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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the matter of)
)
 Amendment of 47 C.F.R. § 1.1200) GC Docket No. 95-21
et seq. Concerning Ex Parte)
 Presentations in Commission)
 Proceedings)

REPORT AND ORDER

Adopted: March 13, 1997 ; Released: March 19, 1997

By the Commission:

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I. INTRODUCTION

1. In this Report and Order, we amend our rules governing ex parte presentations in proceedings before the Commission. Ex parte presentations are communications directed to the merits or outcome of a proceeding which, if written, are not served on the parties to the proceeding or, if oral, are not preceded by notice to the parties and an opportunity for the parties to be present. The rules specify under what circumstances ex parte presentations are permissible in Commission proceedings, under what circumstances they must be disclosed on the record, and under what circumstances they are prohibited. The ex parte rules do not otherwise affect the rights of persons to participate as "parties" to a Commission proceeding. Most prominently, we simplify the method for determining which proceedings are "restricted" under the ex parte rules and thereby subject to the prohibition on ex parte presentations. We also make an exemption to the Sunshine Period prohibition for widely attended speeches or panel discussions in exempt or permit-but-disclose proceedings, transfer responsibility for dealing with alleged ex parte violations from the Office of Managing Director to the Office of General Counsel, and make various minor changes in the rules.

2. We believe that the rules as amended, which are set forth in Appendix B, are simpler and clearer, and thus more effective in ensuring fairness in Commission proceedings. The amendments will make it easier for persons to determine their status under the rules and will provide more frequent reporting by the Commission of when ex parte presentations occur. We stress that the ex parte rules are important and that full compliance is expected. See generally Press Broadcasting Co. v. FCC, 59 F.3d 1365 (D.C. Cir. 1995).

3. The new rules will become effective 30 days after publication in the Federal Register and will then apply to all pending and new FCC proceedings, except for individual pending proceedings where the Commission or the staff has issued an order, letter, or public notice to govern the ex parte status of that individual pending proceeding. Specific pending proceedings within this exception will be governed by whatever ex parte rules the Commission or the staff previously established for that proceeding.

II. BACKGROUND

4. In the Notice of Proposed Rulemaking in this proceeding, we proposed to revise our ex parte rules to make them simpler and clearer. Amendment of 47 C.F.R. § 1.1200, 10 FCC Rcd 3240 (1995) (Notice). In so doing, we sought to enhance the ability of the

public to communicate with the Commission in a manner that comports with fundamental fairness. The Notice proposed to simplify the system for classifying how ex parte presentations are treated in various proceedings. The Notice also proposed certain modifications in the Sunshine Period prohibition contained in the rules and miscellaneous proposals for making the rules more effective.

5. We received seventeen comments and five reply comments in response to our Notice, which are listed in Appendix A to this Report and Order. Additionally, the Federal Communications Bar Association (FCBA), on April 25, 1995, sponsored a seminar on our proposals. The seminar generated extensive discussion of matters raised in the Notice. (An audio recording of this seminar and written materials distributed during the seminar have been placed in the record of this proceeding.) Our examination of these comments has persuaded us to depart from our proposals in some respects and, generally, to retain more of the existing rules than we originally proposed. In addition to the revisions specifically discussed below, we have made some minor stylistic changes to enhance the clarity of certain provisions.

III. CLASSIFICATION OF PROCEEDINGS

A. General approach

6. Our principal proposal concerned the system for classifying proceedings as restricted, permit-but-disclose (non-restricted), and exempt. 10 FCC Rcd at 3241-45 ¶¶ 9-37. In restricted proceedings, ex parte presentations are generally prohibited. In permit-but-disclose proceedings, ex parte presentations are permissible, but generally must be disclosed. Such disclosure is accomplished by placing any written presentations in the record or, if the presentation is oral, by placing in the record a memorandum containing any data or arguments not already reflected by that person's written submissions in the proceeding. Finally, in exempt proceedings, ex parte presentations generally may be made without limitation.

7. In the Notice, we generally proposed to reduce significantly the category of proceedings that would be classified as restricted. We proposed to treat as restricted only those proceedings in which ex parte communications are barred by the Administrative Procedure Act. Under the proposal, only proceedings designated for formal evidentiary hearing and proceedings involving mutually exclusive applications to be decided by hearing would be restricted. The Commission reserved the right to restrict other proceedings on a case-by-case basis. We further proposed to limit the types of proceedings that would be exempt to notice of inquiry proceedings and complaints not served on the subject of the complaint. (Formal complaints under 47 U.S.C. § 208 and 47 C.F.R. § 1.721 would, however, be treated as permit-but-disclose proceedings.) All other proceedings would be subject to permit-but-disclose procedures.

8. As discussed below, the commenters have persuaded us to depart from the proposals contained in the Notice in several respects. We believe that the approach we adopt here will serve our primary goal of making it easier to determine the ex parte status of a proceeding. At the same time, the approach will ensure fundamental fairness in Commission proceedings and minimize confusion among persons accustomed to our existing rules.

9. Our primary proposal -- to treat most adjudications not designated for formal hearing ("informal adjudications") as permit-but-disclose proceedings -- provoked considerable controversy. Under current rules, such proceedings are generally treated as restricted proceedings as soon as more than one party is formally involved in the matter. Some commenters agreed with our proposal and with the analysis in the Notice that permit-but-disclose procedures are adequate to preserve the fairness of these informal adjudicatory proceedings and that more relaxed procedures would facilitate beneficial communication between the Commission and the public.¹

10. Other commenters, however, raised objections to the broad use of permit-but-disclose procedures in adjudications.² They contended that allowing ex parte presentations in informal adjudications would foster the appearance that some parties have greater access to the decisionmaker than others. In addition, they expressed concern that -- in the case of oral presentations -- disclosure procedures would neither fully reflect the presentation nor substitute for an opportunity to be present and thus be unfair to a party. They also warned that a permit-but-disclose procedure would encourage the parties to jockey for the opportunity to have "the last word," thereby undermining the orderliness of the pleading cycle in adjudicatory matters and potentially causing delay. The objectors further asserted that prohibiting ex parte presentations is not a burden on the parties, whereas it would be burdensome for parties to attempt to monitor the record for ex parte presentations. Most of the parties addressing this matter were especially opposed to treating proceedings involving formal section 208 complaints under 47 U.S.C. § 208 and 47 C.F.R. § 1.721 as permit-but-disclose proceedings.³

11. We have been persuaded by the concerns expressed by experienced practitioners that our proposal would be disruptive in adjudicatory proceedings. In addition, we do not

¹ Rochester Comments at 1-2; Ameritech Comments at 2-3; SBC Comments at 1-2; Pac Bell Comments at 2.

² Sprint Comments at 2-7; FCBA Comments at 5-9; Press Comments at 1-10; BellSouth Reply at 1-3. See also FCBA Seminar (audio tape).

