Perspectives from FSF Scholars
March 10, 2025
Vol. 20, No. 14

Reprise: The FCC Should Employ Rebuttable Presumptions to Reduce Unnecessary Regulations

by

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In a *Perspectives from FSF Scholars* published on February 20, I reprised a suggestion from my 2008 law review article titled, "A Modest Plea for FCC Modesty Regarding the Public Interest Standard." There I suggested that, "in an exercise of regulatory self-restraint, going forward the agency should narrow the exercise of its public interest authority." To accomplish this deregulatory tilt, I recommended that the Commission, either through the issuance of policy statements or case-by-case adjudication, or both, indicate that it no longer serves the public's interest for the FCC to exercise unbridled public interest regulatory authority.

More often than not, the agency has deployed the delegation of indeterminate public interest authority in a way that expands, rather than narrows, its regulatory ambit.

While acknowledging there are almost certainly other candidates as well, I identified four specific areas in which the agency could achieve a less interventionist regulatory posture by narrowing the exercise of its public interest authority: (1) transaction reviews involving the transfer or assignment of licenses or authorizations; (2) periodic regulatory review proceedings; (3) forbearance relief; and (4) universal service.

Here I want to reprise another earlier, somewhat related suggestion. In my 2019 *FSF Perspectives*, "The FCC Should Employ Rebuttable Presumptions to Reduce Unnecessary Regulation," I urged the Commission to "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." I explained that "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."

While the quotes in the paragraph above were written in 2019 during President Trump's first term, he has made clear, through the issuance of executive orders and otherwise, that he views deregulatory efforts to be as important, if not more so, in his second term. As the January 31, 2025, Fact Sheet accompanying President Trump's "10 – for – one" deregulation executive order rightly declares: "Overregulation stops American entrepreneurship, crushes small business, reduces consumer choice, discourages innovation, and infringes on the liberties of American citizens."

My generic proposals for the FCC, (1) to narrow the exercise of its public interest authority and (2) also employ rebuttable evidentiary presumptions that facilitate the non-enforcement and repeal of obsolete or ill-conceived regulations are both directed towards supporting and accelerating meaningful deregulatory efforts at the Commission. Of course, there will continue to be individual proceedings in which the Commission's actions, dictated by its understanding of particular statutory mandates or otherwise, are not deregulatory in nature. But my proposals are intended to suggest new generic policy and procedural directions that facilitate implementation of a less interventionist regulatory posture. In this way, the FCC's direction would be brought more in line with the technologically dynamic competitive communications and media marketplace that now prevails.

With regard to my proposal that the Commission consider employing rebuttable evidentiary presumptions, here I am going to reproduce below (with only minor non-substantive edits) the "Introduction and Summary" from my 2019 Perspectives because it fully explicates the idea.

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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.

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."

[I]t 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.

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In order to eliminate a multitude of Analog Era legacy regulations that no longer serve to protect consumers or a enhance competition, and to achieve meaningful deregulation that comports with today's dynamic Digital Age communications marketplace, the Commission should consider employing rebuttable deregulatory presumptions.

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