

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
2006 Quadrennial Regulatory Review –	)	
Review of the Commission’s Broadcast Ownership Rules	)	MB Docket No. 06-121
and Other Rules Adopted Pursuant to Section 202 of the	)	(and MB Docket Nos. 02-277,
Telecommunications Act of 1996	)	01-235, 01-317, 00-244)

**COMPLAINT UNDER THE DATA QUALITY ACT**

**Of**

**FREE PRESS  
CONSUMER FEDERATION OF AMERICA  
CONSUMERS UNION**

Ben Scott  
Derek Turner  
Marvin Ammori  
Free Press  
501 Third Street NW, Suite 875  
Washington, DC 20001  
(202) 265-1490

Mark Cooper  
Consumer Federation of America  
1620 I Street, NW, Suite 200  
Washington, DC 20006  
202-387-6121

Gene Kimmelman  
Consumers Union  
1101 17th Street, NW, Suite 500  
Washington, DC 20036

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## **Summary of Complaint Under the Data Quality Act**

Under the Data Quality Act and the Office of Management and Budget (OMB) and FCC guidelines implementing that Act, the Commission cannot disseminate influential scientific information unless the information is reproducible and peer reviewed. Here, in violation of the DQA and associated guidelines, the Commission released ten studies consisting of influential scientific information prior to any peer review and without releasing underlying data sufficient for researchers to reproduce and test the studies' results. The Commission provided the "peer review" reports, which were little more than glorified comments over a month into the comment period, and two days later, it finally made available additional underlying data under restrictive conditions, although Commenters still dispute whether sufficient data is yet available to render all the studies reproducible.

This complaint is filed simultaneously with a motion for extension of time. Commenters urge the Commission to implement policies conforming with the DQA, the OMB guidelines, and the Commission's own guidelines. It should issue a notice seeking comment on a peer review plan, followed by completion of peer review, and then (and only then) will the studies be ready for public comment as documents promulgated by the agency.

If, however, the Commission intends to go forward with a comment cycle on the studies released in July—studies which, at best, must be considered as non-peer-reviewed drafts—it should provide at least 90 days from the date that access was provided to the underlying data for the preparation and filing of those comments.

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**Complaint Under the Data Quality Act**

Free Press, Consumer Federation of America, and Consumers Union (“Commenters”), pursuant to the Commission’s guidelines<sup>1</sup> implementing the Data Quality Act (DQA),<sup>2</sup> respectfully request an extension of time in the above-captioned proceeding and file a complaint regarding the Commission’s dissemination of influential scientific information. In response to the ten studies commissioned by the FCC released on July 31, 2007, a public notice released that day seeking public comment on the studies,<sup>3</sup> “peer review” reports released on September 4, 2007,<sup>4</sup> and additional underlying data made available, under restrictive conditions, on September 6, 2007.<sup>5</sup> Commenters seek the institution of a credible peer review process, with additional time for comment as discussed below, or—should the Commission proceed with the non-peer reviewed drafts—at least an additional 90 days for comments and reply comments, running from

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<sup>1</sup> Implementation of Guidelines for Ensuring and Maximizing Quality, Objectivity, Utility and Integrity of Information Pursuant to Section 515 of Public Law No. 105-554, 17 FCC Rcd 19,890 (Oct 08, 2002) (“FCC Guidelines”).

<sup>2</sup> Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515, *codified at* 44 U.S.C. § 3516 note (2001) (“Data Quality Act”).

<sup>3</sup> *FCC Seeks Comment On Research Studies On Media Ownership*, Public Notice, MB Dkt. No. 06-121, July 31, 2007, available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3470A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A1.pdf).

<sup>4</sup> Peer Review Materials, [http://www.fcc.gov/mb/peer\\_review/peerreview.html](http://www.fcc.gov/mb/peer_review/peerreview.html).

<sup>5</sup> *FCC’s Media Bureau Adopts Procedures for Public Access to Data Sets Underlying Economic Studies for 2006 Quadrennial Regulatory Review of Commission’s Media Ownership Rules*, Public Notice, MB Dkt. No. 06-121,

the date that access is provided to the underlying data for preparing and filing comments.

The Commission should grant this extension and perform an adequate peer review process to comply with the DQA, and the implementing guidelines promulgated by the OMB and FCC.<sup>6</sup> Under the DQA and implementing guidelines, because these ten studies are “influential scientific information,” the Commission’s processes with regard to these ten studies are subject to rigorous reproducibility and peer review requirements. The Commission, however, has adopted processes that fail to provide adequate reproducibility or peer review.

