

# Standards Related to the Commission's Equipment Authorization Program

## Manifest

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## **1. Introduction and Statement of Purpose**

This is a comment by [Public.Resource.Org](#) (“Public Resource”), [iFixit](#), and [Make Community](#) on the Notice of Proposed Rulemaking (NPRM) entitled *Updating References to Standards Related to the Commission’s Equipment Authorization Program* ([87 FR 15180](#)).

Public Resource is a 501(c)(3) nonprofit organization based in California. Its mission is to make the law more readily available. iFixit is a collaborative effort spanning thousands of fixers, repair-seekers, and translators dedicated to assisting people in repairing their equipment. Make Community is an organization that has been elevating makers, nurturing a global cultural movement, and celebrating creativity, innovation and curiosity since 2005.

In this comment, we focus on a single issue: the public availability and accessibility of documents that are proposed to be incorporated by reference into law. As the Commission states in the Federal Register Notice of Proposed Rulemaking:

*The Commission’s proposals are limited to the incorporation by reference of standards that are associated with equipment authorization and the recognition of Telecommunication Certification Bodies (TCBs). Incorporation by reference is the process that Federal agencies use when referring to materials published elsewhere to give those materials the same force and effect of law in the Code of Federal Regulations as if the materials’ text had actually been published in the Federal Register. 5 U.S.C. 552(a)(1) and Office of the Federal Register, IBR Handbook 1 (July 2018).*

We would like to state one important and overriding fact at the outset: America is a better place because of the dedicated efforts of the FCC staff and commissioners. The technical regulations promulgated by the FCC have created and guided one of the best telecommunications systems in the world. We greatly appreciate your efforts.

It is precisely because this work is so important that the FCC must address this one glaring defect in this rulemaking: The text of the proposed law is hidden from public view, with access deliberately limited and available only by expensive entry fees. Special permission is required just to read the law. In most cases, copying the law—or

even repeating a brief extract—is purportedly prohibited without a special license that is only awarded by a private organization at its discretion.

This defect is especially problematic during the notice and comment period. How can we comment on a proposed rule when the important details of that rule is hidden behind a cash register, technical limitations, and terms of use?

This is not how the rule of law is supposed to work. This is not how federal rulemaking is supposed to work.

This proposed rule is an important update to our national telecommunications regulations, one that aims to enact into federal law standards that are integral to the testing of equipment and accreditation of laboratories that test RF devices.

What is not clear is why the FCC believes that it is appropriate or in the public interest to issue a proposed or final rule that includes major components that many people, including many interested parties, will not be able to fully access, because obtaining these components of the law requires payment of exorbitant fees and because of improper assertion of copyright claims that deter people from communicating the text of these provisions to others. Indeed, these restrictions are intended to prevent interested people from speaking about or even quoting their own laws.

Accordingly, Public Resource, iFixit, and Make Community are not commenting here on the substantive merits of the proposed rule. Instead, we ask the FCC to recognize that it has acted illegally and arbitrarily at this Notice of Proposed Rulemaking (NPRM) stage in not making the details of these standards—which are integral parts of the rule—available to us and other members of the public on a free and unrestricted basis. This unwarranted action by the FCC places an impossible to surmount barrier on members of the public who wish to review the entire rule in order to fully understand it and to make appropriate comments.

A final rule that incorporated the standards without making them freely available would be equally invalid. The new regulation would make these standards part of the law, yet the FCC proposes to exclude the texts of these standards from the text of the published regulation. Nor does the FCC propose to link the online version of the regulation to websites offering free and unrestricted access to the standards. Instead, the FCC apparently expects people to purchase the standards from private organizations at substantial cost, subject to a series of elaborate requirements and restrictions for online use, with the organizations claiming the right to prohibit purchasers from sharing these provisions of the law with others.

This failure to make standards that are proposed to be part of the rule freely available denies people basic access to their own laws, the laws they are both bound to obey and dependent upon for protection. In so doing, the proposed rule violates the Administrative Procedure Act (“APA”) ([5 U.S.C. § 553](#)) and the fundamental principle of responsive governments worldwide for millennia—that people are entitled to read and speak the laws that govern them, with no restrictions.

Because it is illegal and arbitrary to publish this proposed rule without making incorporated standards freely available, the FCC should re-publish the proposed rule with the incorporated public safety standards available online on a free, unrestricted basis and re-open the comment period. As to any final rule, the FCC may not lawfully incorporate these standards into its regulation until and unless they are written directly into the rule, or else permanently available to the public online without charge and without any restriction whatsoever on use.

