

SUMMARY

In this Emergency Motion, the Asian American Justice Center, League of United Latin American Citizens, National Urban League and One Economy Corporation – all of them highly respected national civil rights and service organizations (herein the “Civil Rights Organizations”) focused on bringing the underserved Americans online – respectfully move the Commission to correct or amend the agency’s October 16, 2009 Revised Sunshine Notice. Emergency relief is required to ensure lawful and non-discriminatory public participation with respect to the Commission’s consideration of a Notice of Proposed Rulemaking on policies to preserve the open Internet at its October 22, 2009 open meeting. In the Revised Sunshine Notice, the Commission waived “the Sunshine Period Prohibition on ex parte contacts with the Commission” but only “to the extent that those contacts are made through the Open Internet Blog [<http://blog.openinternet.gov>].” While undoubtedly intended to facilitate public participation, the practical effect of this action is to bar public input by those who lack Internet access or rely on other means of communication while affording those with Internet access the last word. Accordingly, the Civil Rights Organizations urge the Commission to act promptly to restore neutral treatment of all parties by either (1) rescinding the limited waiver afforded only for Internet bloggers, or (2) waiving the agency’s Sunshine period prohibitions for all persons irrespective of the form of communication they use.

As detailed below, the Commission’s waiver requires immediate remedial action for several important reasons:

First, the waiver proceeds from the mistaken assumption that comments submitted on the FCC’s Open Internet Blog are “instantaneously available to all interested parties.” However, members of the public lacking Internet access will not know, let alone instantly know, that contacts have been made during the Sunshine period—nor will they know the contents of those

submissions. Indeed, given the prohibition against other forms of participation, those without Internet access are effectively precluded from responding in any event, particularly given the small window of time between the waiver decision and the Commission's meeting date. Ironically, the waiver prejudices those for whom the Commission holds the highest concern: persons and communities who are on the unserved or underserved side of the Digital Divide.

Second, the waiver violates the FCC's own rules regarding the Sunshine period. The waiver ignores the fact that the agency's Sunshine period prohibitions apply uniformly to "all" presentations unless a particular presentation is covered by an express and existing exception. A waiver for bloggers is not one of those exceptions. The effect of the waiver, without any prior notice or accompanying explanation, is to ignore settled rules which are intended to protect the integrity of agency processes and to ensure equitable treatment of interested parties, particularly in the potentially formative days leading up to an open Commission meeting.

Third, the waiver violates the Administrative Procedure Act's prohibition against disparate treatment of parties in agency deliberations. There is no justifiable basis for treating one group of interested persons (those with Internet access) and another group (those without such access) differently with respect to their ability to participate in this proceeding.

Fourth, the waiver is problematic for a number of additional reasons. It could create the unfortunate appearance of inconsistency with the spirit underlying the Commission's desire to provide consumers with freedom regarding how they choose to communicate. It is also inconsistent with agency precedent regarding the use of the Internet to disseminate information, which generally recognizes that Internet-only mechanisms should not be employed because not all interested groups have equal access to the Internet. Finally, the waiver is contrary to the record established in the National Broadband Plan proceeding which establishes that requiring

consumers to go online immediately or be shut out of meaningful discourse (*i.e.*, a “cold turkey” approach to spurring broadband adoption) is unwise.

Therefore, we respectfully request that the Commission afford this motion expedited treatment and award the relief sought herein.

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I. INTRODUCTION

On October 16, 2009, the Commission released a Revised Sunshine Notice regarding its October 22, 2009 open Commission meeting.¹ In the Revised Sunshine Notice, the Commission stated that it “will consider a Notice of Proposed Rulemaking on polices to preserve the open Internet.”² In general, when the Commission releases a Sunshine Notice, this action triggers a prohibition on all presentations to agency decisionmakers regarding matters listed in the Notice for the duration of the Sunshine period.³ In this case, however, the Commission carved out a novel and significant exception to this general rule, but it did so for only a certain group of commenters: those who submit their comments via the FCC’s Open Internet Blog. According to the Revised Sunshine Notice:

The Commission waives the Sunshine Period Prohibition on ex parte contacts with the Commission to the extent that those contacts are made through the Open Internet Blog [<http://blog.openinternet.gov>]. Such contacts take place in a forum that is both instantaneously available to all interested parties and will not intrude on the Commission’s decision making.⁴

As explained below, immediate Commission action is necessary to ensure fair and non-discriminatory participation in this proceeding because the Commission’s decision to create an Internet bloggers-only waiver proceeds from a faulty factual premise and is otherwise unwise and unlawful. Therefore, the Civil Rights Organizations respectfully request that the Commission immediately rescind its waiver or, in the alternative, expand the waiver to cover all

¹ See *Revised Sunshine Notice*, FCC To Hold Open Commission Meeting Thursday, October 22, 2009 (rel. Oct. 16, 2009) (the “Revised Sunshine Notice”) (*available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-294028A1.pdf).

