

Dec. 2, 2013

*via electronic mail*

Diane Cornell, Special Counsel  
Office of Chairman Tom Wheeler  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: A Call for Input: Improving Government Efficiency at the FCC  
Improving the Process for Handling Petitions for Rulemaking  
Enabling Electronic Filing for all Proceedings**

Dear Ms. Cornell,

The Samuelson-Glushko Technology Law and Policy Clinic (TLPC) commends Chairman Wheeler's recent decision to solicit public input on reforming and improving the efficiency of the Commission's processes and we appreciate your diligent work toward that end.<sup>1</sup> Following up on our telephone conversation of Nov. 19, we would like to highlight two areas of possible reform for your consideration: (1) maintaining status information and implementing a shot clock for placing petitions for rulemaking on public notice for comments—i.e., before the Commission addresses their substantive merits; and (2) enabling electronic filing in all dockets.

**Status Information and a Public Notice “Shot Clock” for Petitions for Rulemaking**

Entrepreneurial businesses of all sizes seeking to enter the technology marketplace with innovative products and services often must seek Commission approval, particularly where a technology involves use of the wireless spectrum. Often, the approval required is a change in the Commission's rules.

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<sup>1</sup> Diane Cornell, *A Call for Input: Improving Government Efficiency at the FCC* (Nov. 18, 2013), available at <http://www.fcc.gov/blog/call-input-improving-government-efficiency-fcc>.

The process for obtaining such an approval initially requires a business to file a petition for rulemaking, the Commission to place the petition on public notice, and the public to file comments. Those initial steps are followed by a sequence of additional steps leading to a Commission decision on the substance of the proposed rule change.

We do *not* suggest any changes to the sequence of additional steps the Commission takes to address the substance of a petition. We recognize that those steps are necessarily time-consuming in many cases; their outcome may be uncertain because of the potentially complex and contentious nature of the proposed rule changes and the need for the Commission to carefully deliberate on their potential impact.

Rather, we propose that the Commission focus narrowly on reforming the process of placing petitions on public notice and soliciting comment. The timing of these initial steps is under the Commission's control. Moreover, the timing of the process is critical to the early survival of entrepreneurs whose technologies depend on Commission approval.

More specifically, the success of these entrepreneurs depends on investments from venture capitalists and other early stage (e.g., "angel") investors. These investors provide early funding in the hope that the entrepreneurs will eventually be profitable and compensate the investors for the risk they have taken. If the initial steps of the Commission's approval process are too slow or unpredictable, however, investors may prematurely cut off funding even if the underlying technologies and proposed businesses built on those technologies appear promising in the long term.

Businesses and investors currently suffer from a lack of transparency and associated uncertainty as to when—or even whether—critical petitions for rulemaking will be placed on public notice. Without the comments submitted in response to those notices, businesses and investors also lack knowledge of the initial extent of public support or opposition to the Commission's approval of necessary rule changes. Accordingly, we propose two straightforward procedural reforms that could address these issues and

provide additional certainty to businesses and investors without unduly burdening the Commission.

First, the Commission could implement a centralized, publicly accessible repository of information on the status of petitions, including their filing date, Commission actions taken to date, links to public comments filed on the petitions, and so on. Such a repository would provide both businesses and investors with a transparent source for essential information about critical petitions and serve as a reference point for how similar petitions are progressing. This information would help businesses and investors make more informed decisions about when to stand by a particular technology that is likely to succeed or wind up activities for a technology that is likely to fail. Providing this repository would serve both President Obama’s “commit[ment] to creating an unprecedented level of openness in government” and Chairman Wheeler’s efforts to “encourage[e] investment and innovation” in the telecommunications sector.<sup>2</sup>

Second, the Commission could create additional up-front certainty for businesses and investors by setting a “shot clock” for the relevant bureau to make a threshold determination that a petition is non-frivolous and put out a public notice seeking comment on the petition. The initial comments on a petition (or lack thereof) are likely to provide additional useful signals to businesses and investors that a particular technology is well-positioned to receive approval, or that it will likely encounter technical or other roadblocks during the approval process.

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This shot clock is well within the spirit, if not the letter, of the Commission's rules. Rule 1.403 generally requires petitions for rulemaking meeting the requirements of Rule 1.401 to be given a file number and "promptly thereafter" placed on public notice.<sup>3</sup>

While Rule 1.403 does not specify precisely how long a period is contemplated by "promptly thereafter," we believe that a period of no longer than 90 days would be reasonable in light of the limited, generally ministerial conclusions required under Rule 1.401. 1.401(a)-(d)'s requirements merely set forth general pleading requirements, compliance with which should be easily and quickly ascertained.<sup>4</sup>

Rule 1.401(e) also affords the Commission the ability to deny petitions that "are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission." However, Rule 1.401(e) was enacted to quickly "relieve the public of needless effort in the preparation of comments on [frivolous] petitions, as well as [to] obviate[e] Commission consideration of those comments," not to delay placing non-frivolous petitions on notice.<sup>5</sup> Because determinations of mootness, prematurity, repetition, and frivolity can be made in relatively rapid order, imposing a reasonable shot clock for those determinations would substantially serve the public interest without significantly burdening the Commission's resources.

### **Enabling Electronic Filing**

Finally, we encourage you to review and expand the Commission's use of electronic filing. In 2011, the Commission expanded electronic filing requirements to numerous

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<sup>3</sup> 47 C.F.R. § 1.403. Rule 1.45 may impose additional constraints on oppositions to petitions, replies to those oppositions, and other related documents. *See* 47 C.F.R. § 1.45(b)-(c).

<sup>4</sup> 47 C.F.R. § 1.401(a)-(d).

<sup>5</sup> *See In the Matter of Amendments to Part 0, § 0.281(b)(6), and Part 1, §§ 1.401 and 1.405(d), of the Commission's Rules, with Respect to the Delegation of Authority to the Chief, Broadcast Bureau, and Procedures Regarding Petitions for Rule Making*, Memorandum Opinion and Order, 79 FCC.2d 1, 3-4, ¶ 4 (1980).

dockets, citing “broa[d] suppor[t]” from numerous stakeholders.<sup>6</sup> Yet certain proceedings, such as those for processing closed captioning waivers and public comments, still do not allow electronic filing.<sup>7</sup>

While there may be historical reasons for permitting or requiring paper filing in limited contexts, such as filing of documents under seal or permitting filers without access to a computer or the Internet to participate in FCC proceedings, the Commission should always permit the filing of electronic documents unless there is a compelling, intractable reason not to. Today, electronic filing is likely to be an effective and efficient means of filing for most parties before the Commission, while requiring paper filing causes significant additional expense to both parties and the Commission and often leads to misfiled, mislabeled, or lost documents.<sup>8</sup>

We recognize that identifying proceedings where electronic filing is not permitted and any procedural impediments to allowing electronic filing may take significant background research. If it would be helpful, we would be happy to assist in that effort.

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Again, we appreciate your consideration of these proposals and the significant time and energy that you and your colleagues are investing in reforming the Commission's processes. We stand ready to assist in any way we can; please don't hesitate to contact us if you have any questions or concerns.

Best regards,

/s/

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