**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Amendment of the Commission's *Ex Parte* Rules and Other Procedural Rules | ) | GC Docket No. 10-43 |
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# REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

**Adopted: February 1, 2011** **Released: February 2, 2011**

**Comment Date: (45 days after publication in the Federal Register)**
**Reply Comment Date: (75 days after publication in the Federal Register)**

By the Commission: Commissioner Copps issuing separate statement.

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## I. INTRODUCTION

1. The *Report and Order* amends and reforms the Commission's rules on *ex parte* presentations made in the course of Commission rulemakings and other permit-but-disclose proceedings.[1] The *Report and Order* adopts a new rule requiring all oral *ex parte* communications to be documented, and their content described. This reform should enable those participating in our proceedings as well as those observing them to better identify and understand the issues being debated before the Commission. New electronic filing rules will empower anyone using the Internet to access this information, and stronger enforcement provisions will bolster these new requirements. Given the complexity of the issues we must decide and the far-reaching impact our decisions often have, we believe these initiatives to increase transparency serve the best interests of the Commission, the entities we regulate, and the public we serve. We also continue this proceeding with a *Further Notice of Proposed Rulemaking* that asks for comment on whether the interests of fairness and openness would be served by adopting real party-in-interest disclosure rules based on those that apply in many court proceedings.

## II. EXECUTIVE SUMMARY

Filing and Content Requirements

2. *Ex parte* notices will be required for all oral *ex parte* presentations in permit-but-disclose proceedings, not just for those presentations that involve new information or arguments not already in the record.

3. If an oral *ex parte* presentation is limited to material already in the written record, the notice must contain either a succinct summary of the matters discussed or a citation to the page or paragraph number in the party's written submission(s) where the matters discussed can be found. If an oral *ex parte* presentation includes new information, the notice must contain a summary of the new data and arguments presented.

4. Notices for all *ex parte* presentations must include the name of the person(s) who made the *ex parte* presentation as well as a list of all persons attending or otherwise participating in the meeting at which the presentation was made.

5. Notices of *ex parte* presentations made outside the Sunshine period must be filed within two business days of the presentation.

6. The question whether to require disclosure of real parties-in-interest requires further consideration in light of issues raised by the commenters. Therefore, while we do not adopt disclosure requirements today, we are including a *Further Notice of Proposed Rulemaking* to elicit further comment on this matter.

[1] This proceeding was initiated by the Notice of Proposed Rulemaking in GC Docket No. 10-43, FCC 10-31, 25 FCC Rcd 2403 (Mar. 25, 2010) (*Notice*). Section 1.1202(a) of the Commission's rules defines a "presentation" as a communication directed to the merits or outcome of a proceeding. 47 C.F.R. § 1.1202(a). An oral presentation is "*ex parte*" when it is made without advance notice to other parties to a proceeding and without the opportunity for them to be present. *Id.* § 1.1202(b). For purposes of the *ex parte* rules Commission proceedings are divided into three categories: those in which there is no restriction on *ex parte* presentations ("exempt" proceedings); those in which *ex parte* presentations are prohibited ("restricted" proceedings); and those in which *ex parte* presentations are permitted subject to disclosure ("permit-but-disclose" proceedings). *Id.* §§ 1.1204, 1.1206, 1.1208. The various categories of "permit-but-disclose" proceedings are enumerated in Section 1.1206(a)(1)-(14) of the rules, and include informal rulemaking and declaratory ruling proceedings.

Special Provisions for the Sunshine Period

7. The Sunshine period will begin on the day (including business days, weekends, and holidays) after issuance of the Sunshine notice, rather than when the Sunshine Agenda is issued (as the current rules provide).

8. If an *ex parte* presentation is made on the day the Sunshine notice is released, an *ex parte* notice must be submitted by the next business day, and any reply would be due by the following business day. If a permissible *ex parte* presentation is made during the Sunshine period (under an exception to the Sunshine period prohibition), the *ex parte* notice is due by the end of the same day on which the presentation was made, and any reply would need to be filed by the next business day. Any reply must be in writing and limited to the issues raised in the *ex parte* notice to which the reply is directed.

9. Commissioners and agency staff may continue to request *ex parte* presentations during the Sunshine period, but these presentations should be limited to the specific information required by the Commission.

Electronic Filing

10. *Ex parte* notices must be submitted electronically in machine-readable format. PDF images created by scanning a paper document may not be submitted, except in cases in which a word-processing version of the document is not available. Confidential information may continue to be submitted by paper filing, but a redacted version must be filed electronically at the same time the paper filing is submitted. An exception to the electronic filing requirement will be made in cases in which the filing party claims hardship. The basis for the hardship claim must be substantiated in the *ex parte* filing.

Enforcement

11. To facilitate stricter enforcement of the *ex parte* rules, the Enforcement Bureau is authorized to levy forfeitures for *ex parte* rule violations.

12. The rules are modified to require that copies of electronically filed *ex parte* notices must also be sent electronically to all staff and Commissioners present at the *ex parte* meeting so as to enable them to review the notices for accuracy and completeness. Filers may be asked to submit corrections or further information as necessary for compliance with the rules. Where staff believes there are instances of substantial or repeated violations of the *ex parte* rules, staff should report such to the General Counsel.

New Media

13. Comments made on the Commission's new media sites will not routinely be incorporated into the records of all permit-but-disclose proceedings at this time. The Commission will continue to incorporate this material into some Notices of Inquiry and other proceedings, and will continue to develop ways that will make its inclusion in additional proceedings technically possible. In the interim, users of new media may file comments electronically in any permit-but-disclose proceeding consistent with the *ex parte* rules by clicking on the link to ECFSExpress on the Commission's homepage, www.fcc.gov.

Other Amendments

14. The minor conforming and clarifying rule changes proposed in the *Notice* are adopted.

## III. BACKGROUND

15. The Administrative Procedure Act does not restrict *ex parte* presentations in informal rulemaking proceedings.[2] The Commission, however, adopted *ex parte* rules for rulemaking proceedings after a 1977 decision by the D.C. Circuit vacating the Commission's pay cable rules. In *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) ("*HBO*"), the court criticized the Commission's practice of engaging in oral *ex parte* contacts throughout the course of the rulemaking without documenting them in the record.[3] The court declared that "[e]ven the possibility that there is . . . one administrative record for the public and this court and another for the Commission and 'those in the know' is intolerable," and stated that undocumented discussions are "inconsisten[t] . . . with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law."[4] While the court recognized that "informal contacts between agencies and the public are the 'bread and butter' of the process of administration and are completely appropriate so long as they do not . . . raise serious questions of fairness," the court held that "any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon."[5] The Commission's *ex parte* rules attempt to assure that the Commission's use of *ex parte* presentations as a means of obtaining timely information is consistent with the need to assure that interested parties, and the public, know what information and arguments are being presented to the Commission and who is presenting them.

16. The *ex parte* rules have been amended and clarified on several occasions since their adoption, with the most recent comprehensive review occurring in 1997.[6] In 2007, the Government Accountability Office (GAO) issued a report on the Commission's rulemaking process, stating that although most of the hundreds of *ex parte* filings it had examined in four rulemaking proceedings appeared to comply with Section 1.1206 of our rules, several did not appear to be sufficient.[7] For example, one filing did not address which organization was represented or what was discussed in an *ex parte* meeting; another discussed new information supported by a research report, but failed to include the report; and others did not describe the discussion, merely referring to the party's written comments.[8]

17. On October 28, 2009, the Commission held a staff workshop on the *ex parte* rules during which senior staff and outside experts explored whether the *ex parte* rules address the current needs of the Commission and the public.[9] The workshop discussions, combined with our continuing effort to ensure

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[2] 5 U.S.C. § 553(c) requires only that interested persons be given the opportunity to participate in rulemakings through written submissions "with or without opportunity for oral presentation."

[3] In response to an order of the court, the Commission produced a 60-page list of *ex parte* contacts that had taken place. *HBO*, 567 F.2d at 52.

[4] *Id.* at 54, 56.

[5] *Id.* at 57.

[6] *See, e.g.*, *Amendment of the Commission's Ex Parte Rules*, Order, 4 FCC Rcd 4716 (1989); *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, Notice of Proposed Rulemaking, 10 FCC Rcd 3240 (1995); *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, Report and Order, 12 FCC Rcd 7348 (1997).

[7] GAO, GAO-07-1046, *Telecommunications: FCC Should Take Steps to Ensure Equal Access to Rulemaking Information*, at 21-22 (2007).