² *Id.*

³ See, e.g., 47 C.F.R. §1.1203. The Commission’s rules provide for some exceptions to the agency’s general prohibition on presentations during the Sunshine period, but—as explained below—none of those exceptions allow the Commission to create an exception for comments submitted on the FCC’s Open Internet Blog.

⁴ Revised Sunshine Notice at 1.

persons who may want to contact the agency—regardless of the medium they use to make such presentations.

II. THE WAIVER IS FOUNDED UPON MISTAKEN ASSUMPTIONS

As an initial matter, the Commission should amend or correct the waiver because it rests upon mistaken factual assumptions. The Revised Sunshine Notice expressly states that *ex parte* contacts made through the FCC’s Open Internet Blog are made “in a forum that is . . . instantaneously available to all interested parties.”⁵ In other words, the Commission’s decision to waive its Sunshine period prohibitions for Internet bloggers appears to be grounded in an assumption that “all interested persons” have “instantaneous[]” access to the Internet. However, the evidence regarding broadband access is clear and to the contrary.

As the Commission itself has recognized, a significant percentage of the population does not have access to broadband at all, let alone instantaneous access. According to a recent study cited by the Commission, 33% of adult Americans have not adopted broadband at home and another 4% do not even have access to broadband at home.⁶ Moreover, there is evidence that broadband adoption varies significantly across demographic groups. For example, African Americans, Hispanics, and lower income Americans trail the national average in access to broadband at home.⁷

Thus, the Revised Sunshine Notice’s factual assertion—that comments submitted on the FCC’s Open Internet Blog are “instantaneously available to all interested persons”—is clearly

⁵ *Id.*

⁶ See Pew Internet & American Life Project, Home Broadband Adoption (June 2009) (“Pew Home Broadband Adoption Report”); see also FCC New Release, Broadband Task Force Delivers Status Report On Feb. 17 National Broadband Plan (rel. Sept. 29, 2009).

⁷ See Commission Open Meeting Presentation on the Status of the Commission’s Processes for Development of a National Broadband Plan, at 82 (citing Pew Home Broadband Adoption Report, which found that in 2009, home broadband adoption stood at 65% for White Americans, 46% for African Americans and 40% for Hispanic Americans.)

incorrect. For those significant numbers of Americans who are on the wrong side of the Digital Divide and who have no access to the Internet, they will not know, let alone instantly know, that presentations have been made over the FCC's Open Internet Blog during the Sunshine period. Nor will these groups know the contents of presentations submitted over the Open Internet Blog.

As noted above, minority groups comprise a disproportionate share of those without access to the Internet. These groups will be uniquely impacted by the FCC's waiver decision. Yet, Congress's and the Commission's focus on broadband has long been to bring service and an open Internet to such unserved and underserved individuals, groups, and communities.⁸

III. THE WAIVER VIOLATES THE COMMISSION'S SUNSHINE RULES

In addition to being based on a faulty assumption about access to the Internet, the Commission's waiver violates the agency's Sunshine rules, which are intended to protect the integrity of agency processes and to ensure equitable treatment of all interested parties during the Sunshine period.⁹ The Commission's Sunshine rules do not allow the Commission to create a waiver just for comments submitted on its Open Internet Blog. The Commission's Sunshine period prohibitions expressly provide that “[w]ith respect to any Commission proceeding, *all presentations* to decisionmakers concerning matters listed on a Sunshine Agenda, whether *ex parte* or not, are prohibited” during the relevant time period unless a specific exemption applies under the Commission's rules.¹⁰

⁸ See, e.g., Section 706(a) of the Telecommunications Act of 1996, 47 U.S.C. §1302(a) (directing the Commission to “encourage the deployment on a reasonable and timely basis of advanced communications capability [including broadband] to all Americans”); see also *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289, 15362 (¶196) (2007) (stating that the “[r]apid deployment and ubiquitous availability of broadband services across the country are among the Commission's most critical policy objectives.”).

⁹ See e.g., 47 C.F.R. §1.1200 (stating that the Commission's rules governing its Sunshine period prohibitions are intended “[t]o ensure the fairness and integrity of its decision-making”).

¹⁰ 47 C.F.R. §1.203(a) (emphasis added).

