

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

TO THE COMMISSION – EXPEDITED ACTION REQUESTED

**APPLICATION FOR REVIEW OF DECISION DENYING THE  
EMERGENCY MOTION TO CORRECT OR AMEND THE  
COMMISSION’S OCTOBER 16, 2009 REVISED SUNSHINE NOTICE**

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## EXECUTIVE SUMMARY

The Commission launched this net neutrality proceeding with the goal of preserving an open Internet so that all citizens can enjoy its benefits. Chairman Genachowski has described access to the Internet as critical to our country's democratic institutions and Commissioner Copps recently underscored that basic civil rights of our citizenry are at stake in this proceeding.<sup>1</sup> Against this backdrop, LULAC is stunned that the Commission has adopted, and its Office of General Counsel ("OGC") has now defended, a policy that only allows Internet bloggers to express their views to the agency during its Sunshine period, while all other members of the public who use conventional means of public comment are prohibited from doing so. Given that the digital divide limits access to the Internet by minorities as well as the socially and economically disadvantaged, the effect of this "bloggers-only" exception is to discriminate against those whose interests should be paramount in this proceeding by restricting their ability to participate on an equal opportunity basis with others. This is not just a question of some members of the public being relegated to "steerage" while others are given priority in first class; rather, it is about the Commission leaving members of the public at the dock while the net neutrality ship sails away.

When the Commission first announced its decision to waive the Sunshine period for bloggers, LULAC and others promptly filed an Emergency Motion asking the Commission to either rescind the blogger waiver or to accept comment from all members of the public. Rather than act on the merits of the Emergency Motion, the Commission sat on the request for immediate action until after it adopted the Net Neutrality NPRM, the Sunshine period had ended,

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<sup>1</sup> LULAC emphasizes that in this Application for Review, it is not taking a position one way or the other on the merits of the underlying Net Neutrality rulemaking proceeding.

and nearly two months had passed. Now, the OGC has determined that the Emergency Motion is “moot” – thanks to the agency’s failure to act – and that, in any event, the Commission’s bloggers-only exception was justified because their submissions were “immediately viewable by the public.”

The OGC’s analysis does not hold water, and the Commission should expeditiously reverse its ruling. As detailed below, the Commission cannot duck legal accountability here by the expediency of delaying action until the Sunshine period has passed. Indeed, the OGC’s finding is contradicted by a prior Commission determination in this very proceeding, where the Commission concluded that the close of Sunshine *does not moot* questions over whether comments were submitted in violation of the Sunshine period rules. Moreover, the basic factual assumption underlying the Commission’s waiver and the OGC’s defense is incorrect in any event; blogger filings were not immediately available – rather, the Commission inexplicably delayed the posting of blogger filings for approximately three days (nearly half of the entire Sunshine period). In addition, the OGC fundamentally misperceives the role of the Sunshine period – which is to cut off all public comment completely for one week leading up to the adoption of an item to give the Commissioners a quiet time for deliberation – it is not, contrary to the OGC’s apparent misunderstanding, simply a means of preventing last minute filings where responses would not be possible.

**The Relief Requested In The Emergency Motion Is Not Rendered Moot By The Commission’s Failure To Act In A Timely Manner.** The end of the Sunshine period did not render moot the core issue presented in the Emergency Motion: namely, what is or is not lawfully part of the official record in this proceeding? The Commission has apparently incorporated over 6,000 blogger entries into the formal rulemaking record that were submitted

during the Sunshine period but, after the Sunshine period ended, formally excluded over 90 written submissions from the public – including several submissions filed by minority groups – that were also submitted during the Sunshine period. These actions have a continuing effect and constitute a continuing taint on this rulemaking proceeding – calling into question the lawfulness of any final rules the agency may adopt in this proceeding. Moreover, the OGC’s defense of the Commission’s waiver decision suggests that the Commission intends to use the blogger exception again during the Sunshine period leading up to any order or final rules the Commission ultimately adopts in this proceeding. This is a classic case where the courts will not view legal issues as moot if they are capable of repetition yet able to evade review.

**Contrary To The OGC’s Assertion, The Blogger Comments Were Not “Immediately Available” To The Public.** The blogger waiver and the OGC defense of the waiver assert that blog filings were “instantaneously available” and “immediately viewable by the public.” The facts, however, paint an entirely different picture. Among other things, the Commission apparently delayed the posting of numerous, perhaps thousands of these presentations, for approximately three days – nearly half of the entire Sunshine period – before eventually making them available on the Commission’s website. Thus, members of the public did not know – let alone instantly know – what postings were being submitted on the agency’s Open Internet Blog.

During the Sunshine period, the Commission’s staff had easy access to the Open Internet Blog and – with no transparency or standards – was in a position to review, monitor, and make posting decisions during the Sunshine period. Indeed, while the Commission eventually released a “moderation policy” on the Open Internet Blog, it remains unclear what the staff was doing and under what guidelines, if any. But what is clear, however, is that the blogger filings were neither

“instantaneously available” nor “immediately viewable by the public,” and there was some form of intervention by the Commission or on its behalf between the blogger comments being received by the agency and the blogger comments being posted. Accordingly, the core rationale of the waiver and its legal defense is built upon a faulty and fatal factual assumption.

LULAC also notes that the Commission apparently changed the format of the Open Internet Blog during Sunshine. Instead of directing commenters to the Commission’s blog, the Commission changed its website mid-stream and started directing users to an “ideascale” page without any warning or explanation. The practical effect of this change was to relocate the thousands of previously filed blog comments to another page and, since the agency apparently did not provide a link to that page, members of the public would not have known they existed let alone how to respond to them.