[8] *Id.*

[9] A video recording of the workshop was made available on the Commission's website at http://www.fcc.gov/live/2009_10_28-workshop.html. A transcript of the proceedings is included in the record of this proceeding and is cited as *Workshop Transcript*.

fairness and transparency in Commission decision-making, led to the issuance of the *Notice* in this proceeding.[10]

18. The *Notice* identified two particular shortcomings of the current rules governing oral *ex parte* contacts in permit-but-disclose proceedings. First, not all oral *ex parte* presentations are documented, because the current rule requires an *ex parte* notice only when new data or arguments are presented. Second, in many cases *ex parte* notices contain little information about what was actually presented and discussed.[11] To address these issues, the *Notice* proposed several significant changes to the current rules. To address the lack of a comprehensive filing requirement, we proposed to require the filing of a notice for all oral *ex parte* presentations in permit-but-disclose proceedings unless a specific exemption applies. If the *ex parte* presentation raises new issues or contains new information, we proposed that the *ex parte* notice summarize all new data and arguments presented. If the *ex parte* presentation involves no new arguments or information but instead reiterates previously filed written material, we proposed that the notice contain either a summary of the presentation or a citation to the page or paragraph in the party's prior written submission where the material discussed can be found. To provide the public with better information about the parties making *ex parte* presentations, the *Notice* sought comment on whether to require disclosure of ownership or other information sufficient to identify who the party is and the nature of its interest in the proceeding.

19. To ensure that *ex parte* notices can be accessed quickly and easily, the *Notice* proposed to codify a preference for electronic filing of all *ex parte* notices in machine-readable formats. To allow parties sufficient time to include in their notices the added information the revised rules require, we proposed that notices of *ex parte* presentations made outside the Sunshine period be filed within two business days of the presentation. We further proposed that notices of *ex parte* presentations made during the Sunshine period be filed within four hours of the presentation. Comment was also sought on whether to amend the rules exempting certain communications from the ban on *ex parte* presentations during the Sunshine period or in restricted proceedings, and whether to begin the Sunshine period prohibition on *ex parte* presentations at midnight following the release of the Sunshine notice.

20. The *Notice* also sought comment on the relevance of other agencies' *ex parte* rules to any rule changes the Commission might consider, on how new media communications might be treated under the *ex parte* rules, and on a number of minor updates and clarifications to the text of the rules.

## IV. REPORT AND ORDER

21. We find, as did the court in *HBO*, that oral *ex parte* presentations in permit-but-disclose proceedings can provide the Commission and staff with important, timely information about the complex legal, economic and technical issues the Commission considers.[12] We also find that open and transparent decision-making requires that interested parties, and the public, have complete information about who is engaging in *ex parte* discussions in pending proceedings and what arguments and showings are being made.

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[10] Because the *ex parte* rules are procedural in nature, notice and comment are not required before amending the rules. *See* 5 U.S.C. § 553(b)(3)(A). We found that soliciting public comment in this proceeding is consistent with the underlying intent of the *ex parte* rules by promoting fairness and transparency in Commission decision-making. *Notice*, 25 FCC Rcd at 2404, para. 1 n.4.

[11] *Notice*, 25 FCC Rcd at 2405, para. 5.

[12] The Federal Communications Bar Association Access to Government Committee (FCBA Committee) agrees, stating that prohibiting oral *ex parte* presentations would eliminate an important means of public participation and undermine the completeness of records in Commission proceedings. FCBA Committee Comments at 8.

22. We find that the public interest is best served by striking a balance between these interests. Based on our experience with the current rules, the discussion of the rules in the October 28, 2009 workshop, and the comments in the record of this proceeding, we find that the *ex parte* rules that currently apply in permit-but-disclose proceedings imperfectly achieve this balance and therefore should be amended. In the paragraphs that follow, each of the major issues raised in the *Notice* is outlined, the pertinent comments are briefly summarized,[13] and our analyses and conclusions are discussed.[14]

## A. Filing and Content Requirements

### 1. *Ex Parte* Presentations for Which *Ex Parte* Notices Must Be Filed

23. Section 1.1206(b)(2) of our rules requires that a notice of an oral *ex parte* presentation must be filed only if new data or arguments not already reflected in the party's written comments, memoranda or other filings in that proceeding are discussed.[15] In the *Notice*, we suggested that this reduces the adequacy of the record on which Commission decisions are based and deprives parties and the public of a fair opportunity to respond.[16] We therefore proposed to require the filing of *ex parte* notices for every oral *ex parte* presentation, whether or not it contains new data or arguments. To the extent that the presentation merely reiterates data and arguments already contained in the written comments filed by the presenter, the filing would either include a summary of this information or provide specific references, including paragraph or page numbers, to the presenter's prior filings containing the data and arguments presented.[17]

24. Comments. The perspectives of those commenting on this proposal varied considerably. A few, including AT&T and the Independent Telephone and Telecommunications Alliance (ITTA), do not support it. AT&T argues that the public interest is adequately safeguarded by the current requirement to summarize only new arguments, and states that summarizing all arguments would be repetitive, unnecessarily burdensome, and counterproductive.[18] AT&T argues in the alternative that, should the Commission choose to require references to prior written comments, parties should only be required to file a short plain statement of those arguments, similar to the notice pleading requirements in Rule 8 of the Federal Rules of Civil Procedure, which AT&T characterizes as "a short plain statement of matters discussed that are covered in prior filings – and no more."[19] ITTA agrees with AT&T, and argues that if the proposal is adopted parties should only be required to refer generally to prior filings rather than having to provide a page or paragraph number.[20]

25. Sprint states that while the *Notice*'s proposal would indeed foster transparency, it may not be administratively practical. In particular, Sprint believes that, while requiring parties to reference previous filings is appropriate, requiring the inclusion of citations to page and paragraph numbers is

[13] A list of parties filing comments and reply comments in this proceeding appears at Appendix B.

[14] With the exception of some of the minor clarifying and conforming amendments adopted *infra* paragraph 76, this proceeding does not consider *ex parte* contacts in contexts other than permit-but-disclose proceedings. *Ex parte* presentations are prohibited in matters such as formal rulemakings and adjudications where the Administrative Procedure Act requires a hearing, 5 U.S.C. § 557(d); 47 C.F.R. § 1.1208, and are not restricted in "exempt" proceedings; *see* 47 C.F.R. § 1.1204(b). *See supra* note 1.

[15] 47 C.F.R. § 1.1206(b)(2).

[16] *Notice*, 25 FCC Rcd at 2406, para. 6.

[17] *Id.* at 2407, para. 8.

[18] AT&T Comments at 1-2.

[19] *Id.*

[20] ITTA Comments at 4.

impractical, expensive, and apt to delay filings, especially during the Sunshine period.[21] While Qwest Communications, Inc. (Qwest) does not oppose mandatory filing of notices for all *ex parte* presentations, it notes that there is no evidence of widespread violation of the *ex parte* rules, and argues that parties themselves have an incentive to submit complete filings because they can be used as the basis for the Commission's reaching decisions on issues that are in the parties' interests. Therefore, Qwest raises the possibility that consistent enforcement of the current rules might be as effective in ensuring compliance as the proposed rule change.[22]

26. Public Knowledge (PK) and Consumer Federation of America (CFA), filing jointly, argue that oral *ex parte* presentations should be limited to existing arguments, and Marcus Spectrum Solutions (Marcus) would prohibit *ex parte* presentations in permit-but-disclose proceedings prior to the submission of reply comments.[23]

27. Other commenters endorse the proposal to require the filing of notices for all *ex parte* presentations. The National Association of Telecommunications Officers and Administrators (NATOA), the National Telecommunications Carriers Association (NTCA), and the National Association of State Consumer Advocates (NASUCA) all support the proposal. NATOA maintains that this rule change would impose only a minimal burden on parties and would greatly enhance transparency. NATOA notes that organizations with limited resources would particularly benefit because better access to the content of *ex parte* presentations would enable them to participate in Commission proceedings more effectively.[24]

28. Still other parties support the proposal but urge that we adopt additional requirements. Mr. Pierre de Vries, who uses the Commission's Electronic Comment Filing System (ECFS) to track and analyze the social dynamics of lobbying at the Commission, suggests that parties filing *ex parte* notices be required to include a complete list of everyone participating in the *ex parte* meeting. He also proposes that filers be required to distinguish whether they are submitting an *ex parte* document or a memorandum of an oral *ex parte* presentation.[25] Mr. de Vries, Media Access Project (MAP), NASUCA, PK, and CFA all urge the Commission to require the submission of audio recordings of oral *ex parte* presentations.[26]

29. PK and CFA also propose an alternative plan for revising the *ex parte* rules. They propose that each year, each Commissioner and Bureau separately choose one of three options for dealing with oral *ex parte* contacts and notify the public which option has been chosen. Their first option would be to eliminate all oral *ex parte* presentations. PK and CFA state that this would not be an extreme change because the brevity of most oral *ex parte* notices suggests that most substantive material is presented in written form. The second option would be to record all oral *ex parte* presentations and make them available online, and the third option would be to have an independent member of the Commission who is not participating in the meeting transcribe or summarize the meeting in detail. PK and CFA argue

[21] Sprint Comments at 3-4.

