

**The Free State Foundation**  
**P. O. Box 60680**  
**Potomac, MD 20859**  
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August 1, 2017

**Re: WC Docket No. 17-108; Restoring Internet Freedom**

**EX PARTE WRITTEN SUBMISSION**

Ms. Marlene Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Dear Ms. Dortch:

Enclosed you will find for filing in the above-referenced proceeding and attached as Appendix A a *Perspectives from FSF Scholars* co-authored by me and my Free State Foundation colleague Seth Cooper. The *Perspectives*, titled “D.C. Circuit Ruling Supports FCC’s Use of Deregulatory Presumptions,” was published on July 27, 2017, and is available on FSF’s website here:

[http://freestatefoundation.org/images/D.C. Circuit Ruling Supports FCC s Use of Deregulatory Presumptions\\_072717.pdf](http://freestatefoundation.org/images/D.C._Circuit_Ruling_Supports_FCC_s_Use_of_Deregulatory_Presumptions_072717.pdf)

The attached *Perspectives* explains that a recent decision of the Court of Appeals for the District of Columbia Circuit bolsters the case for the Commission’s legal authority to employ rebuttable evidentiary presumptions, and the *Perspectives* urges the agency to adopt such presumptions when there is evidence markets are competitive.

Here is the first paragraph of the *Perspectives* attached as Appendix A:

“When there is evidence that markets are competitive, the Federal Communications Commission’s policies should treat regulatory intervention as the exception. The recent decision by the D.C. Circuit in *NATOA v. FCC* upheld the authority of the Commission to adopt rebuttable presumptions of competitiveness in local cable markets in order to better match regulatory policy with market realities. This D.C. Circuit decision affirming the FCC’s *Effective Competition Order* (2015) is significant because its reasoning bolsters the Commission’s legal authority for applying deregulatory rebuttable presumptions on a broader basis as a means of reducing unnecessary regulation. This would include oversight of Internet service providers’ practices if the Commission decides to retain any circumscribed regulatory authority over Internet providers in the *Restoring Internet Freedom* rulemaking proceeding.”

Thank you for including this submission in the *Restoring Internet Freedom* record.

**Sincerely,**

/s/ Randolph J. May

Randolph J. May

President, The Free State Foundation  
The Free State Foundation

cc: The Honorable Ajit Pai  
The Honorable Mignon Clyburn  
The Honorable Michael O’Rielly



***Perspectives from FSF Scholars***  
***July 27, 2017***  
***Vol. 12, No. 24***

**D.C. Circuit Ruling Supports FCC's Use of Deregulatory Presumptions**

**by**

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

When there is evidence that markets are competitive, the Federal Communications Commission's policies should treat regulatory intervention as the exception. The recent decision by the D.C. Circuit in *NATOA v. FCC* upheld the authority of the Commission to adopt rebuttable presumptions of competitiveness in local cable markets in order to better match regulatory policy with market realities. This D.C. Circuit decision affirming the FCC's *Effective Competition Order* (2015) is significant because its reasoning bolsters the Commission's legal authority for applying deregulatory rebuttable presumptions on a broader basis as a means of reducing unnecessary regulation. This would include oversight of Internet service providers' practices if the Commission decides to retain any circumscribed regulatory authority over Internet providers in the *Restoring Internet Freedom* rulemaking proceeding.

The FCC's *Effective Competition Order* replaced the Commission's pro-regulatory presumption that cable providers can be rate regulated for lack of effective competition with a rebuttable presumption that local cable markets are subject to effective competition. The deregulatory presumption was based on the fact that two nationwide direct broadcast satellite providers (DBS), holding a nationwide market share of 34% of video service subscribers, compete with incumbent cable operators. Under the rebuttable presumption of effective competition, local franchising authorities are prohibited from regulating basic cable tier and equipment rates unless they present actual evidence demonstrating a lack of effective competition in their area.

In *NATOA v. FCC*, the D.C. Circuit ruled on July 7, 2017, that the *Effective Competition Order's* deregulatory presumption is a permissible construction of Section 543 of the Communications Act. The court also concluded that the presumption of effective competition was reasonably

supported by market evidence, recognizing that the presumption nonetheless was capable of being rebutted where warranted by evidence in local cable markets. The court thus rejected claims that the order was arbitrary and capricious under the Administrative Procedure Act.

