

*Group B -- Session 3 -- June 3, 2004*  
*The George Washington University – eRulemaking Workshop 2.0*

**M1: Moderator**

R: Respondents

**M1: So, what are your thoughts?**

R1: I am going to be speaking this afternoon. I am expecting to make many of the same points. So I think I am by myself in violent agreement, but a lot of the other people from the non-profit world, particularly about people's technological desires, what they would like to see in terms of functionality. In fact, I made notes about what I am going to say and they specifically say; we need an API to allow people to submit and search comments. And both of the people this morning said the same thing and we didn't prearrange that or anything, so I think we are just all thinking in the same direction.

R7: Would you tell me what API stands for?

R1: API stands for application programming interface, but it means that there is a way for, a published way, for third parties to make programs that work together with them, that interoperate with them. So for example, you have a web site...by the way I am a computer geek professionally so...so if you have a web site where people can do things, you publish technical information to help third parties write programs that do things on your web site; that's an API. So for example, if I wanted to write my own program that will search your web site or retrieve particular documents from your web site or something like that; if you published a suitable API than I could use that to do that thing. So all the non-profits seem to have programmers who want to implement certain things and they tend to feel they are not getting as much information as they could. And there is not as much functionality as there could be in the web sites that the agencies provide. That's a big theme for part of my talk this afternoon.

R7: In line with your comment, I was struck by the [name] comment about the politics of the text analysis system. I guess that to me leads me to understand better why groups want to have their own analysis system being able to interface with databases. I fear that if the government through their eGovernment, eRegulations system is the one that develops the text analysis system for application to all agencies, it is going to be such a lowest common denominator system that I think it is not going to be particularly useable for a lot of agencies.

R1: One thing that came up yesterday about that is, what some people called the transparency issue, so if there's question about whether...the way that an agency uses technology will tend to bias what it sees or discriminate against someone or something because some group of commenter uses language differently or whatever. It would be really helpful if people were able to review how the agency is using the technology to analyze things. And there was a little bit of controversy in one of our sessions yesterday, about whether particular legislation allows the public to find out how the agency is doing that, in whether it is a Word product or whatever. But a lot of people were concerned, that they want to know if you are doing some kind of word

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R3 also in session 1A (R8);

R4 also in sessions 1A (R2), 4A (R8), 2B (R6), 5B (R5);

R7 also in session 4A (R2)

frequency and you have reason to believe that that will lead to some kind of bias and you actually get the information that might help you make a case about whether the bias is there or not. So I think people were calling that a transparency question.

R2: One of the things I wonder about is when the...we submit comments all the time and we often then will go back and once a rule is finished go back...and of course the agencies have to prepare a response to commenters. And for many that we have made, EPA for example, they are using tools like we saw today to organize their responses to comments and I wonder what the...first of all what I have seen done this morning and what I have seen going back in response to comments is one of the things that this software doesn't have and I don't understand how it would do, is to take, is to organize data that are submitted.

R1: Like a table or something?

R2: Yes, for example our comments on one rule stood, it was this high, we had a lot of data in there. Now the response to comments only included our letter, which happened to be almost 300 pages long and had a lot of data in it, but the documents that supported the comments; all of the data, the surveys, and all that kind of stuff, it's not clear to me how this kind of response...they did clearly use this kind of software to organize the comments so that they could respond to the comments in the sufficient document. Course that's kind of a separate process from using the information in the comments to come up with the final rule, so it isn't clear to me how this kind of analysis would sort out or take advantage of data that are submitted. The other thing I wonder about is would it matter when these searches are done and the language is all organized the way it was described today; does it matter how much knowledge the person has about the rulemaking in terms of doing the analysis, the language analysis? Does it matter? So you sort by words and you find that a word was cited 200 times. Who decides which of those terms are important to the outcome of the rulemaking or driving that? I mean EPA uses the same contractors over and over and over and over again to analyze comments and to categorize comments. Does it matter who is doing that, in terms of biasing the outcome? Does the software, does the person that is doing that analysis have to have specific knowledge of the rulemaking and what's important; that kind of thing.

R4: I guess I'd like to say several things. One is that I think it is really confusing because the things that [name] and [name] are talking about are kind of separate from what the eRulemaking initiative is doing. So they are talking about developing some possibilities and the software they are using isn't actually in use yet. Goodness knows what the agencies are doing now, but they are not using the software [name] is talking about; that's still in the development phase. But the confusing thing is the eRulemaking team is in the process of doing a whole bunch of other stuff and all the data mining may come along down the track. Now, it's really good to be thinking about it now because we haven't really had the luxury to do that with the eRulemaking initiative. It's happening and we are trying to catch up. I have the same problem [name] has because I will be talking before the next sessions, but the technology for the initiative is all coming along. Where as, all these issues of, how's the data mining going to work; that's really relevant and it's good that there's time to think about that now. I think it would be good to talk with [name]

