

April 22, 2014

EX PARTE VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: ***In the Matter of Amendment of the Commission's Ex Parte Rules and Other Procedural Rules, GC Docket No. 10-43***
FCC Seeks Public Comment on Report on Process Reform, GN Docket No. 14-25

Dear Ms. Dortch:

T-Mobile USA, Inc. ("T-Mobile")¹ has previously expressed its support for the adoption of rules by the Federal Communications Commission ("FCC" or "Commission") that would require participants in a rulemaking proceeding to disclose the filer's real parties-in-interest.² In a recent report on FCC reform, the agency recognized the numerous benefits of adopting such rules, and recommended that the Office of General Counsel draft an Order incorporating such requirements into the FCC's regulations.³ As the Commission has noted, truth-in-pleading requirements will benefit members of the public, by allowing them to better evaluate the true level of support for a filed proposal, and will equally benefit the FCC, by helping the agency better distinguish repetitious or duplicative filings underwritten by a party, even if they purport to be filed under the name of another entity.

¹ T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile US, Inc., a publicly traded company.

² See Letter from Trey Hanbury, Counsel to T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission, GC Docket No. 10-43 (filed Dec. 20, 2013; amended Feb. 3, 2014) ("T-Mobile December Letter"); Letter from Trey Hanbury, Counsel to T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission, GC Docket No. 10-43 (filed Feb. 24, 2014); Letter from Trey Hanbury, Counsel to T-Mobile, to Marlene H. Dortch, Secretary, Federal Communications Commission, GC Docket No. 10-43 (filed Mar. 12, 2014).

³ See *Report on FCC Process Reform*, Recommendation 5.44 at 79 (Feb. 14, 2014) ("*Report on Process Reform*"), attached to FCC Seeks Public Comment on Report on Process Reform, GN Docket No. 14-25, *Public Notice*, DA 14-199 (rel. Feb. 14, 2014).

On March 26, 2014, Minority Media & Telecom Council (“MMTC”) filed an *ex parte* recommending that the Commission reject Recommendation 5.44.⁴ MMTC puts forth several reasons why it believes that disclosure rules are inadvisable for participation in FCC proceedings, but its reasons miss the mark.

Relevance of federal courts’ disclosure rules. MMTC asserts that federal courts’ disclosure rules are inapplicable because the purpose underlying them is merely to assist judges in determining whether they must recuse themselves in a case because of investments or other involvement with a parent corporation or dominant shareholder of a party.⁵ But MMTC has failed to recognize another critical aspect of these disclosure rules: to assist the court in “assessing the credibility to be attached to the views submitted by the amicus.”⁶

MMTC claims that the disclosure rules relating to authorship or financial contribution to an amicus brief, Federal Rule of Appellate Procedure 29 and Supreme Court Rule 37.6, serve only to “deter counsel from using an amicus brief to circumvent page limits on parties’ briefs.”⁷ However, these rules serve a much broader function, and one that is equally important in proceedings before the Commission. The Supreme Court adopted its amicus brief disclosure rule in response to parties who were “silently . . . authoring or financing amicus curiae briefs in support of their positions.”⁸ To characterize the disclosure rule as a ministerial enforcement of the page limit on parties’ briefs misses the point. The Supreme Court was concerned with parties appropriating the brief of what it believed to be a true amicus—it sought to avoid parties taking advantage of additional pages *under the name of a third party*. Although the Commission does not impose page limitations on *ex parte* pleadings and comments, the same concern applies. When an interested party files under the name of another without disclosing that fact, the Commission loses the ability the Supreme Court ensured for itself—to accord those briefs “a lesser degree of credibility.”⁹

Disclosure rules exist, and are workable, in the agency context. MMTC asserts that the proposed disclosure rules would be “unworkable in the agency context,” but its reasoning leading to that conclusion is flawed.¹⁰ It claims that the FCC’s requirement of ownership disclosures for most license owners renders disclosure requirements in Commission proceedings “duplicative and unnecessarily burdensome.” But the exact opposite is true. Because license owners would already be prepared to make the requisite disclosures, no additional burden would be imposed upon them—the parties with the most direct financial interest in FCC proceedings.

⁴ See Letter from David Honig, President, MMTC, to Marlene H. Dortch, Secretary, Federal Communications Commission, GC Docket No. 14-25 (filed Mar. 26, 2014) (“MMTC Letter”).

⁵ See *id.* at 1-2.

⁶ Stephen M. Shapiro, et al., *Supreme Court Practice* 518 (10th ed. 2013) (“Supreme Court Practice”).

