

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Benefits and Burdens of Requiring
Commenters to File Cited Materials in
Rulemaking Proceedings as Further Reform to
Enhance Record-Based Decisionmaking

GC Docket No. 10-44

REPLY COMMENTS OF THE USA COALITION

The Universal Service for America Coalition (“USA Coalition” or “Coalition”), by its attorneys, respectfully submits these reply comments on the issues raised by the Federal Communications Commission (“FCC” or “Commission”) in the Public Notice released on November 29, 2011 in the above referenced docket.¹ Rather than adopting rules that discourage participation by the public in rulemaking proceedings, the Commission should comply with the letter and the spirit of the Administrative Procedures Act by conducting all rulemaking proceedings in a manner that facilitates input by parties of all sizes and provides sufficient time for parties to consider all relevant materials and provide meaningful feedback for the agency to consider before the agency takes action. The Commission should also publish and request comment on proposed rules -- particularly rules as important as those adopted in the recent ICC/USF Order -- rather than permitting parties to see the text of rules only after they have been adopted. The Commission should not adopt rules that place onerous requirements on parties who wish to participate in rulemaking proceedings.

¹ *Comment Sought On Benefits & Burdens of Requiring Commenters To File Cited Materials IN rulemaking Proceedings As Further Reform to Enhance Record-Based Decision Making*, GC Docket NO. 10-44, DA 11-1950 (rel. Nov. 29, 2011) (Public Notice).

I. The Commission Should Ensure Greater Transparency For Information Considered And Relied Upon By Commission Staff

The USA Coalition joins commenters in “applaud[ing] the Commission for taking steps to improve transparency, robust public participation, and informed decision-making in FCC proceedings.”² The Coalition believes that particular attention during this proceeding should be paid to the occasional practice by Commission staff of submitting into the record important data or key filings toward the end of the filing period (*i.e.*, shortly before the “Sunshine Period” comes into effect), thereby depriving participants in the docket of the opportunity to meaningfully review and comment on the material.³ For this reason, the USA Coalition joins with CTIA in calling for a narrowly-tailored rule or policy requiring Commission’s staff’s prompt submission into the record of non-record documents and analyses created for, or relied upon in, decisionmaking or the development of staff recommendations.⁴ Importantly, the USA Coalition agrees with commenters arguing that any new rules should require increased transparency in Commission decision-making and should not result in additional burdens being place on docket participants.⁵

In the lead up to the Commission’s recent *USF/ICC Reform Order*,⁶ the Wireline Competition Bureau (WCB) of the FCC submitted a letter into the record, only a few days before the beginning of the “Sunshine period,” describing a long and complicated analysis it undertook designed to identify study areas where only a single USF-supported wireless provider offers

² TLP Comments at 2 (quotations omitted).

³ Public Notice at 2.

⁴ CTIA Comments at 4.

⁵ *See, e.g.*, Comments of Cary Coglianese, Professor of Law at University of Pennsylvania, at 3 (“If anything is deficient in terms of public accessibility to information in the federal regulatory process it is that agencies fail to post relevant information in a timely manner”).

⁶ *Connect America Fund*, WC Docket No. 10-90, *Report & Order & FNPRM*, FCC 11-161 (rel. Nov. 18, 2011) (“*USF/ICC Reform Order*”).

service.⁷ Because of the late date of the WCB's filing, many parties were unable to meaningfully review and/or comment on the data gathered, the extensive analysis undertaken, and the conclusions reached by the WCB. Much of this filing was purportedly key to some of the decisions reached by the Commission in that proceeding. The USA Coalition believes that the type of data gathering and analysis undertaken by the WCB (or other Commission staff) should not be submitted for use by decision-makers at the last moment. Instead, it should be submitted in time to permit *all* docket participants to review and comment. In order for all docket participants to engage in such review and comment, information *must* be made publicly available with sufficient time to allow all participants to review the information without disrupting the participant's normal business operations. Otherwise, only those who can afford to hire teams of lawyers and analysts at the last moment will be able to review and comment,⁸ thereby biasing the record in the direction of their views. Indeed, for many smaller participants, receiving important, data-driven information with only a few days remaining before a filing deadline is equivalent to not receiving the information at all, as these participants require a reasonable amount of time to dedicate the appropriate resources to the review of that information. Further, failure to provide that information in a timely-manner provides an unfair advantage to the largest companies that have the financial resources and ability to review data-driven analyses virtually overnight. Last minute release of data also prevents the Commission from considering valuable feedback on the data that the public otherwise could have provided.

