

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 )  
Amendment of the Commission's *Ex Parte* ) GC Docket No. 10-43  
Rules and Other Procedural Rules )

**COMMENTS OF QWEST CORPORATION**

Qwest Corporation (Qwest), through counsel and in response to the Federal Communications Commission's (Commission) *Notice of Proposed Rulemaking* released on February 22, 2010 (*NPRM*),<sup>1</sup> files these comments. Qwest supports the Commission's objective to improve the transparency and effectiveness of Commission decision-making by considering changes to its *ex parte* and other procedural rules through this notice and comment rulemaking proceeding. The Commission's overall *ex parte* framework is well-suited to maximizing the opportunity for the efficient submission of relevant and timely arguments and data in those proceedings where such presentations are permitted. While supportive of the Commission's goals and the general direction taken in the proposed rules, there are several areas where Qwest urges the Commission to proceed cautiously, or to make no change in the current rules, in order to avoid imposing burdens that outweigh the potential benefits of a proposed rule. Qwest supports all of the Commission's proposals identified in the *NPRM* as *Minor Changes*.<sup>2</sup>

**I. COMPLETE AND ACCURATE SUMMARIES OF ORAL *EX PARTE* PRESENTATIONS PROMOTE A FULLY DEVELOPED RECORD**

Qwest agrees that when "the record does not adequately reflect the contents of oral *ex parte* presentations, the public is deprived of a fair opportunity to respond to oral

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<sup>1</sup> Amendment of the Commission's *Ex Parte* Rules and Other Procedural Rules, Notice of Proposed Rulemaking, FCC 10-31, GC Docket No. 10-43, rel. Feb. 22, 2010.

<sup>2</sup> *NPRM* ¶ 35.

communications with decisionmakers”<sup>3</sup>, and the adequacy of the record is in question should the Commission rely upon information presented in the oral *ex parte* presentation in its decision. The Commission, interested parties and the public are well-served when the Commission’s *ex parte* rules work to ensure that oral *ex parte* presentations are accurately and completely summarized in the record of a proceeding.

In order to require greater disclosure about the contents of oral *ex parte* presentations, the Commission proposes to amend its rules to: 1) require the filing of an *ex parte* notice for every oral *ex parte* presentation, even if the data or arguments presented have already been placed in the record by the presenter; and 2) require that the notice summarize the data or arguments previously placed in the record by the presenter or explicitly state that the data and arguments are already reflected in prior written filings and provide specific references to where the data and arguments can be found in the presenter’s prior filings.<sup>4</sup> Alternatively, the Commission asks whether “more aggressive enforcement” of its existing *ex parte* rules would alleviate the need for this proposed rule change and address concerns about incomplete or inaccurate summaries of oral *ex parte* presentations.<sup>5</sup>

As context, it merits noting that there is no evidence of rampant violations of the Commission’s *ex parte* rules. Rather, there is recent evidence of substantial compliance with the Commission’s *ex parte* rules. In the *NPRM*, the Commission notes that the Government Accountability Office (GAO) addressed itself in September 2007 to access to rulemaking information at the Commission.<sup>6</sup> After reviewing hundreds of *ex parte* filings in four case studies, GAO concluded that most *ex parte* filings satisfied the requirements of the

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<sup>3</sup> *Id.* ¶ 6

<sup>4</sup> *Id.* ¶ 8.

<sup>5</sup> *Id.* ¶ 11.

<sup>6</sup> *Id.* n. 13.

