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A Modest Plea for FCC Modesty Regarding the Public Interest Standard

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A MODEST PLEA FOR FCC MODESTY REGARDING THE PUBLIC INTEREST STANDARD

RANDOLPH J. MAY*

TABLE OF CONTENTS

INTRODUCTION

I am encouraged by the title the *Administrative Law Review*'s editors chose for one of the sessions of this important Symposium—*New Frontiers: Public Interest Regulation in a Converging Twenty-First Century Media Marketplace.* This indicates an awareness that, as far as today's communications marketplace goes, we indeed inhabit a new frontier. The twenty-first century marketplace, still shy of a full decade into the century, bears little resemblance to the more monopolistic environment that prevailed well into the last century. It certainly bears little resemblance to the much less competitive communications marketplace that prevailed at the time of *Red Lion Broadcasting Co. v. FCC*,[1] the fortieth anniversary of which provided the occasion for this

* President of The Free State Foundation, a nonprofit think tank located in Potomac, Maryland. I gratefully acknowledge the excellent research assistance on this article of Kate Manuel, FSF Research Associate.

1. *See* 395 U.S. 367, 400 (1969) (finding that existing broadcasters had a "substantial

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Symposium.

As the Symposium's subtitle indicates, *Red Lion*, rightly, is best known for providing further sanction against constitutional attack for the Federal Communications Commission's (FCC or Commission) public interest regulation of broadcasting content.[2] To be sure, the constitutionality of the FCC's administrative exercise of its public interest authority had been upheld in the early years of broadcast regulation, most notably in *FCC v. Pottsville Broadcasting Co.*[3] and *NBC, Inc. v. United States*.[4] But *Red Lion* was icing on the public interest cake—to the extent the public interest needed further icing.

What I aim to do in this short Essay is, at bottom, fairly modest. I want to suggest—in light of all the changes that have occurred in the communications marketplace in the forty years since *Red Lion*—that the FCC itself should act more modestly. In an exercise of regulatory self-restraint, going forward the agency should narrow the exercise of its public interest authority. Through either the issuance of policy statements or case-by-case adjudication, or both, the agency should demonstrate its understanding that it no longer serves the public's interest for the FCC to exercise unbridled public interest regulatory authority. At the end, I will suggest several specific instances in which the FCC could commence this exercise in regulatory modesty.

First, I want to provide some context by outlining the pervasive extent of the FCC's present public interest authority, even after adoption of the Telecommunications Act of 1996,[5] which Congress said was intended to provide a "pro-competitive, de-regulatory national policy framework."[6] Second, I want to suggest that, given the standard's indeterminateness, it might have been thought that Congress's delegation of public interest authority violates the nondelegation doctrine. Third, I want to point out, at least in a cursory fashion, the extent to which competition and convergence have rendered the communications marketplace that existed at the time of *Red Lion* a distant memory. Finally, I want to end by urging the FCC to embrace the notion of regulatory modesty by exercising self-restraint in the exercise of its public interest authority. Given the understandable space

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advantage over new [market] entrants").

2. The Symposium's subtitle is "Public Interest Media Regulation Forty Years After *Red Lion Broadcasting Co. v. FCC*."

3. 309 U.S. 134, 145 (1940) (noting the FCC's responsibility to consider applications based on public interest factors).

4. 319 U.S. 190, 227 (1943) (holding that the public interest standard did not unconstitutionally delegate legislative authority to the FCC under the Federal Communications Act).

5. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.).

6. H.R. REP. NO. 104-458, at 113 (1996) (Conf. Rep.).

constraints of this Symposium issue, I necessarily will do all of this in a suitably brief fashion. Nevertheless, I hope to do so convincingly enough to at least provoke interest and some sympathy for—if not total agreement with—my argument, especially among present and future FCC Commissioners.

