

Before the
Federal Communications Commission

**SECURING AN OPEN AND TRANSPARENT INTERNET
REQUIRES AN OPEN AND TRANSPARENT REGULATORY PROCESS**

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52
)	

Comments of
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January 2010

**SECURING AN OPEN AND TRANSPARENT INTERNET
REQUIRES AN OPEN AND TRANSPARENT REGULATORY PROCESS**

**Comments on:
Preserving the Open Internet/Broadband Industry Practices
Notice of Proposed Rulemaking
Paperwork Reduction Act Statement
Initial Regulatory Flexibility Analysis
and
Data Quality Act Pre-Dissemination Review**

A regulatory regime mimics the process used to produce it. Thus, the only way FCC may be able to achieve its goal of securing an open and transparent internet through “predictable, minimalist, consistent”¹ regulation is to use an open and transparent regulatory process to fashion the rules.

The NPRM cites Justice Brandeis in stating that “we believe that sunlight is the best disinfectant and that transparency discourages inefficient and socially harmful market behavior.”² The Center for Regulatory Effectiveness (“CRE”) applauds this belief and urges the Commission to demonstrate the same strong commitment to transparency in this rulemaking process that it demands from industry in the marketplace.

These comments will explain that in order to achieve regulatory transparency, the Commission must stringently adhere to the applicable “good government” laws including:

- ▶ The Data Quality Act (“DQA”) including OMB and FCC implementing guidance;
- ▶ OMB’s Final Information Quality Bulletin for Peer Review;
- ▶ The Paperwork Reduction Act;
- ▶ The Regulatory Flexibility Act; and
- ▶ The Open Government Directive.

CRE also notes that the FCC is obligated to post all information quality Requests for Correction received on this rulemaking on a publicly available website.³

Adherence to the non-discretionary duties by the Commission will ensure that the regulatory process is open and transparent and that any rules promulgated are based only on data meeting specified quality standards.

¹ Federal Communications Commission, Notice of Proposed Rulemaking (“NPRM”), GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93 October 22, 2009, para. 47.

² NPRM, para. 118. (Note omitted.)

³ John D. Graham, Ph.D., Memorandum for the President’s Management Council, “Posting of Information Quality Correction Requests and Responses,” August 30, 2004.

The Open Government Directive

President Obama's Open Government Directive⁴ creates an unprecedented federal commitment to openness based on the "three principles of transparency, participation, and collaboration...." The Directive applies to all Executive Branch agencies, including independent agencies such as the FCC.

The Directive's transmittal memorandum from OMB Director Orszag explains that

To create an unprecedented and sustained level of openness and accountability in every agency, senior leaders should strive to incorporate the values of transparency, participation, and collaboration into the ongoing work of their agency.

This White House statement encapsulates CRE's comments and provides the framework for the detailed comments below. All of CRE's comments on the need for FCC compliance with the "good government" laws are aimed at helping the Commission achieve the Administration's commitment to openness and accountability discussed in the Directive.

CRE also notes that the Open Government Directive emphasizes the importance of Data Quality and compliance with the OMB's DQA compliance guidance documents. As the Directive explains,

To improve the quality of government information available to the public, senior leaders should make certain that the information conforms to OMB guidance on information quality and that adequate systems and processes are in place within the agencies to promote such conformity.

CRE will discuss the crucial role of FCC compliance with the DQA in the next section of these comments.

Among the requirements of the Open Government Directive are that agencies designate a "Flagship Initiative." The Flagship Initiative is a "specific, new transparency, participation, or collaboration initiative that your agency is currently implementing...."

- ▶ CRE recommends that the Commission designate this rulemaking on governance of the nation's most crucial communications system as its Flagship Initiative under the Directive.

Designation of the rulemaking as the Commission's Flagship Initiative will provide an opportunity for the agency to further improve its regulatory processes and to turn its openness aspirations into action.

In support of the Administration's Open Government projects, CRE will be submitting a copy of these comments to the White House's Open Government Initiative "Inbox."⁵

⁴ http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf.