Commission's rules and only several of the filings appeared to be insufficient.<sup>7</sup> GAO further concluded that those engaging in oral *ex parte* presentations had an incentive "to file complete *ex parte* disclosures" since information not filed in the public record with the *ex parte* notice "cannot be used to support a rulemaking."<sup>8</sup>

Qwest does not oppose a rule change requiring the filing of an *ex parte* notice for all oral *ex parte* presentations, including those that only address arguments or data already submitted in the record by the presenter. Qwest also does not object to either summarizing in its *ex parte* notice arguments or data presented in an *ex parte* meeting that it has previously submitted in the record of the proceeding or citing to those arguments or data in comments, memoranda or other filings already in the record of the proceeding. While not opposing such a rule change, Qwest questions whether it is necessary in light of the already substantial level of compliance with the Commission's current *ex parte* rules and the Commission's ability to address noncompliant behavior through enforcement actions. The Commission's existing enforcement authority provides it with sufficient means to address the seemingly limited instances of noncompliance with its *ex parte* rules. Qwest believes that consistent enforcement by the Commission of its *ex parte* rules, in a manner that is not unduly punitive for inadvertent or minor violations but is progressive in severity for egregious or repetitive violations, is as likely to promote the filing of complete and accurate memoranda summarizing oral *ex parte* presentations as the proposed rule change.

The Commission asks "whether parties should [except with respect to exempt presentations during the Sunshine period] have two business days after making an oral *ex parte*

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<sup>7</sup> GAO, *TELECOMMUNICATIONS, FCC Should Take Steps to Ensure Equal Access To Rulemaking Information*, GAO-07-1046, at 21.

<sup>8</sup> *Id.*

presentation to make a filing rather than the current one business day.”<sup>9</sup> Qwest supports this proposed rule change. Should the Commission decide to require the filing of *ex parte* presentation notices for all oral *ex partes* as well as require that notices include summaries of, or citations to, arguments or data previously placed in the record by the presenter, the additional filing time will ensure that there is adequate time to prepare a notice that conforms to the requirements of the new rule.

The Commission proposes to continue treating status inquiries as non-presentations pursuant to Commission rule 1.1202(a).<sup>10</sup> Qwest supports this proposal.

## **II. THE COMMISSION SHOULD MAXIMIZE PARTIES’ USE OF ELECTRONIC FILING**

Qwest supports the Commission’s goal to expand the electronic filing of *ex parte* submissions by parties, as well as its ongoing efforts to enhance Commission systems to expand the ability of the public to electronically search for and retrieve non-confidential documents and data from Commission databases. While the electronic filing of *ex parte* submissions is to be strongly encouraged, if not mandated where feasible, alternatives for non-electronic filing should be retained where it is not reasonably possible or would be unduly burdensome for interested persons to file electronically. Electronic filing, search and retrieval are efficient and economical, and in virtually all instances, increase access to government and promote public participation in governmental decision-making.

Qwest supports the Commission’s proposal to amend its *ex parte* rules “generally to require that written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations in docketed proceedings be filed electronically on a Commission electronic

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<sup>9</sup> *NPRM* ¶ 10.

<sup>10</sup> *Id.* ¶ 12.

comment filing system.”<sup>11</sup> The proposed rule provides a reasonable exception to electronic filing in situations where the electronic filing of the *ex parte* presentation or summary of the oral *ex parte* presentation is not possible or would result in an undue hardship for the filer. Given the exception to ensure that circumstances making it impossible or unduly burdensome to file electronically don’t preclude an interested person from filing an *ex parte* submission, Qwest encourages the Commission to adopt this proposed rule.

The Commission expresses concern that the time currently allowed for the filing of a summary of an oral *ex parte* presentation in those limited instances where an *ex parte* presentation is permitted during the Sunshine period (by the end of the business day following the oral presentation), is too long considering that it is the end of a proceeding when final judgments are being made by decision-makers.<sup>12</sup> To address this concern, the Commission proposes to amend its rules to require that notices summarizing oral *ex parte* presentations made during the Sunshine period:

- be filed electronically within four hours of completion of the presentation;<sup>13</sup>
- be emailed or faxed to all Commission staff in attendance and all parties that have provided contact information if electronic filing is not available, unless the Sunshine notice provides otherwise;<sup>14</sup> and
- that the notice cite the exception permitting the *ex parte* during the Sunshine period and the date and time of the presentation, on the first page.<sup>15</sup>

Qwest supports the Commission’s proposal with respect to the requirement that the notices be filed electronically, or emailed or faxed to Commission staff in attendance at the presentation and all parties having provided contact information should electronic filing not be

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<sup>11</sup> *Id.* ¶ 16.

