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A Proposal for Improving the FCC's Regulations Impacting Small Businesses

by

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Existing law gives the Federal Communications Commission unique tools for eliminating or modifying regulations that are outdated and do not benefit consumers. However, as we have pointed out in an ongoing series of specific reform proposals in 2017, the Commission has underutilized those deregulatory tools, saddling communications providers with unnecessary restrictions and compliance burdens. For the reform proposals published so far this year, please see the list at the end of this *Perspectives from FSF Scholars*.

Under new leadership, the Commission should proactively use its deregulatory powers to reduce costly regulations and facilitate stronger investment in innovative and job-producing services and products. This is especially so with regard to small businesses, which is the focus of this *Perspectives*.

In a pair of recent *Perspectives* in this series, we proposed ways for the Commission to revitalize its [Section 10 forbearance](#) and [Section 11 biennial regulatory review](#) powers to remove obsolete legacy rules. We now propose a way for the Commission to rescind or amend burdensome regulations that significantly impact smaller providers of communications services by exercising its review powers under Section 610 of the Regulatory Flexibility Act. Our proposal calls on the Commission to conduct the required Section 610 reviews in a timely manner and to employ a

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rebuttable evidentiary presumption that market competition exists as a basis for removing unnecessary regulatory burdens.

Small enterprises offer voice, video, and data services to residential and business customers in regional and niche markets. Yet they are susceptible to regulatory imposition of what Congress called “unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses.” Providing small enterprises with relief from such burdens allows them to be more efficient and competitive. Market entry is also encouraged by minimizing unnecessary regulations.

Section 610 of the Regulatory Flexibility Act, titled “periodic review of rules,” calls for agencies to publish a plan for the periodic review of rules that “have a significant economic impact upon a substantial number of small entities.” Based on standards established by the U.S. Small Business Administration, such entities include wireline and mobile telecommunications providers with 1,500 or less employees as well as cable and other providers of video subscription services with less than \$38.5 million in annual receipts. Regulatory reviews are to be conducted “within ten years of the publication of such rules as the final rule.” According to Section 610(a): “The purpose of the review shall be to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes, to minimize any significant economic impact of the rules upon a substantial number of such small entities.”

Pursuant to Section 610(b), agencies conducting periodic reviews should consider factors such as “the continued need for the rule,” “the complexity of the rule,” and “the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.” To make its Section 610 reviews more effective in carrying out Congress’s deregulatory intent, the Commission should establish a procedural mechanism to help ensure that its consideration of Section 610(b)’s analytical factors is closely connected to recent technological advancements and current competitive conditions. The Commission should adopt a simple procedural rule governing its future reviews of rules significantly impacting a substantial number of small entities, to the effect that: “Absent clear and convincing evidence to the contrary, the Commission shall presume that the rules under review should be amended or rescinded to minimize any significant economic impact on a substantial number of small entities.”

Such a market-oriented presumption is surely justified by the competitive dynamics and innovation that characterize today’s communications marketplace. Over the last ten years, for instance, telecommunications providers and consumers have migrated from legacy TDM networks to all-IP networks. VoIP subscriptions nationwide are now nearly equal in number to switched circuit access lines. From a consumer standpoint, local and long distance voice services are no longer distinct. During the last decade, mobile networks have undergone multi-generational upgrades, with widespread 4G broadband network availability. The Apple iPhone was launched in 2007, and already close to 80% of mobile subscribers now own smartphones. With respect to voice services, nearly 50% of households are currently wireless-only.

Over the last decade cable providers have transitioned their video networks from analog to digital, and increasingly to HD video, while also transitioning from QAM transmission technology to IP-based technology. Video subscription services are now offered by cable, direct broadcast satellite (DBS), and telco video service providers. Consumers can also choose among a growing number of popular Internet-delivered video services, including Amazon Prime, Netflix, HBO Now, or Verizon's go90. Investment and innovation in wireline broadband networks has resulted in 78% of all Americans having access to fixed broadband services at speeds of 50 Mbps download/5 Mbps upload as of June 2015. In addition, cable providers have increased market share in the broadband enterprise market, spurring incumbent fiber infrastructure upgrades. Gigabit broadband potentialities and planned trials for 5G networks also call for an analysis that regards the communications market as presumptively competitive and therefore presumably free of any need for sector-specific rules that significantly impact small enterprises.

