

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

To: The Commission

REPLY COMMENTS

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP (“BloostonLaw”) hereby submits, pursuant to Section 1.415(c) of the Commission’s Rules, its reply comments in the above-captioned proceeding. In particular, the Commission proposed in its Public Notice dated November 29, 2011¹ to require “commenters to file materials they cite in pleadings [to be] submitted in rulemaking proceedings, so that those materials are more accessible to all interested parties.”² While BloostonLaw supports the Commission’s desire to make its notice and comment rulemaking proceedings more transparent to the public, it concurs with the commenters in the record of this proceeding who have unanimously agreed that the Commission’s proposal, while meritorious in theory, will be unworkable in practice.

¹ Public Notice entitled “Comment Sought on Benefits and Burdens of Requiring Commenters to File Cited Materials in Rulemaking Proceedings as Further Reform to Enhance Record-Based Decision Making (DA 11-1950) (GC Docket No. 10-44) (Rel. Nov. 29, 2011).

² *Id.* at 1.

I. A Requirement to Submit a Copy of All Cited Materials is Both Unnecessary and Burdensome and Will Become a Disincentive to Participate in Rulemaking Proceedings.

The Commission's proposal, while well-meaning, will impose significant burdens on the public and practitioners and have a deleterious effect on the Commission's ability to obtain quality input from the public during its public comment cycles. Currently, when commenters rely on data and other sources of information in support of their comments, the practice is to cite that information for support so that the reader can locate the original document for further review if necessary. Such documentation, which typically includes court and Commission decisions, comments and other pleadings that have been filed in the same or related proceedings, research data, journal and newspaper articles and government documents, is generally available on the Internet or through public library resources.³ As a result, the Commission's proposal to require the filing of these sorts of documents as an appendix to all pleadings and *ex parte* proceedings in rule making proceedings is unnecessary.

Assuming *arguendo* that there might be some value to the Commission's proposed requirement, the value of requiring the submission of all cited documents does not outweigh the burden placed on the public. As pointed out by Professor Cary Coglianese of the University of Pennsylvania Law School, the Commission's proposal amounts to "two significant steps backwards in terms of the administrative policy." Professor Coglianese states in his comments that the first backwards step "takes the form of a

³ Comments of National Public Radio at 4; Comments of Nickolaus Leggett at 3.

retreat from a clear trend in facilitating public participation” since the Commission’s proposed action is contrary to the considerable strides federal agencies have made in making it easier for the public to participate in notice and comment rulemaking proceedings.⁴ A prime example is the Commission’s design of its Electronic Comment Filer System (“ECFS”), which encourages comments not only from corporations and counsel in the industry, but also from general members of the public. The second step backwards is the Commission’s clear abrogation of its responsibility under American administrative law to collect and consider evidence in the record.⁵ Professor Coglianese points out that the Commission’s proposal will transfer that responsibility from the agency to the public.⁶

In particular, the proposed document submission requirement will require commenters to spend a substantial amount of time and money collecting, organizing and filing cited materials with the Commission even though most if not all of these documents are readily available in the public domain.⁷

To the extent that documents are protected by copyright – which includes decisions in national reporter system and on Lexis and WestLaw, books, journal articles as well as newspaper articles – such materials may not reproduced without the express

⁴ Comment of Cary Coglianese at 1.

⁵ *Id.*

⁶ *Id.*

⁷ Comments of Telecommunications Law Professionals at 3; Comments of National Public Radio at 4; Comments of CenturyLink at 2; Comments of AT&T at 3.

permission or license from the copyright owner.⁸ As a result, this restriction will force the public and practitioners to determine (a) whether the particular document is protected by copyright laws, and if so, (b) whether it can obtain a license or permission to reproduce the document for submission to the Commission. Aside from being a time consuming process, the license fees could make compliance with the Commission's proposed requirement expensive. Finally, the submission of documents into the docket will make review of the docket unwieldy for the public since the comment files will be far lengthier, and filers would be required to download and/or print larger document files, that are likely to be hundreds of pages each rather than the typical 10 to 20 pages for each filing currently.⁹ Taken together, it appears that the Commission's proposal would likely have the opposite effect of building a complete record by discouraging the public from either citing or addressing specific materials in their comments or discouraging participation in rulemaking proceedings where individuals and small/medium businesses might otherwise have participated in.¹⁰

BloostonLaw agrees that the Commission's proposal is unnecessary and unworkable. Nonetheless, if the Commission is compelled to require the submission of documents with comments and *ex parte* submissions in rulemaking proceedings, it should limit its proposal to those materials which are (a) not generally available in the public

⁸ Comments of Nickolaus Leggett; Comments of National Public Radio at 4. In this regard, the Commission can take official notice of the special licensing arrangements with Rand-McNalley that were required when it utilized the Major Trading Area/Basic Trading Area market schemes for some of its early spectrum auctions.