<sup>12</sup> *Id.* ¶ 19.

<sup>13</sup> *Id.* ¶ 20.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* ¶ 21.

available. The Commission does not discuss in the *NPRM* how or when parties would be required to provide their contact information so that anyone who may make an oral *ex parte* presentation during this period would have it. That would have to be worked out in order to implement the proposed rule. Qwest also supports requiring a citation to the exception permitting the *ex parte* presentation during the Sunshine period, and the date and time of the presentation, on the first page of the notice. Qwest is concerned, though, that filing (or emailing/faxing) the notice within four hours of the presentation may provide insufficient time for the preparation of the notice, especially if a substantial amount of information and data must be included in the notice in order for it to be accurate and complete. Qwest believes that eight hours is a more reasonable time period in which to file the notice.

### **III. NARROWING THE SUNSHINE PERIOD EXCEPTION FOR REQUESTED *EX PARTE* PRESENTATIONS IS UNNECESSARY**

The Commission requests comments on the exception to the current restrictions on *ex parte* communications during the Sunshine period for “presentations ‘requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence, or for resolution of issues, including possible settlement.’”<sup>16</sup> It asks whether the exception should be narrowed to prohibit solicitations by outside parties of requests for *ex parte* presentations from the Commission staff during the Sunshine period.<sup>17</sup>

Qwest believes that narrowing the exception by prohibiting outside party solicitations for requests for presentations would be counter-productive. In those instances where Commission staff is unaware of the existence of important information in the possession of an outside party and would not independently solicit a presentation, it would unnecessarily limit Commission

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<sup>16</sup> *Id.* ¶ 23.

<sup>17</sup> *Id.*

access to information that could aid in achieving an outcome that best serves the public's interest. While Qwest appreciates the concern that this exception is capable of being abused, the decision on whether to request an outside party presentation during Sunshine rests with Commission staff, and Qwest is confident that the exercise of good judgment by the Commission's staff in responding to solicitations for such presentations is a sufficient safeguard against attempted abuses.<sup>18</sup> To the extent that abuses of the exception are brought to the attention of the Commission, Qwest believes that the problem can better be addressed through the targeted coaching and training of staff rather than through the proposed modification of the rule.

The Commission proposes to modify rule 1.1203(b) to establish midnight after a Sunshine notice release as the commencement of the Sunshine period for the purpose of prohibited *ex parte* communications.<sup>19</sup> Qwest supports this proposed modification. It alleviates the need for outside parties to determine the actual time of day of a release, eliminates the preemption of presentations scheduled on the day of a release, and creates a clear, objective demarcation point for the cessation of *ex parte* presentations, absent a codified exception.

#### **IV. A MORE COMPELLING REASON SHOULD EXIST BEFORE DISCLOSURE STATEMENTS ARE REQUIRED**

The Commission states that it is "interested in whether the ability of both the Commission and the public to evaluate the positions taken in Commission proceedings would be improved if parties provided more information about themselves and their interests in the proceedings."<sup>20</sup> It asks for comment on the desirability of requiring filers to submit disclosure statements with their filings in all Commission proceedings and offers three examples of

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<sup>18</sup> Absent evidence to the contrary, Qwest believes that good judgment is being exercised by Commission staff.

<sup>19</sup> *NPRM* ¶ 25.

<sup>20</sup> *Id.* ¶ 27.

disclosure requirements for consideration as possible models for the Commission – Supreme Court Rule 29.6, Rule 26.1 of the Circuit Rules for the U.S. Court of Appeals for the D.C. Circuit, and the Lobbying Disclosure Act’s requirement that registered federal lobbyists disclose certain of their clients. The Commission acknowledges that greater disclosure requirements might discourage participation by some entities in its proceedings.<sup>21</sup>

Qwest has no objection in principle to the Commission requiring parties in all of its proceedings to disclose relevant information about who they are, or if acting in a representative capacity, who they represent. It is unclear to Qwest, though, precisely what the Commission is attempting to ascertain about parties through a disclosure statement and how that information would be used to evaluate the credibility of a party’s arguments or data.