The prohibition under 47 C.F.R. §1.203(a) on “all presentations” clearly encompasses presentations made on FCC’s the Open Internet Blog.¹¹ While the Commission’s Sunshine period prohibitions contain a couple of notable exceptions—which allow for comments during the Sunshine period in specific, enumerated situations—none of these exceptions exempt comments submitted on the FCC’s Open Internet Blog.¹² And while the Sunshine period prohibitions only cover presentations to “decisionmakers,” the Commission’s rules define “decisionmakers” broadly to include all FCC employees who are “or may reasonably be expected to be involved in formulating a decision.”¹³

Also, the waiver created by the Revised Sunshine Notice includes no protections to ensure that agency decisionmakers do not access the Open Internet Blog or otherwise become influenced by comments submitted therein. Nor is it clear that the Commission could cure the defects in its waiver decision by simply prohibiting all agency decisionmakers from accessing the Open Internet Blog during the Sunshine period—even assuming such an approach were practical and enforceable. The Commission’s Sunshine period prohibitions apparently apply to all presentations directed to agency decisionmakers regardless of whether the decisionmakers are actually exposed to the presentations.¹⁴ Thus, prohibiting agency decisionmakers from accessing the Open Internet Blog would not provide an adequate remedy.

¹¹ See 47 C.F.R. §1.202(a) (defining “presentation” for purposes of the FCC’s *ex parte* rules as “[a] communication directed to the outcome or merits of a proceeding”). It is plain that a comment filed on the FCC’s Open Internet Blog could be a communication directed to the outcome or merits of a proceeding.

¹² See 47 C.F.R. §§1.203(a) (identifying types of presentations exempt from the Commission’s Sunshine period prohibitions); see also *Amendment of 47 C.F.R. Sec. 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, 12 FCC Rcd 7348, 7360 (1997) (“During th[e] entire [Sunshine] period, presentations, whether *ex parte* or not, are prohibited, unless requested by the Commission or its staff or coming within other enumerated exemptions.”).

¹³ 47 C.F.R. §1.202(c).

¹⁴ See 47 C.F.R. §1.203(a) (prohibiting communications “to decisionmakers” (emphasis added)).

Moreover, the Commission cannot create a new Internet bloggers-only exception to its Sunshine period prohibitions without following APA notice and comment rulemaking procedures—which it has not done in this case. Since the Commission’s Sunshine period prohibitions and the existing exceptions thereto are codified as agency rules, the Commission cannot amend them or create new exceptions to them without first complying with the APA’s notice and comment rulemaking provisions.¹⁵ Indeed, implicitly recognizing this APA requirement, the Commission has previously proceeded by APA rulemaking procedures when amending its rules governing Sunshine period presentations.¹⁶ Here, however, the Commission simply announced its decision to create the waiver in the Revised Sunshine Notice without providing any notice or opportunity to comment. Therefore, there is no lawful basis for creating an Internet bloggers-only exception.

IV. THE WAIVER VIOLATES THE APA’S PROHIBITION ON DISPARATE TREATMENT OF PARTIES IN AGENCY DELIBERATIONS

The Commission’s decision to create a waiver for commenters submitting presentations over the FCC’s Open Internet Blog also violates the APA’s prohibitions on disparate treatment of parties in agency deliberations. APA case law makes it clear that an agency’s action is arbitrary and capricious—and thus unlawful—when it treats similarly situated persons

¹⁵ See 5 U.S.C. §551(5) (“‘rule making’ means agency process for formulating, amending, or repealing a rule”); see also *SBC Inc. v. FCC*, 414 F.3d 486, 497-98 (D.C. Cir. 2005) (“Legislative rules are subject to the notice and comment requirements of the APA because they work substantive changes in prior regulations, or create new law, rights, or duties. . . . Furthermore, if an agency’s present interpretation of a regulation is a fundamental modification of a previous interpretation, the modification can only be made in accordance with the notice and comment requirements of the APA.” (citations and quotation marks omitted)).

¹⁶ See, e.g., *Amendment of 47 C.F.R. Sec. 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, 12 FCC Rcd 7348 (1997); see also *Amendment of Subpart H, Part 1 of the Commission’s Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 6053 (1987).

differently.¹⁷ As the courts have made clear, “an agency’s unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard.”¹⁸

The waiver treats similarly situated persons dissimilarly without offering an adequate justification. The agency’s waiver decision effectively draws a distinction between commenters with access to the Internet on the one hand and those without access to the Internet on the other. The FCC’s waiver decision then treats these two groups entirely differently with respect to their ability to submit comments to the Commission. With respect to the first group (those with access to the Internet) the FCC’s waiver decision allows them to continue to submit comments to the Commission over the Open Internet Blog. But, with respect to those persons without Internet access, the FCC’s waiver decision prohibits them from making any further presentations to the Commission.

