Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of the Commission's *Ex Parte* Rules	)	GC Docket No. 10-43
and Other Procedural Matters	)	
	)	

COMMENTS OF

MARCUS SPECTRUM SOLUTIONS LLC

I. Introduction

Marcus Spectrum Solutions LLC ("MSS") is pleased to participate in this important rulemaking that goes to the heart of transparency at FCC. MSS has been an active participant in FCC proceedings both on its own behalf and in collaboration with clients. MSS has also had a strong interest in the *ex parte* issue and since its October 3, 2006 letter to the FCC General Counsel, shown in Appendix 1, has repeatedly pointed out apparent *ex parte* violations. More recently MSS filed in September 2008 a Petition for Review, shown in Appendix 2, that is probably the only appeal the Commission has ever received to review *ex parte* enforcement matters. While 19 months have transpired since the filing of this Petition, we are pleased to note that the Commission recently announced that the Order resolving this issue is in circulation. (It should be noted that the insertion

of these appendixes into the public record of this proceeding marks the first time that they have ever been publicly available in the several year pendency of these complaints.)

II. Basic Issues Not in NPRM

There are two basic issues with the Commission's ex parte system, neither of which are acknowledged in the NPRM:

1) Among **all** the federal involved in administrative rulemakings agencies – both Executive Branch agencies and independent agencies – **only the Commission** has an *ex parte* system that depends entirely on statements filed by outside parties as the sole source of information in its docket files. As far as we can determine, **every other federal agency** involved in such rulemakings uses a notification prepared by its own staff, possibly with the inclusion of material provided by the outside party. The NPRM does not question this practice, but we believe that it is a root cause of the current problem. Outside parties do not always have the same transparency goals as the Commission. In some circumstances there are pragmatic and tangible benefits from presenting ones views to commissioners and staff under circumstances that preclude a rapid effective rebuttal by others. As long as this incentive exists the Commission will have *ex parte* and transparency problems unless there is strict and prompt enforcement of these rules.

2) In the 30 years that these rules have been inexistence, there appears to have been **no enforcement action** ever taken under these rules. Indeed, when the staff was asked at the October 28, 2009 workshop about the approach to enforcement,

> they replied that when a complaint is made they telephone the alleged violator and tell them to stop improper behavior. While this action might be reasonable for an initial offense, the lack of an follow up for repeat offenders means that a very few parties practicing before the Commission can repeatedly violate such rules with impunity. MSS has filed repeated complaints about one party that seems to be the worst offender after it took 9 months to get a reply on this subject from a letter to the previous FCC General Counsel.

While she was at the Commission, former Commissioner Abernathy told an ITU meeting,

> I believe that transparency is best achieved through the creation and publication of clear rules. However, for the regulatory regime to be successful, these rules must also be strictly enforced. Based on personal experience, I know that the U.S. regulatory model has only been successful when the FCC has enforced its rules vigorously. Failure to enforce rules sends the inappropriate signal that companies may engage in anticompetitive behavior or other unlawful conduct with impunity.[1] (Emphasis added in last sentence)

Thus the longstanding unwillingness to enforce *ex parte* rules affects not only the involved rulemakings but also raises transparency issues throughout the Commission's entire jurisdiction.

III. Filing Time Issue

MSS applauds the proposed 2 day filing requirement if and only if this is accompanied with actual enforcement of the new limit. Drawing a new "line in the sand" will be a foolish waste of effort unless it is accompanied with actual enforcement. One way to improve enforcement in the present computer age is simply to modify ECFS to require

[1] Remarks of Commissioner Kathleen Q. Abernathy, Market Reform: A Tool for Achieving Universal Access Panel, Global Symposium for Regulators. Geneva, Switzerland, December 8, 2003 (http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-241937A1.doc)

entry of the date of the meeting in the case of *ex parte* notifications. Then the ECFS software could automatically flag all late filings for enforcement action.

IV. Enforcement and Penalties

Para. 32 of the NPRM seeks comment "on whether stricter enforcement of our existing rules would lessen or eliminate the need for any of the changes to our rules that we propose in this Notice". Of course, as stated above, there has been no meaningful enforcement of these rules for decades.

Previous *ex parte* complains of MSS have been dismissed by OGC staff acting under delegated authority for the following reasons:

- an undocumented requirement that only parties with standing in a proceeding can file complaints,
- that there is an unspecified "statute of limitations" on the timeliness of complaints,
- that the standard of compliance is the practice of other parties in the same proceeding,
- that the presence of multiple complaints is important, and
- that the complainant must prove substantial harm.