[22] Qwest Comments at 3-4.

[23] PK and CFA Joint Comments at 7; Marcus Comments at 7.

[24] NATOA Comments at 2, 3; NTCA Comments at 4; NASUCA Comments at 3-4; *see also Workshop Transcript* at 57-64.

[25] de Vries Comments at 6.

[26] de Vries Comments at 10; MAP Comments at 2. PK and CFA also advocate recording all oral *ex parte* contacts as one of three options for reforming the *ex parte* rules. PK and CFA Joint Comments at 5-6. Their proposal is discussed in detail *infra* paragraph 32.

that the third option would not increase the burden on either the staff involved in the meeting or the parties, and would provide a neutral way to record the presentations.[27]

30. In reply comments, AT&T states that it is not necessary to make audio or video recordings of oral *ex parte* presentations in order to ensure that other parties and the public know the substance of an *ex parte* discussion. AT&T also maintains that storage and retrieval of these recordings would present a practical problem.[28] The National Association of Broadcasters (NAB) also argues that mandated recordings would be impractical, and states that they would unduly inhibit the free flow of information.[29] AT&T does not support NASUCA's proposal to require all parties to accompany each *ex parte* filing with a log of all previous filings, maintaining that ECFS is user-friendly enough to make such a proposal unnecessary.[30] NASUCA, however, contends that the burden should be on those making oral *ex parte* contacts to disclose all of them, not on other parties with more limited ability to locate previous filings.[31]

31. Documented *Ex Parte* Presentations Permitted. As an initial matter, we do not agree with the contention of PK and CFA that oral *ex parte* presentations should be limited solely to data and arguments already in the written record, or with the Marcus's contention that *ex parte* presentations should be prohibited prior to the filing of reply comments. As we stated previously, our own experience bears out the court's observation in *HBO* that *ex parte* presentations can give the Commissioners and staff valuable new information on the often highly complex and technical legal, economic, and engineering issues that we must consider in reaching our decisions. Prohibiting *ex parte* contacts outright, or limiting them in time and scope, could adversely affect our ability to respond to new issues as they arise in the course of a proceeding. Limiting oral *ex parte* presentations to material already in the record would result in mere redundancy, prevent the Commission from obtaining information it needs as efficiently as possible, and provide inadequate assurance that an undisclosed *ex parte* presentation had not been made. We agree with AT&T and NAB that recording all oral *ex parte* contacts and making them available online would be impractical compared with posting more complete and comprehensive written summaries online. For these reasons, we continue to believe that oral *ex parte* presentations on the issues raised in permit-but-disclose proceedings should continue to be allowed and should not be limited by the alternatives commenters have suggested.

32. We do not adopt the proposal of PK and CFA that each Bureau and Commissioner's office select one of three alternative ways of treating oral *ex parte* presentations.[32] We are amending our rules to promote openness and transparency in our decision-making process. To do this effectively, the rules must be clear and consistent so that everyone (including the parties participating in our proceedings as well as the public monitoring them) understands the facts and arguments the Commission is considering. This proposal is incompatible with that goal. If implemented, it would allow the adduction of more record information in some proceedings than in others, and the ability of interested parties to present their arguments may depend on which Bureau or Office is assigned to the proceeding. Parties involved in multiple proceedings could be subject to different *ex parte* disclosure rules, which could cause unintended compliance errors. More problems would occur in cases where the issues in a proceeding are assigned to several Bureaus, each of which could be using different rules on *ex parte* presentations, or when a matter is sent by a Bureau that has used one set of rules on *ex parte* presentations to the five

[27] PK and CFA Joint Comments at 4-7.

[28] AT&T Reply Comments at 1-2; *see also* FCBA Committee Comments at 7.

[29] NAB Reply Comments at 2-3. NAB did not participate in the comment phase of this proceeding.

[30] AT&T Reply Comments at 2.

[31] NASUCA Reply Comments at 2.

[32] *See supra* paragraph 29.

Commissioners, who might be using different rules. These outcomes could well hamper equal and open access to Commission decision-making, impede the Commission's ability to do its work capably and quickly, and interfere with the public's ability to follow our proceedings and understand how our decisions are reached.

33. Notices of All *Ex Parte* Presentations Required. After considering all the comments, we adopt the proposal we put forth in the *Notice*, and require the filing of notices for all oral *ex parte* presentations made in permit-but-disclose proceedings, regardless of whether they involve new data or arguments or simply reiterate what the party has already submitted in the written record of the proceeding. Transparency requires that interested parties, and the public, know that *ex parte* meetings are taking place, no matter whether old or new information is being discussed. Therefore, we agree with those commenters who state that this proposal will better assure procedural fairness to parties participating in a proceeding, especially those with limited resources, as NATOA points out.[33] Just as important, this rule change will increase the public's ability to follow the course of Commission proceedings, thereby facilitating the public's ability to express opinions on pending matters either by submitting written comments or by joining the informal discussion of issues on the Commission's new electronic media platforms.[34] This, in turn, should increase public confidence in the integrity of Commission decisions.

34. Weighed in this balance, we do not agree with the commenters who object to this amendment on the ground that it is unnecessary. Nor do we find it burdensome, because most parties already file at least a pro forma notice after making an oral *ex parte* presentation. We also do not concur with arguments that amending our rules is unnecessary, either because the 2007 GAO Report apparently found few violations, or because the Commission receives relatively few complaints of *ex parte* rule violations each year. Absent a requirement that notices must be filed for all *ex parte* presentations, it is impossible to know with certainty who is making *ex parte* contacts and precisely what these discussions involve. With such limited ability to reliably detect violations under the current rules, it is difficult, if not impossible, to file complaints about them. We therefore find that we should not rely on either the 2007 GAO Report or our own enforcement record to conclude that the current rules need not be amended.

### 2. Content of Notices

35. Summary or Citation Required. Having determined to require the filing of *ex parte* notices for all *ex parte* presentations in permit-but-disclose proceedings, we turn to the issue of what information these notices should contain. As an initial matter, we do not believe it would impose a significant burden on any party, or cause undue delays in filing, to require that a party reiterating data or arguments in its written submissions either summarize the information presented *ex parte* or include a citation to the pages or paragraphs of its own prior filings where the information can be found. Any incremental effort a party expends in providing brief summaries or citations to what it has itself written is minimal, and more than outweighed by the degree to which this requirement will facilitate the ability of everyone else involved – the Commission, staff, other parties, and the public – to understand how the issues in permit-but-disclose proceedings are being developed and refined. We will therefore require parties making *ex parte* presentations that reiterate arguments previously made on the record to provide either a brief summary of the argument or a citation to either the page or the paragraph in the written material where the argument can be found. As our rules currently provide, when an *ex parte* presentation involves a discussion of new information or arguments, the notice must summarize the new arguments and data.[35] Summaries must be sufficiently detailed that they would inform a person who did not attend

[33] NATOA Comments at 2.

[34] For a further discussion of the treatment of comments submitted on the Commission's blogs and websites, see *infra* paragraphs 73-75.

[35] *Notice*, 25 FCC Rcd at 2407, para. 8.

the presentation of the facts that were discussed, the arguments made, and the support offered for those arguments.

36. List of Participating Parties Required. Currently Section 1.1206(b)(2) of the rules does not require that notices of *ex parte* presentations include a list of everyone attending or otherwise participating in an *ex parte* meeting. Many parties already include a list of attendees in their *ex parte* notices, and we find that requiring all parties to include such a list would not materially increase the burden of preparing *ex parte* notices. We agree with Mr. de Vries that listing the names of all persons attending an *ex parte* presentation would significantly improve the transparency of the Commission's decision-making processes, and that other parties and the public are entitled to know who is attending or otherwise participating in meetings with decision-makers when an issue is being presented *ex parte*. We will therefore amend our rules to incorporate a requirement that notices of *ex parte* presentations include a complete list of every person participating in the meeting.

