



October 2009

FCC Joins the Blogosphere - Now What?

Anne Goodwin Crump
crump@fhhlaw.com
703-812-0426

As a part of its ongoing efforts to make its proceedings more accessible to the public and to appear to be up on modern methods of communication, the FCC announced last month that it had launched on Ideascale, a “crowd-sourcing platform”. The stated purpose of this launch is to allow the “online community” to discuss ideas related to issues (including particularly all things broadband) pending before the FCC in its various proceedings. In addition, the Commission noted the posting of Chairman Julius Genachowski’s first video blog to the FCC’s blog on broadband (which has been creatively dubbed “Blogband”). The FCC continued its flurry of new media activity by announcing that it will be launching on Facebook and Twitter as well, and they will be linked through www.fcc.gov/connect.

Shortly after making these announcements, however, the Commission apparently paused to consider the legal ramifications of all of these marvelous new methods of communicating with the public. That is, how will what is said on the Blogband and other new sources fit in with the notice and comment procedures mandated by the Administrative Procedure Act (APA)? These concerns are especially relevant to the National Broadband Plan, which is the subject of a docketed rule making proceeding. In such proceedings, interested parties are invited to submit written comments through the Commission’s Electronic Comment Filing System (ECFS), and copies of such comments are generally available for review on ECFS. The Blogband, however, is completely outside of that system. How, then, was the Commission to follow proper APA-mandated procedures so that interested parties could have notice of all other parties’ submissions and so that all comments considered would be included in the administrative record? After all, an administrative record is necessary for effective review of the agency’s activities by the courts. Further, how would Blogband postings fit in with the Commission’s *ex parte* rules, which generally require that submissions made to decision-making personnel also be filed with the Office of the Secretary to be made a part of the record?

The Commission began answering these questions in a Public Notice released on September 22, 2009. Taking perhaps the simplest approach, the Commission stated that it would deem the Blogband to be a part of the record in the docketed proceeding dealing

with the National Broadband Plan. It further advised all interested parties to review not only ECFS submissions but also the Blogband. Finally, since Blogband postings are available for review by the public, the Commission stated that it would waive the requirement that postings be filed with the Secretary.

The September 22 Public Notice thus takes care of a number of the most pressing issues as they relate to the broadband proceeding, but it leaves a number of questions unanswered. For example, we now know how blog postings made by members of the public are to be treated, but what about responses or other postings made by FCC personnel? What legal status would they have? Is someone at the FCC reviewing every posting before it is made? This issue would seem to get even bigger once the Commission is active on Facebook and Twitter. Also, what will happen when blog/Facebook/Twitter communiqués are used for proceedings other than broadband? There would seem to be a huge possibility for an FCC staff member to make a statement that might either (a) indicate ahead of time which way a Commission decision is going or (b) contradict FCC policy. The use of social networks in particular, with their informal atmosphere, would appear to be fraught with danger. We will be watching with interest to see what issues arise and how the Commission deals with them.