As noted by the Clerk of the Supreme Court in commentary to revised Supreme Court Rule 29.6 “Rule 29.6 has been revised to identify interests sufficient enough to cause a Justice’s recusal. . . . It is patterned on the recently adopted Rule 26.1 of the Federal Rules of Appellate Procedure.”<sup>22</sup> The rationale for disclosure in the Supreme Court and the federal appellate courts is clearly understood. In matters before these courts, Justices/judges are required to recuse themselves if they have a conflict of interest, and ascertaining certain information about the parties through a corporate disclosure statement assists in the identification of disqualifying conflicts. In the context of lobbying and the Lobbying Disclosure Act (LDA), not everyone who engages in lobbying a member of Congress or covered member of the Executive Branch is required to register as a lobbyist and thereby become subject to the disclosure requirements of the LDA. Only those that spend a certain percentage of their time engaged in lobbying are

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<sup>21</sup> *Id.* ¶ 29.

<sup>22</sup> Clerk’s Comment to Revisions to Rules of the Supreme Court of the U.S., effective May 3, 1999 (<http://www.law.cornell.edu/rules/supct/99rulechanges.htm>).

required to register and file the required lobbying disclosures. The disclosure is required to permit the public and those being lobbied to know who is paying professional lobbyists significant compensation to present their positions.

As stated above, Qwest has no objection in principle to the Commission requiring parties to Commission proceedings to file disclosure statements where there is a likely benefit to the decision-making process arising from the disclosure. Nothing presented in the *NPRM* convinces Qwest that either the process or outcome in Commission proceedings will benefit from mandatory disclosure statements by all parties in all Commission proceedings. Qwest would encourage the Commission to not move forward with this proposed rule until a more compelling rationale for its adoption can be presented for consideration and comment, particularly if the Commission has a concern about such a requirement discouraging some entities from participating in Commission proceedings.

**V. NEW MEDIA SHOULD BE EMPLOYED IN WAYS THAT ENHANCE THE DEVELOPMENT OF A COMPLETE AND ACCURATE RECORD**

The Commission offers no proposed rule concerning the use of new media technologies (such as “blogs, Facebook, and IdeaScale”)<sup>23</sup> in the *NPRM* but asks for general comments on its use in Commission proceedings. New media technologies have the potential to open the operation of the Commission to many citizens who feel disconnected from governmental decision-making that affects them on a daily basis. It is appropriate that the Commission be in the forefront of the utilization of new media technologies as a means to stay connected with the public. Still, the role of new media technologies in Commission proceedings must be addressed carefully in order to avoid undermining the integrity of the Commission’s decision-making processes. While all that wish to participate in Commission proceedings should be enabled to do

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<sup>23</sup> See *id.* ¶ 33.

so, there remains a need to know who is participating in Commission proceedings and who is influencing Commission decision-making. The *ex parte* rules play a critical role in ensuring that all who attempt to influence the decision-making process disclose their efforts. New media technologies should not be permitted to be used as vehicles to circumvent the *ex parte* rules. To the extent that new media technologies can be used to enable greater public participation in Commission proceedings and other aspects of the Commission's operation, it should be encouraged. It should be done, though, in a manner that is fair, transparent and facilitates orderly and efficient decision-making.

## VI. CONCLUSION

Overall, the modifications proposed by the Commission to its rules support its goal of improving the transparency and effectiveness of Commission decision-making. Qwest supports this goal and most of the proposed rule changes. Qwest urges the Commission to move cautiously in determining its use of new media technologies in Commission proceedings in order to avoid circumvention of the *ex parte* rules. Qwest also recommends that the Commission retain the current exception to the Sunshine period restriction on *ex parte* presentations for those presentations made pursuant to a request from the Commission or its staff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST CORPORATION** to be: 1) filed with the FCC via its Electronic Comment Filing System in GC Docket No. 10-43; and 2) served via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com).

/s/ Richard Grozier

May 10, 2010