

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of the Commission's <i>Ex Parte</i>)	GC Docket No. 10-43
Rules and Other Procedural Rules)	
)	FCC 10-31
)	
)	
)	



INITIAL COMMENTS

Daniel Mitchell
Vice President, Legal and Industry

Karlen Reed
Senior Regulatory Counsel

Its Attorneys

4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
(703) 351-2000

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INITIAL COMMENTS

The National Telecommunications Cooperative Association (NTCA)¹ files these comments in response to the Federal Communications Commission (Commission or FCC) February 22, 2010 Notice of Proposed Rulemaking (NPRM) requesting input on proposed revisions to its ex parte rules – those rules that control how, when, and where interested parties can present their views on pending Commission matters.² In the NPRM, the Commission proposed changes to its rules governing disclosure of communications with Commission staff and decision makers when not all parties to the proceeding are present.

I. INTRODUCTION AND SUMMARY

The proposed ex parte rule changes affect: 1) the completeness, accuracy and timeliness of ex parte filing notices; 2) exemptions from ex parte filings; 3) Sunshine period issues;

¹ NTCA is a premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents 580 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service rural local exchange carriers (LECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

² *In the Matter of Amendment of the Commission's Ex Parte Rules and Other Procedural Rules, Notice of Proposed Rulemaking*, GC Docket No. 10-43, FCC 10-31 (rel. Feb. 22, 2010) (NPRM).

4) disclosure statements regarding ownership; and 5) new media, such as blogs. The Commission intends its proposed rule changes to make the Commission's decision-making process more open, transparent, fair and effective. These rule changes are intended to provide the public with more information about the contents of the ex parte presentations.

The Commission conducted a workshop on October 28, 2009, on the current ex parte rules as a precursor to this NPRM.³ As part of the panel discussion in the workshop, one panelist neatly summarized the purpose of the Commission's ex parte rules:

From the presenter's perspective, they allow the presenter to have an official record of what they have said to the Commission, which gives them an opportunity to have that relied upon by the Commission. From the Commission's perspective, it gives the kind of transparency that is important to this process and also does allow them to have some reliance on the presentations that are made. And from other parties' perspective, it gives them knowledge that the contacts have been made, and it gives them the ability to come in and make their own arguments.⁴

Any new ex parte rules the Commission adopts through this rulemaking should adhere to the principles of fairness, reliability, completeness, accuracy, transparency, and timeliness. The Commission should require more detailed, electronically filed ex parte notices for all non-exempt ex parte meetings. This will help ensure a fair opportunity to review and respond. The filing period for non-Sunshine notices should be extended to two business days, and status inquiries should remain exempt from the notice rules. These measures will allow filers to create more complete, accurate and timely ex parte notices. Commission-requested meetings should no longer be exempt from the ex parte notices. This procedure will enhance the transparency of the Commission's processes. Sunshine period ex parte meetings should be reported within one business day of the meeting, and the sunshine ex parte notices should include the time and date

³ NPRM, ¶ 5; *Improving Disclosure of Ex Parte Contacts*, FCC Workshop held Oct. 28, 2009, Washington, D.C. (filed Mar. 16, 2010), GC Docket No. 10-43 (FCC Transcript).

⁴ FCC Transcript, pp. 13-14.

of the meeting and sent to all participant staff. These efforts, too, will improve the level of fairness for opportunity to respond. Disclosure statements can be problematic, so the Commission should create a best practices list of examples before adopting rules on disclosures. Knowing who is filing the notices improves the reliability of the information transmitted. Finally, new media technologies offer new opportunities for public input, but the Commission should not use blogs for rulemaking proceedings. Restricting rulemaking proceedings to the Commission's usual electronic docket will ensure a locatable, complete record for review and appeal.

II. EX PARTE NOTICE TIMELINESS AND COMPLETENESS.

The Commission proposes to make the FCC's processes more transparent by changing or clarifying who must file ex parte notices, when the notices should be filed, how the notices are to be filed, and what happens when the responsible party does not file the proper notice.