37. Disclosure of Real Parties-In-Interest. As we noted in the *Notice*, at times a party filing a pleading with the Commission or making an *ex parte* contact may be representing the interests of another undisclosed party, or the presenter's interest in the proceeding may not be entirely clear. We therefore asked whether the ability of both the Commission and the public to evaluate the positions taken in Commission proceedings would be improved if parties provided more information about themselves and their interest in the proceeding.[36] We asked whether disclosure requirements in the Supreme Court or Circuit Court Rules would serve as workable models for such disclosure, or whether the Lobbying Disclosure Act would provide a useful framework. We also noted that ownership information on commercial broadcast and wireless licensees is on file with the Commission and is electronically accessible, and we asked whether this information or other publicly available information would be useful in identifying real parties in interest in the *ex parte* context.[37]

38. The commenters had disparate views, and raise issues both for and against the adoption of a disclosure rule that persuade us that further comment should be sought. We have included a *Further Notice of Proposed Rulemaking* at paragraphs 77-84, *infra*, soliciting additional views. We will deem the comments already submitted in this proceeding to be part of the record of the *Further Notice*.

39. We do not believe that further requirements concerning the content of *ex parte* notices should be imposed at this time. In particular, we do not find it necessary to require that parties list of all their prior *ex parte* filings in a given proceeding. ECFS now makes it simple to find which parties have made oral *ex parte* presentations in a given proceeding and how often they have made them, and therefore this proposal would impose an unnecessary burden without increasing the transparency of our proceedings.

### B. Exemptions

#### 1. Sunshine Exemption

40. Section 1.1203(a) prohibits all presentations to decision-makers, whether *ex parte* or not, during the Sunshine period on matters listed on a Sunshine Agenda unless an exemption applies.[38] This

[36] *Id.* at 2413, para. 27.

[37] *Id.* at 2414-15, paras. 28-29.

[38] A Sunshine Agenda or Sunshine notice is typically released seven days before a Commission meeting and lists the items that will be presented to the Commission. The period between the release of the Sunshine Agenda and the Commission meeting is intended to provide decision-makers a "period of repose" during which they can consider the upcoming items free from outside interruptions. *See Amendment of Part H, Part 1 of the Commission's Rules*

(continued....)

prohibition currently applies from the time a Sunshine notice is issued until the Commission releases a text of the decision or order relating to the matter, issues a public notice stating that the matter has been deleted from the Sunshine Agenda, or issues a public notice stating that the matter has been returned to the staff for further consideration.[39] This prohibition is subject to an exemption at Section 1.1203(a)(1) for *ex parte* presentations requested by, or made with the advance approval of, the Commission or staff for the clarification or adduction of evidence, or for resolution of issues, including possible settlement pursuant to Section 1.1204(a)(10).[40]

41. In the *Notice* we stated that information gathered pursuant to this exemption can be particularly important and timely to the extent it contributes needed information to the record of a proceeding that is under active consideration by the Commission. On the other hand, we noted that the exemption could be manipulated by some parties to gain last-minute access to decision-makers immediately prior to a Commission decision, posing the potential for the type of procedural unfairness the *ex parte* rules are intended to prevent.[41] Some participants in our October 28 Workshop stressed this concern, noting that parties with limited means and parties not located near the Commission are put at a particular disadvantage to the extent they are unable to know and respond to other parties' eleventh-hour presentations.[42] In light of these concerns, the *Notice* asked whether permitting *ex parte* presentations under any circumstances during the Sunshine period is compatible with the "period of repose" for internal deliberation the Sunshine period is intended to provide and, if so, whether the current exemption should be narrowed. In the event some type of exemption were found to serve the public interest, we also asked whether the Sunshine period prohibition should begin at midnight following the release of the Sunshine notice.

42. Comments. NTCA states that communications made during the Sunshine period are often the most revealing because they can show how the Commission views an issue and where gaps are perceived to exist in the record. However, NTCA believes that the Commission should make sure that parties making *ex parte* presentations during the Sunshine period file the requisite notice.[43] Qwest argues that the Commission should not prohibit parties from soliciting *ex parte* presentation requests from Commission staff, because it would limit decision-makers' access to potentially significant information. Qwest maintains that the exercise of good judgment by Commission staff is sufficient to prevent this process from being abused.[44] Verizon also believes the current exemption works well, but proposes that we not allow replies to *ex parte* notices during the Sunshine period.[45]

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*and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, Report and Order, 2 FCC Rcd 3011, 3020 (1987).

[39] 47 C.F.R. § 1.1203(b)(1)-(3).

[40] A party making an oral *ex parte* communication during the Sunshine period pursuant to this exemption is required to file an *ex parte* notice pursuant to Section 1.1204(a)(10)(iv).

[41] *Notice*, 25 FCC Rcd at 2412, para. 23. We also stated that Section 1.1204(a)(10)(iii) exempts from disclosure "information relating to how a proceeding should or could be settled," and noted that this provision could be used to allow undisclosed discussions of the merits of a proceeding. *Id.* In the absence of comment directed to this issue, we will not amend Section 1.1204(a)(10)(iii) at this time. We emphasize, however, that the settlement exception should not be used as an avenue to present new facts or arguments concerning the merits of the proceeding.

[42] *See Workshop Transcript* at 87-101.

[43] NTCA Comments at 7.

[44] Qwest Comments at 7. ITTA agrees, arguing that such a proposal would limit the staff's ability to handle different situations on a discretionary basis. ITTA Comments at 5-6.

[45] Verizon Comments at 4.

43. Other parties express different views. Media Access Project (MAP) states that *ex parte* communications during the Sunshine period have become increasingly common, and urges the Commission to prohibit outside parties from soliciting requests for *ex parte* presentations.[46] NASUCA, NAB and the American Cable Association (ACA) also argue that the Commission should prevent parties from soliciting *ex parte* presentations during the Sunshine period.[47] Both NASUCA and NAB also argue that, once Sunshine's "period of repose" is broken by an *ex parte* contact, it is only fair to allow other parties to file replies.[48]

44. Solicitation of *Ex Parte* Presentations. We believe that the current rules allowing the solicitation of *ex parte* presentations during the Sunshine period (either by the Commission or staff or with the advance approval of the Commission or staff) serves the public interest. As a practical matter important issues can arise late in the deliberative process, and efficient decision-making requires that staff and Commissioners be permitted to gather the information needed to resolve them.[49] As the issues the Commission considers grow in both number and complexity, it is essential that the Commission have the ability to test its assumptions and conclusions, and that the information and arguments the Commission relies on in reaching its decisions are clear, compelling, and timely.[50] Allowing the solicitation of *ex parte* presentations during the Sunshine period serves those needs, and we therefore retain the exemption in Section 1.1203(a)(1) and 1.1204(a)(10).

45. We find that fairness and transparency in these situations are protected by the requirement that all *ex parte* presentations solicited during the Sunshine period are subject to the same disclosure rules that apply whenever an *ex parte* presentation is made. We also believe that, out of fairness as well as the interest in a complete and accurate record, other parties should have an opportunity to reply to *ex parte* presentations made during the Sunshine period, just as they would if the *ex parte* presentation were made at any other time. However, in the interests of administrative efficiency, we believe that *ex parte* contacts during the Sunshine period should be minimized and limited to information that is necessary to the impending decision. Similarly, any reply filed in response to a solicited *ex parte* presentation that occurs during the Sunshine period should be limited to the specific issues raised in the *ex parte* notice, including any new facts or data submitted. Consistent with the views of the commenters addressing this issue, we have determined that the Sunshine period shall commence on the day (including business days, weekends, and holidays) following the release of the Sunshine notice. As commenters have explained, this approach will afford parties a sufficient opportunity to make submissions before the Sunshine period begins.[51]

### 2. Status Inquiries

46. The *Notice* also raised the issue of the exemption provided for inquiries on the status of permit-but-disclose proceedings. Section 1.1202(a) and the note to that section generally provide that

[46] MAP Comments at 3.

[47] NASUCA Reply Comments at 6; NAB Reply Comments at 4; ACA Comments at 4.

[48] NASUCA Reply Comments at 5; NAB Reply Comments at 4.

[49] *See Workshop Transcript* at 88.