⁵ <http://www.ostp.gov/cs/opengov/from-the-inbox/>

The Data Quality Act

The FCC is well versed in the requirements of the Data Quality Act, and thus poised to adhere to the Data Quality requirements of the Open Government Directive, having written detailed implementing guidance and, as discussed below, having addressed Requests for Correction.

CRE calls the Commission's attention to two critical interrelated aspects of the information quality assurance process:

1. Pre-dissemination Review; and
2. Ensuring that all third-party data on which the Commission uses or relies on – including comments and related documents submitted in response to this NPRM – comply with quality standards set forth in the OMB and FCC DQA implementing guidance. Scientific information, including technical analyses, will also need to comply with the standards and procedures set forth in the OMB Peer Review Bulletin.

Pre-Dissemination Review

The FCC implemented the DQA through the Commission's rigorous agency-specific information quality guidelines ("Guidelines").⁶ These Guidelines establish procedures for "reviewing and substantiating the quality, objectivity, utility, and integrity of information before it is disseminated by the Commission."⁷

The Commission further demonstrated its commitment to quality assurance by devoting an entire section of the Guidelines to their "Pre-Dissemination Information Review and Substantiation Process." This section states, in part, that

*For each information dissemination product covered by these guidelines every Bureau or Office shall conduct a pre-dissemination review using the standards below:*⁸

Furthermore, for information products "that contain analytic results, the FCC is committed to applying rigorous robustness checks and will document what checks were undertaken as part of the required methodological section or appendix."⁹

⁶ Federal Communications Commission, Information Quality Guidelines, Adopted: October 4, 2002, FCC 02-277.

⁷ Ibid., para. 7. (Emphasis added.)

⁸ Ibid., Appendix A, III (3). (Emphasis added.)

⁹ Ibid., Appendix A, III (3)(a).

The Guidelines' commitment to pre-dissemination review is exemplary. Of specific relevance to this network neutrality rulemaking, the FCC Guidelines emphasize the need for transparency. Moreover, the Commission provides a specific definition of transparency which includes,

*practices of describing the data and methods used in developing an information dissemination product in a way that it would be possible for an independent reanalysis to occur by a qualified individual or organization.*¹⁰

Transparency is also incorporated directly into the definition of information quality. For example, the FCC's definition of Objectivity in part state that

*In a substantive sense objectivity means that, where appropriate, data should have full, unbiased, reliable, accurate, transparent documentation; and error sources affecting data quality should be identified and disclosed to users.*¹¹

Also of note, the FCC's definition of "reproducibility" inherently requires that the source material be transparent with respect to data and specific analytic methodology. The Commission states that

With respect to analytic results, "capable of being substantially reproduced" means that independent analysis of the original or supporting data using identical methods would generate similar analytic results, subject to an acceptable degree of imprecision or error.

The reproducibility requirement, and other heightened data quality standards, applies to "influential" information which is defined by the FCC as data that has a "clear and substantial impact on important public policies or important private sector decisions."

- ▶ The Center for Regulatory Effectiveness encourages the FCC to publish its pre-dissemination review record for comment on all information used to develop the proposed rule prior to taking any final action. We recognize, however, that it may not be feasible for the Commission to publish the entire pre-dissemination review record prior to adoption of a final rule. Therefore, we recommend that the Commission publish for public review and comment, the pre-dissemination review record as it applies to any "procedural rules specifically governing complaints involving alleged violations of any Internet principles we codify in our regulations."

The Data Quality Act Applies to Third-Party Data

Any and all third-party data which the FCC uses or relies on, whether commissioned by the FCC or submitted by a stakeholder, must comply with the same FCC and OMB quality standards that apply to

¹⁰ Ibid., Appendix A, II (14).

¹¹ Ibid., Appendix A, II (11).