⁷ MMTC Letter at 2.

⁸ Supreme Court Practice at 518.

⁹ *Id.* at 755.

¹⁰ MMTC Letter at 2.

Expanding this requirement to other entities achieves a critical purpose. If a non-profit (or other) organization has no financial stake in the Commission's policy decision, that fact will be revealed by its disclosure. If, on the contrary, an organization (even a non-profit) does have a financial stake in the Commission's policy outcome, or if its brief was underwritten by an entity that does, *that* fact will be revealed by its disclosure. And this latter group of organizations, who have a hidden interest or are funded by an interested party, is exactly the group of filers that the Commission and the public deserve to be made aware of.

MMTC claims that “[e]ntities that would benefit from a non-profit organization's positions almost certainly would participate in the proceeding in their own regard and, even if they did not, their identities are well-known to the Commission.”¹¹ It provides no support for this allegation. And it ignores the very purpose of the disclosure rules: to bring into the daylight those entities that either wish to obscure their interest in the proceedings or wish to create the false impression that their proposed outcome enjoys the support of more filers than is truly the case.

Nor would the FCC be unique among agencies in requiring disclosure by participants in administrative proceedings. Other agencies have adopted disclosure rules in response to a genuine concern that the agency's record accurately reflect the real parties-in-interest. For example, the U.S. Food and Drug Administration (“FDA”) requires an annual disclosure of all the current members of each organization participating in FDA administrative proceedings.¹² In fact, the Administration has recognized that disclosure of real parties-in-interest can be critical: in 2013, it instructed the U.S. Patent and Trademark Office to begin a rulemaking process to make disclosure of real parties-in-interest by patentees and applicants mandatory.¹³

Non-profit organizations should be subject to the disclosure rules and would not suffer undue burdens to comply with them. MMTC argues that non-profit organizations would be harmed by implementation of disclosure rules.¹⁴ This argument presupposes that non-profit organizations that file with the FCC are acting on their own behalf. However, the proposed disclosure rules would serve to root out instances where that is not the case—where powerful, for-profit corporations corral non-profits into making their filings for them and improperly give the Commission the impression that more filers support a given proposal than is actually the case.

MMTC raises the specter of constant updates and calculations on the part of non-profit organizations seeking to comply with the disclosure requirements, but the reality need not be so grim. The Commission could adopt a reporting period, say six months or a year, at which point filers could simply update their disclosures. Alternatively, the Commission could follow the lead

¹¹ *Id.* at 3.

¹² 21 C.F.R. §10.105(c).

¹³ See Fact Sheet; White House Task Force on High-Tech Patent Issues (Jun. 4, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues> (last accessed April 22, 2014).

¹⁴ See MMTC Letter at 3.

of the Supreme Court and require an update only if there is a “material change” to a filer’s disclosure.¹⁵

Similarly, MMTC’s concern that non-profit organizations would be required to track all participants on conference calls related to filings has no basis in reality.¹⁶ The Supreme Court requires disclosure of whether counsel for a party authored an amicus brief “in whole or in part,”¹⁷ but that Rule “does not require disclosure of the fact that party counsel may have reviewed an amicus brief in order to identify inaccuracies and avoid repetition of matter already presented in the party’s brief.”¹⁸ Nor does it include “[a]dvice by party counsel that amicus counsel rewrite, delete, or add certain matter.”¹⁹ In fact, *Supreme Court Practice*, a well-regarded treatise on the subject that the Court itself frequently cites, explains that authoring an amicus brief “in part” is “interpreted to mean something more substantial than editing a few sentences.”²⁰ A similar, commonsense application of the rule would no doubt be adopted by the Commission.

MMTC provides no support for its bald assertion that “the concerns about hidden interests that motivate rules such as the Fourth Circuit’s are less applicable to nonprofit organizations, which have defined missions that guide their advocacy.”²¹ As noted above, the concern at which the disclosure rules are directed is other interested parties who may fund or “ghostwrite” a filing which purports to come from a non-profit organization. The disclosure would not affect the organization’s ability to act in furtherance of its stated mission, but it would require the organization to explain that funding or authorship of its filing came from outside the organization, by a party that may have its own, independent, interest in the outcome of the Commission’s proceeding.

