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FCC Revises Its *Ex Parte* Rules

The Federal Communications Commission has revised its *ex parte* rules, which generally prohibit meetings with decision-making staff concerning a contested proceeding unless full disclosure of the participants and content is made on the public record. Although these rules may seem mostly designed for attorneys and lobbyists, anyone having business before the FCC needs to be aware of their existence, when they apply and what they prohibit.

The basic principle is that one side may not try to influence an FCC decision-maker (including all staff involved in the process) without full disclosure and enabling all other interested parties to present their views as well. In general, the rules apply to any contested matter, including rulemakings, complaints and mutually-exclusive or challenged applications or requests for relief. Unopposed applications, meetings in which all sides participate, and written communications served on all other interested parties are generally exempt.

The *ex parte* rules arose three decades ago in response to court concerns that undocumented oral contacts with FCC staff had led to two different records – one for the public and a more extensive one for “those in the know.” The Commission determined that it needed a means to obtain timely information concerning the complex issues it was called upon to consider, but balanced against the public’s need to be aware of who was engaging in discussions with its staff and the arguments and showings that were being made. Among the few exceptions are certain emergency and status inquiries. There are many pitfalls for the unwary. For example, while pure status inquiries are permitted, how may advocates can resist adding a subtle hint as to why action is needed or an understated suggestion as to the form of relief that is desired?

Even when the rules permit contact for contested matters, they require that a statement be placed in the public record to apprise others of what was said so as to afford an opportunity for opposing parties to express their views as well. The rules apply not only to the parties’ principals and their attorneys and other representatives, but also to anyone who approaches FCC decisionmakers on a party’s behalf. Problems often arise when frustrated applicants rally viewers or listeners to express their support, or turn to their legislators, who may not be aware of the danger in sending the Commission a letter urging action on behalf of a constituent.

The revisions are intended to address two shortcomings of the current *ex parte* rules – an exemption for presentations with no new data or arguments, and notices having insufficient disclosure of what actually was said or discussed. Here is a general overview of the revised rules:

Scope – All presentations to FCC staff in “permit-but-disclose” proceedings will be covered, regardless of whether they involve new data or arguments or merely reiterate material already submitted in the written record of a proceeding.

Content – *Ex parte* reports must be sufficiently detailed so that they would inform a person who did not attend a presentation of the facts presented, arguments made and support offered, and must contain a complete list of all persons who participated in the meeting. The Commission is also issuing a notice of proposed rulemaking to explore whether real-parties-in-interest (including members of trade associations) should also be disclosed, although it is willing to consider whether to exempt information available elsewhere (as on websites) or that might be burdensome to compile.

Exceptions – In addition to the current exceptions that include emergency information and status inquiries, a further exception will enable Commission staff to request information necessary to an impending decision during the “Sunshine Period” between placing an item on the Commission’s meeting agenda and issuance of its decision, when most communications are prohibited altogether.

Method of Filing – Electronic filing of *ex parte* reports through the FCC’s on-line system will be mandatory. Not only the notice but appendices and attachments must be machine-readable, and scanned materials will be permitted only when a word-processing version is not available. Confidential information may be removed, but only if a complete copy is filed in paper format with the FCC Secretary. Waivers of the electronic filing requirement will be considered on a case-by-case basis.

Filing Deadlines – *Ex parte* reports must be filed by the end of the second business day following the presentation. However, reports of presentations made during the Sunshine Period must be filed by the end of the same day.

Enforcement – *Ex parte* notices must be sent electronically to all FCC staff who attend a presentation. They are expected to review the notices expeditiously, detect any errors or omissions, and request that they be cured. Repeated violations of the full disclosure requirement will be reported to the FCC’s General Counsel, who may impose sanctions.

While there are many details and other provisions, it is essential that all parties having business with the FCC be aware that a wide variety of communications with FCC staff are subject to the *ex parte* rules and should be discussed beforehand with knowledgeable counsel to avoid inadvertent violations and potentially harsh penalties.

A copy of the Commission’s Report and Order and Further Notice of Proposed Rulemaking, FCC 11-11, is available on the Commission’s website at:
http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0214/FCC-11-11A1.pdf.

If you have any questions, please contact [Peter Gutmann](#) or one of our other Womble Carlyle [Telecommunications](#) professionals.

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