Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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 DA 11-1950

To: The General Counsel

COMMENTS OF

CONSUMER ELECTRONICS ASSOCIATION
CTIA - THE WIRELESS ASSOCIATION®
INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE
MOTION PICTURE ASSOCIATION OF AMERICA, INC.
NATIONAL ASSOCIATION OF BROADCASTERS
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
PCIA–THE WIRELESS INFRASTRUCTURE ASSOCIATION
TELECOMMUNICATIONS INDUSTRY ASSOCIATION
UNITED STATES TELECOM ASSOCIATION

David H. Solomon
Jonathan V. Cohen
Natalie G. Roisman
WILKINSON BARKER KNAUER, LLP
2300 N Street, NW
Suite 700
Washington, DC 20037
202.783.4141

Their Attorneys

January 9, 2012

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The Consumer Electronics Association, CTIA - The Wireless Association®, Independent Telephone and Telecommunications Alliance, Motion Picture Association of America, Inc., National Association of Broadcasters, National Cable & Telecommunications Association, PCIA–The Wireless Infrastructure Association, Telecommunications Industry Association, and United States Telecom Association (the "Associations") respectfully file these comments to express strong concern that a rule broadly requiring parties in Commission rulemaking proceedings to submit any materials they cite in pleadings or *ex parte* submissions would be unnecessarily burdensome and unlikely to further Commission objectives. If the Commission takes any action in response to the public notice released by the Office of General Counsel on November 29, 2011 ("*Notice*"), it would be far more appropriate for it to (1) encourage parties to include complete and accessible citations in their filings, and/or (2) establish internal procedures or practices to ensure prompt placement in the record of non-record materials on which the Commission intends to rely.

The Commission has been in the vanguard among federal agencies in recognizing the ways that technological developments in electronic media and e-government tools can increase transparency, public participation, and informed decision making in Commission proceedings. The Associations support the Commission's many positive efforts in this area, including recent modifications to the Commission's *ex parte* and other procedural rules. As the Commission has explained, transparency demands that those participating in and observing Commission proceedings be able to identify materials on which the Commission may rely in its decision-making process and, if they so desire, to examine those materials themselves.

However, legal citations already are designed precisely to facilitate such access, and there is no need for, or benefit from, a requirement that cited materials be filed. In any event, compiling a huge volume of potentially duplicative material in one place does not necessarily facilitate access or transparency and may make it more difficult for interested parties to find useful information in the Commission's already dense comment database. Moreover, the Associations are not aware of any complaints from members of the public who were unable to identify and review sources and materials cited in documents filed with the Commission, and the *Notice* does not indicate any pattern of such difficulties or even any basis for concern that such difficulties occur. Rather, the *Notice* points only to complaints regarding the timing of the placement into the record of non-record materials on which the Commission intends to rely. The Commission should not impose unnecessary constraints on its rulemaking process, particularly where there is no demonstrated need for any such requirement.

Yet, the *Notice* contemplates potential adoption of a burdensome filing requirement that is not narrowly tailored. Parties would be forced to devote a substantial amount of time and resources to compiling and uploading copies of cited materials, a cost that would be felt most acutely by smaller entities. Some parties might even reconsider plans to participate in Commission proceedings, or omit certain sources in support of their arguments, thereby diluting the legal and evidentiary rigor of filings and depriving the Commission of information that could be critical to its deliberations.

A broad requirement to file copies of cited materials also would be unworkable. The *Notice* itself points out many of the challenges inherent in the proposal, such as whether to treat data and economic analysis differently from other forms of information, whether to require full sources or only excerpts, and how to address copyright issues. A broad rule requiring filing of full copies of all cited materials would be overwhelmingly burdensome as a practical matter, and even an attempt to craft a more tailored version of the rule could require the Commission to make distinctions between categories of materials that would be likely to draw the Commission into constant debate and perhaps litigation over whether particular filings comply with the rule. In contrast, if proper citations are provided in comments and *ex parte* submissions, all interested parties have ample opportunity to review the material on which arguments are based.

Yet another practical difficulty is that some computer systems may lack the capability to handle the volume of required data uploads. Some Commission rulemaking proceedings draw thousands of comments, and no one can accurately predict the amount of additional data the proposed requirement will require commenters to submit electronically. In the absence of any demonstrated problem, it seems ill-advised for the Commission to seek a "solution" that itself is rife with pitfalls.

Finally, but perhaps most importantly, the proposal in the *Notice* is inconsistent with directives from both the Administration and Congress to reduce burdens on participants in rulemakings, particularly for small entities. It is contrary to President Obama's Executive Orders on regulatory reform and the Commission's plan to analyze its existing rules and eliminate unnecessary data collections, which was developed as part of the Administration's regulatory reform agenda. The proposal also contravenes the requirements of the Paperwork Reduction Act, under which the Commission must reduce information collection burdens on the public and adopt only those collections that are necessary for the agency's performance and not unnecessarily duplicative of information that otherwise is reasonably accessible.

