BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

REPLY COMMENTS OF FREE PRESS

I. Introduction

Meaningful *ex parte* disclosures provide substantial value to the public. Free Press participates actively in a wide range of agency proceedings and has filed hundreds of notices of ex parte communication. Based on our experience, the burden of filing *ex parte* notices is minimal, and the value to the public of transparent processes – particularly when *ex parte* presentations contain original arguments or material – greatly outweighs the burden.

Many of the proposed rule changes are straightforward, valuable, and long overdue. We therefore focus on two aspects of the proposed rules that can help level the playing field for advocacy between large incumbent telecom companies (who can afford to hire professional lobbying firms) and smaller organizations, whether corporate or public interest. First, we offer comments on the proposed sanctions for violations.[1] An effective scheme for sanctions will strike the proper balance between enforcing *ex parte* rules and encouraging participation from a broad range of voices.

[1] *Id.* at para. 32. *See* Comments of NASUCA at 9-10; Comments of AT&T at 6; Comments of NTCA at 6.

Second, we strongly support the Commission's proposal to include disclosure obligations as part of the *ex parte* process.[2] Many commenters filing in the initial round support disclosure obligations, in at least some respects.[3] Free Press supports mandatory disclosure of all financial contributions directed to funding Commission advocacy activity, in all its forms. Without such disclosure, it may be greatly unclear whether advocacy is driven by the general public good, or by specific special interests; in the worst case, this can undermine the Commission's responsibility to shape communications policy for the benefit of the public. The Commission should consider the imposition of disclosure obligations not only in *ex parte* proceedings, but also in comments and all other filings before the Commission.

II. Sanctions

Free Press supports the Commission's proposal to place greater emphasis on the enforcement of *ex parte* rules.[4] Appropriate sanctions under appropriate circumstances, including both monetary forfeitures and disqualification from further participation in a proceeding, should be used to discourage incomplete *ex parte* notices and other rule violations.[5] However, to promote a level playing field for advocates, the Commission should favor disqualification, other equitable remedies, or variable fines tailored to organizational size. There is no fixed amount of monetary forfeiture that will be simultaneously large enough to be a

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[2] *Amendment of the Commission's* Ex Parte *Rules and Other Procedural Rules*, Notice of Proposed Rulemaking, GC Docket No. 10-43 (rel. Feb. 22, 2010), at paras. 27-31 (*Notice*).
[3] *See* Comments of NTCA at 9-10 ("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."); Comments of Verizon and Verizon Wireless at 4-5 ("The Commission should require filers to provide a disclosure statement in connection with their filings."); Comments of the National Association of State Utility Consumer Advocates (NASUCA) at 2, 5-6 (supporting disclosure of representations of interest in *all* filings, not merely *ex parte* presentations).
[4] *Notice* at para. 32.
[5] *See* Comments of NASUCA at 9-10.

meaningful deterrent for corporations with multibillion-dollar revenues and yet small enough not to cripple a non-profit organization.

Further, sanctions should be designed so as not to dissuade or scare away new participants. The Commission has taken great strides to encourage participation from a broad range of individuals and organizations through its recent new media work, including blogs and a process of including blog comments in official proceedings. To avoid undermining these efforts and inadvertently discouraging further participation from smaller entities, the Commission should include in its rules a clear system of warnings and/or opportunities to correct incomplete *ex parte* notices belatedly before assigning penalties, whether injunctive or pecuniary.

In general, *ex parte* sanctions should focus on willful or repeated infringers, and infringers from Commission-regulated businesses and law firms representing them. A primary purpose of transparency in agency processes is reducing the chance of agency capture, excessive influence on an agency by the targets of its authority, as this can undermine Congressional intent. To ameliorate this danger, transparency must be particularly protected for those interactions between an agency and its regulated businesses, as opposed to casual, part-time participants.