[50] Nor is it correct as a practical matter to regard the Sunshine period as a time when, absent *ex parte* presentations, Commission decision-makers are entirely isolated from outside opinions on the issues they are considering. During the Sunshine period decision-makers may be exposed to discussions of the pending issues in the trade press and mass media. *Id.* at 23-24.

[51] *See, e.g.*, NATOA Comments at 5 ("[T]he additional notice will give all parties an equal opportunity to respond to last minute arguments . . . [and] give all parties fair warning to make final arguments before the start of the Sunshine period."); *see also* NASUCA Comments at 8; Qwest Comments at 7; Verizon Comments at 3.

inquiries related solely to the approximate time that action in a proceeding may be taken, without expressing a view on the merits or outcome of the proceeding or the date by which it should be resolved, are not "presentations," and are therefore exempt from the rules on *ex parte* presentations.[52] We did not propose any change to this rule, and requested comment. One party addressed this issue and did not advocate a change in the rule, nor do we amend it.[53] However, we restate that if a staff member believes that an *ex parte* presentation has actually been made, and the presenter appears to believe the communication was only a status inquiry, the staff member should inform the party making the contact of the party's obligation to file an *ex parte* notice.[54]

### 3. Interagency Discussions

47. Marcus proposed that we delete the exception in Section 1.1204(a)(5) to the extent that it permits the National Telecommunications and Information Administration (NTIA) to discuss with the Commission issues concerning their shared responsibility over spectrum management.[55] Specifically, Marcus states that NTIA should be required to file an *ex parte* notice of any written contact it has received from a non-federal entity and forwarded to the Commission. The FCBA Committee agrees with Marcus and argues that all contacts with other agencies should be disclosed.

48. We do not adopt either proposal. Section 1.1204(a)(5) of the rules requires the Commission to disclose factual information on issues of shared jurisdiction that is obtained *ex parte* from another Federal agency or agency staff member if the Commission relies on it in its decision-making process.[56] Section 1.1204(a)(6) contains a similar provision regarding contacts between the Commission and the Department of Justice or Federal Trade Commission on telecommunications competition matters not designated for hearing. A note to these paragraphs specifies that such information will be relied on by the Commission and disclosure made only after advance coordination with the agency involved. If the other agency does not wish the information disclosed, the Commission will not disclose it and cannot rely on it in its decision-making process. To require disclosure of all interagency *ex parte* contacts may not only affect another agency's jurisdictional responsibilities, as the Note states, but could also adversely affect the Commission's ability to render timely decisions based on the best information possible. We therefore believe that the current rules strike an appropriate balance between transparency and due process on the one hand and reasoned decision-making and administrative dispatch on the other.

## C. Method of Filing

49. In the *Notice* we called attention to the fact that today many *ex parte* notices are filed electronically on ECFS. This allows Commission staff, parties, and the general public easy and timely access to these filings online. By contrast, when *ex parte* notices are filed in paper format, they can take several days to appear in ECFS. This delays the staff's ability to analyze the contents of the presentation

[52] *See* 47 C.F.R. § 1.1202(a).

[53] NTCA Comments at 7.

[54] Section 1.1202(a) of the Commission's rules states that a status inquiry stating or implying a view as to the merits or outcome of a proceeding or a preference for a particular party, or stating why timing is important to a particular party or indicating a view as to the date by which a proceeding should be resolved, or otherwise intending to address the merits or outcome or to influence the timing of a proceeding, is a "presentation."

[55] Section 1.1204(a)(5) of our rules exempts any presentation "to or from an agency or branch of the Federal Government or its staff and involves a matter over which that agency or branch and the Commission share jurisdiction."

[56] Section 1.1204(a)(5) provides that "any new factual information obtained through such a presentation that is relied on by the Commission in its decision-making process will, if not otherwise submitted for the record, be disclosed by the Commission no later than at the time of the release of the Commission's decision."

and limits outside parties' ability to respond to it, particularly during the Sunshine period. We therefore proposed to require that *ex parte* notices be filed electronically in any proceeding in which electronic filing is available. We sought comment on whether these electronic filings should be required in a machine-readable format, such as Microsoft Word ".doc" format or non-copy protected text-searchable ".pdf" format for text filing, and "native formats" for non-text filings such as spreadsheets in Microsoft ".xml" format. We also recognized that electronic filing could be problematic where the party making the *ex parte* presentation does not have access to a computer or the Internet or the filing contains confidential business or financial information. We proposed specific language to codify the general requirement and exceptions, and sought comment on these issues.[57]

50. Comments. All the commenters addressing this issue generally support electronic filing of *ex parte* notices, agreeing that electronic filing increases transparency and reduces delay. Most of those commenting on the qualification concerning feasibility and on the undue hardship exception support the inclusion of both.[58] NASUCA does not believe that the caveat "where feasible" should be codified, because this would provide a loophole to electronic filing. NASUCA notes that where electronic filing is not feasible, a party can invoke the "undue hardship" exemption, and should be required to substantiate the hardship in its paper filing.[59] It argues further that electronically filed *ex parte* notices should include the date and time of filing, and that all late filings should be subject to sanctions.[60] MAP notes that Section 1.1206(b)(2) of our rules contemplates that Commissioners and staff will receive copies of *ex parte* notices, but that the rule exempts electronically filed notices.[61] MAP urges us to change this provision.[62]

51. There is somewhat less agreement among the commenters on filing confidential information electronically as well as on our proposal to require filings in machine-readable format. ITTA and NTCA generally support the latter proposal.[63] However, Verizon suggests that the Commission clarify that parties may remove metadata from electronic filings, which may include confidential or privileged information. Verizon argues that parties should not be required to electronically file confidential documents, and suggests that this exception be codified with the undue hardship exception. It also contends that the Commission should not require parties to file redacted versions of confidential documents in machine-readable format, because the manual scanning it requires may disrupt the documents' native formats. Verizon also maintains that parties should not be required to file maps, network schematics, or other large and unwieldy data files in machine-readable format.[64] AT&T, while supporting the use of formats that allow keyword searches, opposes requiring parties to file documents in formats that cannot be protected from post-filing alteration.[65]

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[57] *Notice*, 25 FCC Rcd at 2409-10, paras. 15-17.

[58] *See* ACA Comments at 5; AT&T Comments at 3; NATOA Comments at 3; NTCA Comments at 5; Qwest Comments at 4-5; Sprint Comments at 5; Verizon Comments at 2-3; FCBA Committee Comments at 3-5; *see also Workshop Transcript* at 44. NASUCA argues that in codifying a "preference," the Commission is actually imposing a requirement, which NASUCA supports. NASUCA Comments at 4-5. ITTA does not believe there is a need to codify a preference for electronic filing, because most parties already file electronically. ITTA Comments at 5.

[59] NASUCA Comments at 5.

[60] NASUCA Reply Comments at 4.

[61] Section 1.1206(b)(2) provides that a party making an *ex parte* presentation may electronically file one copy of the *ex parte* notice on ECFS, which will then be available to the Commissioner and staff present at the meeting.

[62] MAP Comments at 2.

[63] ITTA Comments at 5; NTCA Comments at 5.

[64] Verizon Comments at 2-3.

[65] AT&T Comments at 3.

52. Electronic Filing Requirement. We adopt the proposed rule requiring electronic filing. Electronic filing is fast and cost-efficient for the parties and the Commission, and is widely used in the federal courts.[66] Consistent with the intent of Section 1.1206(b)(2) and to assist Commissioners and decision-making staff, we modify Section 1.1206(b)(2) to ensure that parties filing *ex parte* notices electronically also send copies to those Commissioners and staff who attended the meeting. We also adopt the requirement that electronic filings be made in a machine-readable format where feasible. This requirement parallels D.C. Circuit Court of Appeals Rule ECF-5, which requires electronically filed documents to be in machine-readable and text-searchable format.[67] We are not persuaded that the possibility of altering electronically filed documents is of sufficient concern to warrant departing from the same filing procedure that federal courts use. As the court rules also provide, we will grant exceptions to the electronic filing requirement for parties unable to comply by reason of hardship. A party claiming a hardship exemption must state the basis for its claim in the notice.