I. THE PERVASIVE NATURE OF PUBLIC INTEREST REGULATION

The public interest standard that was the keystone of the Radio Act of 1927 and its successor, the Communications Act of 1934,[7] still pervades the current regulatory regime. After passage of the Telecommunications Act of 1996,[8] there remain nearly one hundred statutory provisions that direct or authorize the FCC to act in the public interest.[9] The public interest standard is at the heart of regulation of the radio spectrum. Thus, all of the FCC's decisions relating to spectrum licenses must be based on findings that the action is in the public interest.[10] For example, the agency's decision to grant or renew a broadcast or other spectrum license must be based on a finding that such action serves the public interest.[11] And if a licensee wishes to assign or transfer control of an existing license, the Commission must make a determination that the assignment or transfer is in the public interest.[12] Therefore, as a matter of practical effect, the FCC must approve all mergers of media companies because the licenses they hold are integral to the operation of their businesses.

Just as the public interest standard is at the heart of the FCC's regulation of broadcasters and other spectrum licensees, it also plays a central role in the agency's regulation of communications common carriers. There are over twenty separate provisions in Title II of the Communications Act, the part of the Act concerning common carriers, which refer to public interest determinations.[13] Key provisions are found in § 201(b) of the Act, authorizing the FCC to prescribe such provisions "as may be necessary in

7. Radio Act of 1927, Pub. L. No. 632, 44 Stat. 1162 (1927), *repealed by* Communications Act of 1934, Pub. L. No. 416, § 602(a), 48 Stat. 1064, 1102 (codified as amended in various sections of 47 U.S.C.).

8. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.).

9. *See* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, at 456–67 (2001) (listing provisions in the Communications Act that pertain to the public interest standard).

10. Title III of the Communications Act contains the provisions relating to the Commission's authority to license uses of the spectrum for broadcasters and others. There are forty separate provisions in Title III that refer to "the public interest" or "the public interest, convenience, and necessity." *See id.*

11. 47 U.S.C. §§ 307(a), 309(a) (2000).

12. 47 U.S.C. § 310(d).

13. *See* May, *supra* note 9.

the public interest" to carry out the provisions of the Act,[14] and § 214(a), which requires the Commission to make a public interest determination before issuing a certificate authorizing a common carrier to construct new facilities or extend or acquire existing ones.[15] Thus, § 214, like § 310,[16] requires that the Commission make a public interest determination before an assignment or transfer of control of operating authority takes place. In effect, this requires preapproval of mergers involving companies holding § 214 common-carrier certificates of authority.

The 1996 Telecommunications Act (1996 Act) not only left the traditional public interest regulatory model in place, it extended its reach in some important respects. For example, both of the so-called regulatory reform provisions added by the 1996 Act—one granting the FCC authority to forbear from applying any of the Act's provisions or any Commission regulation to a telecommunications carrier or service, and the other requiring periodic review of regulations—require public interest determinations.[17] And, the new section governing the provision of universal service subsidies incorporates a public interest determination.[18] In language typical of that found throughout the Communications Act, the FCC is directed, in establishing the definition of services that will be supported by universal service support mechanisms, to consider the extent to which such services "are consistent with the public interest, convenience, and necessity."[19] The fact that Congress delegated public interest authority in key sections of the 1996 Act is an indication of the extent to which the public interest model was embedded in the public policy mindset of the time.

II. THE PUBLIC INTEREST MODEL RAISES CONSTITUTIONAL CONCERNS

Absent having kept up with all the latest jurisprudence—say, post-1935—one might suppose that a congressional delegation of authority to an administrative agency to act in the "public interest," with the indeterminateness inherent in the phrase, would violate constitutional separation-of-powers principles inherent in the nondelegation doctrine.[20]

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14. 47 U.S.C. § 201(b) (2000).
15. *Id.* § 214(a). The FCC has exercised its forbearance authority under § 10 of the Communications Act, 47 U.S.C. § 160, to relieve some carriers of the requirements under § 214 and to make them less burdensome for others.
16. *See supra* note 12 and accompanying text.
17. 47 U.S.C. §§ 160(c), 161(a) (2000).
18. *Id.* § 254(c)(1)(D).
19. *Id.*
20. *See* THE FEDERALIST NO. 47, at 264 (James Madison) (J. R. Pole ed., 2005) (quoting Montesquieu's injunction that "[w]hen the legislative and executive powers are united in the same person or body . . . there can be no liberty").

