

Comment from Senior Fellow Richard J. Pierce on *Mass Comments, Computer-Generated Comments and Fraudulent Comments*

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I support the proposed recommendations. The ACUS staff, the consultants and the members of the rulemaking committee worked hard to draft the best possible set of recommendations to address the many problems that are caused by mass comments, computer-generated comments and fraudulent comments. If we believe that we can do nothing effective to address these problems at their source, the actions recommended offer the best prospects for reducing the many serious problems that are created by these three phenomena. I believe that we can and should address the problems at their source, however. Each of these phenomena and the many problems that they create have only one source—the widespread but mistaken public belief that notice and comment rulemaking can and should be considered a plebiscite in which the number of comments filed for or against a proposed rule is an accurate measure of public opinion that should influence the agency’s decision whether to adopt the proposed rule. I believe that ACUS can and should assist agencies in explaining to the public why the notice and comment process is not, and cannot be, a plebiscite, and why the number of comments filed in support of, or in opposition to, a proposed rule should not, and cannot, be a factor in an agency’s decision making process.

**The Notice and Comment Process Allows Agencies to Issue Rules that Are Based on Evidence**

The notice and comment process is an extraordinarily valuable tool that allows agencies to issue rules that are based on evidence. It begins with the issuance of a notice of proposed rulemaking in which an agency describes a problem and proposes one or more ways in which the agency can address the problem by issuing a rule. The typical notice is long. It includes extensive discussion of the sources of the evidence to support the agency’s belief that the problem exists and of the sources of evidence to support the agency’s belief that its proposed solutions to the problem would be effective. That evidence typically includes studies done by the agency and/or by third parties that purport to document the existence and severity of the problem, its sources, and the potential means through which the agency can address the problem.

The agency then solicits comments from interested members of the public. The comments that assist the agency in evaluating its proposed rule are rich in data and analysis. Some support the agency’s views with additional evidence, while others purport to undermine the evidentiary basis for the proposed rule. The agency then makes a decision whether to adopt the proposed rule or some variant of the proposed rule in light of its evaluation of all of the evidence in the record, including both the studies that the agency relied on in its notice and the data and analysis in the comments submitted in response to the notice. Courts require agencies to address all of the issues that were raised in all well-supported substantive comments and to explain adequately why the agency issued, or declined to issue, the rule it proposed or some variation of that rule in light of all of the evidence the agency had before it. If the agency fails to fulfill that duty, the court rejects the rule as arbitrary and capricious.

The notice and comment process is the best means that has ever been devised to insure that agency rules are supported by evidence. It is not perfect, however. Studies have found that the comments that have the greatest potential effect on the agency decision making-process are filed disproportionately by companies that would bear the costs imposed by the rules and/or the trade associations that represent those companies. Typically, there are more comments that are rich in data and analysis that are filed by regulated companies and their trade associations than by the intended beneficiaries of the proposed rules. That finding is easy to explain. Each regulated firm has a large amount of money at stake in the rulemaking, and regulated firms have the expertise required to draft effective comments. By contrast, individual beneficiaries typically have little or no expertise that is relevant to a rulemaking, and they have too little at stake in a rulemaking to justify devoting a lot of time and money to the process of drafting effective comments. Often, there are millions of members of the public who are potentially affected by a rule, but each member is affected in ways that do not justify the large expenditures of time and money that are required to draft and file comments that are rich in data and analysis. In most cases, the potential beneficiaries of a rule suffer from collective action problems that render it difficult for them to join together to sponsor and fund comments that are rich in data and analysis. ACUS has long supported efforts to assist the intended beneficiaries of rules in their efforts to overcome the obstacles to their ability to participate effectively in rulemakings, but those obstacles are so formidable that ACUS has enjoyed limited success in those efforts so far.

