

CHALLENGING: Who Has Standing to Challenge the FCC Lead Gen Ruling and How Can It Be Done?

Article By:

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So with the big FCC vote on the new proposed lead gen rule set for tomorrow (and with passage seemingly a foregone conclusion) I have been asked one big question more than any other.

How can the ruling be challenged in court?

It seems as if far more companies are interested in challenging the ruling in court than were interested in commenting on the NPRM leading up to the proposed rule. One little problem though—they can't.

Under the Hobbs Act an appeal from FCC action can be taken by “any party aggrieved by the final order” so long as it is brought “within 60 days after its entry...” 28 U.S.C. § 2344.

This seems like great language except in order to be a PARTY that has standing to appeal you must have actually participated in the NPRM process—and its not clear how much participation is required to provide standing:

To achieve party status under the Hobbs Act, one must “have participated in the proceeding before the agency. The degree of participation necessary to achieve party status varies according to the formality with which the proceeding was conducted.

Unfortunately the case law is not uniform as to what degree of participation is necessary to trigger party status in an NPRM proceeding. At minimum, however, “party aggrieved” means a party who has “made a full presentation of views to the agency.” Accordingly, determining who does have standing is a bit trickier than it might seem.

But let’s start with who does *not* have standing— anyone out there who didn’t either comment, reply, or hold ex parte meetings with the Commission. You stood on the sidelines and, as a result, you lack standing to challenge the ruling. **Sorry, not sorry. I warned you.**

All right so with that out of the way let’s look at the entities that have a fighting chance here (I do not include consumer side groups, who are unlikely to challenge the ruling):

Entities That DEFINITELY Have Standing:

To be assured of standing in a proceeding like this one you need to have both commented, filed a reply comment and held at least one ex parte with the Commission.

- CTIA
- LendingTree, LLC
- NetNumber, Inc.
- **R.E.A.C.H.**

That’s it. Four of us who *definitely* have party status.

Entities that PROBABLY Have Standing:

One step below are the entities that both commented and filed a reply comment in connection with the proceeding:

- Insurance Marketing Coalition
- QuinStreet (No reply comment but comment and ex parte meeting noted on record.)
- Solar Energy Industries Association

So a total of 7 entities are at least *probably* armed with standing to challenge suit.

Entities that MAY Have Standing:

Finally are companies who participated in some fashion in the proceeding but it is unclear whether they participated sufficiently to have independent standing to challenge the ruling:

- Assurance IQ, LLC
- Balboa Digital/Kevin Wagoner
- Consumer Consent Council
- Drips Holdings, LLC
- Online Lenders Alliance/Michael Day
- Professional Association for Customer Engagement
- Pain, Edmond and Stodolak, David
- Receivables Management Assoc International
- SolarReviews
- UnitedHealthcare
- Contact Care Compliance* (reply only)
- Retail Industry Leaders Association* (reply only)
- American Bankers Association, ACA International, American Financial Services Association, Bank Policy Institute, Credit Union National Association, Mortgage Bankers Association, National Association of Federally Insured Credit Unions,

National Council of
Higher Education
Resources, and Student
Loan Servicing Alliance* (reply and ex parte only)

- Zillow* (ex parte only)
- EXP Realty* (ex parte only)

So there you go, a total of 30 entities on the planet MAY have standing—and the ones with asterisks next to their names...probably not (sorry, just being real.)

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