**Finally, The OGC Fails To Recognize That The Purpose Of The Sunshine Period Is To Provide The Agency A Quiet Period For Deliberations.** The OGC’s decision also belies a fundamental misunderstanding of the fundamental purpose of the Commission’s Sunshine period rules, which is to give the Commissioners a period of repose, free from external pressure, in the week leading up to a decision. The OGC indicated that the Commission’s waiver decision was consistent with the Commission’s Sunshine period prohibitions because bloggers “had an immediate opportunity to post a response” and, therefore, there was less of a risk that “persons would not have a fair opportunity to respond.” This reasoning shows a basic misunderstanding of the applicable rules. As noted, the Sunshine period rules are not intended to ensure that members of the public have an opportunity to respond on the record to last minute filings. Its purpose is to cut off all comment completely, unless a specific, codified exception applies.

Accordingly, the OGC's defense of the waiver misperceives the very purpose of having a Sunshine period at all.

For these and the additional reasons set forth below, LULAC respectfully asks that the full Commission grant this Application for Review and reverse the OGC's finding that the Emergency Motion is moot. If the full Commission reaches the merits of the Emergency Motion, LULAC respectfully asks the Commission to find that its decision to create a bloggers-only exception to the agency's Sunshine period rules was unlawful for the reasons set forth herein and in the Emergency Motion. In this way, the Commission can reinforce public confidence in the basic fairness of its Sunshine procedures and demonstrate that the Commission's commitment to closing the digital divide extends to its own treatment of those who have yet to enjoy first class digital citizenship.

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TO THE COMMISSION – EXPEDITED ACTION REQUESTED

Pursuant to Section 1.115 of the Commission’s rules, 47 C.F.R. § 1.115, the League of United Latin American Citizens (“LULAC”) respectfully requests that the full Commission grant this Application for Review and reverse the OGC’s decision to dismiss as moot their October 19, 2009 Emergency Motion.<sup>2</sup> If the full Commission reaches the merits of the Emergency Motion, LULAC respectfully asks the Commission to find that its decision to create a bloggers-only exception to the agency’s Sunshine period rules was unlawful.

**I. BACKGROUND**

On October 16, 2009, the Commission released a Revised Sunshine Notice regarding the Commission’s October 22, 2009 open meeting and its consideration of proposed rules in this proceeding.<sup>3</sup> In the Revised Sunshine Notice, the Commission stated that it would “consider a Notice of Proposed Rulemaking on policies to preserve the open Internet” at its October 22

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<sup>2</sup> See *Broadband Industry Practices*, WC Docket No. 07-52, Emergency Motion To Correct Or Amend The Commission’s October 16, 2009 Revised Sunshine Notice (filed Oct. 19, 2009) (the “Emergency Motion”). A copy of the Emergency Motion is appended hereto as Attachment 1.

<sup>3</sup> 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](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-294028A1.pdf)).

meeting.<sup>4</sup> 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.<sup>5</sup> In this case, however, the Commission carved out a novel and significant exception to its general rule, but it did so for only a certain group of commenters: those who submit their presentations via the Commission'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.<sup>6</sup>

In light of the Commission's decision to create this unprecedented and prejudicial exception, LULAC and others filed an Emergency Motion with the Commission during the Sunshine period on October 19, 2009. The Emergency Motion established, among other things, that the waiver (1) proceeds from the mistaken factual assumption that comments submitted on the Commission's Open Internet Blog are "instantaneously available to all interested parties," (2) violates the Commission's own rules regarding the Sunshine period, and (3) violates the Administrative Procedures Act ("APA") by treating similarly situated persons – those with Internet access on the one hand and those without such access on the other – differently with respect to their ability to continue to participate in the agency's deliberative process without

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<sup>4</sup> *Id.*

<sup>5</sup> *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 in the Emergency Motion, *see* Emergency Motion at 3-5 – none of those exceptions allowed the Commission to create an exception for presentations submitted on the Commission's Open Internet Blog.

<sup>6</sup> Revised Sunshine Notice at 1.

providing a lawful justification. Therefore, the Emergency Motion asked the Commission to act promptly to restore the 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.

During the Sunshine period, while the Emergency Motion remained pending at the Commission, interested parties made literally thousands of presentations to the agency over the Commission's Open Internet Blog.<sup>7</sup> Indeed, it appears that approximately 6,000 presentations were made over the Commission's Open Internet Blog during the Sunshine period alone.<sup>8</sup> In addition to these blog submissions, some presentations were made to the agency using more traditional forms of communication, including by writing letters to the Commission.<sup>9</sup>

Also during the Sunshine period, the Commission apparently made a number of significant changes to its blog and to the Commission's OpenInternet.gov website (a site the Commission launched in conjunction with this net neutrality rulemaking),<sup>10</sup> without providing any notice or explanation. Among other things, the Commission's OpenInternet.gov website started directing bloggers to an ideascale page set up by the agency, *see* <http://openinternet.ideascale.com/>, rather than continuing to direct users to the Open Internet Blog, which was the only website the Commission purported to exempt from the Sunshine

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<sup>7</sup> *See, e.g.*, <http://blog.openinternet.gov/?p=1>.

<sup>8</sup> *See, e.g.*, <http://blog.openinternet.gov/?p=1>.

<sup>9</sup> *See* FCC, Public Notice, DA 09-2402, *Notice of Prohibited Presentations In The Matter of Preserving The Open Internet; Broadband Industry Practices (WC Docket No. 07-52)* (the "Prohibited Sunshine Presentations Public Notice") (identifying traditional written submissions filed with the Commission during the Sunshine period) (rel. Nov. 10, 2009). The Prohibited Sunshine Presentations Public Notice is appended hereto as Attachment 2.