³ US West Comments at 2-3; MCI Comments at 6; MCI Reply comments at 2-3; AT&T Comments at 2-7; AT&T Reply at 1-3; Pac Bell Reply at 2; Sprint Reply at 4. But see Ameritech Comments at 2; Nynex Comments at 3 (favoring use of permit-but-disclose).

wish to adopt a policy that commenters believe would create the appearance of unfairness. We have therefore decided to continue to treat as restricted proceedings most informal (*i.e.*, non-hearing) adjudications. Similarly, we will continue to treat proceedings involving broadcast channel allotments as restricted.

12. We continue to believe, however, that our *ex parte* rules will be simpler and more effective if two of the three categories of proceedings contain shorter lists of covered proceedings and the third category is a catch-all. In light of the comments, we now believe that the catch-all category should be the "restricted" category rather than the "permit-but-disclose" category. To this end, we have simplified the lists of exempt and permit-but-disclose proceedings and eliminated the list in the rules specifically setting forth all restricted proceedings.

13. Under the new rules, if a proceeding is not contained in the simple lists of exempt and permit-but-disclose proceedings, everyone will be on clear notice that it is restricted unless and until its status is altered by the Commission or the staff. Consistent with our current practice, specification on a case-by-case basis would only be done in an appropriate order, letter, or public notice, not orally. We are amending § 1.1200(a) to codify this practice.

B. Definition of a party

14. Under the amended rules, the key to determining whether *ex parte* obligations apply in restricted and permit-but-disclose proceedings is to refer to the definition of a party in new section 1.1202(d). If a "party" exists, as defined in that section, any presentations to the Commission regarding the proceeding would be constrained by the necessity of service or notice to that party in restricted proceedings (or compliance with permit-but-disclose requirements where applicable). The new definition of a party largely tracks the substantive requirements of the existing *ex parte* rules by defining a party to include: (1) any person who files an application, waiver request, petition, motion, request for a declaratory ruling, or other filing seeking affirmative relief (including a Freedom of Information Act request), and any person who files a written submission referencing and regarding such pending filing which is served on the filer, or, in the case of an application, any person filing a mutually exclusive application; (2) any person who files a complaint which is served on the subject of the complaint or which is a formal complaint under 47 U.S.C. § 208 and § 1.721 of our rules, and the person who is the subject of such a complaint; (3) any person who files a petition to revoke a license or other authorization or a petition for an order to show cause and the licensee or entity who is the subject of the petition; (4) the subject of an order to show cause, hearing designation order, notice of apparent liability, or similar notice or order, or petition for such notice or order, or any other person who has otherwise been given formal party status in a proceeding; and (5) in a rulemaking proceeding (other than a broadcast allotment proceeding) or a proceeding before a Joint Board or before the

Commission to consider the recommendation of a Joint Board, the general public. To be deemed a party, a person must make the relevant filing with the Secretary, the relevant Bureau or Office, or the Commission as a whole. Written submissions made only to the Chairman or an individual Commissioner will not confer party status since such filings do not demonstrate the requisite intent or formality for party status. See § 1.1202(d)(1) Note 2.

15. The new rules provide several examples of how the rules apply in specific contexts involving restricted proceedings (see subsection C, below, regarding restricted proceedings). See § 1.1208, Note 1 Examples. Specifically, for example, after the filing of an uncontested application or waiver request, the applicant or other filer would be the sole party to the proceeding. The filer would have no other party to serve with or provide an opportunity to be present at any presentations to the Commission, and such presentations would therefore not be "ex parte presentations" and would not be prohibited. On the other hand, in the example given, because the filer is a party, a third person who wished to make a presentation to the Commission concerning the application or waiver request would have to serve the filer or provide the filer with an opportunity to be present. Further, once the proceeding involved additional "parties" (e.g., an opponent of the filer who served the opposition on the filer), the filer and other parties would have to serve each other or give each other an opportunity to be present. The format of the rules has thus been made shorter and simpler but, in substance, the ex parte restrictions that apply are generally unchanged.

C. Restricted proceedings

16. As under the existing rules, our new rules provide that, in restricted proceedings, ex parte presentations are prohibited. Consistent with the above discussion, we conclude that it is unnecessary to include an extensive list of the specific types of proceedings that are restricted in our rules, however. Because this will be the "catch-all" category under our new rules, we believe that such a list might cause undue confusion.

17. To simplify matters, our new rules regarding restricted proceedings eliminate the need to determine whether a filing in restricted proceedings is a "formal opposition" or a "formal complaint." Currently, the rules define a formal opposition or complaint as a pleading opposing the grant of a particular application, waiver request, petition for special relief or other request for Commission action, or a pleading in the nature of a complaint (other than a section 208 complaint), which meets the following requirements: (1) the caption and text of a pleading make it unmistakably clear that the pleading is intended to be a formal opposition or formal complaint; (2) the pleading is served upon the other parties to the proceeding or, in the case of a complaint, upon the person subject to the complaint; and (3) the pleading is filed within the time period, if any, prescribed for such a pleading.

18. In our experience, the timeliness and formality requirements of the definition of a formal opposition or formal complaint have led to unnecessary complexity. Accordingly, we

will no longer tie our ex parte requirements to the designation of a pleading, but, as discussed in subsection B, above, to the "party" status. In the new definition of a party, we provide that a person attains party status and becomes entitled to protection from ex parte presentations by other parties simply upon the filing of a written submission served on an existing party. See § 1.1202(d)(1), (2). Thus, so long as a submission is served, party status (and hence the right to receive service and to be present for oral presentations in a restricted proceeding) occurs regardless of whether a person's submission would be considered "formal" under the existing rules or whether the submission is timely. The new definition of a party expressly notes, however, that identifying a person as a "party" for purposes of the ex parte rules does not constitute a determination that such person has satisfied any other legal or procedural requirements (e.g., timeliness or standing) to be a party for other purposes. See § 1.1202(d) Note.

19. A special provision applies in the Mass Media context. The Commission's rules require broadcast stations to invite listeners and viewers to submit comments when the Commission is considering new or modified broadcast station license applications or applications for renewals or transfers of such licenses. See 47 C.F.R. § 73.3580. It would be inconsistent with the spirit of this requirement to take any action that might discourage such informal comments from viewers or listeners or otherwise overly formalize the process. Accordingly, we make clear that unlike other written submissions about applications (which, under our amended rules, must be served on the applicant and any other parties) comments from individual viewers or listeners regarding a pending broadcast application need not be served on the applicant. See § 1.1204(a)(8). Such informal comments will, of course, be placed in the record regarding the application. We also make clear that the individual viewers or listeners filing such informal comments would not become "parties" simply by service of the comments. When, however, participation as a party by individual viewers or listeners filing such comments would be conducive to the Commission's consideration of the application or would otherwise be appropriate, e.g., the individual has filed a formal petition to deny under Section 309, the Mass Media Bureau will promptly afford the commenter party status. See § 1.1202(d) Note 4.