Each of these may or may not be a good policy in its own right, but the reality is that these "reasons" are justified by neither codified rule nor public statements of the Commission nor by published precedents. Collectively, these rationalizations resemble the policies used in the 1980s and 1990s to dismiss indecency complaints using a "shell game" approach.

The NPRM raises the possibility of "monetary forfeitures" but does not indicate any legal basis for such action. MSS doubts the Commission has the legal authority to do so, but is open to other viewpoints.

In any case, the most effective possible sanction is simple: forbid all oral *ex parte* presentations by the guilty party for a stated time period proportional to the gravity of the offense and previous infractions. (The party would still be allowed to make written *ex parte* presentations.) First offenses and minor infractions should get public warnings.

Considering the current emphasis on transparency at the Commission, MSS is amazed by the question, "We also seek comment on whether all *ex parte* sanctions, including admonitions, should be publicly announced." We see not justification, or even an attempt at justification for not announcing sanctions. The only real question here is whether all complaints should be publicly announced. The past Star Chamber approach to *ex parte* enforcement is completely unjustified.

V. The Need to Work with NTIA to End the "NTIA Loophole"

The "NTIA Loophole" is an insidious evasion of the *ex parte* rules that exploits the present exemption given to NTIA under §1.1204(a)(5) and only applies to spectrum rulemakings that affect spectrum used by the Federal Government. But as we have written elsewhere[2] private parties have learned how they can whisper points in their favor to NTIA and then get NTIA to present these viewpoints to FCC decision makers with a timely trace on the public record that can be rebutted. In a public meeting at FCC in

[2] *See* http://spectrumtalk.blogspot.com/2006/06/transparency-at-fcc-ntia-ex-parte.html

around 2003, Assistant Secretary Gallagher, head of NTIA, acknowledged that he did so and found nothing wrong with it. Indeed it is perfectly legal at present. However, it vitiates the transparency goal of these rules when used to hide private party presentations.

The solution to this problem is to urge NTIA to file in the public record any outside contact with non-federal entities presenting information they want NTIA to forward to FCC in an ongoing rulemaking subject to *ex parte* procedures. (Entities that are contractors performing spectrum management studies for NTIA or agencies using spectrum under NTIA assignments should continue to be exempt from such procedures.)

VI. Authorize *ex parte* Filings by FCC Employees in Special Cases

There are rare occasions when a routine meeting with an outside party who does not understand the *ex parte* rules, e.g. a small business or public interest group not directly involved in the proceeding or a foreign entity, drifts into what is effectively the oral *ex parte* presentation. Under present rules this presents a dilemma: does the Commission staff allow the issue not to be documented or does it have to explain the rules to someone who may be visiting Washington temporarily and about to fly somewhere in a few hours?

During his FCC career, Dr. Marcus, Director of MSS, solved this problem on a very small number of occasions by just writing a memo on the meeting and inserting it into the record of the proceeding. We believe that this served the public interest and served the spirit of these rules. However, it did not serve the letter of the rules. This should be a rare event, but it should also be allowed explicitly in the interest of transparency.

VII. Discourage or Forbid Oral *ex parte* Presentations Before Reply Comment Date

The Commission presently received thousands of oral *ex parte* presentations each year. Many of them are during the comment period. It is hard to justify why these are needed before the pleading cycle is over. It often is an attempt to gain attention before comments are due or to supplement pleadings with personal contact and leads to an escalation of legal costs for all involved as all parties try to keep up. It also is very time consuming for Commission officials. Thus we urge the Commission to discourage such contact during pleading cycles except in cases where clarifications of the intent of a notice is requested. In such cases of clarification, public meetings are generally better than private ones. We note that in the procedurally parallel case where a federal agency issues a request for proposals (RFP) to private entities, **all** contact with the private parties must be documented in detail including any questions and answers relating to clarifications to the meaning of the RFP. Similarly, in the interest of transparency, all *ex parte* contact seeking clarification of an NOI or NPRM should be either at a public meeting or documented in detail beyond what is required by the present rules.

VIII. Conclusions

MSS commends the Commission for its *sua sponte* initiation of this important proceeding to improve transparency. *Ex parte* has been a major problem area for the Commission for decades and the Commission has been a party to most of the litigation that has set precedent in this area. Now it is time for the Commission to be a leader in resolving these problems.

