Perspectives from FSF Scholars
January 8, 2019
Vol. 14, No. 1

The FCC Should Employ Rebuttable Presumptions to Reduce Unnecessary Regulation

by

Randolph J. May *

I. Introduction and Summary

The Federal Communications Commission (FCC) should adopt rebuttable evidentiary presumptions that tilt towards the non-enforcement and repeal or modification of obsolete regulations so that the agency uses its forbearance authority and regulatory review process as Congress intended when it adopted the Telecommunications Act of 1996. The use of deregulatory rebuttable presumptions would be a fairly modest but nevertheless important regulatory reform procedural measure that is consistent with the Trump Administration FCC's efforts to eliminate regulations that are not necessary to protect consumers or competition.

Congress amended the Communications Act in 1996 to establish a "pro-competitive, de-regulatory national policy framework" for telecommunications. As a key part of the Telecommunications Act of 1996, Congress added a new Section 10 to the Communications Act, expressly authorizing the FCC to forbear from enforcing requirements that are no longer necessary to ensure telecommunications carriers' rates and practices are reasonable or to protect consumers or the public interest. Congress also added a new Section 11 to the act requiring the FCC to periodically review telecommunications regulations and repeal or modify those that are no longer "necessary in the public interest" due to competition between service providers.

Sections 10 and 11 are potentially effective deregulatory tools. But the reality is that the FCC has used its forbearance and regulatory review authority less robustly than it could have. Overall, since 1996, the agency has compiled a disappointing record of denying meritorious petitions for forbearance, delaying ruling on forbearance petitions until the last minute, and imposing procedural requirements making forbearance relief more difficult to obtain. The Commission's implementation of Section 11 has been similarly crabbed with many rules not being seriously considered for repeal or modification.

Given the increasingly competitive communications marketplace and ongoing technological dynamism facilitating development of new service offerings and consumer devices, the use of rebuttable evidentiary presumptions favoring forbearance and repeal or modification of obsolete regulations would constitute an important regulatory reform. Specifically, the FCC should adopt a presumption in forbearance proceedings that, absent clear and convincing evidence to the contrary, enforcement "is not necessary to ensure that a telecommunications carrier's charges or practices are not unreasonable or unreasonably discriminatory or necessary for the protection of consumers, and non-enforcement is consistent with the public interest." It should also adopt a presumption in the regulatory review process that, absent clear and convincing evidence to the contrary, "regulation is no longer necessary in the public interest as the result of meaningful competition" between service providers.

I first proposed the use of such presumptions in a 2011 *Perspectives from FSF Scholars*, which called for adding the language quoted above to Sections 10 and 11 of the Communications Act. Representative Bob Latta (R-OH) introduced legislation that would have implemented these statutory amendments, but the legislation has not been enacted. Subsequently, in January 2017, I, along with Free State Foundation Senior Fellow Seth Cooper, renewed the call for the use of rebuttable evidentiary presumptions in separate *FSF Perspectives*, one relating to regulatory reviews and one to forbearance. But this time we called for the FCC to adopt the presumptions by rulemaking.

Now, the Free State Foundation reform idea has received support within the agency. In an address at an FSF event in June 2018, Commissioner Michael O'Rielly endorsed the idea:

> In light of the vibrant competition in the various sectors of the communications marketplace, not only should the Commission review all proceedings with a deregulatory eye, but it should also use available tools, such as forbearance and mandatory reviews, to eliminate unnecessary regulation….This presumption could only be overcome by clear and convincing evidence to the contrary. In context, he was arguing that deregulatory presumptions should be added by Congress to sections 10 and 11 of the Communications Act, but there is no reason why the Commission, on its own accord, could not use such an approach when considering forbearance petitions or reviewing rules.

And Commissioner O'Rielly included the idea in his recently released blog listing proposed reforms the Commission should consider: "No. 20. Implement a deregulatory presumption when reviewing and implementing rules and forbearance requests."

