

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

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

COMMENTS OF FREE PRESS

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SUMMARY

The Further Notice of Proposed Rulemaking in this proceeding seeks comment on the disclosure of real parties-in-interest for Commission filings. The Commission states that a suitable disclosure requirement would serve the public interest, and seeks comment on how to structure such a rule to improve the knowledge of such interests for other parties and the public, without creating excessive compliance burdens.

Free Press applauds the Commission for recognizing the existence of hidden conflicts of interest and the value of greater disclosure for bringing these conflicts to light. These conflicts are significant, and impact every major Commission proceeding, including the proposed merger of AT&T and T-Mobile. No individual or organization should be prevented or unnecessarily deterred from participating in any Commission proceeding. But participants with material conflicts should be required to disclose them to help ensure that Commission processes remain open and transparent.

Reasonable rules would require organizations with material conflicts to include clear and comprehensive disclosure statements describing their relationships with real parties-in-interest as part of any and all filings made in Commission proceedings. Such a disclosure requirement would significantly improve transparency without imposing undue burdens. Centralized or distributed publication of conflict information not included within individual filings would fall short on both these criteria, as such publications would not provide the same level of detail with the same accessibility, and yet would require greater effort from many parties.

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Introduction

The central question at issue in this *Further Notice* is “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 interest in the proceeding.”¹ To this question, the Commission appears to have already answered in the affirmative: “[W]e believe it would serve the public interest to have a disclosure requirement ... without imposing undue burdens on the disclosing party or requiring duplicative filing of information already generally available from another source.”²

Free Press applauds the Commission for recognizing the existence of hidden conflicts of interest and the value of greater disclosure for bringing these conflicts to light. Numerous organizations that participate actively in Commission proceedings have real or potential conflicts as a result of contributions they receive from parties-in-interest in those same proceedings. In some instances, these conflicts shape the advocacy and message of an organization, reflecting the interest of its contributors rather than the interest of the organization itself or its constituents.

No individual or organization should be prevented or unnecessarily deterred from participating in any Commission proceeding. But participants with material conflicts should be required to provide full disclosure of such conflicts, to help ensure that Commission processes can remain open and transparent. In practice, participants often

¹ *Amendment of the Commission’s Ex Parte Rules and Other Procedural Rules*, GC Docket No. 10-43, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-11, ¶ 37 (rel. Feb. 2, 2011) (*Order and Further Notice*).

² *Id.* ¶ 80.

fail to provide sufficient information voluntarily. Observers sometimes can follow the money trail, but only with significant effort. At present, journalists are beginning to turn up evidence of clear but undisclosed conflicts in the alleged grassroots support for the proposed AT&T acquisition of T-Mobile. But so long as identification of these conflicts requires substantial effort by concerned individuals and the press, their harmful and too often non-transparent impact on governmental processes will remain.

As the Commission itself has suggested, reasonable rules requiring disclosure of material conflicts are warranted to address these concerns.³ Such rules should require organizations with material conflicts to include clear and comprehensive disclosure statements as part of any and all filings made in Commission proceedings. Suitable disclosure requirements would not be unduly burdensome to filers, as they would be based on information that many filers are required to keep and would involve no additional or mandatory filings.

I. The Need for Disclosure is Great.

A. Current disclosures do not clearly inform the public, other parties, or the Commission of conflicts of interest.

Even though the Commission has determined that disclosure requirements would be helpful, opponents of oversight and transparency will no doubt reiterate in this round their previous arguments, asserting that the Commission is mistaken and that no action is needed. But a growing volume of evidence of such conflicts belies these arguments and illustrates the existence of material, hidden conflicts of interest in advocacy before the Commission. Regulated entities with significant vested interests in Commission

³ *Id.*

proceedings routinely make cash donations to outside organizations, either directly or through closely-allied foundations or other affiliates.⁴ The recipients then file supportive public statements with the Commission, generally without discussing the contributions they have received or providing any indications of potential conflicts of interest.