A. All Ex Parte Meetings Should Result In An Ex Parte Filing, With Few Exceptions.

The Commission intends to require all ex parte presenters to file notices of every meeting, not just for those meetings in which the presenter delivers new data or arguments.⁵ The Commission asserts that more summaries of the facts and opinions presented will also aid the reader in understanding the material.⁶ The FCC proposes that all ex parte notices would contain either: 1) summaries of the data or arguments presented during the meeting; or 2) explicit statements that the data and arguments are already reflected in the presenter's prior filings, together with the specific page or paragraph numbers to the previous filings.⁷ The Commission intends to change the ex parte rules to clarify that all documents that are shown to or given to

⁵ *Id.* ¶¶ 8, 9.

⁶ *Ibid.*

⁷ *Id.* ¶ 8.

Commission during ex parte meetings must be filed. The Commission seeks comment on these new proposals.

NTCA agrees with the Commission's tentative conclusions that all ex parte meetings should produce an ex parte filing, whether the information presented is new or old. More in-depth detailed summaries will aid commenters and Commission alike in recalling and understanding the presentations. In the alternative to summaries, the Commission should be able to see and rely on direct page and date references on previous filings. This approach nails down the reference. Also, clarification of the ex parte rules is necessary to ensure that all ex parte participants reveal the documents shown, not just delivered, to the Commission and staff. The Commission should adopt these proposed rule changes.

B. The Ex Parte Filing Deadline Should Be Extended to Two Business Days, and Staff Need Not Be Responsible For Filing The Notices.

In light of the expanded notice requirements, the Commission seeks comment on its proposal to extend the filing period for ex parte notices from one business day to two business days.⁸ An exception to this expanded period will be ex parte meetings held during the Sunshine Period, described below. The Commission also proposes to modify the ex parte rules by allowing Commission staff, at staff's option, to file an ex parte summary of a meeting attended by many parties.⁹ The Commission seeks comment on these approaches.

Extending the filing interval to two business days for non-Sunshine period ex parte filings is certainly appropriate and appreciated given the need for more detailed ex parte filings. This would allow participants to meet on a Tuesday and file by Thursday, or meet on Friday and file by Tuesday the next week. The Commission should, however, specify that the filings should

⁸ *Id.* ¶ 10.

⁹ *Id.* ¶ 40.

be made by a time certain, for example 5:00 p.m. Eastern Time, on the date due rather than just rely on a general business day calculation. This further specification will cement the deadline for compliance more clearly. As for allowing staff to file the ex parte, this may prove to impose too great a time constraint on the Commission staff's limited resources. A better approach is to keep the burden of filing on the non-staff participants – it will be their obligation to decide who is responsible for the filing, and enforcement will be more meaningful and less perverse if the ex parte rules did not require the FCC to enforce sanctions against their own staff for non-compliance.

C. Electronic Filing Is The Best Filing Method For Ex Parte Notices.

The Commission proposes to amend its ex parte rules to require that written ex parte presentations and memoranda be filed electronically on a Commission electronic comment filing system only.¹⁰ Where a filing does not have a docket number assigned or where e-filing would impose an undue hardship, the presenter would have to file a paper copy of the memorandum with an original and one copy sent to the Secretary's office.¹¹ The Commission seeks comment on these proposals and on whether the electronic filings must be in a machine-readable format, such as a searchable “.pdf” format and “.xml” format for spreadsheet filings.¹²

Electronic filing is the preferred method for ex parte notices because posting on the FCC's electronic services are quicker and more efficient than posting hard copies. The Commission should, however, allow paper filings if electronic filings are not feasible. Finally, searchable .pdf and .xml documents are more useful to the Commission and commenters than non-readable formats. The Commission should adopt these filing methods.

¹⁰ *Id.* ¶ 16.