20. We shall also treat as restricted all complaint proceedings except for informal complaints under 47 U.S.C. § 208 and 47 C.F.R. § 1.716, which we will continue to treat as exempt, and cable rate complaints under 47 U.S.C. § 543(c), which we will treat as exempt or permit-but-disclose proceedings depending on the circumstances. See paragraphs 24, 28, and 35, supra. In formal complaints filed under 47 U.S.C. § 208 and 47 C.F.R. § 1.721, parties will include the complainant and target. In all other complaint proceedings, we will treat as parties the complainant and the subject of the complaint where the complaint shows that the complainant has served it on the subject. If the complaint has not been served, neither the complainant nor the target will be deemed a party. See § 1.1202(d)(2).

21. Under the existing rules, 47 C.F.R. § 1.1208(c)(B), formal § 208 complaints are restricted, but informal § 208 complaints are exempt. In the Notice, we proposed to apply permit-but-disclose requirements to formal § 208 complaints and all informal complaints that are served on the subject of the complaint. 10 FCC Rcd at 3244 ¶ 29. Several commenters opposed our proposal to no longer treat informal § 208 complaints as exempt proceedings.⁴ These commenters argue that typically the large volume of complaints against common carriers received by the Commission are expeditiously resolved without prejudice to the complainant through informal discussions with the carrier involved. The commenters allege that permit-but-disclose procedures would hinder this process. Moreover, they maintain that most complainants are unfamiliar with the Commission's common carrier complaint rules and do not realize that serving their complaint could have ex parte consequences.

22. Our rules specifically provide that we will informally mediate informal § 208 complaints. 47 C.F.R. § 1.717. Only if no satisfactory resolution can be reached in this manner is the filing of a formal § 208 complaint and the initiation of formal processes warranted. 47 C.F.R. § 1.718. In recognition of the explicit distinction between informal and formal processes in common carrier complaint proceedings, we will continue to treat informal complaints as exempt and formal complaints as restricted. Except for cable rate complaints (see paragraph 35, infra), the Commission has no rules establishing objective distinctions between formal and informal complaints. For example, in the cable area, complaints may be filed through a petition for special relief, which by rule "may be submitted informally, by letter" 47 C.F.R. § 76.7(b). Moreover, we are concerned that those complainants who take the trouble to serve the subject of their complaints in these areas where no objective requisites are established for formal complaints may have a continuing interest in being informed of the complaints' progress that would be prejudiced by ex parte presentations. Accordingly, complainants in such proceedings who serve their complaint on its subject will be treated as parties under our ex parte rules. We will not permit ex parte presentations in such situations if the complaint shows that the complainant served it on the subject of the complaint.

23. Our new rules eliminate an anomaly under our existing rules whereby technically the subject of a petition to revoke does not become a party and entitled to the protection of the ex parte rules until it formally opposes the petition to revoke. In our definition of a party, we expressly distinguish a complaint from a petition to revoke a license. Under the amended rules, the subject of a petition to revoke a license would be a party entitled to service, and, hence, the petitioner would be in violation of our ex parte rules if the licensee were not served. See § 1.1202(d)(3).

⁴ US West Comments at 3; Ameritech Comments at 4-5; SBC Comments at 2-3; MCI Comments at 5-6; MCI Reply at 2; Nynex Comments at 3-4; AT&T Reply at 3-4; Pac Bell Comments at 2-3.

24. In the Notice, we observed that a proceeding becomes restricted if it involves mutually exclusive applications, but, under existing practice, we treat mutually exclusive "short-form" applications subject to competitive bidding as exempt proceedings until the "long-form" is filed and formally opposed or unless restricted for some other reason (e.g., a waiver request). 10 FCC Rcd at 3244 n.15, citing Public Notice, 9 FCC Rcd 6760 (1994). As a consequence, prior to the point where long-form applications are filed and formally opposed, mutually exclusive applicants in auction proceedings may freely communicate with the Commission concerning their applications, so long as the application has not become subject to ex parte restrictions for some other reason, e.g., the applicant has filed a waiver request that has been formally opposed. We shall now codify this existing practice in our rules by adding a note to the definition of party in § 1.1202(d). Because the applications are not going to be compared against each other, we see no prejudice to other applicants to permit ex parte presentations under those circumstances. Hence, such applicants are not required, in the absence of other circumstances that might trigger ex parte restrictions (e.g., requests for waiver), to serve other applicants or to otherwise comply with ex parte restrictions when they communicate with the Commission concerning their own applications. We will also extend this practice to applications subject to lotteries. Given the similarities between proceedings involving competitive bidding and those involving lotteries, we believe that the two types of proceedings should be treated the same way for purposes of the ex parte rules.

25. To the extent that there has apparently been some confusion, we take this opportunity to emphasize that all waiver proceedings are restricted, unless there is an order, letter, or public notice to the contrary. While the Commission or the staff has discretion under § 1.1200(a) to conclude that certain waiver proceedings involve broad policy issues more than the rights of specific parties and therefore make such proceedings permit-but-disclose, all waiver proceedings -- except for those associated with a particular tariff filing -- are restricted in the absence of such action. Requests for waiver or for special relief associated with particular tariff filings have the same ex parte status as does the tariff filing itself.

26. Finally, in new § 1.1202(e), to avoid any possible ambiguity, we codify our existing interpretation that a matter designated for hearing is any matter that has been designated for hearing before an administrative law judge or which is otherwise designated for a hearing conducted in accordance with 5 U.S.C. § 554.

D. Exempt proceedings

27. We shall continue to exempt certain proceedings from ex parte restrictions, and, for the most part, our rules regarding exempt proceedings will remain unchanged. Thus, under the amended rules, exempt proceedings will continue to include notice of inquiry

proceedings (see § 1.1204(b)(1)) and informal § 208 complaint proceedings. Analogously, we will treat cable rate complaints not filed on the standard complaint form required by 47 C.F.R. § 76.951 (FCC Form 329) as exempt. As with the requirements of formal § 208 complaints, the requirement that cable rate complaints be filed on a specific form establishes a clear requisite for "formal" cable rate complaints. Given the choice of such complainants not to use the required form, we do not believe that any degree of formality for such proceedings is appropriate under our *ex parte* rules. See § 1.1204(b)(6). See also paragraph 35, *infra*. As under the current rules, however, the Commission may decide on case-by-case basis that a particular inquiry contemplates the immediate adoption of a binding policy statement. Under these circumstances, it would be appropriate to treat the inquiry like a permit-but-disclose rulemaking.

28. We have decided to depart from our proposal in the Notice, and we now conclude that petitions for rulemaking (except in a broadcast allotment proceeding, which we have treated and will continue to treat as restricted) should continue to be treated as exempt proceedings, as under the current rules. See § 1.1204(b)(2). Like a notice of inquiry, a petition for rulemaking initiates a process that is tentative and preliminary to the consideration of a proposed rule.⁵ Therefore, it is desirable to permit the maximum degree of free discussion, and there is no danger of prejudicing interested persons.

