

ALERT

FCC Revises Rules for Reporting *Ex Parte* Communications

February 4, 2011

On Wednesday, February 2, 2011, the Federal Communications Commission (FCC) released a Report and Order (R&O) and Further Notice of Proposed Rulemaking (FNPRM) to amend its rules governing *ex parte* presentations made in rule making and other permit-but-disclose proceedings. The R&O generally adopts the proposals set forth in the Commission's March 25, 2010 Notice of Proposed Rulemaking (NPRM). The FNPRM solicits comments on a proposal to require parties to provide additional disclosure regarding real parties-in-interest.

The Report and Order

The revisions to the *ex parte* rules, which will become effective 30 days following the R&O's publication in *Federal Register*, are as follows:

- **General Requirement.** *Ex parte* notices must be filed in connection with *all* oral *ex parte* presentations in rule making and permit-but-disclose proceedings. The revised requirement applies even if the *ex parte* presentation is limited to issues and arguments that are already contained in a proceeding's record.
- **Contents of Notices.** Notices for *ex parte* presentations that were limited to facts and arguments already within a proceeding's record must either provide a brief summary of the argument or must cite to the page or paragraph of the written material in the record where the argument is raised. A notice filed for an *ex parte* presentation that raised new arguments or discussed new information must summarize the presentation in

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sufficient detail such that it would "inform a person who did not attend the presentation of the facts that were discussed, the arguments made and the support offered for those arguments." Finally, all *ex parte* notices must include a complete list of the individuals participating in the meeting.

- **Filing Deadlines.**

- *Outside of the Sunshine Period.* *Ex parte* notices must be filed within two business days (excluding intervening weekends or holidays) of the date of the presentation.
- *Upon Release of the Sunshine Notice.* Parties making *ex parte* presentations on the same day that a Sunshine Notice is released must file a notice by the next business day.
- *During the Sunshine Period.* Parties making *ex parte* presentations within a proceeding's Sunshine period must file a notice by 11:59:59 pm of the day on which the presentation was made.

- **Electronic Filing.** In the R&O, the FCC amended its rules to require parties to submit *ex parte* notices electronically in proceedings in which electronic filing is available. Electronically filed *ex parte* presentations must be submitted in a native format (e.g., .doc, .xml, .ppt, searchable .pdf). In other words, scanned copies of documents are not permitted unless a machine-readable copy of a document is not available. In addition, the agency clarified its rules and now requires parties to electronically transmit a copy of *ex parte* notices to members of the Commission's staff who attended a particular presentation. Appendices and attachments to *ex parte* notices should also be electronically filed and in a machine-readable format, if feasible.
- **Treatment of Confidential Material.** Parties filing *ex parte* notices may remove meta-data containing confidential or privileged information. Similarly, parties will not be required to electronically file confidential information in clear text, but a redacted copy of the *ex parte* notice must be electronically filed at the same time that the paper filing is submitted. Once again, where feasible, redacted, electronically filed notices must be submitted in machine-readable format.
- **Solicitation of Presentations During the Sunshine Period.** In the R&O, the FCC opted to retain rules permitting the solicitation of *ex parte* presentations during the Sunshine period (either by the Commission and its staff or with the agency's prior approval).
- **Status Inquiries.** The R&O does not modify the Commission's rule permitting parties to make status inquiries in permit-but-disclose proceedings.
- **Interagency Discussions.** The Commission declined to adopt commenters' proposals that other governmental agencies should file *ex parte* notices following discussions with FCC staff about pending proceedings.
- **Sanctions.** The R&O authorizes the Enforcement Bureau to levy forfeitures for *ex parte* rule violations.
- **New Media.** In the R&O, the FCC declined to adopt a general rule that would incorporate all blog posts and new media presentations into every rule making proceeding. The Commission will therefore continue to take a proceeding-by-proceeding approach to new media contacts and will incorporate new media contacts into a proceeding's record under the terms announced for such proceedings.

The Further Notice of Proposed Rule Making

The FNPRM seeks comment on a proposal to require parties to provide enhanced disclosure about real parties-in-interest. Specifically, the FNPRM asks whether it is sufficient to apply enhanced disclosure obligations on *ex parte* filings or whether such a rule should be expanded to apply to all or certain categories of FCC proceedings. The item also solicits comments on how enhanced disclosure requirements would apply to different categories of entities. Finally, the FNPRM queries whether disclosure is appropriate in cases where the information is easily found among the Commission's records or on an entity's website.

Comments in response to the FNPRM are due 45 days following *Federal Register* publication. Reply Comments are due 75 days after *Federal Register* publication.