March 29, 2010

/S/

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cc:
Austin Schlick
Joel Kaufman
Bruce Liang Gottlieb
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SERVICE

In accordance with §§1.47,1208 I certify that I have sent a copy of this document on March 29, 2010 to

Jonathan D. Blake, counsel for MSTV
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by First Class Mail

Michael J. Marcus
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Appendix 1

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October 9, 2006

Sam Feder, Esq.
General Counsel
Federal Communications Commission
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Washington, DC 20554 USA

By e-Mail

Dear Mr. Feder,

I am writing you to express concern over the inconsistent compliance of commenting parties with the FCC's *ex parte* rules. Over the past two decades, chairmen and commissioners have consistently said that the FCC should have fewer rules and enforce those that remain. At present, FCC has two basic filing requirements for parties that contact FCC staff on rulemakings:

47 CFR 1.1206(b)(1) requires that *ex parte* filings be made "no later than the next business day after the presentation".

47 CFR 1.1206(b)(2) states "More than a one or two sentence description of the views and arguments is generally required."

Let us consider two large broadcast trade associations: NAB and MSTV. NAB appears to consistently comply with both requirements, occasionally even filing on the same day as the meeting, while MSTV consistently fails to meet one or both of these requirements. Examples are shown in the attachment.

Typical MSTV discussions of the substance of a meeting are "We discussed interference issues relating to the placement of unlicensed devices in the television band" or "to discuss issues in the above referenced proceeding".

By contrast, here are the discussions of meetings from two different recent NAB filings:

During the meetings, we discussed the importance of Commission adoption of flexible service rules for the nascent in-band/on-channel digital radio service. We also emphasized the need for FCC authorization of supplemental audio channels and AM nighttime operations as necessary to the digital radio transition currently underway. NAB urged swift Commission action on these issues, as discussed in our filed comments in this proceeding. - http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518396642

We stressed the need to prevent cable operators from stripping out portions of local broadcasters' free, over-the-air programming streams. We emphasized that advertiser supported broadcasting programming must

obtain carriage to reach viewers and, thus, to be economically viable. Carriage would also serve the public interest because the viewers would be assured of access to broadcast multicast streams, including local

programming. Finally, we confirmed that NAB continues to monitor the continued rollout of digital television, including multicast programming. NAB is willing to regularly share such information with the FCC. - http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518359890

I have never attended law school, but I think that the minimum requirement of 47 CFR 1.1206(b)(2) is quite clear and when it says "More than a one or two sentence description of the views and arguments is generally required" a reasonable person would expect 1) at least 3 sentences, 2) some discussion of the party's views, and 3) some discussion of the party's arguments. Now perhaps if the meeting dealt solely with previously filed material then an explicit reference to that material might suffice. But if that is your interpretation it would be clearer for all involved if it was documented in either the rule or some other readily available material. The last available clarification of *ex parte* requirements, the 10/11/2000 Public Notice states,

Where there is ambiguity about whether data or arguments are already in the public record, the spirit of our rules would counsel parties to briefly summarize the matters discussed at the meeting.

http://www.fcc.gov/Bureaus/OGC/Public_Notices/2000/fcc00358.doc

Of course, it is hard to imagine that most ex parte meetings do not deviate from previously filed material.

The 2000 Public Notice reminded us of what the intent of these rules are"

The Commission's *ex parte* rules enhance participation in permit-but-disclose proceedings and protect the integrity of the Commission's processes by ensuring the transparency of these proceedings.

I note that the Commission consistently advocates transparency for other countries as they develop their telecommunications regulatory schemes. *See* http://www.fcc.gov/ib/sand/globaloutreach/ . As you may recall, while I worked at the Commission I had the opportunity to work for almost a year at the Japanese Ministry of Posts and Telecommunications and was able to observe an "opaque" system first hand. Having had this experience I can personally vouch for the superiority of the systems the FCC has selected. (Since that time, the Japanese system has improved in many ways.)

A search of the Commission's web site indicates that there apparently have never been a sanction under 47 CFR 1.1216 (at least since the web site was created more than a decade ago) and that the Commission last issued a formal warning to a party about *ex parte* violations on March 7, 2002 - http://www.fcc.gov/transaction/echostar-directv/fccextensionletter030702.pdf . I also note that on the OGC *ex parte* page, http://www.fcc.gov/ogc/xprte.html, there is no information about enforcement of the rules or even to whom suspected violations should be reported.

My personal research seems to indicate that the FCC is the only federal regulatory agency relying on written *ex parte* filings from outside parties on their meetings with agency staff in rulemakings, as opposed to adjudicatory proceedings. This tentative conclusions

is based on a CFR search on "*ex parte*" that only finds citations for other agencies dealings with adjudicatory proceedings, communications with staff at other agencies who indicate surprise at FCC's procedure and indicate that they deal with *ex parte* meetings by writing memos for the public docket file themselves, and the presence in other agencies' docket files of staff memos documenting meetings, *e.g.* http://dmses.dot.gov/docimages/pdf97/411551_web.pdf .

