

Oct. 5, 2020

Tribes Seek Further Consultation in Ex Parte Rules Proceeding

Tribal entities have asked the FCC to engage in further consultation with them and to extend the pleading cycle on a notice of proposed rulemaking proposing “several modest but important updates” to its ex parte communications rules, including exempting government-to-government consultations between the Commission and federally recognized tribes in permit-but-disclose proceedings.

The NPRM also proposed exempting communications with the toll-free numbering administrator and the reassigned number database administrator and requiring that “all written ex parte presentations and written summaries of oral ex parte communications (other than presentations that are permitted during the Sunshine period) be submitted before the Sunshine period begins and to require that replies to these ex parte presentations be filed within the first day of the Sunshine period” (*TR Daily*, July 10).

In comments filed in GC docket 20-221, the National Congress of American Indians (NCAI) said it appreciates “the Commission’s intention to improve the experience of tribal nations in consulting with the Commission on a government-to-government basis. To facilitate this effort, we request the Commission engage in tribal consultation on this proposed rulemaking and extend the comment deadline.”

“The proposed rule is a Commission action which would significantly and uniquely affect tribal nations because it sets forth a new process for exempting tribal nations from ex parte rules for ‘permit-but-disclose’ proceedings. Tribal nations may reasonably have questions regarding the application of this exemption,” NCAI added. “For example, a tribal nation may provide information regarding the location of cultural resources in a tribal consultation under the new proceedings and request that this evidence be used by the Commission in its decision-making, without disclosure of the cultural resources location. It is unclear the extent to which a tribal nation may condition or limit information provided into the public record. Accordingly, given outstanding questions regarding application of the exemption, the Commission should engage in full and meaningful tribal consultation to guide its proposed rule.

“Second, we request a sixty day extension of the comment period to enable tribal consultation and full review of the proposed rule,” NCAI continued. “Tribal nations across the country are responding to various emergencies including increased COVID-19 infections, school re-openings, economic downturn, and devastating natural disasters such as wildfires. Many tribal nations did not have the bandwidth to adequately assess and respond to this proposed rulemaking which was open for only 45 days.”

The Cherokee Nation said “the rulemaking doesn’t adequately contemplate how the *ex parte* exemption impacts normal rulemakings, proceedings, consultations, or [section] 106 reviews, therefore tribes need additional information to provide the FCC with meaningful feedback. While we appreciate the

opportunity to comment, we lack the proper dialogue with the Commission to understand how this proposed rulemaking will impact our various partnerships with the FCC, and we would request the Commission conduct outreach with tribal nations prior to enacting the proposed rulemaking so all tribes understand the potential positive and negative consequences of the Commission's proposal."

As another reason to defer action in the proceeding, the tribe also noted that "many tribal nations have been taxed with the ongoing global pandemic while advancing their efforts with the FCC."

NTUA Wireless LLC (NTUAW), a for-profit entity that is 51%-owned by the Navajo Tribal Utility Authority, said it "supports the implementation of the Commission's proposed changes to the *ex parte* rules. To the extent that the Commission also asked for comment upon certain alternatives to its proposal in the NPRM, NTUAW believes that the Commission's proposal strikes the right balance between additional flexibility to promote Tribal engagement while maintaining transparency of its processes not offered by the proposed alternatives."

ACA said that it "recognizes the benefits of the *NPRM's* proposal to require that all written *ex parte* presentations and written summaries of oral *ex parte* presentations (other than presentations that are permitted during the Sunshine period) be submitted before the Sunshine period begins, and to require that replies to these *ex parte* presentations be filed within the first day of the Sunshine period. However, ACA Connects' support for it is contingent on the Commission's adoption of two companion measures.

"First, in conjunction with adopting the *NPRM's* proposal, the Commission must expand by a day, to three weeks and one day, the date it makes available to the public drafts of documents to be voted on at Open Commission Meetings," the trade group argued. "While ACA Connects recognizes the benefits to the Commission's decision-making that should result from adoption of the *NPRM's* proposal, it does not believe these benefits must come at the expense of the public having one less day of advocacy.

"Second, the Commission should convert its practice of making drafts of documents to be voted on at Open Commission Meetings publicly available, as modified by adding a day on the front end, to a codified rule," ACA added. "Doing so will memorialize a successful practice that has now been in place for several years, help to ensure it remains in place, and overall contribute to the Commission's transparency and accountability. The Commission possesses authority to adopt ACA Connects' companion proposals, without seeking further comment, in an order responsive to the *NPRM*."

T-Mobile US, Inc., said it "supports the Commission's efforts to update its *ex parte* rules. But if the Commission wishes to promote transparency, provide a fair opportunity for public input, and ensure a fully developed record, the Commission should continue to allow notices of oral *ex parte* presentations made the same day the Sunshine notice is released to be submitted the next business day and replies to all *ex parte* notices to be submitted the following business day after an *ex parte* notice is made publicly available."

Among other things, T-Mobile argued that "requiring the same-day submission of notices of oral *ex parte* presentations could undermine the Commission's efforts to increase transparency and develop a fully informed record. ... If the Commission abbreviates the time period for submitting notices of meetings held the same day the Sunshine notice is released, then interested parties could be deterred from scheduling meetings on that day. That, in turn, could cut short the opportunity for parties to

provide feedback on draft items and effectively result in a less informed record, undermining the very purpose and reducing the effectiveness of the Commission's decision to release draft items."

The carrier also said that replies should be required the day after ex partes are posted, not filed, noting that ex partes filed late in a day are often not available until the next business day. —Paul Kirby, paul.kirby@wolterskluwer.com

Copyright © 2020 CCH Incorporated, All Rights Reserved