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about what does his software do precisely and how would it handle that, but the answer maybe that they don't know yet. I thought the talks this morning were really interesting in a lot of ways. I thought they were also interesting with respect to the digital divide. I guess one of the things I'm curious about is how...what groups feel about that. I feel like political participation is so hard to generate and I did a report which caused me to look at some statistics on how many people are just not literate are pretty astonishing. It was around 20%. And if you've got an awful lot of people who just don't read, you've got a problem with participation; political participation no matter if it's off-line or online. So eRulemaking is just kind of following along and maybe it's making that worse, but on the other hand there's, in Canada they are doing broadband for Indian tribes. So these rural areas are getting online, so I guess I have a feeling, with respect to the digital divide, forget eRulemaking, that's a sidelight; think about how you get access for people. And think about whether when it gets on people's telephones are they going to...when there's Internet on your telephone is somebody going to be able to plug into eRulemaking that way? So some of it, I think we get excited about the wrong things, maybe we ought to think about where is it we want to go? What is it we want, the eRulemaking system or participation in government? What is it we want to achieve and how do we push the eRulemaking system so that helps us to get there? So, I guess that's my short summary of my strongest reaction to this morning.

R1: Are you saying that 20% of Americans are illiterate?

R4: According to the statistics that I thought...I can't remember if it was just below or just above. That's probably...I don't know how basic; I don't know how they were measuring literacy. I never got around to going back and trying to figure that out. Even if people can do basic things, if they can't read easily, they are probably not going to get very excited about political issues that would require a lot of background information.

R2: Well, in the political process we've always depended on groups to represent those people. They don't necessarily...those groups can be represented by people that are very literate. We all know there are many groups out there that fit into those categories, that don't have advocates. Some of those groups do have advocates that would be able to use...would not be on the other side of the digital divide. We know not all groups have advocates that would be...

R7: I would have to say I don't really agree with your comment. I think that if you simply look at the workforce itself right now, basically between 13-16% of the workforce are organized. Which means the vast majority of people, at least when it comes to dealing with worker-based issues, don't have an advocate. When you add on top of it the increasing language barriers; and I'm always concerned about illiteracy. I can not think of any time that we've had a comment come in, whether it's been a comment or someone testifying at a hearing, who is illiterate that we would discount them because their language is not the same as mine. Because a person that can't read could also come to the hearing and give oral testimony; that type of thing. But the growing issue is; what are we going to do with comments that come in in Spanish or Vietnamese and Russian and anything else? Whether we are establishing a different type of divide that is; you can only participate if you know English.

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R7 also in session 4A (R2)

R4: Let me say two things to that. One is, I'm not saying that people who are not literate can not participate now. I'm saying that I think that it is less likely. I'm saying the percent illiterate is just a kind of marker for how hard it is to get people involved in politics to start with. But about the question of other languages, one sort of intermediate, just sort of practical thing to decide; I went through that with trying to get money, which we didn't, for translation into Spanish on a dialogue we did. It was pointed out to me by some of the Spanish speaking people that a heck of a lot of people can read or understand more of the language than they are comfortable speaking. So if you can find a way to translate peoples' comments they might not need a translation of everything that's happening in order to take part.

R1: Is there currently legal clarity about how non-English submissions are handled in rulemaking processes?

R7: I don't think there is any legal clarity. The Administrative Procedures Act requires that we publish notices of proposed rulemaking in the Federal Register; the official recognized...I do not know whether the Federal Register has an automatic process for having a Spanish version, so I think that, to me, increasingly is going to become a barrier to participation.

R1: I know my organization is probably kind of different because our constituency is very, very highly educated and generally exclusively computer professionals. It seems to me that we currently do political outreach exclusively through print. If someone, online in particular, if someone couldn't read English or Spanish on the Internet that person would not know that we exist, not know about any of our advocacy. We may be in one extreme.

R4: If it's not pdf's, which the Federal Register unfortunately is, than theoretically you could at least try the automatic translation.

R1: There's an ASCII text version of the Federal Registry. I have a very low opinion of machine translation. I would be troubled if, at least if agencies; I wouldn't be troubled if the public used it, I would be troubled if agencies tried to rely on that for this kind of thing. I use to experiment with some of the early systems, translating systems, from English into another language and back using the system and seeing what it looked like. It was ridiculous.

R7: I wonder how in the Department of Labors situation, how much different the overtime docket would have looked if there had been a broader way for non-English speaking workers to participate. And even non-English speaking employers to participate as well, or non-fluent English speaking persons to participate.

R1: Seems like that could be very significant, people not knowing their legal rights because they don't speak English, or a lot of things like that, or just not being given their legal rights and so it seems like that could make the docket look very different.