The primary purpose of this paper is to show once again, now with a further discussion demonstrating legal authority, that it is within the FCC's power to adopt these presumptions through the use of the agency's rulemaking authority. The presumptions would not conflict with anything in the Communications Act – an important factor that agencies have emphasized when adopting similar presumptions. Indeed, the deregulatory congressional intent is further evidenced by the fact that, under Section 10, if the FCC fails to act on a petition to forbear from regulation in a timely fashion, the forbearance petition is deemed granted, not denied. In other words, the default position is deregulatory. And the presumptions are consistent with the historical precedent of similar presumptions being created and employed by the FCC and other agencies.

The FCC can also show the requisite connection between the presumed lack of need for enforcement and regulation and the competitiveness of the telecommunications market. Congress expressly recognized the increasing competitiveness of this market when it enacted the 1996 amendments. Since that time, it is beyond dispute that competition has only grown with, among other things, Voice over Internet Protocol (VoIP) and wireless services becoming increasingly common alternatives to traditional legacy telephone services. Not to mention other communications alternatives such as WhatsApp, Snapchat, Facebook's Messenger, and Skype, which very often are substitutable by consumers for traditional telecom services.

I stress that the presumptions would not be outcome determinative. The statutory criteria for forbearance or repeal or modification of regulations would remain unchanged. The presumptions would also be rebuttable, not absolute. Moreover, even if the presumption were not overcome in specific instances, the FCC would retain the discretion to determine the scope of forbearance and whether to repeal or modify regulations, as well as the nature of any modification to its regulations.

II. Presumptions Would Help Realize the Deregulatory Potential of Forbearance Petitions and the Regulatory Review Process

Congress added Sections 10 and 11 to the Communications Act in 1996 to create a "pro-competitive, de-regulatory national policy framework" for telecommunications "by opening all telecommunications markets to competition."[1] Indeed, Senator Larry Pressler, the Senate floor manager for the bill, characterized the 1996 amendments as "the most comprehensive deregulation of the telecommunications industry in history."[2]

Section 10, codified in 47 U.S.C. § 160, authorizes the FCC to forbear from applying regulatory or statutory requirements to telecommunications carriers or services if it determines that enforcement is "not necessary" to ensure that charges and practices are "just and reasonable" or to protect consumers, and forbearance is "consistent with the public interest." Section 11, codified in 47 U.S.C. § 161, requires the FCC, in even-numbered years, to review "all regulations" applicable to telecommunications service providers and determine whether any of these regulations are "no longer necessary in the public interest as the result of meaningful economic competition" between providers. Section 11 further requires that the FCC repeal or

[1] Cellco P'ship v. FCC, 357 F.3d 88, 91 (D.C. Cir. 2004) (quoting S. Rep. No. 104-230, at 126 (1996)).
[2] H.R. Conf. Rep. No. 104-458, at 113 (1996), reprinted in 1996 U.S.C.C.A.N. 124.

modify any regulation that it determines is "no longer necessary in the public interest." (The FCC has similar regulatory review authority as to media companies under Section 202(h) of the 1996 act.)

Sections 10 and 11 are potentially powerful deregulatory tools. If implemented consistent with the deregulatory intent of the 1996 legislation which created them, they could play a significant role in reducing the burden of unnecessary regulations. This is a burden which affects not only firms providing telecom services in competitive markets but also consumers as well, as a federal appeals court recognized when upholding the FCC's adoption of a presumption that there is "effective competition" among cable service providers, discussed below.[3]

The FCC, however, has used its Section 10 forbearance authority and Section 11 regulatory reviews less fully than it could have. As a 2017 *Perspectives from FSF Scholars* explained:

> The Commission has compiled a disappointing track record of denying meritorious petitions for forbearance relief, along with delaying rulings until just before the expiration of the shot clock. The Commission has also adopted procedural hurdles that make forbearance relief more difficult to obtain. For example, evidencing a pro-regulatory institutional bias, the rules adopted by the Commission place the burden on petitioners to satisfy each element of the statutory forbearance criteria.[4]

Since adoption of the Telecommunications Act of 1996, the FCC's implementation of Section 11 similarly has been too crabbed with too many obsolete rules still in force.[5] The Commission's broad interpretation of the word "necessary" has also helped to ensure that certain requirements some would argue are no longer essential remain on the books even if they are subjected to review.[6] Commenters have proposed numerous worthy candidates for repeal or modification, including "leftover requirements related to Section 272, interconnection requirements that place onerous burdens and TELRIC-based rate controls on ILECs but not on other competitors, tariff requirements, rate averaging rules, and costly accounting and recordkeeping rules."[7] However, many of these provisions remain on the rule books.