I note also that the present FCC *ex parte* filing requirement for outside parties has a basic disincentive for compliance: Generally the parties making a presentation to FCC staff would prefer that those holding conflicting viewpoints know as little about the meeting as possible and find out as late as possible. This is because timely knowledge lets those with opposing positions rebut promptly what was said, particularly if there were factual misstatements. The longer the original presentation remains in the minds of the FCC staff unchallenged, the more likely it is to be believed in the long run. Clearly the intent of the present rules is to encourage debate and minimize the potential for believing erroneous facts, but the present level of noncompliance and the apparent agency disinterest in enforcement may encourage parties to attempt noncompliance.

I recommend that the Commission either advise commenting parties that it intends to enforce the rules that are in place or that it clarify or modify the rules so that they are enforceable. The fact that two well respected and well funded broadcast trade associations have such a different interpretation of the rules, at the very least, shows confusion about what the rules are and your intent to enforce them.

Please feel free to contact me at the above number if you need any additional information. Due to the time difference, do not call after 4 PM Washington time.

Sincerely,

/s/

Michael J. Marcus

Attachment

Recent filings by NAB that appear to meet the letter and spirit of *ex parte* rules:

7/7/06 Docket 99-325
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518396642
6/15/06 Docket 98-120
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518359890
6/14/06 Docket 98-120
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518359823
6/9/06 Docket 98-120
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518359495
6/8/06 Docket 98-120
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518359466
6/9/06 Docket 98-120
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518359465
6/7/06 Docket 98-120
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518359098
6/6/06 Docket 98-120
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518358927
4/3/06 Docket 03-187
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518332696
10/25/05 Docket 05-24
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518173505

Recent MSTV filings that all appear to violate 47 CFR 1.1206(b)(1) (except those marked with *) and all appear to violate 47 CFR 1.1206(b)(2):

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518510021
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518510012
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518335029
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518188391
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516283268
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516282342
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518510022
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518510015
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518462117
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518359759
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518357430
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518112428
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518007956
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518007951
*http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517082137
*http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6516883681

Appendix 2

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Ex Parte Complaint	)	Docket No. _____
	)	
Of Marcus Spectrum Solutions, LLC	)	

PETITION FOR REVIEW

Michael J. Marcus
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Pursuant to §5(c)(4) of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. 155(c)(4), and §1.115 of the Commission's Rules, 47 C.F.R. §1.115, Marcus Spectrum Solutions, LLC ("MSS" or "Petitioner"), respectfully submits this Petition for Review of the letter from Joel Kaufman, Associate General Counsel and Chief, Administrative Law Division, Office of General Counsel to MSS dated July 28, 2008 ("OGC letter"). The OGC letter rejects a complaint filed by MSS on April 25, 2008 ("MSS complaint") pursuant to §1.1214 of the Commission's Rules.

The OGC letter is a delegated action under §0.251(g), 47 C.F.R. §0.251(g) and thus is subject to review by the Commission under §5(c)(4) of the Act and §1.115 of the Commission's Rules. In particular, MSS believes that the OGC letter "involves a question of law or policy which has not previously been resolved by the Commission", §0.115(b)(2)(ii). MSS seeks a Commission determination that the MSS complaint is valid, that *some* sanction or warning pursuant to §1.1216 be taken, and that the text of the last paragraph of the OGC letter be withdrawn as inappropriate and that it is a poor precedent.

BACKGROUND

In 2006 while doing research on the compliance level of FCC ex parte rules, §§1.1200,1216, MSS observed the striking dichotomy between the compliance of two major broadcasting trade associations, the National Association of Broadcasters (NAB) and the Association for Maximum Service Television (MSTV). It appeared that NAB was meticulous in observing the rules, more so than other major groups appearing before the Commission, while MSTV had the worst record of any entity examined, both on timeliness and content (47 CFR 1.1206(b)(2). On October 13, 2006 MSS conveyed these findings in a letter to the FCC's General Counsel, Sam Feder.[3] Included in the letter was the observation that the last enforcement action in the ex parte area appears to have been warning letter ("Ferree/EchoStar letter") sent on March 7, 2002.[4] The MSS

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[3] *See* http://spectrumtalk.blogspot.com/2006/10/letter-to-fcc-on-ex-parte-compliance.html

[4] Letter from W. Kenneth Ferree, Chief, Cable Services Bureau to Pantelis Michalopoulos and Gary M. Epstein, Re: Consolidated Application of EchoStar Communications Corporation, General Motors Corporation and Hughes Electronics Corporation for Authority to Transfer Control, CS Docket No. 01-348, March 7, 2002 (http://www.fcc.gov/transaction/echostar-directv/fccextensionletter030702.pdf) This letter deals with both ex parte and another unrelated issue. The ex parte sections states,