Under the reproducibility requirement, the Commission must provide additional information so that the public can analyze, reproduce, and undertake sensitivity studies of the ten studies disseminated by the Commission. If it does not initiate a new peer review process, then it must provide sufficient time with the necessary data to permit reproducibility. Under the peer review requirement, the Commission must institute a credible and transparent peer review process, and should then seek further comment on the studies.

## **I. Facts**

This proceeding concerns some of the most important rules ensuring a democratic media system and has a long history. The proceeding could fundamentally reshape the nation’s media environment, as it will shape the rules governing local radio and television cross-ownership with newspapers, local television ownership, local radio ownership, and the extent of minority and female media ownership. During its history, the FCC’s actions have received sustained and overwhelming public criticism by millions of Americans, have been partially overturned by

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Sept. 5, 2007, *available at* [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3740A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3740A1.pdf). The Order is available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3741A1.doc](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3741A1.doc).

<sup>6</sup> Office of Management and Budget Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002) (republication) (“OMB Guidelines on Data Quality 2002”); Office of Management and Budget Final Information Quality

Congress, reversed and remanded by a federal appellate court, and subject to an investigation by the FCC's Inspector General prompted by congressional revelations that the FCC suppressed and destroyed several internal studies when senior personnel disagreed with the studies' conclusions. Though this history inspires nothing but skepticism, the Commission's processes regarding ten recently released studies flout the applicable statutory and regulatory requirements for transparency, including reproducibility, and for peer review.

**A. Background: Suppressing and Destroying Studies**

In 2002, the Commission began a review of its broadcast ownership rules. Two million Americans filed comments that opposed relaxing the rules and permitting greater consolidation.<sup>7</sup> After the Commission relaxed the rules in June 2, 2003,<sup>8</sup> Congress overruled part of the FCC order pertaining to the national ownership of broadcast television stations.<sup>9</sup> That year, the Senate Commerce Committee held eight full committee hearings on the topic of media ownership and reported out a bill that would have reversed much of the FCC's order.<sup>10</sup> At the same time, a coalition of citizens' groups appealed the FCC's decision, and in June of 2004, the Third Circuit found that much of the Commission's order was arbitrary and capricious, lacking in reasoned analyses and insufficiently justified. The Court remanded the rules to the Commission, retained jurisdiction, and stayed the implementation of the rules adopted in 2003 or any future rule

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Bulletin for Peer Review, Supplementary Information, 70 Fed. Reg. 2664 (Jan. 14, 2005) ("OMB Bulletin on Peer Review 2005"); FCC Guidelines, 17 FCC Rcd 19,890.

<sup>7</sup> See, e.g., Prometheus Radio Project v. FCC, 373 F.3d 372, 386 (3d Cir. 2004) ("Notably, nearly two million people weighed in by letters, postcards, e-mails, and petitions to oppose further relaxation of the rules."); Chelie Pingree, *The Big Media Monopoly*, WASH. POST, Aug. 13, 2003, at A26 (noting the number had surpassed two million).

<sup>8</sup> 2002 Biennial Review Order, 18 FCC Rcd 13,620 (2003).

<sup>9</sup> See Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (2004); Prometheus Radio Project, 373 F.3d at 389.

<sup>10</sup> Ben Scott, *The Politics and Policy of Media Ownership*, 53 AM. U. L. REV. 645, 654-55, 662 (2004).

changes until that Court approved of those changes.<sup>11</sup>

In July 2006, in response to this remand and the independent statutory obligation under 202(h) of the 1996 Telecommunications Act to review its broadcast ownership rules, the Commission released a further notice of proposed rulemaking.<sup>12</sup> Comments were ultimately due October 23, 2006 and reply comments were due January 16, 2007.<sup>13</sup>

In September, 2006, during the reconfirmation hearing of Chairman Kevin Martin, Senator Barbara Boxer revealed that the FCC had suppressed a 2004 FCC study that showed locally owned stations produced five minutes more local news coverage in a half-hour newscast than their competitors and that media consolidation likely harmed local news reporting. That conclusion conflicted with the FCC's previous conclusions in this proceeding. Within a week, a former FCC lawyer informed the Associated Press that the FCC "ordered its staff to destroy all copies," or "every last piece," of the draft study—not because of criticism with its methods but because of disagreement with its well-supported conclusions.<sup>14</sup> Senator Boxer received and released a second suppressed study—this one pertaining to the enormous increase in radio consolidation since the 1996 Act—the following week.<sup>15</sup> In response to these exposures and pressure from Senator Boxer and others on Capitol Hill, the Commission authorized an Inspector General investigation into the suppression of studies.<sup>16</sup> Also in response, the Commission made

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<sup>11</sup> Prometheus Radio Project, 373 F.3d at 382.

