Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

	)	CG Docket No. 16-124
In the Matter of	)	EB Docket No. 16-120
	)	IB Docket No. 16-131
2016 Biennial Review of Telecommunications	)	ET Docket No. 16-127
Regulations	)	PS Docket No. 16-128
	)	WT Docket No. 16-138
	)	WC Docket No. 16-132

REPLY COMMENTS OF THE FREE STATE FOUNDATION*

These reply comments are submitted in response to the *Public Notice* soliciting comments in the Commission's 2016 biennial review of telecommunications regulations conducted pursuant to Section 11 of the Communications Act. The *Public Notice* seeks input as to which rules should be modified or repealed as part of the 2016 biennial review.

These brief reply comments emphasize the need for the Commission to revitalize its biennial regulatory review process. First, the Commission must take a hard look at regulations that can no longer be justified. And it should act without undue delay in conducting its current Section 11 review so as to eliminate those no longer necessary regulations. As Commissioner Ajit Pai emphasized at the Free State Foundation's Tenth Anniversary Gala Luncheon on December 7, 2016, it's time to "fire up the weed whacker and remove those rules that are holding back investment, innovation, and job creation."

* These reply comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

Indeed, there doesn't appear to be any reason, consistent with the congressional direction, that the Commission cannot act to eliminate unnecessary regulations as it proceeds through the review process, rather than waiting until the end to act in one fell swoop.

Then, the Commission should take another regulatory reform step: It should adopt a procedural rule for implementing future Section 11 regulatory reviews, to the effect that: **"Absent clear and convincing evidence to the contrary, the Commission shall presume that regulations under review are no longer necessary in the public interest as a result of meaningful competition among providers of such service."** By adopting this rebuttable presumption as a procedural rule implementing Section 11, the congressionally-mandated regulatory review process would be more likely to reflect Congress's deregulatory intent when it included Section 11 in the Telecommunications Act of 1996.

In light of the obvious technological developments and market conditions that have created so much more competition and consumer choice, adoption of a rebuttable deregulatory evidentiary presumption is fully justified. Such a rebuttable presumption would not be outcome-determinative, but it would be a means for the Commission, consistent with Section 11's direction and in conformance with the provision's criteria, to more expeditiously eliminate outdated regulations absent clear and convincing evidence they are still needed. These points are discussed in much more detail in the *Perspectives from FSF Scholars Paper*, "A Proposal for Improving the FCC's Regulatory Reviews," published on January 3, 2017,[1] and attached as an appendix.

[1] Randolph J. May and Seth L. Cooper, "A Proposal for Improving Section 11 Regulatory Reviews," *Perspectives from FSF Scholars*, Vol. 12, No. 1 (January 3, 2017), available at: http://freestatefoundation.org/images/A_Proposal_for_Improving_the_FCC_s_Regulatory_Reviews_010317.pdf.

A rebuttable presumption that legacy regulations are no longer necessary in the public interest would comport with the realities of today's communications marketplace, in which different technological platforms – including fiber, cable, wireless, satellite — compete against each other. As of 2015, nearly half of adults – 48.3% – live in households that no longer subscribe to wireline voice services but rely only on wireless. Total wireless connections at year's end 2015 exceeded 374 million. Among wireline services, the number of incumbent local exchange carrier (ILEC) switched access lines has continued to plummet while the number of VoIP subscriptions has continued to rise. At the end of 2015, ILEC residential switched access lines in service totaled 65 million. VoIP subscriptions – principally offered by competing cable entrants in the voice market – rose to 59 million.[2]

Comments filed in this proceeding have identified many regulations that ought to be eliminated – or at very least substantially modified. Candidates for elimination include leftover requirements related to Section 272,[3] interconnection requirements that place onerous burdens and TELRIC-based rate controls on ILECs but not on other competitors,[4] tariff requirements,[5] rate averaging rules,[6] and costly accounting and recordkeeping rules.[7]

As a general matter – and as urged in comments – the Commission should no longer single out ILECs for special regulatory burdens.[8] The current state of marketplace competition provides no justification for such extra burdens. In addition, comments

[2] Source citations are contained in the attached appendix. *See* footnote 1, *supra*.
[3] Comments of CenturyLink, at 8-10.
[4] *Id*., at 10-11.
[5] Comments of Verizon, at 9-10; Comments of United States Telecom, at 11-12.
[6] Comments of Verizon, at 12.
[7] Comments of CenturyLink, at 17; Comments of United States Telecom, at 9.
[8] Comments of United States Telecom Association, at 8-9.

rightfully have identified unnecessary requirements for transferring spectrum licenses that place burdens on licenses in certain bands but not in others.[9] Those spectrum-related regulations also should be eliminated or modified. Simple streamlined standards applicable to all spectrum bands would better enable secondary market transactions for spectrum licenses, thereby allowing those licenses to be put to better use without undue delay.