Article I of the Constitution vests "all legislative Powers" in Congress.[21] This provision could have been construed strictly to mean that Congress could not delegate *any* lawmaking power to an Executive Branch agency nor, certainly, to a so-called independent agency.[22] But if construed so literally, the modern administrative state could not exist. Thus, in modern times, the nondelegation doctrine has come to be understood to prohibit only standardless delegations of legislative authority.

The Supreme Court articulated the still-extant test for determining whether an act violates the nondelegation doctrine in 1928. In *J.W. Hampton, Jr., & Co. v. United States*, the Court declared: "If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[23] The purpose of requiring an intelligible principle is so that Congress must establish, even if within somewhat broad parameters, the policy guidelines it wishes its delegates to follow. Otherwise, the delegate—not Congress—is engaging in lawmaking, and Congress has abdicated its legislative function and, with it, political accountability.

The last time the Supreme Court struck down a law for violating the nondelegation doctrine was 1935, when it did so twice.[24] For our purposes here, it is sufficient to note the Court's characterization of the laws it held unconstitutional—two different provisions of the New Deal's National Industrial Recovery Act (NIRA) intended to address Depression Era economic woes. In *Panama Refining Co. v. Ryan*, the Court said a provision of the statute authorizing the President to prohibit the shipment in interstate commerce of certain petroleum products was unconstitutional because it "establishe[d] no criterion to govern the President's course."[25] Similarly, in *A.L.A. Schechter Poultry Corp. v. United States*, the Court invalidated NIRA's provision authorizing the President to establish "codes of fair competition" for various commercial sectors. The Court stated that

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21. U.S. CONST. art. I, § 1.

22. For one of the older cases that adopted this literal approach, see Field v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

23. 276 U.S. 394, 409 (1928) (emphasis added).

24. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 432–33 (1935) (holding Congress's delegation of authority to an agency under the National Industrial Recovery Act was unconstitutional because the Act did not establish any rules or procedures for the agency to follow); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550–51 (1935) (finding Congress's delegation of legislative power to the Executive Branch was unconstitutional because the Legislative Branch did not provide any standards or procedures by which to govern the President's determinations).

25. *Panama Refining*, 293 U.S. at 415.

"Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."[26] If our constitutional system is to be maintained, Chief Justice Hughes declared, Congress must not be allowed "to transfer to others the essential legislative functions with which it is thus vested."[27]

After *Panama Refining* and *Schechter Poultry*, one might suppose a delegation to an agency to act in the "public interest" would fall prey to a nondelegation doctrine attack. After all, in 1999, constitutional law scholar Gary Lawson called the public interest standard "[e]asy kill number 1" on nondelegation doctrine grounds because the licensing provisions of the Communications Act grant "nearly absolute discretion about a subject that is absolutely central to the regulation of broadcasting."[28]

In reality, the public interest standard has been anything but an easy kill. Not long after the *Panama Refining* and *Schechter Poultry* nondelegation doctrine high-water mark, the Supreme Court proclaimed that the public interest standard "is as concrete as the complicated factors for judgment in such a field of delegated authority permit."[29] Thus, in 1943, in the landmark case of *NBC, Inc. v. United States*,[30] the Supreme Court rejected a nondelegation doctrine attack claiming that the public interest standard "is so vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional."[31] The Court referred to its admonition in *FCC v. Pottsville Broadcasting Co.* that the criterion "is as concrete" as could be expected in such a dynamic field.[32] And it cited an earlier Federal Radio Commission case in which it had said the public interest standard "is to be interpreted by its context," taking into account various aspects of radio-transmission services.[33] All told, the Court found this sufficient, if unenlightening.

