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A Modest Proposal for FCC Regulatory Reform: Making Forbearance and Regulatory Review Decisions More Deregulatory

by

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It has been almost thirty-five years now that I have been – to lapse into a bit of Washington-speak – "doing" communications law and policy. During this time, I have witnessed dramatic changes in the communications and information services marketplace, far greater than I could have imagined when I began. To a significant extent, of course, these marketplace developments have been driven by equally dramatic technological advances – which I also could not have imagined when I began.

Make no mistake: Although there may be differing views concerning the *extent* to which competition has developed in particular market segments, or the *pace* at which it has developed, the changes have been steadfastly in the direction of more competition and more consumer choice in more market segments.

Indeed, in large part in reaction to the developing marketplace competition and ongoing technological changes, Congress passed the Telecommunications Act of 1996. Congress stated right in the text of the statute that it intended for the FCC to "promote competition and *reduce regulation*." And, in the principal legislative report accompanying the 1996 Act, Congress stated its intent "to provide for a pro-competitive,

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de-regulatory national policy framework." Thus, while the 1996 Act was not necessarily drafted in a way that removed as much ambiguity as it should have, there is no mistaking that Congress had in mind it was adopting a statute – the most significant change to the Communications Act since its enactment in 1934 – with a deregulatory thrust.

In other words, Congress concluded, with unassailable logic, that the development of more competition and more consumer choice should lead to reduced regulation.

Despite the fact that fifteen years have passed since adoption of the 1996 Telecom Act, and that during this period marketplace competition has continued to develop dramatically and steadily, the FCC has not done nearly enough, on an overall basis, to effectuate Congress's intent that the agency should "reduce regulation" and provide a "de-regulatory" policy framework. There are various explanations, which I am not going to catalogue here, as to why this is so. For present purposes, the point is that the FCC has failed to reduce regulation commensurate with the development of competitive markets. In fact, as evidenced by its recent decision to adopt new "net neutrality" mandates regulating broadband Internet service providers, by retaining an analog-age mindset the Commission has increased regulations in material ways.

What really is needed to more fully achieve the deregulatory framework called for by the present competitive broadband marketplace is a radical overhaul of the Communications Act along the lines that I – in conjunction with many think tank and academic colleagues – proposed in 2005 in the [Digital Age Communications Act Project](#). To his credit, Senator Jim DeMint and other Senators have continued to advocate adoption of just such a radical, but sensible, overhaul, most recently with the introduction of his [Freedom for Consumer Choice Act](#), which is closely patterned after the earlier Digital Age Communications Act.

But short of a more comprehensive overhaul of the Communications Act, which may not be accomplished for several years, what I want to do here is suggest a fairly simple, but nevertheless important, regulatory reform measure that could be adopted in the interim to effectuate what Congress intended to be the deregulatory tilt of the 1996 Act.

The Problem: The FCC's Cramped Interpretation of the Regulatory Relief Provisions

The 1996 Act introduced into the Communications Act two new provisions – both, by their terms, unmistakably intended to be tools for the FCC to use to reduce regulation as more competition and more consumer choice continued to develop. These provisions are Section 10 ["Competition in the Provision of Telecommunications Service"] and Section 11 ["Regulatory Reform"]. Section 10 mandates that the Commission "*shall forbear*" from applying any regulation or statutory provision if the agency determines enforcement of such requirement "is not necessary" to ensure that telecommunications carriers' charges and practices are reasonable and "not necessary for the protection of consumers," and that forbearance is consistent with the public interest.

Section 11 ["Regulatory Reform"] requires periodic reviews of FCC regulations for the purpose of the Commission determining "whether any such regulation is no longer in the public interest as a result of meaningful economic competition between providers of such service." The Commission is required "to repeal or modify any regulation it determines to be no longer in the public interest." While this provision applies to telecommunications providers, a nearly identical provision, Section 202 of the 1996 Act, applies to the Commission's media ownership regulations.

