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

May 22, 2021

Anyone who has observed interactions between lions and ostriches learns quickly that ostriches fare better when they form a group, match the roars of the lions, and implicitly threaten the lions with their lethal 8 inch long toes rather than when they stick their heads in the sand and expose their most vulnerable body parts to the lions. The current version of the preamble and recommendations resembles the latter response. We need to take our heads out of the sand and to acknowledge the source of the problems that we are attempting to address.

It is easy to identify the source of the problems that we are supposed to address. Many members of the public have the unsupported and unsupportable belief that the number of comments that support or oppose a proposed rule are, and should be, considered in the process of deciding whether to issue a proposed rule. That mistaken belief is the only reason why the three problematic phenomena of mass comments, computer-generated comments and fraudulent comments exist. If we continue to ignore the source of the three phenomena and to acquiesce implicitly in the widespread but erroneous belief that is the source of the phenomena, we are certain to see them grow and spread to more rulemakings, with an attendant growth in the problems that they create.

Every study that has considered the question has concluded that the notice and comment process cannot, and should not, be used as a plebiscite. The alternative approach that has been embraced by all courts and most scholars characterizes the notice and comment process as a means of gathering evidence for or against a proposed rule. Thus, for instance, courts regularly tell agencies that they need not respond to all comments but that they must respond to all well-supported substantive comments.

The rulemakings involving net neutrality provide the best illustration of the three phenomena. They also illustrate the intractable mess that they create. 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.

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.

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.

It is possible for individual citizens to provide useful comments in a rulemaking. 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.

Many people have urged us to distinguish carefully among the three phenomena we are addressing. I agree that we should try to do so, but I doubt that we can be completely successful. Step one in

that process is to identify comments that are falsely attributed to someone as raising unique problems. Anyone who engages in that form of conduct has committed a federal crime. With the exception of DOJ, agencies that conduct notice and comment proceedings have neither the power nor the forensic capability to investigate situations in which they believe that someone has committed that crime. They should be encouraged to notify DOJ of any such situation and to provide DOJ with the evidence that suggests the existence of the crime.

Step two should be to distinguish between mass comments and computer-generated comments. However, as Nina Mendelson has explained, the distinction between those two phenomena is subtle, since all comments are generated in part through the use of computers. 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 practical problems no matter how they are characterized. I doubt that it is possible to distinguish between mass comments and computer-generated comments.

Ideally, the preamble to the recommendations should begin by describing the source of the three phenomena and the many problems that they create—the widespread erroneous belief that the notice and comment process can and should be a plebiscite. It then should describe and explain the socially-beneficial effects of the notice and comment process—the process provides a means through which agencies can make decisions based on evidence. The recommendations should include a statement that encourages agencies to tell the public what the notice and comment process can and cannot accomplish in an effort to educate the public and to encourage the public to participate in the process in useful ways.

I recognize, however, that it is far too late in the process of considering the preamble and the recommendations to make such dramatic changes. In the circumstances, I could live with the addition to recommendation 12 that I have proposed. Without that addition or some comparable change I intend to lead a movement to defeat these recommendations at the plenary.

Richard J. Pierce, Jr.