And despite its conceded vagueness, to this day the public interest standard has remained good enough to pass constitutional muster. In 2001

26. *Schechter Poultry*, 295 U.S. at 537–38.
27. *Id.* at 529.
28. Gary Lawson, *Delegation and the Constitution*, REG., Spring 1999, at 23, 29, *available at* http://www.cato.org/pubs/regulation/regv22n2/delegation.pdf.
29. FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940).
30. *See* 319 U.S. 190 (1943) (affirming the Commission's first rules governing network broadcast practices).
31. *Id.* at 225–26.
32. *See id.* at 216 (citation omitted) (noting that the Court had previously held the public interest standard articulated by Congress was an appropriate one for broadcast regulations).
33. *See id.* (citation omitted) (listing several factors—including the scope, character, and quality of services—that are relevant when divining the public interest).

the Supreme Court sustained the Clean Air Act against a nondelegation doctrine challenge.[34] In the course of doing so, the Court reaffirmed the (at least theoretical) vitality of the "intelligible principle" requirement.[35] To bolster his position that the Clean Air Act provision is constitutional, Justice Scalia, writing for the majority, observed that the Court had "found an intelligible principle" even in the "public interest" itself.[36] Realistically, at least for the foreseeable future, we may assume that the Supreme Court is highly unlikely to hold that the public interest standard violates the nondelegation doctrine.

Hence, my fallback position: The FCC should commit acts of regulatory modesty by constraining the exercise of its public interest authority. Before offering some suggestions for self-restraint, a very brief word about the changed marketplace environment is in order.

III. COMPETITION AND CONVERGENCE IN TODAY'S DIGITAL WORLD

Last century's analog age was characterized for the most part by a monopolistic environment in the provision of telephone and other telecommunications services, and a less than vigorously competitive environment in the provision of most mass media services, such as broadcasting and cable television. Last century's era of limited—and in some instances, nonexistent—competition is largely a bygone memory.

As the title of this Symposium session indicates, today's marketplace is characterized by convergence—that is, the blurring or disappearance of formerly distinct service boundaries. And although the title does not refer to competition, it is a fact that competition is as much a defining characteristic of today's marketplace as lack of competition was of last century's. The rapid advent of both competition and convergence is attributable in large part to the transition from analog to digital technologies and from narrowband to broadband services.[37] And, to be sure, in addition to technological advances, changes in the regulatory and legal environment have facilitated a manifestation of convergence through

34. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) (holding that, while congressional delegation of authority to the EPA was not unconstitutional, the agency unreasonably interpreted the Clean Air Act as it related to the implementation of revised ozone standards).

35. *See id.* at 472 (noting that Congress must "offer an intelligible principle" when delegating its decisionmaking authority to an agency).

36. *Id.* at 474.

37. *See* Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 FED. COMM. L.J. 103, 108–10 (2006). As for convergence, in 2004, the FCC explained how the greater bandwidth of broadband networks encourages the introduction of services "which may integrate voice, video, and data capabilities while maintaining high quality of service." IP-Enabled Services, 19 F.C.C.R. 4863, 4876 (2004) (notice of proposed rulemaking).

the entry of new communications competitors and the availability of offerings of formerly distinct services on a bundled basis.

This is not the place to rehearse—with a surfeit of accompanying facts and figures which change monthly, if not more frequently—all of the developments that distinguish today's marketplace from the one that existed even a few years ago. It suffices to highlight a few salient points indicative of the increasingly competitive and convergent marketplace. Wireless providers have emerged as such vibrant competitors that by the end of 2007 more than 15% of American households were strictly wireless.[38] Cable companies now offer Internet-based telephone services that have increased competition still further, with the number of cable-based voice subscribers now numbering over 16 million people.[39] With respect to their traditional video offerings, cable operators face continued competition from satellite companies, which occupy about 30% of the market.[40] And now traditional telephone companies, having invested billions of dollars in upgrading their networks with high-capacity fiber, are quickly becoming significant competitors in the video-services market.[41] Moreover, consumers increasingly use their wireless devices not only to make phone calls, but to distribute and receive all manner of video content, including television programs.[42] Telephone, cable, wireless, and satellite operators all compete in the Internet access market segment.