The Revised Sunshine Notice provides no legal justification for embarking on a course that differentiates between bloggers and everyone else. Nor does there appear to be any lawful basis for doing so. Therefore, the Commission’s waiver violates the APA’s prohibition on treating similarly situated persons differently.

¹⁷ See, e.g., *Etelson v. Office of Personnel Mgmt.*, 684 F.2d 918, 926 (D.C. Cir. 1982) (“Government is at its most arbitrary when it treats similarly situated people differently.”). When attempting to draw distinctions between similarly situated persons, the APA requires the Commission to “do more than enumerate factual differences, if any . . . it must explain the relevance of those differences to the purposes of the . . . Communications Act.” *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965); *Independent Petroleum Ass’n of America v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996) (“An agency cannot meet the arbitrary and capricious test by treating type A cases differently from similarly situated type B cases The treatment . . . must be consistent. That is the very meaning of the arbitrary and capricious standard.”).

¹⁸ *FEC v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986).

V. THE WAIVER IS PROBLEMATIC FOR ADDITIONAL REASONS

A. The Waiver Could Be Perceived As Inconsistent With The Spirit Of The Commission's Desire That Consumers May Choose Their Means Of Communication

The Commission has long expressed its belief that consumers should have the freedom to select how they will communicate with others. Here, however, the waiver flies in the face of this principle. Under the Commission's waiver decision, commenters who choose to communicate with the Commission through means other than the Open Internet Blog (*e.g.*, by using ECFS, regular mail, the telephone, or face-to-face meetings with Commission staff) are blocked from further participation. This is obviously inconsistent with allowing consumers to select how they will communicate and an inappropriate policy to employ in agency deliberations generally.

B. The Waiver Contradicts Agency Precedent Regarding The Use Of The Internet

The Commission's waiver also contradicts agency precedent regarding the use of the Internet. Under the agency's Equal Employment Opportunity rules, licensees are prohibited from excessively using online-only recruitment methods because such an approach effectively shuts out those without Internet access—including significant percentages of minorities.¹⁹ Likewise, the Commission's Office of Communications Business Opportunities ("OCBO") makes it a practice to use regular mail when sending information about broadband to minority-owned and women-owned businesses.²⁰ The Commission's waiver decision contradicts these

¹⁹ See, *e.g.*, 47 C.F.R. §§22.321, 23.55, 73.2080; see also *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, FCC Rcd, 17 FCC Rcd 24018, 24051 (2002) ("[W]e are unable to conclude that Internet usage has become sufficiently widespread to justify allowing it to be used as the sole recruitment source."); *id.* (noting the FCC's concerns "[w]ith regard to the access of minority and rural populations to the Internet").

²⁰ See, *e.g.*, FCC Internet Website, Office of Communications Business Opportunities ("OCBO also mails information on Commission notices and new service opportunities to those within our database of over 3,000 small, minority-owned, and women-owned businesses and other interested entities.") (*available at* <http://www.fcc.gov/ocbo/>).

precedents and practices because it forces those who want to continue to participate in this proceeding to do so online—or not at all.

C. **The Waiver Is Contrary To The Record Established In The National Broadband Plan Proceeding**

Relatedly, at the October 2, 2009 Civil Rights Broadband Workshop, the Commission's staff considered the merits of a "cold turkey" approach to securing broadband adoption. Under such an approach, an employer or government agency would make it impossible for anyone without access to broadband to apply for a job or participate in an agency proceeding. The intent behind such a "cold turkey" approach would be to force non-adopters and those without access to the Internet to get online immediately. The problem, as indicated above and as evidenced by the record in the National Broadband Plan proceeding, is that certain consumers have no access to broadband (or no affordable access). Requiring them to go online immediately, rather than motivating and assisting them to do so, harms these consumers.

Here, the Commission has created a waiver for those fortunate enough to be able to go online immediately and access the FCC's Open Internet Blog. This "cold turkey" approach for non-adopters would ignore the problems identified in the National Broadband Plan workshop and represent a dramatic shift in the agency's approach to Internet access—one it should consider more carefully, rather than adopting as a revision to a prior Sunshine Notice. We hope this does not mean that the Commission has prejudged the National Broadband Plan proceeding by determining that a "cold turkey" approach is sound policy.

VI. **PRAYER FOR RELIEF**

For the foregoing reasons, the Civil Rights Organizations respectfully request that the Commission either rescind its waiver for comments submitted through the FCC's Open Internet Blog or, in the alternative, expand the waiver to permit all persons to submit comments to the Commission regardless of the medium they use to submit them. Inasmuch as the Sunshine

period runs through this Thursday, October 22, 2009, expedited action on this motion is respectfully requested.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Honig', with a stylized flourish at the end.

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