> "We further note that your ex parte notice regarding the February 21, 2002, meeting was filed with the Commission on March 5, 2002. Your delay in filing this notice is contrary to Commission's rules. You are reminded that, pursuant to Section 1.1206(b)(2), you are required to file written notice of an oral presentation to Commission staff no later than the next business day following the presentation. Under Section 1.1216, violations of the ex parte rules may result in sanctions, including forfeitures. We admonish the Applicants to comply with the ex parte requirements on a going-forward basis, and caution that future violations will be referred to the Office of General Counsel for further action pursuant to Section 1.1214." (References deleted)

letter also contained a list of 16 specific MSTV filings that appeared to violate the ex parte rules, all of which were late filed.

The 10/13/06 MSS letter was answered by Mr. Kaufman on March 30, 2007, more *than 5 months later*. The reply indicated that the Commission was "aware of no complaints against MSTV by other parties with regard to various filings and proceedings you reference in your letter".[5] In a subsequent letter, Mr. Kaufman explained the lack of action on the 10/13/06 letter as follows,

> "We understood your October 13, 2006 letter to express general concern about the enforcement of ex parte rules, with the particular meetings cited merely being examples"[6]

It has subsequently become apparent that the OGC approach to ex parte compliance is closely related to the Commission's former and now discredited policy of indecency complaints: constantly inventing new technicalities to dismiss the complaint *without any action* on procedural grounds in a sort of "shell game". These technicalities have included:

- an undocumented requirement that only parties with standing in a proceeding can file complaints,
- that there is an unspecified "statute of limitations" on the timeliness of complaints,
- that the standard of compliance is the practice of other parties in the same proceeding,
- that the presence of multiple complaints is important, and
- that the complainant must prove substantial harm.

Perhaps these would be good policies, perhaps not.

<u>In any case they are policies that are embodied **neither** in the Commission's regulations **nor** in its past decisions (let alone court decisions) **nor** even in advisory information on its website.</u>

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[5] Letter from Joel Kaufman to Michael J. Marcus, March 30,2007

[6] Letter from Joel Kaufman to Michael J. Marcus, October 15, 2007

What *is* clear is the following quote from the Commission's rules:

> **§ 1.1214 Disclosure of information concerning violations of this subpart.**
>
> Any party to a proceeding or any Commission employee who has substantial reason to believe that any violation of this subpart has been solicited, attempted, or committed shall promptly advise the Office of General Counsel in writing of all the facts and circumstances which are known to him or her. (Emphasis added)

This rule clearly requires reporting of an infraction, or even "substantial reason to believe" there was an infraction of the ex parte rules to OGC. Note that it applies to both parties to a proceeding and Commission employees[7]. It does not exclude reporting by others as has been claimed by OGC.

The ex parte rules were adopted to enhance the transparency of the Commission. These rules stem from a 1977 recommendation of the former Administrative Conference of the United States which described possible problems with oral communications during informal rulemakings saying,

> "First, decision makers may be influenced by communications made privately, thus creating a situation seemingly at odds with the widespread demand for open government; second, significant information may be unavailable to reviewing courts; and third, interested persons may be unable to reply effectively to information, proposals or arguments presented in an ex parte communication."[8]

The Commission proselytizes the benefits of transparency in its dealings with regulators in other countries.[9] Commissioner Abernathy in an address to the 2003 ITU Global

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[7] I f the Commission agrees that there have been multiple infractions by MSTV, it may wish to examine why none of its employees have ever taken the action required by §1.1216 when they have been served copies of the filings in question under the terms of §1.1206(b)(2):

> "Except in proceedings subject to §1.49(f) in which pleadings are filed electronically, a copy of the memorandum must also be submitted to the Commissioners or Commission employees involved in the oral presentation."

