

## Congress and the Commission Look to Make FCC More Responsive and to Take Costs Into Account in Making New Rules - Will It Work?

By David Oxenford

November 21, 2011

In recent weeks, there seems to be a competition to make the FCC more responsive, and to mandate that, before it adopts any new regulations, it take into account the costs of the proposed regulations and the burden that they place on those being regulated. The Communications and Technology Subcommittee of the House Energy and Commerce Committee adopted a bill (**The FCC Process Reform Act of 2011**) that would, if adopted by the full House and the Senate, require that the FCC, before adopting any new regulations, take several steps to make sure that regulations were really necessary (see a summary of House bill [here](#)). Before adopting any rule, the Commission would have to survey the marketplace, determine that there was a market failure or specific consumer harm, then take into account the cost of complying with regulations before the new regulations are adopted. The proposed legislation would also require that the FCC adopt deadlines on many FCC actions ("shot clocks"), perhaps in response to a [Study commissioned by the House Committee](#) looking at the length of time that many FCC proceedings take. The FCC adopted its [own proposals for making its regulations less burdensome](#) by reviewing the continuing need for existing rules, following the President's call for all agencies to take such action. The FCC report, after making the seemingly obligatory bows to broadband adoption that the Commission seeks to foster, talked about many of the same issues that the Congressional committee seemed to be addressing - deleting unnecessary regulation wherever possible. What changes will these efforts bring to the FCC?

Call me cynical, but I doubt that the proposed changes will really lead to any significant differences in the way that the FCC does business. The FCC is already bound by all sorts of laws that demand that it take into account many of the same considerations that are included in the plans of Congress and the FCC. The [Paperwork Reduction Act](#) has already stopped certain regulations from going into effect, including the Form 355 (which sat in limbo for 4 years and the FCC is only now [considering reviving](#) in a somewhat more abbreviated form). The FCC also must take into account the Regulatory Flexibility Act, looking at the impact of any regulation on small entities who would be subject to any new rule. Congress itself has already enacted other requirements that the FCC review regulations on a periodic basis - for instance the required Quadrennial Review of the FCC's multiple ownership rules. And what do these accomplish?

These legal obligations require the FCC to jump through a few more hoops before they adopt any new rule - adding another set of factors to analyze in their decision making. Addressing these procedural issues usually takes an extra page or two at the end of any FCC decision - often a fairly rote analysis, but once in a while giving rise a point of appeal for some party to a particular case or proceeding. But many times these appeal issues would be ones that would have been raised based on the merits of the decision in assessing whether the decision served the public interest - even without these statutory obligations.

As to imposing deadlines on FCC actions, in recent years, the FCC has adopted its own shot clocks for many different kinds of actions. The Media Bureau several years ago adopted processing standards for routine applications, and the Bureau has done a very good job of meeting those and often exceeding those standards. It is not the routine processing that is usually the problem for the FCC (at least in recent

years). While everyone wants their application processed faster than it is, for the most part the FCC does a quite good job of disposing of the usual application for regulatory approval. But it's the novel or complex or highly contested cases which are the ones where artificial deadlines, no matter how well intentioned, may not serve the public. While in some cases, the regulatory drag does kill transactions, especially in rulemaking proceedings, it can also stop FCC actions before there is a clear path to a decision in the public interest. A rush to a decision can often lead to a bad decision - or a decision where one side or the other takes a big loss, rather than some sort of compromise decision (or at least a decision where something that the side that might otherwise think that it lost at least gets some protections) that often develops over time.

As difficult decisions take time, the deadlines sometimes get in the way, or are ignored, or become meaningless or mired in politics. The constant review of the FCC multiple ownership rules has been going on since the early 1990s (if not before) and recent [press reports](#) hint that the Notice of Proposed Rulemaking that may be coming out of the FCC with proposals that will insure that fights continue for the foreseeable future. While Congress has mandated a Quadrennial Review of the ownership rules, the 2003 decision on these rules ended up, after appeals, being rolled into the [2007 decision](#), which itself [was overturned on appeal](#), and that action is at least a partial cause of the FCC missing the 2011 date for the [current Quadrennial review](#). With the Notice of Proposed Rulemaking only being considered - and once released it will require more public comment and further consideration before any final decision - my prediction is that the final decision won't be out until after the 2012 elections. But I'm not sure that this long-term consideration is not better than pushing to complete a review quickly, as who knows what would be the result of a rushed action.

While legislative fixes for regulatory decision making may sound appealing, they may well just add to that delay but requiring more analysis and I- dotting and T-crossing before any decision can be reached. Certainly, Congress and the public need to keep up the pressure for expeditious decision-making, but whether more rules and governing statutes need to be added to the thicket that must be navigated before anything is ever done remains to be seen.

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.