The scope of potential conflict is broad, and as a result, disclosure obligations should be broad to match. Instances of explicit *quid pro quo* are likely extremely rare. But an ongoing relationship of financial support quite obviously *could* influence an organization, whether or not it does in any particular instance.⁵ That is precisely the point of requiring greater disclosure: the public, other parties, and the Commission have the right to know about such relationships because of the potential for conflicts of interest.

The *Further Notice* seeks comment on whether existing sources of information suffice to bring conflicts to light.⁶ Adequate disclosure of contributions and other conflicts is not customarily included in any FCC filings. Some parties assert that adequate information is available through public sources, including the Internet.⁷ These assertions are wrong. *Some* information on financial contributions is publicly accessible, and journalists are beginning to track down this information. However, as one filer in this proceeding noted: “Sometimes all the clicking in the world will not reveal the truth.”⁸

⁴ See, e.g., Eliza Krigman, “AT&T gave cash to merger backers,” *Politico* (June 10, 2011), available at <http://www.politico.com/news/stories/0611/56660.html>.

⁵ Organizations routinely disclaim any influence as a result of contributions. Free Press does not here seek to challenge any individual organizations on the veracity of such assertions.

⁶ *Order and Further Notice* ¶ 83.

⁷ E.g., *id.* ¶ 77.

⁸ Reply Comments of the National Association of State Utility Consumer Advocates, GC Docket No. 10-43, at 5 (filed June 8, 2010).

More importantly, even in circumstances where exhaustive Internet searches or consultation of databases and tax documents can reveal conflicts, such effort should not be necessary, as it undermines the effectiveness of disclosure. Commission staff, congressional staff, and the media – all of whom are key audiences for Commission filings – have enough work to do as it is, without being required to invest the time and effort to determine whether a filer has any conflicts that influence its position. As a result, the transparency benefits of hard-to-locate information are greatly reduced, at best, compared to the benefits of a more transparent process directly before the Commission.

B. Conflicts of interest are at work even now in the proposed acquisition of T-Mobile USA by AT&T.

Major Commission proceedings routinely include participation by organizations with significant potential conflicts of interest. Participation by entities with these potential conflicts shapes public conversation and political processes. Conflicts of interest have already made their mark on the AT&T/T-Mobile merger review process, as AT&T has relied upon various organizations' endorsements to promote the transaction's supposed benefits. AT&T contends that its proposed merger has strong public support, "perhaps the broadest, deepest range of public interest support ever filed at the FCC in support of any transaction."⁹ Such assertions are, quite frankly, ludicrous. Reports informally tabulating public comment on the merger suggest ratios as large as 28 consumer comments against the merger for every single comment supporting it.¹⁰ Yet

⁹ Jim Cicconi, "Merger Support Strong... Growing," AT&T Public Policy Blog (May 31, 2011), at <http://attpublicpolicy.com/wireless/merger-support-strong-growing/>.

¹⁰ See Kristi E. Swartz, "AT&T T-Mobile deal gets support from Georgia leaders but not consumers," *Atlanta Journal-Constitution* (June 14, 2011), available at <http://www.ajc.com/business/at-t-t-mobile-976884.html>.

these assertions go beyond ludicrous and become blatantly misleading if any of the supposed support is bought and paid for.

Politico has recently reported that some organizations that support the AT&T/T-Mobile merger have received substantial contributions from AT&T.¹¹ Such organizations may be well-staffed and capable of coming to independent judgments on the merits of the proposed merger, but it is important for decision-makers and other parties alike to know that these organizations are receiving financial contributions from a merger applicant and then advocating on behalf of that merger.

Moreover, even more problematic than participation by legitimate public interest organizations that receive support from other parties-in-interest is participation by “astroturf”¹² telecommunications organizations: groups focused specifically on broadband and telecommunications policy that purport to serve the public interest, and yet are predominantly funded by regulated entities and consistently supportive of such entities’ agendas. One example of such an organization is the Internet Innovation Alliance (IIA). The filing by IIA in the AT&T/T-Mobile merger docket states that the purpose of the group is “to promote policies that ensure every American, regardless of race, income or geography, has access to the benefits of broadband.”¹³ In a separate statement attached to that filing, IIA is described thus: “Founded in 2004, the IIA is a

¹¹ Krigman, *supra* note 4.