Importantly, the reasoning in *NATOA v. FCC* provides legal support for regulatory reform proposals which we suggested in January 2017 regarding Sections 10 and 11 of the Communications Act. Those statutory sections are deregulatory tools that have been woefully underutilized by the Commission. Adopting rebuttable evidentiary presumptions as procedural rules for implementing Sections 10 and 11 would invigorate the sensible deregulatory orientation of those sections with more durable processes from one review to the next.

Deregulatory evidentiary presumptions can also be implemented in other contexts to reduce regulatory burdens and prevent agency overreach. For example, in the *Restoring Internet Freedom* proceeding, to the extent that the Commission retains any regulatory authority over Internet service providers, it should consider incorporating some form of deregulatory evidentiary presumption into whatever narrowly-circumscribed oversight regime it might establish.

Section 10 provides that the FCC “shall forbear” from applying any regulation or provision of the Act to a telecommunications carrier or service “if the Commission 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. In a *Perspectives from FSF Scholars* titled “[A Proposal for Improving the FCC’s Forbearance Process](#),” we recommended that the Commission adopt the following 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.”

Section 11 requires the Commission periodically to review telecommunications regulations and states that the agency “shall repeal or modify any regulation it determines to be no longer necessary in the public interest.” In a *Perspectives* titled “[A Proposal for Improving the FCC’s Regulatory Reviews](#),” we recommended that the Commission adopt a similar procedural rule for 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.”

The proposed language for these proposed procedural rules tracks closely with the language of Sections 10 and 11 that specifies the applicable criteria for deciding whether to grant regulatory relief. Establishing these procedural rules will not change the substantive criteria of Sections 10 and 11 so they will not be outcome determinative. Rather, these rules will merely establish rebuttable evidentiary presumptions that match today’s widely-accepted market realities.

The D.C. Circuit’s legal reasoning in *NATOA v. NCTA* bolsters the Commission’s statutory authority to adopt rebuttable presumptions as procedural rules for implementing Sections 10 and

11. In *NATOA v. FCC*, the court stated that “[b]ecause Congress has not spoken directly to the question whether the Commission may use a rebuttable presumption in lieu of case-by-case findings of fact, we analyze the Commission’s decision under *Chevron* step two.” Specifically, the Court concluded that the statutory requirement that the Commission “finds” there is effective competition before terminating regulation constituted an ambiguity warranting application of *Chevron*’s deferential standard of review. The court then concluded that the Commission’s adoption of a rebuttable presumption was a permissible construction of Section 543.

Similarly, Congress has not spoken directly to whether the Commission may use rebuttable presumptions “if the Commission determines” that its Section 10 criteria is satisfied. Nor has Congress spoken directly to the use of rebuttable presumptions regarding “any regulation it determines” is no longer necessary in the public interest under Section 11. Therefore, the Commission’s adoption of a rebuttable presumption in connection with implementing those sections most likely would be upheld as permissible statutory constructions. This result would fit with prior D.C. Circuit rulings, such as *Ad Hoc Telecommunications Users Committee v. FCC* (2009) and *Cellco Partnership v. FCC* (2004), which have applied *Chevron* to the Commission’s decisions interpreting Sections 10 and 11 more generally.

Further, the D.C. Circuit recognized the Commission’s adoption of a rebuttable presumption of effective competition in local cable markets responded to a “time sensitive situation” of local authorities enforcing rate regulations where effective competition exists “in defiance of the ‘[p]reference for competition’ made express in the Communications Act and to the detriment of consumers.” Certainly, Sections 10 and 11 both reflect the Act’s preference for competition. The very purpose of both sections is to eliminate or reduce regulatory burdens. Language in Section 10 providing that the Commission “shall forbear” from enforcing regulations when the statutory criteria is met – as well as Congress’s inclusion of a shot clock for deciding forbearance petitions – clearly evince a deregulatory tilt that a rebuttable presumption would help fulfill. Likewise, language in Section 11 requiring that the Commission “shall repeal or modify” regulations no longer necessary in the public interest evinces a deregulatory preference that justifies application of a rebuttable presumption.

