

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

<b>BENEFITS AND BURDENS OF REQUIRING</b>	)	
<b>COMMENTERS TO FILE CITED</b>	)	<b>GN Docket No. 10-44</b>
<b>MATERIALS IN RULEMAKING</b>	)	
<b>PROCEEDINGS AS FURTHER REFORM TO</b>	)	<b>DA 11-1950</b>
<b>ENHANCE RECORD-BASED DECISION-</b>	)	
<b>MAKING</b>	)	

**COMMENTS OF THE  
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
and the  
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL  
TELECOMMUNICATIONS COMPANIES**

To the Commission:

**I. INTRODUCTION**

The National Telecommunications Cooperative Association (NTCA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) hereby submit these comments in the above-captioned docket.<sup>1</sup> The Commission seeks comment on whether certain procedures would "improve transparency and efficiency" in Commission proceedings.<sup>2</sup> Specifically, the Commission asks whether commenters should be required to file copies of the materials they cite in pleadings that are submitted in rulemaking proceedings.<sup>3</sup> NTCA and OPASTCO support the

---

<sup>1</sup> The National Telecommunications Cooperative Association (NTCA) is a national trade association representing more than 580 rural rate-of-return regulated telecommunications providers. The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) is a national trade association representing approximately 470 small incumbent local exchange carriers (ILECs) serving rural areas of the United States.

<sup>2</sup> *Comment Sought on 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, Public Notice, DA 11-1950 (rel. Nov. 29, 2011) (PN).

<sup>3</sup> PN at 1.

Commission's interest in improving the rulemaking process, but for the reasons set forth below, find the instant proposal unnecessary and unduly burdensome.

The Commission explains that over the last two years, it has "honed its procedures to improve efficiency and transparency in its operations."<sup>4</sup> Indeed, measures taken to initiate and enhance use of the Electronic Comments Filing System (ECFS);<sup>5</sup> to balance more comprehensive *ex parte* filing requirements with additional time to file; and, those aimed at ensuring parity during Sunshine period<sup>6</sup> are examples of thoughtful, rational, and useful measures the Commission has imposed. The instant proposal to require copies of cited materials would not generate similar benefits.

## **II. DISCUSSION**

Reasoned rulemaking which implements regulatory policy rests upon the same principles that guide the assurance of due process and *stare decisis* in the judiciary.<sup>7</sup> Reliance upon verifiable evidence and tested assumptions should ensure that regulations emerge thoughtfully and purposefully, rather than arbitrarily and capriciously. As noted by the Government Accountability Office (GAO), "Regulation is one of the principal tools that the government uses to implement public policy."<sup>8</sup> Indeed, the process of

---

<sup>4</sup> PN at 1.

<sup>5</sup> See, *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization: Report and Order*, GC Docket No. 10-44, FCC 11-16, 26 FCC Rcd 1594, at paras. 13-21 (2011).

<sup>6</sup> See, *Amendment of the Commission's Ex Parte Rules and Other Procedural Rules: Report and Order and Further Notice of Proposed Rulemaking*, FCC 11-11, 26 FCC Rcd 4517, at paras. 45, 56, 60, 61 (2011).

<sup>7</sup> See, Becker, David H., *Changing Direction in Administrative Agency Rulemaking: "Reasoned Analysis," The Roadless Rule Repeal, and the 2006 National Park Service Management Policies*, 30:1 ENVIRONS 65, 67 (2006) (addressing imperative that changes in regulatory law be based upon reasoned analysis, including reasoned explanation of departure from past practice, where necessary).

<sup>8</sup> U.S. GOV'T. ACCOUNTABILITY OFFICE, *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews*, Report to the Chairman, Committee on Oversight and Government Reform, House of Representatives, GAO-09-

crafting regulation itself is regulated by precise Federal standards set forth in the Administrative Procedure Act,<sup>9</sup> ensuring through avenues of public participation that regulations reflect the public's interests. The D.C. Circuit has noted the importance of public accessibility to rulemaking records, declaring, "the possibility that there is . . . one administrative record for the public and this court and another for the Commission and 'those in the know' is intolerable. . . ."<sup>10</sup> Accordingly, the APA augurs several benefits: (1) it ensures that the formulation of enforceable regulations occurs subject to public oversight, rather than the shielded confines of government fiat; (2) it accommodates and fosters the opportunity to build a full and complete record; and (3) it enables peer review of information submitted to the record upon which an ultimate decision will be made. Arguably, it is the third of those benefits that the Commission seeks to enhance with the instant proposal.