---

[3] See Nat'l Ass'n of Telecomm. Officers & Advisors v. FCC, 862 F.3d 18, 25 (D.C. Cir. 2017) (noting that prices set below competitive level result in diminished quality, while prices set above competitive level drive some consumers to less preferred alternatives).

[4] Randolph J. May and Seth L. Cooper, "A Proposal for Improving the FCC's Forbearance Process," *Perspectives from FSF Scholars*, Vol. 12, No. 4 (Jan. 17, 2017), available at http://www.freestatefoundation.org/images/A_Proposal_for_Improving_the_FCC_s_Forbearance_Process_011717.pdf.

[5] Since Ajit Pai became FCC Chairman in January 2017, the FCC's pace of utilizing the Section 11 regulatory review process, commendably, has picked up.

[6] See Prometheus Radio Project v. FCC, 373 F.3d 372, 391-94 (3d Cir. 2004) (upholding the FCC's interpretation of "necessary" in Section 11 of the Communications Act as meaning "useful," "convenient," or "appropriate," rather than "required" or "indispensable").

[7] Reply Comments of the Free State Foundation Before the Federal Communications Commission, In Matter of 2016 Biennial Review of Telecommunications Regulations, CG Docket No. 16-124, EB Docket No. 16-120, IB Docket No. 16-131, ET Docket No. 16-127, PS Docket No. 16-128, WT Docket No. 16-138, WC Docket No. 16-132 (Jan. 3, 2017), at 3, available at http://www.freestatefoundation.org/images/FSF_Reply_Comments_Sec_11_-_Final_010317.pdf.

Presumptions favoring the non-enforcement and repeal or modification of obsolete regulations would help change this situation. I first proposed such presumptions in a 2011 *Perspectives from FSF Scholars* titled "A Modest Proposal for FCC Regulatory Reform," which called for Congress to amend Sections 10 and 11 of the Communications Act.[8] Specifically, the *Perspectives* called for Congress to add a sentence at the end of Subsection 10(a) stating that:

> In making the foregoing determinations [regarding forbearance petitions], absent clear and convincing evidence to the contrary, the Commission shall presume that enforcement of such regulation or provision is not necessary to ensure that a telecommunications carrier's charges or practices are not unreasonable or unreasonably discriminatory or necessary for the protection of consumers and is consistent with the public interest.[9]

The *Perspectives* similarly called for the addition of a sentence at the end of Section 11(a) stating that:

> In making the forgoing determination [regarding whether a regulation is necessary], absent clear and convincing evidence to the contrary, the Commission shall presume that such regulation is no longer necessary in the public interest as a result of meaningful competition between providers of such service.[10]

Representative Bob Latta (R-OH) introduced legislation to this effect in the 113th, 114th, and 115th Congresses. His FCC "ABCs" Act would amend Section 10 to establish a presumption that, absent clear and convincing evidence to the contrary, "the requirements for forbearance . . . are met."[11] It would also amend Section 11 to establish a presumption that, absent clear and convincing evidence to the contrary, "regulation is no longer necessary in the public interest" due to "meaningful economic competition" between telecommunications service providers.

Such legislation has not been enacted, but in 2017, FSF Senior Fellow Seth Cooper and I again called for the establishment of rebuttable presumptions favoring the non-enforcement and repeal or modification of obsolete regulations, but this time, however, it was proposed that the FCC adopt the presumptions by regulation.[12] Doing so is within the FCC's authority, as explained below, and the idea now has received support within the agency. In June 2018, FCC Commissioner Michael O'Rielly included the adoption of a "deregulatory presumption" for Section 11 regulatory reviews among his proposals to "improve the functionality, legitimacy, and

---

[8] See Randolph J. May, "A Modest Proposal for FCC Regulatory Reform: Making Forbearance and Regulatory Review Decisions More Deregulatory," *Perspectives from FSF Scholars*, Vol. 6, No. 10 (Apr. 7, 2011), available at http://www.freestatefoundation.org/images/A_Modest_Proposal_for_FCC_Regulatory_Reform.pdf.