Presumably violations of the §1.1214 requirement are punishable under the provisions of §502 of the Act, 47 U.S.C. 502

[8] Administrative Conference of the United States Recommendation No. 77-3, Ex parte Communications in Informal Rulemaking Proceedings, 42 FR 54253, Oct. 5, 1977, formerly codified as 1 C.F.R. 305.77-3 (Available at http://www.law.fsu.edu/library/admin/acus/305773.html)

[9] The Commission advocates transparency in its outreach to its foreign counterparts in its publication "Connecting the Globe: A Regulator's Guide to Building a Global Information Community" (http://www.fcc.gov/connectglobe/sec1.html, http://www.fcc.gov/connectglobe/sec3.html)

Symposium for Regulators listed transparency as one of the three principles of the Commission. She stated,

> "I believe that transparency is best achieved through the creation and publication of clear rules. However, for the regulatory regime to be successful, these rules must also be strictly enforced. Based on personal experience, I know that the U.S. regulatory model has only been successful when the FCC has enforced its rules vigorously. Failure to enforce rules sends the inappropriate signal that companies may engage in anticompetitive behavior or other unlawful conduct with impunity."[10] (Emphasis added in last sentence)

The issue in this Petition is quite simple: The Commission has reasonably clear rules in the ex parte area and almost all parties appearing before the Commission have a high compliance practice. But the Commission is failing to enforce these rules or to make other efforts to improve compliance in the particular case where a single party *repeatedly* violates these rules *over a long time period.* As Comm. Abernathy said, this failure to enforce rules sends the wrong signals to regulatees.

Reasonable people could disagree on how to increase compliance and the Commission is free to take whatever path it considers appropriate. But repeatedly dismissing complaints, failing to even issue a warning to the apparently noncompliant party involved, *and* then publicly criticizing the complainant is probably an "inappropriate signal".

MSS COMPLAINT

The MSS complaint of April 25, 2008 dealt with three cases of apparent violation of the ex parte rules by MSTV. The first instance dealt with a meeting that took place on February 5, 2008 (Tuesday) but the notice was not filed until February 8, 2008 (Friday). Previously MSTV had tried to rationalize multiple late filings by stating that no new information was presented and thus a filing was not even needed. By this logic, the unnecessary filing could not be late. However, the complaint points out that 14 pages of the attachment to the filing consisted of material not previously in the record of the proceeding.

The second case in the complaint dealt with a February 11, 2008 ex parte meeting for which the filing was timely. The substantive part of the filing amounts to one sentence:

> "OET's testing of white space devices was discussed and in particular MSTV's October 15, 2007 letter to Mr. Julius Knapp on this subject."

§1.1206(b)(2) requires that

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[10] Remarks of Commissioner Kathleen Q. Abernathy, Market Reform: A Tool for Achieving Universal Access Panel, Global Symposium for Regulators. Geneva, Switzerland, December 8, 2003 (http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-241937A1.doc)

> "(m)emoranda must contain a summary of the substance of the ex parte presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required."

The October 11, 2000 Public Notice expands on this requirement stating,

> "Where there is ambiguity about whether data or arguments are already in the public record, the spirit of our rules would counsel parties to briefly summarize the matters discussed at the meeting."[11]

The third case dealt with an ex parte meeting held on March 27, 2008 (Thursday) and filed on March 31, 2008 (Monday). As in the second case, the attachment to the filing contains information not previously in the docket.

OGC LETTER

The OGC letter dismisses all the complaints and goes on to criticize the complainant.

For the case of the February 5, 2008 meeting, the OGC letter concludes, "You did not indicate, however, how the two-day delay in filing prejudiced you". MSS agrees that it made no such showing. However, OGC cites no regulation, precedent or even a comment on the OGC website that *requires* proof of prejudicial action in a § 1.1214 complaint.[12] If OGC was concerned about the issue of level of "prejudice" and had the legal basis to be concerned, they should have requested such information rather than using its absence as justification for dismissing the complaint.
The second case, the February 8, 2008 meeting, OGC points out that the filing mentions a letter to the Commission staff almost 4 months earlier for substance and that MSTV

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[11] Public Notice, COMMISSION EMPHASIZES THE PUBLIC'S RESPONSIBILITIES IN PERMIT-BUT- DISCLOSE PROCEEDINGS, FCC 00-358, October 11, 2000 (http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-00-358A1.pdf)

[12] The OGC website, http://www.fcc.gov/ogc/xprte.html, has the following information on reporting ex parte violations:

> **How to Report Suspected Violations of the Ex Parte Rules**
>
> Section 1.1214 of the Commission's Rules provides:
>
> > Any party to a proceeding or any Commission employee who has substantial reason to believe that any violation of this subpart has been solicited, attempted, or committed shall promptly advise the Office of General Counsel in writing of all the facts and circumstances which are known to him or her.
>
> This may be done by sending a letter addressed to: Office of General Counsel, Attention: Ex parte complaints, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554 (by United States Postal Service, including USPS overnight delivery), or Office of General Counsel, Attention: Ex parte complaints, Federal Communications Commission, 9300 East Hampton Drive, Capitol Heights, MD 20743 (by commercial overnight mail)

stated that "the content of the meeting consisted of matter already in the record in MSTV's previous filings".[13]

Here is the total content of this MSTV filing:

> On February 8, 2008, Mr. Bruce Franca and Mr. Victor Tawil of the Association for Maximum Service Television (MSTV) met with Mr. Julius Knapp, Mr. Alan Stillwell, Mr. Robert Weller of the Office of Engineering and Technology (OET). Dr. Rashmi Doshi, Mr. William Hurst and Mr. Steven Martin of OET's Laboratory Division also attended the meeting by teleconference. OET's testing of white spaces devices was discussed and in particular, MSTV's October 15, 2007, letter to Mr. Julius Knapp on this subject.