<sup>10</sup> *See* <http://www.openinternet.gov/>; *see also* <http://www.openinternet.gov/about-open-internet.html>.

period rules. Moreover, the Commission apparently removed any direct link to its original posting on the Open Internet Blog – a posting that contained more than 7,000 comments – which effectively made the posting and comments unavailable to the general public.<sup>11</sup>

After receiving thousands of presentations on its Open Internet Blog during Sunshine, the Commission held its open meeting on October 22, 2009. During this meeting, the agency adopted the Net Neutrality NPRM.<sup>12</sup> The applicable Sunshine period ended later that day when the Commission released the text of the Net Neutrality NPRM.<sup>13</sup>

Nineteen days later, on November 10, 2009, the Commission released the Prohibited Sunshine Presentations Public Notice in which the OGC identified 91 presentations that it determined were submitted to the agency during the Sunshine period in violation of the Commission’s rules.<sup>14</sup> The OGC determined that these 91 presentations would be “associated with, but not made part of the record in WC Docket No. 07-52.”<sup>15</sup> However, the OGC noted that

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<sup>11</sup> See <http://blog.openinternet.gov/?p=1>. Currently, it appears that the only way members of the public can access this original posting, which contains a video of Chairman Genachowski’s September 21, 2009 speech at the Brookings Institute (during which the Chairman announced his intention to initiate this net neutrality rulemaking proceeding) is if they know the direct link associated with the posting. In other words, the Commission has apparently stopped allowing members of the public to access this original blog posting – and the thousands of comments submitted in response thereto – by clicking through from any link on the Open Internet Blog.

<sup>12</sup> See *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, FCC 09-93 (rel. Oct. 22, 2009) (the “Net Neutrality NPRM”).

<sup>13</sup> See 47 C.F.R. § 1.1203(b)(1) (stating that the Sunshine period ends when the Commission releases the text of a decision or order relating to the matter).

<sup>14</sup> See Prohibited Sunshine Presentations Public Notice.

<sup>15</sup> Prohibited Sunshine Presentations Public Notice at 1. The Commission’s rules provide that prohibited *ex parte* presentations “shall be placed in a public file which shall be associated with but not made part of the record of the proceeding.” 47 C.F.R. § 1.1212(d).

none of the 91 presentations were submitted through “the Open Internet Blog, as to which the Commission waived the ex parte rules.”<sup>16</sup>

Nearly a full month later, on December 2, 2009, the OGC acted on the Emergency Motion.<sup>17</sup> The OGC denied the Emergency Motion on the grounds that it was moot “[b]ecause the October 22 meeting has already taken place.” As discussed below, the OGC’s decision is clearly erroneous. It flies in the face of settled agency precedent, and is based on a flawed understanding of the relevant facts and the fundamental purpose of the Commission’s Sunshine period rules.

## **II. ARGUMENT**

### **A. The Emergency Motion Is Not Moot And LULAC Is Entitled To A Decision On The Merits.**

The OGC erred in dismissing the Emergency Motion as moot. According to the OGC, the Emergency Motion is moot for one reason: “[b]ecause the October 22 meeting has already taken place.”<sup>18</sup> Tellingly, the OGC does not cite a single authority in support of or otherwise explain its determination regarding mootness.<sup>19</sup> There is good reason for this. The OGC’s

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<sup>16</sup> Prohibited Sunshine Presentations Public Notice at 1.

<sup>17</sup> See Letter from Joel Kaufman, Associate General Counsel, FCC, to David Honig, Counsel, Minority Media and Telecommunications Council (Dec. 2, 2009) (the “OGC Letter”). This letter is appended hereto as Attachment 3.

<sup>18</sup> See OGC Letter at 1. Consistent with applicable FCC rules, see 47 C.F.R. § 1.115(c), in seeking review of the OGC’s decision, which dismissed the Emergency Motion as moot, LULAC does not rely on any questions of fact or law upon which the OGC has been afforded no opportunity to pass.

<sup>19</sup> Given the Commission’s prior determination that the mootness doctrine that applies in Article III federal courts does not limit the Commission’s decision-making, see *In The Matter Of Silver Star Telephone Company, Inc. Petition For Preemption And Declaratory Ruling*, 13 FCC Rcd. 16356 n.50 (1998) (rejecting argument that the mootness doctrine applicable in Article III courts limits the FCC’s decision-making), the OGC’s failure to provide any authority or citation in support of its mootness determination is curious.

assertion that the Emergency Motion is moot does not withstand even casual scrutiny and is contradicted by numerous authorities, including an OGC decision in this very proceeding.

The mere fact that the Commission held its open meeting does not moot a determination on the merits of whether or not presentations were submitted to the Commission during the Sunshine period in violation of the Commission's rules. Indeed, the Commission routinely waits until after the Sunshine period has expired to determine whether any presentations were submitted in violation of the Commission's Sunshine period prohibitions.<sup>20</sup> In fact, *in this very proceeding*, the OGC determined *after* the Commission's October 22 open meeting that 91 written presentations were submitted during the Sunshine period in violation of the Commission's rules.<sup>21</sup> There is no lawful basis for the OGC to determine, post-Sunshine, that those 91 presentations were submitted in violation of the Commission's Sunshine prohibitions, but then to decline to determine, post-Sunshine, whether the blogger presentations were submitted pursuant to unlawful exception to those same rules. The mere fact that the blogger presentations were submitted in electronic form does not provide a lawful basis for distinguishing between the two sets of filings because, among other things, the agency has

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<sup>20</sup> See, e.g., *Notice Of Prohibited Presentations In The Matter Of High-Cost Universal Service Support (WC Docket No. 05-337)*, 23 FCC Rcd. 17961 (2008) (determining post-Sunshine that presentations made during the Sunshine period violated the FCC's Sunshine period rules); *Notice Of Prohibited Presentations In The Matter Of Unlicensed Operation In The TV Broadcast Bands (04-186)*, 23 FCC Rcd. 17392 (2008) (same); *Notice Of Prohibited Presentations In The Matter Of Formal Complaint Of Free Press And Public Knowledge Against Comcast Corporation For Secretly Degrading Peer-To-Peer Applications; Broadband Industry Practices (WC Docket No. 07-52)*, 23 FCC Rcd. 13307 (2008) (same).