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R4: One of the things that I am wondering about increasing in all of this; there were several things said this morning about people feeling really antagonistic toward agencies. I guess one of the things that eRulemaking seems like to me is, that it could be either an opportunity to find lots more ways to litigate against agencies or it could be a major way to get some collaboration going. The kinds of things you are saying, like the employers/employees who don't speak so much English; I mean to me that's an outreach problem of the agency. That's some place where it would be really good to talk with the agency and say, look you are not reaching the right people for the rulemaking. You are not reaching the real stakeholders. But then if I think about what was said this morning about agencies are not our friends, I sort of wonder, how do groups feel about that? Are there possibilities for collaboration? Some of the things that have been said about submission of comments; some of these things are things that if a range of non-profit organizations could get together and say to the agencies, this has got to change. At least some agencies; I know there is a lot of variation in agencies as well, but at least in some agencies I think there are some people who might be an audience. Is that too optimistic?

R7: I guess you could fault the agencies for not publicizing in broader fashion, the fact that we have X or Y rulemaking going on. Maybe all press releases that go out should be done in multiple languages, so it could be picked up by outlets. Even if those additional outlets picked it up, I think the powerful organizations who know how to use rulemaking system have so complicated rulemaking with going to Capitol Hill to force the agencies to do X, Y, and Z; that it is only the most sophisticated that understand the nuances of what they can challenge. For example, to get a regulation of [org], we have to do an analysis under the Reg. Flex Act, we have to do a Paperwork Reduction Act, we have to follow the Executive Order on small businesses, now we have SBREFA, and we have the Congressional Review Act afterwards. Now the next thing that is going to be imposed on us is scientific peer review of not only health data, but economic data as well. What person with a 6<sup>th</sup> grade education at the most, is going to understand all those regulations or want to participate? So I think it has sort of become a vicious circle. I would say, to me the fault lies less with the agencies than with the powerful organizations who know that you'll get fewer regulations out if you make agencies jump through an additional dozen hoops to do anything. So that when [org] first started rulemaking back in the early 1970's it might have taken us two years to complete a rule, now it takes us a decade to do a rule. I never have heard any one of the powerful organizations, and I guess on our end of things would be the powerful employer organizations and business organizations say; "we went too far, we'd like to tell Congress to strip away all of this and make rulemaking easy for all persons".

R1: There was some discussion yesterday about the peer review and I missed some of it, but I remember having concern about that, in terms of participation. I was telling the story of a rulemaking we participated in where we made some policy arguments; it's a tri-annual review at the Library of Congress of this copyright legislation that we care a lot about. So we made these policy arguments and they said, "oh this is not evidence, we can't be persuaded by your mere policy advocacy". So three years later it came around again and they had said we need specific cases, so we recruited specific individuals who had actually been harmed by the action of legislation and they came in with their specific stories. I tried to do this particular activity and I was impeded. And then our adversary said, "well that's anecdotal because you just found these

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particular people's stories and we don't know how widespread this is". And that seems like a major issue in public participation; if people are going to argue that your individual experience can't be credited because it is not a study. Like if an employee were to come to you and say, "well I'm an employee and I have the following experience and my employer behaved this way toward me". If someone can come under the SBREFA peer review and say, "well you can't do anything based on what that employee told you because that employee is just an employee and not a study". That seems like a big public participation problem, which is not at all specific to eRulemaking, so we may be a little afield here.

R7: I don't think that's necessarily afield. It seems like with eRulemaking the ability of any group to, I hate to use the word flood, but flood an agency with a lot of the same identical comments signed by a number of people, I think has had an exponential growth. However, and they are primarily anecdotal. You can count up the numbers but since nothing, you get nothing different about any person, it's not really a database to analyze. And our agency or [org] or client agency is required by its own statute to base its rulemaking on the best available evidence and fairly, much has concluded that anecdotal may be supportive but your best available evidence is going to be scientific, peer reviewed type of information. Which makes me think that what might be beneficial for organizations who decide they want to send a group of things in to have...even literally set up their own forms so that people have to add very specific information. That once you get 80,000 of those in, because literally it becomes an analyzable database. Like the number of years the person has worked; the average salary; if it's an injury, the average cost of the injury among that database; average days of work; if it's an employer, the average costs that they've encountered in providing training; or doing something like that. So you create a database that either you can analyze; the group can analyze and then present to the agency or the agency than can turn what would just be the same comment; that they would say, "oh yeah we got 80,000 of those, lets move on to the next". It can analyze because there is something a little bit more relevant. That's how you turn anecdotal information into potentially something that would be closer to the end of best available evidence.

R1: I guess there is still some difficulty in terms of the representativeness of these particular people because someone could say, well you went out and found the 80,000 people in the country who have been most abused by their employers and perhaps those are the only people in the entire country who have had that experience. So how can you base policy for the entire country off those particular people? How do we know if that's representative?