The advantages that regulated firms enjoy in the notice and comment process are offset to a considerable extent by the large number of studies that are relevant to many rulemakings that were conducted by agencies and academic institutions that have no apparent source of bias that is relevant to a rulemaking. In many cases, individual members of the public can make effective use of those studies in the comments that they file. The rulemaking at FERC that was triggered by a petition for rulemaking filed by the then-Secretary of Energy in 2017 illustrates this phenomenon. The Secretary urged FERC to adopt a rule that would have had the effect of requiring electric generating companies to increase dramatically the amount of coal that they use to generate electricity. He claimed that such an increase in use of coal to generate electricity would increase the reliability of electricity service to consumers without significantly increasing air pollution. I was one of several individual citizens who made it impossible for FERC to adopt the proposed rule by filing comments that referred to, and incorporated by reference, the many studies that (1) identify the sources of unreliability of electricity generated through use of coal, e.g., coal piles freeze and coal trucks and trains are unable to make deliveries in extremely cold conditions, (2) the massive increases in mortality and morbidity that would result from the increased emissions of small particulate matter, and (3) the catastrophic effects of the resulting increased emissions of carbon dioxide on efforts to mitigate climate change. Citizens should be encouraged to participate in notice and comment proceedings in that manner.

### **Mass Comments Are Not Helpful to Agency Decision Making and Create Major Problems**

Individual members of the public also can participate in the notice and comment process in another way. Sometimes the companies and advocacy organizations that support or oppose a proposed rule organize campaigns in which they induce members of the public to file purely conclusory

comments in which they merely state their support for or opposition to a proposed rule. The proponents or opponents then argue that the large number of such comments prove that there is strong public support for the position taken in those comments. Comments of that type have no value in an agency's decision-making process. Every scholar who has studied the issue has concluded that the number of comments filed for or against a proposed rule is not, and cannot be, a reliable measure of the public's views with respect to the proposed rule.

Mass comment campaigns create major problems in the notice and comment process. Many of those problems are described in the report that the ACUS consultants wrote to support their proposed recommendations. Others are described in the comments filed by the Democracy Forward Foundation and in the May 6, 2021, report of the Attorney General of New York on the results of her investigation of the mass comment campaign that took place in the context of the most recent net neutrality rulemaking. Democracy Forward has a mission of ensuring that agencies issue rules that are well-supported by scientific evidence. For that purpose, they study the comments that are filed in rulemakings to determine whether the substantive positions taken in the comments are well-supported by the available scientific evidence. If they see errors or omissions in those comments, they bring them to the attention of the agency in supplemental comments and/or make use of them in briefs that they file in court proceedings to review the resulting rules.

Democracy First knows that there are only a few comments submitted in each rulemaking that are likely to influence the agency or a reviewing court. They are the comments that are rich in data and analysis. Democracy First has experienced increasing difficulty even finding those comments in the massive records of the rulemakings that have attracted mass comments. If they cannot find a comment, they cannot possibly evaluate it to determine whether it is well-supported by the available scientific evidence or bring its flaws to the attention of the agency or a reviewing court. The difficulty that participants in rulemakings experience in locating the important comments that have been filed in a rulemaking creates serious risks that agencies will issue rules that are based on inaccurate data or faulty analysis, and that the courts will uphold those rules.

The FCC's net neutrality rulemakings illustrate well the effects of mass comment campaigns. I will put the net neutrality dispute in context by personalizing it. Many years ago, when the concept of net neutrality was first suggested I was asked to serve as an expert witness in support of net neutrality. I was asked to perform that function because of the significant roles that I had played in the process of designing and implementing the arguably analogous systems of equal access to gas pipelines and equal access to electricity transmission lines that FERC had implemented.