53. Confidential Information. We also find merit in the concerns expressed by some commenters about requiring the electronic filing of confidential information in *ex parte* notices. We will permit parties to remove metadata containing confidential or privileged information, and we will not require parties to file electronically *ex parte* notices that contain confidential information.[68] We will, however, require that a redacted version be filed electronically at the same time the paper filing is submitted, and that the redacted version be machine-readable whenever technically possible.[69]

54. Appendices and Attachments. With particular regard to appendices and attachments, we will also follow the D.C. Circuit rule and require that as a general matter appendices and attachments to an electronically filed notice should also be filed in a machine-readable format, and that PDF images created by scanning a paper document may not be submitted, except in cases where a word-processing version of a document is not available.[70] We find that any incremental burden on the parties to prepare and submit redacted or scanned versions of certain material is outweighed by the efficiency of having these materials electronically accessible to the Commission, to other parties, and to the public.

55. At the same time, however, we are mindful of the fact that there will be instances in which appended material is voluminous or otherwise not practically filed in machine-readable format, and we believe carefully considered exceptions should be made in those cases. In considering such exceptions we again find appropriate guidance in court rules. For example, District of Columbia District Court Local Rule LCvR 5.4(e)(1)(A)-(C) provides that attachments exceeding 500 pages, or not in a format that readily permits electronic filing such as large maps, charts, videotapes, and similar material,

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[66] Rule 25(a)(2)(D) of the Federal Rules of Appellate Procedure permits federal appellate courts to permit or require papers to be filed, signed, or verified by electronic means provided reasonable exceptions are allowed. The U.S. Court of Appeals for the District of Columbia Circuit and the U.S. District Court for the District of Columbia, along with other courts, now require most filings to be submitted electronically. *Administrative Order Regarding Electronic Case Filing* (D.C. Cir., May 15, 2009) (*May 15 Administrative Order*); D.D.C. LCvR 5.4(a).

[67] Rule ECF-5(B), *May 15 Administrative Order*.

[68] This parallels the D.C. Circuit rule, which states that documents under seal may not be filed electronically unless the court orders otherwise. D.C. Circuit Court Rule ECF-8(B), *May 15 Administrative Order*; *see also* D.D.C. LCvR 5.4(e)(2).

[69] These confidentiality provisions are applicable to *ex parte* notices only. Confidentiality issues arising in the context of other filings will be considered at a later date. *See Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Notice of Proposed Rulemaking, 25 FCC Rcd 2430, 2435, para. 14 (2010).

[70] *Id*; *see also* D.D.C. LCvR 5.4(e)(1)(A)-(C), providing that attachments exceeding 500 pages, or not in a format that readily permits electronic filing, such as large maps, charts, videotapes, and similar material, or that are filed under seal, may be filed in paper form.

or that are filed under seal, may be filed in paper form. We will consider waivers of the electronic filing requirement for appendices and attachments on a case-by-case basis, and will require parties seeking a waiver to claim it when the filing is made.

### D. Filing Deadlines

56. In light of the added filing requirements proposed in the *Notice*, we proposed to extend the deadline for filing notices of *ex parte* presentations from one to two business days for any presentation not made during the Sunshine period. However, in recognition of the need to assure procedural fairness for all parties during the compressed seven-day Sunshine period, we also proposed a filing deadline of four hours for any *ex parte* presentation made during the Sunshine period.

57. Comments. PK and CFA argue that the one business-day filing deadline for *ex parte* presentations should not be extended. They state that a one day deadline is necessary to serve the interests of openness and transparency and does not impose an unreasonable burden on the party preparing a filing.[71] The remaining commenters support the proposal to extend the filing deadline, asserting that it would reasonably accommodate the extra effort involved in preparing *ex parte* notices after the rule changes proposed in the *Notice*, especially by parties with limited means, and would not materially undermine the interests of transparency and due process.[72] Marcus supports the proposal, but only if it is strictly enforced. Marcus suggests that ECFS be modified to flag automatically late filings for enforcement action.[73] NTCA suggests that the Commission set a specific time-of-day requirement to avoid confusion.[74]

58. There was somewhat less agreement among the commenters on the proposal to codify a four-hour deadline for filing notices of *ex parte* presentations made during the Sunshine period. ITTA, MAP, NASUCA, PK and CFA, Verizon, NAB and NATOA support the proposal.[75] NATOA, for example, argues that the availability of electronic filing makes it easy for parties to file from anywhere, even if the party is outside the office or still engaged in meetings at the Commission. NATOA also points out that parties know the contents of their presentations and can most likely anticipate the questions that will be asked, adding to the ease of meeting the four-hour deadline.[76]

59. ACA, NTCA, Qwest, and Sprint doubt that a four-hour deadline would allow sufficient time to prepare *ex parte* notices, and propose a one-day filing deadline instead.[77] Sprint notes that parties often schedule several *ex parte* presentations with Commissioners and staff in the course of a single day, making the calculation of a four-hour filing deadline problematic and compliance difficult. Sprint also argues that requiring the electronic filing of *ex parte* notices should alleviate concerns about the incremental additional filing time that it recommends.[78]

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[71] PK and CFA Joint Comments at 7-8.

[72] *See, e.g.*, ACA Comments at 3; ITTA Comments at 4; NASUCA Comments at 3-4; Qwest Comments at 4; Verizon Comments at 1; NTCA Comments at 4-5. NTCA also suggests that the Commission specify a time-of-day requirement to avoid confusion. NTCA Comments at 5.

[73] Marcus Comments at 3-4.

[74] NTCA Comments at 4-5.

[75] ITTA Comments at 6; MAP Comments at 3; NASUCA Comments at 7 and Reply Comments at 5; PK and CFA Joint Comments at 8; Verizon Comments at 4; NAB Reply Comments at 3; NATOA Comments at 4-5.

[76] NATOA Comments at 4-5.

[77] ACA Comments at 5; NTCA Comments at 8; Qwest Comments at 6; Sprint Comments at 6-7.

[78] Sprint Comments at 7; FCBA Committee Comments at 6.

60. Filing Deadlines for Presentations Outside the Sunshine Period. We agree with the preponderance of the comments that support an extension of the filing deadline from one to two business days for *ex parte* presentations occurring outside the Sunshine period. We find that this extension is reasonably calibrated to the expanded filing requirements we are adopting today. In addition, because we are requiring the submission of most *ex parte* notices electronically, which should speed their public availability, the added day for filing should not materially affect the ability of the Commission and its staff, other parties, and the public to identify the issues parties are raising and debating. In the interests of clarity and uniformity, we use "business day" to denote the entire calendar day (*i.e.*, from 12:00 a.m. until 11:59:59 p.m.) for any day other than a weekend or holiday, and further specify that the governing time zone will be Eastern Time.[79] Thus, for example, if an *ex parte* presentation occurs on a Tuesday, the *ex parte* notice must be filed no later than 11:59:59 p.m. on the following Thursday, assuming no intervening holidays. But, if an *ex parte* presentation is made on the day the Sunshine notice is released, an *ex parte* notice must be submitted by the next business day—a shorter deadline that is necessary to afford all parties a sufficient opportunity to present their arguments within the compressed timeframe of the Sunshine period. Under these circumstances, any reply would need to be filed by the next business day following filing of the *ex parte* notice, and must be submitted in writing and limited to only the particular issues raised in the *ex parte* notice. Thus, if an *ex parte* presentation is made on a Tuesday and the Sunshine notice is also issued on that day, the *ex parte* notice must be filed no later than 11:59:59 p.m. on Wednesday, and any reply would need to be filed by 11:59:59 p.m. on Thursday, assuming no intervening holidays. Copies of any reply must be provided to each staff member or Commissioner who received the original presentation from the submitting party. Neither oral replies nor oral or written sur-replies are permitted in the absence of an express request by a Commissioner or staff.

61. Filing Deadlines for Presentations During the Sunshine Period. When *ex parte* presentations are made during the limited Sunshine period, it is particularly important that the required notices be filed quickly and in an accessible electronic format.[80] However, we are persuaded that the commenters raise a valid point about the difficulty of complying with a four-hour filing deadline, especially in those not-infrequent cases in which a party makes several oral *ex parte* presentations in one day.[81] While we concur with the points NATOA raises about the ease with which an electronic filing can be made, even when the party is not present in an office, we believe that imposing a four-hour deadline on filings made after a series of meetings at different times during the same day could result in rushed, insufficient filings and unintentional noncompliance with the deadline. For this reason, we amend our rule to provide that permissible *ex parte* presentations made in permit-but-disclose proceedings during the Sunshine period (under an exception to the Sunshine period prohibition) must be summarized and placed in the record by the end of the same day (*i.e.*, by 11:59:59 p.m.) on which the presentation was made. This revised deadline is more easily applied than our four-hour proposal and should not materially affect the interests of due process and transparency. Consistent with this revised rule, we will allow parties to file written replies to *ex parte* presentations during the Sunshine period no later than the next business day following the presentation. These replies shall be limited to addressing the specific issues and information in the *ex parte* notice to which they are replying. Copies of any reply must be provided to

[79] *See generally* 47 C.F.R. § 1.4(e)(2). In the *Notice* we proposed to clarify Section 1.1203 to state, *inter alia*, that the Sunshine period prohibition does not affect parties' obligation to file a memorandum summarizing an oral *ex parte* presentation for presentations made on the last day before the Sunshine period begins, even though new *ex parte* presentations are not permitted unless they are made pursuant to an exception to the prohibition on *ex parte* contacts. *Notice*, 25 FCC Rcd at 2418, para. 43. We adopt this proposal *infra* paragraph 76(viii).