For these reasons, the Commission should not adopt a rule requiring the filing of cited materials in rulemaking proceedings.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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 DA 11-1950

To: The General Counsel

COMMENTS OF

CONSUMER ELECTRONICS ASSOCIATION
CTIA - THE WIRELESS ASSOCIATION®
INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE
MOTION PICTURE ASSOCIATION OF AMERICA, INC.
NATIONAL ASSOCIATION OF BROADCASTERS
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION
PCIA–THE WIRELESS INFRASTRUCTURE ASSOCIATION
TELECOMMUNICATIONS INDUSTRY ASSOCIATION
UNITED STATES TELECOM ASSOCIATION

The undersigned associations (collectively, the "Associations"), through their attorneys, hereby comment on the public notice released by the Office of General Counsel ("OGC") on November 29, 2011 in GC Docket No. 10-44.[1] As explained below, the Associations urge the Federal Communications Commission ("FCC" or "Commission") not to require commenters to submit full copies of any materials they cite in pleadings or *ex parte* submissions filed in rulemaking proceedings. Rather than advancing the Commission's goals of transparency and informed decision making,[2] adoption of this requirement would impose time-consuming, unnecessary burdens on commenters that likely would reduce public participation (especially by

[1] *Comment Sought on Benefits and Burdens of Requiring Commenters to File Cited Materials in Rulemaking Proceedings as Further Reform to Enhance Record-Based Decisionmaking*, Public Notice, GC Docket No. 10-44, DA 11-1950 (OGC rel. Nov. 29, 2011) ("*Notice*").

[2] *Notice* at 2.

smaller entities) and complicate informed decision making. If it deems it necessary to address any specifically identified transparency issues, the Commission may address those in a suitably targeted manner, such as by encouraging parties to include complete and accessible citations in their filings and/or by establishing appropriate internal practices regarding the placement in the record of non-record materials on which the Commission intends to rely.

I. INTRODUCTION

The Associations are filing these comments to express their strong concerns regarding any requirement to require commenters to submit full copies of materials they cite in filings made in rulemaking proceedings.

Recent developments in – and the continued evolution of – electronic media and e-government tools offer many opportunities to improve the Commission's processes, including by promoting participation in its rulemaking proceedings and access to materials filed therein. The Commission has been in the vanguard among federal agencies in recognizing many of these benefits and has worked to promote greater public participation in its proceedings. The Associations fully support the Commission's many positive efforts to increase transparency, public participation, and informed decision making in Commission proceedings, including recent *ex parte* rule modifications in GC Docket No. 10-43 that properly and effectively balanced a need for increased transparency with a limited, tailored administrative burden on filing parties.[3] Nonetheless, the Associations are filing these comments to express their strong concerns that the

[3] For example, the Commission recognized that the new *ex parte* rules might require more effort on the part of filing parties and extended the deadline for filing notifications of *ex parte* presentations to allow an additional business day for the preparation and filing of such notices. *Amendment of the Commission's* Ex Parte *Rules and Other Procedural Rules*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4517, 4533 ¶ 60 (2011) ("*Ex Parte Rules Order*").

broad requirement seemingly contemplated in the *Notice* is unnecessarily burdensome and would contradict rather than further the Commission's goals.

The *Notice* asks whether the Commission should require commenters to file materials they cite in pleadings submitted in rulemaking proceedings. Although well-intentioned, the *Notice* offers no evidence of a need for such a broad requirement, supplies little detail or analysis of the burdens it would impose, and provides no guidance as to whether such a requirement would apply to literally every cited source or to some subset thereof.[4] While advances in technology may make it more feasible for parties to file and access documents electronically,[5] that does not mean that such a requirement, which could result in the filing of thousands of additional documents, is necessary. Parties filing documents in FCC rulemaking proceedings have every incentive to provide full and accurate cites that enable the Commission staff and interested parties to view supporting documents. In particular, parties increasingly are including Uniform Resource Locators ("URLs") in their citations to facilitate online access to supporting documents. Given technological developments, Commission staff and interested parties can easily locate almost any source cited by a filer. If they cannot, the staff can ask a filer to provide or file the particular source that is sought.[6] If necessary, the Commission can remedy appropriately on its own the only problem cited by the *Notice* by promptly placing in the record copies of any non-cited materials on which the Commission intends to rely.

---

[4] The *Notice* includes one paragraph that poses a series of open-ended questions regarding the proposed filing requirement. Each of these questions is discussed herein.

[5] The *Notice* states that the proposed requirement "may be viable under the Commission's current electronic filing processes, when it would not previously have been feasible." *Notice* at 3.

[6] The Commission's rules require filers to identify themselves, so other interested parties that have difficulty locating particular cited material also can contact the filer. *See* 47 C.F.R. § 1.419(e).

The Commission should not impose unnecessary constraints on its rulemaking process that are not required by the Administrative Procedure Act ("APA").[7] Adoption of the proposal would create a complex, costly, and time-consuming burden, which would be felt most acutely by small entities (including many of the Associations' members) that lack the staff and economic resources to prepare and upload copies of all cited sources. By significantly increasing the cost of filing comments, the proposal thus likely would discourage some parties (particularly smaller entities) from participating fully in rulemaking proceedings, or from referencing materials that would help inform the Commission's decision making. At a minimum, compliance with the proposed new filing rule would tax limited resources that can better be applied to advancing substantive arguments that will assist the Commission in its deliberations. For all of these reasons, as discussed in more detail herein, the Commission should not adopt the broad proposal raised by the *Notice* and, if it deems necessary, address any actual transparency issues in a targeted way, through internal reforms, and by encouraging complete and accessible citations.