<sup>21</sup> See Prohibited Sunshine Presentations Public Notice.

already determined that electronically submitted presentations can violate the Sunshine rules in the same manner as more traditional filings.<sup>22</sup>

If the OGC's reasoning were correct, then no party could be found liable for violating the Commission's Sunshine period rules, unless the agency acted on the alleged violation before the Sunshine period expired. Yet, this is clearly incorrect. As noted above, the Commission regularly addresses allegations of Sunshine period violations after the Sunshine period has ended.<sup>23</sup> Indeed, this appears to be the agency's routine practice.<sup>24</sup>

Moreover, the OGC's asserted basis for not reaching the merits of the Emergency Motion is highly suspect, given that it was entirely and solely within the Commission's control to act on the Motion before the Commission's October 22 meeting. As noted above, LULAC and others filed the Emergency Motion on October 19 – three days before the Commission's meeting – and expressly asked the agency to take expedited action on its request. The Commission cannot now be heard to assert that the Emergency Motion is moot because the October 22 open meeting has already taken place, since it was the Commission that elected not to address the Motion until nearly two months after it was filed.

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<sup>22</sup> See, e.g., *Notice Of Prohibited Presentations In The Matter Of Applications Of Cellco Partnership D/B/A Verizon Wireless And Atlantis Holdings Llc; For Consent To Transfer Control Of Licenses, Authorizations, And Spectrum Manager And Defacto Transfer Leasing Arrangements; And Petition For Declaratory Ruling That The Transaction Is Consistent With Section 310(B)(4) Of The Communications Act (WT Docket No. 08-95)*, 23 FCC Rcd. 16530 (2008) (finding that e-mails are presentations within the meaning of the FCC's Sunshine period rules and excluding certain e-mails from the record after determining that they were submitted during the Sunshine period in violation of the FCC's rules).

<sup>23</sup> See *supra* note 20.

<sup>24</sup> See *supra* note 20; see also 47 C.F.R. § 1.1212 (setting forth the procedures the General Counsel must follow when determining whether a violation of the Sunshine period rules has occurred).

In addition, the Commission should address the merits of the Emergency Motion because the issues raised therein would (even if they were moot) fall within an exception to the mootness doctrine. The issues raised in the Emergency Motion are clearly capable of repetition yet, under the OGC's analysis at least, able to evade review, which is a well recognized exception to mootness.<sup>25</sup> Indeed, nowhere in the OGC Letter does the agency disavow its use of a blogger exception or state that it will not use the same exception in this proceeding during the Sunshine period preceding any final rules or order the agency ultimately adopts in response to the Net Neutrality NPRM. Therefore, LULAC is entitled to a decision on the merits.

At bottom, the mere fact that the Commission held its open meeting is, contrary to the OGC's determination, irrelevant to a determination on the merits of whether bloggers submitted presentations to the Commission pursuant to an unlawful exception to the agency's Sunshine period rules. And the problems associated with the Commission's decision are ongoing because, as discussed below, the Sunshine violations infected the Commission's decision to adopt the Net Neutrality NPRM and the blogger presentations are currently part of the record, while the 91 traditional presentations remain excluded. Moreover, the Commission still possesses authority to attempt to redress the violations of its rules by granting equal treatment to all blogger and non-blogger presentations submitted during Sunshine for purposes of agency's official record in this proceeding. This provides an additional basis for finding that the Emergency Motion is not moot.<sup>26</sup>

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<sup>25</sup> *See, e.g., Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (discussing the capable of repetition yet evading review exception to mootness).

<sup>26</sup> *Cf. Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (providing that the Article III mootness inquiry turns on whether there remains an injury traceable to the government actor which is likely to be redressed by a favorable decision). As noted above, the Commission can still attempt to remedy the harm flowing from its violation of the Sunshine period rules by, among other things, treating

**B. The Additional Points Made By The OGC Letter Are Based On An Erroneous Understanding Of The Relevant Facts And The Purpose Of The Commission's Sunshine Period Rules.**

After providing its reason for denying the Emergency Motion, the OGC then purported “to address some of the concerns expressed” in the Motion.<sup>27</sup> However, in attempting to address the “concerns” it perceived, the OGC revealed a fundamental misunderstanding of the relevant facts and the basic purpose of the Commission’s Sunshine period rules. In doing so, the OGC did not allay LULAC’s concerns, but only further undermined the credibility of its decision to dismiss the Emergency Motion as moot.

As an initial matter, the OGC displayed a clearly erroneous understanding of the relevant facts. In its letter, the OGC defended the Commission’s decision to create a bloggers-only exception by stating that traditional ECFS presentations may not be available until a day after they are submitted to the agency, but that the blog submissions were “immediately viewable by the public”<sup>28</sup> This Commission made a similar assertion in the Revised Sunshine Notice when it stated that blog submissions were “instantaneously available to all interested parties.”<sup>29</sup> As pointed out in the Emergency Motion, however, the blog submissions were not immediately available to all interested parties.<sup>30</sup> Moreover, since the filing of the Emergency Motion, it has become clear that the Commission moderated postings submitted over its Open Internet Blog and

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blogger and non-blogger presentations submitted during the Sunshine period equally for purposes of the Commission’s official record in this net neutrality proceeding.

<sup>27</sup> See OGC Letter at 1 (“Because the October 22 meeting has already taken place, the Motion is moot. I wish, nevertheless to address some of the concerns expressed therein.”).

<sup>28</sup> OGC Letter at 1.

<sup>29</sup> See Revised Sunshine Notice at 1.

<sup>30</sup> See Emergency Motion at 2-3.

apparently delayed the posting of numerous, perhaps thousands of these presentations.<sup>31</sup> Indeed, the Commission apparently delayed the posting of these presentations for approximately three days – nearly half of the entire Sunshine period – before eventually posting the presentations to the Commission’s website.<sup>32</sup> Therefore, the OGC’s justification for treating blog submissions differently than traditional modes of communication is factually incorrect.