[80] This point was one on which all the participants in the October 28 *Ex Parte* Workshop agreed. *See Workshop Transcript* at 101-04.

[81] Although the revised rules we adopt today provide that *ex parte* presentations should be limited in number and in scope, the number and complexity of the issues presented in some permit-but-disclose proceedings may require the adduction of additional information during the Sunshine period.

each staff member or Commissioner who received the original presentation from the submitting party. Finally, as in the case of filings for presentations made on the day the Sunshine Notice is issued, neither oral replies nor oral or written sur-replies shall be permitted in the absence of an express request by staff.

### E. Sanctions and Enforcement

62. In the *Notice* we stated our intent to place increased emphasis on enforcement addressing impermissible *ex parte* contacts, regardless of any rule amendments we might adopt in this *Report and Order*. We asked specifically what sanctions would be appropriate to address the filing of insufficient *ex parte* notices, and whether prejudice to other parties should be a principal factor in determining an appropriate sanction. We also sought comment on whether all sanctions for *ex parte* rule violations should be publicly announced.[82]

63. Comments. AT&T does not believe that additional authority or special sanctions are needed to address *ex parte* violations. It states that if an *ex parte* notice is insufficient, the Commission should simply ask the filer to remedy the deficiency. AT&T argues that sanctions should be imposed only when a party fails to file a required *ex parte* notice or repeatedly violates the rules.[83] NTCA concurs that further enforcement rules are not necessary at this time.[84]

64. Most of the commenters, however, urge the Commission to more vigorously enforce its *ex parte* rules, with or without mitigation in some cases. For example, MAP, Marcus and NASUCA all support more vigorous enforcement action. MAP and Marcus allege there has been widespread noncompliance with the current rules, which is sanctioned either inadequately or not at all.[85]

65. Some commenters, including FP, PK and CFA, support more stringent enforcement, but believe that sanctions should be imposed only for willful and repeated violations. These commenters suggest that it would be appropriate to let first- and second-time offenders correct their errors without consequence in order not to discourage participation in Commission proceedings. They recommend that we reserve stricter sanctions for parties repeatedly filing late or incomplete notices.[86] Similarly, although FP believes in the need for stricter sanctions, including monetary forfeitures and disqualification from further participation in the same proceeding in which the *ex parte* violation occurred, it urges us to tailor the sanction to the resources of the party.[87] PK and CFA state that the Commission should bar repeat offenders from making further *ex parte* presentations, and would increase the debarment period based on their record of prior violations. Marcus also makes this recommendation.[88] NASUCA argues that prejudice to other parties should elicit the harshest sanctions, but contends that the absence of prejudice is not cause to let offending parties escape sanctions. NASUCA also maintains that a violator's claim that its violations were inadvertent should not preclude the Commission from admonishing or penalizing the violator, and believes that a ban on all further *ex parte* filings by parties willfully and repeatedly violating

[82] *Notice*, 25 FCC Rcd at 2415, para. 32.

[83] AT&T Comments at 6.

[84] NTCA Comments at 6; *see also* FCBA Committee Comments at 6.

[85] MAP Comments at 1; Marcus Comments at 4-5; *see also Workshop Transcript* at 50-51.

[86] PK and CFA Joint Comments at 9; FP Reply Comments at 2-3.

[87] FP Reply Comments at 2-3.

[88] PK and CFA Joint Comments at 9; Marcus Comments at 4-5.

the rules would be an effective deterrent.[89] Marcus and NASUCA state that all sanctions, including admonitions for first infractions and minor offenses, should be publicly announced.[90]

66. Enforcement Authority. We reiterate the tentative conclusion in the *Notice* that stricter enforcement of our *ex parte* rules complements the improvements to the rules we are adopting today and reinforces their purpose in making our proceedings more open and transparent to the public and fairer to interested parties. We further find that the revised enforcement program we adopt today will be best implemented by close coordination between the Office of General Counsel and the Enforcement Bureau. Accordingly, the Office of General Counsel will retain the authority it currently has under Section 0.251(g) of the Rules to issue rulings on whether violations of the *ex parte* rules have occurred and to impose appropriate sanctions. We will, however, amend our rules to require that the General Counsel refer any case in which a forfeiture or a citation may be warranted to the Enforcement Bureau for disposition,[91] and we will delegate authority to the Enforcement Bureau to levy fines for violations of the *ex parte* rules. In the event the Enforcement Bureau ultimately determines that a forfeiture or a citation is not warranted, the General Counsel will take appropriate action on the matter. As several of the commenters have suggested, the Commission will also give public notice via the Internet of the filing and disposition of *ex parte* complaints.

67. We decline at this point to provide for the harsher sanction of routine disqualification that some commenters suggest. Although it would certainly deter parties from violating the rules, routinely barring parties from further participation in Commission proceedings diminishes their ability to influence action from the Commission that would serve the public interest, and it would lessen the pool of knowledge and information on which to base our decisions. However, we will monitor this new enforcement program to assure that it is effective in deterring future violations.

### F. Other Issues

#### 1. Other Agencies' Procedures

68. In the *Notice* we observed that other federal agencies have *ex parte* rules and procedures that differ from our own, including the requirement that Commissioners and staff summarize and file oral *ex parte* communications rather than the parties making them.[92] We asked whether any of these differing approaches would be instructive in considering amendments to our own *ex parte* rules.

69. Comments. We received only a limited response to this question. Marcus emphasizes that the Commission is the only federal agency that relies solely on interested parties to write and file *ex parte* notices; it asserts that the rules of other agencies place this requirement on the staff.[93] NTCA, on the other hand, believes that the obligation to file *ex parte* notices correctly lies with the party making the *ex parte* presentation and not with the Commission staff.[94] FCBA Committee states that requiring the staff to prepare *ex parte* notices would be overly burdensome and could cause staff to be disinclined to meet with members of the public, reducing participation in Commission proceedings and limiting the

[89] NASUCA Comments at 9-10; NASUCA Reply Comments at 6.

[90] Marcus Comments at 5; NASUCA Comments at 9-10.

[91] We note that in certain circumstances as set forth in Section 503(b)(5) of the Communications Act, the Enforcement Bureau must first issue a citation of the violation charged before imposing forfeiture liability on a party. *See* 47 U.S.C. § 503(b)(5).

[92] *Notice*, 25 FCC Rcd at 2408-09, paras. 13-14.

[93] Marcus Comments at 2.

[94] NTCA Comments at 5.

information the Commission might otherwise receive.[95] NASUCA observes that the Commission's specific proposals are better suited to serve the purpose of reform than adopting the approach of another agency.[96]

70. Role of Commission Staff. The procedural rules developed by each agency not only ensure due process in the agency's particular proceedings but also reflect the agency's judgment about how it can most effectively conduct its business.[97] In that sense, one agency's procedural rules do not fit all, and we would be ill-advised to incorporate the *ex parte* rules of another agency without giving considerable thought to whether those rules would achieve the interests of administrative efficiency, procedural due process and transparency better than our own rules as amended today.

71. From that perspective, we see no clear advantage to the suggestion by Marcus that Commission staff prepare and file *ex parte* notices. Other agencies may be differently situated to the extent their docket is primarily adjudicatory rather than rulemaking (*e.g.*, the Federal Trade Commission). Also, staff summaries raise an issue of fairness. The complex legal and technical nature of the issues sometimes presented *ex parte* make it preferable for the parties arguing those issues to summarize them. We also question what procedures would be used in cases where the presenter believes a staff summary is incorrect or incomplete. Finally, the time staff would spend in writing summaries of *ex parte* presentations would take away from the time available to analyze the issues and assist the Commission in reaching its decisions.[98] For these reasons, we will be guided by the proposals in the *Notice* to improve our own rules rather than by proposals that we follow the rules of other agencies.

