Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Encouraging the Provision of New Technologies and Services to the Public	)	GN Docket No. 18-22

COMMENTS OF
THE FREE STATE FOUNDATION[*]

These comments are submitted in response to the Commission's request for public comments regarding its Notice of Proposed Rulemaking to establish guidelines and procedures for implementing Section 7 of the Communications Act. The proposal's purpose is to encourage new technologies and services. While these comments urge the Commission to adopt its Section 7 proposal, they also urge the Commission to modify its proposal to better achieve Section 7's purposes and to overcome regulatory inertia against prompt agency approval of new technologies and services.

More specifically, we recommend that the Commission adopt a rebuttable presumption that applications and permits determined by the Commission to offer a "new technology or service" within the scope of Section 7 are in the public interest absent clear and convincing evidence to the contrary. Also, we recommend the Commission adopt a "deemed granted" provision that would be triggered if the Commission fails to act on the merits of a petition or application within Section 7(b)'s one-year timeframe.

[*] These reply comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

The Notice recognizes, correctly, that "outdated technical rules and regulations can require proponents of new technologies or services to either seek a waiver of those rules or petition the Commission to conduct a rulemaking." The Notice also rightly observes that competitor petitions "to deny or oppose the introduction of new technologies or services" can delay or prohibit public interest benefits to consumers.

Section 7 of the Communications Act provides:

> (a) It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest.
> (b) The Commission shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed. If the Commission initiates its own proceeding for a new technology or service, such proceeding shall be completed within 12 months after it is initiated.

Proactive use of Section 7 could prove useful at different points in the ongoing development and rollout of next-generation broadband services, including innovative 5G wireless services, that may employ new technologies. In a February 2017 *Perspectives from FSF Scholars*, attached as Appendix A, we proposed that the FCC should clear away regulatory obstacles to market investment innovation by relying more on its Section 7 authority. The Commission's proposed rulemaking to invigorate Section 7 for promoting new technologies and services is therefore a welcome development.

The proposed rules include basic filing requirements and a 90-day review led by the Office of Engineering and Technology (OET) to determine if a proposed technology or service is "new" and within the scope of Section 7. Sensibly, the proposed rulemaking avoids prescribing strict criteria for what constitutes a "new technology or service." An overly formulaic approach could constrict Section 7's scope and thus fail to encourage

innovation. If the determination is positive, the Commission will "decide within a year of the filing date the appropriate course of action with respect to the petition or application." To their credit, the proposed rules would allow pending applications and petitions to be considered under Section 7. Consistent with Section 7(a), opponents would bear the burden of showing that the technology or service is not in the public interest.

In all, the proposed rulemaking to breathe new life into Section 7 merits the Commission's approval. At the same time, the proposal's goal of spurring new technology and service offerings would be furthered by incorporating additional de-regulatory measures to overcome bureaucratic inertia. The Commission should adopt a rebuttable evidentiary presumption that applications and permits determined by the Commission to offer a "new technology or service" within the scope of Section 7 are in the public interest. A procedural rule embodying such presumption would read substantially as follows: "Absent clear and convincing evidence to the contrary, the Commission shall presume that a technology or service proposed in an application or petition under Section 7 which it has determined to be new within the meaning of Section **7** is in the public interest and that an application or petition seeking to deploy or offer such technology or service will be granted."

The presumption could be rebutted by the proffering of evidence that the proposed new technology or service is not in the public interest. Thus, the procedural rule would not dictate ultimate outcomes.

Surely, adoption of the presumption in connection with Section 7 is in keeping with the agency's general rulemaking authority.[1] The reasoning in *NATOA v. FCC* (2017)

[1] 47 U.S.C. § 154(i).

also supports the Commission's authority. In that case, the D.C. Circuit upheld the Commission's rebuttable presumption of competitiveness in local cable markets under Section 543 because "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."[2] That statutory ambiguity warranted *Chevron*'s deferential review standard and the presumption was deemed a permissible construction. Similarly, Congress has not spoken directly to whether the Commission may use a rebuttable presumption in connection with Section 7. Adopting such a presumption would therefore be a permissible construction.

Also, the Commission should adopt a "deemed granted" provision that would be triggered if the agency fails to act on the merits of a petition or application within Section 7(b)'s one-year timeframe. A deemed granted provision would help make Section 7's timeframe meaningful while preserving agency authority to act prior to its expiration.