II. THERE IS NO DEMONSTRATED NEED FOR PARTIES TO FILE MATERIALS CITED IN RULEMAKING PROCEEDINGS

The only basis for the proposed rule mentioned in the *Notice* is the "small number of commenters" that expressed concern regarding the Commission staff's placement of un-cited materials into the record toward the end of the proceeding.[8] Such a problem can be addressed in a narrowly tailored way by the Commission staff's prompt submission into the record of non-record documents relied upon in decision making, without any need for an overly burdensome rule. By contrast, the Associations are not aware of any complaints from members of the public who were unable to identify and review sources and materials cited in documents filed by

[7] 5 U.S.C. § 553.

[8] *Notice* at 2.

outside parties, and the *Notice* does not indicate any pattern of such difficulties or any basis for concern that such difficulties occur. The Associations and any other parties filing comments have every incentive to provide full and accurate citations so that Commission staff can access underlying sources that support arguments made in filings. Other participating parties, as well as observing parties, benefit from this incentive as well.

More specifically, there is no evidence that citations in pleadings and *ex parte* submissions are insufficient to allow interested parties to access and review relevant sources. The long history of legal citations, as well as the ever-evolving nature of *The Bluebook* and similar guides, ensures that citations point a reader directly toward a supporting source.[9] In fact, parties filing pleadings with the FCC increasingly are including URLs in their citations to facilitate access to supporting documents by Commission staff and interested parties. As the editors of *The Bluebook* and many parties participating in Commission proceedings implicitly recognize, URLs in submitted documents often provide the most convenient and efficient way for a reader to instantaneously find and view the cited source.[10] Clearly, a cited source available online will be far easier for interested parties to locate than it would be through the

[9] *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 1 (Columbia Law Review Ass'n *et al*. eds., 19th ed. 2010) ("*The Bluebook*") ("The central function of a legal citation is to allow the reader to efficiently locate the cited source.") ("[T]he citation forms … are designed to provide the information necessary to lead the reader directly to the specific items cited. Because of the ever-increasing range of authorities cited in legal writing, no system of citation can be complete…. Always be sure to provide sufficient information to allow the reader to find the cited material quickly and easily."). *See also* THE UNIVERSITY OF CHICAGO MANUAL OF LEGAL CITATION vi (The University of Chicago, 20th Anniversary Ed. 2010) ("*Maroonbook*") ("Users should be guided by the following four principles, listed in order of importance: (1) Sufficiency: The citation should give the reader enough information to locate the cited material without further assistance …."); ASSOCIATION OF LEGAL WRITING DIRECTORS & DARBY DICKERSON, ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION (4th ed. 2010).

[10] The Nineteenth Edition of *The Bluebook*, released in 2010, changed the rules regarding Internet citation "primarily to allow increased citation to Internet sources." *The Bluebook* at VII. The updated rules now also include suggested citations for new forms of online electronic media, including podcasts and online recording. *See id.* at VIII.

Commission's Electronic Comment Filing System ("ECFS") or on the Commission's website, particularly for those not familiar with the Commission's electronic databases. Furthermore, several websites are actively increasing the scope of materials available to the public online, including by providing access to regularly updated laws and regulations, legal opinions, law review articles, and other scholarly works.[11] In light of the expanded ability to access documents via electronic sources, there is no reason to believe that any parties would have difficulty accessing and reviewing properly cited sources and materials.

The Associations further note that a review of other independent regulatory agencies that conduct rulemaking proceedings reveals that none requires the submission of cited materials in rulemaking proceedings.[12] Moreover, section 1.720(f) of the Commission's rules,[13] which requires the filing of certain materials in the context of formal complaints, is not relevant here. When the Commission adopted that provision in 1988, the publicly-available Internet as we know it did not exist, and the authorities covered – including, for example, unpublished court decisions – were not readily available to the public. Indeed, the Commission specifically

---

[11] *See, e.g.*, Google Scholar, http://scholar.google.com/; Scribd, http://www.scribd.com/; Jurist, http://www.jurist.law.pitt.edu/; Cornell University Law School Legal Information Institute, http://www.law.cornell.edu/. With the power and accuracy of today's Internet search technologies, sources from these websites and others can typically be found within seconds. Google, Yahoo!, and Microsoft's Bing have had measured success rates (meaning that a search results in a visit to a website) of 68 to 81 percent. *See Experian Hitwise reports Google share of searches at 66 percent in July 2011*, Press Release (Aug. 11, 2011), *available at* http://www.hitwise.com/us/about-us/press-center/press-releases/experian-hitwise-reports-google-share-of-searche/.

