

**THE DATA QUALITY ACT:
NEW LEGAL CONSTRAINTS ON THE FCC MEDIA OWNERSHIP RULEMAKINGS**

In the Matter of)	
)	
2006 Quadrennial Regulatory Review –)	MB Docket No. 06-121
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules Adopted)	
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	
2002 Biennial Regulatory Review –)	MB Docket No. 02-277
Review of the Commission’s Broadcast)	
Ownership Rules and Other Rules Adopted)	
Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	
Cross-Ownership of Broadcast Stations)	MM Docket No. 01-235
and Newspapers)	
)	
Rules and Policies Concerning Multiple)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations in)	
Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244

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I. The Media Ownership Rulemakings Are Dependent On Data Quality

- A. *The Need for Data Quality.*** The Federal Communications Commission (“FCC”) will need to rely on quality information – and only quality information – when considering: 1) the issues raised by the US Court of Appeals for the Third Circuit in their *Prometheus* decision; and 2) “whether the media ownership rules are ‘necessary in the public interest as the result of competition.’”¹

The FCC has recognized its need for quality information when considering the issues raised by the *Prometheus* decision. Specifically, the Commission, in its *Further Notice of Proposed Rulemaking* stated, “[w]e encourage commenters to buttress their arguments with current empirical evidence and sound economic theory.”²

In developing its decisions, the Commission will be evaluating studies performed by:

- ▶ The FCC; and
- ▶ Third-parties.

All of the data used or relied on by the Commission, whether developed internally, by agency contractors, or by independent third-parties, will need to adhere to applicable Data Quality standards.

- B. *Why Data Plays A Decisive Role In The FCC’s Media Ownership Decisions.*** Resolution of the issues before the Commission must be supported by accurate, reliable and objective data. For example, with respect to the Local TV Ownership Rule, the FNPRM explained, “The court, however, remanded the numerical limits of the new rule for further justification.”³ Furthermore, data based on faulty assumptions or which has other flaws is not legally acceptable. As the FNPRM went on to note, the court found “[n]o evidence support[ing] the Commission’s equal market share assumption, and no reasonable explanation underlies its decision to disregard actual market share.”

¹ Federal Communications Commission, *Further Notice of Proposed Rulemaking* in Docket Numbers MB 06-121, MB 02-277, MM 01-235, MM 01-317, MM 00-244, July 24, 2006 (“FNPRM”), p. 2.

² *Ibid.*, p. 4.

³ *Ibid.*, p. 8.

The FCC highlighted other data-dependent issues in the Local TV Ownership Rule such as how “should we address the court’s concern that the revised numerical limits allow concentration to exceed the 1800 HHI benchmark relied upon by the Commission” and whether “there is additional evidence to support the Commission’s decision to treat capacity as an important factor in measuring the competitive structure of television markets?”⁴

Resolution of issues associated with the other rules remanded to the Commission will also require the use of quality data. For example, with respect to the Local Radio Ownership Rule, the “court further faulted the Commission for not explaining why it could not take ‘actual market share’ into account when deriving the numerical limits.”⁵

On the Cross-Media Limits issue, the court “found that the Commission...irrationally assigned outlets of the same media type equal market shares, and inconsistently derived” the Cross Media Limits from its Diversity Index.⁶

II. Why There Is A Data Quality Act

- A. ***Purpose of the Data Quality Act.*** The Data Quality Act⁷ (“DQA”), also known as the Information Quality Act, provides statutorily-mandated procedures and standards for agencies to use in addressing the Data Quality issues which underlie federal rulemakings and other information disseminations. The DQA was enacted to ensure that the information relied upon and disseminated by federal agencies would meet specified quality standards. As House Report 106-756 explained,

*The Committee has included statutory language (Section 515) which requires...ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by Federal agencies...in fulfillment of the purposes and provisions of the Paperwork Reduction Act of 1995.*⁸

⁴ Ibid., p. 9.

⁵ Ibid., p. 11.

⁶ Ibid., p. 14.

⁷ 44 U.S.C. 3516, notes.

⁸ House of Representatives, Treasury, Postal Service, and General Government Appropriations Bill, 2001, House Report 106-756, July 18, 2000, pp. 54-55.

B. *Applicability of The Data Quality Act.* The DQA applies to all Executive Branch agencies, including independent agencies such as the FCC. Specifically, the DQA fully applies to all agencies subject to the Paperwork Reduction Act. The information quality standards and procedures set by the DQA applicable to the FCC are set forth in two rules:

1. The Office of Management and Budget's government-wide requirements found at <http://www.whitehouse.gov/omb/fedreg/reproducible2.pdf>; and
2. The FCC-specific requirements found at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-277A1.pdf.

III. How the Data Quality Act is Applicable to the Media Ownership Rulemakings

With respect to the Media Ownership rulemakings, the DQA and its implementing documents explain specific duties the FCC must undertake both before and after publication of the FNPRM.

A. *Pre-FNPRM Publication.* Before publication of the FNPRM, the FCC was required to engage in two key steps:

1. **Pre-dissemination Review of FNPRM Information.** As OMB explained, agencies are required to "develop a process for reviewing the quality...of information before it is disseminated. ... This process shall enable the agency to *substantiate* the quality of the information it has disseminated through documentation or other means appropriate to the information."⁹

The FCC emphasized the agency's commitment to pre-dissemination review in its agency-specific implementation of the DQA when it stated "[w]e also publish procedures for reviewing and substantiating the quality, objectivity, utility, and integrity of information before it is disseminated by the Commission."¹⁰

Thus, at this point in time, the Commission should be able to document the quality of all information disseminated in the FNPRM.