¹² The term “astroturf” refers to organizations that hold themselves out as representatives of the public’s interest – often purporting to be “grassroots” organizations whose decisions are made from the bottom up – but that in reality are top-down organizations paid for and controlled by industry interests.

¹³ Letter from Bruce Mehlman, Internet Innovation Alliance, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 11-65 (filed Apr. 20, 2011).

broad-based coalition supporting public policies that harness the power of innovators and the market to bring broadband to all Americans including the underserved, communities of color and citizens in rural areas.” These two descriptions parrot the words and phrases used by legitimate public interest and grassroots groups to describe their advocacy.

But IIA is not a grassroots coalition. IIA counts AT&T as one of its members and appears to depend heavily on AT&T’s financial support for its ongoing operation. IIA, like many other organizations, does not clearly disclose its conflicts. In a very few places on its website and elsewhere, IIA notes that AT&T is a member organization of the alliance.¹⁴ However, being part of an alliance is categorically different from providing a large percentage of its funding or controlling its messaging. Furthermore, nothing in the group’s *ex parte* letter itself notes the conflict. The letter provides only the name of the group’s executive director, Bruce Mehlman, without mentioning any potential or actual conflicts for either IIA or Mr. Mehlman himself.

Not all organizations supporting the merger have received compensation or promises of compensation from AT&T. However, this does not detract from the merits of transparency as one antidote for conflicts of interest. Moreover, such a requirement would not discourage participation by groups who express their support for the merger solely out of a genuine belief that it will help the public, because any such filers could be recognized as free from suspicions of potential conflict due to contributions.

¹⁴ The letter filed in Docket 11-65 states both “According to the merging parties (including IIA member AT&T)” and “The IIA includes members such as Alcatel Lucent, AT&T, Ciena, The National Black Chamber of Commerce and The National Grange.” *Id.*

II. Filers with material conflicts should include clear and comprehensive disclosure statements in all FCC filings.

The *Further Notice* seeks comment generally on what disclosure rules would best balance the interest of increasing transparency and avoiding undue compliance burdens.¹⁵ Appropriate rules would require disclosure by filing organizations of material conflicts, which arise with the receipt of substantial or targeted monetary contributions as well as targeted non-monetary contributions made by an interested party in Commission proceedings. Disclosure statements should be included in each relevant filing, as part of the same document in which the filer submits its presentation on the matters before the Commission. Disclosure obligations should apply to all filings, including notices of *ex parte* presentations, comments, reply comments, petitions, and any other document filed with the Commission, whether in permit-but-disclose or exempt proceedings.

Model disclosure rules cited in the original *Notice* and referenced in the *Further Notice* include Supreme Court Rules 29.6 and 37.6, Rule 26.1 of the Rules for the U.S. Court of Appeals for the D.C. Circuit, and the Lobbying Disclosure Act.¹⁶ These models are instructive but ultimately may be insufficient to address the unique problems arising in Commission proceedings. Court disclosure rules are often linked to partial corporate ownership, which offer no help in identifying many conflicts of interest in Commission filings. Lobbying Disclosure Act rules come closer, and involve a broader scope of contributions, so that modified rules broadly similar to current LDA rules could suffice.¹⁷

¹⁵ *Order and Further Notice* ¶ 80.

¹⁶ *Id.* ¶ 82.

¹⁷ Reply Comments of Free Press, GC Docket No. 10-43, at 5-6 (filed June 8, 2010) (Free Press Reply Comments).

An example of disclosure rules closer to home might prove even more useful, however: the original ARMIS disclosures.¹⁸ ARMIS gathered detailed financial and operational data from local exchange carriers. Though many of the disclosure requirements have been modified or removed in recent years,¹⁹ these obligations required local exchange carriers to disclose charitable contributions to organizations in excess of a given threshold.²⁰ However, the transparency problems that this proceeding seeks to remedy are more appropriately solved through disclosure by the recipient of the contributions, rather than by the contributor as ARMIS reports required.

