

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Benefits and Burdens of Requiring Commenters) GC Docket No. 10-44
to File Cited Materials in Rulemaking Proceedings)
as Further Reform to Enhance Record-Based)
Decisionmaking)

To: The Commission

Comments of National Public Radio, Inc.

Introduction

Pursuant to Section 1.415 of the Commission’s Rules, 47 C.F.R. § 1.415, National Public Radio, Inc. (“NPR”) hereby submits its Comments in response to the Commission's Public Notice requesting comment on whether to require parties to submit copies of materials cited in pleadings or *ex parte* submissions.¹

NPR is a non-profit membership corporation which produces and distributes noncommercial educational programming through more than 900 public radio stations nationwide. In addition to broadcasting award winning NPR programming, including *All Things Considered*[®], *Morning Edition*[®], and *Talk Of The Nation*[®], NPR’s Member stations are themselves significant producers of news, information and cultural programming. NPR also operates the Public Radio Satellite Interconnection System and provides representation and other

¹ Public Notice: Comment Sought on Benefits and Burdens of Requiring Commenters to File Cited Materials in Rulemaking Proceedings as Further Reform to Enhance Records-based Decisionmaking, GC Docket 10-44, DA 11-1950, rel. Nov. 29, 2011 [hereinafter "Public Notice"].

services to its Member stations. Given its own interests and those of its Members, NPR has long been an active participant in Commission regulatory proceedings.

I. An Obligation To File All Materials Cited In Pleadings Would Produce Little Benefit

In proposing to require commenters to file materials cited in pleadings, the Public Notice points to the twin objectives of "improve[d] transparency and efficiency in Commission proceedings."² More specifically, the Public Notice recounts several recent regulatory changes and touts the proposed requirement as predicated on the same principle of "bas[ing Commission] decisions on record evidence, properly disclosed, with the least burden on filers."³ While there is no doubting the value of the general principle, the proposed filing requirement barely advances that principle, if at all.

At best, the instant availability of cited material might provide some measure of convenience, but the same internet access that provides access to the Commission's website also provides access to the same materials via other sources. The real issue, the Public Notice admits, is the Commission's consideration of materials not part of the docket in a particular proceeding.⁴

Addressing that issue does not depend on what commenters have filed or cited in their pleadings. The pleadings submitted by members of the public already disclose the materials that are part of the docket by reference. If the Commission has determined that its own actions should be more transparent, it need only disclose the materials it is considering by submitting a

² Id. at 1.

³ Id.

⁴ Id. at 2.

public filing in the proceeding at issue, as it has done in two recent proceedings.⁵ If the timing of such submissions raises transparency concerns,⁶ a simpler solution would be to provide additional time for the docket, as augmented by the Commission, to ripen by allowing interested parties to comment on the significance of the material provided by the Commission.⁷

It is also difficult to see the benefit in having multiple commenters citing the same material submit multiple copies of that material. What is the benefit of having tens or even hundreds of copies of the First Amendment, for instance, submitted in a proceeding addressing the regulatory obligations of broadcasters, especially when a simple Internet search would provide instant access to any interested party? In the case of more obscure materials, the Commission could require commenters to submit materials "not routinely available," as it currently does in formal complaint proceedings,⁸ but even that obligation is misplaced in a public rulemaking proceeding.

That is because a commenter already has an obvious incentive to provide or facilitate access to materials that it believes warrant Commission consideration in some respect. Inaccessible materials are unlikely to have much influence. There is no need for the Commission to attempt to discern the "ease of access" for various types of materials or police whether a commenter has submitted an acceptable excerpt, if such are permitted.⁹ Instead, if the

⁵ See id.

⁶ See id.

⁷ See Preserving the Open Internet, Broadband Industry Practices, Report and Order, 25 FCC Rcd 17905, 18049-50 (2010) (dissenting Stmt. of Commr. McDowell).

⁸ Public Notice at 3 n.9.

⁹ See id. at 3.

commenter can facilitate access to cited material by providing a website URL, it can be expected to do so, again because facilitating access is in the commenter's interest.

In sum, any benefit produced by the contemplated filing requirement is illusory at best, and unrelated to the stated problem of inadequate Commission transparency.

II. Imposing An Obligation To File All Materials Cited In Pleadings Would Impose Significant Costs

If the benefits associated with the proposed filing requirement are insignificant, the burdens are anything but. Even in the case of materials in the public domain, having to submit an electronic copy of every authority or reference material cited in a pleading would require additional time and labor. For materials subject to copyright protection, a mandatory submission requirement could impose a financial cost as well. In the case of material originated via an Internet website or other digital platform, it may be difficult to segregate the "material" for purposes of submitting a copy to the docket of a proceeding. Imposing the proposed requirement would undoubtedly spawn disputes over compliance, adding an additional cost.

Perhaps most damning, such a filing requirement would, as the Public Notice itself suggests, create a disincentive to robust public comment by discouraging commenters from citing or addressing specific materials.¹⁰ Even if commenters decide in most instances that the value of citing particular material outweighs the burden of submitting a copy, they inevitably will make such a calculation and avoid addressing materials for which submitting a copy does impose a meaningful burden. Given the Commission's interest in improving the quality of its

¹⁰ See id. ("Might this proposal diminish the quality of the comments received by the Commission, for instance if the additional burden of providing supporting materials outweighs their perceived value to the commenter?").

proceedings and promoting "robust public participation,"¹¹ creating any disincentive to public comment is counterproductive.

Conclusion

For the foregoing reasons, the Commission should refrain from requiring parties to submit materials cited in pleadings or *ex parte* submissions.

Respectfully submitted,

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¹¹ See id. at 2.