## **2. The Proposed Rulemaking**

The Commission proposes to incorporate by reference technical standards that govern the operation of accredited testing laboratories and are also used by manufacturers when they are self-certifying. The Commission’s notice informs the public that each standard is available for purchase from the relevant standards development organization (known as “SDOs”) or available for inspection (but not copying) at the FCC’s office in Washington, DC. Those standards are:

- IEEE/ANSI C63.25.1-2018, “American National Standard Validation Methods for Radiated Emission Test Sites; 1 GHz to 18 GHz.” The [cost of purchasing this standard](#) is \$63.00 in electronic format which restricts uses through digital rights management. IEEE also sells [hardcopy](#) on Amazon for \$139.50. IEEE describes the purpose of the standard as “to describe validation methods of test sites used for radiated emissions measurements in the 1 GHz to 18 GHz frequency range as required by ASC C63® standards. The site validation requirements described in this document are applicable to fully anechoic rooms (FAR) and open area test sites (OATS) as well as semi-anechoic chambers (SAC) that are configured with absorber on the ground plane.”
- IEEE/ANSI C63.10–2020, “American National Standard of Procedures for Compliance Testing of Unlicensed Wireless Devices.” The [cost of this](#)

standard is \$176.00 in electronic format which restricts uses through digital rights management. It is not available in hardcopy. This standard specifies U.S. consensus standard methods and instrumentation and test facilities requirements for measurement of radio frequency (RF) signals and noise emitted from unlicensed wireless devices (also called unlicensed transmitters, intentional radiators, and license-exempt transmitters) operating in the frequency range 9 kHz to 231 GHz.

- ISO/IEC 17011:2017, "Conformity assessment—Requirements for accreditation bodies accrediting conformity assessment bodies." The cost of this standard is \$175.00 in electronic format which restricts uses through digital rights management. The standard specifies requirements for the competence, consistent operation and impartiality of accreditation bodies assessing and accrediting conformity assessment bodies.
- ISO/IEC 17025:2017, "General Requirements for the Competence of Testing and Calibration Laboratories." The cost of this standard is \$175.00 in electronic format which restricts uses through digital rights management. The standard specifies a variety of aspects of a laboratory, including the technical competence of staff; the validity and appropriateness of test methods; traceability of measurements and calibration to national standards; suitability, calibration, and maintenance of the testing environment; sampling, handling, and transportation of test items; and quality assurance of test and calibration data.

### **3. Why We Care**

Knowledge of the technical and safety requirements for electronic equipment is a core competency for the thousands of volunteers and professionals that fix their own equipment, evaluate commercial equipment, and make new things. We are particularly interested in being able to validate commercial products to assess how to fix them and whether or not they operate properly. Knowledge of these technical standards enforced by the FCC is vital to understand how these devices operate and whether they are operating properly.

We also care about these proposed requirements because we believe that our own efforts dovetail with the FCC's own enforcement efforts. As with other areas of public safety, such as consumer products and occupational safety, as citizens we help alert the government to unsafe devices. Again, without the ability to read the underlying

technical and safety specifications, we are unable to work hand-in-hand with our government to make sure our electronic equipment operates properly under the legal requirements of the law.

In addition to Public Resource, iFixit, and Make Community, a wide range of entities have an interest in shaping, understanding, evaluating, and monitoring compliance with these FCC rules, including government officials at the state and municipal level, officials at other agencies in the federal government, small businesses wishing to make or use relevant devices, engineering professionals, and engineering students. These standards are not only for the use and benefit of a small group. While not everyone has the training and experience to readily evaluate or monitor compliance with all of the standards incorporated in the proposed regulation, many people do, and interested advocacy and media outlets, among others, may seek out employees, volunteers, consultants and others who have the capacity to advise them.

Yet even though the technical and safety requirements for electronic equipment are very much a matter of public concern, the FCC appears to be acting as if the details of these issues can comfortably be left in the hands of those who already have purchased the relevant standards incorporated into law, or can easily afford to purchase such standards.