The proposed disclosure rules address specific, demonstrable conflicts before the Commission. Perhaps the most troubling aspect of MMTC’s *ex parte* filing is its assumption that “parties in FCC proceedings already have an incentive to disclose their identities, because failure to do so can undermine the weight the Commission’s staff assigns to their arguments.”²² This premise is simply false. Interested parties in FCC proceedings have every incentive to make it appear to the Commission that their position enjoys broader public support than it really does. They may also wish to conceal the origin of certain positions, for example, where a public corporation would like a certain result in an FCC proceeding but does not want to go on the record as supporting that outcome. Absent disclosure rules, it is difficult to obtain a clear picture of how deeply influenced filers may be by their donors. For example, the author of a recent

¹⁵ S. Ct. R. 29.6.

¹⁶ See MMTC Letter at 3.

¹⁷ S. Ct. R. 37.6.

¹⁸ *Supreme Court Practice* at 755.

¹⁹ *Id.*

²⁰ *Id.*

²¹ MMTC Letter at 4.

²² *Id.* at 3.

study on industry funding found that in the period between 2011-2013, AT&T and Verizon alone donated \$500,000 to MMTC, while in 2011 \$1.7 million of the \$2 million that MMTC received from contributors was derived from sponsorships, donations and fees from companies, lobbyists, lawyers and broadcasters with interests before the FCC.²³ Contrary to MMTC's assertions, this information was not freely disclosed in its filings before the FCC; in fact, the only way the authors of the study were able to compile this information was by undertaking a time-intensive review of MMTC's IRS filings and sponsorship lists.²⁴ It is exactly this type of lack of transparency that the proposed disclosure rules would prevent.

Furthermore, establishing as a threshold for disclosure contributors of \$150,000 or 10% of an organization's budget is not arbitrary. This threshold is based not on a contributor's likelihood to influence the Commission's decision-making. Rather, it seeks to reveal contributors with sufficient control over the budget of a filing organization to influence the content of a given filing. The proposed disclosure threshold reflects a commonsense determination that contributors of \$150,000 would have sufficient influence over smaller organizations. Contributors of 10% of an organization's budget, however large the organization, would be sufficiently likely to be meaningfully involved when that organization prepares an FCC filing. In both cases, disclosure would be appropriate and would give the Commission, and the public, important information about the source of positions advocated in the organization's filings.

The proposed disclosure rules do not threaten filers' freedom of association. MMTC cites cases in support of its assertion that the proposed disclosure rules would violate filers' First Amendment rights of speech, association, and liberty, but it misapprehends the import of those decisions. *NAACP v. Alabama*, the case on which MMTC primarily relies, involved the compelled disclosure of the NAACP's statewide membership list to Alabama's Attorney General, "without regard to [the members'] positions or functions in the Association."²⁵ The Supreme Court held that compelled disclosure of the Association's "rank-and-file" members could not be justified by the limited state interest in determining whether the NAACP was conducting intrastate business in violation of a state statute.²⁶ The Court held that disclosure of the membership list had "no substantial bearing" on that inquiry and accordingly held that the compelled disclosure was invalid.²⁷ The Court, however, was clear to emphasize that the NAACP sought only to vindicate the rights of its "rank-and-file members"—and that it did not object to identifying those members "who are employed by or hold official positions with it."²⁸

²³ See Jason McLure, "Civil Rights Group's FCC Positions Reflect Industry Funding, Critics Say," Public Integrity (June 6, 2013), available at <http://www.publicintegrity.org/2013/06/06/12769/civil-rights-groups-fcc-positions-reflect-industry-funding-critics-say> (last accessed Apr. 22, 2014).

²⁴ See *id.*

²⁵ 357 U.S. 449, 451 (1958).

²⁶ *Id.* at 464.

²⁷ *Id.* at 466.

²⁸ *Id.* at 464.

Unlike the compelled disclosure at issue in *NAACP v. Alabama*, the proposed rules for filers before the Commission are significantly more narrowly tailored. They seek to reach only those individuals who have a direct and palpable relationship to the matter before the Commission and those who exercise a significant influence on the filing entity. In light of the important goals of transparency, public confidence in the Commission's work, and enhanced agency decision-making, such disclosure is both necessary and appropriate.

Moreover, T-Mobile has proposed that a process be implemented that would allow filers to request confidentiality if they believe that the disclosure requirements might reasonably be expected to lead them to suffer economic harm in the form of reduced, or chilled contributions. Such process would protect those filers with genuine confidentiality concerns.

In conclusion, MMTC's objections to the sensible proposed disclosure rules give no credit to the demonstrated need for greater transparency before the Commission and vastly overstate the potential for harm such rules could create. T-Mobile urges the Commission to adopt much-needed disclosure rules for the benefit of the Commission and the public at large.

Consistent with section 1.1206(b)(2) of the Commission's rules, please associate this letter with the above-referenced dockets.

Respectfully submitted,

/s/ Trey Hanbury

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