It is obvious these provisions were added to the Communications Act as tools to reduce regulation as competition developed to protect consumers. There may be – and there certainly have been – differences of opinion as to the evidentiary showings required before the Commission must *forbear* from regulation under Section 10 or *modify or repeal* a regulation under Section 11. But a difference of opinion concerning evidentiary showings does not justify a refusal to acknowledge the unmistakable deregulatory thrust of the forbearance and regulatory review provisions.

Nevertheless, for whatever reasons, the FCC has utilized the deregulatory tools only sparingly and fitfully. I don't want to rehash here all the Commission's past forbearance decisions in order to explicate the Commission's reasoning. Instead, I want to look forward and offer a remedial fix. But if you want just one illustrative example of what is wrong with the way the FCC considers forbearance petitions, look no further than the agency's June 10, 2011, *Qwest Phoenix MSA Order* denying Qwest's petition for relief from certain regulations applicable to carriers with dominant market power.

As my colleague Seth Cooper explains in considerable detail in his *Perspectives from FSF Scholars* entitled "[Forbearance Follies](#)," the Commission approached the case, consistent with the way it has treated other forbearance petitions, in a way that "could make forbearance relief virtually impossible to obtain." In the face of substantial evidence to the contrary, in its market power analysis the agency went out of its way to disregard completely the availability and use of wireless services on the basis that wireless services are not substitutable for wireline services. And the Commission placed the burden to prove the existence of competitive conditions on the proponent of forbearance, making it easier, as an evidentiary matter, to dismiss the requested relief.

Similarly, the Commission's travails with completing the 1996 Act's periodic regulatory reviews in a way that passes judicial muster are well-known. Put charitably, the Commission does not have an enviable record in this regard. Suffice it to say, they certainly have yet to be used meaningfully as a vehicle for reducing regulation except in limited circumstances.

In light of this history, Congress should amend the Communications Act to make the provisions – forbearance and periodic regulatory reviews – the viable deregulatory tools they were intended to be. This is not to suggest they should be used to embark on eliminating regulations willy-nilly and without reason. But Sections 10 and 11 (and the similar Section 202 governing media ownership regulations) need fixing.

The Solution: Revise the Forbearance and Regulatory Review Provisions

Congress could accomplish this relatively simply by leaving the existing provisions intact while adding an evidentiary presumption to each provision that would enhance the likelihood the Commission would reach a deregulatory decision. A sentence could be added at the end of Section 10(a) to the effect that: "In making the foregoing determinations, 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."

Similarly, a sentence could be added to the Section 11 regulatory review provision which says: "In making the foregoing determination, 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."

Establishing such evidentiary presumptions in Sections 10 and 11 (and Section 202) would not dictate the outcome of the Commission's assessment of any particular forbearance petition or regulatory review. And that is not the intent. But the presumptions would require the Commission to grant regulatory relief absent the presentation of convincing evidence to the effect that the requisite consumer protection and public interest showings have not been made. This should make it more difficult, for example, for the Commission to ignore or minimize the significance of evidence of wireless substitution for wireline in performing a competition analysis.

President Obama's [Executive Order No. 13563](#) ["Improving Regulation and Regulatory Review"], issued on January 18, 2011, directs agencies to review existing regulations to determine whether they are "outmoded, ineffective, insufficient, or excessively burdensome." This order was issued to carry out President Obama's injunction, as he put it in his ["Towards a 21st Century Regulatory System."](#) *Wall Street Journal* commentary, to initiate a government-wide review to "remove outdated regulations that stifle job creation and make our economy less competitive." Adoption of the revisions to Sections 10 and 11 along the lines suggested above not only would be consistent with furthering the regulatory review called for by President Obama's executive order and commentary, they are necessary if the injunction is to have any real meaning.

There are many other regulatory reform measures that have merit and warrant consideration as well. By offering this one proposal, I surely do not mean to suggest any lessening of the need for consideration of others. But I do suggest that adoption of the modest proposal put forward here would go a long way towards eliminating, in President Obama's words, "outmoded, ineffective, insufficient, or excessively burdensome" regulations.

And, after all, isn't that the very same reason that Congress included the provisions for forbearance relief and periodic regulatory reviews in the Telecommunications Act of 1996?

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