[9] A Modest Proposal for FCC Regulatory Reform, supra note 10, at 4.

[10] Id. at 4.

[11] See H.R. 2649, 113th Cong.; H.R. 655, 114th Cong.; and H.R. 557, 115th Cong.

[12] See Randolph J. May and Seth L. Cooper, "A Proposal for Improving the FCC's Forbearance Process," *Perspectives from FSF Scholars*, Vol. 12, No. 4 (Jan. 17, 2017), available at http://www.freestatefoundation.org/images/A_Proposal_for_Improving_the_FCC_s_Forbearance_Process_011717.pdf; Randolph J. May and Seth L. Cooper, "A Proposal for Improving the FCC's Regulatory Reviews," *Perspectives from FSF Scholars*, Vol. 12, No. 1 (Jan. 3, 2017), available at http://www.freestatefoundation.org/images/A_Proposal_for_Improving_the_FCC_s_Regulatory_Reviews_010317.pdf.

transparency of the Commission."[13] In so doing, Commissioner O'Rielly specifically noted the "vibrant competition in the various sectors of the communications marketplace" as grounds to "review all proceedings with a deregulatory eye" and "use available tools, such as forbearance and mandatory [regulatory] reviews, to eliminate unnecessary regulation."[14] And Commissioner O'Rielly included the idea in his list, released on December 20, 2018, of proposed reforms the Commission should consider: "No. 20. Implement a deregulatory presumption when reviewing and implementing rules and forbearance requests."[15]

III. The FCC Has the Authority to Adopt These Rebuttable Presumptions

The FCC has the authority to adopt rebuttable presumptions that, absent clear and convincing evidence to the contrary, statutory and regulatory requirements no longer need to be enforced to ensure that rates and terms for telecommunications services are just and reasonable and telecommunications regulations are no longer necessary in the public interest. The Commission and other agencies have created similar deregulatory presumptions in the past, even when the governing statute is silent on the matter and does not expressly require or authorize the agency to create any presumptions. Instead, the statute typically requires only that the agency make specific findings before it takes certain actions – as Sections 10 and 11 of the Communications Act require the FCC to do. The agency then promulgates regulations adopting presumptions that the agency relies upon in making the requisite findings.

For example, the Depository Institution Management Interlocks Act (P.L. 95-630) does not contemplate banking regulators relying on a presumption when considering proposals for a bank management official to serve simultaneously with two unaffiliated depository institutions or their holding companies. The statute says only that banking regulators may reject notices of proposed "dual service" when, among other things, the service cannot be structured or limited to ensure that it does not result in "a monopoly or substantial lessening of competition in financial services."[16] However, banking regulators, on their own initiative, adopted a presumption that dual service would not result in monopoly or substantially lessen competition when the depository institution seeking to add an official (1) primarily serves low- and moderate-income areas, (2) is controlled or managed by members of minority groups or women, (3) has been chartered for less than two years, or (4) is deemed to be in "troubled condition."[17]

Similarly, the Energy Policy Act of 2005 (P.L. 109-58) does not contemplate the Federal Energy Regulatory Commission (FERC) relying on presumptions when determining whether to terminate the requirement that an electric utility enter into a new contract or obligation to purchase electric energy from qualifying cogeneration facilities and qualifying small power

[13] Remarks of FCC Commissioner Michael O'Rielly Before the Free State Foundation (June 28, 2018), available at https://docs.fcc.gov/public/attachments/DOC-352081A1.pdf.
[14] Id.
[15] Michael O'Rielly, "Further Improving FCC Procedures," December 20, 2018, available at: https://www.fcc.gov/news-events/blog/2018/12/20/further-improving-fccs-procedures
[16] See 12 U.S.C. § 3204(8)(B)(i).
[17] See Office of the Comptroller of the Currency et al., Management Official Interlocks: Final Rule, 64 FR 51673, 51678 (Sept. 24, 1999) (codified at 12 C.F.R. § 26.6(a)). See also 12 C.F.R. §§ 212.6, 238.96, 348.6, 563f.6, 711.6 (similar).