29. The proposal contained in the Notice also had the effect of applying permit-but-disclose requirements in tariff proceedings even before they were set for investigation. Currently, such proceedings are exempt from *ex parte* restrictions. Only one commenter agreed with this proposal, arguing that permit-but-disclose procedures are necessary to protect the rights of those objecting to tariff filings.⁶ Several commenters, however, strongly urged that tariff proceedings should remain exempt, as under current policy, until they are set for investigation. These commenters contend that there is an overriding need for the flexibility provided by informal discussions between the carrier and the Common Carrier Bureau staff to clarify complex technical issues involved in tariff filings in a timely, cost-effective fashion.⁷

30. We agree with the commenters that, prior to an investigation, the tariff review

⁵ See Memorandum of the President of the United States on Regulatory Reinvention Initiative (Mar. 4, 1995) at 4.

⁶ Sprint Reply at 2-4.

⁷ Rochester Comments at 2-3; GTE Comments at 2-3; BellSouth Comments at 5; Ameritech Comments at 3-4; SBC Comments at 2-3; MCI Comments at 2-4; MCI Reply at 5; Nynex Comments at 4-5; AT&T Comments at 7-11; AT&T Reply at 4; Pac Bell Comments at 3.

process was not intended to be a formal adversarial process or to result in a final decision and that investigatory and complaint procedures are the appropriate means of resolving issues that cannot be dealt with informally on an ex parte basis. We also agree that the current practice worked well and has not raised problems of fairness. In view of the comments, which are consistent with our own experience, we conclude that the existing practice of treating pre-investigation tariff proceedings -- including associated requests for waiver and for special relief -- as exempt should not be changed. See § 1.1204(b)(3).

31. Finally, because of our new rule defining a "party," discussed above at paragraphs 14-15, and because some listings of exempt proceedings appear unnecessary in order to determine the proper classification and may be confusing, some provisions of the existing rules for exempt proceedings (and associated rules) have been deleted. See existing §§ 1.1204(a)(1) (unopposed adjudication), (a)(3) (unopposed FOIA request), (a)(8) (unopposed request for declaratory ruling), (a)(9) (certain rulemakings), (a)(10) (section 221(a) proceeding), (a)(11) (section 214(a) proceeding).

E. Permit-but-disclose proceedings

32. We now turn to the applicability of permit-but-disclose procedures in Commission proceedings. As a preliminary matter, we note that in our Notice, we proposed using the term "permit-but-disclose" to replace the existing term "non-restricted" because it is more descriptive. 10 FCC Rcd at 3242 ¶ 13. The FCBA supported this change, and we adopt it.⁸

33. As a general matter, we see no reason to change the treatment of most permit-but-disclose proceedings as we have encountered no difficulties or objections. Accordingly, the following proceedings will continue to be treated as permit-but-disclose: (1) declaratory ruling proceedings; (2) proceedings under 47 U.S.C. § 214(a) that do not involve applications under Title III of the Communications Act; and (3) Freedom of Information Act requests. As under current practice, however, the Commission may decide on a case-by-case basis that because a petition for declaratory relief predominately concerns the rights of particular parties, it should be treated as restricted, and may so modify treatment of the proceeding. Applications for a Cable Landing Act license are similar to § 214 applications (and often filed in conjunction therewith), and the new rules also expressly subject them to permit-but-disclose procedures, again provided that no Title III applications are involved.

34. One commenter urged that informal notice-and-comment rulemakings, (*i.e.*, virtually all Commission rulemakings other than broadcast allotment rulemakings) which are

⁸ See FCBA Comments at 3 n.4.

currently permit-but-disclose proceedings, should be treated as restricted proceedings.⁹ Sprint argued that rulemakings have as great an impact on parties as adjudications and that the same elements of procedural fairness are involved. We have decided, however, to adhere to our long-standing practice of treating rulemakings (other than broadcast allotment proceedings) as permit-but-disclose after the issuance of a notice of proposed rulemaking. As participants at the FCBA seminar (*supra*) pointed out, rulemakings, unlike adjudications, often involve a need for continuing contact between the Commission and the public to develop policy issues. Further, we are confident that a permit-but-disclose procedure in rulemakings gives interested persons fair notice of presentations made to the Commission and ensures the development of a complete record. In this regard, we find that proceedings involving the issuance of policy statements, interpretive rules, and rules issued without notice and comment are substantially similar to those involving the notice-and-comment rulemaking, and we shall add an express provision to the rules treating them as subject to permit-but-disclose procedures once they are issued. See § 1.1206(a)(2).

35. Consistent with the general treatment of rulemakings, we will continue to treat the following common carrier proceedings as permit-but-disclose: (1) tariff investigations which have been set for investigation under 47 U.S.C. § 204; (2) proceedings conducted pursuant to 47 U.S.C. § 220(b) for prescription of common carrier depreciation rates (upon release of a public notice of specific proposed depreciation rates); and (3) proceedings to prescribe a rate of return under 47 U.S.C. § 205. Additionally, we will continue to treat proceedings before a Joint Board or before the Commission involving a recommendation from a Joint Board as permit-but-disclose. Proceedings involving cable rate complaints under 47 C.F.R. § 543(c) and filed on the required form (FCC form 329) will also be treated as permit-but-disclose. These proceedings resemble tariff investigations and involve a broad examination of industry rate structures and levels. Our experience indicates that, as in a tariff investigations, informal discussions with Commission staff, subject to disclosure, are useful in resolving the relevant issues. We also note that, at the time when cable rate complaints were restricted, the Commission provided for modified ex parte procedures upon request of cable operators in situations where general discussions would implicate specific pending cable rate proceedings. See Modification of Ex Parte Procedures in Certain Cable Rate Proceedings, 9 FCC Rcd 7812 (1994). We affirm that those procedures remain available and that the staff remains free to exercise its discretion under section 1.1200(a) to modify ex parte procedures in cable rate proceedings by letter, order, public notice, or letter as appropriate to serve the public interest. In light of our new definition of party, we have modified some of the language included in the § 1.1206(b) list of permit-but-disclose proceedings. We have also eliminated existing subsections that appear unnecessary to determining classification of proceedings and may be confusing. See § 1.1206(b)(5), (b)(6) Note.

⁹ Sprint Reply at 4-5.

IV. SUNSHINE PERIOD PROHIBITION

36. Our Notice also proposed modifications in the Sunshine Period prohibition, which imposes additional restrictions on communications regarding matters pending before the Commission for consideration at a Commission meeting. 10 FCC Rcd at 3245-46 ¶¶ 38-43. The Sunshine Agenda period is defined as beginning with release of a public notice listing a matter for consideration at a Commission meeting (the Sunshine Agenda) and ending with (1) the release of the text of a decision or order dealing with the matter, (2) issuance of a public notice that the matter has been deleted from the agenda, or (3) issuance of a public notice that the matter has been returned to the staff for further consideration. During this entire period, presentations, whether ex parte or not, are prohibited, unless requested by the Commission or its staff or coming within other enumerated exemptions. 47 C.F.R. §§ 1.1202(f), 1.1203.