#### **4. The Process for the Proposed Rulemaking Is Not Lawful**

In order to comment on this Notice of Proposed Rulemaking, we would have to each expend \$589. Furthermore, the standards, once obtained, are subject to onerous terms of use. Among other provisions, the terms of use for the ANSI "reading room" specify:

*THE COPYRIGHTED STANDARD(S) AND OTHER INFORMATION PROVIDED HEREWITH ARE LICENSED (NOT SOLD). BY DOWNLOADING ANY FILE PROVIDED HEREWITH TO YOUR COMPUTER, YOU ARE ACCEPTING AND AGREEING TO THE TERMS OF THIS AGREEMENT. IF YOU ARE NOT WILLING TO BE BOUND BY THE TERMS OF THIS AGREEMENT, PRIOR TO DOWNLOADING OR COPYING TO YOUR COMPUTER ANY FILE(S), YOU MUST DECLINE ACCESS TO SUCH MATERIALS.*

*(a) This Agreement does not convey to you an interest in or to the Product, but only a limited right of use, revocable in accordance with the terms of this Agreement.*

*(b) You may install one (1) copy of the Product on, and permit access to it by, a single computer owned, leased or otherwise controlled by you. In the event that computer becomes dysfunctional, such that you are unable to access the Product, you may transfer the Product to another computer, provided that the Product is removed from the computer from which it is transferred and the use of the Product on the replacement computer otherwise complies with the terms of this Agreement. You may print one (1) copy of the Product for personal use only. Neither concurrent use on two or more computers nor use in a local area network or other network is permitted. You shall not merge, adapt, translate, modify, rent, lease, sell, sublicense, assign or otherwise transfer the Product, or remove any proprietary notice or label appearing on any of the Product. You may make one (1) copy of the Product for backup purposes only.*

*(c) You acknowledge and agree that the Product is proprietary to the Copyright holder (the "Owner") identified on the front page of the Product, and is protected under U.S. copyright law and international copyright treaties. You acknowledge and agree that all provisions regarding the usage and copying of the Product in this Agreement replace all otherwise applicable limitations and privileges under the U.S. Copyright law, including, without limitation, the fair use doctrine. You further acknowledge and agree that all right, title and interest in and to the Product, including all intellectual property rights, are and shall remain with the Owner.*

Think about those limitations on use. You are required to give up all fair use rights under U.S. copyright law. You may not share this document with your colleagues, even a paragraph's worth.

We believe it is inherently unfair for our government to contemplate binding regulations that we are not allowed to see. The Administrative Procedures Act, under which federal rulemaking is governed, requires that all citizens may participate in the process that results in regulations which we will have to live by. They cannot do that in a meaningful way unless they have access to the text of the standards on which they may comment and must obey.



## 5. Availability of the Law After Incorporation by Reference

We also believe that if these standards are indeed incorporated by reference, the final documents will not be adequately available to the public. There are three ways to examine these standards.

First, the Code of Federal Regulations requires that one copy of each standard must be available at the FCC's office in Washington, and a second at the Office of the Federal Register. Viewing these standards requires a trip to Washington, D.C., several days advance notice, but even then, we would be forbidden from photocopying the relevant pages.

Second, a few standards bodies make a subset of these standards available in so-called "Read-Only Reading Rooms." ANSI hosts these facilities for a few [IEEE standards](#) and a few ISO/IEC standards, but none of the standards that are subject to this rulemaking is available through ANSI (or the IEEE).

But for those that are available, in order to use these reading rooms, the user must accept all cookies on the web site and must provide extensive [registration information](#), including address, telephone number, and name of employer. Once registered, the user must accept the end user license agreement which warns the user:

*By clicking on the link(s) to view the "read only" standards (the "Licensed Materials"), I agree to be bound by the terms and conditions of this End User License Agreement as a permitted "Recipient" of the Licensed Materials. I further agree to abide by all security measures imposed by the American National Standards Institute (ANSI) and/or any licensor with respect to accessing all materials during this session.*

*Access to the Licensed Materials is strictly for the purpose of review. I understand that I may not copy, use or further distribute the Licensed Materials except as set forth in this agreement and that the Licensed Materials are owned and copyright protected under U.S. copyright law and international copyright treaties. I further understand that I am not permitted to republish, modify, condense, or abbreviate the Licensed Materials.*

*I agree to be bound by any additional agreements as may be requested by ANSI from time to time as a result of updated or additional materials being made available as a condition of continued access to the licensed materials.*

*I agree that ANSI may terminate my access to the Licensed Materials at any time and for any reason, including my failure to comply with the terms of this license or any license agreement incorporated herein.*

After completing that process and attempting to access a standard on the Firefox or Chrome browsers, interested persons were confronted with the following message:

*Group for Department: IEEE-135 and Channel: RO could not be resolved.  
Error 50000, Level 16, State 3, Procedure GetEncryptionRequirements, Line  
263*

This is because the user is required to install the ["FileOpen plug-in,"](#) which only works with Adobe's Acrobat PDF viewer before being able to view the standards. Many of us do not have the Adobe Acrobat PDF viewer, so that requires a second installation. And, because the standards are locked down so totally (no cut and paste or printing is allowed), the documents become inaccessible to the visually impaired, a gross violation of the Americans with Disabilities Act.