<sup>12</sup> 2006 Quadrennial Regulatory Review, Further Notice of Proposed Rule Making, 21 FCC Rcd 8834 (July 24, 2006).

<sup>13</sup> 2006 Quadrennial Regulatory Review, Extension on Comment Period, 21 FCC Rcd 14,460 (December 15, 2006).

<sup>14</sup> Associated Press, *Media Ownership Study Ordered Destroyed*, Sept. 14, 2006, <http://www.msnbc.msn.com/id/14836500/>.

<sup>15</sup> See, e.g., *Second Secret Study Found*, STOP BIG MEDIA, <http://www.stopbigmedia.com/blog/?p=28> (and original sources linked therein); John Eggerton, *Boxer Produces Another Unpublished FCC Report*, BROADCASTING & CABLE, Sept. 18, 2006, available at <http://www.broadcastingcable.com/article/CA6373194.html>.

<sup>16</sup> Associated Press, *FCC Chair Orders Probe into Why Media Ownership Studies Were Destroyed*, Sept. 19, 2006, <http://www.freepress.net/news/17742>.

available on its website study drafts,<sup>17</sup> including a controversial memorandum by then-chief economist of the FCC that laid out a research strategy specifically designed to justify a preconceived goal—to repeal the newspaper-media cross-ownership rule.<sup>18</sup>

At the same time, the Commission has still not fully responded to a Freedom of Information Act request, filed by Georgetown University Law Center’s Institute for Public Representation, filed over a year ago, on August 10, 2006.<sup>19</sup> This FOIA request sought access to studies and drafts produced, but not released, following July 1, 2003, as part of the Commission’s localism inquiry or media ownership proceeding.

### **B. The Ten Recent Studies: Limited Transparency, Rushed Timelines**

In the context of this controversy of suppressing and ordering the destruction of studies pertaining to the very issue of media ownership, late on November 22, 2006, on the Wednesday eve of the Thanksgiving holiday, the Commission quietly announced that it would commission ten studies in this proceeding.<sup>20</sup> Commissioner Capps issued a statement noting, with some understatement, that “many people already doubt the credibility of the research we do,” and stated that the announcement “raises more questions in the public’s mind than it answers. How were the contractors selected for the outside projects? How much money is being spent on each project—and on the projects collectively? What kind of peer review process is envisioned? Why are the topics so generalized rather than being targeted to more specific questions?”<sup>21</sup> Commissioner Adelstein similarly noted that the notice raised more questions than it answered,

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<sup>17</sup> Additional Materials, <http://www.fcc.gov/ownership/additional.html>.

<sup>18</sup> Leslie Marx, *Summary of Ideas on Newspaper-Broadcast Cross-Ownership*, June 15, 2006, <http://www.fcc.gov/ownership/materials/newly-released/newspaperbroadcast061506.pdf>.

<sup>19</sup> Jonathan Make, *FCC to Probe Discarded Studies; Group Seeks More Data*, COMM. DAILY, Sept. 20, 2006.

<sup>20</sup> *FCC Names Economic Studies to Be Conducted as Part of Media Ownership Rules Review*, Public Notice, MB Dkt. No. 06-121, Nov. 22, 2006, available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268606A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-268606A1.pdf).



referred to notice’s release as a “unilateral” release by Chairman Martin, and argued that “the truncated period of time to complete the studies is an ingredient for a study that doesn’t engender public faith and confidence.”<sup>22</sup>

On July 31, 2007, the Commission released ten commissioned studies, as well as releasing minimal underlying data, and no peer review reports. It provided 60 days for comment and 15 for reply comments.<sup>23</sup> At the same time, it also released a further notice of proposed rulemaking in this proceeding, specifically on the issue of minority and female ownership—an issue which the Third Circuit’s 2004 decision instructed the Commission to address.<sup>24</sup> The FCC announced a comment window on the minority and female ownership issues that overlapped with the window for analyzing and commenting on the ten ownership studies.

Even though comments on the studies are due October 1, 2007, and the reply comments are due October 16, 2007, the Commission failed to post the “peer review” reports until September 4, 2007, oddly after the studies had been completed and released, and over a month into the comment period.<sup>25</sup> On September 6, 2007, after a month of requests by Commenters, the Commission made available for review and inspection “the author-created data sets, as well as any programming software and programming code the authors used,” for several of the studies.<sup>26</sup> This data is available subject to a Protective Order and “reasonable advance notice” only on a

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<sup>21</sup> *Commissioner Michael J. Copps Comments on the Fcc’s Media Ownership Studies*, MB Dkt. No. 06-121, Nov. 22, 2006, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268611A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268611A1.doc).