⁹ Comments of Verizon at 3; Comments of Nickolaus Leggett at 2.

¹⁰ Comments of National Public Radio at 4; Comments of CenturyLink at 2.

domain – e.g., not published in print or digital media and (b) not protected by copyright restrictions. A requirement of this nature would not be unduly burdensome since it would be limited in scope to those materials that are not generally available to the public and are not protected by copyright restrictions that would otherwise prohibit the copying and/or dissemination of work product without the copyright owner’s permission.

II. **The Commission’s Proposal is Contrary to the Paperwork Reduction Act.**

It is well established that the Paperwork Reduction Act is designed to ensure that information collections by Governmental agencies is limited to that information that “is necessary for the proper performance of the functions of the agency, including that the information has practical utility.”¹¹ As discussed above, the Commission’s proposal would place significant additional burdens on public participation in rulemaking proceedings that would be contrary to the Paperwork Reduction Act because the Commission’s proposal will have the opposite effect by increasing the paperwork burden on the public without the required showing that the additional information is necessary and useful to the Commission.¹²

Interestingly enough, on November 2, 2011, Representative Greg Walden, Chairman of the Energy and Commerce Subcommittee on Communications and Telecommunications introduced HR3309 (*the FCC Process Reform Act*) to improve the

¹¹ See 44 U.S.C. §3506(c) (underlining added). §3502(11) defines “practical utility” as “the ability of an agency to use information, particularly the capability to process such information in a timely and useful fashion.”

¹² Comments of AT&T at 3-4.

ways that the Commission operates.¹³ Among other things, this legislation would require the Commission to: (a) survey the state of the market place prior to initiating new rulemakings in order to ensure that the Commission has an up-to-date understanding of the rapidly evolving and job-creating market place; (b) establish its own shot-clocks so that the public can know how quickly to establish action from the Commission and (c) identify any market failure, consumer harm or regulatory barrier to investment before adopting economically significant rules and after identifying any such issues, demonstrate that the benefits of the regulation outweigh the costs (while at the same time taking into account the need for regulation to impose the least amount of burden on society). If enacted, this legislation would expressly apply to the Commission the regulatory reform principals that President Obama endorsed in his January 18, 2011 Executive Order 13563.¹⁴

Executive Order 13563 is very clear that regulations must “protect public health, welfare, safety and our environment while promoting economic growth, innovation, competitiveness and new job creation.” In so doing, the President has mandated that regulatory agencies must “identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends.” The Commission’s proposal to require the collection and submission of full copies of all materials by parties cited in rule

¹³ H.R. 3309, 112th Cong., 1st Sess. 157 Cong. Rec. 7255-56 (2011). Two additional bills have been introduced in the US Senate, S 1784 (the “Process Reform Act”) and S. 1817 (the “Telecommunications Jobs Act”), which contain language that is virtually identical to HR3309. See S. 1784, 112th Cong., 1st Sess. 157 Cong. Rec. S7066 (2011); S. 1817, 112th Cong., 1st Sess. 157 Cong. Rec. S. 7187 (2011).

¹⁴ See President Barak Obama, Executive Order 13563 (Jan 18, 2011), 76 FR 3821 (2011) (hereinafter, “Executive Order 13563”).

making proceedings simply does not meet this standard and should therefore be rejected. The proposed requirement contravenes the standards in HR3309 and Executive Order 13563. If adopted, the requirement will place an undue burden on public participation in Commission rulemaking proceedings that BloostonLaw believes will ultimately have a chilling effect and reduce the quality of the Commission's record rather than enhance it. This is because the collection and submission of the documents requested by the Commission with each and every pleading or *ex parte* filing in a rulemaking proceeding would force commenters to expend valuable staff and financial resources that could otherwise be put to growing their revenue producing business activities, and hence, tax collections to the Government. In many instances, a commenter may cite a legal decision or Commission order that is dozens or hundreds of pages long, for a statement that only occupies a page or two from the document. Attaching this unwieldy volume of documents will add to the time and expense of filing comments, and geometrically increase the time and expense of other commenters trying to evaluate the record in a proceeding – often during a reply comment schedule that is considerably shorter than the comment cycle.

Conclusion

For the foregoing reasons, BloostonLaw urges the Commission to abandon its proposal as unnecessary and unduly burdensome. The proposal, while well intentioned, would be a step backwards from the strides that the Commission has taken in making public access to its processes user friendly. In the alternative, the Commission should

scale back its proposal to a requirement to attach only those materials that are not available in the public domain, provided that they are not protected by copyright laws.

Respectfully submitted,

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