R4: I think it is really interesting idea because I think you have the possibility that if you became clever in setting up that kind of form, you might actually be able to identify particular problems with particular rules. If it turned out that a bunch of people were injured because there was no rule about a specific issue, it seems to me that might be counted as substantive, because the way I understand it, in a sense because the rulemaking isn't a vote, that can play in your favor. It's not that you have the masses of people, but if you identify an issue than it seems to me that it would be hard to argue that it was not interesting because it was from a particular group.

R1: Actually someone will try to argue that.

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R7 also in session 4A (R2)

R4: I'm sure, I'm sure. I'm just saying I think the idea of organizations setting up forms is really interesting because we were talking yesterday about structured comments and whether it is good for the agency to set up forms. Well the idea that the organization has the possibility to set up forms; that's kind of exciting. You could just play the form game.

R6: I just had a vendor come and see me last week. He's developed software that could do exactly that. It can fill in fields with particular terminology or numbers to the individual's letter to make it unique to them or to their experience. It's called Write Text.

R1: You mean that someone writes a particular letter and this software...someone completes a web form and this software writes a letter based on that?

R6: No, the letter exists; the body, the paragraphs, the ending, but there are fields that occur in different parts of the paragraph or a sentence that can automatically insert a unique phrase or unique number. She was talking about how they wanted letters that had more specific evidence to make that particular letter stronger in terms of value or whatever. That's what this person has done and I said to him, this is something that has a lot of potential because agencies always come back to us and say, "every letter that you have submitted is the same". So some go so far as to say all 80,000 letters only count as one versus those groups that took the time to write very substantial comments, with what you had mentioned before, with data, and charts, and analysis and that kind of stuff. So it's happening.

R4: That's fascinating. So actually what that comes down to is that an organization using that kind of software; if you know that they are going to come up with those kind of numbers that [name] has about the degree of difference between one letter and another, you can run the messages from your members through the same kind of stuff to make sure...

R1: But there are different extremes. One is the extreme where you say, especially if you have a more adversarial relationship, which is something that's been talked about. My organization has not attempted to do this, so I want to be clear about that, but if you had an adversary relationship and you wanted to defeat duplicate detection; there is actually clearly technical means of automatically generating letters that will resist duplicate detection so that they don't, as the saying goes, appear to be form letters. I have thought about there are these phrase structure grammars where you have essentially a tree of grammatical possibilities; ways that things could be structured; different parts of a sentence. And you can pick at random different ways of phrasing different things and have something that is semantically equivalent. So you can say, ok here are 80,000 letters; it may be hard for a computer program to recognize that these were all generated by the same process but actually they were still [?] generated. I would imagine people with an adversarial relationship to agencies actually doing that in order to try and create more work for the agency or less appearance. Now it may be hard for people to draw a line between: we are going to randomly generate a form letter to send and we are going to facilitate the automatic generation of a form letter that is actually specific to each commenter. In other words, if you ask the commenter what the commenter's job is, maybe you are asking that because you

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R7 also in session 4A (R2)

think it is useful information for the agency or maybe you are asking that because it will make duplicate detection harder for the agency. Maybe the agency wants that information, maybe it will just make them not notice that it is a form letter. It maybe kind of difficult to account for what an organization's motivation is.

R2: I think that it is naïve to assume, [name] is right, you have to be pretty sophisticated to navigate the rulemaking process to really impact a rule. As [name] was saying, they are bound by law to use best available technology, or whatever the phrase is for them. Under the Endangered Species Act you have to base it on best available information or something. What difference would it make to the outcome whether the agency said, if you have 15,000 people send letters, if the letter doesn't have information that is going to really influence the outcome, what difference does it make if all 20,000 of them are identical or if all of them are slightly different and the software that is used doesn't detect that they are all identical? Who cares in terms of the outcome of the rule? I mean the outcome of the rule...what does the agency use in those comments to influence the rule making? Well, if it is not actual data, in this case it doesn't matter, does it? It's not just an opinion kind of thing; you know, "I don't like this rule." Well, you have to be prepared to provide information to either bolster your case, otherwise its not going to have much influence anyway. It has to be something that is going to make a difference to the agency. [name] does the agency, Department of Labor or OSHA for example; the rules really should be based on sound economic information, health, all that kind of stuff. What kind of information can an individual out there provide, that would influence the outcome? A person just by themselves, what would it have to be that would actually influence the outcome?