III. Disclosure Obligations

Free Press also supports the Commission's proposal to include disclosure as part of the *ex parte* process. Greater disclosure obligations are needed to promote democratic participation in governmental processes. Specifically, transparency will help limit confusion over groups that purport to be representatives of the public interest, yet advocate at the Commission on behalf of industry interests that pay them specifically for their advocacy work – so-called "astroturf"

groups.[6] As the public stature and prevalence of astroturf groups increases, their participation in Commission proceedings creates problems for both the Commission and the public: The Commission receives imperfect information about the interests of the groups before it, and as a result, policymaking may suffer. Free Press, among other groups,[7] has been concerned by the growing amount of Commission advocacy by organizations funded primarily or solely by industry interests – even funded specifically for their pro-industry advocacy work – actively lobbying in favor of the policy positions of their funders while purporting to be independent representatives of the public interest.[8] Although we would prefer the names of these groups to be less deliberately misleading,[9] all have a right to participate in Commission proceedings, regardless of their funding source. But organizations whose Commission activity is funded primarily or solely by incumbent industry contributions should be identified as such, particularly when they participate in proceedings in defense of those same companies.

Lobbying resources available to the public fall far short of the vast amounts spent by incumbent regulated businesses. The largest broadband and wireless service providers have

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[6] *See, e.g.*, "Astroturf: Exposing the Fake Grassroots," Free Press, at http://www.freepress.net/astroturf.

[7] *See, e.g.*, "Net Neutrality in One Page – A Rebuttal," Public Knowledge, at http://www.publicknowledge.org/node/451 ("Sites have sprung up around the Internet (many sponsored by phone and cable companies), acting as "astroturf" sites - coalitions that appear to be grass-roots in nature and composed of a "nationwide coalition of Internet users" (HandsOff.org)."); "Wolves in Sheep's Clothing, Part II," Common Cause, at http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/WOLVESPART2.PDF.

[8] Free Press is a non-profit, non-partisan organization; our funding comes from individuals and foundations, and we accept no money from organizations with a stake in our work. Our annual reports and IRS Form 990s are available on our website at http://www.freepress.net/about_us/annual_reports.

[9] Consider two of the organizations highlighted at Free Press's astroturf site, groups known for taking substantial contributions from industry participants and then aligning their advocacy with them: the American Consumer Institute, and the Institute for Policy Innovation. Neither of these names reveals the organizations' industry bias.

spent approximately $873 million lobbying since 1999, well over double the FCC's annual budget.[10] Although the Commission cannot remedy the fundamental disparity in lobbying resources, its proposals for disclosure obligations, if properly designed, can mitigate the effects of this inequality by clearly distinguishing filers representing only the public interest from those representing incumbent corporate voices.

The Commission has proposed two models for possible disclosure obligations: federal court rules requiring disclosure of corporate ownership and control and rules from the Lobbying Disclosure Act (LDA) requiring disclosure of financial contributions.[11] In many cases, rules regarding ownership disclosure in Commission proceedings will not aid the public: Astroturf organizations are often structured as independent organizations that receive ongoing or per-project funding from industry, rather than anything resembling an equity stake. However, properly-designed LDA-style rules of mandatory disclosure of contributions can provide much needed transparency.

Many options for LDA-style rules could suffice to create meaningful transparency in this space. As one example, the Commission could require disclosure by filers of any contributing for-profit organizations that offer services regulated by the Commission or otherwise have business with the Commission, if the contribution exceeds a certain fixed amount or if the contribution was specifically made for purposes of the filer's participation in specific Commission proceedings. Under such rules, disclosure statements indicating all contributing organizations would be attached to all written *ex parte* notices and delivered as part of *ex parte* presentations by the recipient organization.

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[10] John Dunbar, "Industry lobbying keeps public in the dark about broadband," American University School of Communications, Investigative Reporting Workshop (Mar. 12, 2010).
[11] *Notice* at para. 28.