Moreover, the Commission’s decision to change the format of its social media websites during the Sunshine period, including the format of its Open Internet Blog, further undermines the OGC’s assertion that the blog submissions were immediately viewable by the public. As noted above, the Commission apparently changed its OpenInternet.gov site and started directing bloggers to an ideascale page set up by the agency, *see* <http://openinternet.ideascale.com/>, rather than continuing to direct users to the Open Internet Blog, which was the only website the Commission purported to exempt from the Sunshine period rules.<sup>33</sup> The Commission also apparently removed any direct link to its original posting on the Open Internet Blog – a posting

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<sup>31</sup> *See* [http://blog.openinternet.gov/?page\\_id=2](http://blog.openinternet.gov/?page_id=2) (setting forth the Commission’s “moderation policy”).

<sup>32</sup> *See* <http://blog.openinternet.gov/?p=1>. As it currently appears, this blog posting shows comments being submitted to the agency during the entire Sunshine period. However, the Commission has not provided any public explanation for why there was a significant delay in posting some of these submissions to the agency’s blog or provided details about the timing or exact duration of these delays.

<sup>33</sup> Notably, neither the OGC nor the Commission has stated whether comments submitted during the Sunshine period on the Commission’s ideascale page were submitted in violation of the Commission’s Sunshine period rules. Nor has the agency explained how, consistent with APA requirements, the agency will respond to significant points raised by the thousands of blog submission which the Commission apparently is including in its official record. *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (1977) (“[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”).

which contained more than 7,000 comments submitted by bloggers – effectively making the posting and all of the thousands of responsive comments unavailable to the general public.<sup>34</sup>

In addition, the OGC’s position belies a fundamental misunderstanding of the fundamental purpose of the Commission’s Sunshine period prohibitions, which is to give the agency a period of repose leading up to the adoption of an item – not to allow interested persons to respond to each other on the record. In its letter, the OGC indicates that the Commission’s bloggers-only exception was consistent with the Commission’s Sunshine period rules because interested persons “had an immediate opportunity to post a response” and, therefore, there was less of a risk that “persons would not have a fair opportunity to respond.”<sup>35</sup> However, the Commission’s Sunshine period rules have nothing to do with allowing interested persons an opportunity to respond to one another or creating a mini-pleading cycle during which these parties can make on the record submissions. Rather, as the full Commission has made clear, the “prohibition against presentations during this time is intended to provide decision-makers with a period of repose during which they can be assured that they will be free from last minute interruptions and other external pressures.”<sup>36</sup> Thus, contrary to the OGC’s reasoning, the fact that bloggers may be able to respond to each other on the record has nothing to do with whether the Commission violated its Sunshine period rules by creating the blogger-only exception or

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<sup>34</sup> See <http://blog.openinternet.gov/?p=1>. As discussed above, the Commission has apparently stopped allowing members of the public to access this original blog posting by clicking through on any link on its Open Internet Blog. Rather, it appears that members of the public can only access this posting and the thousands of comments responding thereto if they know the direct link associated with the posting.

<sup>35</sup> See OGC Letter at 1-2.

<sup>36</sup> *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, 6053 (1987) (quotation marks omitted).

whether these submissions disrupted what the agency has deemed to be a critically important period of repose.

The OGC Letter also stated that the Commission’s decision to waive its Sunshine rules for bloggers “reflected the Commission’s determination that it and the public would benefit from the input of interested parties on the Open Internet blog” and that rescinding the waiver would have “deprived the agency and the public of this potential source of information.”<sup>37</sup> However, the Commission’s desire to hear from bloggers during the Sunshine period does not render its waiver decision lawful. Rather, as established in the Emergency Motion,<sup>38</sup> the Commission’s existing Sunshine period prohibitions are codified as agency rules.<sup>39</sup> Thus, the only way the Commission could create a bloggers-only exception would have been to follow the APA’s notice and comment rulemaking procedures.<sup>40</sup> Since the Commission did not follow APA rulemaking procedures when it created the blogger exception, the Commission’s desire to hear from bloggers is immaterial. Indeed, implicitly recognizing this APA requirement, the Commission has previously proceeded by APA rulemaking procedures when amending its Sunshine period rules.<sup>41</sup>

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<sup>37</sup> OGC Letter at 1.

<sup>38</sup> See Emergency Motion at 5.

<sup>39</sup> See 47 C.F.R. §§ 1.1203, 1.1212.

<sup>40</sup> 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)).

<sup>41</sup> 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*

Besides, the OGC's reasoning – that public input during Sunshine is so important that it should be allowed – has already been squarely rejected by the full Commission. When adopting its Sunshine period rules, the Commission considered the value of public input during the final period of deliberations leading up to an agency decision and determined that “it is more important during this period to be free from any hint of external pressure.”<sup>42</sup> Therefore, the Commission's desire to hear from the public (or just a portion of the public, as in this case) is no response at all to the LULAC's claim that the Commission violated its rules – rules that are expressly intended to shield the Commission from public input. Indeed, it strains the imagination to try to come up with a more arbitrary agency action than this one, which offers the reason for the rule as the basis for ignoring the rule.

In any event, the OGC's claim that the Commission wanted additional public input during the Sunshine period does not counsel in favor of creating a limited, bloggers-only exception. Quite the contrary, this counsels in favor of eliminating the Commission's Sunshine prohibitions altogether and hearing from bloggers and non-bloggers alike. Otherwise, it appears that the Commission is only interested in hearing from elite members of the public who enjoy and take advantage of public discourse available on the Internet, to the exclusion of those on the less fortunate side of the digital divide.

The OGC also offers no lawful basis for its implicit determination that the input provided by bloggers is somehow more relevant or valuable to the Commission's decision-making process than information provided by persons who use more traditional means of communication. Nor

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*of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 6053 (1987).