37. We proposed first that a prohibition on presentations analogous to the Sunshine Period prohibition should apply to items considered on circulation rather than at an open Commission meeting. In the circulation process, copies of an item are distributed to the Commissioners, who vote by registering their vote on an electronic system or, in some instances, by noting a paper vote sheet. Under our proposal, the prohibition would apply from the time the adoption of the item was announced in a news release until the text of the decision or order was released.

38. The commenters generally supported this proposal.¹⁰ However, because of some internal changes we have made to the circulation process, we now believe that we need not extend the Sunshine Period prohibition to circulation items. We have adopted new procedures to ensure that the texts of circulation items are released promptly after adoption of the item. See News Release, "FCC to Implement New Guidelines to Improve the Decision-Making Process" (Jun. 19, 1995). As a result, most circulation items are released within a week of adoption. Thus, there should be little or no period of time during which contact with the Commission needs to be limited.

39. One commenter, Consultants, proposed that a more general prohibition on contact with the Commission should be in effect during the circulation process, which it states, the Commission has used with increasing frequency in recent years as an alternative to acting on items at Commission meetings.¹¹ Consultants suggests that circulation items should be treated more analogously to meeting items and that when an item goes on circulation the Commission should issue a public notice cutting off presentations either

¹⁰ BellSouth Comments at 5; SBC Comments at 3; MCI Comments at 12-13; Nynex Comments at 8-9.

¹¹ Consultants Comments at 2-7.

immediately or by a date certain. We shall not adopt Consultants' proposal. We do not believe that such a rule is necessary.

40. Our second proposal was to exempt from the Sunshine Period prohibition the discussion of recently adopted items at widely attended meetings or symposia. The commenters also supported this proposal.¹² They agreed with our reasoning that the discussion of recently adopted items in public forums was not disruptive or unfair. They also agreed that it would be undesirable to chill such public discussion or effectively preclude Commission personnel from attending.

41. Several parties expressed a concern that the exemption should apply only to true public discussion. They contend that the exemption should not apply to private communications to Commission personnel made on the site of a public address or symposium. We agree that the spirit of the exemption would be undermined if the meeting or symposium were not open to broad segments of the public or industry. We think that the new rules' language referring to "widely attended" speech or panel discussions captures this requirement. See § 1.1203(a)(3). On a related matter, we codify in our rules our existing interpretation that statements made by decisionmakers that are limited to providing publicly available information and facts about pending proceedings are not presentations. See Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations, 2 FCC Rcd 3011, 3013 ¶ 13 (1987); § 1.1202(a).

42. Our proposal contemplated that, although widely attended meetings would be exempted from the Sunshine Period prohibition to the extent indicated, they would still be subject to applicable permit-but-disclose requirements. The FCBA proposes that we go further and completely exempt from permit-but-disclose requirements any presentations made at public meetings or symposia. FCBA Comments at 9-10. In our view, this proposal goes too far. Public meetings can be powerful tools for advocacy, at least as effective as written comments. We note, for example, that the record in this rulemaking proceeding would not have been complete if it did not reflect presentations made at the FCBA seminar, which was attended by Commission personnel. We therefore endorse the procedure used by the FCBA in this proceeding of submitting a tape or transcript of the meeting as an alternative means of satisfying the permit-but-disclose requirement in lieu of submitting a memorandum summarizing the content of the presentations required to be disclosed under the rules. Because this is an effective and efficient means of giving notice, we find that the use of this procedure is an appropriate option in this situation, where the preparation of a memorandum might be cumbersome. Our new rules incorporate this option. See § 1.1206(b)(2) Note.

¹² FCBA Comments at 9-10; BellSouth Comments at 5-6; SBC Comments at 3-4; MCI Comments at 12; Sprint Reply at 7; Pac Bell Comments at 3-4.

V. OTHER COMMISSION PROPOSALS

A. Notices of oral presentations in permit-but-disclose proceedings

43. In the Notice, we expressed concern that the disclosure requirement in permit-but-disclose proceedings might not be fully effective. Under the current rules, memoranda describing oral presentations that are required to be filed in permit-but-disclose proceedings ("notifications") must disclose data and arguments not already reflected in that party's earlier submissions in the proceeding. We were concerned that persons who believe that their presentations contain no new data or arguments either file no notification or one that is sketchy and unrevealing. We therefore proposed that all notifications should summarize the entire content of the presentation, even if the data and arguments were not new.

44. The commenters were divided over this proposal. Several of the commenters supported the idea that, even if the claims were previously made in written submissions, more complete disclosure is needed to apprise parties of the claims made to the Commission by their opponents and to give them a fair opportunity to respond.¹³ On the other hand several other commenters argued that reiterating arguments already reflected in written submissions would generate burdensome and unnecessary paperwork duplicating the earlier submissions.¹⁴

45. Upon reflection, we find it undesirable to create such a significant new requirement for those dealing with the Commission. We do not find it is necessary for parties to create additional paperwork which merely reflects submissions already filed; thus, no filing need be made of presentations concerning previously filed submissions. Amendment of Subpart H, Part 1, 2 FCC Rcd 3011, 3032 n.48 (1987). We do, however, find it appropriate to insist on strict enforcement of the existing notification requirement as to new data and arguments, both to ensure that parties receive fair notice of arguments made to the Commission and to ensure that a complete record is compiled. Thus, we again

emphasize that written memoranda which reflect oral ex parte presentations should, at a minimum, contain a summary of the substance of the ex parte presentation. Compliance under the rules will require more than merely a listing of the subjects discussed and generally more than a one or two sentence

¹³ Symbol Comments at 1-4; Sprint Comments at 4; Sprint Reply at 5; Advanced Cordless at 1-2; GTE Comments at 4; Press Comments at 6-7; BellSouth Comments at 6; SBC Comments at 4; Nynex Comments at 6-7; Pac Bell Comments at 4.

¹⁴ FCBA Comments at 4; Rochester Comments at 3-4; Bell Atlantic Comments at 2-3; MCI Comments at 8-9; AT&T Comments at 11-12; AT&T Reply at 4-5.

description of the views and arguments presented.

Id. at 3021 ¶ 79. Moreover, as under our current definitions, any written material shown to the Commission in the course of the oral presentation (as well as any attachments to any written presentations) should also be filed. We now make this aspect of our definition of presentation more explicit in the rules.

46. The Notice further proposed that, if a Commission employee receiving an oral ex parte presentation believes that the notice filed by a person making the presentation is deficient, the employee may request the filing of a supplemental memorandum. 10 FCC Rcd at 3246 ¶ 45. One commenter expressed concern that the definition of "deficiency" is very subjective and that the requirement should not be interpreted to require unduly burdensome notifications.¹⁵

47. We have decided not to adopt the proposed rule. On reflection, it appears unnecessary. The duty to ensure the adequacy of notifications rests with the person making ex parte presentations. While the staff remains free, as under current practice, to request supplemental ex parte notices, the obligation to file a sufficient notice must be satisfied regardless of possible requests by the staff. In addition, we note that if an ex parte notice does not summarize new data or arguments the ex parte rules would have been violated and any Commission employee (or party) is obligated under the current rules to report the violation. See § 1.1214.