2. **Applying DQA Standards to Third-Party Materials.** In addition to ensuring the quality of Commission-developed information, the DQA requires the FCC to apply the DQA to third-party data it used or relied on in developing the FNPRM. As Dr. John Graham explained in a speech to the Toxicology Forum, "[t]he agency

⁹ 67 Fed. Reg. 8459. [Emphasis added]

¹⁰ Federal Communications Commission, Information Quality Guidelines (FCC 02-277), October 8, 2002, para. 7.

guidelines establish performance goals and procedures to assist in the agency's evaluation of all information for which agency dissemination is under consideration, whether that information was generated by the agency or by third parties."¹¹

B. Post-FNPRM Publication. Following publication of the FNPRM, the FCC has three key Data Quality tasks:

1. **Applying DQA Standards to Comments Received.** The FCC will need to apply the OMB and Commission Data Quality standards to all substantive data submitted by commenters. The Commission is only able to use and rely on third-party information that fully complies with Data Quality standards. As the Department of Transportation recently explained in a *Federal Register* notice:

*Pursuant to the Data Quality Act, in order for substantive data submitted by third parties to be relied upon and used by the agency, it must also meet the information quality standards set forth in the DOT Data Quality Act guidelines. Accordingly, members of the public should consult the guidelines in preparing information submissions to the agency.*¹²

2. **Petitions for Correction.** The FCC's Information Quality Guidelines require that the Commission respond to Petitions for Correction (also known as Complaints) within 45 days of receipt and, "[i]f corrective action is warranted," make the needed corrections within 60 days of the petitioning party being notified in the agency's response to the Petition.

The FCC will also need to respond to any Appeals of initial agency decisions within 120 days of receipt. The appeal is to be decided by an office other than the one that provided the initial response per OMB's statement, that "[t]he office that originally disseminates the information does not have responsibility for both the initial response and resolution of a disagreement."¹³

Petitions are filed by stakeholders when they believe that information disseminated by the Commission has failed to adhere to applicable Data Quality standards. The petitions may be filed against FCC-developed information or against FCC information that is based on third-party materials.

¹¹ John D. Graham, Ph.D., "Information Quality and Precaution," February 3, 2004, found at http://www.whitehouse.gov/omb/inforg/speeches/040203_graham.pdf.

¹² 71 Fed. Reg. 54735.

¹³ 67 Fed. Reg. 8458.

3. **Pre-Dissemination Review of Regulatory Decisions.** Before publishing any decisions in the above-captioned dockets, the FCC will need to subject those planned decisions, and their justifications, to the pre-dissemination review process. Such review is required to ensure *and document* that the Commission's published decisions and supporting explanations and materials fully comply with all Data Quality standards. Any instances of non-compliance would subject the decisions to action under the DQA.

IV. The Center for Regulatory Effectiveness' Participation in the Media Ownership Rulemakings

- A. **About the Center for Regulatory Effectiveness.** The CRE is regulatory watchdog established in 1996 by former senior career officials from the Office of Management and Budget, http://www.thecre.com/pdf/Tozzi_Bio_Historical_2.pdf. In its role as a watchdog, CRE intervenes from time to time in regulatory proceedings through the comment process, filing needed Data Quality Petitions, and/or other mechanisms. CRE was the primary proponent of the DQA, http://www.thecre.com/pdf/20021111_fedtimes-tozzi.pdf.
- B. **CRE's Participation in the Media Ownership Rulemakings.** CRE has identified the Media Ownership rulemakings as a landmark regulatory proceeding since:
 - ▶ The Commission's decisions in the rulemakings will affect virtually everyone in the United States;
 - ▶ As a watchdog, CRE closely monitors regulatory actions affecting print journalists, America's preeminent group of watchdogs, <http://www.thecre.com/wdw/2006/20061023.html>; and
 - ▶ Data Quality will be driving the Commission's decisions in the rulemakings.
- C. **Possible CRE Interventions.** CRE is considering a number of interventions in the rulemaking beyond filing comments, including:
 1. **Data Quality Petition.** CRE may file a Data Quality Petition against FCC disseminated information.
 - **Precedent:** Endocrine Effects. CRE filed a Data Quality petition with EPA against the agency's incorrect assertion regarding the supposed endocrine effects of a chemical regulated by the agency.
 - **Resolution.** EPA informed CRE that endocrine effects would not be a regulatory end point, <http://thecre.com/post/>.

2. **Notifying FCC of Third-Party Non-Compliance with the Data Quality Act.** CRE may formally notify the FCC that a third-party study or report in the public record fails to comply with applicable Data Quality standards.

- **Precedent:** WHO Technical Report. CRE wrote to the Department of Health and Human Services (“HHS”) and the US Department of Agriculture explaining that they could not use, as intended, a World Health Organization Report in the planned 2005 Dietary Guidelines since it failed to comply with US Data Quality standards. CRE recommended that the Departments write WHO and explain that US government agencies “cannot base their policy decisions on any facts and analyses...until the facts and analyses supporting scientific recommendations in WHO reports can be shown, through a predissemination review, to meet the U.S. Government’s data quality standards.”
- **Resolution.** HHS wrote to WHO rejecting its Report and transmitting a copy of the Department’s Data Quality guidelines explaining “under the U.S. Data Quality Act, USG agencies operate under guidelines for ensuring and maximizing the quality...of information disseminated to the public.” The HHS letter concluded that the “consultation process of the development of the WHO/ FAO *Report* and the resulting *Report* itself would not meet these current U.S. data quality standards....”
http://thecre.com/pdf/20041101_hhs.pdf

V. **Next Steps**

- A. CRE would like to speak with the FCC about the DQA requirements pursuant to the Commission’s *ex parte* rules as noticed in paragraph 40 of the FNPRM.
- B. Subsequent to the discussion, CRE may file a formal petition under the Data Quality Act and/or invoke the Act’s third-party provisions.