<sup>42</sup> *Policies and Procedures Regarding Ex Parte Communications During Informal Rulemaking Proceedings*, 78 F.C.C.2d 1384, 1403 (1980).

could such a distinction between these two groups survive APA review.<sup>43</sup> Furthermore, given that minorities comprise a deeply disproportionate share of those without access to the Internet,<sup>44</sup> the Commission's apparent decision that input from persons who have Internet access is somehow intrinsically more valuable than those who do not, is suspect at best. It also is extremely worrisome. Given that the digital divide limits access to the Internet by minorities as well as the socially and economically disadvantaged, the effect of the current "bloggers-only" exception is to discriminate against participation by those who should be at the very heart of the open Internet discussion.<sup>45</sup>

Moreover, the OGC appears to view the Sunshine period rules as creating a balancing test. The OGC indicates that the blogger presentations submitted during Sunshine were

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<sup>43</sup> See Emergency Motion at 5-6 (establishing that the Commission's decision to create a bloggers-only waiver violates the APA's prohibition on disparate treatment of similarly situated entities); see also *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.").

<sup>44</sup> See Emergency Motion at 2-3 (citing Pew Internet & American Life Project, Home Broadband Adoption (June 2009), which found that in 2009, home broadband adoption stood at 65% for White Americans, 46% for African Americans and 40% for Hispanic Americans).

<sup>45</sup> See, e.g., Recommendation of the FCC's Advisory Committee on Diversity for Communications in the Digital Age (adopted Dec. 3, 2009) (available at <http://www.fcc.gov/DiversityFAC/adopted-recommendations/digital-divide-120309.doc>) (concluding that the Commission has a statutory obligation to help narrow the digital divide and encourage ubiquitous access to broadband); see also Remarks of FCC Commissioner Michael J. Copps at the Practising Law Institute, at 2 (Dec. 10, 2009) (stating that ensuring universal access to broadband is "something tantamount to a civil right" and that "no one will benefit more from the opportunities of an open Internet than those who have suffered lack of opportunity for generations").

permissible because they “posed a lesser risk of prejudice” than other types of presentations. However, the Commission’s Sunshine period rules create a clear, bright-line test for determining whether a prohibited presentation has been made, and this test has nothing to do with weighing the relative risks of prejudice. As noted in the Emergency Motion, 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, codified exemption applies.<sup>46</sup> The Commission’s rules do not contemplate, and the OGC does not have any discretion to consider, the “risks of prejudice” when determining whether a violation of the Sunshine rules has occurred. The rules are clear: they prohibit “all presentations,” and this obviously includes presentations the OGC considers prejudicial and those it does not. Indeed, when the OGC determined earlier in this proceeding that the 91 traditional presentations violated the Sunshine rules, it did not purport to balance or otherwise consider the relative prejudice of those submissions.<sup>47</sup> The Commission should apply the same standard here.

Finally, the OGC Letter states that the waiver only applied to the Commission’s decision to adopt an NPRM and that there will be “ample opportunities and time for comment on the issues in this proceeding.”<sup>48</sup> While this statement is true as far as it goes, it says nothing about whether the agency acted unlawfully by creating the bloggers-only exception or, perhaps even more importantly, whether this rulemaking proceeding has been tainted from its inception by the

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<sup>46</sup> 47 C.F.R. §1.1203(a) (emphasis added).

<sup>47</sup> See Prohibited Sunshine Presentations Public Notice.

<sup>48</sup> OGC Letter at 2.

Commission's waiver decision.<sup>49</sup> As the full Commission made clear, compliance with the agency's Sunshine period prohibitions serves real and important purposes, and allowing interested parties to participate in the proceeding post-Sunshine is no cure for a failure to enforce the agency's existing rules.<sup>50</sup> Indeed, the purpose of the agency's period of repose is to ensure that the Commission's decisions "may be, and be perceived to be, as objective as possible," and the rules are "necessary . . . if the Commission is to enjoy the confidence of the public *and the courts*."<sup>51</sup> Yet, the OGC does not address whether the Commission's decision to create the bloggers-only exception undermines the lawfulness of any decision the agency may ultimately adopt in this proceeding, particularly when the presentations made pursuant to this exception continue to be part of the administrative record.<sup>52</sup>

### **III. CONCLUSION**

For the foregoing reasons, LULAC respectfully requests that the full Commission grant this Application for Review and reverse the OGC's finding that the Emergency Motion is moot. If the full Commission reaches the merits of the Emergency Motion, LULAC respectfully asks

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<sup>49</sup> Courts have repeatedly expressed concern about how *ex parte* contacts may unlawfully shape the outcome of agency action. *See, e.g., HBO*, 567 F.2d at 53. Indeed, in certain circumstances, courts have determined that principles of administrative law and due process require a remand to the agency and an administrative hearing to determine the scope of *ex parte* contacts and their influence on the agency's decision-making process. *See id.* at 57-59.

<sup>50</sup> *See Policies and Procedures Regarding Ex Parte Communications During Informal Rulemaking Proceedings*, 78 F.C.C.2d 1384, 1403 (1980) (continuing to adhere to the agency's presentation cut off rule even though parties can participate in the proceeding again once the cut off period has expired).

<sup>51</sup> *Policies and Procedures Regarding Ex Parte Communications During Informal Rulemaking Proceedings*, 78 F.C.C.2d 1384, 1403 (1980) (emphasis added).

<sup>52</sup> *Cf. Sprint Corp. v. FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) (vacating FCC rules in the APA context after finding that "the effect of the Commission's procedural errors is uncertain"); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

the Commission to find that its decision to create a bloggers-only exception to the agency's Sunshine period rules was unlawful for the reasons set forth above and in the Emergency Motion. In this way, the Commission can reinforce public confidence in the basic fairness of its Sunshine procedures and – most important – demonstrate that the Commission's commitment to closing the digital divide extends to its own treatment of those who have yet to enjoy first class digital citizenship.