The accumulated data gathered by rule-makers provide the basis upon which sound decisions can be based. The use of citations in written advocacy (and research, generally) enhances the integrity of the record by distinguishing whether any stated proposition, evidence, or analysis derives from the author or another source; in quantitative matters, citations can also discourage the use of claims of uncertain origin. To the writer, the citation is a nimble bulwark: "[t]he text persuades, the notes prove."<sup>11</sup> To the reader, it is a door that opens for further examination or confirmation of the topic; proper citations facilitate readers' ability to locate and review sources that led to the author's conclusion. This review can be undertaken with intent to rebut the author's propositions, or for purposes of additional understanding unrelated to any

---

205, at 1 (Apr 2009), available at <http://www.gao.gov/new.items/d09205.pdf> (last viewed Jan. 6, 2012, 13:49).

<sup>9</sup> 5 U.S.C. § 553 (APA).

<sup>10</sup> *Home Box Office v. FCC*, 567 F.2d 9, at 54 (D.C. Cir. 1977) (court criticized undocumented oral *ex parte* communications during rulemaking proceeding).

<sup>11</sup> GRAFTON, ANTHONY, *THE FOOTNOTE: A CURIOUS HISTORY*, 15 (Harvard University Press 1999), citing CH.-V. LANGOLIS AND CH. SEIGONOBOS, *INTRODUCTION TO THE STUDY OF HISTORY*, 305, 306, (G. G. Berry 1898; repr. 1912).

position the reader may take in response to the author's statements. In all aspects, the use of citations enhances rigorous review of the record, a hallmark of the type of transparency desired by the Commission, by laying assertions bare to the light of scrutiny. To permit proof, however, is not the same as *providing* proof.<sup>12</sup>

The Commission's proposal to require filers to include copies of cited materials conflicts directly with the Commission's stated intent to impose the "least possible burden on filers."<sup>13</sup> Completed properly, footnotes, endnotes, or in-text references provide sufficient guidance for readers to identify, locate, and ultimately obtain sources cited in the pleading (the availability of many materials via the Internet enhances the ability to access even further). From a substantive perspective, the citations do their job quietly and dutifully, standing ready should their need be invoked. From a practical and administrative perspective, the use of footnotes enables authors to reference sources efficiently and effectively, and to acknowledge academic credit where necessary; the vast literature on proper citation and bibliographic formats attests to the widespread acceptance of this approach.<sup>14</sup> In contrast, the Commission's proposal would induce only magnified and unnecessary burdens. These burdens would weigh excessively upon filers, particularly individual or small entities, who would be faced potentially with numerous onerous scenarios: would a filer quoting an academic volume be required to submit a full copy of that book? Would a filer have the facilities to do so electronically, and, if not, does the Commission possess adequate space to store such materials? What costs would be incurred if filers were required to purchase copies or

---

<sup>12</sup> *Cf.*, TOM STOPPARD, NIGHT AND DAY, 97, 98 (Grove Press, Inc. 1979): ("You are confusing freedom with capability. The *Flat Earth News* is free to sell a million copies. What it lacks is the capability of finding a million people with fourpence and the conviction that the earth is flat.")

<sup>13</sup> PN at 1.

<sup>14</sup> By way of example, the "Bluebook," published by the Columbia Law Review Association, provides a standard form of citation for the legal community. *See*, THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, Columbia Law Review Ass'n. *et al.* eds., 19th ed. 2010). General bibliographic forms may be found, for example, in the Chicago Manual of Style. *See*, CHICAGO MANUAL OF STYLE: BIBLIOGRAPHIC FORMAT FOR REFERENCES (University of Chicago Press, 16th ed. 2010).

the rights to copy full volumes or articles they have cited? Would filers be able to cite materials that are not available commercially?

