

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**COMMENTS
OF
PUBLIC KNOWLEDGE
AND
CONSUMER FEDERATION OF AMERICA**

As the Commission recognized, “[o]ral *ex parte* presentations provide a valuable opportunity for parties to converse with Commission staff, addressing concerns and questions in an interactive manner that is not possible in written filings.”¹ However, the value of these presentations comes at a cost: unlike written presentations to the Commission, it is not always clear to those not in attendance what information was actually presented during oral *ex parte* presentations.

Current Commission rules place the burden on the presenting party to file a written record of the presentation.² In theory, this written record grants impacted parties and the public an opportunity to understand the presentation and, if necessary, respond. The Commission recognized the importance of this documentation, noting “[w]hen for

¹ *In the Matter of Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, GC Docket No. 10-43, Notice of Proposed Rulemaking, 75 Fed. Reg. 14409 at ¶ 6 (Mar. 25, 2010) *hereinafter* NPRM.

² 47 U.S.C. § 1.1206(b)(2).

any reason the record does not adequately reflect the contents of oral *ex parte* presentations, the public is deprived of a fair opportunity to respond.”³

In practice, letters documenting oral *ex parte* presentations are often little more than cursory notices that a meeting occurred and a topic was discussed.⁴ Although it is helpful for the public to know that meetings are taking place, and those meetings address specific dockets, that information alone is hardly an adequate way to provide the public with “a fair opportunity to respond.”⁵

The current rules work to encourage this level of brevity. Parties are not required to file letters if they present no new data or arguments to the Commission.⁶ As oral *ex parte* presentations often occur after the filing of lengthy comments, presenters can find predicate for any oral presentation in prior written comments. An individual relying exclusively on letters documenting oral *ex parte* presentations would be forgiven for wondering why many of the presentations occurred at all.

At the same time, this brevity suggests that oral *ex parte* communications are of limited utility. If most oral *ex parte* presentations are dedicated to repeating arguments already advanced in written filings, they may be largely redundant and unnecessary. Instead of providing an opportunity to discuss issues, all too often oral *ex parte* presentations provide a pretext to pressure decision makers. This type of presentation is both a waste of Commission staff time and a disservice to the public.

³ NPRM at 6.

⁴ See, e.g. Letter from Laura Carter, Vice President-Federal Government Affairs, Alltel Communications LLC to Marlene Dortch, Secretary, Federal Communications Commission, WT Docket Nos. 96-86, 06-150 and 05-211; PS Docket No. 06-229; AU Docket No. 07-157 (Apr. 20, 2008) available at <http://fjallfoss.fcc.gov/ecfs/document/view?id=6520006854>.

⁵ NPRM at 6.

⁶ See NPRM at 4. See also § 1.1206(b)(2).

Perhaps the greatest shortcoming of the current *ex parte* system is the lack of enforcement of existing rules. While this shortcoming occasionally manifests itself in the form of late filings, more often it can be seen in the extreme brevity of the filings themselves. All too often *ex parte* filings merely memorialize the existence of a meeting without giving any indication as to the substantive arguments advanced during that meeting. However the Commission chooses to improve the current *ex parte* system, it will do a disservice both to itself and the public if it does not move to enforce vigilantly any new rules.

I. THE COMMISSION MUST RADICALLY OVERHAUL THE ORAL *EX PARTE* PRESENTATION SYSTEM

If the Commission does elect to continue to allow for some level of oral *ex parte* presentations, it must recognize that the current system of requiring parties to document the substance of their presentations has failed to achieve its goals. Presenting parties have collectively proven themselves unwilling or unable to provide the public with adequate documentation of the meetings, and the Commission has been unwilling to enforce the rules to ensure compliance.

Thus, the Commission might rightfully conclude, as it suggests in the NPRM, that both the public and the Commission's decisionmaking process would benefit from a strong reduction in oral *ex parte* presentations.⁷ As the Commission noted, there is no statutory requirement underpinning the current oral *ex parte* presentation process.⁸ Written comments, available to the public in their entirety, would most likely provide more than adequate information for the Commission to rely on in its decisionmaking.

⁷ See NPRM at 13.

⁸ *Id.*

Commenters suggest below three options to reform the oral *ex parte* process. Rather than have the Commission mandate one option, we recommend that each Commissioner and Bureau choose among one of the three. At the beginning of each calendar year, each Commissioner and Bureau would elect an option, and would notify the public through the Commission's website.