R7: I think that the more specific it becomes, the more valuable it becomes. When it is things like, "this would cost me, this would drive me out of business" as opposed to, "this is what the cost would be and its based on this and this and this". That's when it starts to become more valuable. It has to be specific and it can't be...we get comments from both sides that I wouldn't say pass the laugh test because they try to overstate the case. We had on the ergonomics rulemaking we had, if we had one employer comment...do it on both sides; the employer comments, if we had one we had 50,000 who said there isn't valid science to support this rulemaking or would make a couple of extra comments about that. Then you have the opposite side, they are as valid and they would make a couple of extra comments about the science. It turned out when these people came to the hearing, none of them read the science. So what value did their comment have because they didn't know the underlying science to make the comment? Some people ended up looking sort of silly there when they were asked those type of questions. It's not that the agency should try and make anyone look silly; that's not the purpose of information gathering. But, when you want to tease out; explain to me, what studies did you base your opinion on? "Well, I haven't read any of the studies, I was told by this organization that there's no science." So the more specific it is, the more it talks about a real world experience, the more that it doesn't try to overstate the case, the more specifics, the more reasonable cost estimates. Like saying, "if I have to train someone to use this it is going to be a week of training". Come on, that's just not realistic. But if they said, "it would take me one hour or two hours of training, my average hourly wage I pay is this plus benefits"; then we get a real picture. Then it begins to have...and they could have said, "and I've attended conferences in

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R7 also in session 4A (R2)

my industry on such and such a date and in these group discussions businesses said the costs were similar for them”. Then it begins to build up the case for taking it narrowly and make it more broad. As to [name], what you were saying, taking all of these postcards that come in; yes, they are not a random database, they are not going to get you to best available evidence. But they are going to get you out of the file if we look at them once and then we don’t pay attention to them again. We count them up once and that’s all you get. We will put our eyes on them one time, but if they all say the same thing then what are you going to get other than a number at the end of the day. It takes you out of being the least valuable and starts moving you more towards the end of, is there anything valuable to it. You are right. It’s not going to be a scientific peer review, but maybe, our best available evidence; maybe that is the best evidence that is available. Do you know what I’m saying? Then you have to come down, granted we like to have the best scientific peer reviewed stuff, but if it’s not available then you come back down the line of what then became the evidence that was available.

R6: I think it would be fool-hardy for any advocacy organization to believe that if 80,000 of their members submit duplicative comments that that’s just it from us. No, I think that those mass comments are just merely a complement to the activity that they want to do in order to influence a regulatory action or a rule. So then, I know I can only speak from my organization, is that we know that that is not it; there has to be more. So we take the time to submit a thorough, scientifically based comment on a particular proposed rule. But on the other hand, when we say I know there is a lot of cynicism from agencies about these mass comments, but let’s not forget we don’t want to disenfranchise probably the majority of the comments that are being submitted. Don’t you think something like 90% of the comments that are submitted are these mass mailings?

R4: I think it depends. I looked at one docket that had like 20 comments and they were almost all from big companies and a couple of them were from people who used to work with companies like that. So I think for the rulemakings that people get excited about, that’s probably true. But for a heck of a lot of rulemakings there may not be that many people who comment at all.

R1: We mostly follow the Federal Communications Commission; that’s where most of our practices that we tend to practice. That’s exactly that way. You have certain things, currently broadcasting decency, in fact broadcasting decency is so dominated by [?] developed comments that the agency had to make mistakes. For example, someone [can’t hear] ...Chairman Powell saying, “I support broadcasting decency as a free speech issue”. And he wrote back saying, “I share your concern that broadcasting decency not be permitted” because he was getting, so many comments were against broadcasting decency. But you have broadcasting decency, media consolidation, probably five dockets that have lots of these public comments. And then you have the table of frequency allocations for a particular community and it’s like the incumbent broadcasters agree that this station should be licensed and no one else says anything. Ok, this station is licensed.

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R7 also in session 4A (R2)

R5: Very few people subscribe to the Federal Register. I know no one in my family that gets it. My point with this is that we have never had the franchise of making comments on rules in general. We are talking now about the Internet and how some people don't have access to it. What's the lowest common denominator for people who can't read right now? It's the radio and television. Even as you are talking about the FCC permissions to have a radio station broadcast, most of the future of this country is based on audio and visual media. It is not going to be the written word. So right now we are grappling with how to handle an influx of mass comments because organizations such as mine has summarized, filtered the message, and are interpreting for what we consider our constituents. We don't lead them around by the nose; they come to our organizations voluntarily because they don't have the time. They don't get the Federal Register, they wouldn't know page 10-1 from subsection 22A. And they don't want to know because it is just too much for them to sift through. They are worried about carbs right now. They come to us to disseminate this information to them. We build a trust with them and they say, "what you say I will back you up because I believe what you are saying". And the folks in the building across the street may have the opposite opinion and they have their constituents as well. So we bring that information to the agencies because they trust us as interpreters. Well, it's only going to become more, if right now the rulemaking is so overwhelmed by simple postcards and mass letters and now the next level being 20, 30, 40, 50,000 emails that can't be disseminated. When we go to the next step of the official eRulemaking and we want specifics that is going to increase by leaps and bounds the amount of comments the agencies are going to get. If we want to disseminate them with individual terms to make them unique, that is not going to be electronically sort-able. Once again, once you weed out the duplicities you are going to have an even larger stack of unique comments to sift through. So I think we have got to address that issue as well. It is not going to be reducing the work, it's going to be increasing it.

