PUBLICATION

What's the FCC's "Capacity"?

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Most attorneys involved in consumer finance litigation are aware the Federal Communications Commission (FCC) is charged with implementing and enforcing the Telephone Consumer Protection Act (TCPA). Although the FCC's duties do not include interpreting the law, it often opines on the meaning of the statutory text either in response to inquiries from industry participants or on its own initiative in its declaratory rulings and orders. But most practitioners (and indeed even some judges) do not know the extent to which these rulings are entitled to deference by the courts.

Over the last 15 years the FCC has consistently (and perhaps impermissibly) expanded the scope and reach of the TCPA through its declaratory rulings and orders. Recently, the FCC issued an opinion on the definition of an "automatic telephone dialing system," as that phrase is used in 47 U.S.C. Section 227(a)(1). An "automatic telephone dialing system" is defined by the statute as "equipment which has the ***capacity*** (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers" (emphasis added).

The crux of the current debate is over the meaning of the word "capacity." The FCC's interpretation of this word in a declaratory ruling and order that became public on July 2015 (the Ruling and Order), is extremely broad. In the Ruling and Order, the FCC reiterated its belief that "autodialers need only have the 'capacity' to dial random and sequential numbers, rather than the 'present ability' to do so … In other words, the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities." Ruling and Order at ¶15. In the Ruling and Order, the FCC acknowledges that most smartphones fall within its definition. *Id*. at ¶21. However, the FCC did carve out one possible area for further clarification: the FCC stated that "the basic functions of an autodialer are to 'dial numbers without human intervention' …." So, although the FCC defines an automatic telephone dialing system as one that may be prospectively capable of automatically dialing numbers, whether the need for significant human intervention may negate the definition is an open question.

There are several ways to challenge the FCC's definition of "capacity," but some methods present difficult procedural hurdles and nearly impossible legal standards. There are at least two standards by which the FCC's Ruling and Order could be analyzed. *Cf. Chevron USA, Inc. v. Natural Resources Defense Research Council*, 467 U.S. 837, 842-43 (1984); *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944). Under one standard, the FCC's definition is entitled to deference provided it is a "permissible" construction of the statute. *Chevron*, 467 U.S. at 842-43. Under another much less deferential standard, the FCC's definition is only entitled to deference to the extent its reasoning is persuasive and consistent with earlier and later pronouncements. *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944).

Which standard applies depends on the nature of the ruling and whether the FCC is acting within the scope of its authority delegated to it by Congress. Generally, *Chevron* deference is appropriate where the agency is engaging in rulemaking or adjudication under a grant of authority from Congress. On the other hand, *Skidmore* deference is appropriate for interpretations contained in policy statements, agency manuals, and enforcement guidelines. But what about a declaratory ruling and order which is somewhere between rulemaking and a policy statement? This question has probably been recently answered by the Court in *City of Arlington*, *Tx. et al., v. FCC*, 133 S. Ct. 1863 (2013). In *Arlington*, the Court found that the FCC's declaratory ruling and order

was entitled to Chevron deference because Congress had vested the FCC with general rulemaking authority in the applicable statue. The general rulemaking authority language in the statue at issue in *Arlington* is very similar to the wording found in the TCPA. Thus, based on the Court's ruling in *Arlington*, it seems likely that the FCC's interpretation of the word "capacity" would be entitled to under the more deferential *Chevron* standard.

Unfortunately, any direct challenge to the FCC's interpretation of "capacity" may present a significant procedural hurdle. This is because in many jurisdictions, any challenge to an agency's interpretation in a declaratory ruling and order must be brought under the Hobbs Act. 47 U.S.C. § 402(a). The Hobbs Act expressly confers on the federal courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" FCC orders. 28 U.S.C. § 2342. In other words, the FCC's interpretation cannot be collaterally attacked in pending civil litigation in district or state courts.

The Hobbs Act, however, only applies to interpretations the FCC actually makes. It does not apply to items the FCC declines to address. *See e.g. Luna v. Shac, LLC*, 2015 WL 4941781 (N.D. Ca 2015) (currently on appeal to the 9th Cir.). In *Luna* the court circumvented ruling on a direct challenge to the FCC's definition of autodialer by analyzing the extent to which human intervention is required. *Id*. The court found that human intervention was involved in several stages of the process of sending a text message, including transferring of the telephone number into a database, drafting the message, determining the timing of the message and clicking "send" to transmit the message. As such, the court declined to impose liability. *Luna*, 2015 WL 4941781 at *4.

Perhaps the most efficient and effective means for circumventing the impossibility of the *Chevron* standard and the procedural hurdle imposed by the Hobbs Act is to capitalize on the ambiguity left by the FCC in declining to explain what it meant by "human intervention." This is certain to be a developing area in the coming months.