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The FCC Should Revive Notices of Inquiry

by

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On September 30, the Federal Communications Commission (FCC) issued a [Notice of Inquiry](#) (NOI) in a new proceeding styled, “Spectrum Requirements for the Internet of Things.” The Notice seeks public comment regarding current and future spectrum needs “to enable better connectivity relating to the Internet of Things (IoT).” More specifically, it invites comments that evaluate: (1) whether adequate spectrum is available for commercial wireless services that could support the growing Internet of Things or, if not, how best to make adequate spectrum available; (2) what regulatory barriers exist to providing needed spectrum; and (3) what role unlicensed and licensed spectrum should play in supporting the growth of IoT.

In case you’re wondering, the FCC explains at the outset that the Internet of Things “refers to a system of Internet-connected devices that are able to collect and transfer data.” It then goes on to describe all the far-reaching IoT applications that, if you are like me, you’ve probably never imagined. [See paras. 2-3] And it explains that, because mobility is integral to many future IoT applications, wireless connections are crucial. [See para. 4] Hence, the need for adequate

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spectrum, especially including unlicensed spectrum that is the “infrastructure” for the ubiquitous WiFi connections upon which we already are so dependent and likely to become even more so.

Enough said in this venue about the substance of this new IoT NOI (that’s almost a tongue-twister). Here I want to make a point regarding administrative law and regulatory process that the FCC’s new NOI called to mind. Historically, the Commission employed wide-ranging, future-oriented NOIs much more frequently than it has in recent years. Now they are issued only sparingly—and it’s worth noting that Congress required the Commission to issue the IoT NOI. (Indeed, many of the agency’s notices that otherwise might be “counted” as NOIs are, in fact, responsive to congressional directives that follow the same query and response format year after year. They are not really new notices of inquiry in the sense I am addressing here.)

Of course, Notices of Inquiry, which at many, if not most, other federal agencies are variously denominated “Advanced Notices of Proposed Rulemaking” (ANPRM) or “Requests for Information” (RFI) or some such, are not required by the Administrative Procedure Act, or even mentioned by the statute. But as [Administrative Conference Recommendation 2018-7, “Public Engagement in Rulemaking”](#) states, ANPRMs and RFIs (and presumably NOIs) generally may be useful when an agency is determining whether to proceed at all and, if so, what approach to take. Or when the agency has formulated one or more tentative regulatory options and seeks input on which option to propose. Recommendation 2018-7 states that these preliminary devices “may be particularly beneficial when agencies seek additional information to identify areas of concern, compare potential approaches to problems, and evaluate and refine regulatory proposals.”

On the FCC’s website, its [Rulemaking Process page](#), consistent with the ACUS Recommendation, states that “we may release an NOI prior to the issuance of an NPRM” and that “we use them to get early public participation for a variety of reasons,” including when “we want comments on how to solve a problem before making a proposal; have identified a wide range of alternatives and want to narrow the choices before making a proposal; need additional information to help analyze the problem and potential solutions.”

I submit that the FCC should not be quite so parsimonious in using the NOI vehicle. According to the [Report](#) submitted by Professors Michael Sant’Ambrogio and Glen Staszewski accompanying ACUS Recommendation 2018-7, other agencies apparently employ this vehicle much more frequently than the FCC. [See, for example, pages 50-51 of the Report.] In an environment in which down-the-pike potential or likely (but nevertheless uncertain) technological and marketplace developments play a substantial role in shaping future-oriented policy options, NOIs might serve a useful function.

There are others, but here, for illustrative purposes, is one candidate I have in mind. Without going into all the gory details, the FCC-administered Universal Service programs, which provide about \$9 billion in annual subsidies primarily to support deployment and access to telecommunications and Internet services in high-cost rural areas and for low-income persons, are broken. The reason is simple. The program is supported by fees (taxes, really) assessed on the revenues collected by carriers from traditional telephone services, but not Internet access

services. Long story short, usage of traditional telecommunications services has diminished rapidly, while Internet access usage continues to soar, so that the revenue base on which the fees are collected is rapidly shrinking—and the subsidies funded by the Universal Service program continue to grow. Hence, the fees assessed to end users on their bills for telecom usage have grown from about 7% in the early 2000s to a whopping 30% now. [For more on all this, see a recent [Free State Foundation Perspectives](#) by Professor Justin (Gus) Hurwitz, a member of FSF’s Board of Academic Advisors.]

In an [op-ed](#) this past May, FCC Commissioner Brendan Carr offered an interesting idea for funding deployment and upgrades to our nation’s broadband infrastructure, which conceivably could replace, or at least supplement, the current troubled Universal Service programs. In one way or another, he wants to require the companies he refers to as Big Tech to pay fees for their use of the broadband infrastructure. Here’s the rationale for his idea:

Big Tech has been enjoying a free ride on our internet infrastructure while skipping out on the billions of dollars in costs needed to maintain and build that network. Indeed, one [study](#) shows that the online streaming services provided by just five companies—Netflix, YouTube, Amazon Prime, Disney+ and Microsoft—account for a whopping 75 percent of all traffic on rural broadband networks. The same study shows that 77-94 percent of total network costs are related to adding capacity or otherwise supporting the delivery of those streaming services. Ordinary Americans, not Big Tech, have been footing the bill for those costs. Yet Big Tech derives tremendous value from these high-speed networks. Indeed, Facebook, Apple, Amazon, Netflix and Google generated nearly \$1 trillion in revenues in 2020 alone—an almost 20 percent increase over the prior year. It would take just 0.009 percent of those revenues to eliminate entirely the unsustainable 30 percent tax that currently hits consumers on their monthly bills.

To me, Commissioner Carr’s idea, at the very least, deserves serious consideration, and Jessica Rosenworcel, the Acting Chair of the Commission, has called it “intriguing.” There are a host of issues it raises that deserve careful thought. Which entities would be required to pay the subsidies under the new regime—only “Big Tech” and how big is Big Tech? What facilities and services will be subsidized with the additional fees? Does the Commission have the authority to implement Commissioner Carr’s idea, or any part of it, under the current Communications Act? Even if the agency does, for such major changes in funding Universal Service programs, as a matter of ensuring a degree of political accountability, as well as stability, is it preferable for Congress to legislate such changes?

Since Commissioner Carr put forward his idea, it has generated much discussion—buzz, as we say—but not in the context of a Commission proceeding. So, especially since the Acting FCC Chair characterized the idea as intriguing, why not initiate a Notice of Inquiry asking, in a neutral manner, all the pertinent questions? Doing so would allow interested parties an opportunity to provide information and analysis, without having to defend or attack particular proposals based on already-hardened positions. This likely will be helpful to the FCC, and Congress too, in focusing on what almost all observers agree are needed changes to the existing Universal Service programs.

And, to boot, initiating an NOI on an important matter like this, without a congressional directive, might be a spur for the Commission to use such notices, where appropriate, in the future as an important tool in its decision-making toolkit.

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