R7: I thought what they showed on the Department of Transportation's eDocket page, that they take literally a duplicative one and they list either how many and maybe if you click into that you could see the names of all those; is going to make it so much easier for people to sort through a docket. Because when you have to click, oh that's the same, that's the same. But nobody has to buy the Federal Register. Every single Federal Register is available online going back to 1996.

R5: Agreed, but my point was...

R7: Why don't you tell your members that?

R5: That's not the point on that either. It is the factor that, it is very difficult to read for the common person. Now, are we looking to get comments from the citizens or just from people who have the money, the employees, the knowledge, who can hire attorneys and lobbyists to read through the Federal Register everyday?

R4: I think what we've hoped for eRulemaking is that not everybody is going to comment on every rule and it would be a horrible mess if everybody did. But there are people out there who are the stakeholders and might get interested if they knew about it.

R1 also in sessions 2A (R3), 4B (R4), 5A (R6);

R3 also in session 1A (R8);

R4 also in sessions 1A (R2), 4A (R8), 2B (R6), 5B (R5);

R7 also in session 4A (R2)

R5: Exactly

R4: And so how do you get to the right people? And how do you get the information online that would let people get excited about something and be knowledgeable, if they wanted to be. I think the whole environmental movement is a real interesting example of that. You've got people who have been looking at their super fun site and their state for a long time and they are really knowledgeable. And they may be the public and not work in that area but they know a lot and they can put in an informed comment.

R1: In fact, I think everyone is very jealous of the environmental movement. Every new social movement is saying, "how can we do like the environmental movement?" There was a famous line in my movement where someone, I forgot who said, "we need to have an environmental movement for the Internet and we need to all be involved in the same way". Not environmental movement on the Internet but an equivalent. So I think people are very impressed and very jealous.

R4: I think it does bring up some issues and to me one of the biggest issues for organizations is, how can you get out of just thinking about how things are done now? How can all of us get into thinking about how it might be 5 to 10 years from now? I think that there are a lot of organizations that do serve as the intermediary and they sort of base the construction of the organization on the idea that they would synthesize and educate. And now, as you're pointing out, there is the possibility that people could go and do that for themselves, so in a sense that's a threat to how people have gotten people involved and collected money and gone to agencies with the message that we represent a big group. And at the same time, there's a whole bunch of stuff that is now possible that didn't used to be. So how can non-profit organizations, as a group, move on to thinking; "what are the new things we can do?" Instead of saying; "well we don't want to do that because it's a threat". What's the new stuff? What's going to happen in awhile?

R8: What are the new things that you can do?

R6: With the Internet? Fundraising--number one. That has just exploded thanks to Howard Dean and Woo Bon.

R7: I think there is a big issue for doing eRulemaking or eDockets on copyright issues. Some agencies have decided they will put copyrighted materials right on their eDocket. Other agencies have decided, no they will not do that. So the only way that you can obtain copyrighted materials is either by coming into the Docket Office or contacting the Docket Office to obtain that material.

R1: I'm very interested in that because, our advocacy role we work on copyright issues a lot. So I wonder if you could do an example of that, because I am not really familiar with what...

R7: Well, for example a lot of times [agency] in its statute is required to either adopt national industry consensus standards or provide a pretty good explanation of why they have chosen to

R1 also in sessions 2A (R3), 4B (R4), 5A (R6);

R3 also in session 1A (R8);

R4 also in sessions 1A (R2), 4A (R8), 2B (R6), 5B (R5);

R7 also in session 4A (R2)

differ from it. All the national consensus standard setting organizations, the standards that they develop, they're copyrighted. So if we say, you must follow the ANSI standard; when you provide eye and face protection it must meet the requirements of ANSI standard C34, I don't know if that's the right number. Well, if you don't have the ability to see C34, you don't have the ability to comment on whether you think...

R2: You'd have to pay to get that.

R7: You could do it one of two ways. You could contact ANSI and get it. Or you could contact the department and individually either potentially...certain things we have under the copyright laws we can make an individual copy, but we just can't put it across, well at least my agency has decided, you just can't put it up there because you've got balancing and competing interests. ANSI makes their money to support their standard setting by selling its...Journal articles; JAMA is copyrighted publication. New England Journal of Medicine, copyrighted publication. Basically every journal is a copyrighted publication. They want you to contact them and buy the publication.

R1: There was a case that we actually didn't get involved in, although we followed it very closely, called Veek vs. SBCCI.

R7: Was that a case out of Texas or Louisiana dealing with housing codes?

R1: Yes, model codes. That's the one. And there was a model code and it has been adopted into the law by local authorities and this man, Veek, he was a building contractor, I think. But he had posted it online saying, this is the law of such and such jurisdiction. And he was sued by the model code developer for a copyright infringement. He said, "what do you mean, I'm publishing the law". There's a complicated procedural history, I believe on appeal he was permitted to publish it, but it's still a very active field of controversy about things like that.