Having private parties regulate the conditions under which citizens may read the law and proposals to amend the law does not comply with the APA. Telling organizations such as ours that we may not communicate the provisions of the law to our fellow citizens without permission from a private party (which will not grant that permission) defeats the very purpose of being able to comment on proposed changes in the law, an essential requirement of the rule of law.

In addition to the ISO, IEC, and IEEE standards on the ANSI portal, the IEEE also hosts a ["reading room,"](#) which requires an IEEE login, acceptance of all terms of use similar to those of ANSI, and also does not contain the standards in question here.

## **6. Law Governing the Availability of Standards Incorporated by Reference**

The fundamental law of the United States requires that the government make standards that are incorporated by reference into federal regulations widely available to the public, without charge, and that such standards must be in the public domain rather than subject to copyright restrictions. Citizens have the right, without limitation, to read, speak, and disseminate the laws that we are required to obey, including laws that are

critical to public safety and commerce. Open, effective, and efficient government and robust democracy require such free availability of standards incorporated by reference.

### **A. The APA Compels the FCC To Make These Incorporated Standards Freely Available**

The advent of the Internet has fundamentally transformed what it means for material to be reasonably available. The Internet has brought the possibility that all standards incorporated into federal law can be instantly available online, linked directly to the relevant provisions of the CFR.

The widespread availability of the Internet, along with technologies like high-speed scanners and large-capacity hard drives, eliminates any argument that incorporation of standards through simple reference—as opposed to publishing the full text of the standard with the regulations—is needed to save space or trees.

Indeed, the Internet era provides a tremendous opportunity for government to inform its citizens in a broad and rapidly updated manner about the legal standards that must be met in carrying out daily activities. It also allows for companies, non-profits, and citizens to utilize and organize this information to enhance compliance, better understand the provisions of law, improve public safety, increase economic efficiency and opportunity, and highlight opportunities for effective reform.

Another strong advantage of widespread public availability of standards incorporated by reference would be to highlight the need for government to replace old, outdated standards with new ones. Public Resource has conducted an extensive examination of the Code of Federal Regulations with specific focus on incorporations by reference, coupled with an extensive examination of the Standards Incorporated by Reference (“SIBR”) database maintained by the National Institute of Standards and Technology. Many standards incorporated by reference into the CFR have been superseded by new standards from the standards development organizations (SDOs). Greater public access to standards incorporated by reference into federal regulations might alert policy and industry communities to the fact that federal rules all too often continue to rely on outdated private standards and are in need of updating to improve public safety.

The NPRM’s assertion that the incorporated standards are available for inspection at the FCC offices does not fix the problem: People should not be expected to travel from their homes to Washington DC in order to read (but not copy) the laws they are bound to obey. This solution is also inadequate because the agencies do not allow people to make copies of the standards so that they may consult them once they leave the

federal buildings where they are held. Requiring citizens to memorize hundreds of pages of law, let alone be expected to comment to the FCC on their specifics, is tantamount to denying them access entirely.

Given all these factors, the FCC should determine that the mandates of APA and the public interest require that the standards proposes to incorporate by reference into its final rule be written directly into the rule or else available on a public website without charge, and without limitation of use. That would include the FCC making clear that its obligations would not be satisfied by the SDOs continuing to make its standards available only for a fee, and only with the kind of restrictions on access and use described above, limiting the capacity of all persons to read, speak, and use standards that have become binding law.

For all of these reasons, the NPRM's failure to provide access to the text of the incorporated standard violates the provisions of the APA that require agencies to give people an opportunity to comment on proposed rule making. The APA requires that an NPRM include "either the terms or substance of the proposed rule or a description of the subjects or issues involved." [5 U.S.C. § 553\(b\)\(3\)](#). The bare-bones discussions of the standards to be incorporated by reference into the instant rule do not meet this requirement.