48. Finally, Bell Atlantic also suggests that parties should not have to report discussions of hypothetical scenarios or "trial balloons" of potential compromises by parties or Commission staff.¹⁶ Bell Atlantic contends that these discussions need not be reported because, being merely hypothetical, they do not reflect any public position. We do not agree with this reasoning. As Bell Atlantic indicates, such discussions are integral to the resolution of proceedings. But parties to Commission proceedings are not entitled to have a public position and a different, private position before the Commission. The disclosure of such matters is therefore central to the purposes of the ex parte rules.

49. In connection with our proposal to require more detailed notifications, we also proposed to extend the deadline for filing notification from the day of the oral presentation to three days afterwards. 10 FCC Rcd at 3246 ¶ 45. Although we do not adopt our proposal for more detailed notifications, we continue to believe that a longer filing period is justified. In our view, a longer period will enable filers to prepare notices that more accurately and

¹⁵ Pac Bell Comments at 4-5.

¹⁶ Bell Atlantic Comments at 2-3.

fully reflect the content of the presentation.¹⁷ Experience indicates that the present requirement encourages people to prepare the notice before the meeting and that sometimes the notice is not modified to reflect the presentation as actually made.

50. Some commenters contended that notices could be prepared in advance and easily revised in less than three days to take into account unexpected nuances in the presentation. They further contended that increasing the filing period would exacerbate delays in the issuance of public notices reflecting the presentations and would increase the risk that a party would be cut off by a Sunshine notice before being able to respond to a presentation.¹⁸ This is a valid concern. However, it is difficult to conceive that a summary prepared before a meeting can accurately and fully summarize what was actually said during a meeting. Because we see valid concerns on both sides of this issue, we believe that a middle course is appropriate. We will therefore provide that notification should be filed no later than the next business day after the presentation. See § 1.1206(b)(2).

B. Duty to notify the Office of General Counsel of potential ex parte problems

51. In the Notice, we expressed concern that cases may arise in which improper presentations occur because a person privately resolves doubts about the propriety of a presentation without alerting the staff and it is ultimately concluded that the person's rationale is erroneous. 10 FCC Rcd at 3246 ¶¶ 46-47. We proposed that persons with reason to believe that a situation raises an ex parte question must alert the Office of General Counsel of this circumstance before engaging in ex parte contacts. This proposal would codify a statement in Rainbow Broadcasting Co., 9 FCC Rcd 2839, 2846 ¶ 35 & n.34 (1994), remanded on other grounds sub nom. Press Broadcasting Co. v. FCC, 59 F.3d 1365 (D.C. Cir. 1995), that persons communicating with the Commission have such a duty.

52. The commenters split in their response to this proposal. Some favored it on the grounds that it would help avoid inadvertent ex parte violations and assist in clarifying the rules.¹⁹ Other commenters argued that the proposal would infringe on the role of private counsel in interpreting the rules and would burden both private parties and the Commission's staff with a constant need to consult the Office of General Counsel.²⁰

¹⁷ Accord, FCBA Comments at 10; GTE Comments at 4-5; BellSouth Comments at 6; Pac Bell Comments at 4.

¹⁸ Ameritech Comments at 5-6; SBC Comments at 4-5; MCI Comments at 7-8; MCI Reply at 4; Nynex Comments at 7-8; Sprint Reply at 5-6.

¹⁹ FCBA Comments at 10; BellSouth Comments at 6; SBC Comments at 6.

²⁰ GTE Comments at 5-6; MCI Comments at 9, 14.

53. We believe that the commenters opposed to the proposal have pointed out genuine difficulties in its application. We do not wish to unduly interfere with the good faith judgment of private counsel in advising their clients and in deciding when to voluntarily seek Commission guidance, which the existing rules already encourage. Nor do we wish to burden either private parties or the staff with a requirement of constant consultation. In analyzing our proposal further, we find ourselves unable to define clearly the point at which a duty to consult exists, and we find it more appropriate to rely on the deterrent effect of the sanctions that are available when parties and their counsel fail to exercise caution. Additionally, we hope that the clarifications in this Report and Order will reduce the problem of uncertainty in interpreting the rules. We therefore shall not adopt our proposed rule and are modifying the statement in Rainbow indicating that such a duty to disclose exists. We do, of course, continue to encourage persons with questions about the ex parte rules to seek guidance from the Office of General Counsel. See § 1.1200(b). And, as under current practice, following the advice of their counsel will not insulate parties from possible sanctions for rule violations.

54. One commenter also argued that disqualification should not be a sanction for violation of the ex parte rules because a fine is a sufficient remedy. MCI Comments at 14. We disagree. Although a fine may indeed be adequate in many instances, some ex parte violations may be egregious, and disqualification may be the only remedy sufficient to preserve the integrity of the Commission's processes. See also 5 U.S.C. § 557(d)(1)(D) (authorizing agencies to require a person making unlawful ex parte communications in hearing proceedings "to show cause why his claim or interest in the proceeding should not be dismissed . . ."). As a related matter, we have revised the rules to specify that, when a Commission employee reports an oral presentation believed to be prohibited, the report should contain a "full" (as opposed to "brief") summary of the substance of the presentation. See § 1.1212(b)(4). This will help ensure that the Commission has the full facts before it in considering possible sanctions.

C. Treatment of electronic mail

55. Consistent with our existing practice, our Notice proposed to treat relevant electronic communications to the Commission, such as those made by Internet electronic mail, the same as written ex parte presentations. 10 FCC Rcd at 3241 n.5. Thus, in permit-but-disclose proceedings, copies of such presentations would have to be filed in accordance with procedures specified for written presentations. Two commenters urged that hard copies of such presentations should be available for public inspection. SBC Comments at 5-6; Sprint Reply at 6. They noted that not everyone has access to the Internet and that electronic communications should not be a means of evading ex parte disclosure requirements. They suggested that the Commission print out such electronic mail and place it on public notice. Two other commenters objected to a requirement for filing or down-loading hard copies of

electronic mail presentations.²¹ They asserted that such a requirement would negate the efficiency of electronic communication, and put an undue burden on those making presentations and on the staff.

56. We agree with SBC and Sprint that it is important that electronic communications be available for public inspection and copying, particularly for those that do not have access to the Internet. In this regard, the General Counsel has previously addressed the ex parte treatment of Internet electronic mail. See Public Notice, Application of Ex Parte Rules to Internet E-Mail, 9 FCC Rcd 7348 (Gen. Counsel 1994). The public notice indicated that communications by electronic mail would be treated like other written ex parte presentations. Such presentations are thus prohibited in restricted proceedings unless they are also sent to all parties to the proceeding. With respect to permit-but-disclose proceedings, the Public Notice indicated that two hard copies of such presentations should be submitted to the Commission's Secretary, as provided by the rules. We agree that electronic mail is subject to the same ex parte rules as other written presentations. We note, however, that it may be more feasible to place voluminous electronic mail in the record in the form of a computer disk than in paper form. We will deem materials put in the record in this manner in compliance with the rules. In addition, we note that currently not all of those sending electronic mail regarding permit-but-disclose proceedings have submitted the required two hard copies of their presentations. In those situations, consistent with the intent of the Public Notice, the Commission's staff has assumed responsibility for down-loading electronic mail for inclusion in the record to the extent that the senders have not already done so. This treatment of electronic mail has not proved unduly burdensome at this time, and, although we encourage the submission of the prescribed hard copies, we will continue not to enforce that requirement, unless we learn that it has resulted in an excessive burden on the staff.