[12] We have reviewed the procedural rules of the following agencies: the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Energy Regulatory Commission, the Federal Trade Commission, the Nuclear Regulatory Commission, and the Securities and Exchange Commission.

[13] The *Notice* incorrectly cites section 1.721(f) of the rules, which addresses the format of Accelerated Docket complaints. *See Notice* at 3 n. 9. The Associations assume that the *Notice* intended to cite section 1.720(f) instead.

exempted readily obtained authorities such as prior Commission decisions from the rule's scope, noting that "it would be unduly burdensome to require parties to attach copies of Commission authorities on which they have relied."[14] The Commission specifically limited the rule's application to authorities "*which are not routinely available in national reporting systems*."[15] As explained above, the Internet and electronic databases have made the types of information covered by Section 1.720(f) – and virtually all information upon which a commenter would rely – easily available to any interested party.[16] Even to the extent section 1.720(f) still serves some function, that function is limited to the formal complaint process, which involves specific parties and more expansive due process rights, and does not extend to the rulemaking context.

Because the *Notice* does not provide any persuasive evidence of a need for a new filing requirement, the proposal fails to meet the basic requirements for imposing additional regulatory burdens: government agencies must both identify a particular need for new regulation and make a rational connection between the facts found and the choices made.[17] To the contrary, as discussed below, a requirement that participants in rulemaking proceedings file copies of cited materials would actually impede achievement of the Commission's stated goals in this proceeding.

---

[14] *Amendment of Rules Governing Procedures to Be Followed Where Formal Complaints Are Filed Against Common Carriers*, Report and Order, 3 FCC Rcd 1806, 1806 (1988). The Associations acknowledge that attaching copies in paper filings and uploading documents may not represent equivalent burdens. Nonetheless, the Commission recognized that including materials readily available elsewhere was unnecessary, and, as made clear in these comments, uploading relied-upon authorities can involve significant burdens.

[15] *Id.* at 1815 (emphasis added); 47 C.F.R. § 1.720(f).

[16] The likelihood is minimal that a commenter would cite an opinion or document in a rulemaking proceeding that is either not available electronically or not otherwise easily available. In any event, the remote possibility of such an occurrence is not sufficient to justify the broad requirement in the *Notice*.

[17] *See, e.g., Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

III. THE COMMISSION'S PROPOSAL DOES NOT ADVANCE ITS GOAL OF TRANSPARENCY

Although the *Notice* claims transparency as a basis for the proposed requirement, a broad requirement to file copies of cited materials does nothing to "improve transparency and informed decision making"[18] because these materials already have been fully (and transparently) cited in a document filed with the Commission. The Associations agree with the Commission that transparency, robust public participation, and informed decision making are key values to uphold in FCC proceedings, because it is only with a full and meaningful opportunity for public participation that the Commission can properly carry out its regulatory mission. When recently modifying its *ex parte* and Sunshine period rules, the Commission correctly observed that reform of these rules would "enable those participating in our proceedings as well as those observing them to better identify and understand the issues being debated before the Commission," and that the rules should be "consistent with the need to assure that interested parties, and the public, know what information and arguments are being presented to the Commission and who is presenting them."[19] These actions, as well as moving more FCC proceedings to online dockets, already have benefited and will continue to benefit the public.

---

[18] *Notice* at 2.

[19] *Ex Parte Rules Order*, 26 FCC Rcd at 4518 ¶ 1 ("This reform should enable those participating in our proceedings as well as those observing them to better identify and understand the issues being debated before the Commission."); *id.* at 4520 ¶ 15 ("The Commission's *ex parte* rules attempt to assure that the Commission's use of *ex parte* presentations as a means of obtaining timely information is consistent with the need to assure that interested parties, and the public, know what information and arguments are being presented to the Commission and who is presenting them."); *id.* at 4525 ¶ 33 ("Transparency requires that interested parties, and the public, know that *ex parte* meetings are taking place, no matter whether old or new information is being discussed. … [T]his rule change will increase the public's ability to follow the course of Commission proceedings, thereby facilitating the public's ability to express opinions on pending matters either by submitting written comments or by joining the informal discussion of issues on the Commission's new electronic media platforms.").

Transparency also requires that those participating in and observing Commission proceedings be able to identify materials on which the Commission may rely in its decision-making process and, if they so desire, to examine those materials themselves. Full legal citations are designed precisely to facilitate such access. By their very nature, sources properly cited in filed pleadings or *ex parte* notices indicate clearly "what information and arguments are being presented to the Commission" (*i.e.*, the cite) and "who is presenting them" (*i.e.*, the filer). In some cases, the Commission may choose to rely on sources that have not been placed in the record (either through direct filing or citation by a participating party). If the Commission believes that such sources are important and wants to facilitate access to them, it is appropriate for the Commission to place them in the record.