38. CTIA, Wireless Quick Facts, http://www.ctia.org/advocacy/index.cfm/AID/10323 (last visited Sept. 11, 2008).

39. *See* TELECOMMS. INDUS. ASS'N, TIA 2008 TELECOMMUNICATIONS MARKET REVIEW AND FORECAST 91 (2008) (estimating that the number of subscribers to Internet-based telephone services will increase to twenty-three million by 2009).

40. *See* Danny King, *Providers Aim to Keep Up with Growth*, TVWEEK, Mar. 16, 2008, http://www.tvweek.com/news/2008/03/providers_aim_to_keep_up_with.php (giving the relative market shares of cable- and satellite-television providers).

41. *See, e.g.*, David Ho, *Verizon to Speed Up Internet in Ten States*, ATLANTA J. CONST., June 19, 2008, at C3, *available at* http://www.ajc.com/business/content/business/stories/2008/06/19/verizon_internet.html (describing the telecommunications industry's "escalating broadband war with cable companies"); Stephanie N. Mehta, *Verizon's Big Bet on Fiber Optics*, FORTUNE, Feb. 22, 2007, http://money.cnn.com/magazines/fortune/fortune_archive/2007/03/05/8401289/index.htm (estimating that Verizon will spend twenty-three billion dollars "to wire 18 million homes—just over half of its market"—for proprietary fiber-optic service (FiOS) by the end of 2010).

42. *See, e.g.*, Anna Henry, *Driving Mobile Television*, RURAL TELECOMM., May–June 2007, at 21, 21 (hypothesizing that 102 million subscribers will view mobile television by 2010); Amol Sharma, *Telecommunications; What's New in Wireless: A Look at Mobile Devices and Services You Can Expect in the Next Year—And Beyond*, WALL ST. J., Mar. 26, 2007, at R1; Editorial, *A Bundle of Competition: Collin County on the Front Lines in a New Technology Battlefront*, DALLAS MORNING NEWS, June 22, 2008, at 12B, *available at* http://www.dallasnews.com/sharedcontent/dws/news/city/collin/opinion/stories/DN-north_compete_22edi.ART.North.Edition1.4db4496.html ("The telephone also used to be just a telephone, something used to call grandma. Now you can call grandma, surf the Internet, watch live television, take and send pictures, and send text messages from the same device.").

Again, the point here is not to provide anything resembling a complete compendium of all the latest indicators showing the extent of competition and convergence, for it would be outdated long before you read this. The point, rather, is to provide a basis for arguing that it is time for the agency to chart a new, more modest course with respect to public interest regulation.

IV. NARROWING PUBLIC INTEREST REGULATION THROUGH AGENCY SELF-RESTRAINT

In light of the marketplace and technological developments sketched in Part III, Congress should pass a new communications law that replaces the statute's ubiquitous public interest delegation with a competition-based standard akin to the "unfair competition" standard contained in the Federal Trade Commission Act.[43] Indeed, just such a bill incorporating the "unfair competition" standard was introduced in the 109th Congress in the Senate.[44] A competition-oriented standard, which necessarily requires an antitrust-type analysis, would focus the FCC's regulatory decisions on the realities of the marketplace. The new law should also require the FCC to rely more heavily on ex post remedial orders resulting from particular adjudications of complaints, rather than on overly broad ex ante proscriptions adopted in generic rulemakings. By its very nature, the application of a competition standard in the context of fact-specific adjudications would promote an institutional environment much more conducive to employment of rigorous economic analysis than the environment that currently prevails at the FCC.