I spent a lot of time trying to predict the effects of net neutrality. I found it easy to predict that a decision to implement net neutrality would increase the amount of socially beneficial investment in content and reduce the amount of socially beneficial investment in ISP capability, while a decision to leave ISPs with the discretion to provide different treatment to various forms of content would have the opposite effects. I was unable to predict which of those combinations of investment patterns would provide the greatest net benefit to the economy and to consumer welfare, however. Without that capability, I reluctantly declined the offer to participate in the net neutrality debate. I am confident that only a tiny fraction of the millions of people who file comments in net neutrality

rulemakings have any real understanding of the complicated effects of a decision to adopt or not to adopt a net neutrality legal regime.

It should be obvious to all participants in, and observers of, the net neutrality debate that its resolution will add many billions of dollars to the bottom lines of one set of participants and subtract many billions of dollars from the bottom lines of another set of participants. When you couple that reality with the widespread and growing belief that the number of comments for or against a proposed rule has a major effect on the outcome of a rulemaking you get the results that the New York Attorney General documented in the report that she issued on May 6, 2021. She labeled as “fake” 18 million of the 22 million comments that were filed in the docket. The number of “fake” comments filed in support of net neutrality were approximately equal to the number of “fake” comments filed by the opponents of net neutrality. One college student filed 7.7 million comments in support of net neutrality, while ISPs paid consulting firms 8.2 million dollars to generate comments against net neutrality.

Two things are easy to predict if the public continues to believe that the number of comments for or against a proposed rule is an important factor in an agency’s decision-making process. First, the next net neutrality rulemaking will elicit even more millions of comments as the warring parties on both sides escalate their efforts to maximize the “vote” on each side of the issue. Second, the firms that have a lot of money at stake in other rulemakings will begin to replicate the behavior of the firms that are on each side of the net neutrality debate. They will put a lot of money into both “getting out the vote” and disguising “fake” comments as real comments. The results will be massive, unmanageable dockets in which the “noise” created by the mass comments will make it increasingly difficult for agencies and reviewing courts to focus their attention on the substantive comments that provide the evidence that should be the basis for the agency’s decision.

It is important to recognize that even mass comments that are not clearly “fake,” but that state only a position for or against a proposed rule, provide no useful information to an agency. They are instead a reflection of the relative skill of the parties with a lot of money at stake to persuade naïve members of the public to “vote” for or against a proposed rule. The vast majority of the 4 million people who submitted purely conclusory comments in the most recent net neutrality docket that were not “fake” comments had no understanding of the complicated effects of a decision to adopt or to reject net neutrality.

The consultants and the committee have attempted to distinguish between mass comments and computer-generated comments in their report, preamble and recommendations. It is not at all clear that it is possible to make such a distinction. One common practice that some advocacy organizations use illustrates the problem. The organization sends an email to a list of members and/or prospective supporters in which it provides a brief, one-sided description of a proposed rule that it either supports or opposes. It then tells each recipient that, by clicking on an icon in the email, the recipient can simultaneously make a donation of X dollars to the organization and authorize the organization to file a comment for or against the proposed rule on behalf of the recipient. The organization then uses a computer algorithm to craft a dozen or more variations of a purely conclusory statement of support or opposition that it then files on behalf of each of the recipients of the organization’s email who authorize it to file comments on their behalf. It is not

clear whether the resulting comments should be characterized as mass comments or computer-generated comments, but they raise the same serious practical problems no matter how they are characterized. I doubt that it is possible to distinguish between mass comments and computer-generated comments.

### **ACUS Should Initiate Another Project to Address Mass Comments in Rulemakings**

The participants in this project acted on the basis of their belief that ACUS cannot and should not discourage the three phenomena that are causing major problems in the notice and comment process. I do not share that belief. I think that ACUS should initiate a new project in which it decides whether to discourage mass comments, computer-generated comments and fraudulent comments and, if so, how best to accomplish that. I believe that ACUS can and should discourage these practices by, for instance, encouraging agencies to assist in educating the public about the types of comments that can assist agencies in making evidence-based decisions and the types of comments that are not helpful to agencies and that instead create a variety of problems in managing the notice and comment process.

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