production facilities. The statute says only that the purchase requirement terminates if FERC finds that the qualifying facility has nondiscriminatory access to one of three categories of markets.[18] However, FERC, on its own initiative, adopted presumptions that qualifying facilities with a capacity above 20 megawatts have nondiscriminatory access to the market if (1) they are eligible for service under a FERC-approved open access transmission tariff or a FERC-filed reciprocity tariff, and FERC-approved interconnection rules, or (2) they have access to certain markets and meet other conditions.[19] FERC also adopted a presumption that qualifying facilities with a capacity at or below 20 megawatts do not have nondiscriminatory access to the market.[20]

These are not the only examples of agency-created presumptions. Banking regulators have created and rely upon a presumption that the "commencement or expansion of a nonbanking activity *de novo* . . . result[s] in benefits to the public through increased competition" when considering bank holding companies' proposals to engage in nonbanking activity.[21] FERC similarly created and relies upon a presumption that wholesale sellers of electricity that "pass[] two indicative . . . screens" lack horizontal market power when reviewing sellers' market power analyses.[22] Sellers must produce these analyses under specified circumstances (e.g., when seeking market-based rate authority), and the analysis must address, among other things, whether the seller has horizontal and vertical market power.[23] And the Federal Highway Administration (FHWA) has created and relies upon a presumption that concession agreements awarded pursuant to a competitive process represent fair market value when determining whether highway agencies satisfy a regulatory requirement that they receive "fair market value for any concession agreement involving a federally funded highway."[24] Significantly, the FCC, in particular, has created and relies upon a number of such presumptions, including:

- a presumption that foreign carriers "with less than 50 percent market share" in the relevant foreign markets lack sufficient market power to affect competition in the United States, which is used in "applying the dominant carrier safeguards and the No Special Concessions rule," among other things;[25]

- a presumption that there is "effective competition" among cable service providers, which is used in cable rate regulation determinations;[26] and

[18] See 16 U.S.C. § 824a-3(m)(1)(A)-(C).
[19] FERC, New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities: Final Rule, 71 FR 64342, 64372 (Nov. 1, 2006) (codified at 18 C.F.R. § 292.309(c), (e) & (f)).
[20] Id. (codified at 18 C.F.R. § 292.309(d)).
[21] See Fed. Reserve Sys., Bank Holding Companies and Change in Bank Control (Regulation Y): Final Rule, 62 FR 9290, 9334 (Feb. 28, 1997) (codified at 12 C.F.R. § 225.26(c)).
[22] See FERC, Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services for Public Utilities: Final Rule, 72 FR 39906, 40039 (July 20, 2007) (codified in 18 C.F.R. § 35.37(a) & (c)(1)).
[23] Id. (codified at 18 C.F.R. § 35.37(a) & (b)).
[24] See FHWA, Fair Market Value and Design-Build Amendments: Final Rule, 73 FR 77495, 77503 (Dec. 19, 2008) (codified at 23 C.F.R. §§ 710.707, 710.709(c)).
[25] See FCC, Foreign Participation in the U.S. Telecommunications Market: Final Rule, 62 FR 64741, 64743, (Dec. 9, 1997) (codified at 47 C.F.R. §§ 63.10(a)(3) & 63.14(c)). See also 47 C.F.R. §§ 1.767 & 63.22 (similar).
[26] See FCC, Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act: Final Rule, 80 FR 38001, 38013 (July 2, 2015) (codified at 47 C.F.R. § 76.906).

- a presumption that carriage rates for open video system operators are just and reasonable provided certain conditions are met, which is used when assessing whether such operators are complying with a requirement that they "set rates, terms, and conditions for carriage that are just and reasonable, and are not unjustly or unreasonably discriminatory."[27]

Indeed, the Commission's presumption of "effective competition" among cable service providers is particularly noteworthy because, as discussed below, this presumption was adopted in 2015 to replace an earlier presumption that such competition was *lacking*.[28] In reversing the prior presumption, the FCC specifically noted the changes in the video programming services market that had occurred over the two decades since it adopted the earlier presumption, particularly the entry of direct broadcast satellite providers and telephone companies, such as Verizon and AT&T, into the video market.[29]