D. Public notice of ex parte presentations

57. Under the current rules, the Commission's Secretary issues a weekly public notice listing ex parte presentations. Several commenters complained that notices of ex parte presentations often do not appear on this list until two or three weeks after the presentation. They assert that this impairs the ability of parties to respond to presentations in a timely fashion and urge that up-to-date notices should be issued more frequently -- even daily.²²

58. We agree with the commenters that it would be desirable to improve the timeliness of the public notices. To this end, we will provide in the rules that the public notices generally be issued at least twice a week rather than once a week.

²¹ Bell Atlantic Comments at 3; MCI Comments at 14-15.

²² Sprint Comments at 5-6; Sprint Reply at 6; Ameritech Reply at 6-7; Nynex Comments at 7-8; SBC Comments at 5; Pac Bell Reply at 2; MCI Reply at 4.

E. Transfer of functions

59. We proposed to transfer the responsibility of dealing with alleged ex parte violations from the Office of the Managing Director to the Office of the General Counsel. 10 FCC Rcd at 3246 ¶ 48. The commenters uniformly agreed that enforcement of the ex parte rules was an appropriate responsibility of the Office of General Counsel.²³ We shall adopt this proposal. The Office of the Managing Director (or the Secretary) will, however, retain ministerial functions such as placing (or forwarding to the responsible Bureau or Office for placement) materials in the public record or associated files and issuing public notices of permissible ex parte presentations in permit-but-disclose proceedings.

VI. ADDITIONAL CHANGES AND PROPOSALS FROM THE COMMENTERS

A. Status of exempt presentations by government agencies and others

60. Under the current rules, certain kinds of presentations are treated as exempt regardless of the type of proceeding involved. See existing § 1.1204(b). Several commenters argued that we should no longer exempt presentations to or from the Department of Justice or the Federal Trade Commission involving matters which may affect competition in the telecommunications industry. The commenters argue that these government agencies are independent of the FCC and that parties before the Commission have as much right to notice of what these agencies say to the Commission as they do with respect to anyone else who communicates with the Commission about a pending proceeding.²⁴ Most of these commenters also object to the exemption for presentations involving another branch of the government concerning matters of shared jurisdiction and believe that such communications should be placed in the record of the proceeding. The National Telecommunications and Information Administration (NTIA) has expressed its views on this issue as well.²⁵ NTIA, however, does not object to a disclosure requirement along the lines discussed below.

61. At the outset, we note that the text of the existing exemption for presentations to or from the Department of Justice and the Federal Trade Commission relating to competition in the telecommunications industry that was contained in our Notice inadvertently omitted certain existing disclosure requirements in that provision. The exemption currently provides

²³ FCBA Comments at 10-11; BellSouth Comments at 6; SBC Comments at 6; MCI Comments at 13-14.

²⁴ BellSouth Comments at 3-4; US West Comments at 3-5; MCI Comments at 10-11; MCI Reply at 5; Pac Bell Reply at 1.

²⁵ See Letter from Barbara S. Wellbery, Chief Counsel, NTIA, to William Caton, Acting Secretary (October 20, 1995).

that any new factual information obtained through such a presentation and relied on by the Commission will be disclosed by the Commission no later than the issuance of the Commission's decision. Because the omission of that provision was inadvertent, the rules we adopt herein restore that language. This being the case, we continue to believe that under the narrow circumstances delimited by the exemption the exemption furthers the public interest by facilitating inter-agency coordination that leads to more effective, expedited, and consistent enforcement of the laws relating to telecommunications competition. See Amendment of the Commission's Ex Parte Rules, 9 FCC Rcd 6108 (1994). These advantages would be lost if the Commission were not permitted to consult freely with the Department of Justice and the Federal Trade Commission in order to coordinate regulatory efforts even though we do not technically share jurisdiction with these agencies. The existing requirement that the Commission disclose new factual information relied on by the Commission affords protection to the parties which, in these circumstances, reasonably accommodates both the governmental and private interests at stake.

62. We also agree with BellSouth that it would be appropriate to include similar disclosure requirements in the current exemption for presentations from another agency concerning matters of shared jurisdiction. We shall therefore amend the rules accordingly. We point out, however, that such communications, for example, from NTIA concerning spectrum allocation matters, could involve military or classified security information. Any such information would be exempt from disclosure. See 47 C.F.R. § 1.1204(a)(5) (exempting presentations that involve military or foreign affairs function or classified security information). Moreover, we recognize that communications between the FCC and, for example, NTIA, may involve matters that are predecisional with respect to that agency or otherwise privileged or sensitive. Accordingly, we will codify our current informal practice and provide that information will be relied on and disclosure will be made of presentations under the shared jurisdiction exemption only after advance coordination with the other agency. We believe that such coordination is proper to ensure that the other agency retains control over the timing and extent of any disclosure that may have an impact on that agency's jurisdictional responsibilities. If the agency involved does not wish such information to be disclosed, we will not disclose it and will disregard it in our decision-making process, unless it fits within another exemption not requiring disclosure (e.g., foreign affairs). We will also apply this approach to the Department of Justice/Federal Trade Commission exemption. We note that, under both exemptions, the fact that the other agency has its views otherwise disclosed on the record will not preclude further discussions pursuant to, and in accordance with, the exemption. As an additional matter, we believe that a more complete disclosure requirement should be adopted with respect to exempt presentations which relate to emergencies, and we do so.

63. We also clarify the exemptions in two respects regarding the disclosure of new information contained in presentations requested by the Commission. Consistent with the current rules, in restricted proceedings not designated for hearing, any person making a

presentation requested by the Commission must serve any new information presented on other parties to the proceeding. And, in permit-but-disclose proceedings, any such new information must be disclosed in the record. We wish to make clear that, consistent with existing interpretation, see New York Telephone Co., 6 FCC Rcd 3303, 3305 ¶¶ 20-21 (1991), aff'd sub nom. New York State Department of Law v. FCC, 984 F.2d 1209 (D.C. 1993), such new information does not include information relating to how a proceeding could or should be settled, as opposed to decided on the merits. See § 1.1204(a)(10)(ii) & (iii). We will also clarify that ex parte presentations made with the advance approval of the Commission or the staff fall within the scope of this exemption. We see no basis to distinguish, for example, between situations where the staff requests a party to submit an ex parte settlement proposal and those where a party requests and receives advance permission from the staff to submit an ex parte settlement proposal. Indeed, in some circumstances, the staff already treats presentations in the latter category as within the exemption.