Consistent with these reply comments, including the attached appendix, in the current review the Commission should rigorously scrutinize, as expeditiously as possible, the many telecommunications regulations that no longer can be justified in light of technological advances and the prevalent marketplace competition. Moreover, the Commission should take the necessary steps to adopt a procedural rule to govern future Section 11 regulatory reviews. The rule would establish, consistent with Section 11's direction and in conformance with its criteria, a rebuttable evidentiary presumption that regulations under review are no longer necessary in the public interest as a result of market competition between communications service providers.

Respectfully submitted,

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[9] Comments of CTIA, at 9-11; Comments of Verizon, at 4-9.

APPENDIX

Perspectives from FSF Scholars
January 3, 2017
Vol. 12, No. 1

A Proposal for Improving the FCC's Regulatory Reviews

by

Randolph J. May * and Seth L. Cooper **

Introduction and Summary

The inauguration of a new President and Congress offers a renewed prospect for eliminating or modifying outdated legacy Federal Communications Commission regulations that no longer comport with digital age technological and marketplace realities. While it is important for Congress ultimately to substantially update the Communications Act to reflect today's marketplace, pending such an overhaul, the most significant opportunity to bring about needed regulatory reform in 2017 most likely belongs to the FCC. Indeed, the Commission possesses ample authority to eliminate or modify unnecessary and wasteful regulations that have outlived their usefulness and that are now injurious in that they discourage innovation and investment in broadband and other communications services and technologies.

In the Telecommunications Act of 1996, Congress gave the FCC the means to eliminate or curtail outdated, counterproductive regulations. Section 11, entitled "Regulatory Reform," is one of the 1996 Act's express deregulatory tools, albeit one that, by most accounts, has

been underutilized. Section 11 requires the Commission periodically to review telecommunications regulations and to repeal or modify those determined to be "no longer necessary in the public interest as a result of meaningful economic competition."

In 2017, the reconstituted FCC should revitalize the Section 11 regulatory review process. By eliminating or modifying outdated, costly telecommunications regulations that no longer are necessary (if ever they were), the Commission can spur new investment and further innovation that, in turn, translate into more robust economic growth and more jobs.

Of course, the first order of business in this regard is for the Commission to conclude the current Section 11 regulatory review proceeding without undue delay. There are many regulations that are ripe for elimination if given a hard look. In the Section 11 review now underway the Commission should examine existing regulations with a seriousness of purpose that has been lacking in the reviews of past years. Fortunately, the soon-to-be reconstituted agency appears ready to do just that.

As FCC Commissioner Ajit Pai said in his remarks at the Free State Foundation's December 7, 2016, Tenth Anniversary celebration, "[i]n the months to come, we also need to remove outdated and unnecessary regulations." Indeed, he declared, "[w]e need to fire up the weed whacker and remove those rules that are holding back investment, innovation, and job creation." Commissioner Michael O'Rielly made the same point at the Free Station Foundation event in his remarks: "Another priority worth attention is clearing away the existing regulatory underbrush that is choking business and diverting resources away from new and improved products, better service, and lower prices for consumers."

Aside from completing the current regulatory review in a timely fashion, the newly reconstituted FCC should take a further step to help ensure that future Section 11 reviews are effective in achieving the elimination of unnecessary regulations in a communications marketplace in which competition and consumer choice are rapidly becoming the norm. The Commission should adopt a simple procedural rule to the following effect in connection with the implementation of future Section 11 regulatory reviews: "Absent clear and convincing evidence to the contrary, the Commission shall presume that regulations under review are no longer necessary in the public interest as a result of meaningful competition among providers of such service."

Establishing a procedural rule like this will not change Section 11's substantive criteria. And the rule is not outcome determinative. It merely puts into place a rebuttable evidentiary presumption that comports with today's widely-accepted market realities. By adopting this rebuttable presumption as a procedural rule implementing Section 11, the sensible deregulatory orientation, which is inherent in the very nature of the provision, will be more durable from one review to the next.

There is widespread agreement that, due to the continuing advance of innovative digital technologies and competition between the various technological platforms, whether fiber, cable, wireless, satellite, or whatever, many existing telecommunications regulatory

restrictions no longer serve any useful purpose. The costs of complying with these outdated legacy regulations divert financial resources from investment in next-generation services and applications that otherwise would benefit consumers. But the FCC has clung far too long to far too many telecommunications regulations that were fit (if at all) for monopolistic analog copper-wire telephone networks.

A rebuttable deregulatory presumption like the one suggested above would require the FCC to marshal evidence that competition is lacking in telecommunications markets in order to retain legacy regulations. In the absence of clear and convincing evidence demonstrating noncompetitive conditions and public harm, the regulations under review would be repealed or at least modified. Without dictating the outcome of the review of any particular regulation, a procedural rule along these lines necessarily would create a more rigorous review process that accounts for technological advancements and market changes. Consistent with the rule, the Commission would find it more difficult to disregard, for instance, the competitive effects of cable operator entrants in voice services markets or wireless substitution for wireline.

If the FCC adopts a rebuttable evidentiary presumption, it would not be overcome by ambivalent findings regarding marketplace competition. Rather, there would have to be clear and convincing evidence in the record demonstrating that regulations are still necessary in the public interest. In instances in which the Commission is inclined to retain regulations, the higher evidentiary standard will increase the need for clear articulation of the connection between those regulations and contemporary market data. And the Commission will be cognizant that its decisions will be scrutinized by the courts under the new deregulatory standard.

With a new President and Congress set to be sworn in, the time to begin a meaningful, comprehensive overhaul of the Communications Act is ripe. Pending Congress's passage of legislation updating the Communications Act in a comprehensive way, the newly reconstituted FCC can begin eliminating unnecessary, costly regulations. In addition to completing the current Section 11 review in a timely fashion, the Commission should adopt a rebuttable evidentiary presumption that "regulations under review are no longer necessary in the public interest as a result of meaningful competition among providers of such service." This would be an important step in fulfilling Section 11's deregulatory intent.

The FCC's New Opportunities for Removing Outmoded Regulatory Barriers

The regulatory framework now governing telecommunications services is molded to late 20th Century perceptions of uncompetitive analog and copper-wire telephone systems. Innovative digital technologies and competition between incumbent providers, cable entrants, and wireless carriers have upended the old regulatory model's static assumptions. By the end of 2015, for example, 59 million customers subscribed to residential Voice Over Internet Protocol (VoIP) services – offered primarily by cable operator entrants into the voice services market.[1] Meanwhile, the number of residential traditional telephone switched access lines dropped to 65 million.[2] But wireline subscriber data only supplies part of the competitive landscape. At year-end 2015, total wireless

connections in the U.S. exceeded 374 million.[3] And about 48.3% of households are wireless-only.[4]

The dynamism of today's IP-enabled competitive marketplace has rendered many legacy regulatory restrictions unjustifiable. But the FCC has obstinately clung to telecommunications regulations based on a completely outdated picture of technologies and market conditions. Although such regulations no longer serve any useful purpose, they impose steep costs on telecommunications providers, stranding financial resources that otherwise would be invested in next-generation services for consumers.

The inauguration of a new President and Congress bring prospects for an updated Communications Act appropriate for the digital age. Yet the greatest opportunity to bring about reforms and eliminate regulations in 2017 most likely belongs to the Federal Communications Commission. The FCC already possesses ample authority to remove unnecessary and wasteful regulations that have long outlived their usefulness. The Commission has an opportunity to shift federal communications policy in a deregulatory direction that matches today's dynamic digital market – and sweep away numerous costly old regulations off the books.

Revitalizing an Underutilized Statutory Provision for Removing Unnecessary Regulations

The FCC can help clear the decks of old rules and provide telecommunications services providers important relief from compliance costs and restrictions through pro-active use of its Section 11 regulatory review powers.

Entitled "Regulatory Reform," Section 11 applies specifically to telecommunications providers,[5] and also to media ownership rules by incorporation pursuant to Section 202(h) of the Telecommunications Act of 1996.[6] Section 11(a)(2) requires the Commission periodically to review telecommunications regulations in order to determine "whether any such regulation is no longer necessary in the public interest as a result of meaningful economic competition between providers of such service."[7] Under Section 11(b), the Commission is required "to repeal or modify any regulation it determines to be no longer in the public interest."[8]

By its inclusion in the Communications Act, Congress clearly intended for Section 11 to be an important tool for removing outdated telecommunications regulations. Unfortunately, over the past many years the Commission has underutilized its Section 11 powers.