Adopting a rebuttable evidentiary presumption of market competition would not change the analytical factors to be considered under Section 610. Nor would it determine whether or not any particular rule is rescinded or how any particular rule is amended. Rather, the rule would establish a rebuttable presumption in a way that comports with the technological advancements and competitive conditions prevalent in today's communications marketplace.

Establishing the rebuttable evidentiary presumption as a procedural rule would increase the dependability of the Commission's usage of the presumption over successive periodic reviews pursuant to Section 610. The presumption would also make the Commission's periodic reviews more rigorous. The clear and convincing evidentiary standard would require the Commission to offer a stronger rationale, rooted in current competitive conditions in the market, whenever it seeks to retain and refrain from amending regulations subject to review.

The dynamism of the communications marketplace, by definition, should call into question the necessity and usefulness of regulations adopted a decade ago. Unfortunately, the Commission has a history of failing to conduct its periodic reviews "within ten years" as Section 610 requires. The last Section 610 periodic review completed by the Commission was for regulations adopted in the year 2000. In December 2016, the Commission finally issued a public notice seeking comment for its Section 10 periodic review of rules adopted between 2001 and 2004. Once its pending review of those rules is finished, the Commission still has catching up to do.

Certainly, the Commission should conduct its review of regulations from 2001-2004 with dispatch. But it should also promptly undertake a Section 610 review of more recent regulations. There is no reason why the Commission should wait until an entire decade has elapsed before reviewing rules that may have a significant impact on a substantial number of small businesses. The Commission should undertake a comprehensive review of all such rules adopted between 2005 and 2012.

Although Section 610 is directed to rules that substantially impact small enterprises, a more rigorous review process may also benefit larger communications providers. To the extent the Commission's periodic reviews result in the rescission or amending of rules that apply uniformly, both smaller and larger providers would be relieved from the imposition of unnecessary costs. Thus, all providers could increase investment in next-generation technologies

or pursue other entrepreneurial opportunities. A modest reform of this kind should not be viewed in isolation but as part of a broader reform agenda that includes revitalized regulatory review processes under Sections 10 and 11 of the Communications Act.

In sum, the Commission should promptly conduct a review of all rules significantly impacting small providers of communications services that have been adopted up through 2012. Going forward, the Commission should conduct all of its Section 610 reviews in a timely fashion pursuant to a procedural rule like this: “Absent clear and convincing evidence to the contrary, the Commission shall presume that the rules under review should be amended or rescinded to minimize any significant economic impact on a substantial number of small entities.” This rule would help establish a less regulatory environment that is more conducive to investment and innovation, and more likely to create jobs.

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Series of Proposals for Reforming Communications Policy - 2017

Randolph J. May and Seth L. Cooper, “[A Proposal for Improving the FCC’s Regulatory Reviews](#),” *Perspectives from FSF Scholars*, Vol. 12, No. 1 (January 3, 2017).

Randolph J. May, [A Proposal for Trialing FCC Process Reforms](#), FSF Blog, January 9, 2017.

Randolph J. May and Seth L. Cooper, “[A Proposal for Improving the FCC’s Forbearance Process](#),” *Perspectives from FSF Scholars*, Vol. 12, No.4 (January 17, 2017).

Randolph J. May and Seth L. Cooper, “[A Proposal for Improving the FCC’s Video Competition Policy](#),” *Perspectives from FSF Scholars*, Vol. 12, No. 5 (February 8, 2017).

Further Readings

Seth L. Cooper, “[How the FCC Can Eliminate Unnecessary Regulations](#),” *Perspectives from FSF Scholars*, Vol. 11, No. 43 (November 10, 2016).

Randolph J. May, “[A Blueprint for Trump Communications Reform: Unnecessary Regulations Should Be Switched Off](#),” *Perspectives from FSF Scholars*, Vol. 11, No. 41 (November 21, 2016).