¹¹ *Ibid.*

¹² *Ibid.*

D. Stricter Enforcement of Existing Rules Is Not Enough.

The Commission questions whether stricter enforcement of the existing ex parte rules would lessen or eliminate the need for any changes in the rules.¹³ The Commission also seeks comment on the types of sanctions that are appropriate for ex parte violations.¹⁴ Several of the proposed changes, especially clarification on the content of ex partes notices and requiring all presentations to be reflected in ex partes, are changes that active participants in FCC dockets, such as NTCA, clearly recognize as meritorious. Heightening enforcement of the existing ex parte rules alone will not add to the transparency of the Commission's process nearly as much as will implementing these changes. The Commission states that it already intends to enhance its enforcement of the ex parte rules and notes that it can already impose sanctions, such as monetary forfeitures and participation disqualification, for violations of the ex part rules.¹⁵ The Commission, by initiating this proceeding, has already demonstrated its willingness to devote additional time and resources to modifying and enforcing the ex parte rules. Additional formal adopt of rules regarding how the Commission punishes violations of the ex part rules does not appear to be necessary at this time. Flexibility in the agency's hands is the best solution for removing or remedying the wrongs caused by non-compliance to the ex parte rules.

III. EXEMPTIONS FROM EX PARTE FILINGS SHOULD BE FEW.

Traditionally, contacts with the Commission and staff requesting status information has been exempt from the ex parte rules. The Commission clarifies in its NPRM that no changes are being proposed for status inquiries -- those questions regarding the docket status, filing

¹³ *Id.* ¶ 11.

¹⁴ *Ibid.*

¹⁵ *Id.* ¶ 32.

deadlines, and the approximate time within which Commission staff expect a resolution.¹⁶

Status inquiries do not, as the FCC clarified, contain any views as to the merits or outcomes of the proceedings; those status inquiries that do, must be considered ex parte meetings and subject to the rules.¹⁷

Exempting status information inquiries from the ex parte rules is and should remain a reasonable approach since no substantive discussions take place. This approach does, of course, place responsibility on the Commission staff member as well as the industry participant to be alert to the bright line between procedure and substance. Should the staff member feel that the industry participant has crossed the line, the staff member should not hesitate to direct the industry member to file an ex parte notice of their discussion. This approach is an efficient measure to obtain status information and should be adopted by the Commission.

The Commission seeks comment on whether ex parte filings should be required where the Commission or staff request clarification or additional information from an interested party. Currently, this is an exception to the Sunshine Period.¹⁸ The Commission observed that some have urged the FCC to adopt an all or nothing approach to ex parte filings. Sometimes the questions asked during the Sunshine Period are the most revealing about how the Commission is viewing a particular issue, and where gaps in the record lie. These communications, initiated by the Commission, should no longer be exempt from the ex parte rules. Rather, the Commission staff should designate one of the responding industry members to file the ex parte notice. This all-inclusive approach will best provide the transparency sought in the Commission's processes.

¹⁶ *Id.* ¶ 12.

¹⁷ *Ibid.*

¹⁸ *Id.* ¶ 23.

IV. SUNSHINE PERIOD NOTICES SHOULD BE FILED QUICKLY SO OTHERS CAN SEE THE POSITIONS PRESENTED AND HAVE A REASONABLE OPPORTUNITY TO RESPOND.

The Commission proposes to change the ex parte rules for those meetings conducted during the Sunshine Period, the 7-day period immediately prior to a Commission's scheduled Open Meeting. The FCC suggests that Sunshine ex parte notices should be filed within 4 hours of the completion of the presentation so that the ex parte notices are available quickly to all.¹⁹ The Commission also wants all Sunshine ex parte notices to be sent via email or fax to all Commission staff who attend the meeting, unless the Sunshine notice provides otherwise.²⁰ The Sunshine ex parte must also specifically state the date and time of the oral presentation so that compliance with the filing requirements can be determined easily.²¹

