolution disapproving the rules adopted in its Restoring Internet Freedom Order, it would invalidate those rules. However, it would not resuscitate the net neutrality rules that the FCC promulgated in 2015 but eliminated in 2018. Thus, claims that a CRA resolution would "restore net neutrality" are overblown.[17]

The CRA Precludes Adoption of "Substantially the Same" Rule

In addition to preventing a rule from taking effect, a CRA joint resolution disapproving a rule prohibits the agency from reissuing the rule in "substantially the same form" or issuing a "new rule that is substantially the same" as the disapproved rule, "unless the reissued rule or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."[18] This prohibition prevents "the agency from engaging in shenanigans – by reissuing the same rule under a different name or with only trivial or cosmetic revisions …."[19]

The only substantive rule adopted in the Restoring Internet Freedom Order is the transparency rule in 47 C.F.R. § 8.3.[20] Enactment of a CRA joint resolution would preclude the FCC from adopting "substantially the same" transparency rule in the future. Specifically, the FCC would be prohibited from enacting rules requiring a broadband provider to disclose its "network management practices, performance, and commercial terms of its broadband Internet access services."[21] Thus, use of the CRA here would create a transparency void for broadband services — a strange and hardly pro-consumer result.

Congress does not have the option to disapprove the Restoring Internet Freedom Order except for the transparency rule. "Unlike under the regular legislative process, the CRA can only be used to invalidate an agency final rule in its entirety; it cannot be used to modify or restructure a rule in order to make it acceptable to Congress."[22]

Conclusion

Proposals to use the CRA to "undo" the Restoring Internet Freedom Order would not accomplish the objectives its proponents claim they want to achieve. In fact, by eliminating the transparency rule and preventing the FCC from adopting a substantially similar rule in the future, it would deprive consumers of a right to receive vital information about their broadband services. Rather than attempting to craft bipartisan legislation to resolve the net neutrality issue once and for all, supporters of a joint CRA resolution disapproving the Restoring Internet Freedom Order are simply using the issue for political gain.

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[1] Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 32 FCC Rcd 5650 (2018) ("Restoring Internet Freedom Order").

[2] Title II, Subtitle E, P.L. 104-121, 5 U.S.C. §§ 601 et seq. The agency's submission must include: (1) a copy of the rule; (2) a concise general statement relating to the rule, including whether it is a major rule; (3) the proposed effective date of the rule; and (4) information regarding the agency's compliance with certain other federal laws. 5 U.S.C. § 801(a)(1)(A)-(B).

[3] 5 U.S.C. § 801(d)(1). Congress's failure to disapprove a rule does not constitute approval of the rule. See 5 U.S.C. § 801(g).

[4] 5 U.S.C. § 801(b)(1). Congress adopted the CRA in response to the Supreme Court's decision in INS v. Chadha, which found unconstitutional the legislative veto by which Congress – or even a single chamber – could nullify specific agency action that it considered unwise without following the Article I legislative process. INS v. Chadha, 462 U.S. 919 (1983); see Paul Larkin, Reawakening the Congressional Review Act, 41 Harv. J.L. & Pub. Pol'y 187, 196-198 (2018). In contrast to a legislative veto, a rule can only be nullified under the CRA if both the Senate and the House pass the same joint resolution and the President signs it (or Congress overrides his veto). Id. at 198.

[5] 5 U.S.C. § 801(b)(2).

[6] M. Carey, A. Dolan, and C. Davis, Cong. Rev. Serv., The Congressional Review Act: Frequently Asked Questions 2 (2016), available at https://fas.org/sgp/crs/misc/R43992.pdf ("CRA FAQ").

[7] Id. at 6 (noting that "some agency actions that are not subject to notice and comment rulemaking under the APA, and thus may not be published in the Federal Register, may still be considered a rule under the CRA").

[8] See 5 U.S.C. § 551(4) (defining "rule"); 5 U.S.C. § 551(6) (defining "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing").

[9] The decision whether to proceed by rulemaking or adjudication lies within an agency's discretion, NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974), and this is true even when "the decision may affect agency policy and have general prospective application." Chisholm v. FCC, 538 F.2d 349, 365 (D.C. Cir. 1976).

[10] Qwest Servs. Corp. v. FCC, 509 F.3d 531, 536 (D.C. Cir. 2007); see also AT&T v. FCC, 454 F.3d 329, 332

(D.C. Cir. 2006); Regulation of Prepaid Calling Card Services, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, ¶ 41 (2006) (noting that its "decision to classify prepaid calling cards that use IP transport and menu-driven prepaid calling cards as telecommunications services is a declaratory ruling, which is a form of adjudication") (subsequent history omitted).

[11] See 47 C.F.R. § 1.2(a) (citing 5 U.S.C. § 554(e)).

[12] See 47 C.F.R. § 1.4(b)(1) note ("adjudicatory decisions with respect to specific parties [] may be associated with or contained in rulemaking documents"). The FCC acknowledged the dual nature of its decision, noting the distinction between its "Declaratory Ruling" and its "rule changes." Restoring Internet Freedom Act ¶ 354 (noting the FCC's "intention in adopting the foregoing Declaratory Ruling and these rule changes that, if any provision of the Declaratory Ruling or the rules, or the application thereof to any person or circumstance, is held to be unlawful, the remaining portions of such Declaratory Ruling and the rules not deemed unlawful, and the application of such Declaratory Ruling and the rules to other person or circumstances, shall remain in effect to the fullest extent permitted by law").

[13] Qwest Servs. Corp. v. FCC, 509 F.3d at 536.

[14] See Chadha, 462 U.S. at 960-67 (Powell, J., concurring in the judgment).

[15] CRA FAQ at 1.

[16] Reawakening the Congressional Review Act, at 191.

[17] Press Release, Markey Net Neutrality Resolution Reaches 40-Vote Milestone in the Senate (Jan. 9, 2018), available at https://www.markey.senate.gov/news/press-releases/markey-net-neutrality-resolution-reaches-40-vote-milestone-in-the-senate.

[18] 5 U.S.C. § 801(b)(2).

[19] Reawakening the Congressional Review Act, at 204.

[20] The Restoring Internet Freedom Order also modified the Commission's complaint procedures in Section 1.49, amended the authority citation for Part 8 of the Commission's rules, and amended the Commercial Mobile Services definitions in Section 20.3.

[21] 47 C.F.R. § 8.3.

[22] CRA FAQ at 4.