Courts generally have upheld such agency-created presumptions so long as they are not contrary to the underlying statute,[30] and the agency has articulated a "sound and rational connection" between the facts giving rise to the presumption and the facts presumed.[31] The proposed presumptions favoring the non-enforcement and repeal or modification of obsolete regulations would satisfy both these criteria. The FCC has general rulemaking authority,[32] and the presumptions would not conflict with anything in the Communications Act – a factor that other agencies have emphasized when adopting similar presumptions.[33]

To the contrary, the presumptions are consistent with the deregulatory intent of the 1996 act, as well as the historical precedent of similar presumptions created by the FCC and other agencies. As previously noted, the 1996 act was intended to create a "pro-competitive, de-regulatory national policy framework" that the presumptions would further by authorizing the agency to forbear from enforcing unnecessary legacy regulations, or eliminating them.

---

[27] See FCC, Open Video Systems: Final Rule, 61 FR 28698, 28710-11 (June 5, 1996) (codified at 47 C.F.R. § 76.1504(a) & (c)).
[28] 60 FR at 38002.
[29] Id.
[30] Compare Nat'l Ass'n of Telecomm. Officers, 862 F.3d at 24 (finding that the FCC did not run afoul of a statutory requirement that it "find" effective competition in individual franchise areas when it adopted a rebuttable presumption that cable systems were subject to effective competition) with United Scenic Artists, Local 829, Bhd. of Painters & Allied Trades, AFL-CIO v. NLRB, 762 F.2d 1027, 1034 (D.C. Cir. 1985) ("[T]he presumption the Board attempted to establish in this case is not consistent with the Act") (citing Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667 (1961) (similar)).
[31] Chem. Mfrs. Ass'n v. DOT, 105 F.3d 702, 705 (D.C. Cir. 1997). Compare Nat'l Ass'n of Telecomm. Officers, 862 F.3d at 24 (noting, among other things, that the FCC had grounded the presumption that cable systems are subject to effective competition in "strong evidence of market conditions") with Cerrillo-Perez v. INS, 809 F.2d 1419, 1426 (9th Cir. 1987) (court viewing presumption that young children of unlawfully present aliens would always leave the county with their parents upon their parents' deportation as being of "doubtful validity") and United Scenic Artists, 762 F.2d at 1035 (invalidating presumption because it "simply does not follow from the premise").
[32] See 47 U.S.C. § 154(i).
[33] See, e.g., 71 FR at 64342 (stating that FERC is not "precluded [by statute] from acting by rulemaking"). See also Am. Forest & Paper Ass'n v. FERC, 550 F.3d 1179, 1183 (D.C. Cir. 2008) (opining that FERC's determination to adopt certain rebuttable presumptions by rulemaking, rather than case-by-case adjudication "does not violate any of the statute's requirements").

Similarly, there is historical precedent for the use of presumptions that are deregulatory in their intent or effects.

For example, as previously noted, in 2015, under the Obama Administration FCC, the agency adopted a rebuttable presumption that cable systems are subject to "effective competition."[34] Prior to 2015, the FCC had relied on a presumption that cable systems were *not* subject to such competition, and, as the FCC noted, its reversal of the earlier presumption effectively precluded franchising authorities "from regulating basic cable rates" unless they could successfully rebut the presumption.[35] Nonetheless, the FCC viewed the change as warranted in order to "reflect the current MVPD [multichannel video programming distributor] marketplace, reduce the regulatory burdens on all cable operators, especially small operators, and more efficiently allocate the Commission's resources."[36]

To take another FCC example, in 2011, also under the Obama Administration FCC, the Commission had adopted a rebuttable presumption that signed data roaming agreements between mobile service providers are commercially reasonable.[37] This presumption resulted in persons challenging the reasonableness of any term in the agreement bearing the burden of "rebut[ting] the presumption."[38] However, the FCC found adoption of the presumption to be justified based on the "variety of terms and conditions in data roaming agreements," as well as its purpose "to discourage frivolous claims regarding the reasonableness of the terms and conditions in a signed agreement."[39]

Other agencies have relied upon similar justifications in creating deregulatory presumptions. For example, banking regulators noted that the regulations containing the presumption of public benefits from *de novo* banking activity would "eliminate unnecessary regulatory burden and paperwork" and "improve efficiency."[40] And FERC similarly stated that its adoption of presumptions regarding qualifying facilities' access to the market by notice-and-comment rulemaking would "provide[] more effective notice and opportunity for participation by all affected parties," given that there are "recurring and common issues of fact," than there would have been if it had proceeded by case-by-case adjudication.[41]

The FCC could also show the requisite "sound and rational connection" between the presumed lack of need for enforcement and regulation and the competitiveness of the telecommunications market. As early as 1996, when it amended the Communications Act, Congress noted that "changes in technology and consumer preferences have made the 1934 Act an historical anachronism . . . . [which] presumes that telephone service is provided by monopoly carriers."[42] Here, Congress was specifically referring to the increasing competition

---

[34] 80 FR at 38013 (codified at 47 C.F.R. § 76.906).
[35] Id. at 38001.
[36] Id.
[37] See Data Roaming Order, Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, Second Report and Order, at 41, ¶ 81 (Apr. 7, 2011), available at https://docs.fcc.gov/public/attachments/FCC-11-52A1_Rcd.pdf.
[38] Id.
[39] Id.
[40] 62 FR at 9290.
[41] 71 FR at 64342.
[42] S. Rep. No. 104-230, at 126 (1996).

in the markets for "telephone equipment, information services, and long distance services" that began as far back as the 1970s.[43]

The trend toward competition in the telecommunications market that Congress noted in 1996 has only increased since 1996. According to recent FCC data, 63 million customers subscribed to residential Voice over Internet Protocol (VoIP) services – offered primarily by cable operator entrants into the voice services market – at the end of 2016.[44] The number of residential traditional telephone switched access lines had simultaneously dropped to 58 million at the end of 2016.[45] However, wireline subscriber data represents only a segment of the telecommunications market. At the end of 2016, there were also more than 395 million wireless connections in the United States, a total 5% higher than that at the end of 2015.[46] And approximately 51% of households are wireless-only.[47]

This and other similar evidence of the existence of competition among telecommunications providers would support the view that market forces generally suffice to ensure just and reasonable charges and practices and protect consumers, and that enforcement of statutes and regulations governing these matters is no longer necessary. Such evidence also supports adoption at least of a rebuttable presumption that regulations are generally "no longer necessary in the public interest" because of meaningful economic competition between telecommunications service providers.

IV. The Proposed Presumptions Would Not Be Outcome Determinative

Importantly, the proposed presumptions would not be outcome determinative. If the FCC were to adopt these presumptions, the statutory criteria for forbearance and regulatory review determinations would remain unchanged. Forbearance would still be limited to situations where enforcement is not necessary to ensure just and reasonable charges and practices or to protect consumers, and forbearance is consistent with the public interest. Similarly, the repeal or modification of regulations would still occur only when the regulations are no longer in the public interest as the result of meaningful economic competition between providers.

Rather, if adopted, the presumptions would merely serve to ensure that the FCC does not treat enforcement and the maintenance of regulations in their current form as the default. Instead, as discussed below, there would need to be clear and convincing evidence that regulation remains necessary in specific instances.

---

[43] Id.

[44] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, Voice Telephone Services: Status as of December 31, 2016 (Feb. 2018), at 2, available at https://docs.fcc.gov/public/attachments/DOC-349075A1.pdf.

[45] Id.

[46] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, Twentieth Report, WT Docket No. 17-69 (Sept. 7, 2017), at 85, ¶ 5 available at https://docs.fcc.gov/public/attachments/DOC-346595A1.pdf.

[47] National Center for Health Statistics, National Health Interview Survey Early Release Program, Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, June-December 2016, available at https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf.

