

Responses to Questions for the Record of

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The Honorable Henry Waxman

Section 13(a)(1)(A) of the draft legislation effectively requires the FCC to issue a Notice of Inquiry (NOI) for every new rulemaking.

1. Can you think of situations in which an NOI confers no benefit and unnecessarily leads to delay? For example, if the FCC is looking to update technical rules that would re-designate certain spectrum from voice to broadband services, would the requirement for the FCC to issue a NOI really contribute to the process?
2. What happens when the FCC has to address routine matters, such as fee proceedings, or refresh the record in an already open proceeding? Would an NOI still be necessary in such instances?

My reading of Section 13(a)(1)(A) does not support the conclusion that it “effectively requires the FCC to issue a Notice of Inquiry (NOI) for every new rulemaking.” The draft provision only requires an NOI, in fact, when all of several other conditions *have not* been met.

Under the draft provision, a notice of proposed rulemaking (NPRM) would not require an NOI in situations where the Commission can simply identify:

- (1) A prior notice of proposed rulemaking issued during the previous 3 years of which the NPRM is a “logical outgrowth”

Or

- (2) A prior notice on a petition for rulemaking issued during the previous 3 years of which the NPRM is a “logical outgrowth”

Or

(3) An order of a court reviewing action by the Commission or otherwise directing the Commission to act during the previous 3 years of which the NPRM is issued “in response”

Or

(4) A finding that the propose rule or amendment “will not impose additional burdens on industry or consumers”

Or

(5) “For good cause, that a notice of inquiry is impracticable, unnecessary, or contrary to the public interest.”

Satisfying any one of these five broad alternatives excuses the Commission from the need to precede an NPRM with an NOI.

These exceptions strike a reasonable balance between the Commission’s need for flexibility and the goal of improved agency efficiency with the equally important and essential goals of improving the transparency of Commission rulemakings and ensuring adequate opportunity for notice and comment before the agency signals its determination to act.

As noted in my written testimony, the FCC is unique among independent federal agencies in both the volume of its rulemakings and the lack of minimal analytic rigor that is too often associated with the agency’s determination of (1) the need for regulation, (2) the scope of the regulation, or (3) the choices it makes among alternative regulatory solutions.

That failing is amplified by the sheer volume of FCC rulemakings. According to a recent longitudinal study from the Administrative Conference of the U.S., the FCC issued 421 final rules between 2007 and 2012--the most final rules of any independent federal agency. To put that number in perspective, the FCC issued nearly three times the number of final rules as did the Securities and Exchange Commission, which was second with 117 during the same period.¹

Compounding the problem further, the FCC is the only major independent agency that is not required to include cost-benefit analysis in its rulemakings, and the only such agency that does not regularly do so even absent a statutory requirement.²

Until such time as the agency joins the rest of the federal government in conducting this most basic form of economic impact analysis for its proposed rules, it would seem particularly urgent

¹ See Curtis W. Copeland, *Economic Analysis and Independent Regulatory Agencies* (April 30, 2013), Table I at p. 10, available at <http://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf>.

² *Id.* at p. 55, Table 3 at p. 56, p. 63, Table 4 at p. 64, p. 102-105, 108-109, 119-120,

to ensure the FCC first collects essential information about the potential impact of a rulemaking on affected parties and consumers before actually proposing the new rules. The mechanism of an NOI that precedes an NPRM is an effective and efficient mechanism for doing so.

The FCC itself seems to appreciate the danger of proposing regulations absent the kind of economic record regularly compiled by other agencies before they take action. As the ACUS report notes:

Another FCC official said the primary problem they have in doing analyses in certain areas (e.g., spectrum allocation) is that they are regulating in new space with new technology, there is “no record there,” and therefore nobody knows how to quantify benefits or costs with any degree of precision. In such cases, he said, said [sic] they try to put a lower bound on benefits, and an upper bound on costs, to know whether the rule would produce positive net benefits.³

Without more details, it is not possible to address the specific hypotheticals posed in questions (1) and (2). However, in all three cases—the re-designation of spectrum, fee proceedings, and refreshing the record in an already open proceedings—at least one of the five alternative conditions listed above would seem likely be satisfied. If that is the case, then the FCC would not, under the proposed Section 13(a)(1)(A), be required to issue an NOI prior to proceeding with a rulemaking. In such cases, the FCC need simply identify which of the five exceptions it was invoking, and, where required, point to the appropriate source.

³ *Id.* at 105.