<sup>22</sup> *Commissioner Jonathan S. Adelstein Says Public Notice On Media Ownership Economic Studies Is “Scant” And “Undermines Public Confidence,”* MB Dkt. No. 06-121, Nov. 22, 2006, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268616A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-268616A1.doc).

<sup>23</sup> *Fcc Seeks Comment On Research Studies On Media Ownership*, Public Notice, MB Dkt. No. 06-121, July 31, 2007, available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DA-07-3470A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3470A1.pdf).

<sup>24</sup> *2006 Quadrennial Regulatory Review, Second Further Notice of Proposed Rulemaking*, Aug. 1, 2007, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-136A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-136A1.pdf).

<sup>25</sup> *Peer Review Materials*, [http://www.fcc.gov/mb/peer\\_review/peerreview.html](http://www.fcc.gov/mb/peer_review/peerreview.html).

<sup>26</sup> *FCC’s Media Bureau Adopts Procedures for Public Access to Data Sets Underlying Economic Studies for 2006 Quadrennial Regulatory Review of Commission’s Media Ownership Rules*, Public Notice, MB Dkt. No. 06-121,

“limited” number of computers at the FCC’s offices in Washington, D.C., without the option of copying the data for inspection elsewhere. Commenters’ researchers are still negotiating with Commission staff regarding the availability and conditions of availability of certain data.

## **II. The Commission has Violated the Data Quality Act and the OMB and FCC Guidelines Implementing the Act**

Under the DQA, these studies are subject to strict reproducibility and peer-review requirements. The Data Quality Act was enacted to ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by federal agencies.<sup>27</sup> To implement the DQA’s requirements, the OMB issued guidelines in 2002<sup>28</sup> and additional guidelines on peer review for influential scientific information in 2005;<sup>29</sup> the FCC adopted guidelines in 2002.<sup>30</sup> The OMB has stressed the importance of its guidelines: “It is crucial that information Federal agencies disseminate meets these guidelines.”<sup>31</sup>

These guidelines apply strict data quality standards to these 10 studies because the studies are at least “influential scientific information.”<sup>32</sup> The Commission has acknowledged that the studies qualify as “influential scientific information,” both on its website<sup>33</sup> and in letters to researchers soliciting peer review, where it stated: “These ten studies constitute influential

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<sup>27</sup> Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515, *codified at* 44 U.S.C. § 3516 note (2001) (“Data Quality Act”).

<sup>28</sup> OMB Guidelines on Data Quality 2002, 67 Fed. Reg. 8452, ¶ V.5.

<sup>29</sup> OMB Bulletin on Peer Review 2005, 70 Fed. Reg. at 2667.

<sup>30</sup> FCC Guidelines, 17 FCC Rcd 19,890.

<sup>31</sup> OMB Guidelines on Data Quality 2002, 67 Fed. Reg. at 8452.

<sup>32</sup> The studies may also be highly influential scientific assessments, but this Complaint and associated Motion For Extension proceed on the assumption that the studies are influential scientific information.

<sup>33</sup> The FCC has posted the link to the peer review documents for the media ownership studies under this heading: “Influential Scientific Information or Highly Influential Scientific Assessment.” *See* FCC Peer Review Agenda, <http://www.fcc.gov/omd/dataquality/peer-agenda.html> (visited 9/4/2007).

scientific information under OMB’s definition.”<sup>34</sup> Influential scientific information is subject to specific and exacting reproducibility and peer-review standards.<sup>35</sup> Because the studies are influential scientific information, the Commission must make the studies available in a manner permitting reproducibility and must commission meaningful peer review.

The Commission’s processes here have provided too little data and time for reproducibility and have used a “peer review” process far outside the bounds envisioned by the guidelines or usual research practices.

