

Communications Daily

With Commenting Systems Semi-Frozen, Openness Advocates Worry About Participation

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By Matt Daneman

The public commenting systems of numerous regulatory agencies are, like the FCC's electronic comment filing system, seemingly frozen at the point where the agency was shut down, according to experts and our analysis. Government transparency advocates say that's better than nothing, though concerns are strong that the partial federal government shutdown could scare away the public from taking part in ongoing proceedings.

EPA administers Regulations.gov, and has said the daily feed from the Federal Register won't be processed during the shutdown, meaning proposed rules published in FR won't be added to Regulations.gov, said American University administrative law professor Jeffrey Lubbers. The site seems to be taking comments, but nothing seems to have been posted since Jan. 2, he said. An anemic FR is still being put out daily, though the Office of the Federal Register's website isn't being maintained, Lubbers said.

The Administrative Procedure Act doesn't cover such shutdown issues specifically, and it's largely up to each agency to figure out what it can do, Lubbers said. He said there's some value in keeping past comments and proceedings up, and if the agency isn't expending funds just to keep them up there's no reason not to.

The FCC is generally tracking with other agencies in having public commenting portals up, though they are not updating, and potentially still accepting comments, said Amit Narang, Public Citizen regulatory policy advocate. An employment lawyer told us there's no blanket federal rule about rulemaking and what happens during a shutdown or furlough, so agencies decide ad hoc, with some extending comment periods and others not. The National Labor Relations Board earlier this month extended the comment period on at least one open rulemaking.

FCC Commissioner Brendan Carr told us he's had at least one ex parte meeting since the agency shutdown, and was emailed a copy of the subsequent filing afterward, which is a commonplace practice. He said he's "not worried" about the backlog once the agency reopens: "We will work through whatever comes our way."

The FTC, taking comments through Jan. 22 on a divestiture related to the \$80 billion merger of industrial gas companies Praxair and Linde, won't take any action until the government reopens, according to a website page dedicated to the comments.

The shutdown might have come at a time when notably less rulemaking is going on at federal agencies overall, with rulemaking taking a nosedive under the Trump administration's deregulation push, the employment lawyer said. Also, some agencies have had difficulty maintaining commissioner quorums needed to engage in rulemaking, with the five-person Equal Employment Opportunity Commission board having only two members at the end of 2018, he said.

Having public commenting systems still up, even if not posting new comments, is a case of "something is better than nothing," said Lisa Rosenberg, executive director of Open the Government. The FCC is seemingly trying to lessen the impact, however functions that matter most to consumers are gone, she said: "It's really just a fig leaf."

Consumers could be hurt by a sophistication gap, not knowing they can comment and losing interest, while companies and law firms "know what the deal is," Rosenberg said. Such a shutdown also means lost data in the form of consumer complaints -- that being one of the biggest values consumers provide the agency, Rosenberg said. When the FCC and other agencies are back in operation, the backlog they face "is going to be insane," she said. That raises the question of whether the FCC will even give a fair look at consumer comments as it struggles to catch up, she said.

Taxpayers for Common Sense President Ryan Alexander said keeping comments websites static from the point agencies were shut down "is the path of least action." She said it also could reflect an effort by the Trump administration to minimize shutdown effects. "It's better than nothing," by giving people a sense of where things stood before the shutdown, she said.

Public Citizen's Narang said a big problem is those commenting portals don't make clear they're accepting comments, and citizens -- knowing about the government shutdown -- might assume they're not accepting, even during open comment periods. Best practice for the FCC and other agencies would be to toll the amount of time the shutdown lasts and add that to open comment periods, Narang said. That idea could run afoul of the general push for deregulation since it would represent delay, but "robust public participation ... should be the interest that takes precedent," he said. "It's a source of legitimacy for the rulemaking process."

The FCC and other agencies also need to ensure comment periods didn't close during the shutdown, Narang said. Agencies have the discretion to reopen comment periods, since APA doesn't prevent doing that, he said.

It's not clear if during the shutdown [Regulations.gov](https://www.regulations.gov) is still posting the comments it receives on a "real time" basis, Narang said. The site has boilerplate language indicating agencies can choose to redact or withhold some submissions or parts of submissions if they contain private or proprietary information, have inappropriate language or are duplicate examples of a mass-mail campaign. Those policies might point to why [Regulations.gov](https://www.regulations.gov) doesn't seem to always post received comments automatically and quickly, he said.

The FCC's ECFS posting policy, with filings and comments going up hours after submission to the agency, is "the classic case of the system that works well enough," said Public Knowledge

Senior Vice President Harold Feld. He said there wasn't a uniform policy for agency websites when they began taking electronic comments, with each agency now being "a special case ... built up over time." The FCC was an early adopter in the late 1990s of taking electronic comments, he said. FCC comments get posted after "some basic human screening" on issues like categorization and whether there are redacted and unredacted versions, he said.

However, "none of those are insolvable problems" to instantaneous posting, Feld said. But "when you're dealing with older legacy systems, the more you have to tinker ... the more you're likely to screw it up," he said.

[Regulations.gov](https://www.regulations.gov)'s governing board probably "prefers not to have millions of 'e-postcard' type comments posted automatically" because of how that would clutter up site navigation, Lubbers said. Some agencies upload a sampling of identical comments to deal with this problem, presumably with governing board support, he said.

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