R7: I don't know if, it was in the 5<sup>th</sup> circuit and I don't know if it's gone up.

R1: I think the Supreme Court declined serve.

R7: Oh did they decline serve, ok.

R1: In the 5<sup>th</sup> circuit, I think it stands. And that general issue is really pretty alive.

R7: That would only be the law for the 5<sup>th</sup> circuit.

R1: Right, we can't necessarily rely on that.

R7: I think that poses incredible problems for individual participants. National Association of Homebuilders has got a local office in DC and can send someone in to look at the docket. Someone who lives in Missoula, MT can't.

R1 also in sessions 2A (R3), 4B (R4), 5A (R6);

R3 also in session 1A (R8);

R4 also in sessions 1A (R2), 4A (R8), 2B (R6), 5B (R5);

R7 also in session 4A (R2)

R1: We were working on the digital television thing and we were fortunate because the digital television standards, the standards body chose to publish them freely as pdfs. But that could have been a big issue because there are other standards bodies that tried to sell their standards and it could have been very difficult for us or for the individual commenters to get a copy of digital television standards. It was not the assumption of the people who were inventing the digital television system that it would become politicized in a way that the general public would have something to say about it, but it did happen so we were lucky.

**M1: We're getting close to the end of our session. I would like for you to think about the topics that we've discussed and reflect a little bit. Which ones are most central to your position as stakeholders?**

R7: I think his API is probably to me the most important. I don't think that agencies, even if there is no bias, are going to be able to end up with a text analysis or analysis system that is going to be able to be valid or useful for all persons who want to do it. And I think that is going to be very important, if you want to be able to take your own analysis system and hook into a docket and use your own analysis system to tease out the information the way you want.

R1: That's one part of it, but I think in the context in which we are discussing, that's probably the most significant part.

R7: To me that's the critical one.

R1: We have docketing systems and they do not facilitate third party software that helps people search and manipulate the docket. I had to write some for this particular FCC docket and unfortunately it was specific to that docket, not generally applicable.

R6: Because there's no common platform government-wide.

R1: Even if all the agencies were using, I think this is really significant, even if all the agencies were using a common docketing system there is still an extra step to make it so that third parties can write software that works with that. It's not just a question of whether the agencies are using the same technology, it's a question of whether the agencies are using a technology that lets you download a whole docket or run particular searches across a whole docket, if they're not kinds of analysis that the agency itself has thought of.

R5: I would second that because I think, that's the kind of thing that I was talking about before; that's a design issue that depends on what Lockheed Martin is doing right now. And so to me, the idea that you would have an eRulemaking system that's flexible and it's interoperable is just about all you can say about the design of the system now that would let people have something that they could use when they figure out in a few years what's important.

R?: So then you need expandable as well.

R1 also in sessions 2A (R3), 4B (R4), 5A (R6);

R3 also in session 1A (R8);

R4 also in sessions 1A (R2), 4A (R8), 2B (R6), 5B (R5);

R7 also in session 4A (R2)

R1: But if you have...you know people talk about things like disability access issues and they have certain standards that the federal government is suppose to follow about making web sites accessible to people. A partial alternative to that, not **[tape break]** ...and there's the ability to develop software that will work with the government system than someone else can come along and implement that, and make that accessible even if the government agency itself doesn't develop it.

R4: I think that your vendor example is interesting there because I think that a lot of what happens with this is about creating incentives. I mean what if vendors have an incentive to create something interesting instead of to create something that would just make life harder for the agency. I think your point about -- what difference does it make if you can submit things that don't look like duplicates if really they are? -- all that does is just increase the workload and doesn't really help any of us out. I find that an interesting and rather shocking example, but there are going to be vendors who will be doing the kinds of things that [name] is talking about that help you analyze the data, so why not make it easy for them to hook into the system.

R6: All of this eRulemaking stuff has created a brand new industry. It's just popped up in the last five years or so. And now I'm seeing that the trend is now all of these small firms that used to do specific things; whatever you hired them for, now they are beginning to consolidate and becoming these corporations.

R1: Actually, our vendor just got acquired by, I don't know who acquired them, in the Consultancy Club CTSG.

R2: All of this talk about the electronic rulemaking, that's only part of the way public participation can occur in the rulemaking process. Each agency has a public, well I assume they do, most of them have a public participation policy that's in place today that certainly goes beyond just submitting things electronically or of that format. I would hope that this particular thing doesn't drive, or doesn't eliminate those other public participation mechanisms where the agencies go out and listen to people and people can verbally get things in the record. You don't have to submit and seeing a notice on the Internet certainly is not the only way that agencies let the public know that there's rulemaking going on. Have a balanced participation procedure not just...that this doesn't make it all lopsided.