Under the scenario envisioned by the Commission, authors would be compelled to acquire copies of volumes they might otherwise access, without charge, at a library. Where hard-copies are delivered to the Commission, the production and shipping expenses would multiply exponentially, along with Commission storage and personnel costs necessary to absorb the additional paper. Where electronic copies are delivered, the sheer volume of memory required to hold the additional materials would likewise increase demands upon the Commission. All of these impacts would be occasioned by the apparent (and unsubstantiated) presumption that readers are unable to obtain cited materials themselves. Filers would be required to submit to extraordinary expenses to not only acquire materials, but to copy them, as well. Service-list recipient of pleadings would be served no better, having to manage copious volumes of hard-copy or electronic documents. In short, the proposals envision cumbersome, burdensome prospects and threaten to consume quite purposelessly large swaths of both figurative and literal user bandwidth. The proposals would wreak the opposite effect intended by the Commission - by associating onerous obligations with robust research, the Commission would likely encourage filers to rely on as few sources as possible as the transaction and opportunity costs associated with reproducing cited sources could displace resources otherwise directed toward research. Rich public discourse would be replaced by a pauper's selection of sources, and the public interest would be diminished.

The Commission recognizes these hazards even as it proposes them. In the Public Notice, the Commission asks a series of questions upon which it seeks comment: what would be the benefits and burdens of such a new procedural requirement in rulemaking proceedings?<sup>15</sup> NTCA and OPASTCO submit the burdens would outweigh any benefits. Time and resources would be squandered acquiring and then preparing for submission copies of materials otherwise cited sufficiently in the pleading. Moreover,

---

<sup>15</sup> PN at 3.

the benefits of providing a copy of each cited resource remains, at best, questionable: only a handful of cited and provided resources may be of interest to any other filer in a given pleading, and those might be readily accessible through various means.

The Commission asks whether if any such rule is implemented, it should distinguish among types of documents cited; as examples, the Commission asks whether data, economic analyses, law review articles, court decisions, or other government publications should be treated differently.<sup>16</sup> NTCA and OPASTCO submit that, in brief, the proliferation of information that is available via the Internet in the first instance argues against the supposed benefit the supposed benefits that would inure. Beyond that, all documents should be treated equally; it would be exceedingly difficult to distinguish between purportedly different types. Should a law review article from a state university be exempt from the requirement because it might be more readily available (either at a library or on-line) than an article from a smaller, private university? What criteria could the Commission use to distinguish fairly between myriad forms of research or advocacy that would be categorized? Such an effort would be only the endless pursuit of impracticality.

Likewise, the Commission asks whether the ease of access to the cited information should matter.<sup>17</sup> What criteria would determine "ease?" As noted above, the purpose of citations is to distinguish the sources of assertions, and to provide information necessary to enable readers to locate those sources; where accepted academic practices provide a map, the Commission proposes a chauffeur. Finally, the Commission asks whether parties should place an entire document in the record, or whether an excerpt would suffice.<sup>18</sup> Who would play Solomon to split the page, and adjudge whether excerpts surround statements with sufficient context? In contrast, the common citation executes most cleanly the task of providing direction to cited information.

---

<sup>16</sup> PN at 3.

<sup>17</sup> PN at 3.

<sup>18</sup> PN at 3.

### **III. CONCLUSION**

For the reasons stated above, NTCA and OPASTCO oppose the instant proposal. Standard citations distinguish adequately between the source of assertions and evidence, and provide sufficient guidance to readers seeking access to background materials. In contrast, the Commission's proposals would create undue and unnecessary burdens, and should therefore be set aside.

Respectfully submitted,

#### **NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION**

By: /s/ Joshua Seidemann  
Joshua Seidemann  
Director of Policy

4121 Wilson Blvd.  
Arlington, VA 22203  
(703) 351-2035

#### **ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES**

By: /s/ Stuart Polikoff  
Stuart Polikoff  
Vice President – Regulatory Policy and Business Development

2020 K Street, NW  
7th Floor  
Washington, DC 20006  
(202) 659-5990

DATED: January 9, 2012