The D.C. Circuit’s reasoning in *NATOA v. NCTA* also supports the compatibility of rebuttable presumptions as procedural rules for implementing Sections 10 and 11 with the Administrative Procedure Act and general administrative law principles. Citing D.C. Circuit precedent, the court stated that an agency “may only establish a presumption if there is a sound and rational connection between the proved and inferred facts.” The court therefore rejected claims that the Commission’s rebuttable presumption was arbitrary and capricious because the Commission made a justifiable inference of effective competition from a 34% nationwide market share for non-cable video providers as well as market presence of two nationwide DBS providers.

Adoption of rebuttable presumptions to guide the Commission’s implementation of its Section 10 and 11 determinations likewise would be based on strong evidence of competitive market conditions:

- Wireline competition: The FCC’s *Voice Telephone Services Report* (2017) indicates that by the middle of 2016, 60 million consumers subscribed to Voice over Internet Protocol

(VoIP) services compared to 62 million subscribers to voice services using traditional telephone switched access lines.

- Wireless competition: Data collected in the FCC's *Nineteenth Wireless Competition Report* (2016) reveals that, as of December 2015, 97.9% of the U.S. population lived in census blocks served by three or more mobile voice service providers and 93.4% lived in census blocks served by four or more mobile providers.
- Wireless competition with wireline: As of December 2016, nearly 51% of U.S. adults lived in households that are wireless only, according to a Center for Disease Control-National Center for Health Statistics survey.

Surely, a rational connection exists between the foregoing market data and a presumption of market competitiveness – a presumption which could be overcome when proffered evidence warrants.

Market competition between fiber, cable, satellite, wireless, and other IP-based technologies provides consumers with choices that render legacy telecommunications regulations unnecessary. Indeed, the costs of complying with legacy regulations, including mandates to maintain copper-based telephone services, divert investment from more advanced technologies and higher-demand services. Improving the Section 10 forbearance and Section 11 review processes by adopting the procedural rule recommended here would ease such regulatory burdens and expand opportunities for investment in next-generation broadband technologies and services.

Rebuttable presumptions of market competitiveness should be considered in other contexts as well, including in the *Restoring Internet Freedom* proceeding. To the extent the Commission determines it possesses any authority to oversee the practices of Internet services providers and chooses to exercise it, a rebuttable presumption that such practices are commercially reasonable would reflect the broadband market's competitive conditions. Such deregulatory rebuttable presumptions are a way to help prevent the Commission, in an excess of regulatory zeal, from overreaching in the absence of evidence of a market failure.

The D.C. Circuit's recent decision in *NATOA v. FCC* provides the Commission with further support for implementing rebuttable deregulatory presumptions that reflect the realities of today's Digital Age marketplace. By adopting such presumptions, the FCC will take an important step to enhance investment, innovation, and consumer welfare.

\* Randolph J. May is President of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.

\*\* Seth L. Cooper is a Senior Fellow of the Free State Foundation.

## **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 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).

Randolph J. May and Seth L. Cooper, “[A Proposal for Improving the FCC’s Regulations Impacting Small Businesses](#),” *Perspectives from FSF Scholars*, Vol. 12, No. 6 (February 13, 2017).

Randolph J. May and Seth L. Cooper, “[A Proposal for Spurring New Technologies and Communications Services](#),” *Perspectives from FSF Scholars*, Vol. 12, No. 7 (February 21, 2017).

Randolph J. May, *Perspectives from FSF Scholars*, “[A Proposal for Improving the FCC’s Merger Review Process](#),” Vol. 12, No. 9 (March 20, 2017).

## **Further Readings**

Randolph J. May and Seth L. Cooper, “[Six Ways Chairman Pai Can Stop FCC Overreach](#),” *Perspectives from FSF Scholars*, Vol. 12, No.8 (March 1, 2017).

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).

Randolph J. May, “[Dealing Effectively With Effective Competition](#),” FSF Blog (June 8, 2015).

Seth L. Cooper, “[FCC Should Adopt the Deregulatory Proposal for Local Cable Rates](#),” *Perspectives from FSF Scholars*, Vol. 10, No. 15 (April 9, 2015).

Randolph J. May, “[A Modest Proposal for FCC Regulatory Reform: Making Forbearance and Regulatory Review Decisions More Deregulatory](#),” *Perspectives from FSF Scholars*, Vol. 6, No. 10 (April 7, 2011).