Now is the time for the Commission to revitalize this important deregulatory device. First, the Commission should conclude the current Section 11 review proceeding without undue delay. It should examine existing regulations with a seriousness of purpose that has been lacking in the Section 11 reviews conducted over the past many years. There are many regulations that are ripe for elimination if given a hard look.

Implementing Section 11 Through a Deregulatory Evidentiary Presumption

After completing the current review, the reconstituted FCC should take a further step to ensure that future Section 11 reviews are effective in fulfilling their deregulatory purpose. Section 11 reviews should result in the elimination or modification of unnecessary regulations in a communications marketplace in which competition and consumer choice are rapidly becoming the norm. To accomplish this, the FCC should adopt a rebuttable evidentiary presumption as a new procedural rule governing the conduct of its Section 11 regulatory review process. The new procedural rule would state: "Absent clear and convincing evidence to the contrary, the Commission shall presume that regulations under review are no longer necessary in the public interest as a result of meaningful competition between providers of such service."

By adopting a procedural rule of this kind, the substantive criteria of Section 11 would remain unchanged. Nor would the rule's adoption be outcome-determinative with respect to any particular regulations subject to review. The procedural rule simply would embody an evidentiary presumption that comports with widely recognized market realities. And by adopting a rebuttable presumption as a rule, the FCC will make its market-based policy more unmistakable and more enduring. And in the absence of clear and convincing evidence demonstrating uncompetitive conditions and public harm, the telecommunications regulations under review would be repealed or at least modified.

The rebuttable presumption would create a more rigorous review process that takes technological advancements and market changes into account. It would make it more difficult for the Commission's Section 11 analysis to disregard meaningful competition in telecommunications markets resulting from cable operator entrants or wireless substitution for wireline. In practice, a rebuttable presumption with a higher evidentiary standard would increase the likelihood the Commission would find its telecommunications regulations to be no longer necessary in the public interest – and, therefore, to remove or modify such regulations.

The FCC's Authority for Procedural Rules Implementing Section 11

The FCC has ample authority to adopt procedural rules for implementing Section 11. Section 5 of the Communications Act, for instance, provides: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[9] The *Forbearance Procedures Order* (2009) assumed the Commission's authority to adopt procedural rules governing Section 10, and certainly this same authority exists to issue rules implementing Section 11.[10] Unfortunately, the Commission previously exercised its authority unwisely to make regulatory relief under Section 10 more difficult by placing the burden on parties seeking forbearance. But it can now use that same authority to make regulatory relief more achievable under Section 11 by adopting our proposal which places the burden on the Commission or parties seeking continuation of legacy regulations.

The FCC has previously established evidentiary presumptions as a means of enforcing its statutory objectives for telecommunications services. For example, in 2010 it adopted an evidentiary presumption with respect to real-time, two-way switched voice or data services provided by mobile carriers.[11] According to its rule, the Commission "shall presume that a request by a technologically compatible CMRS carrier for automatic roaming is reasonable pursuant to Sections 201 and 202 of the Communications Act."[12] Significantly, the Commission established an evidentiary presumption with a deregulatory thrust in its the *Data Roaming Order* (2011). The Commission presumes a signed data roaming agreement between mobile service providers is reasonable, requiring parties challenging the reasonableness of any term to rebut the presumption.[13]

Even more relevant, the FCC's report for its *2002 Biennial Review* acknowledged that "Section 11 creates a presumption in favor of repealing or modifying covered rules, where the statutory criteria is met."[14] In other words, a presumption applies with respect to the result under Section 11(b). The Commission should now apply a presumption to its meaningful competition and public interest necessity findings under Section 11(a)(2).

In its *2002 Biennial Review Report*, the Commission rejected the idea that Section 11 required the Commission to support its regulations with substantial record evidence in order to avoid their immediate repeal.[15] However, the Commission surely retains the discretionary powers to adopt a presumption as a means of implementing Section 11(a). Certainly, the changed factual circumstances of the past fifteen years regarding the proliferation of advanced technologies and intermodal competitors supply a strong basis for a new approach to implementing Section 11's mandate. The Commission's own minimal usage of Section 11 in the face of the growing mismatch between technological and market assumptions of the late 1990s (or earlier) and the technological advancements and competitive realities of 2017 also warrant a reinvigorated regulatory review process.

The FCC's Application of Its New Evidentiary Presumption Under Section 11

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, 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.

Once such a rebuttable presumption is established as a new procedural rule, the FCC can develop methods or tests for measuring "meaningful competition" or for guiding its conclusion about whether a given regulation is still necessary in the public interest. But in all instances where the FCC applies its new procedural rule, the regulatory review analysis almost certainly should incorporate intermodal or cross-platform competitive effects.