These suggestions, with one exception, are reasonable methods to secure timely, accurate reports of meetings held during the Sunshine Period, often initiated by the Commission or staff to resolve unanswered questions or conflicting responses. The one exception is the proposed 4-hour time limit for filing Sunshine ex parte notices. This short time frame will prove unworkable since many interested parties, such as NTCA, have been asked to meet with Commissioners and staff in Sunshine ex partes throughout the same day, leaving little time to file the notices. The Commission should, instead, adopt a one-business-day approach to filing ex parte notices during the Sunshine period. A one-business-day time frame is more practical and will still allow other participants a chance to review and respond to the ex parte before the Sunshine period expires. Sending copies of the ex parte notices to attending staff is a positive means to reinforce the message, as well as clarify the extent of the discussions. Finally,

¹⁹ *Id.* ¶¶ 20, 21.

²⁰ *Id.* ¶ 20.

²¹ *Id.* ¶ 21.

enforcement of the filing period cannot occur without a clear statement of the date and time of the ex parte meeting. The Commission should adopt these proposed changes and revise the Sunshine ex parte filing period to one business day.

V. DISCLOSURE STATEMENTS CAN BE PROBLEMATIC.

The Commission seeks comment on the desirability of requiring ex parte filers to submit a disclosure statement in connection with all filings.²² This proposed disclosure statement requirement is designed to identify clearly the interests and perspectives represented by the participants in the meeting.²³ The Commission cites several existing disclosure methods,²⁴ asks whether a disclosure rule would dissuade participants from filing comments, and asks what type of disclosures would be appropriate for individuals.²⁵ The Commission also questions whether any exemptions should apply.²⁶ The Commission asks whether reference to an existing FCC disclosure statement, such as the FCC Form 602 or in the FCC's Consolidated Database System, is sufficient disclosure.²⁷

Revealing the interests represented by a commenter's statements can be a useful tool for the Commission and the public to understand the commenter's perspective. The depths and directions of the disclosure, though, can be difficult to regulate by rule due to the variety of possible commenters. For example, NTCA includes a paragraph-long disclosure statement in the first few footnotes of every filing (see fn. 1 herein), providing information about the trade

²² NPRM, ¶ 27.

²³ NPRM, ¶ 27.

²⁴ Supreme Court Rule 29.6 (identify all parent companies and all 10%+ corporate ownership interests); Supreme Court Rule 37.6 (identify monetary contributions made to fund the brief); and U.S. Court of Appeals, D.C. Circuit Rule 26.1 (identify all parent companies and all 10%+ corporate ownership interests but does not apply to trade associations); Lobbying Disclosure Act (LDA – 2 U.S.C. § 1603(b)) (identify clients and organizations whose lobbyists contribute more than \$5,000 in a calendar quarter). *See* NPRM, ¶ 28.

²⁵ NPRM, ¶ 29.

²⁶ *Ibid.*

²⁷ *Id.* ¶ 30.

association's work representing small rural incumbent local exchange carriers (ILECs) across the nation. This disclosure does not, however, list all 580 rural ILEC members of NTCA; such a disclosure would be too inefficient and too cumbersome for every filing as it would easily take up several pages for the disclosure alone. NTCA believes its disclosure is appropriate for this trade association and recommends the Commission adopt a best practices list with examples of types of disclosures so that commenters can tell at a glance what is expected of them.

Ad hoc coalitions that are created for the purpose of a specific docket or specific viewpoint are quite useful for advocacy work, but somewhere in the document the coalition should disclose information about its membership. Large national and multi-national corporations will find that disclosure of all 10%+ ownership companies and parent companies may include irrelevant company identification; still, the Commission should know who is talking to them.

The Commission should create a best practices list of examples before adopting rules on disclosures. The Commission should not enact any additional disclosure requirements until it can pinpoint the types of commenters whose lack of specific identity has caused harm, or could cause harm, to the Commission's processes.²⁸ The NPRM does not contain information pointing to problem classes, so any rules adopted regarding disclosure must be based on substantial record and give the ex parte participants plenty of implementation time and clear instructions on disclosure.