Respectfully submitted,



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January 4, 2010

Attachments

cc: Joel Kaufman, Office of General Counsel

# ATTACHMENT 1



## 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.<sup>1</sup> In the Revised Sunshine Notice, the Commission stated that it “will consider a Notice of Proposed Rulemaking on polices to preserve the open Internet.”<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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

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<sup>1</sup> 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](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-294028A1.pdf)).

<sup>2</sup> *Id.*

<sup>3</sup> 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.

<sup>4</sup> 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.”<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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

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<sup>5</sup> *Id.*

<sup>6</sup> 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).

<sup>7</sup> 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.<sup>8</sup>

### **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.<sup>9</sup> 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.<sup>10</sup>

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<sup>8</sup> 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.”).

<sup>9</sup> 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”).

<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.”<sup>13</sup>

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.<sup>14</sup> Thus, prohibiting agency decisionmakers from accessing the Open Internet Blog would not provide an adequate remedy.

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<sup>11</sup> 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.

<sup>12</sup> 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.”).

<sup>13</sup> 47 C.F.R. §1.202(c).

<sup>14</sup> 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.<sup>15</sup> Indeed, implicitly recognizing this APA requirement, the Commission has previously proceeded by APA rulemaking procedures when amending its rules governing Sunshine period presentations.<sup>16</sup> 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

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<sup>15</sup> 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)).

<sup>16</sup> 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.<sup>17</sup> 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.”<sup>18</sup>

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.

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<sup>17</sup> 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.”).

<sup>18</sup> *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.<sup>19</sup> 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.<sup>20</sup> The Commission's waiver decision contradicts these

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<sup>19</sup> 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").

<sup>20</sup> 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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October 19, 2009

# ATTACHMENT 2



# PUBLIC NOTICE

**Federal Communications Commission**  
**445 12th St., S.W.**  
**Washington, D.C. 20554**

News Media Information 202 / 418-0500  
Internet: <http://www.fcc.gov>  
TTY: 1-888-835-5322

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DA 09-2402

Released: November 10, 2009

## NOTICE OF PROHIBITED PRESENTATIONS IN THE MATTER OF PRESERVING THE OPEN INTERNET; BROADBAND INDUSTRY PRACTICES (WC DOCKET NO. 07-52)

Notice is hereby given that the prohibited written presentations, listed in the appendix, concerning the above-referenced proceeding (WC Docket No. 07-52) were received by the Commission from October 16, 2009 to October 21, 2009. With specified exceptions not applicable here, Section 1.1203 of the Commission's Rules, 47 C.F.R. § 1.1203, prohibits the making of any presentation, whether ex parte or not, to decision-making personnel concerning any matter listed on the Commission's Sunshine Agenda until the Commission releases the text of a decision or order relating to that matter or removes the item from the sunshine agenda. The instant presentations addressed the merits of WC Docket No. 07-52, which was included in the Commission's Sunshine Agenda by Public Notice released October 15, 2009 (revised October 16, 2009) for consideration at the October 22, 2009 open Commission meeting. This matter was the subject of a notice of proposed rulemaking released October 22, 2009. *See Preserving the Open Internet*, FCC 09-93 (October 22, 2009). Under Section 1.1212(d) of the Commission's Rules, 47 C.F.R § 1.1212(d), presentations that are received during the Sunshine Period and do not meet an exception provided by 47 C.F.R. § 1.1204(a) or a Commission waiver shall be associated with, but not made a part of, the record in the relevant proceedings. In this regard, the prohibited presentations here were not made through the Open Internet Blog, as to which the Commission waived the ex parte rules in the revised sunshine public notice. In accordance with the rule, the presentations here will be associated with, but not made part of the record in WC Docket No. 07-52.

The full texts of these presentations are available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12<sup>th</sup> Street, SW, Room CY-A257, Washington, DC, 20554. Copies of these presentations may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12<sup>th</sup> Street, SW, Room CY-B402, Washington, DC, 20554, telephone 1-800-378-3160, web site [www.bcpiweb.com](http://www.bcpiweb.com). These presentations may also be viewed on the Commission's web site (HYPERLINK [http://fjallfoss.fcc.gov/ecfs2/comment\\_search/](http://fjallfoss.fcc.gov/ecfs2/comment_search/) ).

Action by Office of General Counsel, Administrative Law Division.

## Appendix

### Prohibited Presentations Received

<b>Name of Filer</b>	<b>Date Received</b>
Tammy Smith	10/21/2009
T.S. Calvillo-Cox	10/21/2009
Sue Morgan	10/21/2009
Rose O'Toole	10/21/2009
Rebecca Jansen	10/21/2009
Patti Giove	10/21/2009
Nancy Hicks	10/21/2009
Mary Bernardo	10/21/2009
Marilyn Piglia	10/21/2009
LindaKay Gwin	10/21/2009
Kathleen Boggess	10/21/2009
Karen Boswell	10/21/2009
Judy L. Miller	10/21/2009
Helen Zeyen	10/21/2009
Diana Gould	10/21/2009
Deemia Bickford	10/21/2009
Cindie Frap	10/21/2009
Catherine Hall	10/21/2009
CAT	10/21/2009
Ben Mall	10/21/2009
Barbara Green	10/21/2009
Amy Hahn	10/21/2009
Kay Grabner	10/21/2009
Gary Roets	10/21/2009
Dolores Gerber	10/21/2009
Diane Rhoades	10/21/2009
Beth Allen	10/21/2009
Greater Cleveland Partnership	10/21/2009
Catherine Ward	10/21/2009
Annette Lind	10/21/2009
Linda Neely	10/21/2009
John R. Rathgeber	10/21/2009
Joan Massey	10/21/2009
Marialyce Eilts	10/21/2009
Joe Charrette	10/21/2009
Jimmie L Clayton, Jr.	10/21/2009
Bettina Senter	10/21/2009
Michale Gierke	10/21/2009
Cathy Picillo	10/21/2009
Christine Odenbach	10/21/2009
Stella Peterson	10/21/2009
Caleb Harris	10/21/2009
Steve Mills	10/21/2009