Pervasive cable operator entry and mobile wireless substitution have given consumers choices far beyond what existed in 2002, let alone 1996. As a result, incumbent telecommunications provider switched access lines and market share have declined precipitously. The Commission should no longer continue to enforce legacy regulations as if those changes have never happened. Instead, the Commission must finally factor those changes into its assessments of market competition and the public interest necessity of those regulations.

A Clear and Convincing Evidentiary Standard Would Improve FCC Reviews

In addition to reorienting the Commission's frame of reference to comport with today's competitive digital communications market, adoption of a procedural rule such as we have proposed for applying Section 11 likely will increase the quality of the Commission's regulatory review analyses. By coupling a rebuttable presumption with a clear and convincing evidentiary standard, the new procedural rule will prompt the Commission to undertake a more careful examination of market data. In instances where the Commission is inclined to retain its existing regulations, the higher standard will increase the need for the Commission to clearly articulate the connection between those regulations and contemporary market data, not just offer ambivalent suppositions. The Commission will be cognizant that its process and decisions under the new procedural rule will be subject to a more searching review by the Courts.

From the new procedural rule's shift to a deregulatory outlook with heightened evidentiary requirements, it follows that reviewing courts would hold the Commission to the rule's standard. A new procedural rule would require the Commission to provide clear and convincing evidence of meaningful competition and to explain its regulatory decision in connection with record evidence meeting that heightened threshold. Courts would consider whether the Commission adequately justified its own claims concerning whether or not clear and convincing record evidence of meaningful competition exists and, therefore, whether or not the regulation is still necessary in the public interest.

Conclusion

With the upcoming inauguration of a new President and Congress, the time is ripe for an overhaul of the Communications Act. Pending Congress's passage of legislation that it comports to dynamic digital age realities, revitalization of Section 11 by the FCC offers an important avenue for rapidly reducing unnecessary and wasteful telecommunications regulations. The current Section 11 review proceeding should therefore be pursued without delay to eliminate many regulations that are prime candidates for elimination.

The Commission should also promptly adopt – as a new procedural rule – a presumption of meaningful competition in telecommunications markets that can only be rebutted by clear and convincing evidence to the contrary. Adoption of this inherently deregulatory presumption as a procedural rule will provide durability as the Commission conducts successive reviews. Importantly, such a rule would make Section 11 reviews more analytically rigorous, accounting for the actual state of competition in communications

services. Under new leadership, the Commission should reduce legacy regulatory burdens and thereby promote further investments in next-generation broadband technologies that will lead to increases in economic growth, more jobs, and enhanced services for consumers.

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Further Readings

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[1] FCC (Wireline Competition Bureau), Voice Telephone Services: Status as of December 31, 2015 ("*Voice Telephone Services Report*"), 2-3, 5 (November 2016), available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1130/DOC-342357A1.pdf.
[2] *Id.*
[3] 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, *Nineteenth Report*, WT Docket No. 16-137, at 8, ¶ 12 (September 23, 2016), available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-16-1061A1.pdf.
[4] Stephen J. Blumberg and Julian V. Luke, Division of Health Interview Statistics, National Center for Health Statistics, "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2015," at 1 (released May 2016), available at: https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201605.pdf.
[5] 47 U.S.C. § 161(a)(1).

[6] 47 U.S.C. § 303 note.
[7] 47 U.S.C. § 161(a)(2).
[8] 47 U.S.C. § 161(b).
[9] 47 U.S.C. § 154(i).
[10] Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended, *Report and Order* ("*Forbearance Procedures Order*") WC Docket No. 07-267 (June 29, 2009).
[11] Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, WT Docket No. 05-265, at 10, ¶ 18 (Apr. 21, 2010).
[12] 47 C.F.R. § 20.12(d).
[13] 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* ("*Data Roaming Order*"), at 41, ¶ 81 (Apr. 7, 2011) ("*Data Roaming Order*"); *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012) (affirming the Commission's order).
[14] The 2002 Biennial Regulatory Review, *Report* ("*2000 Biennial Review Report*"), GN Docket No. 02-390, at 10, ¶ 21 and 13, ¶ 28 (adopted Dec. 31, 2002; released Mar. 14, 2003); *Cellco Partnership v. FCC*, 357 F.3d 88, 97 (D.C. Cir. 2004) (discussing that presumption in its decision upholding the Commission's interpretation of Section 11, applying *Chevron* deference).
[15] *2000 Biennial Review Report*, at 12-13, ¶ 28.