According to the *Notice*, concerns regarding transparency have led the Commission staff to submit collections of materials into the record in major proceedings,[20] but these concerns are not implicated here. Specifically, the *Notice* references "materials that parties have not submitted in the record" – an apt description of sources that the staff reviews on its own accord and that are not cited by parties filing pleadings or *ex parte* submissions on the record. This description does not apply to materials that *are* fully cited in submissions to the Commission, where the citations provide the public with sufficient awareness that the Commission may consider the cited source(s). Although the *Notice* cites a "small number of commenters" who "voiced concern that such submissions, toward the end of the proceeding, might not serve their intended purpose of promoting transparent decision making and might, indeed, limit

[20] *Notice* at 2 ("In some proceedings, particularly large and complicated rulemakings, staff may analyze materials that parties have not submitted in the record, including materials such as state statutes, academic articles, blog posts, and company financial reports."). The Commission asserts that in many instances "filings that the Commission staff placed in the record had been cited by commenters in their filings, and the staff's submission was intended to make the materials more accessible." *Id*.

opportunities for meaningful responsive comment," these concerns related to the *timing* of the Commission staff's submission of data into the record, not the lack of a requirement for filing full copies of cited materials or the failure of any party to cite source materials fully or properly.[21]

As it has previously done, the Commission staff can add documents to the record of a proceeding to ensure that the public is aware of the non-record materials on which the staff is relying. If the concern is the last-minute timing of such additions to the record, the Commission staff should either work to incorporate such materials into the record at an earlier stage or delay Commission action until a sufficient time has passed. Thus, if the Commission wishes to address certain specific concerns raised in the *Notice* (*e.g.*, public access to documents that were not cited in the record but on which the Commission staff is relying), the Commission could place certain materials into the record on an *ad hoc* basis or craft internal rules or policies sufficient to resolve any concern without placing a burden on participating parties. The Commission also could identify materials cited by commenters as particularly helpful to its rulemaking efforts and place such materials into the record to facilitate even easier public access. The proposal in the *Notice* is unnecessary to effectuate these reforms (if the Commission deems them worth pursuing).

IV. THE PROPOSED FILING REQUIREMENT WILL IMPOSE SUBSTANTIAL AND COMPLEX BURDENS THAT WILL DETER PARTICIPATION AND HARM INFORMED DECISION MAKING

Even if it could be shown that interested parties have difficulty accessing cited materials, the filing requirement outlined in the *Notice* is likely to have unintended consequences contrary to the Commission's key values of "robust public participation" and "informed decision

[21] *Id.* at 2 & n. 8.

making."[22] Adoption of this time-consuming requirement would impose burdens on commenters that likely would reduce public participation (especially by smaller entities) and ultimately render informed decision making more difficult for the Commission.

Though the *Notice* does not address or analyze the burdens the proposal would create, it is clear that a significant burden would befall all parties filing comments and *ex parte* submissions. Each party would be forced to devote a substantial amount of time and resources to compiling copies of cited materials, making their meaningful participation in Commission proceedings more difficult and expensive. For pleadings making arguments that find support from numerous sources, this could be an extremely time-consuming and complex undertaking. Commenting parties typically have limited budgets to devote to their participation in Commission rulemaking proceedings. The time and expense associated with complying with a new requirement to file copies of all cited sources could discourage parties from making additional substantive arguments or even from participating entirely. At a minimum, the proposed requirement might induce some parties to omit certain sources in support of their arguments, thereby diluting the legal and evidentiary rigor of filings and depriving the Commission of information that could be critical to its deliberations.

The harmful effects of the proposal would be felt most acutely by small entities, including many of the Associations' members, whose ability to meaningfully participate in Commission rulemaking proceedings is subject to the greatest constraints. These entities may have more limited means than large entities to gather materials in support of their positions in Commission rulemaking proceedings. Further, small entities may not easily or inexpensively be able to obtain full copies of the materials that they cite in their comments in a format that can be

[22] *Id.* at 2.

filed electronically. In addition, some smaller entities and individuals do not have access to the high-speed broadband Internet access services that may be needed to easily upload large files to the Commission's filing systems. In short, by driving up the costs of filing, the proposed filing requirement would exacerbate the difficulties smaller entities already face in making their voices heard by the Commission.

Furthermore, for all participants in rulemaking proceedings, the time required to assemble cited material would be substantial. Under the proposal, copies of all cited materials presumably would have to be filed at the same time as the comments or other *ex parte* communications in which those materials were cited. If so, comments and other submissions would need to be completed well in advance of the filing deadline to allow time to assemble copies of the cited materials. Uncertainties regarding the amount of time that would be required to upload submissions that include voluminous cited sources would require parties to build in a significant amount of time to ensure that applicable deadlines are met. Depending on the length of cited materials, it might not be possible to upload a source to ECFS as part of a filing or even as a single file; in some cases, a party providing detailed citations in its submission could be forced to upload hundreds of source documents.[23]

[23] For example, CTIA's recent comments in the Commission's proceeding on the State of Mobile Wireless Competition included only two attachments to its comments, yet the document was too large for ECFS to accommodate and had to be subdivided into four separate documents. *See* Comments of CTIA - The Wireless Association®, WT Docket No. 11-186 (filed Dec. 5, 2011). Indeed, there is no telling how voluminous the electronic filings would have been if CTIA's filing also had included all materials cited in the more than 200 footnotes and dozens of charts and graphs. Similarly, PCIA's comments in the Broadband Acceleration Docket were 66 pages long (not including two lengthy exhibits), and included 230 footnotes (some referring to the same source) referencing news publications, local zoning regulations, state law, seminars, FCC documents, and much more. Filing these source materials would have made the filing exponentially longer. *See* Comments of PCIA–The Wireless Infrastructure Association, WC Docket No. 11-59 (filed Jul. 18, 2011). *See also* Comments of National Association of Broadcasters, MB Docket No. 09-182 (filed Jul. 12, 2010) (NAB's comments in media