Given the FCC's previous failures to provide information to docket participants on a timely basis, the USA Coalition applauds the Commission's commitment to better disclosure of

⁷ Letter from Jennifer Prime, Legal Counsel to the WCB, to Marlene Dortch, Secretary of the FCC, WC Docket No. 10-90 (Oct. 19, 2011) ("WCB Letter").

⁸ Or they can conclude that no comment is needed, as they are in agreement with the information contained in the agency submittal, which will still result in a skewed viewpoint in the record.

the underlying data in the Mobility Fund docket. Specifically, the Commission has committed to using American Roamer data, which is publicly available for a fee, to develop its map of areas without access to wireless services. While we in no way endorse the data of American Roamer, we understand that the FCC will be relying on that data, if at all, only to compile a list of areas upon which the Commission will then seek comment from the public. Specifically, we understand that the Commission will put out for public comment the map of unserved areas that the Commission develops from the data, presumably with sufficient information -- and advanced notice -- that the public can analyze the information and, where appropriate, challenge those determinations. The USA Coalition is encouraged by these statements and the Commission's apparent intent to ensure that the failures which gave rise to the Public Notice here are not repeated.

II. The Commission Should Avoid Imposing Onerous Burdens on Docket Participants, But Encourage Filers To Include Internally-Generated Analyses In Filings

The USA Coalition agrees with the near universal sentiment of commenters in this proceeding that docket participants should not be required to submit all non-record material cited in filings into the record.⁹ Such a requirement is unnecessarily burdensome and would not significantly increase the ability of the public to access information. At a minimum, the USA Coalition agrees with commenters urging the Commission to provide an exception for information that is:

- Publicly available on the Internet, including the Commission's own website;
- Available on a widely-used legal search engine under standard rate plans (*e.g.*, Lexis or Westlaw); or

⁹ See NPR Comments at 2-3; AT&T Comments at 2-3; CenturyLink Comments at 2-5; CTIA Comments at 4-12; FCBA Comments at 2-5.

- Part of industry publications commonly subscribed to by practitioners of communications law (*e.g.*, *Communications Daily*).¹⁰

Failure to include such exceptions would require commenters to make unnecessarily large filings, and vastly increase the administrative costs associated with such filings. Further, as other commenters have noted, the new rule proposed by the Commission would require commenters to engage in a copyright analysis of every item it cites, as filing via ECFS would effectively result in a copy of the item being made available to the public.¹¹ This approach places an unfair burden on docket participants.

Notwithstanding the foregoing, the USA Coalition joins with TLP in urging the Commission to adopt policies that require participants “to file any internally-generated data or compilations of information that it relies upon in its pleadings.”¹² Of particular concern is the recent behavior by some of the nation’s largest carriers in the USF/ICC reform dockets, wherein they promoted and routinely met with Commission staff to promote their ABC Plan but delayed placing that plan into the record for an extended period of time. To the extent the Commission wishes to improve transparency relating to participant-driven data collection, the Commission should consider adopting rules or policies designed to limit consideration of unfiled information or plans and to promote the timely sharing of information relating to proposals such as those submitted by the proponents of the ABC Plan.

¹⁰ See TLP Comments at 6.

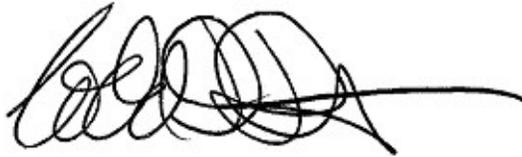
¹¹ NPR Comments at 4; CTIA Comments at 15; FCBA Comments at 4; TLP Comments at 6.

¹² See TLP Comments at 6..

Conclusion

The USA Coalition urges the Commission to take steps to ensure that information relied upon by the Commission in its decision making is available to the public, either through ECFS, through publicly-available sources (including those available at reasonable rates), or by releasing the information itself. However, the Commission should refrain from adopting broad requirements that would significantly increase the burden on parties seeking to participate in the docket but which would not meaningfully change the ability of either the Commission, its staff, or the public to access that information.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Todd D. Daubert', with a long horizontal flourish extending to the right.

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