#### **A. The Commission’s Studies are Not Reproducible**

Under the Data Quality Act, the Commission must provide the public with the underlying data and sufficient time to reproduce the results of the studies and to perform sensitivity analyses. Quite simply, as the OMB guidelines specify in several places, “independent analysis of the original or supporting data using identical methods would generate similar analytic results.”<sup>36</sup> That is, the Commission must ensure that the studies are “sufficiently transparent in terms of data and methods of analysis that it would be feasible for a replication to be conducted.”<sup>37</sup> Similarly, “information, agency guidelines shall include a high degree of transparency about data and methods to facilitate the reproducibility of such information by qualified third parties.”<sup>38</sup> The FCC has similarly stated that

Reproducibility means that the information is capable of being substantially reproduced, subject to an acceptable degree of imprecision. For information judged to have more influence or important impact, the degree of imprecision that is tolerated is reduced. With respect to analytic results, “capable of being substantially reproduced” means that

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<sup>34</sup> See, e.g., Michelle Connolly, FCC Chief Economist, *Letter to Matthew Gentzkow*, Aug. 7, 2007, [http://www.fcc.gov/mb/peer\\_review/prreqstudy6.pdf](http://www.fcc.gov/mb/peer_review/prreqstudy6.pdf).

<sup>35</sup> OMB Bulletin on Peer Review 2005, § II.1.

<sup>36</sup> OMB Guidelines on Data Quality 2002, 67 Fed. Reg. 8452, ¶ V.10.

<sup>37</sup> *Id.* at 8455.

<sup>38</sup> *Id.* at § V.3.b.ii.

independent analysis of the original or supporting data using identical methods would generate similar analytic results, subject to an acceptable degree of imprecision or error.<sup>39</sup>

As the information in the studies will influence a very important proceeding, and have an “important impact,” the degree of imprecision should be low.

Public researchers need access to underlying data to undertake sensitivity analyses, particularly regarding how analytic results hinge on specific analytic choices. The OMB guidelines state:

The more important benefit of transparency is that the public will be able to assess how much an agency’s analytic result hinges on the specific analytic choices made by the agency. Concreteness about analytic choices allows, for example, the implications of alternative technical choices to be readily assessed. This type of sensitivity analysis is widely regarded as an essential feature of high-quality analysis, yet sensitivity analysis cannot be undertaken by outside parties unless a high degree of transparency is achieved. ... [T]he transparency achieved by reproducibility will allow the public to undertake sensitivity studies of interest.<sup>40</sup>

Reproducibility suggests nearly identical access for public researchers as for the government-selected researchers. As the OMB has stated, “a qualified party, operating under the same confidentiality protections as the original analysts, may be asked to use the same data, computer model or statistical methods to replicate the analytic results reported in the original study.”<sup>41</sup> Moreover, the OMB has specifically stated that this reproducibility requirement is not alleviated by any peer-review processes, as reproducibility is essential to a transparent process.<sup>42</sup>

To permit this kind of reproducibility, the Commission must make all the relevant data available, and for a period of time sufficient for the necessary reproductions and sensitivity

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<sup>39</sup> FCC Guidelines, 17 FCC Rcd 19,890, § II.13.

<sup>40</sup> OMB Guidelines on Data Quality 2002, 67 Fed. Reg. at 8456.

<sup>41</sup> *Id.*

<sup>42</sup> As the OMB has stated, “The fact that the use of original and supporting data and analytic results have been deemed ‘defensible’ by peer-review procedures does not necessarily imply that the results are transparent and replicable.” *Id.* at 8455

analyses. The Commission has not provided the sufficient data for enough time to perform such analyses. The public cannot evaluate these ten studies under the Commission’s rushed timeline. The 10 studies involved analyses of millions of data points, as well as controversial methodological and qualitative judgments regarding these data points. The studies were performed by twenty experienced researchers over eight months. The underlying data was not made available until September 6, well over a month into the comment period. Even if all the relevant underlying data is available as of September 6, which is not yet clear, members of the public still cannot reproduce these studies and perform sensitivity analyses in 25-40 days calendar days—or 15-27 business days. Moreover, it is unlikely that the data is flawless, and the Commission should factor in the time necessary to correct the erroneous typos and flaws in the data. Indeed, the “peer review” report for Study 6 failed to replicate the results because the author had provided erroneous versions of some variables, and could not replicate six columns of data and other specific entries.<sup>43</sup> Even if the peer-reviewer claims that the lack of replication does not undermine the study, the OMB independently requires reproducibility, whatever a peer reviewer states, because the public must be permitted transparent access to underlying data to reproduce and analyze the study.<sup>44</sup> Moreover, disputes remain regarding how much data is available and under which circumstances. For example, even though Study 6 was produced through evaluation and coding of video clips away from the FCC headquarters, the Commission has attempted to limit access to these clips only to the FCC headquarters, not under merely “the same confidentiality protections.”