64. In order to encourage the efficacy of settlement discussions, we will also make one other change in the rules. Any new information going to the merits that is presented in settlement discussions must be promptly disclosed, regardless of whether the proceeding is restricted or permit-but-disclose. (We are amending the rules to so provide in the case of restricted proceedings; the rules already so provide for permit-but-disclose proceedings through the cross-reference to section 1.1206 disclosure requirements.) In some circumstances, such prompt disclosures may hinder settlement discussions and not be necessary as a matter of fairness to other parties. Specifically, in those situations where the Commission or the staff intends that the product of settlement discussions will be disclosed to the other parties or the public for comment before any action is taken, the Commission or the staff in its discretion may defer disclosure of any new information going to the merits that is presented during the settlement discussions until comment is sought on the settlement proposal or the settlement discussions are terminated. See § 1.1204(a)(10)(v). This is a workable approach that the Commission has already used in certain circumstances under the existing rules.

65. Also with respect to presentations requested by the Commission, we have added language to reflect an existing practice. The rules provide that the Commission may dispense with the service or disclosure requirements in connection with presentations requested by the Commission if they would interfere with the effective conduct of an investigation. Our practice, as we now incorporate into the rules, is that a determination will be made in the Commission's discretion as to when and how disclosure will be made if necessary. See § 1.1204(a)(10)(ii) Note; Amendment of Subpart H, Part 1, 2 FCC Rcd 6053, 6054 ¶¶ 10-14 (1987).

66. Finally, we have revised the rules to clarify the language of the exemption for the filing of presentations authorized by statute or rule and to add to the exemption the filing of required forms. See § 1.1202(a).

B. Definition of ex parte presentations

67. One commenter proposed to clarify the definition of ex parte presentations to provide that ex parte presentations should not include: (1) status inquiries to the Commission that do not involve the merits of a particular matter submitted for a determination by the Commission; (2) requests for interpretations of existing rules or procedures; (3) inquiries regarding administrative procedures; and (4) inquiries from the Commission to a person or entity that involve information available to the general public or necessary for the Commission to evaluate an uncontested application or issue.²⁶

68. The existing rules already exclude from the definition of presentations status inquiries not involving the merits of a proceeding, with certain qualifications that we continue to deem appropriate in order to ensure that a status inquiry does not in fact become a presentation on the merits. § 1.1202(a) and Note. Similarly, although presentations encompass both substantive and procedural issues that go to the merits of a proceeding, the Commission has already made clear that inquiries to Commission staff regarding compliance with procedural requirements (such as service and timeliness requirements) would not implicate ex parte restrictions unless they were directed to matters at issue in a particular proceeding. See Amendment of Subpart H, Part 1, 2 FCC Rcd 3011, 3013 ¶ 15 (1987). We are amending the rules to make this explicit in the rule itself. Also, the rules make clear that communications between the Commission and the filer of an uncontested application or other request for action would not fall within the definition of ex parte presentations because there would be no other parties to be served or notified. See § 1.1202(b); 1.1206(a) Note; 1.1208, Note. Moreover, presentations requested by the Commission or its staff for the clarification or adduction of evidence are generally exempt from ex parte restrictions subject to certain disclosure requirements. § 1.1204(a)(10). We see no reason why someone who provides generally available information to the Commission at the Commission request should not have to disclose this fact; other parties have a right to know that such information is now being considered in the proceeding. Accordingly, we believe that the existing rules and the amendments adopted herein provide sufficient clarity regarding these issues.

69. As a related matter, the FCBA proposed that permit-but-disclose procedures could be applied in restricted proceedings with respect to certain presentations relating to the need for expedition.²⁷ Such presentations include requests for action by a date certain and requests which refer to matters other than the need to resolve administrative delay as a basis for expedition. Because the FCBA considers this class of presentations to be less "egregious" than others, it proposed that permit-but-disclose treatment would be appropriate rather than the current prohibition of such ex parte presentations.

²⁶ SBC Comments at 2.

²⁷ FCBA Comments at 8.

70. We are persuaded that there may well be circumstances in which the need to seek expedition in a particular restricted proceeding is sufficiently urgent to justify giving parties an opportunity to make oral ex parte presentations on this subject. Nevertheless, such situations pose some risk of prejudice to other parties, and we do not believe that permit-but-disclose procedures provide adequate protection. Consequently, we will treat such presentations consistently with other presentations permitted in restricted proceedings. See § 1.1204(a)(10). Parties to restricted proceedings -- whether designated for hearing or not -- may make oral presentations requesting action by a date certain or giving reasons for expedition other than the need to avoid administrative delay. They may not, of course, address the merits or outcome of the proceeding in any other respect. They must promptly file a detailed summary of the presentation in the record and serve it on the other parties (see paragraph 45, above, regarding the need for detail). To ensure fairness, the other parties will then have the opportunity to respond in support or opposition to the request for expedition, including by oral ex parte presentation, subject to the same service requirement and the same prohibition on otherwise addressing the merits or outcome of the proceeding.

VII. REGULATORY FLEXIBILITY CERTIFICATION

71. The NPRM incorporated an Initial Regulatory Flexibility Analysis (IFRA) of the proposed rules pursuant to 5 U.S.C. § 605. No comments were received in direct response to the IFRA. Section 604 of the Regulatory Flexibility Act, as amended, requires a final regulatory flexibility analysis in a notice and comment rulemaking proceeding unless we certify that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). We believe that the rules we adopt today will not have a significant economic impact on a substantial number of small entities.

72. As noted above, our purpose in revising the ex parte rules is to simplify and clarify them. The modifications do not impose any additional compliance burden on persons dealing with the Commission including small entities. The revised rules clarify the situations in which ex parte presentations are permissible, when they must be reported on the record, and when they are prohibited, without significantly changing the current rules substantively. The revised rules do not otherwise affect the rights of persons to participate as parties in Commission proceedings. There is no reason to believe that operation of the revised rules will impose any costs on parties in particular proceedings subject to those rules, beyond those costs incurred under our former rules. Rather, we anticipate that the revisions will serve to make the rules easier to comply with and more effective for small entities as well as others. By increasing the frequency with which the Commission issues reports of ex parte presentations, the amended rules will make it easier for small entities and others to determine when ex parte presentations have occurred.

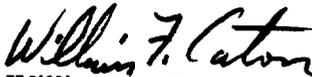
73. Accordingly, we certify, pursuant to Section 605(b) of the Regulatory Flexibility Act, as amended by the Contract with America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996), that the rules will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. § 605(b). The Commission shall send a copy of this Report and Order, including this certification, to the Chief Counsel for Advocacy of the SBA. 5 U.S.C. § 605(b). A copy of this certification will also be published in the Federal Register. Id.

VIII. ORDERING CLAUSES

74. ACCORDINGLY, IT IS ORDERED, That pursuant to sections 4(i), 4(j), 303(r), and 409 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 303(r), 409. 47 C.F.R. Part 1 IS AMENDED as set forth below effective 60 days after publication in the Federal Register.

75. Further information on this proceeding may be obtained by contacting David Senzel, Office of General Counsel at (202) 418-1760.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary