

Special Review Memorandum

Re: A Prime FCC Objective: Greater Decisionmaking Control.

Foreword

Just this past October, you'll recall, your Review remarked that one of the clearest challenges the next Administration will face is how better to engineer public policy consent. Publicist Edward L. Bernays -- Freud's brother-in-law, incidentally -- said that guiding and shaping public opinion is critically important in any democracy. Surely the current President, who'll leave office with lower approval ratings than any recent President, must now appreciate that. And, the incoming President -- who just won the Marketing Association's Annual Prize -- knows about "engineering consent," too. See generally "Engineering Consent," TPR 24:40 (Oct. 5, 2008) at pp. 1-4.

Restoring Financial Market Confidence & Pensions

At present, the biggest single short-run challenge the incoming Obama Administration faces is calming investors and thus restoring some stability to stock, bond, and municipal bond markets. The Obama Administration desperately needs a Deng Xiao Ping, you know -- someone who tells the "Angry Left" to cool it, to leave capitalism alone for the time being.¹ Because if they don't succeed in calming these mightily roiled financial waters, it's going to be really bad, isn't it?

State, local government, institutional, and business pension systems are currently under mounting stress. Vast amounts of pension assets have disappeared -- up to \$2 trillion, by some estimates. Insufficient assets means payouts have to be adjusted, right? What do you think the psychological impact of that on a broad scale might be?

There's also the car industry problem. The more the "Angry Left" hammers GM, Ford, and Chrysler, the greater the chance they'll simply file for bankruptcy. And, like steel companies, airlines, and others which have utilized "strategic bankruptcy" the car companies will terminate pension payments to some 2 million people! And, this'll happen -- again, unless the incoming Administration can somehow calm the situation.²

¹ What's a good example of politics intruding on economics? Well, during the campaign Senator Clinton and others noted that reducing the capital gains tax can boost Federal tax revenues (an approach which President Kennedy pioneered). When Senator Obama was asked about this, he indicated he would pursue hiking the capital gains tax even though it might reduce revenues. He said this is "fundamental fairness." This is the sort of thinking followed by Hua Guofeng -- the Chinese leader Deng ousted in 1980. Hua and other dyed-in-the-wool Chinese Marxist-Leninists said politics had to come first, always. Deng, the consummate pragmatist, said he was more in favor of a strong and growing economy than doctrinal purity. Fortunately for regular Chinese, Deng prevailed.

² In theory, the Bush Administration is doing something. But one has the sense that the President, being short, is focusing on a lot of other things. According to former Senator Fritz Hollings,

But What About the FCC?

But what about the Federal Communications Commission (FCC) and its ongoing "transition" processes? Hundreds of Washington insiders reportedly are busy working on this small agency and its issues. A former FCC Commissioner has even been named to oversee this process.

Remember that scene in Lawrence of Arabia where the Arab Legion has finally captured Damascus, and there's a tumultuous session where the various clans, tribes, and sects loudly argue with each other? Well, Presidential transitions are always a bit like that, aren't they?

Senator Obama's also suddenly discovered lots of close advisers and friends. They're eager to pour through the FCC's files, identify potential "slots" for themselves and their friends and allies. No doubt transition team members will have all sorts of new and innovative recommendations. Then, there'll even be formal transition reports, meetings, press availabilities. Everything PowerPoint can produce. Zorba's "full catastrophe."

But When All Is Said and Done

But when all is said and done, what does the FCC really need to do over the next few years? Sure, there are more radio frequencies to be auctioned, longstanding rulemakings to be wound-up, and new consumer protection measures to be put in place. But what the FCC really needs to do is develop some way to maintain greater policy control of agency decisionmaking, right?

For the FCC in recent years has been the single most-reversed Federal agency, hasn't it? Hardly anything consequential seems to escape the proverbial endless appeals. In Vermont Yankee, the Supreme Court spoke of regulatory ping-pong. And, boy isn't that true in the case of the FCC?

Every time the unelected Judiciary reaches down and decides to oust FCC decisionmaking, remember, it's a net loss to the system, isn't it? Appointed by Presidents and confirmed by the Senate, FCC Commissioners are supposed to be responsible to "The People" -- at least a lot more than's true of Federal appeals court judges. FCC Commissioners are supposed to engaged in "reasoned decisionmaking" and, when the results of that process are discarded, aren't things worse? At least in theory.

appearing on C-SPAN radio recently to promote his new book, the President's chief activities these days involve (a) arranging for mountain-bike rides and (b) watching movies. It's unclear that he's done much else. The Bush Administration did say they're not in favor of the expanded IMF the EU seems to support. But one does have the sense of a disengaged, disinterested group, not really sensitive to the problems of regular Americans -- and, worse, not really interested in learning much about those problems, thanks very much.

More Rationales Than a 17-Year-Old Past Curfew

Of course, the FCC's been losing cases in the Federal appeals courts for years.

And, FCC Chairmen have come up with plausible, if not always persuasive reasons for this perennial shortcoming.

For years, the argument was that the courts somehow resented the FCC's competing efforts to interpret provisions of the 1996 Telecommunications Act. Then, there was the argument the appeals courts were skeptical about the FCC's consideration of non-industry arguments. That judges didn't think the FCC gave the genuine public even the proverbial time-of-day. But what's the real problem? Well, it's essentially three-fold.

No Trial-Type, Fact-Based Hearings -- Ever!!

First, there's the fundamental problem. Not since the early 1970s has the FCC ever conducted an actual trial-type, fact-based hearing -- one which afforded parties an opportunity to cross-examine.³ Every other regulatory agency in the country -- Federal or state -- does that all the time. Other agencies produce a transcript, an administrative law judge's opinion and/or recommendations. Their processes are "quasi-judicial."