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<sup>43</sup> Matthew Gentzkow, *Peer Review Evaluation FCC Media Ownership Study #6 (News Coverage of Cross-Owned Newspapers and Television Stations by Jeffrey Milyo)*, [http://www.fcc.gov/mb/peer\\_review/prstudy6.pdf](http://www.fcc.gov/mb/peer_review/prstudy6.pdf).

<sup>44</sup> As the OMB has stated, “The fact that the use of original and supporting data and analytic results have been deemed ‘defensible’ by peer-review procedures does not necessarily imply that the results are transparent and replicable.” OMB Guidelines on Data Quality 2002, 67 Fed. Reg. at 8455

Because the Commission has disseminated influential scientific information that is not reproducible, it has violated the DQA guidelines and must make the information available in a manner meeting the reproducibility requirement. It must provide all the relevant information and provide researchers not merely half of the original comment period, limited to its DC headquarters during business hours, and should grant Commenters Motion for Extension filed simultaneously with this Complaint.

**B. The Commission’s “Peer Review” Process is Woefully Inadequate under the DQA**

The Commission has to choose a “peer review mechanism that is adequate.”<sup>45</sup> In doing so, it should consider the “complexity of the science to be reviewed” and “the relevance of the information to decision making.”<sup>46</sup> That is, more important and relevant information should be subject to a more intense peer review process: “More rigorous peer review is necessary for information ... likely to affect policy decisions that have a significant impact.”<sup>47</sup> The benefits of peer review are many. Peer review contributes to strong science. Also, where the FCC in this very proceeding has a history of suppressing studies and being overruled by Congress and the courts, “peer review, *if performed fairly and rigorously*, can build consensus among stakeholders and reduce the temptation for courts and legislators to second-guess or overturn agency actions.”<sup>48</sup> For influential scientific information, such as the ten studies here, the OMB’s directive to perform adequate peer review has almost no exception and the Commission has not

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<sup>45</sup> OMB Bulletin on Peer Review 2005, 70 Fed. Reg. at 2668.

<sup>46</sup> *Id.* at 2668

<sup>47</sup> *Id.* at 2668. *See also id.* (“The National Academy of Public Administration suggests that the intensity of peer review should be commensurate with the significance of the information being disseminated and the likely implications for policy decisions.”).

<sup>48</sup> *Id.* at 26668.

pointed to any here.<sup>49</sup>

The Commission has adopted a process not even remotely approaching the peer-review process envisioned by the DQA or researchers' usual best practices.

### **1. The OMB Guidelines Require Peer Review Prior to, Not Following, Publication**

The DQA, and the research world, envision a peer-review process preceding the completion of a study, unlike the Commission's process here. Quite simply, the OMB issued a bulletin which stated, "This Bulletin establishes that important scientific information *shall* be peer reviewed by qualified specialists *before* it is disseminated by the Federal government."<sup>50</sup> Here, the studies are influential scientific information and the Commission disseminated them on July 31, 2007. Yet, the Commission had not had the studies peer-reviewed.<sup>51</sup> It only solicited peer reviewers in August,<sup>52</sup> and posted the "peer review" reports in September. So clearly, it violated the guidelines by disseminating the information without peer-review.

### **2. Peer-Review Should be Early in the Process**

The DQA follows the generally accepted definition of peer review—that such review takes place during the drafting of scientific studies to determine, and correct, flaws in a study before the study's release. In a section concerning the timing of peer review, the OMB made clear that peer review should take place early in drafting influential scientific information:

As a general rule, it is most useful to consult with peers early in the process of producing

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<sup>49</sup> Notice and comment procedures do not obviate the need for peer review. And only three possible "alternatives" could replace peer review, none of which are applicable here. And while the OMB recognizes the possibility of exceptional circumstances, waivers of peer-review "will seldom be warranted." *Id.* at 2672.

<sup>50</sup> *Id.* at 2665 (emphasis added).

<sup>51</sup> If the studies were released solely for the purpose of peer review, which they apparently were not, the reports should have been marked on every page as not-yet-peer reviewed. *Id.* at 2667 (noting, when the study "is highly relevant to specific policy or regulatory deliberations, this disclaimer shall appear on each page of a draft report"). These studies were not released with this notification.