R7: I would add making eRulemaking system usable and available to the growing non-English speaking population in this country. Another one would be, I think there's still a large distrust in whether the eSystem is working. So we tend to get, people give us electronic comments and then fax and mail the same thing in too. So you've got all three routes, just cause they're not sure it's really working. The last thing, and I was surprised that you guys haven't brought this up, I would think that organizations would be very concerned about the eGovernment one portal because does one size fit all? In other words: are you losing contact and losing specification that might make your interaction more useful if you have a docket and the eRulemaking done by the specific agency? For example, OSHA is going to lose, it looks like, its docket office. It's going

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R4 also in sessions 1A (R2), 4A (R8), 2B (R6), 5B (R5);

R7 also in session 4A (R2)

to be sent over to the Department of Transportation. As soon as they scan the document in we are going to get rid of the paper. Well, if it didn't scan in properly it's gone and you couldn't come over to the department anymore and look at the hard copy of anything. To me, if I were an organization I would be really concerned what ends up happening. OSHA may not be perfect, but by golly they always do find the specific document, or EPA whatever branch you are working with, or FDA. Everything is going to go to a central place for being scanned, put into the computer and then they are going to get rid of the paper.

R4: Actually, not everybody is getting rid of the paper. Probably eventually they'll want to, but I think at the moment it's agency by agency. But the problem is the only place where it's really been shown that this stuff is a cost saving is the DOT system which saved the money by getting rid of the paper. I think that maybe another one of those things where we have to say, ok it's probably going to happen eventually, so what are the safeguards that have to be built in? Because I agree, it's kind of silly to do it before you have the safeguards in place. But on the other hand, it's probably going to come.

R7: Well if the decision is made, and I don't know what decision will ultimately be made about, what will happen to copyrighted documents? And if the decision is, they won't go up on a web docket than where do people get them?

R4: That's one of the issues, and somebody was describing that sometimes people send in physical objects; a model or a this or a that. So there's lots and lots of questions about how you maintain those things.

R1: Is it legitimate to file an object in the docket?

R7: Yes

R4: Apparently.

R1: I've been trying to do demos, but I didn't know I could actually file the demo.

R7: We have video tapes, we have cassette tapes, we have posters that are entered, we've had broken chairs entered as exhibits and stools, we've had...I'm sure you guys have entered certain kinds of pieces of equipment into the record to show what's used currently in home building.

R1: So I guess it's worth mentioning in terms of the loss of paper; there's a big issue about the archiving of, the permanence and the durability of digital media. It's a whole field you can read; there's a book called Time and Bits: Managing Digital Continuity which may be a little out of date but there was a symposium about whether things in digital form can actually be preserved. Nicholson Baker wrote an extremely controversial book called Double Fold about libraries digitizing things instead of keeping paper and he showed in some cases that the paper was actually much more durable and long lasting.

R1 also in sessions 2A (R3), 4B (R4), 5A (R6);

R3 also in session 1A (R8);

R4 also in sessions 1A (R2), 4A (R8), 2B (R6), 5B (R5);

R7 also in session 4A (R2)

R4: But only from certain eras.

R1: Yes, it depends whether it was printed in a particular period of time when the paper had relatively low acid content. But I have a book that is older than the US Constitution and you can just open it up and read it.

R4: Now I think it was like during the war they used anything that they could get to make paper.

R1: And they would use newsprint.

R7: That was when it was all rag paper.

R1: But if you have something and the only copy in the world is on a hard drive or on mag. tape or something it hasn't really been shown in many cases that those will last for a long time and there is an issue about losing things.

R4: Somebody was saying yesterday this is already an issue. For example, I think he was talking about aircraft designs that, where the aircraft may stay around for 50 years say, and it's already a question with some of the early designs. Just like all of the digital security stuff, I think those are issues for everybody. Those are issues that have some how got to be confronted and solved. This is just one place.

R1: But you have cases where the traditional way of doing something with paper may have almost accidentally had certain advantages. We work on these voting issues and there's a similar case where it so happens that certain traditional ways of doing things happened not to have certain vulnerabilities even though they weren't necessarily designed that way. And more high tech ways of doing things may have certain vulnerabilities and failure modes and fragility. Just because of their complexity and it's worth paying attention to the fragility that's introduced.

R5: Which brings me to the point that I was going to bring up that we didn't discuss here, but I feel is important; the receipt verification of submissions. Or a verification receipt. Otherwise, there is really no record of submission, so electronically there has to be some type of authentication/verification method that goes back to a submitter.

R1: The FCC gives you a nice little certificate suitable for framing, but on your computers. Little color and FCC logo. "Thank you for your submission number such and such, docket such and such, FCC logo. We appreciate your comment."

R7: As an aside, but for membership organizations; helping all of their members understand all of this better. My recommendation would be that all organizations should include on their annual conferences the ABC's of rulemaking with representatives from what ever agency they deal with. Year in, year out because it changes. What are the ABC's of rulemaking; walk us through, walk us through, walk us through. So we become proficient at it.

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