In the near term, however, it is doubtful Congress will enact a new law overhauling the Communications Act along these lines. So, short of such a new law or the Supreme Court's deciding, suprisingly, that the public interest standard is unconstitutional, regulatory constraint under the public interest standard must come from the agency itself. The fact that the public interest standard remains in the statute and is not unconstitutional does not mean that the FCC itself should not narrow its application in appropriate circumstances and contexts. Recall Justice Frankfurter's remark in *Pottsville Broadcasting* that the standard is "as concrete as the complicated

43. Federal Trade Commission Act § 5(b), 15 U.S.C. § 45 (2000) ("Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition . . . .").

44. Digital Age Communications Act of 2005 § 102, S. 2113, 109th Cong. (2005); Randolph J. May, *Perspective: Time for a Digital Age Communications Act*, CNET.COM, July 13, 2005, http://news.cnet.com/Time-for-a-Digital-Age-Communications-Act/2010-1071_3-5785159.html; May, *supra* note 37, at 103.

factors for judgment in such a field of delegated authority permit."[45] There is no logical reason why the lack of "concreteness" should only be used to extend the agency's regulatory reach, as opposed to contract it. There are many instances in which such narrowing might be appropriate—especially in ways that tie the need for regulation more closely to competitive market conditions. To illustrate, below are a few important examples.

A. Merger Approvals

As explained above, whenever entities holding FCC licenses or authorizations seek to merge by acquiring or transferring control of a license or authorization, the FCC must find that the proposed transaction is in the public interest.[46] The FCC's review of a proposed transaction's competitive impact largely duplicates the antitrust review performed by the Department of Justice (DOJ) or the Federal Trade Commission (FTC). The DOJ and FTC possess the expertise to conduct such competitive-impact analyses. No one benefits from the wasteful expenditure of time and resources resulting from such duplicative competitive-impact reviews from two different government agencies.

Moreover, in conducting its review under the public interest standard, the FCC often ranges far beyond just analyzing the specific impact of the proposed merger. The inherent vagueness of the public interest standard leaves the Commission largely free to seek to impose "voluntary" conditions on a merger that are unrelated to any alleged competitive impact of the specific transaction. The Commission merely withholds approval of the merger until the parties come forward to propose conditions which the Commission has telegraphed in closed door negotiations that it would find acceptable to meet whatever public interest concerns that opponents, the FCC, and others have raised. So, for example, in the past, the Commission has conditioned approval of the merger of two telephone companies on its provision of discounts to low-income households for broadband service, on repatriation of jobs that have been outsourced overseas, and on adherence to net-neutrality commitments. However salutary such regulatory mandates might, or might not, be if imposed on an industry-wide basis in a generic rulemaking proceeding, it is inappropriate and often unseemly for the agency to impose such requirements on specific companies through a process of last-minute regulatory extraction when the conditions bear no relationship unique to the proposed merger.

The FCC should reform the merger review process by announcing a policy that, absent extraordinary circumstances, it will largely defer to the

45. FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940).
46. *See supra* notes 12 & 16 and accompanying text.

DOJ's and the FTC's expertise regarding any competitive concerns raised by the merger. And the agency should announce that it will refrain from imposing "voluntary" conditions on merger proponents that are unrelated to compliance with existing statutory or regulatory requirements. In this way, in the context of merger reviews, the agency would narrow substantially the application of the public interest standard. While the interested parties and the public would benefit from the cost savings associated with the elimination of duplicative agency reviews, the public interest would still be protected by ensuring that the merger would not be approved until it meets all existing Communications Act and agency regulatory requirements.[47]

B. Regulatory Review Proceedings

The 1996 Telecommunications Act added provisions requiring the FCC to conduct periodic reviews of all regulations relating to telecommunications service providers and media ownership.[48] Regarding the periodic review of regulations pertaining to telecommunications services providers, the Act requires the Commission to "determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[49] With respect to review of media ownership regulations, the Act requires the agency to "determine whether any of such rules are necessary in the public interest as the result of competition."[50] In both instances, the FCC is directed to "repeal or modify any regulation it determines to be no longer necessary in the public interest."[51]