<sup>52</sup> See, e.g., Michelle Connolly, FCC Chief Economist, *Letter to Matthew Gentzkow*, Aug. 7, 2007, [http://www.fcc.gov/mb/peer\\_review/prreqstudy6.pdf](http://www.fcc.gov/mb/peer_review/prreqstudy6.pdf).

information. Early peer review occurs in time to focus attention on data inadequacies in time for corrections. ... If review occurs too late, it is unlikely to contribute to the course of a rulemaking. Furthermore, investing in a more rigorous peer review early in the process “may provide net benefit by reducing the prospect of challenges to a regulation that later may trigger time consuming and resource-draining litigation.”<sup>53</sup>

Similarly, the OMB makes clear that peer review should always be a “deliberation” improving the study:

[Peer review] is a form of deliberation involving an exchange of judgments about the appropriateness of methods and the strength of the author’s inferences. Peer review involves the review of a *draft* product for quality. ...

The peer reviewer’s report is an evaluation or critique that is *used by the authors of the draft to improve the product*. Peer review typically evaluates the clarity of hypotheses, the validity of the research design, the quality of data collection procedures, the robustness of the methods employed, the appropriateness of the methods for the hypotheses being tested, the extent to which the conclusions follow from the analysis, and the strengths and limitations of the overall product.

The critique provided by a peer review often suggests ways to clarify assumptions, findings, and conclusions. For instance, peer reviews can filter out biases and identify oversights, omissions, and inconsistencies. Peer review also may encourage authors to more fully acknowledge limitations and uncertainties. In some cases, reviewers might recommend major changes to the draft, such as refinement of hypotheses, reconsideration of research design, modifications of data collection or analysis methods, or alternative conclusions.<sup>54</sup>

Here, the peer review “reports,” issued after the studies’ apparent completion and dissemination, cannot be used “by the authors of the draft to improve the product,” nor to “clarify assumptions, findings, and conclusions,” nor to “filter out biases and identify oversights, omissions, and inconsistencies,” nor to engage in “reconsideration of research design, modifications of data collection or analysis methods, or alternative conclusions.” The reports can do so only if the Commission withdraws the studies and asks the authors to improve—or even redesign—their studies based on the reports.

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<sup>53</sup> OMB Bulletin on Peer Review 2005, 70 Fed. Reg. at 2668 (internal quotations and citations omitted).

<sup>54</sup> *Id.* at 2665 (emphasis added).



Rather than demonstrate that peer review helped shape and improve these studies, as peer review is almost universally understood in the research community and in the OMB guidelines, the FCC merely posted comments by selected researchers discussing finished studies. These researchers, like any researchers, including the Commenters here, could have filed comments in response to the notice analyzing these studies. But, of course, notice and comment does not serve as a substitute for peer-review.<sup>55</sup>

### **3. The Commission Did Not Follow its Procedures for Alerting the Public That This Information Was Not Peer-Reviewed or That the Information Would Be**

The Commission has not followed the required processes in alerting the public to the peer review process, nor solicited any public participation. The OMB has stated that the Commission should provide a peer review plan, and that the public should have sufficient time to comment on and to respond to that peer review plan. The OMB has specified that “[a] key feature of this planning process is a Web-accessible listing of *forthcoming* influential scientific disseminations (i.e., an agenda) that is regularly updated by the agency.”<sup>56</sup> Indeed, “[w]hen new entries are added to the agenda of forthcoming reports and other information, the public should be provided with sufficient time to comment on the agency’s peer review plan for that report or product. Agencies shall consider public comments on the peer review plan.”<sup>57</sup>

Here, even though the Commission hosts a “Peer Review Agenda” that references the OMB requirements,<sup>58</sup> it did not place any peer review plan, nor provide any time for public comments, nor consider any of these comments it did not solicit. Rather, it only posted a link to

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<sup>55</sup> *Id.* at 2672.

<sup>56</sup> *Id.* at 2672.

<sup>57</sup> *Id.* at 2673. We are also not aware that the Commission has also complied with this encouragement: “Agencies are encouraged to offer a listserve or similar mechanism for members of the public who would like to be notified by email each time an agency’s peer review agenda has been updated.” *Id.*

<sup>58</sup> <http://www.fcc.gov/omd/dataquality/peer-agenda.html>.

the “peer review reports” after the reports were no longer “forthcoming” and when the Commission has already posted the reports. The decision to secretly select individual peer reviewers and the failure to provide transparency in the peer review process has resulted in a very uneven set of peer reviews. While some reviews are serious, others appear imbalanced and/or shoddy. The reviews, as well as the studies, would have vastly improved with an open process, as would the credibility of the Commission’s research.

#### **4. The Commission Should Adopt a Balanced, Transparent Process With Public Input So That Its Peer Review Will Be Credible**

As the Commission cannot turn back the clock and initiate a peer review process taking place early in the production of these studies, the Commission must attempt to implement a credible, transparent process ensuring the objectivity and quality of these studies.