Commission-generated data. OMB's government-wide information quality guidelines explicitly state that if an agency uses data from third-party sources, that data must comply with the DQA standards:

if an agency, as an institution, disseminates information prepared by an outside party in a manner that reasonably suggests that the agency agrees with the information, this appearance of having the information represent agency views makes agency dissemination of the information subject to these guidelines.¹²

The need for third-party data used by the Commission to comply with data quality standards was further emphasized in a National Academy of Sciences workshop on information quality guidelines. A senior OMB official explained that

If a government agency wishes to rely upon and cite information from industry in support of a decision, that information must meet the same quality standard that information generated by the agency must meet. Thus, the OMB guidelines apply to any information disseminations by an agency, regardless of the original source of the information.¹³

CRE emphasizes that third-party data used by the Commission is subject to the same Request for Correction process as data developed and disseminated by the Commission.

The FCC's Experience in Responding to Requests for Correction of Third-Party Data

On two occasions CRE petitioned the FCC to not use or rely on certain third-party studies as they did not adhere to the Commission's Data Quality standards. These petitions were filed prospectively, after the documents had been submitted into the record but before the Commission could potentially use them.

The first CRE petition concerned a highly publicized study on broadcast localism.¹⁴ The study, which had been attributed to FCC staff, was submitted to the docket by a US Senator after it received substantial press in the blogosphere and among NGOs.¹⁵ It is important to note that the study never passed through the FCC's pre-dissemination review process.

¹² 67 FR 8454, February 22, 2002.

¹³ John D. Graham, Ph.D., Administrator, Office of Information and Regulatory Affairs, "OMB's Role in Overseeing Information Quality," Remarks to Public Workshop on Information-Quality Guidelines, Sponsored by Committee on Data Quality, Science, Technology and Law Program, National Research Council/National Academy of Sciences, Washington, DC, March 21, 2002.

¹⁴ <http://www.fcc.gov/omd/dataquality/requests/2007/cre-media-ownership.pdf>.

¹⁵ <http://www.benton.org/node/5769>.

The second CRE petition concerned two studies commissioned by the FCC on media ownership.¹⁶ CRE explained that both of the media ownership studies in question failed to comply with FCC data quality standards and, thus, could not be used or relied on by the Commission. CRE also pointed out that the studies failed to comply with OMB's Final Information Quality Bulletin for Peer Review.

The FCC responded to CRE's Data Quality petitions in the final rule by stating that none of the studies on which CRE petitioned would be used by the agency.¹⁷

The Paperwork Reduction Act

CRE appreciates the FCC publishing its Supporting Statement and related documentation for the planned Network Management Practices disclosure requirements during the NPRM comment period.

In its Supporting Statement, the FCC justifies the massive information disclosure – more than three-quarters of a million hours just in 2010 – by making three specific assertions, that the ICR would:

1. “[E]nable broadband subscribers to understand and take advantage of the technical capabilities and limitations of the services they purchase.”
 2. “Benefit content, application, and service providers and investors by increasing access to information needed to develop and market new Internet offerings” and
 3. “[B]enefit policy makers and the Internet users who rely on them by providing an empirical foundation for evaluating the effectiveness and necessity of ongoing policies.”
- It is essential that all three of these assertions regarding the utility of the data be verified. Thus, CRE recommends to OMB that:
- The Terms of Clearance for the ICR require that the FCC conduct three studies, one for each assertion, using data obtained during the first year and provide those studies to OMB and the public for review and comment prior to the ICR being renewed.
 - The ICR be approved for two years, not three, so as to allow evaluation of the utility of the data before permitting the reporting burden to continue.

¹⁶ <http://fjallfoss.fcc.gov/ecfs/document/view?id=6519740881>.

¹⁷ Federal Communications Commission, Report and Order and Order on Reconsideration, MB Docket No. 06-121, MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244, MB Docket No. 04-228, MM Docket No. 99-360, FCC 07-216, Adopted December 18, 2007, FN 467.

- ▶ CRE recommends to the FCC that they conduct the above described studies, and provide them to the public in draft for comment, as part of its Flagship Initiative. Conducting an open public assessment of the effectiveness of its policies is the best way the FCC can demonstrate its commitment to transparency and accountability, as called for by the Open Government Directive.
 - Since the FCC has identified policy makers as one of the principle beneficiaries of the data, the study will help the Commission assess how well they use information collections in setting policy, an issue with FCC-wide implications and which could help improve FCC information collection and use practices – one of the reasons why this rulemaking should be the Commission’s Flagship Initiative.

