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

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
AMENDMENT OF 47 C.F.R. § 1.1200 ET SEQ. CONCERNING EX PARTE PRESENTATIONS IN COMMISSION PROCEEDINGS	)	GC Docket No. 95-21

To: The Commission

FEDERAL COMMUNICATIONS BAR ASSOCIATION'S OPPOSITION TO PETITION FOR RECONSIDERATION OF HOGAN & HARTSON L.L.P.

The Federal Communications Bar Association (the "FCBA"), by its undersigned President-Elect and representative, and pursuant to 47 C.F.R. Section 1.429(f) (1996), hereby respectfully submits this Opposition to the Petition for Reconsideration (the "Petition") of the Report and Order in the above-referenced proceeding [1/] that was submitted to the Commission on May 2, 1997 by the law firm

1/ Report and Order in GC Docket No. 95-21, In the Matter of Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings, FCC 97-92, adopted March 13, 1997 and released March 19, 1997, 62 Fed. Reg. 15852 (published April 3, 1997).

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of Hogan & Hartson L.L.P. ("H&H"). In support, the FCBA offers the following:

1. This Opposition is timely filed, within 15 days of the publication in the Federal Register of notice of H&H's Petition. See 62 Fed. Reg. 27603 (published May 20, 1997).

2. The FCBA is a not-for-profit corporation organized under the laws of the District of Columbia in order to promote the interests of attorneys and other professionals who are involved in the development and application of communications law and policy at the federal level. The FCBA's membership currently consists of over 3,100 persons. [2/]

3. The FCBA strongly supports the Report and Order in this proceeding and applauds the Commission for a creative approach to the difficult task of balancing the need to allow reasonable access to decision-making personnel

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2/ The views expressed in this Opposition do not reflect the views of each and every member of the FCBA. (Indeed, many of the attorneys at H&H are FCBA members.) The views expressed in this Opposition reflect the collective position of the FCBA's officers and the FCBA's Executive Committee.

at the Commission on the part of persons and entities affected by Commission rules and policies against the need to maintain orderliness, fairness, and the appearance of fairness in all Commission proceedings.

4. The FCBA believes that the Report and Order strikes a reasonable and sound balance between the competing interests of access and fairness. In the kinds of proceedings in which the Commission typically benefits the greatest from the widest possible participation on the part of the affected public, the new *ex parte* communications rules will permit relatively unimpaired access to decision makers at the Commission. Thus, in such "permit-but-disclose" proceedings as informal rule making proceedings, proceedings involving a policy change or a rule interpretation, declaratory ruling proceedings, and the like, parties may freely communicate with Commission decision-making personnel with respect to the merits of the proceeding at all times (other than during the so-called "Sunshine Act" period), with the only caveat being that any written communication going to the merits of the proceeding or a written memorandum of any oral communication going to the merits of the proceeding must be filed with the Commission within one business day after the communication.

47 C.F.R. Section 1.1206 (adopted effective June 2, 1997). With the exception of proceedings that are "exempt" from the strictures of the *ex parte* communications rules, all other proceedings are "restricted," meaning only that any communication going to the merits of the proceeding must be reduced to writing and served upon all other parties (or, in the case of an oral communication going to the merits of the proceeding, other parties must be given advance notice of the communication and an opportunity to be present).

5. H&H takes a different view. H&H would like to see the Commission adopt rules that limit the types of proceedings that would be characterized as "restricted" to "quasi-judicial" proceedings, leaving "permit-but-disclose" as the so-called "default" category into which all other non-exempt proceedings would fall for purposes of the *ex parte* communications rules. H&H Petition, at Page 2. Quoting from the Notice of Proposed Rule Making in this proceeding, 10 FCC Rcd 3240 (1995), H&H argues that the rules adopted in the Report and Order will inhibit "informal contacts between members of the public and an administrative agency [that are] the 'bread and butter' of the administrative process." H&H Petition, at Page 2, quoting the Notice of Proposed Rule Making, 10 FCC Rcd at 3242.

6. H&H's Petition for Reconsideration fails to state with specificity which types of proceedings -- beyond those already categorized as "permit-but-disclose" under the new 47 C.F.R. Section 1.1206 -- should be added to that category. Rather, H&H's Petition merely generalizes that ". . . the free flow and collection of information and the public's interest in open communication with the Commission" would be better served by expanding the "permit-but-disclose" category and shrinking the "restricted" category. The FCBA submits respectfully that the "permit-but-disclose" category currently includes most of the kinds of proceedings about which H&H is apparently concerned. See Paragraph 4, supra. H&H complains that the categorization of a proceeding as "restricted" might complicate efforts by the Commission or its staff to foster a negotiated settlement of a dispute among parties to the proceeding. H&H Petition, at Page 3. However, H&H's Petition overlooks the fact that 47 C.F.R. Section 1.1204(a)(10) (adopted effective June 2, 1997) specifically exempts from the strictures of the *ex parte* communications rules

> . . . [a] presentation . . . requested by (or made with the advance approval of) the Commission or staff . . . for resolution of issues, including possible settlement . . .,

subject to certain limitations set forth in the remainder of the rule.

7. H&H has not clearly articulated its specific points of disagreement with the rules adopted in the Report and Order and has not provided examples that support H&H's generalized grievance with the decision reached in the Report and Order to itemize the kinds of proceedings that fall within the "exempt" and "permit-but-disclose" categories and to treat all other proceedings as "restricted." It is not a sufficient basis for overturning the carefully-crafted product of the Report and Order that H&H would have reached a different decision, based upon H&H's vaguely-worded and largely-unsupported concern that that product may ". . . have unanticipated, and possibly unfair, consequences." H&H Petition, at Page 4. H&H must demonstrate, in a concrete fashion, that the Report and Order committed error as a matter of law or policy. H&H has not done so. Indeed, the only concrete example of "unfairness" that H&H fears that the Report and Order will spawn, i.e., encumbering Commission-assisted settlement negotiations in "restricted" proceedings, has been shown by the FCBA not likely to materialize (see Paragraph 6, supra).

8. For the foregoing reasons, the FCBA urges the Commission to deny H&H's Petition and to affirm the Report and Order. [3/]

Respectfully submitted,

FEDERAL COMMUNICATIONS BAR ASSOCIATION

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June 4, 1997

3/ The FCBA takes no position with respect to the Petition for Reconsideration of the Report and Order that was filed on May 5, 1997 by the law firm of Lukas, McGowan, Nace & Gutierrez.

CERTIFICATE OF SERVICE

Nadine Smith-Garrett, a secretary in the law firm of Paul, Hastings, Janofsky & Walker LLP, hereby certifies that she has on this fourth day of June, 1997, caused copies of the foregoing **FEDERAL COMMUNICATIONS BAR ASSOCIATION'S OPPOSITION TO PETITION FOR RECONSIDERATION OF HOGAN & HARTSON L.L.P.** to be mailed to the following by first-class United States mail, postage prepaid:

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