Compiling a huge volume of likely duplicative material in one place does not necessarily facilitate access or transparency for interested parties. The costs in resources and time of the proposed new filing rule thus far outweigh any benefit. Especially in the absence of evidence that interested parties have encountered problems reviewing cited sources and making responsive arguments, the public interest requires that the Commission refrain from adopting a requirement that could deter meaningful participation in Commission proceedings (or at a minimum diminish the quality of comments and *ex parte* communications) and thereby make Commission decisions less informed, not more.

V. A REQUIREMENT TO FILE COPIES OF ALL CITED MATERIALS IS UNWORKABLE AS A PRACTICAL MATTER

A. The Commission Would Face Myriad Practical Difficulties in Crafting Any Effective Rule

Requiring the submission of full copies of all materials cited by commenters and filers of pleadings and *ex parte* communications in Commission rulemakings is impractical in a number of ways.[24] Many of the practical difficulties of the proposal are highlighted by the very questions on which OGC sought comment in the *Notice*. For example, the *Notice* asks whether "data" should be treated differently from "other forms of information," and whether "economic analysis" should be treated differently from law review articles, court decisions, or other government publications. It asks for input on whether the "ease of access to the cited

---

ownership proceeding were 97 pages long, not counting five exhibits, and included 304 footnotes, a number of which cited to multiple source materials).

[24] If the Commission proceeds, at the very least it should clarify that the proposal covers neither FCC documents that are available on the Commission's website nor any filings already accessible through the ECFS. The Commission and its staff have worked hard to make the FCC's website accessible for procuring documents, and it would make no sense to require commenters to file duplicative copies of such items into the Commission's system. For example, a reply commenter should not be required to file copies of all comments in the proceeding that it cites in its reply.

information" should matter, and on whether considerations of practicality, such as when copying is not permitted, should impact the crafting of a filing requirement.[25] The *Notice* also asks whether "parties [would] need to place an entire document in the record" or whether "an excerpt [would] suffice."[26] As explained below, the definitional and line-drawing challenges posed by each of these questions are at best highly problematic.

For example, if "data" and "economic analysis" are to be treated differently from "other forms of information," commenters would need to determine for each cited source material whether that material falls within the definition of "data" or "economic analysis" and thus qualifies for special treatment. Even in the unlikely event that the Commission could draw rational distinctions between various categories of cited materials, individual commenters inevitably would differ in their judgments as to whether their materials fall within the categories subject to special treatment, thereby ultimately resulting in the inconsistent filing of data with the Commission.

Recognizing the burden that would be imposed by the proposed new rule, the *Notice* asks whether mandating the filing of something less than full copies of cited materials might suffice.[27] Even a more narrowly crafted approach, however, could be rife with practical difficulties and substantive risks. Adoption of a "light" version of the proposed rule would require the Commission to draw distinctions between categories of material that would have to be filed and those that would not. It is highly doubtful that this line-drawing exercise would produce a non-arbitrary rule that could be rationally and consistently applied to all filings in all rulemaking proceedings, meaning that the Commission likely would be drawn into debate and perhaps even

[25] *Notice* at 3.

[26] *Id*.

[27] *Id*.

litigation over whether a particular filing complies with the rule. In addition, regardless of the standard used to judge the sufficiency of an excerpt, one can easily imagine commenters taking different approaches. Conversely, if citations provided in comments and *ex parte* submissions are adequate, all interested parties have ample opportunity to review the material on which arguments are based.

As the *Notice* recognizes, yet another hurdle is posed by circumstances in which materials "could not practically be placed in the record, such as when third parties do not permit copying (*e.g.*, daily newsletters) . . . ."[28] Arguments made by participants in rulemaking proceedings often are based on copyrighted materials. As the *Notice* implies, requiring the submission of copies of such material for the Commission's public record raises thorny issues of commercial and copyright law. It may be legally impossible for a filer to submit such a source in full or even in part, even where a source is easily available to both the filing party and any interested reader. In addition, reproduction of analyst reports, surveys, and other materials may be subject to licensing limitations. It is far from certain that these concerns can be adequately addressed. In the absence of a demonstrated problem, it seems ill-advised for the Commission to seek a solution that itself has so many pitfalls.

B. Some Computer Systems May Lack the Capability to Handle the Volume of Required Data Uploads

Not all computer systems are equipped to handle large-volume data uploads, and this may be particularly true for those on which small entities rely. Consequently, participants in rulemaking proceedings may have problems during the uploading or downloading of numerous sources filed electronically. To the extent that any interested party is unable to submit the

[28] *Id*.

required copies, a new filing requirement would degrade, not improve, transparency and informed decision making.