Perhaps, the whole discussion concerned a letter sent almost 4 months earlier. But since there had been FCC Laboratory testing going on since that letter, it seems reasonable to assume that some observation of subsequent events came up in the discussion. OGC concludes, "Based on the record before us, we have no reason to doubt these (MSTV's) assertions". It appears the "the record" consists of the MSS complaint and the MSTV response. There is no indication that OGC asked any of the six FCC employees present at the meeting about what transpired or looked at their notes of the meeting. In view of the cryptic and marginally compliant, at best, nature of this MSTV filing, the lack of curiosity of the OGC staff is surprising. Does a complainant under §1.1214 procedures have to file a FOIA request for the notes of Commission employees at the meeting in question? In any case, the MSTV filing on its own face raises serious questions with respect to the previously quoted requirements of §1.1206(b)(2) and the guidance of the October 11, 2000 Public Notice.

The third case deals with the March 27, 2008 meeting that was apparently filed on March 31, 2008[14]. MSTV points out that it actually filed a notice on March 28, 2008[15] but that they had "inadvertently omitted the attachment" that was the substance of the meeting. I would agree that this is a reasonable explanation in general. However, it seems odd that these notices were filed by one of the most prominent law firms in Washington and the second filing neglects to mention it is a correction to the earlier filing and does not ask leave to file an amended version. Note also that "flexible interpretations" of the ex parte rules and late filings are not new and isolated issues for MSTV and its outside counsel.

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[13] OGC letter at p. 3

[14] ECFS address:
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519869684

[15] ECFS address:
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519869371

Two fundamental questions are:

> Under the present OGC policies, how many late filed marginally compliant, at best, ex parte filings must one make in a year before one receives a warning like the Ferree/EchoStar letter from the Commission?
>
> Does the present OGC ex parte compliance policy constitute a "(f)ailure to enforce rules (that) sends the inappropriate signal that companies may engage in anticompetitive behavior or other unlawful conduct with impunity" as Comm. Abernathy warned?

OGC LETTER FINAL PARAGRAPH

The OGC letter ends with the following paragraph,

> " We have now reviewed your complaints about five specific filings by MSTV, and our examination of these filings have revealed, at most, slight deviations from the requirements of the ex parte rules that do not warrant sanctions. While we expect all parties to comply with the ex parte rules, we remind you that the purpose of the rules is to give parties a fair opportunity to respond to arguments made by other parties in a proceeding, not to create a secondary 'battle zone' over minor infractions that do not significantly affect the parties' ability to respond to the merits of a dispute. Accordingly, please be advised that future allegations may, if the facts warrant, be handled in a more summary manner".[16]

This accounting neglects to mention the 16 apparent violations that were first addressed in the MSS October 13, 2006 to Mr. Feder and which OGC has avoided addressing so far. Nor does it reflect any effort by OGC to search ECFS to identify other late filed MSTV filings – which are numerous. Finally it takes a "shoot the messenger approach" to the complainant.

There are two types of possible ex parte violations at question here, filing timeliness violations of §1.1206(b)(2) which are objective in nature and content adequacy violations of §1.1206(b)(2) which are somewhat subjective in nature. OGC has shown a disinterest in enforcing either of their requirements. Other parties practicing before the Commission make great efforts, often at significant expense, to meet the timeliness requirements of §1.1206(b)(2). It is because of these great efforts by others that compliance overall is quite high. MSTV is a notable exception to this high compliance. While OGC does not mention it, MSTV's recent compliance with timeliness has improved in recent months, probably as a result of the MSS complaints that OGC criticizes.[17]

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[16] OGC letter at p.4

[17] Notwithstanding the general improvement, MSS notes that so far in 2008 MSTV has submitted 5 late filed ex parte notifications in various proceedings, not including the notifications mentioned in the MSS complaint. These are listed in the Appendix. MSS is not a party to most of these proceedings and thus under OGC's interpretation of the ex parte rules may not complain about them. But these multiple late filings point out that the issues in the complaint are not isolated rare events for MSTV but rather a consistent pattern.