The rules Free Press proposes would not create significant burdens for any parties. Contributing organizations would face no burdens whatsoever. Recipients of material contributions, whether monetary or non-monetary and whether general or targeted, would be required to track their received contributions to be appropriately included in any Commission filings. Many of these recipients are nonprofit organizations that already track their contributions for IRS purposes; as a result, the effort needed to include the information in documents already being prepared by the organization for a Commission filing should be minimal. Furthermore, no new filings are needed to comply with the disclosure requirement under the proposed rules, because additional language is added to filings that the organization already would be preparing. For the same reason, no entities are *required* to comply with the rules – the rules apply only if and when an organization voluntarily chooses to file a public document with the Commission.

¹⁸ *Id.* at 6-7.

¹⁹ See ARMIS Data Descriptions, Federal Communications Commission, *at* <http://transition.fcc.gov/ccb/armis/descriptions.html> (last visited June 14, 2011).

²⁰ Free Press Reply Comments at 6-7.

A. Filers with material conflicts must be subject to disclosure obligations.

Organizations that receive substantial or directed contributions from interested parties and subsequently file in a proceeding at the Commission should disclose the contribution in that filing, as it may give rise to a material conflict. The potential for a conflict of interest can occur whether the contribution is monetary or non-monetary. Conflicts can occur with substantial general monetary contributions to an organization; with targeted monetary contributions of any amount, if the contribution is directed to pay for the costs of filing or if the contribution is a *quid pro quo* for the filing; and with nonmonetary contributions, such as a third party providing part or all of the text of the filing. All types of independent organizations, associations, and alliances should be required to report all such contributions and material conflicts.

Organizations, groups, and associations who receive material contributions from interested parties should disclose those contributions. All individuals, organizations, associations, and groups should have a presumptive right to participate in Commission proceedings, regardless of their sources of funding.²¹ Material conflicts should not prevent anyone from participating, nor cause their filings to be classified separately from the filings of other organizations. However, such conflicts should be clearly disclosed in any and all written filings, so that the Commission, other participants in the proceeding, and the general public are made well aware of any third parties whose interests potentially are reflected in the filings. The Commission should adopt rules that require disclosure of all material contributions made by an interested party to any organization,

²¹ *Id.* at 4. An exception to this right should apply to filers who have violated various Commission proceeding rules and received sanctions that prohibit further participation in specific proceedings.

group, or association whether operating as a nonprofit or for-profit entity.

Only material contributions made by a regulated entity or other party-in-interest for Commission activity should be disclosed by the recipient of such contributions.²² Interested parties to Commission activity include businesses that offer services regulated by the Commission; businesses that have a significant financial stake in Commission regulatory activity; and other organizations with close ties to such businesses.²³ Filers subject to disclosure rules should include organizations, associations, and other informal groups, whether operating as for-profit or nonprofit entities.²⁴ Generally, individual filers need not be subject to disclosure obligations unless they receive specific funding to participate in a proceeding,²⁵ a relationship frequently disclosed already in Commission proceedings by having the individual file an expert declaration attached to the filing of the expert's paying client. The core problem of hidden conflicts arises in the context of organizations and groups that purport to serve a general public purpose, yet receive funds from industry to serve narrow industry goals. Consequently, the scope of potential filers should be broadly interpreted to include all possible organizations, with few exceptions.

²² *See, e.g., id.* at 5 (“[T]he 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....”).

²³ *Id.* Nonprofit associations closely tied to for-profit businesses that would be included within these rules – such as the AT&T Foundation or Google.org – should be presumed to constitute an interested party for purposes of these rules. The Commission could make an exception to this presumption if documentation can be provided that indicates a clear division between the organizations. However, in some corporate structures, such divisions are impossible. For example, AT&T's chief lobbyist Jim Cicconi is also the head of the AT&T Foundation, and certainly should be presumed to take his corporate employer's interests into account when awarding foundation money to recipients.

²⁴ *Id.* at 4.

²⁵ *Id.* at 6.

B. Material conflicts include monetary and non-monetary contributions that are either significant in themselves or directed specifically towards participation in Commission proceedings.

The *Further Notice* seeks comment on requiring disclosure by nonprofit organizations funded by contributions, by organizations for which a third party pays for the preparation of a filing, and by organizations that file a comment written or otherwise provided by a third party.²⁶ Whether financial or substantive, such contributions certainly can create a material conflict of interest if they create a situation in which the filing organization would suffer cognizable harm from taking a position opposite to that of its benefactor.