It seems obvious that these rather unique agency-specific periodic-review provisions were intended by Congress in 1996 to alter the regulatory status quo by mandating that the Commission affirmatively consider whether new competition has displaced the need for legacy regulations. But the Commission, thus far, has been inclined to treat them in a rather business-as-usual manner. In two early cases involving the

47. I have previously addressed this proposal. *See* Randolph J. May, *Reform the Process*, 27 NAT'L L.J. 23, 27 (2005), *available at* http://www.freestatefoundation.org/images/Reform_the_Process--NLJ.pdf (suggesting that government agencies wastefully spend resources in duplicating review of mergers and "merger proposals should be considered in a fair, timely, and efficient manner").

48. *See* Telecommunications Act of 1996 § 402(a), 47 U.S.C. § 161 (2000) (review of regulations pertaining to telecommunications services); Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111 (1996) (review of media ownership regulations).

49. Telecommunications Act of 1996 § 402(a), 47 U.S.C. § 161(a)(2) (2000).

50. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111 (1996).

51. Telecommunications Act of 1996 § 402(a), 47 U.S.C. § 161(b) (2000); Telecommunications Act of 1996, Pub. L. No. 104–104, § 202(h), 110 Stat. 56, 111 (1996).

agency's first post-1996 Act regulatory review of its media ownership rules, the D.C. Circuit reversed agency decisions not to relax certain existing ownership rules.[52] For present purposes, the particular rules at issue and the Commission's analysis regarding review of the rule in each instance are not important. What is important is the Commission's approach to the task assigned by Congress. In both the *Fox* and *Sinclair* cases, the court stated that "[§] 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules."[53] The court read the statute to require the FCC to repeal or modify a rule unless the rule was "necessary" in a sense akin to indispensable, while the agency maintained it needed merely to determine whether a rule's retention was "in the public interest" or useful or appropriate, but not indispensable.[54] Indeed, the Commission petitioned for rehearing, arguing that the court set too strict a standard for retaining rules. On rehearing, the court deleted its discussion concerning the appropriate regulatory review standard because it found that the Commission had erred even applying the more relaxed standard that simply equated "necessary" with being consonant with the public interest.[55] Thus, it left this interpretative issue unresolved.

Whether or not the Commission agrees with the initial D.C. Circuit view that the statute creates a presumption in favor of repealing rules, it nevertheless could articulate a standard that gives more weight to the existence of marketplace competition in making the public interest determination. After all, when Congress refers specifically to "competition" in conjunction with a determination as to whether regulations are still "necessary" in the public interest, it is fair to surmise it meant to establish a stricter standard than if it had said simply "in the public interest." But more to the point for present purposes, it is likely that the courts would find (as the D.C. Circuit once did) that the FCC at least possesses the discretion to narrow the scope of its public interest determination in this way. The Commission should avail itself of the opportunity to construe this provision incorporating the public interest standard in a narrowing way that gives effect to the Act's obvious deregulatory intent.

52. Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002), *modified*, 293 F.3d 537 (D.C. Cir. 2002); Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002).

53. *Fox*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 159.

54. 2002 Biennial Regulatory Review, 17 F.C.C.R. 18,503, 18,511 (2002) (notice of proposed rulemaking).

55. *Fox*, 293 F.3d at 540.

C. Forbearance Relief

In addition to the periodic-regulatory-review provisions, the 1996 Telecommunications Act contained a related reform provision. This provision *requires* the FCC to forbear from applying any Communications Act provision or agency regulation to a telecommunications carrier or service if the Commission determines that enforcement of the regulation or provision (1) is not necessary to ensure that the providers' rates or practices are just and reasonable and not unjustly or unreasonably discriminatory; (2) is not necessary for the protection of consumers; and (3) "is consistent with the public interest."[56] As far as I have been able to determine, this forbearance authority is unique, and not found in other regulatory statutes. Like the periodic review requirement, the deregulatory intent of the forbearance provision is obvious on its face.[57]