But if OGC does not want to tackle the objective and quantifiable timeliness issue, how can it deal with the more subjective content issues raised by §1.1206(b)(2)? OGC states that "the purpose of the rules is to give parties a fair opportunity to respond to arguments made by other parties in a proceeding". But how does one respond to the MSTV filing concerning the February 8, 2008 meeting reproduced above? Are we really to believe that MSTV in the almost 4 months since the cited letter had made no new observations that they conveyed to the Commission staff at that meeting? Making this determination on based *solely* on the MSS complaint and MSTV response without any input from the 6 Commission employees present appears questionable at best considering the 3 month period between the filing of the MSS complaint and the OGC letter would have allowed adequate time to ask the employees involved and study any notes that were taken.

As cited at the beginning of this Petition, §1.1214 refers to "any violation" and has the verb "shall" in it. OGC's criticism of MSS is misplaced as MSS was only reporting what it was *mandated* to do as a party to this proceeding. Also, the behavior in question is not an isolated clerical error, but rather a consistent MSTV pattern as shown in the Appendix herein. (It is ironic to note that on the very date of the OGC letter MSTV submitted yet another late filed ex parte notice in an unrelated proceeding in which they took the unusual approach of "fuzzifying[18]" the date of the actual meeting.)

Finally OGC "advises" that "future allegations" may "be handled in a more summary manner". Actually MSS agrees with these words, although probably in a different context than OGC. It is hard to believe that OGC has such a time consuming and burdensome process for handling simple allegations of late filed comments. MSS believes that the language of the Ferree/EchoStar letter is appropriate for *any* late filed ex parte filing without asking the party involved to justify their actions. If any party has facts mitigating the late filing, let them respond to such a warning and ask that it be withdrawn. But generally late filed notices should be a *prima facie* issue like parking tickets.

With respect to §1.1206(b)(2) content adequacy issues, MSS believes the language of the rule is clear with respect to "(m)ore than a one or two sentence description of the views and arguments presented is generally required" and "a summary of the substance of the ex parte presentation and not merely a listing of the subjects discussed". These two criteria are rather objective. A filing that does not meet these criteria on the surface, *e.g.* a one sentence description of only topics discussed, should at the very least also result in a letter similar to the Ferree/EchoStar letter. Time consuming inquiry letters as OGC has been using should only be used in marginal cases.

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[18] *See* http://www.moneyglossary.com/?w=Fuzzify

ALTERNATIVE REQUESTS FOR RELIEF

Pursuant to §1.115(b)(4) MSS proposes alternatives for the requested relief. Note that MSS is *not* requesting any specific §1.1216 sanction, only constructive efforts to improve compliance and send a message to other parties that ex parte rule compliance is actually expected in Commission proceedings.

(1)The action originally requested in the MSS letter:

> "• a warning letter to MSTV and outside counsel involved in such filings,
>
> • a consent agreement with them on future compliance, and
>
> • quarterly public reporting of all their *ex parte* contact for the next 2 years with FCC including the dates of the meeting, the dates of filing, and the URL of the filed notices so your office (OGC) and the public can readily confirm ongoing compliance."

Or

(2) A warning letter, similar to the Ferree/EchoStar letter, to MSTV and outside counsel advising them of the violation and the possibility of stronger action if the violation is repeated.

In any case, MSS requests that the last paragraph of the OGC letter be withdrawn.

MSS is open to the use of the Alternative Dispute Resolution provisions of §1.18 to resolve this issue.

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Appendix

2008 MSTV ex parte Filings that Appear to Violate §1.1206(b)(2) Timeliness Requirement – Excluding Those Mentioned in Previous MSS Complaints

Proceeding	**Date of Meeting**	**Date of Filing**	**ECFS Address***
CS Docket No. 98-120+	"a permitted *ex parte* meeting on Thursday" (presumably July 24)	July 28, 2008 (Monday) [Same date as OGC letter]	6520035884
ET Docket 04-186	May 9, 2008 (Friday)	May 13, 2008 (Tuesday)	6520009565
MB Docket 07-91+	May 8, 2008 (Wednesday)	May 12, 2008 (Monday)	6520009409
MB Docket 07-91+	May 1, 2008 (Thursday)	May 6, 2008 (Tuesday)	6520008383
MB Docket 07-91+	May 1, 2008 (Thursday)	May 6, 2008 (Tuesday)	6520008380

* Documents can be found on ECFS by appending the indicated 10 digit number to this prefix:

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=

+ MSS is not a party to these proceedings and thus under OGC's interpretation of the ex parte rules may not question these filings.