Jennifer Cato	10/21/2009
Governor Haley Barbour	10/21/2009
State Representative Enest D. Wooton	10/21/2009
Greater Norwalk Chamber of Commerce	10/21/2009
State Senator Joseph J. Crisco, Jr.	10/21/2009
State Representative Gary Odom	10/21/2009
State Representative Pam Sawyer	10/20/2009
State Representative Joseph Brennan	10/20/2009
State Senator Dennis Hollingsworth	10/20/2009
South Missouri Network Against Sexual Violence	10/20/2009
Jeanne Zuzik	10/20/2009
Sharon Weston Broome	10/20/2009
Lou Molitor	10/20/2009
Lieutenant Governor Ron Ramsey	10/20/2009
San Diego-Imperial Counties Labor Council	10/20/2009
Black Economic Council	10/20/2009
Governor Jeremiah W. Nixon	10/20/2009
Kansas State NAACP Conference of Branches	10/20/2009
Greater Danbury Chamber of Commerce	10/20/2009
City Manager Jack Tarkington	10/20/2009
National Hispanic Council on Aging	10/20/2009
Latino Institute for Corporate Inclusion	10/20/2009
Blake Wheelis	10/20/2009
State Representative Mike Hill	10/20/2009
Economic Development Commission	10/20/2009
Governor Jack A. Markell	10/20/2009
Governor Kenny McBride	10/20/2009
Mayor Jimmy Harris	10/20/2009
Governor Janice K. Brewer	10/20/2009
Attorney General W.A. Drew Edmonson	10/20/2009
Governor Rick Perry	10/20/2009
Southern Christian Leadership Conference	10/20/2009
Selectman Tom Buzi	10/20/2009
International Brotherhood of Electrical Workers	10/20/2009
Internet Security Alliance	10/20/2009
Mayor Mike Ragsdale	10/20/2009
Senator L. Scott Frantz	10/19/2009
State Majority Leader Mark Norris	10/19/2009
Data Foundry, Inc.	10/19/2009
Sandra Holt	10/19/2009
John Caves	10/19/2009
Del Houghton	10/19/2009
Carl Grams	10/19/2009
C.F.Bird	10/19/2009
Allen Jones	10/19/2009
Chris Kershner	10/16/2009
Lynn Ward	10/16/2009
C. K. Casteel, Jr.	10/16/2009

# ATTACHMENT 3



Federal Communications Commission  
Washington, D.C. 20554

December 2, 2009

David Honig  
Minority Media and Telecommunications Council  
3636 16<sup>th</sup> Street N.W.  
Suite B-366  
Washington, D.C. 20010

Re: WC Docket No. 07-52

Dear Mr. Honig:

The Commission received the "Emergency Motion to Correct or Amend the Commission's October 16, 2009 Revised Sunshine Notice" (Motion), which you filed on October 19, 2009, on behalf of the Asian American Justice Center, et al. The Motion involved the "Revised Sunshine Notice," issued on October 16, 2009, in which the Commission announced that it would consider at its October 22, 2009 open meeting a notice of proposed rulemaking on policies to preserve the open Internet (WC Docket No. 07-52). In particular, the Motion objected to language waiving the Sunshine Period Prohibition (47 C.F.R. § 1.1203) for ex parte contacts made through the Open Internet blog [<http://blog.openinternet.gov>], asserting discrimination against those who do not have access to the Internet, and sought either rescission of the waiver or expansion to all modes of communication with the Commission.

Because the October 22 meeting has already taken place, the Motion is moot. I wish, nevertheless, to address some of the concerns expressed therein. First, the limited Sunshine Period waiver reflected the Commission's determination that it and the public would benefit from the input of interested parties on the Open Internet blog. Rescinding the waiver would have deprived the agency and the public of this potential source of information. Nor would a generally applicable waiver have been appropriate, given the materially different nature of the modes of communication at issue here. A blog posting is immediately viewable by the public, and anyone disagreeing with it has an immediate opportunity to post a response. By contrast, conventional filings on the Commission's ECFS system are not due until the day after a presentation is made and may not appear online until the day after filing, if submitted late in the day. Submissions may take much longer to appear in the case of a filing submitted by first class mail. The availability of the blog for comment during the Sunshine Period therefore posed a lesser risk of prejudice to those interested in the proceeding in comparison with permitting other types

David Honig

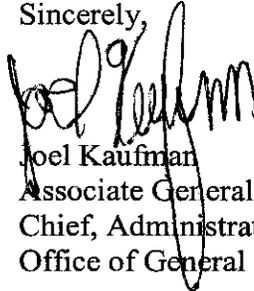
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of presentations. Indeed, expanding the Sunshine Period waiver to apply to conventional filings could have posed a much greater risk that interested persons would not have a fair opportunity to respond.

Finally, I note that the item to which the Sunshine Period waiver applied in this matter was a notice of proposed rulemaking. There will be ample opportunities and time for comment on the issues in this proceeding, both for those who have access to the Internet and for those who do not.

I wish to conclude with two observations. First, I understand that the concerns that you raise are important and note that the Commission will be addressing issues of expanding Internet connectivity in formulating a National Broadband Plan. Further, issues regarding the Sunshine Period Prohibition, including those raised by the Motion, will receive further attention by the Commission, which is undertaking a general reexamination of the ex parte rules as part of its FCC reform initiative. As a first step in these efforts, on October 28, 2009, the Office of General Counsel held a public forum on possible modifications to the ex parte rules. Your continued participation, and public input generally, is encouraged in each of these respects.

Sincerely,



Joel Kaufman  
Associate General Counsel and  
Chief, Administrative Law Division  
Office of General Counsel