Some Commission rulemaking proceedings draw thousands of comments – they are closely watched and often are critical to the nation's communications system and economy.[29] The Commission conducts multiple rulemaking proceedings at the same time, and most comments are submitted at or near the deadline for filing. No one can accurately predict the amount of additional data the proposed requirement will require commenters to submit electronically to the Commission's ECFS, but a very real risk exists that the Commission's online systems will be unable to handle the resulting avalanche of documents. This concern is not mere speculation, as significant problems recently have been experienced in connection with the filing of large amounts of data with the Commission.[30] Even if the problems are limited to the time it takes to upload copies of cited materials, the prospect of such delays in the rulemaking

[29] For example, in its recent Universal Service Fund/Intercarrier Compensation Transformation proceeding, the Commission received "over 2,700 comments, reply comments, and ex parte filings totaling over 26,000 pages." *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, *et al.*, FCC 11-161 ¶ 12 (rel. Nov. 18, 2011).

[30] *See*, *e.g.*, Comments of the National Association of Broadcasters, MM Docket Nos. 00-168, 00-44, at 5 (filed Dec. 22, 2011) ("[R]ecent history indicates that unanticipated problems can and do arise when a number of licensees attempt to upload data to the FCC's database around the same time."); Comments of the Joint Broadcasters, MM Docket Nos. 00-168, 00-44, at 15 n. 31 (filed Dec. 22, 2012) ("During the recent biennial ownership report filing … the Commission's servers apparently were so overloaded that it took as many as 24 hours to upload a single Microsoft Excel spreadsheet associated with such reports."); Comments of Hubbard Broadcasting, Inc., MM Docket Nos. 00-168, 00-44, at 2 (filed Dec. 22, 2011) ("It often required many hours for CDBS to accept an upload of a single attachment to an ownership report. Indeed, at one point, the FCC's staff advised that it would require more than 24 hours to complete the upload of a single required ownership spreadsheet into CDBS. During the time it takes to upload a document into a CDBS account, no other filing may be made into the same account. Thus, these delays can paralyze a licensee's ability to make filings for hours at a time or longer.").

context would force interested parties to devote significantly more time to the filing process, potentially diverting attention from the advancement of substantive legal and policy arguments.

VI. THE PROPOSAL IS INCONSISTENT WITH ADMINISTRATION AND CONGRESSIONAL DIRECTIVES TO REDUCE BURDENS ON PARTICIPANTS IN RULEMAKINGS, PARTICULARLY SMALL ENTITIES

The contemplated adoption of a burdensome new filing requirement that is neither justifiable nor narrowly tailored runs counter to the Administration's regulatory reform policy and the Congressional goals of the Paperwork Reduction Act ("PRA"). On January 18, 2011, President Obama issued an Executive Order, titled "Improving Regulation and Regulatory Review," reaffirming principles originally articulated in Executive Order 12866 (signed by President Clinton in September 1993), which directed each Federal agency to propose or adopt a regulation "only upon a reasoned determination that its benefits justify its costs," and to "tailor its regulations to impose the least burden on society . . . ."[31] Chairman Genachowski subsequently directed the Commission's bureaus and offices "to act in a manner consistent with its principles."[32] For the reasons discussed above, the proposal outlined in the *Notice* would not meet these requirements. To the very limited extent that adoption of the proposed new filing requirement would produce any public interest benefits, those benefits clearly would not be significant enough to justify the costs and unintended consequences that the new requirement would certainly impose.

---

[31] *See* Exec. Order No. 13563 of January 18, 2011, 76 Fed. Reg. 3821 (Jan. 21, 2011) ("January 18, 2011 Executive Order"), *quoting* Exec. Order No. 12866, 58 Fed. Reg. 51735, 51736 §§ 1(b)(6), (11) (Oct. 4, 1993).

[32] Remarks of FCC Chairman Julius Genachowski, Georgetown Center for Business and Public Policy, Georgetown University, Washington, D.C. (Nov. 7, 2011), at 2, *available at* http://www.fcc.gov/events/chairman-genachowskis-remarks-georgetown-university ("Genachowski Georgetown Remarks").

Similarly, it would be hard to reconcile adoption of the proposed new filing requirement with the Commission's "Preliminary Plan for Retrospective Analysis of Existing Rules," developed as part of the Administration's regulatory reform agenda.[33] Specifically, the Plan was issued consistent with President Obama's July 11, 2011 Executive Order, which asks independent agencies to develop a plan to "consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome . . . ."[34] Referring to its Data Innovation Initiative, the Commission's Plan touts the "25 data collections that may be eliminated" and states that the Commission "regularly examines its existing regulations and identifies means for minimizing regulatory burdens . . . ."[35] Chairman Genachowski described the efforts as, among other things, "removing needless burdens on industry. . . ."[36] The Associations applaud the Commission's Data Innovation Initiative, which seeks (among other things) to eliminate unnecessary data collections. The proposal under consideration here, however, runs counter to the Commission's efforts to streamline regulation and reduce burdens.