The Commission should ensure scientific and process integrity:

Regardless of the peer review mechanism chosen, agencies should strive to ensure that their peer review practices are characterized by both scientific integrity and process integrity. “Scientific integrity,” in the context of peer review, refers to such issues as “expertise and balance of the panel members; the identification of the scientific issues and clarity of the charge to the panel; the quality, focus and depth of the discussion of the issues by the panel; the rationale and supportability of the panel’s findings; and the accuracy and clarity of the panel report.” “Process integrity” includes such issues as “transparency and openness, avoidance of real or perceived conflicts of interest, a workable process for public comment and involvement,” and adherence to defined procedures.<sup>59</sup>

Here, the Commission must ensure scientific and process integrity far better than it has.

For scientific integrity, the Commission should at least ensure the unquestioned “expertise and balance of the panel members.” Rather than seeking individual reviewers, as the Commission has done for almost every study, the Commission should select panels of reviewers. The OMB has stated, in discussing the benefits of panel reviews, that “[w]hen time and resources

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<sup>59</sup> OMB Bulletin on Peer Review 2005, 70 Fed. Reg. at 2668.

warrant, panels are preferable, as they tend to be more deliberative than individual letter reviews and the reviewers can learn from each other.” Panels are more “particularly valuable for highly complex, multidisciplinary, and more important documents.”<sup>60</sup> Here, the ten studies are an important part of one of the most important proceedings at the Commission. The studies involve complex statistical and methodological judgments. They warrant a panel of reviewers.

More importantly, to ensure a transparent and credible process at an agency now lacking in some credibility, the agency must select a balanced panel. The OMB has stated that

[R]eviewers should also be selected to represent a diversity of scientific perspectives relevant to the subject. On most controversial issues, there exists a range of respected scientific viewpoints regarding interpretation of the available literature. Inviting reviewers with competing views on the science may lead to a sharper, more focused peer review.<sup>61</sup>

The issue of media ownership is clearly controversial. Researchers do hold a range of viewpoints. The Commission should not select only those reviewers who would agree with the FCC’s conclusions in its 2003 Order—or with the conclusions presented in other studies that the Commission has *not* suppressed or destroyed.

To ensure a balanced panel of reviewers, the Commission should encourage public participation. The general public, as well as consumer groups like the Commenters, should be invited to nominate expert reviewers to ensure balanced panels.

Indeed, for process integrity, at every stage of the peer review process, the Commission should permit public participation. The OMB encourages such public participation to ensure transparency, legitimacy, and sound science.

Public comments can be important in shaping expert deliberations. Agencies may decide that peer review should precede an opportunity for public comment to ensure that the public receives the most scientifically strong product (rather than one that may change

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2669.

substantially as a result of peer reviewer suggestions). However, there are situations in which public participation in peer review is an important aspect of obtaining a high-quality product through a credible process. ...

Public participation can take a variety of forms, including opportunities to provide oral comments before a peer review panel or requests to provide written comments to the peer reviewers. Another option is for agencies to publish a “request for comment” or other notice in which they solicit public comment before a panel of peer reviewers performs its work.<sup>62</sup>

Commenters urge the Commission to adopt the following process, which may not be ideal in other circumstances where the FCC engaged in early peer review.

The Commission must issue a notice seeking comment on a peer review plan, followed by completion of peer review, and then (and only then) will the studies be ready for public comment as documents promulgated by the agency. As noted, this process would improve the quality of information and be more credible to the public, Congress, and the courts.

### **III. The Commission Must Initiate a Credible Peer Review Process and Provide Sufficient Time for the Process**

The Commission should initiate a credible and adequate peer review process that conforms to the DQA guidelines, as opposed to its chosen process, which merely invites selected researchers, like the rest of the public, to comment on completed studies. It should provide the necessary time for this process.

Should the Commission disregard the DQA and the OMB and FCC guidelines implementing the DQA, it should grant Commenters’ Motion to Extend filed simultaneously with this Complaint, and provide 90 additional days running from the availability of the data necessary for reproducibility.

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<sup>62</sup> *Id.*

Respectfully submitted,

Ben Scott  
Derek Turner  
Marvin Ammori  
Free Press  
501 Third Street NW, Suite 875  
Washington, DC 20001  
(202) 265-1490

Mark Cooper  
Consumer Federation of America  
1620 I Street, NW, Suite 200  
Washington, DC 20006  
202-387-6121

Gene Kimmelman  
Consumers Union  
1101 17th Street, NW, Suite 500  
Washington, DC 20036

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