Material contributions include monetary and non-monetary contributions that fund a third party's Commission advocacy activity.²⁷ Material contributions that trigger material conflicts fall into two categories: *substantial* contributions, and contributions that are *targeted* to a specific advocacy activity.²⁸ Substantial contributions are large monetary contributions made to an organization and used for its overall operating expenses, particularly contributions so large that the recipient organization would be significantly impaired in its operations if the contribution were to be withdrawn or not renewed. Targeted contributions can take the form of specific monetary contributions to an organization, or written work product that is written by an interested party and given to a third party to file with the Commission in the third party's name. With a substantial or a targeted contribution, the recipient organization has reason to undertake activity that it might not otherwise enter into, and it could suffer harm if it chooses to take a policy

²⁶ *Order and Further Notice* ¶ 82.

²⁷ Free Press Reply Comments at 2.

²⁸ *Id.* at 5.

position not in line with its benefactor's position. Consequently, such contributions should be considered material for the recipient organization's Commission activity.

Contributions to the ongoing operating expenses of an organization create a linear range of material impact on the behavior of that organization, depending in part on the level of the contribution. Some organizations, such as the Internet Innovation Alliance, likely receive a majority of their funding from direct contributions from AT&T and other industry participants. These contributions are certainly material – IIA has yet to take a position that of which its chief benefactor AT&T would not approve, and is unlikely to do so. Other organizations may receive contributions from industry participants that are not tied to advocacy activity and not at a scale where the contribution is likely to influence the work of the recipient (who may also receive funding from a broad range of private sector organizations as well as large foundations and individual donors). Often, such contributions are tied to sponsorship of the public events of the recipient, and the sponsoring organization is clearly labeled as such. In these situations, the contributing organization receives positive advertising value from the sponsorship, and the purpose of the contribution is likely not to shape or influence the activity of the recipient.

Targeted contributions – whether monetary or non-monetary – create a higher burden of disclosure. Any organization that prepares a filing at the expense of an interested party, accepts a financial contribution in exchange for engaging in specific advocacy activity, or files a comment or other written document in its own name when the material was prepared by an interested party, should be required to disclose such a conflict. A similar requirement currently applies to some court proceedings: rule 29(c)(5) of the Federal Rules of Appellate Procedure. FRAP Rule 29(c)(5) requires non

governmental amicus curiae filing amicus briefs in federal appellate courts to provide a statement indicating whether the brief was authored in whole or in part by counsel to a party in the case, and whether a third party (particularly a party to the case) made a financial contribution that was intended to help pay for the filing. The proposed disclosure rule would exceed FRAP 29(c)(5) only in that there are not often equivalents for “parties” in Commission proceedings, and as a result, disclosure should be required if any third party authored the filing in whole or in part.

Suitable disclosures should also be made if a filing is undertaken with the promise or clear expectation of a subsequent contribution by an interested party, if there are oral or written assertions of a *quid pro quo*. Although such a requirement may prove difficult to enforce, the efficacy of a rule requiring disclosure would be greatly undermined if interested parties could direct organizations to file pro-industry comments or notices of *ex parte* presentations or communications, and then pay the filers after the fact without disclosure. Without such a forward-looking conflict rule, interested parties or enterprising individuals could create shell corporations using *de minimis* corporate funding (or even personal funds), prepare and file comments and other filings without disclosing conflicts, and then receive after-the-fact “charitable contributions” from allied industry players. If the Commission’s rules cover written or express oral promises of future compensation as well as contributions already received, even such worst-case scenarios circumstances can be included within the scope of the rules.

- C. Disclosure of each material contribution, including the identity of the contributor and the nature of the contribution, should be made within each affected filing.**

The *Further Notice* seeks comment on the process for suitable disclosure,

including whether the Commission should collect disclosure statements within a centralized database, or whether disclosure on an entity's website is sufficient.²⁹ Both of these options would be poor choices for disclosure requirements, as they fail both of the Commission's stated criteria: They would fail to provide adequate disclosure of conflicts, and they create too large a burden for compliance. A more effective, and less burdensome, solution is to require disclosure in each filing. Maximum transparency value at minimum compliance cost would be achieved with disclosure on an early page of a filing, in plain text, either as part of a cover page or as part of a description of the interest of the filer.

