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A Proposal for Improving the FCC's Forbearance Process

by

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Beginning January 20, the Federal Communications Commission will have an opportunity to bring its regulations into closer alignment with present technological and marketplace realities that have enabled competition and consumer choice in most communications market segments. Under new leadership, the Commission can – and should – curtail costly regulations that are no longer necessary to protect consumers or competition. There is no disagreement among economists and other policy experts that such outdated, no longer necessary regulations discourage innovation and investment in digital age communications services. And, importantly, because they discourage innovation and investment, they hinder economic growth and job creation.

In the Telecommunications Act of 1996, Congress provided the FCC with two new groundbreaking tools to eliminate or curtail costly outdated regulations – Section 10, titled "Competition in Provision of Telecommunications Service," and Section 11, titled, "Regulatory Reform." The unique deregulatory tools contained in these two sections have been far too seldom used.

In a *Perspectives from FSF Scholars*, "A Proposal for Improving the FCC's Regulatory Reviews," published on January 3, 2017, we recommended that the Commission adopt the following procedural rule implementing Section 11's retrospective regulatory review

requirement: "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." Now, in our ongoing series of new reform proposals, we recommend that the Commission adopt the same form of procedural rule to implement Section 10's forbearance requirement: "In making forbearance 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." [For another in the series of new reform proposals, see "A Proposal for Trialing FCC Process Reforms."]

The proposed language for each of these procedural rules specifically tracks the relevant statutory provisions' language specifying the applicable decisional criteria to be considered in determining whether to grant regulatory relief.

Section 10 provides that the FCC "shall forbear" from applying any regulation or provision of the Communications Act to a telecommunications carrier or service if the agency determines enforcement is not necessary to ensure that charges or practices are just and reasonable or necessary to protect consumers, and if it determines that forbearance is consistent with the public interest. It is important to note the mandatory language ("shall forbear") and to understand that, as far we have been able to determine, this grant of authority to forbear from applying regulations or statutory provisions is unique among federal regulatory agencies. In other words, it is difficult to contest Congress's deregulatory intent in including Section 10 in the Communications Act.

Further evidence of Congress's deregulatory intent relates to the shot clock that governs FCC action on forbearance petitions. Under Section 10, if the Commission fails to respond to a petition seeking forbearance within one year, or within fifteen months if the Commission grants itself a three-month extension, the forbearance petition "shall be deemed granted by operation of law." So, significantly, the default position, absent Commission action, is deregulation.

Unfortunately, the FCC has been lackluster – and, at times, hostile – when it comes to granting relief from regulatory burdens under Section 10. (For that matter, as we stated in our January 3 *Perspectives*, the very same can be said for the FCC's underutilization of Section 11). 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.

Certainly without delaying action on any pending petitions, the newly reconstituted FCC should act to make the Section 10 regulatory forbearance process the viable deregulatory tool that Congress intended. To overcome pro-regulation institutional bias, in implementing Section 10, the Commission should shift the burden onto those advocating continued regulatory enforcement by adopting the following procedural rule: "In making forbearance 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."

Adopting a rule embodying this deregulatory rebuttable evidentiary presumption would not change the substantive criteria to be applied under Section 10. Therefore, the rule would not dictate the outcome of any particular forbearance petition. Like our proposal regarding Section 11, the new rule simply would establish a rebuttable evidentiary presumption that takes account of current market realities consistent with Section 10's deregulatory intent. The Commission would be required to grant forbearance relief absent the presentation of clear and convincing evidence that enforcement of the regulation is necessary to ensure reasonable charges and practices and consumer protection, consistent with the public interest.

The FCC also has authority to undertake forbearance reviews *sua sponte*. The proposed procedural rule's broad application to "forbearance determinations" therefore would include Section 10 reviews initiated by the Commission, just as it would apply to reviews of submitted petitions.

The Commission, likewise, should apply the rebuttable presumption to forbearance determinations involving wireless or "commercial mobile radio services," which are authorized by Section 332(c)(1)(A). The exercise of forbearance authority (in addition to other FCC tools such as preemption of state and local regulatory barriers) could be especially pertinent to fostering the development of new 5G wireless technology. According to a just-released Accenture study, deployment of the next generation small cell wireless infrastructure is anticipated to result in $275 billion in new investment and the creation of up to 3 million new jobs. Outdated regulatory impediments that are costly and burdensome, and that are not necessary to protect consumers or the public interest, should not be allowed to slow 5G infrastructure deployment. The Commission should forbear from applying such regulations.

The net effect of the rebuttable evidentiary presumption – that the Section 10 criteria for forbearance relief are satisfied by existing competitive conditions absent clear and convincing evidence to the contrary – would be to ensure that the forbearance review process is consistent with Congress's clear deregulatory intent. When conducting a competitive analysis under Section 10, the new procedural rule would make it more difficult for the Commission to ignore or minimize evidence, as has often been its practice. For example, the Commission has minimized the competitive effects of entry by cable operators in the voice services market – as it did in proposing new rate regulations for business data services (BDS). The new rule would similarly make it more difficult to disregard evidence of wireless substitution for wireline – as the Commission did in the *Qwest-Phoenix MSA Order* (2010). The heightened evidentiary standard would increase the need for the Commission to demonstrate convincingly a connection between current competitive market conditions and continued enforcement of the regulations at issue. Also, the Commission would be aware that its decisions would be scrutinized by the courts under the new evidentiary standard.

It is now widely recognized that the digital revolution has enabled competition and consumer choice. Various IP-enabled platforms employing fiber, cable, satellite, wireless, and other technologies compete in many market segments, rendering many telecommunications regulations no longer necessary and justifiable. Legacy regulatory compliance costs consume vital economic recourses while providing little or no discernable benefits.

Easing regulatory burdens increases opportunities for entrepreneurial investment in next-generation broadband services and technologies that enhance consumer welfare. Like our proposal with regard to improving Section 11 retrospective regulatory reviews, the procedural rule proposed here would invigorate the Section 10 forbearance process as the deregulatory tool that Congress intended. This, in turn, will promote more investment and job creation.

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Further Readings

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