²⁸ The Commission states in the NPRM that it receives generally not more than one or two ex parte notice complaints a year. NPRM, ¶ 5.

VI. NEW MEDIA TECHNOLOGIES.

The Commission has begun using new media technologies in its proceedings, such as the blog format for the National Broadband Plan (NBP) in www.broadband.gov, OpenInternet.gov, and reboot.fcc. On a case-by-case basis, the Commission has modified its ex parte rules to accommodate the use of these new media forms to garner information and comments.²⁹ The Commission now seeks comment on the use of these new media formats.

The Commission's effort to include new media technologies in the stream of information that forms the record on its proceedings is laudable. Individuals, organizations, municipalities, and businesses have been willing and able to present their non-traditional perspectives on key dockets, such as the NBP. Wading through the enormous amount of blog information submitted on the NBP blog, however, has demonstrated how difficult monitoring all filings can be in large proceedings. Being able to monitor and respond to all arguments in blogs whose contents are considered part of the official record can become overwhelming and nearly impossible. Appellate review of blog content can equally feel the strain of determining whether the agency's determinations rest on sound evidentiary proof. For these reasons, the Commission should not permit blog material for rulemaking proceedings. The Commission, commenters, and appellate courts alike will benefit if they know exactly where to look for the official record, especially in the case of rulemaking proceedings. Perhaps a more effective use of blog material is during notices of inquiry, where the purpose of the proceeding is to gather information, and not during rulemaking proceedings. The Commission should refrain from allowing blog material to be considered part of any rulemaking proceeding so that the record can be readily identified.

²⁹ NPRM, ¶ 33.

VII. CONCLUSION

For these reasons, the Commission should adhere to the principles of fairness, reliability, completeness, accuracy, transparency, and timeliness in this procedural docket on ex parte notices. The Commission should require more detailed, electronically filed ex parte notices for all non-exempt ex parte meetings to help ensure a fair opportunity to review and respond. The filing period for non-Sunshine notices should be extended to two business days, and status inquiries should remain exempt from the notice rules, as measures that will allow filers to create more complete, accurate and timely ex parte notices. Commission-requested meetings should no longer be exempt from the ex parte notices; this will enhance the transparency of the Commission's processes.

Sunshine period ex parte meetings should be reported within one business day of the meeting, and the sunshine ex parte notices should include the time and date of the meeting and sent to all participant staff. These efforts will improve the level of fairness for opportunity to respond. Disclosure statements can be problematic, so the Commission should create a best practices list of examples before adopting rules on disclosures. Finally, new media technologies offer new opportunities for public input, but the Commission should not use blogs for

rulemaking proceedings. Restricting rulemaking proceedings to the Commission's usual electronic docket will ensure a locatable, complete record for review and appeal.

Respectfully submitted,



By: /s/ Daniel Mitchell
Daniel Mitchell
Vice President, Legal and Industry

By: /s/ Karlen Reed
Karlen Reed
Senior Regulatory Counsel

Its Attorneys

4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
(703) 351-2000

May 10, 2010

CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the foregoing Initial Comments of the National Telecommunications Cooperative Association in GC Docket No. 10-43, FCC 10-31, was served electronically on this 10th day of May 2010 to the following persons:

Julius Genachowski, Chairman
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554
Julius.Genachowski@fcc.gov

Best Copy and Printing, Inc.
Federal Communications Commission
445 12th Street, SW, Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554
Michael.Copps@fcc.gov

Julie Veach
Federal Communications Commission
Office of General Counsel
445 12th Street, SW
Washington, D.C. 20554
Julie.Veach@fcc.gov

Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554
Robert.McDowell@fcc.gov

/s/ Adrienne L. Rolls
Adrienne L. Rolls

Commissioner Mignon Clyburn
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554
Mignon.Clyburn@fcc.gov

Commissioner Meredith Attwell Baker
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington, D.C. 20554
Meredith.Baker@fcc.gov