No matter which option the Commission decides to implement, or decides to make available to Commissioners and Bureaus to implement, one change is vital. If a party has a new argument for the Commission, it should be forced to present that argument in a detailed, written filing. Critically, it must be made available to the public before the Commission notices an item for a public meeting, or 21 days before the item is decided on circulation. A new argument appearing for the first time in a last minute oral *ex parte* presentation, or in the written record of that presentation, is unfair to other parties to the proceeding and undermines the Commission's ability to examine all appropriate evidence in a balanced matter.

A. *Option 1: Eliminate Oral Ex Parte Presentations*

The strongest remedy for the shortcomings discussed above would be for a Commissioner or Bureau to eliminate oral *ex parte* presentations entirely. As the current brevity of many letters documenting oral *ex parte* presentations suggest, the substance of many oral *ex parte* presentations is already presented in written form. The Commission could adopt a system allowing those offices that choose this option to make written requests to parties for additional information or clarification, with the responses also coming in written form. This would allow the public to fully understand the Commission's decisionmaking process. Oral presentations would still be allowed at

public hearings and similarly open venues, but private meetings about issues pending before the Commission would be eliminated.

B. *Option 2: Make a Video Record of All Oral Ex Parte Presentations*

A blanket ban on oral *ex parte* presentations may be neither practical nor desirable to implement. There can be value in “an interactive dialogue that can root out areas of concerns, address gaps in understanding, identify weaknesses in the record, discuss alternative approaches, and generally lead to more informed decisionmaking.”⁹ Currently, however, that value is undermined by the opacity of the oral *ex parte* presentations.

In the age of YouTube and other online video services, where cameras and microphones are inexpensive and widely available, there is no reason why every oral *ex parte* presentation could not simply be recorded and made available to the public. Such a recording could benefit the public in a number of ways.

First and foremost, it would put the entirety of the discussion between the party and Commission staff into the public record. There would be no question as to the nature of an oral *ex parte* communication, or what topics were discussed.

Second, it would eliminate any filter between the substance of the presentation and the public. By its very nature, even the most diligent and detailed letter from a party describing its oral *ex parte* presentation eliminates and simplifies issues discussed and points raised. The act of summarizing forces the author to determine what information is relevant for the record and what is extraneous detail. Unfortunately, extraneous details at the time of the oral *ex parte* presentation can sometimes become highly relevant weeks,

⁹ *Id.* at 1.

months, or even years later. An audio and video recording of the presentation would preserve all points of discussion, no matter how obscure they may appear at the time.

Third, the recording would increase public confidence in the Commission's decisionmaking process. The audio and video recording of the presentation would make all meetings about official Commission business public, even if they occur in a small conference room deep within the Commission. A member of the public concerned about the impact that a specific party might have on the Commission's decisionmaking process would be able to witness the interactions directly, without having to rely on a written account of the discussion.

C. *Option 3: Record All Oral Ex Parte Presentations via an Independent Third Party*

Although full audio and video recordings of every oral *ex parte* presentation would benefit the public, such recordings could become unwieldy. They might be over inclusive, recording long stretches of silence before and after the meeting, irrelevant pleasantries, and other discussions far removed from the official issue at hand. If asking the parties themselves to record the oral *ex parte* presentations has proven to be under inclusive, and recording the presentations themselves might be over inclusive, allowing an independent third party – a “neutral scribe” to record and summarize the presentation may strike the correct balance.

Importantly, this neutral scribe would not be the Commission staff member with whom the oral *ex parte* presentation was scheduled. Requiring that staff member to prepare a detailed report of the presentation would increase the burden of meeting with concerned parties, which would likely create an incentive towards brevity in reporting.

Instead, the scribe would be another member of the Commission staff tasked with attending the meeting but not participating in any way. The scribe would attend the oral *ex parte* presentation exclusively to record its contents for the public record. It would be within the discretion of the Commissioner or Bureau to decide if the scribe is tasked with fully transcribing the meeting (similar to a court reporter) or merely creating a detailed summary.

The written record created by the neutral scribe would also have the advantage of being easier to index and search with current technology. In addition, the scribe would have a professional incentive to be complete in preparing the record of the meetings.