But the FCC never does this because they're afraid it might produce policy-inconvenient results. So as Judge Frank might say, instead of hearings, the FCC always "woosh-wooshes." They don't have hearings. Instead, they phony up a record to support predetermined outcomes. Remember how in Steve McQueen's Cincinnati Kid, his girlfriend (Ann Margaret) put together a jigsaw puzzle -- using scissors? Well, that's what the FCC almost always does. And, increasingly, appeals court judges are wise to the FCC's pretty transparent "secrets." That's why they keep getting reversed.

Telephone Book-Sized Decisions

Second, the FCC regularly produces these telephone book-sized decisions - - hundreds of paragraphs of impenetrable words. Of course, the problem is that nearly all Federal appellate judges are former Government staffers. So they personally know what the likelihood is an FCC Commissioner actually read some 481-page, 1,200-footnote tome.

When an appeals court reviews a Federal Reserve Board decision, it's usually pretty short -- say 25 pages, double-spaced. What that length and succinctness tells the appeals courts is that Federal Reserve Board Members

³ In very rare instances, the FCC has had to convene hearings to consider competing broadcast applications. But they hate to do that, too. Hearings, transcripts, sworn testimony -- it's so confining, isn't it?

actually read, and probably understood the ruling -- so you, as an appeals court judge, at least have "cover."

But when you get a four-pound document from the FCC, what's the message? That there are a handful of faceless, nameless GS-13 staff lawyers typing their hearts out in some windowless FCC cubicle -- and, you're supposed to defer to their judgment?

If the FCC used trial-type proceedings, Commissioners could then say (a) We've reviewed pp. 1-27 of the ALJ's decision and (b) think he's right for the following good and sufficient reasons. The message to an appeals courts would be, "Here's an FCC decision actually read and understood by the agency's 'First Class' people." That sort of decision would be upheld. But the others? Not very likely.

Fundamentally Biased and Unfair

Third, the way the FCC does business typically advantages the large and entrenched -- the agency's "anchor clients" -- and thus is fundamentally unfair to the "Dorothy's" of the world, namely the small and meek.

Instead of having a trial-type proceeding where parties -- in the presence of one another -- make presentations, according to standard legal and evidentiary rules, each FCC Commissioner "holds court." Parties troop in and make "ex parte" presentations. Notices are filed. But only companies with large Washington offices -- or, deep pockets to pay many Washington lawyers -- are able to keep track of who's saying what to whom. Parties who can afford only one appearance are harmed -- because their opponents may be back, meeting with decisionmakers constantly.

Well, we expect appeals courts are wising up to this FCC approach. In the Third Circuit's writings on the FCC's media ownership rules (the Prometheus case) there's the suggestion the judges find this bizarre practice a bad idea. And, if appeals courts more fully understood how the FCC routinely does business, they'd recoil -- and, have.

"And, the Answer is..."

The FCC and transition team can come up with all the new and innovative ideas they want. But if they don't address the issue of securing and maintaining decisionmaking control, forget it! The Federal Judiciary already has great influence on U.S. communications policymaking. And, that'll expand, that's for sure.

So, what's the solution? It's quite easy. The "Sunshine in Government Act" envisions the people's business will be conducted in public. Thus, we'd forbid the FCC from deciding anything unless it's done in public. There could be ad hoc exemptions. But the FCC would have to operate the way the county governments

operate across the country. No more secret "circulation." No more "ex parte meetings." None of that. Period. And, if FCC Commissioners are unwilling or unable to act in public, there's a solution: Get different Commissioners. The FEC and other agencies operate in public. The FCC can, too.

Second, we'd require the FCC to conduct trial-type, fact-based hearings on all questions of fact (and, maybe law). No more winging it. No more citing magazine articles. None of that. The FCC's supposed to be "quasi-judicial." That's how it'd be. (We also think requiring parties to state their case in public will tend to weed out the phonies.)

Third, as we've said for years, the FCC Secretary needs to assign all matters to a supervising Commissioner -- who'd then be responsible to shepherd the matter through the process. No more losing petitions and requests. And, no more excuses. If something untoward occurs, the public (and, Congressional oversight body) would know precisely who's initially at fault.

Finally, we think we'd return the FCC to the way it used to be -- where the head of the agency is picked by the Commissioners and the position rotates, if not annually, every two years. We're increasingly bothered by the "cult of personality" aspects of the FCC. We want the agency to start operating more like a regular collegial body. This isn't -- or, shouldn't be -- political theater. It should be a quasi-judicial regulatory process.

Conclusion

If the FCC started operating "normally," the agency's problems with appeals courts and Congress would be reduced. Look at it this way: If what the FCC does is regarded as chiefly political, then others will have no hesitation to interfere. But if what the FCC does is seen as based on facts and law, adduced in a trial-type proceeding -- well, we think that's more acceptable. And, more likely to be left alone.

It's important to remember, moreover, that regularizing how the FCC does business matters greatly in terms of investment, jobs creation, and innovation. As Frank Louthan of Raymond James Inc., has aptly said, investors want markets and sectors to be "analyzable." If they can be analyzed taking into accounts facts and law, that's one thing. But if one also has to factor in the political predilections of the various Commissioners, etc.? Well, the investment community has a lot of solutions to that challenge, don't they? Move somewhere else.

Process and procedural reform at the FCC, therefore, is critical. And, if it isn't undertaken, not a whole lot else is going to make a lot of difference, is it?

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