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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.

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(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).