II. THE COMMISSION SHOULD ALSO IMPLEMENT SMALLER CHANGES TO THE ORAL *EX PARTE* PRESENTATION SYSTEM

In addition to implementing the kind of large-scale oral *ex parte* presentation reform set out above, the Commission should strive to correct some of the system's most problematic aspects. Perhaps the greatest justification for oral *ex parte* presentations is that it grants Commission staff the opportunity to probe evidence and arguments proffered by various parties. In light of this, the Commission should narrow the scope of oral *ex parte* presentations to include only existing arguments.

Furthermore, if the scope of oral *ex parte* presentations is so limited, there is no reason to extend the filing deadline from one to two business days.¹⁰ A recent study found that very few letters documenting oral *ex parte* presentations were filed late under

¹⁰ See NPRM at 10.

current rules.¹¹ Those late filings came from both small companies such as SageTV and large companies familiar with Commission rules such as AT&T, Comcast, and NAB.¹²

Commenters are unaware of any evidence that the current one day filing deadline imposes an unnecessary burden on parties before the FCC, or that the burden of the deadline falls disproportionately on small groups and members of the general public. The public benefit of a timely public record of any oral *ex parte* presentations outweighs any benefit created by extending the filing deadline.

Finally, Commenters support the proposed reduced filing window for *ex parte* presentations given during the Sunshine period.¹³ All parties must have an opportunity to respond to arguments presented to the Commission, and the compressed timetable of the Sunshine period makes timely notice of new arguments critical. Generally, the Commission should strive to avoid *ex parte* presentations during the Sunshine period whenever possible. A rule prohibiting outside parties from soliciting opportunities to give *ex parte* presentations during the Sunshine period will help to protect the “period of repose” that Sunshine rules aspire to create.¹⁴

III. ANY EFFORT TO REFORM THE ORAL *EX PARTE* PRESENTATION PROCESS WILL BE WASTED WITHOUT A COMMITMENT TO ENFORCEMENT

As the above-cited study suggests, there are currently little to no consequences for not complying with the Commissions rules regarding documenting oral *ex parte*

¹¹ Jonathan Make, *Late Ex Parte Filings May Point to Wider Compliance Problem*, Communications Daily, Vol. 30, No. 32, Feb. 18, 2010.

¹² *Id.*

¹³ NPRM at 20.

¹⁴ *Id.* at 23.

presentations.¹⁵ The companies and organizations that filed late continue to operate before the Commission and do not appear to have suffered any adverse consequence for late filing. Letters are regularly filed that contain no meaningful information about a meeting beyond the attendees and the docket number, again without any objection from the Commission.

It is unlikely that these oversights and deficiencies are due to a malicious intent by parties before the Commission. Instead, over time, the Commission has made it clear that it does not require complete or timely documentation of oral *ex parte* communications, and parties have adapted accordingly.

The Commission must reexamine and strengthen its enforcement of the rules surrounding oral *ex parte* presentations. It must develop real consequences for failing to meet the rules, and then commit to imposing those consequences on rule breakers.

In order to be an effective deterrent, the consequences for rule violation must be meaningful. That does not mean that they must be draconian. First and even second time violators should be given an opportunity to correct the error without significant consequence. However, as violations repeat over time the Commission should impose sanction.

These sanctions could include temporarily barring individuals who file late or inadequate notices of oral *ex parte* presentations from participating in future oral *ex parte* presentations for an escalating period of time. This bar on participation could, where appropriate, extend to other members of the filer's company, organization, or law firm.

¹⁵ Jonathan Make, *Late Ex Parte Filings May Point to Wider Compliance Problem*, Communications Daily, Vol. 30, No. 32, Feb. 18, 2010.

The Commission should not use these sanctions as a way to prevent public participation in decisionmaking, but rather as an incentive to abide by straightforward rules.

CONCLUSION

Although born of good intentions, the Commission's current system for handling oral *ex parte* presentations is failing to adequately document important information before the Commission. It allows for meetings between individual parties and the Commission that are not meaningfully documented. These meetings undermine public confidence in the Commission and obscure the Commission's decisionmaking process. As currently configured, the harms of the oral *ex parte* presentation process outweigh the benefits.

Fortunately, it is possible to maintain the benefits of the process while eliminating many of the harms. By working to create a more complete record of these presentations, and by vigorously enforcing its own rules, the Commission should be able to benefit from interactive dialogue while building a complete public record.

Respectfully Submitted,

/s/

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