Commission centralized databases or individual entity websites would fail to provide the same level of reliable, up-to-date transparency. A Commission database would require collection, standardization, and formatting of submitted disclosure documents, which could introduce delays and compliance costs. Updating websites may require payment of fees to independent website developers, on top of the costs of updating and formatting the disclosure information. Furthermore, the purpose of disclosure obligations is undermined if the information isn't readily available at the same time and in the same presentation in which government officials review the substantive arguments for which the disclosed conflicts are relevant.

To the extent that conflicts are associated with a single filing and not an organization – for any targeted contributions, whether monetary or non-monetary – centralized databases or website disclosures are hardly even comprehensible. To achieve meaningful and accurate disclosure, the relevant databases or websites would need to

²⁹ *Order and Further Notice* ¶ 83.

have entries not just for the organizations but for individual filings by those organizations. Without such precise and granular disclosures, updates to websites and databases could retroactively and unfairly impugn conflicts onto earlier or unrelated filings, if a contribution is received well after a filing is made or if a contribution is targeted to a single filing.

Furthermore, both databases and websites would generate additional and unnecessary burdens of compliance, because any organization with conflicts would need to continuously update its conflict information whether it continues filing with the Commission or not. Organizations on the periphery of Commission issues that file one time to participate in a single proceeding should not be subject to any ongoing compliance requirements, and the cost of the separate operation seems greater than including such information in the filing itself. Databases and websites also impose a greater burden on the *beneficiaries* of such disclosure, who need to take the affirmative step of looking at an outside source for each participant in a proceeding. Although a centralized database might lower this cost, the cost would still be greater than reading a few lines of additional text in a filing for which the disclosure is relevant.

Commission rules requiring each filing to list contributions that meet the above standards, including the contributing organization and the nature and timing of the contribution where relevant, would suffer from neither of these problems and would strike a better balance.

D. Material conflicts should be disclosed in any filing included as part of the public record in any Commission proceeding.

The *Further Notice* seeks comment on whether material conflicts should be

disclosed only in *ex parte* filings, or in other Commission filings as well.³⁰ As Free Press stated in previous comments, conflicts should be disclosed in all filings with the Commission, not just *ex parte* filings.³¹ Any document made part of the public record in an open proceeding creates an opportunity for hidden conflicts that influence Commission decision-making processes, including but not limited to comments, reply comments, and petitions in either permit-but-disclose proceedings or exempt proceedings, and written and oral *ex parte* filings in permit-but-disclose proceedings.

A significant part of the political value of support for an industry agenda lies in its public nature, whether that support is genuine or contrived via contributions. For example, AT&T has placed tremendous rhetorical weight on the supportive statements that many organizations have filed.³² Whenever such statements are included within a public Commission record – regardless of the nature of the proceeding or the statement – any material conflicts ought to be recorded as part of the statement.

Participation that currently requires no written record can be exempted from contributor disclosure rules. Such meetings already take place outside the public record in their entirety, and requiring disclosure in this context would not comport with the Commission’s broader *ex parte* framework.

Requiring disclosure as part of all public, on-the-record documents filed with the Commission requires minimal effort for full compliance. Because no disclosure is

³⁰ *Id.* ¶ 81.

³¹ Free Press Reply Comments at 2.

³² Cicconi, *supra* note 9. To the extent that supporters receive a *quid pro quo* of contributions in exchange for their advocacy, it seems dishonest to reference them as signs of public support; at the very least, any filings that become part of the public record must reflect those contributions.

required except as part of documents that the organization is already filing or is required to file, no additional documents need be filed by any party as a result of the proposed rules. Furthermore, all filings that require disclosure are filings that the organization has voluntarily opted into – by choosing to file a public document in an open proceeding, or by choosing to participate in a meeting that already carries an obligation to file a written notice of *ex parte* communication.

Respectfully Submitted,

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