

FCC Implements Revisions to Ex Parte Lobbying Rules

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By Christopher A. Fedeli

On Feb. 2, 2011, the Federal Communications Commission (FCC) released a [Report and Order](#) (Order) revising certain of its rules for ex parte presentations to Commissioners and staff. In the Order, the FCC adopted many of the changes it first proposed one year ago (summarized in our [previous advisory](#)). The changes generally expand or clarify existing requirements to disclose meetings with FCC decision makers. With these revisions, the FCC intends to promote additional transparency and opportunity to be heard during the rulemaking process. The FCC also released a Further Notice of Proposed Rulemaking (FNPRM) asking for additional comment on whether ex parte notices should also contain corporate ownership disclosures.

The key changes from yesterday's action are as follows:

General meeting notice rules: new filing and content requirements

Most significantly, the Order expands the notice requirement to include written notices of *all* ex parte meetings—regardless of whether “new” arguments or data are put forth in those meetings or not. The current rules do not require written notices of lobbying meetings if parties merely reiterate arguments already made in previously-filed comments. Where similar positions have been advocated to the Commission in prior filings, parties must now summarize the arguments made in ex parte notices or cite to the pages or paragraphs of such prior filings where the information can be found. As before, any new arguments and data presented orally must also be summarized in the written ex parte notice.

The Commission also adopted other changes to its general meeting notice rules. The FCC will now require written notices to list the names of everyone participating in ex parte meetings, something the FCC acknowledges most parties already do. In addition, the FCC will now require parties to mail, email, or fax copies of ex parte notices to each meeting participant, and to provide electronic copies to Commissioners and Staff in attendance at the meetings, in a machine readable format, where feasible. The FCC declined to revise its rule and will still allow parties to make ex parte presentations at the invitation of FCC staff in restricted proceedings or during the sunshine period. Notice of such meetings must still be filed afterwards. The FCC also revised its rules to clarify that any documents “shown or given” to Commission staff during meetings constitute ex parte comments themselves and must be filed. Finally, the Commission adopted its earlier proposal to extend the time for filing notices for ex partes made outside the sunshine period from one to two business days following a meeting.

Special sunshine period notice requirements

The FCC also adopted a set of changes to the written notice requirements for presentations made during and immediately before the sunshine period. The sunshine period refers to the time immediately preceding an FCC vote or decision in which administrative agencies are supposed to reflect on rulemaking issues without additional input from lobbyists. Currently, once the sunshine period goes into effect, further ex parte contacts are generally prohibited unless authorized or requested by the FCC for a specific purpose.

The new rules are designed to bring additional clarity and order to procedures for presentations to the Commission at the start of (and during) the sunshine period. The changes are:

- The sunshine period will now commence on the day *after* the FCC announces it—not the moment it is announced. Rather than one business day, this one day rule is literal—weekends and holidays are included.
- Parties making an ex parte presentation on the day the sunshine period is announced will have until close of business the next day to file the written notice, instead of the usual two business days.
- During the sunshine period, the FCC will permit the filing of written ex parte comments (but not meetings) in response to notices of meetings that occurred on the day the sunshine period was announced. Those comments must be filed one business day after the meeting notice is filed, and may not raise issues beyond those in the notice.
- Notices of ex parte presentations that occur during the sunshine period must be summarized and filed before midnight of that same day. Written replies will also be permitted to such notices, and must be filed no later than one business day after the meeting notice.

Other issues

Enforcement. The FCC will begin stricter enforcement of its ex parte lobbying rules under a revised enforcement regime. In the changes outlined in the Order, the Enforcement Bureau will now be empowered to issue fines for violations of the ex parte rules. The FCC explained that FCC staff members attending ex parte meetings may report suspected violations to the General Counsel's office. If the General Counsel's office determines fines may be warranted, the matter will be referred to the Enforcement Bureau for forfeiture proceedings. If the Enforcement Bureau concludes no punishment is warranted, the General Counsel's office will then "take appropriate action."

Electronic filing. The FCC adopted a rule requiring electronic filing of all ex parte notices in proceedings where electronic filing is currently available (generally, in permit-but-disclose proceedings only). Furthermore, all electronically filed ex parte notices—and attachments—must be machine readable. The submission of scanned printed documents in non word-searchable formats will no longer be permitted. Finally, ex partes containing confidential information must be submitted both by paper with the confidential data, and electronically in redacted form.

New media. The FCC determined not to adopt a rule that would include public comments on the FCC's blogs, facebook page, or twitter feed in the public record of relevant proceedings. The Commission appeared to agree that adding the large volume of such Internet remarks into the record of rulemaking proceedings would unduly burden reviewing parties. Commenters also suggested that new media remarks might be appropriate for inclusion in broad Notice of Inquiry proceedings, but not in rulemakings designed to impose new regulations. The FCC clarified that parties making comments via new media may still separately file their remarks in the relevant FCC docket if they wish to include them in the record. The Commission will also continue to incorporate new media Internet postings into specific inquiries and other proceedings on terms announced for those particular proceedings.

Settlement meetings in rulemakings and adjudications. The FCC declined to amend its current rule allowing for settlement discussion meetings requested by Commission staff in adjudicatory proceedings or rulemaking proceedings without ex parte notice filings. Notice will still be required if settlement discussions occur during the sunshine period. Such settlement discussions with FCC staff are now one of the few remaining exceptions to the ex parte notice requirements. The FCC warned, however, that this settlement exception "should not be used as an avenue to present new facts or arguments concerning the merits of the proceeding."

Further Notice of Proposed Rulemaking (FNPRM)

Recognizing divisions among commenting parties, the FCC asks for additional input on whether corporate ownership disclosure statements should accompany all ex parte notices. In response to last year's notice, commenters pointed out that extensive corporate ownership information for all licensees of wireless or broadcast spectrum is already electronically available on the FCC's website, and usually elsewhere on the Internet. Some commenters recommended that the FCC provide a means to for filers to link to filed ownership information. Accordingly, the FCC requests further comment on whether a more modest ownership disclosure should be required with ex parte notices. The FCC also asks whether ownership disclosures should be included with other pleading and comment filings, as well as with ex parte notices. Finally, the FCC asks whether the disclosure requirement should apply equally to the public interest groups that frequently lobby the FCC. Such a rule could require public interest groups to publicly identify their largest financial backers.

The new rules go into effect 30 days after the Order is published in the Federal Register. Further comments and reply comments on the corporate ownership disclosure issues are due 45 and 75 days after the FNPRM is published in the Federal Register.

If you have questions, please contact Paul Glist, David Oxenford, Suzanne K. Toller, or Maria T. Browne.

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