Despite the fact that competition and convergence have rendered many of the agency's legacy regulations obsolete, the Commission has granted forbearance petitions sparingly, in part because it has interpreted the add-on public interest prong of the forbearance test expansively. Again, the indeterminate nature of the standard easily allows the Commission to do so. But it ought to be sufficient for purposes of evaluating whether forbearance should be granted for the Commission to determine whether, absent enforcement, a provider's rates and practices are just and reasonable and not unjustly or unreasonably discriminatory, and whether enforcement is necessary for the protection of consumers. After all, should not the agency's principal concern be the protection of consumers?

Therefore, the Commission should announce as a matter of policy that it will construe the public interest prong as surplusage which imposes no additional requirement that is not already encompassed by the first two prongs of the test. Because of the public interest standard's indeterminateness, the Commission possesses discretion to adopt such an

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56. Telecommunications Act of 1996 § 402(a), 47 U.S.C. § 160(a) (2000).

57. As far back as 1981, the FCC had asserted some measure of forbearance authority, despite the absence of any provision in the Communications Act explicitly providing for it. Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 84 F.C.C.R.2d 445 (1981) (further notice of proposed rulemaking). Several times the FCC exercised its claimed authority to forbear from enforcing the Communications Act's tariff-filing requirements, and it was reversed by the lower courts. In 1994, the Supreme Court definitively resolved that the FCC lacked authority not to apply the Act's tariff-filing requirement. MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218 (1994). The Supreme Court's decision, along with the earlier judicial decisions, provided a significant impetus for inclusion of explicit forbearance authority in the Telecommunications Act of 1996. For this forbearance history, with citation to authorities, see generally Randolph J. May, *Why Forbearance History Matters*, PERSP. FROM FSF SCHOLARS, June 17, 2008, at 1–2, *available at* http://www.freestatefoundation.org/images/Why_Forbearance_s_History_Matters.pdf.

interpretation, and this narrowing construction would be consistent with the forbearance provision's overall deregulatory intent.

D. Universal Service

There are other sections of the Communications Act, like the forbearance section, in which the public interest standard is tacked onto the end as a catch-all. By way of example, take § 254,[58] the provision governing universal service, which was also added by the 1996 Act. The provision lists seven principles upon which the FCC is to base policies for the preservation and advancement of universal service. These include factors such as the provision of quality services at reasonable rates, access to advanced services, access by consumers in rural high-cost areas to services at rates comparable to rates charged in urban areas, and equitable contributions by service providers to support universal service.[59] Not surprisingly, the last principle stated is the catch-all public interest standard.[60]

After Congress delineates in fairly specific terms six decisionmaking principles, what is to be made of a seventh that merely directs the Commission to consider the public interest? This is a case in which agency modesty suggests the Commission should announce that—at least absent some exigent circumstances that it determines Congress could not have foreseen—it will base its decisions on the six specific principles included in the statute. And the Commission would do well to comb through the Communications Act for other instances in which the catch-all public interest standard is added to a list of specified factors for consideration. These provisions should be high on the list of candidates for a Commission pronouncement that it will narrow their application in an exercise of self-restraint.

CONCLUSION

With convergence and competition in the communications marketplace a reality, it is indeed time to revisit the application of the public interest standard. Whatever the merits of regulation under the indeterminate standard in the earlier, more monopolistic analog age (and I have serious doubts), the exercise of such unbridled and malleable discretion by the FCC is no longer appropriate in today's digital environment. Assessments of marketplace competition primarily should guide the Commission's regulatory decisions. Absent Congress's or the courts' narrowing the

58. 47 U.S.C. § 254 (2000).
59. *Id.* § 254(b)(1)–(6).
60. *Id.* § 254(b)(7).

agency's public interest authority, which is unlikely, the Commission, uncharacteristically, should heed my modest plea for regulatory modesty. In an exercise of self-restraint, the FCC should commit itself to narrowing the application of its public interest authority.

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