The presumptions would also be rebuttable, not absolute. In this regard, they would be like numerous other agency-created presumptions, including FERC's presumption that sellers who "pass[] two indicative . . . screens" lack horizontal market power[48] and the FCC's presumption that foreign carriers with less than 50% market share in relevant foreign markets "lack[] sufficient market power to effect competition in the United States."[49] In both cases, the agency expressly provided for parties who wish to contest the application of the presumption in specific circumstances to make their case to the agency.[50] Similar provisions for contesting the rebuttable presumption could be made by the FCC in implementing Sections 10 and 11. This would allay potential due process concerns that could be raised by parties who otherwise might claim to be deprived of protected rights without notice or an opportunity for a hearing if the presumptions were irrebuttable.[51]

Specifically, the proposed presumptions could be overcome by clear and convincing evidence that forbearance or the repeal or modification of regulations is not warranted in specific circumstances. And as FSF scholars have previously noted in discussing the presumptions:

> Clear and convincing evidence is an intermediate standard of proof. It requires a greater quantum of proof than a mere preponderance of the evidence. Yet it requires evidence less conclusive than proof beyond a reasonable doubt. If a clear and convincing evidence standard is adopted as a means for rebutting a deregulatory presumption under Section 11, [for example,] ambiguous evidence about the state of competition would not satisfy that standard. Nor would the presumption be overcome by evidence that equally supports "yes" or "no" or ambivalent findings as to whether there is meaningful competition that has made those regulations unnecessary in the public interest. Rather, there would have to be clear and convincing evidence in the record demonstrating that the regulation is still necessary in the public interest.[52]

It is also important to note that, even if the presumption could not be overcome in specific cases, the FCC would retain discretion as to the scope of any forbearance and the nature of any changes to its regulations. The FCC would still be able to grant or deny forbearance petitions in whole or in part.[53] It would also still be able to grant forbearance only for a period of time or subject to certain conditions.[54] Similarly, in the regulatory review process, the FCC would

---

[48] 72 FR at 40039 (codified in 18 C.F.R. § 35.37(c)(1)).
[49] 62 FR at 64743 (codified in 47 C.F.R. §§ 63.10(a)(3) & 63.14(c)).
[50] See 18 C.F.R. § 35.37(c)(3); 47 C.F.R. § 63.10(b).
[51] See, e.g., Chem. Mfrs. Ass'n, 105 F.3d at 702 et seq. (discussing potential due process concerns regarding presumptions). See also Cerrillo-Perez, 809 F.2d at 1426 (invalidating presumption, in part, because it "relieve[d] [the agency] of its duty to consider applications on an individual basis"); United Scenic Artists, 762 F.2d at 1035 (invaliding presumption, in part, because it could be "overcome only in extraordinary circumstances").
[51] See 47 U.S.C. § 160(c) ("The Commission may grant or deny a petition in whole or in part . . . .").
[52] A Proposal for Improving the FCC's Regulatory Reviews, supra note 15, at 6.
[53] See 47 U.S.C. § 160(c) ("The Commission may grant or deny a petition in whole or in part . . . .").
[54] See, e.g., FCC, In Matter of Petition of NTCA—The Rural Broadband Association and the United States Telecom Association for Forbearance Pursuant to 47 U.S.C. § 160(c) from Application of Contribution Obligations on Broadband Internet Access Transmission Services: Order, WC Docket No. 17-206, June 7, 2018, available at https://docs.fcc.gov/public/attachments/FCC-18-75A1.pdf (temporary forbearance); FCC, News Release, FCC Conditionally Grants TracFone's Petition for Forbearance, Sept. 6, 2005, available at https://docs.fcc.gov/public/attachments/DOC-260881A1.pdf (conditional grant of forbearance).

still be able to decide whether regulations are to be repealed or modified, as well as to determine the nature of any modifications made to its regulations.

V. Conclusion

The FCC's adoption of presumptions favoring the non-enforcement and repeal or modification of obsolete regulations would help the FCC carry out the "pro-competitive, de-regulatory national policy framework" for telecommunications that Congress intended when it added Sections 10 and 11 to the Communications Act in 1996. The FCC has the authority to create the proposed presumptions, and it and other agencies have created similar deregulatory presumptions in the past. The presumptions would not override the statutory criteria for forbearance or for repeal or modification of regulations. They would merely tilt the default position in favor of forbearance and the repeal or modification of unnecessary regulations unless there is clear and convincing evidence that the statutory criteria have not been met.

* Randolph J. May is President of the Free State Foundation, an independent**,** nonpartisan free market-oriented think tank located in Rockville, Maryland. He acknowledges, and is grateful for, the substantial assistance of Kate M. Manuel, an Adjunct Senior Fellow at the Free State Foundation, in the preparation of this paper.