The Regulatory Flexibility Act

Per the FCC’s statement that Regulatory Flexibility Act (“RFA”) comments “must be identified as responses to the IRFA” CRE hereby notifies the Commission that the following constitutes our response to the Initial Regulatory Flexibility Analysis (“IRFA”).

The IRFA contained in the NPRM is deeply deficient and does not comply with minimum statutory requirements. Specifically, among the mandatory statutory requirements for an IRFA are that:

1. “Such analysis shall describe the impact of the proposed rule on small entities.”¹⁸ and
2. “Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.”¹⁹

Instead of describing any significant alternatives to the proposed rule, the IRFA states that “we have yet to describe any significant alternatives....”²⁰

Instead of describing the impact of the proposed rule on small entities, the IRFA states,

*We do not attempt here to provide an estimate in terms of potential burden hours. Rather, we anticipate that commenters will provide the Commission with reliable information on any costs and burdens on small entities.*²¹

¹⁸ 5 USC 603(a).

¹⁹ 5 USC 603(c).

²⁰ Ibid., para. 46.

²¹ NPRM, Appendix C, para. 45.

Ironically, the Commission's statement refusing to provide a small business burden estimate for comment is in reference to the agency's proposed "transparency principle." By not providing the RFA-required burden estimate, the Commission is not adhering to its own transparency requirements. Moreover, by depriving the public the opportunity to comment on these estimates, the agency is not complying with the "participation" and "collaboration" principles set forth in the White House's Open Government Directive.

With respect to both the burden estimate and the significant regulatory alternatives requirement, the agency states that they will develop these based on public comments received. In making these statements, the Commission is missing the fundamental purpose of the IRFA, allowing meaningful public participation in the rulemaking process through comment on the agency's initial assessments and perspectives. Unless the FCC publishes their initial burden estimates and significant regulatory alternatives for public comment, they will not have met their statutory responsibility under the RFA nor their regulatory reform responsibilities under the Open Government Directive.

- ▶ CRE advises the FCC that they need to publish a Revised Initial Regulatory Flexibility Act for public comment prior to publication of the final analysis with the final rule.

Recommendations

CRE recommends that the FCC:

- ▶ Designate this rulemaking on governance of the nation's most crucial communications system as its Flagship Initiative under the Directive.
- ▶ Publish for public review and comment their pre-dissemination review record as it applies to any procedures governing the Commission's processing of alleged violations of the rules developed through this proceeding.
- ▶ Conduct and obtain public comment on studies to determine the accuracy of the three assertions made regarding the utility of the network management practices data (described on p. 6).
- ▶ Publish a Revised Initial Regulatory Flexibility Act for public comment.

About CRE

The CRE is a regulatory watchdog established in 1996 by former senior career officials from the Office of Management and Budget.²² In its role as a watchdog, CRE intervenes in regulatory proceedings through filing Data Quality Petitions and other mechanisms. CRE also maintains the most complete online library documenting the history of centralized regulatory review.²³

²² http://www.thecre.com/emerging/Jim_Tozzi_Bio.html.

²³ <http://thecre.com/ombpapers/centralrev.html>.

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CRE officials have been involved in virtually all major regulatory reform initiatives in the last thirty years, from the PRA²⁴ to the DQA.²⁵

Promotion of transparency in the rulemaking process has been the focal point of CRE's regulatory reform work²⁶ which is why CRE applauded President Obama's decision to publish the Open Government Directive.²⁷

CRE sees this landmark proceeding on preserving an open internet/broadband network management as an important opportunity to assist the FCC in achieving its regulatory transparency objectives.

²⁴ <http://thecre.com/ombpapers/PaperWorkReductionAct.htm>.

²⁵ http://www.thecre.com/pdf/20021111_fedtimes-tozzi.pdf.

²⁶ <http://www.npr.org/templates/story/story.php?storyId=4599065>.

²⁷ http://www.thecre.com/quality/2009/20091213_regweek.html.