By adopting its proposal, including these modifications, the Commission can further Section 7's policy of promoting new technologies and services.

Respectfully submitted,

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[2] 862 F.3d 18, 25 (D.C. Cir. 2017).

Perspectives from FSF Scholars
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A Proposal for Spurring New Technologies and Communications Services

by

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So far this year we have published five pieces in our ongoing series of proposals for specific communications policy reforms and Federal Communications Commission process reforms. Each of the reform proposals can be implemented by the FCC under its existing authority. The previous proposals, with links, are listed at the end of this piece.

Here we offer a sixth proposal for consideration as the new FCC seeks to reorient the agency's policies and practices in a way that encourages more innovation and more investment in new technologies and services. We propose that the FCC rely, more so than in the past, on Section 7 (47 U.S.C. §157) of the Communications Act to spur the development and implementation of new technologies and services. By doing so, the Commission would contribute to furthering the nation's competitiveness, economic growth, job creation, and social well-being.

Section 7, titled "New Technologies and Services," was added to the Communications Act in 1983. The section provides in its entirety as follows:

> (a) It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this chapter shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

> (b) The Commission shall determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed. If the Commission initiates its own proceeding for a new technology or service, such proceeding shall be completed within 12 months after it is initiated.

Note the following key features of Section 7: First, it applies both to new technologies and services. Second, a party opposed to a new technology or service bears the burden of demonstrating it is inconsistent with the public interest. Third, the Commission must act in a timely manner (if one year is considered timely in today's technologically dynamic environment!), regardless of whether the agency is considering a petition or application proposing a new service or technology or whether the Commission initiates a proceeding on its own.

In our pieces suggesting rule changes with regard to the conduct of Section 10 (forbearance) and Section 11 (periodic regulatory review) proceedings, we pointed out that these two provisions – clearly intended by Congress to be deregulatory tools – have been underutilized by the Commission. Section 7, which was added to the Communications Act thirteen years before Sections 10 and 11, is just as underutilized.

In then-Commissioner (now Chairman) Ajit Pai's maiden speech in July 2012, he highlighted Section 7, stating that "many communications lawyers don't know what it is." Quoting Section 7's text, Chairman Pai called the provision "the neglected stepchild of communications law." And he added:

> "The message from Congress is clear: The Commission should make the deployment of new technologies and services a priority, resolving any concerns about them within a year."

While acting judiciously, the Commission should rely on this "neglected stepchild" more than it has in the past to spur the development of new technologies and service offerings. We don't want to offer here a catalog of possibilities. But certainly Section 7 is implicated in proceedings involving transitions from older technologies to new ones, including the ongoing IP transition. Had the Commission heeded Congress's intent in adopting Section 7, the IP transition proceeding would not have been conducted at such a decidedly leisurely pace.

Reliance on Section 7 could prove useful at different points in the ongoing development and rollout of next-generation 5G wireless services and other new broadband services that may employ new technologies.

Establishing a rigid regulatory criterion for defining a "new technology or service" is most likely impracticable. A formulaic approach could end up constricting the scope of Section 7 and hindering innovation rather than encouraging it. In any event, in applying Section 7, the Commission should deem it part of the opponents' burden to show that the technology or service at issue is not new.

In closing, it is useful again to highlight key features of Section 7: the timeliness requirement, and the burden placement on those opposing a new technology or service. These features are important not only because of what they dictate with regard to carrying out Section 7's congressional direction in any particular instance. They are also significant markers with respect to the way the Commission should think about implementing other Communications Act provisions and structuring its own rules and processes.

In today's Digital Age, timeliness of Commission action is more important than ever before. Otherwise, rapid changes in existing markets, or the development of entirely new markets, outpace the agency's decisionmaking, rendering the agency's actions meaningless or even downright harmful. Also, as we have pointed out with regard to implementation of Sections 10 and 11, with competition and consumer choice increasingly the norm across the communications landscape, to enhance consumer welfare, the Commission should rely more on rebuttable evidentiary presumptions favoring marketplace competition rather than on regulatory mandates.

In other words, timely agency actions and deregulatory defaults should be guideposts for the new FCC.

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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).

Randolph J. May and Seth L. Cooper, "A Proposal for Impacting the FCC's Regulations Impacting Small Businesses", *Perspectives from FSF Scholars*, Vol. 12, No. 6 (February 13, 2017