LDA-style rules would avoid the complexities that might arise from other forms of rules. For example, court-style corporate ownership or affiliation rules might raise problems for trade associations.[12] Businesses or trade associations of businesses are clearly advocating for their own interests; there is no secret influence present. To serve the purpose of advancing democratic processes, disclosure rules should be designed to ferret out hidden financial interests, rather than to repeat the obvious. And in general, disclosure rules focused on contributions would not apply to individuals filing solely in their own interest.[13] However, individuals who receive specific funding to participate in a proceeding – such as a subject matter expert who files with the FCC a study or report, if paid for the project – would need to comply with such rules.

This type of disclosure is not without Commission precedent. The reports previously filed through the Automated Reporting Management Information System (ARMIS) included similar substance (though delivered by the contributor rather than the recipient). Table I-7 within report 43-02 required ILECs to disclose donations or payments above a certain monetary level. This table was entitled "Donations or Payments for Services Rendered By Persons Other Than Employees." These public disclosures included payments for external services such as written or oral advocacy efforts. Most relevant for the present context is the section on "Membership Fees and Dues." This section required disclosure of funding to a variety of entities including non-profits, chambers of commerce, universities, and others. For instance, a Pacific Bell filing for the year of 1994 disclosed contributions to groups including the Alliance for

[12] *See* Comments of NTCA at 9-10.
[13] *See* Comments of NASUCA at 6.

Public Technology and the Asian Business Association,[14] groups which remain active in Commission proceedings.[15]

ARMIS reports offer not merely precedent for this disclosure, but also evidence of its value. Early reports offer the most evidence due to changes in the reporting threshold. For more recent reports, the Commission raised the reporting threshold from $10,000 to amounts larger than $50,000, resulting in far fewer disclosures despite no evidence of reduced advocacy activity or expenditures.[16] Likely, the circumstances have worsened since early ARMIS reports, yet changes to these disclosure rules (and to ARMIS reports themselves) have eliminated the only direct source of information for the Commission and the public on sponsored advocacy.

The only party to oppose LDA-style rules in initial comments, AT&T, somehow manages simultaneously to make a compelling case *in favor of* such rules.[17] As AT&T explains, the purpose of the LDA is "to maintain the integrity of a basic governmental process."[18] According to AT&T, governmental officials benefit from LDA disclosures by knowing "whether the lobbyist is in fact promoting the general good or is in fact seeking to further a narrow special interest."[19] AT&T's doubt over the potential benefits of such rules, in light of these arguments, is puzzling. Commission administrative rulemaking proceedings, like Congressional legislative activity, are "basic governmental processes" in that they can result in the development of binding

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[14] Pacific Bell, FCC Report 43-02, ARMIS USOA Report, Period Jan 1994 to Dec 1994, Table I -7, p. 16 ("Pacific Bell Report").
[15] *See e.g.* Comments of Alliance for Public Technology, In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51 (Nov. 13, 2009); Comments of Asian Business Association, In the Matter of *Preserving the Open Internet*, GN Docket No. 09-191 (Jan. 13, 2010).
[16] *See e.g.* Pacific Bell Report; Instructions for FCC Report 43-02, ARMIS USOA Report, December 1998, p. 141 (Adopted by the Commission in CC Docket No. 86-182).
[17] Comments of AT&T at 3-5.
[18] *Id.* at 4.
[19] *Id.*

laws. Whether before Congress or the Commission, illegitimate advocacy can influence a basic government process. This is exact context for which LDA-style rules would be beneficial and would improve government integrity, by identifying whether a party making an *ex parte* presentation is representing the "general good" or "a narrow special interest."

In administrative processes, hidden contributions and expenditures can empower well-financed incumbents to secretly drown out the voice of new entrants, competitors, and the public, allowing them to shape public policy for private gain. Such a result is antithetical to good government, and to the Commission's emphasis on transparent, data-driven policymaking.

Respectfully submitted,

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