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How Should Courts Consider Agency Remarks During the Comment Period?

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How Should Courts Consider Agency Remarks During the Comment Period?, by Daniel Lyons

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Thanks to Chris Walker for inviting me to join the conversation about last week's net neutrality decision. Previous posts by Aaron Nielson and Daniel Deacon did an excellent job highlighting one of the decision's major themes, the dialogue between the majority and the partial dissent regarding the proper amount of scrutiny to apply to arbitrary and capricious review.

In this post, I want to focus upon a somewhat ancillary issue, the petitioners' interconnection notice claim, by expanding upon some thoughts that I originally shared at Volokh Conspiracy (here and here). Petitioners repeatedly argued that because the agency departed significantly from the proposed rule, they lacked notice and meaningful opportunity to comment on many aspects of the final rule. The claim was particularly strong with regard to interconnection because of several statements that the agency and its chairman made during the comment period that were flatly inconsistent with the final rule. The agency's conduct raises broader questions about how courts should interpret agency speech that influences the comment process.

The net neutrality order primarily regulates the network management practices of broadband providers—the networks like Comcast and Verizon through which residential households access the Internet. But broadband providers are only a subset of the roughly 35,000 networks that comprise the Internet. These networks are stitched together through interconnection agreements, individualized arms-length transactions that together dictate how traffic is shuttled between the Internet's endpoints. Although interconnection agreements implicate some of the same anticompetitive concerns that animate the net neutrality debate, interconnection markets are far more complex, dynamic, and competitive than broadband, and are much less understood by regulators.

In its original 2010 net neutrality rules the Commission was quick to disavow any interest in regulating interconnection—both because of its admitted unfamiliarity with interconnection markets and because it wished to defuse the argument that it was trying to "regulate the Internet." The 2014 proposed rule "tentatively conclude[d] that we should maintain this approach" but

sought comment on whether to change this conclusion. In a contemporaneous statement attached to the proposed rule, Commission Chairman Tom Wheeler was less equivocal: "Separate and apart from this connectivity is the question of interconnection ('peering') between the consumer's network provider and the various networks that deliver to that ISP. That is a different matter that is better addressed separately. Today's proposal is all about what happens on the broadband provider's network."

During the comment period, Netflix signed several high-profile interconnection agreements with prominent broadband providers such as Comcast. It used the ensuing press coverage to lobby publicly for the Commission to expand the scope of the proceeding to include interconnection as well. In response to media questions, Commission Chairman Tom Wheeler told reporters at a press conference that "peering [the form of interconnection agreement Netflix signed] is not a net neutrality issue." Shortly thereafter, an agency spokesperson clarified to the *The National Journal* that " [p]eering and interconnection are not under consideration in the Open Internet proceeding."

Despite this guidance, in the final rule the Commission asserted jurisdiction under Title II to review interconnection agreements between broadband providers and other networks and entertain complaints under Section 201 and 202 that particular agreements reflect unjust or unreasonable practices or unreasonable discrimination. Petitioners argued that in light of the proposed rule's tentative conclusion, and Chairman Wheeler's contemporaneous statement that interconnection was a "separate" issue "better addressed separately," interested commenters lacked notice that the Commission intended to assert jurisdiction over interconnection agreements—let alone subject them to stringent Title II common carriage requirements.

But the court rejected this claim. It noted, correctly, that the bar for notice is fairly low: "An NPRM satisfies APA notice obligations when it expressly asks for comments on a particular issue or otherwise makes clear that the agency is contemplating a particular change." Here, while the proposed rule tentatively foreswore jurisdiction over interconnection, it also sought comment on whether to change that conclusion. The Court held this was adequately notified parties that a change was possible and provided "sufficient factual detail and rationale for the rule to permit the parties to comment meaningfully."

While the court's recitation of hornbook administrative law is correct, it failed to consider the effect of Chairman Wheeler's contemporaneous written statement, and the quotes that he and the agency gave later, foreswearing interest in the issue. Petitioners' claim that they were misled finds support in press coverage during the period: for example, Bloomberg described the comments as throwing "cold water on Netflix Inc.'s plea to include network interconnection arrangements in the… upcoming net neutrality proceeding." I can personally testify to the effect these statements had on my own comments. Spurred by Netflix's interconnection disputes, I wrote and presented a paper that summer discussing regulation of interconnection markets. I also filed comments in the net neutrality proceeding, but facing limited time constraints and assuaged by the chairman's repeated statement of disinterest, I did not include my interconnection analysis in my comments and instead focused on other issues. So I do not find it hard to believe that, given the wide range of issues in play, the agency's guidance would have led other commenters similarly to focus much less on this issue and to choose not to develop arguments fully that they otherwise would have presented.

Of course, the court may not have addressed the agency's statements outside the NPRM because they were not raised by the parties. While petitioners highlighted Chairman Wheeler's written contemporaneous statement, none made reference to the additional spoken comments at the press conference or to the *National Journal* in response to the Netflix controversy. And it is unclear whether they could have done so, as these comments may not have been included in the administrative record.

And that raises a more general question about how courts should consider agency statements outside the record that may influence the proceedings while a comment period remains open. Last year, numerous critics assailed the Environmental Protection Agency for using the web and social media to seek comments favorable to its proposed rule to expand its jurisdiction over the waters of the United States. The agency reportedly launched a blog campaign and coordinated a "social media Thunderclap" to get the topic trending on Twitter in the hope of generating a counterweight to the proposed rule's opponents. I

would argue that courts should look skeptically upon comments solicited (and perhaps also influenced) by the agency when determining whether the agency took a "hard look" at the question.

It also raises questions about how courts should consider the statements and conduct of others that are outside the record but may have influenced the agency's proceeding. As hinted at above, the proposed rule did not recommend Title II reclassification. The agency shifted to this more aggressive regulatory posture shortly before issuing the final rule, in part because of a flood of comments advocating Title II. But two other simultaneous events seemed pivotal as well, both coming shortly after the comment period closed: a mob of protesters blockaded Chairman Wheeler's home and President Obama made an unusual public statement explicitly calling upon the Commission (an independent agency) to abandon its proposed rule and instead adopt a Title II approach. Somewhat surprisingly, neither of these events is mentioned in the court's 184-page opinion.

While the question of outside influence is not new, I predict such issues will increase in frequency as the social media age increases the planes of contact between agencies and the public they serve. If courts are to maintain their traditional role as guardians of agency procedure, they must adapt traditional doctrines to consider the practical effects that such statements have on agency deliberations.

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