## **B. The Constitution and Judicial Decisions of the United States Compel the FCC to Make All Final Standards Freely Available**

The U.S. Supreme Court in *Wheaton v. Peters*, [33 U.S. 591](#) (1834), and *Banks v. Manchester*, [128 U.S. 244](#) (1888), held that the law "is in the public domain and thus not amenable to copyright." *Veeck v. Southern Bldg. Code Congress International, Inc.*, [293 F.3d 791, 796](#) (5th Cir. 2002) (en banc), cert. denied, [539 U.S. 969](#) (2003). *Wheaton*, *Banks*, *Veeck* all concerned comparable fact patterns: A private party was trying to stop another private party from publishing material that was part of the law. In none of those cases was anyone trying to prevent the first party from selling copies of such material, and we do not question the right of SDOs to sell standards incorporated by reference into law. Rather, we believe, as the courts concluded in those cases, that once material has become law, everyone has the right to read the law and to speak and copy it, without limitation—a proposition clearly applies to standards incorporated by reference into federal law, notwithstanding assertions of copyright by SDOs.

In *Georgia v. Public Resource* (2020), the U.S. Supreme Court rejected an effort by the state of Georgia to use copyright claims to prevent Public Resource from posting online

the Official Code of Georgia, and Chief Justice Roberts, writing for the Court, reaffirmed the almost 200-year-old principle that “no one can own the law.” *Georgia v. Public.Resource.Org, Inc.*, [140 S. Ct. 1498, 1507](#) (2020).

In *American Society for Testing v. Public.Resource.Org*, faced with a copyright complaint filed by SDOs, because Public Resource posted hundreds of standards incorporated by reference into federal and state statutes and regulations, noted “a serious constitutional concern with permitting private ownership of standards essential to understanding legal obligations.” [896 F.3d 437, 447](#) (D.C. Cir. 2018). Concurring, Judge Katsas stated, “As a matter of common-sense ... access to the law cannot be conditioned on the consent of a private party.” [Id. at 458](#).

On remand from that decision, the United States District Court for the District of Columbia ruled on March 31, 2022, that it was protected fair use for Public Resource to post online a series of standards incorporated by reference. *American Society for Testing et. al. v. Public.Resource.Org*, [2022 WL 971735](#) (D.D.C. 2022).

The principle that the law must be public and available to citizens to read and speak has its roots in the concept of the rule of law itself, as well as central provisions of our Constitution. See generally Thomas Henry Bingham, [The Rule of Law](#), 37–38 (Penguin Press 2011) (“The law must be accessible...the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations.”); Brian Z. Tamanaha, [On the Rule of Law: History, Politics, Theory](#), 34 (Cambridge Univ. Press, 2004) (“Citizens are subject only to the law, not to the arbitrary will or judgment of another who wields coercive government power. This entails that the laws be declared publicly in clear terms in advance.”). That is why, going back to ancient times, societies that replaced the rule of tyrants with the rule of law prominently displayed the laws in public places for all to see. See, e.g., Robert C. Byrd, [The Senate of the Roman Republic: Addresses on the History of Roman Constitutionalism](#) 33, 128, 135 (U.S. Government Printing Office, 1995).

As this history suggests, open access to the law is essential to a free society. Citizens are expected to obey the law, but they cannot do so effectively if they do not know it. Further, the First Amendment right to freedom of speech is imperiled if citizens are barred from freely communicating the provisions of the law to each other. Cf. *Nieman v. VersusLaw, Inc.*, [512 Fed. Appx. 635](#) (7th Cir., 2013) (“The First Amendment privileges the publication of facts contained in lawfully obtained judicial records, even if reasonable people would want them concealed.”). By the same token, equal protection of the laws and due process are jeopardized if some citizens can afford to purchase

access to the laws that all of us are bound to obey (with potential criminal penalties for non-compliance with some of these laws), but others cannot. Cf. *Harper v. Va. State Bd. of Elections*, [383 U.S. 663, 666](#) (1966) (a state violates the Equal Protection Clause “whenever it makes the affluence of the voter or payment of any fee an electoral standard”); see also *Magna Carta* [1297 c. 9](#) (cl. 29) (1297) (“We will sell to no man, we will not deny or defer to any man either Justice or Right.”).

Consistent with these fundamental principles, it is unlawful and unreasonable for the FCC to propose making these standards part of binding United States law without providing a means for citizens to access them without cost or restriction.

## **7. What the FCC Should Do Instead**

It is essential that the rules of the road that govern our national telecommunications infrastructure be available for all to know and that we be allowed to copy, speak, and otherwise communicate the laws by which citizens are expected to know their rights and responsibilities. That requires that the FCC restart this rulemaking proceeding with everyone having free access and the right to copy these proposed standards, which is what 5 U.S.C. § 553 mandates.