---

[33] Federal Communications Commission, *Preliminary Plan for Retrospective Analysis of Existing Rules* (Nov. 7, 2011), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1107/DOC-310874A1.pdf ("Plan"). The Commission recently issued a Public Notice seeking comment on the Plan. *See Commission Seeks Comment on Preliminary Plan for Retrospective Analysis of Existing Rules*, Public Notice, GC Docket No. 11-199, DA 11-2002 (OGC rel. Dec. 8, 2011).

[34] Exec. Order No. 13579 of July 11, 2011, 76 Fed. Reg. 41587 (Jul. 14, 2011).

[35] Plan at 4. The Data Innovation Initiative includes the appointment of a Chief Data Officer for each of the Commission's Bureaus and Offices, whose mission entails modernizing and streamlining how the Commission collects, uses, and disseminates data, including recommending the elimination or improvement of existing data collections. *See FCC Launches Data Innovation Initiative: Agency Appoints Data Officers and Releases Public Notices of Review*, News Release (rel. Jun. 29, 2010), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Digest/2010/dd100629.html. The proposal in the *Notice* is inconsistent with this mission.

[36] Genachowski Georgetown Remarks at 2.

The proposal also is inconsistent with Congressional goals. Under the PRA, each agency, including the Commission, is required to manage its information resources in a manner to "reduce information collection burdens on the public."[37] The first stated purpose of the PRA is to "minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions … and other persons resulting from the collection of information by or for the Federal Government."[38] The proposed requirement would serve only to increase the burden on the public without any countervailing benefit to the Commission or the public, in contravention of both the letter and the spirit of the PRA. The Commission also is required by the PRA to certify that proposed information collections are (i) "necessary for the proper performance of the functions of the agency," and (ii) "not unnecessarily duplicative of information otherwise reasonably accessible to the agency."[39] The proposed requirement fails to meet these standards. Assuming (given no evidence to the contrary) that cited material is reasonably accessible, a rule requiring commenters and filers of *ex parte* communications to file copies of cited materials is not necessary to the agency's performance and it would be duplicative of information that is already readily accessible. Because the proposal set forth in the *Notice* does not meet the threshold for regulation permissible under the PRA, the Commission should cease consideration of any such rule.

VII. CONCLUSION

For the reasons set forth above, the Commission should not adopt the proposal in the *Notice* to require filing of cited materials in rulemaking proceedings. Instead, if the Commission takes any action in response to the *Notice*, it would be far more appropriate for it to (1)

[37] 44 U.S.C. § 3506(b)(1)(A).

[38] *Id.* § 3501(1).

[39] *Id.* § 3506(c)(3)(A), (B).

encourage parties to include complete and accessible citations in their filings, and/or (2) establish internal procedures or practices to ensure prompt placement in the record of non-record materials on which the Commission intends to rely.

Respectfully submitted,

CONSUMER ELECTRONICS ASSOCIATION
CTIA - THE WIRELESS ASSOCIATION®
INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE
MOTION PICTURE ASSOCIATION OF AMERICA, INC.
NATIONAL ASSOCIATION OF BROADCASTERS
NATIONAL CABLE & TELECOMMNICATIONS ASSOCIATION
PCIA–THE WIRELESS INFRASTRUCTURE ASSOCIATION
TELECOMMUNICATIONS INDUSTRY ASSOCIATION
UNITED STATES TELECOM ASSOCIATION

By: */s/ David H. Solomon*

David H. Solomon
Jonathan V. Cohen
Natalie G. Roisman
WILKINSON BARKER KNAUER, LLP
2300 N Street, NW
Suite 700
Washington, DC 20037
202.783.4141

Their Attorneys

January 9, 2012

Your submission has been accepted

ECFS Filing Receipt - Confirmation number: 201219318904

Proceeding

Name	Subject
10-44	In the Matter of Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commisssion Organization.

Contact Info

Name of Filer: Consumer Electronics Association; CTIA - The Wireless Association; Independent Telephone and Telecommunications Alliance; Motion Picture Association of America, Inc.; National Association of Broadcasters; National Cable & Telecommunications Association; PCIA - The Wireless Infrastructure Association; Telecommunications Industry Association; and United States Telecom Association

Attorney/Author Name: David H. Solomon

Lawfirm Name (required if represented by counsel): Wilkinson Barker Knauer, LLP

Address

Address For: Law Firm
Address Line 1: 2300 N Street, NW
Address Line 2: Suite 700
City: Washington
State: DISTRICT OF COLUMBIA
Zip: 20037
+4: 1128

Details

Type of Filing: COMMENT

Document(s)

File Name	Custom Description	Size
Association Comments re FCC Public Notice DA 11-1950.pdf		131 KB

Disclaimer

This confirmation verifies that ECFS has received and accepted your filing. However, your filing will be rejected by ECFS if it contains macros, passwords, redlining, read-only formatting, a virus, or automated links to other documents.
Filings are generally processed and made available for online viewing within one business day of receipt. You may use the link below to check on the status of your filing:
http://fjallfoss.fcc.gov/ecfs/comment/confirm?confirmation=201219318904
For any problems please contact the Help Desk at 202-418-0193.