72. As we stated previously, we are amending our rules to clarify that copies of all electronically filed *ex parte* notices be sent electronically to staff and Commissioners who participated in the presentation. This will enhance the ability of decision-makers to review these notices expeditiously, detect any outstanding errors or omissions, and request that they be cured. Filers may be asked to submit any corrections or further information as necessary to comply with the *ex parte* rules. Where staff believes there are instances of substantial or repeated violations of the *ex parte* rules, staff should report such to the General Counsel.

### 2. New Media

73. Although we did not propose any rule amendments in the *Notice* regarding the treatment of comments on various Commission new media sites, including the Commission's blogs, its Facebook page, its MySpace page, its IdeaScale pages, its Flickr page, its Twitter page, its RSS feeds, and its YouTube page,[99] several commenters addressed this issue.

74. As a general matter the commenters addressing this issue see the Commission's use of new media as a valuable part of its public outreach, but several expressed reservations about the use of this material in Commission proceedings. For example, NTCA states that blog material should not be used as part of the record in rulemaking proceedings. Although NTCA believes blog material may be helpful in some proceedings such as notices of inquiry, it states that the volume of blog material that may be submitted makes it difficult to monitor. NTCA argues that including such submissions in the record of

[95] FCBA Committee Comments at 6.

[96] NASUCA Comments at 6.

[97] *See Workshop Transcript* at 15-16.

[98] *See Workshop Transcript* at 64-67, 110. In the *Notice* we proposed to codify the practice whereby the staff at its discretion may file an *ex parte* summary of a multiparty meeting, *Notice*, 25 FCC Rcd at 2417, para. 40, and we adopt this proposal *infra* paragraph 76(vii).

[99] *Notice*, 25 FCC Rcd at 2415-16, paras. 33-34; *see* http://www.fcc.gov/connect for links to these and other sites.

a rulemaking proceeding could obscure rather than clarify the record, and that result would be inconsistent with the goal of the *ex parte* rules. Accordingly, NTCA encourages the Commission not to exempt new media from the rules.[100] AT&T, Qwest, and Verizon agree with NTCA.[101] Verizon states that if new media presentations are included in the public record, they should be subject to the same *ex parte* rules as traditional presentations, including the requirement to file a notice and the prohibition on presentations during the Sunshine period.[102]

75. These comments illustrate the complications associated with increasing the accessibility of Commission decision-making via new media in proceedings governed by the Administrative Procedure Act. We have incorporated some of this material into the record of some inquiries and other proceedings, and we will continue to develop ways that will make its inclusion in more proceedings technically and practically possible. However, at this time we agree with the commenters that incorporating blog posts and other presentations via new media into the record of all rulemaking proceedings would be impractical. Therefore, as stated in the *Notice*, we will continue to associate new media contacts in the records of specific proceedings, on the terms announced for those particular proceedings.[103] In addition, users of new media may file comments electronically in any permit-but-disclose proceeding consistent with the *ex parte* rules by clicking on the link to ECFSExpress on the Commission's homepage: www.fcc.gov.

### G. Minor and Conforming Amendments

76. The *Notice* proposed a series of minor changes to the *ex parte* rules designed to update or clarify them.[104] These minor changes either received no comment or were supported by those commenting on them. Accordingly, for the reasons stated in the *Notice*, we adopt the following minor amendments:

i. Section 1.1202(d)(6) duplicates Section 1.1202(d)(5) and is deleted;

ii. Section 1.1204(a)(6) is amended to change the word "telecommunications" to "communications" and to delete the word "competition";

iii. Section 1.1204(a)(12) is amended to add the Pooling Administrator and the TRS Numbering Administrator to the list of entities with whom communications are exempt from the *ex parte* rules;

iv. Section 1.1206(a) is amended to delete from the list of permit-but-disclose proceedings Bell Operating Company applications under Section 271 of the Act, because all Bell Operating Companies have applied for and received authority under Section 271 in all their respective states;

[100] NTCA Comments at 11.

[101] AT&T Reply Comments at 2-3; Qwest Comments at 9-10; Verizon Comments at 5.

[102] Verizon Comments at 5.

[103] *See Workshop Transcript* at 109-17.

[104] *Notice*, 25 FCC Rcd at 2416-18, paras. 32-45.

v. Section 1.1208 is amended to require the filing of a disclosure notice when parties in restricted proceedings make a permissible presentation on a non-*ex parte* basis (*i.e.*, when other parties have been given advance notice and an opportunity to participate);[105]

vi. Section 1.1206(b)(2) is clarified to state expressly that documents shown or given to Commission staff during *ex parte* meetings are themselves written *ex parte* presentations and must be filed;[106]

vii. Section 1.1206(b)(2) is amended by adding a sentence to note one to codify the practice whereby the staff at its discretion may file an *ex parte* summary of a multiparty meeting as an alternative to having each participant do so;

viii. Section 1.1203(a)(4) is clarified to state that the requirement to disclose presentations made during the Sunshine period only applies to presentations made in permit-but-disclose proceedings;

ix. Section 1.1203 is clarified to state that the Sunshine period prohibition does not affect parties' obligation to file a written *ex parte* presentation or memorandum summarizing an oral *ex parte* presentation made on the day before the Sunshine period begins, even though new *ex parte* presentations are not permitted during the Sunshine period unless they are made pursuant to an exception to the prohibition on *ex parte* contacts;[107]

x. Section 1.1206 is non-substantively reorganized to make it clearer and easier to understand and to make various conforming edits.[108]

## V. FURTHER NOTICE OF PROPOSED RULEMAKING

77. As noted above at paragraph 38, the issue whether to adopt some form of enhanced disclosure requirement drew divergent views from the commenters. AT&T strongly opposes the required filing of disclosure statements, saying that the burden on parties would outweigh the benefits. ITTA also opposes the proposal, maintaining that parties already have an incentive to clearly identify themselves in order to avoid the risk that their presentation will suffer "diminished appreciation" by Commission decision-makers.[109] Sprint and the FCBA Committee likewise contend that the proposal is not needed because most parties identify themselves in any event and further information is readily available on the Internet. Sprint maintains that, if additional disclosure is required, the Commission should permit parties to reference in their *ex parte* notices the file number of their previously filed ownership reports, and suggests that the Commission develop a way to link the information contained in such reports to an *ex parte* notice. Sprint also urges the Commission to limit the burden that a disclosure requirement would impose by using the same guidelines applicable to updating ownership information on other Commission ownership forms.[110]

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[105] As we stated in the *Notice*, this amendment will facilitate review of the record of restricted proceedings by Commission staff and outside parties. *Notice*, 25 FCC Rcd at 2417, para. 41. NASUCA supports this amendment. NASUCA Comments at 8.

[106] NTCA supports this amendment. NTCA Comments at 4.

[107] NASUCA supports this amendment. NASUCA Comments at 8.

[108] Qwest supports all the minor amendments listed above. Qwest Comments at 1.

[109] AT&T Comments at 3-5; ITTA Comments at 7.

[110] Sprint Comments at 7-9; FCBA Committee Comments at 6.

78. Other commenters support some type of additional disclosure requirement. NASUCA maintains that the burden of identifying real parties-in-interest appropriately falls on those making *ex parte* presentations, not on the public.[111] FP urges the Commission to require mandatory disclosure of all financial contributions directed to funding Commission advocacy activity, including, but not limited to, oral *ex parte* presentations. FP argues that disclosure rules are particularly needed with respect to grassroots or issue-specific organizations that receive funding from industry participants. FP suggests that these groups should be required to disclose the names of all backers who contributed more than a certain dollar amount to support them.[112] NASUCA also recommends that the Commission not impose the same disclosure requirements on individuals as those applicable to companies and organizations.[113] Verizon recommends that we base our disclosure rule on the D.C. Circuit's disclosure rules,[114] and suggests that once an initial disclosure statement is submitted it should be presumed valid for one year or until the filer experiences a material change in ownership or membership, in which case an updated disclosure form would be required.[115]

79. NTCA comments that requiring a comparable level of disclosure from different types of participating entities would be difficult to implement. NTCA also recommends that we not adopt any disclosure requirement until we define the specific instances in which lack of disclosure historically has been a problem. Instead, NTCA recommends that we develop a "best practices" list, which would give examples of the level of disclosure required of different entities. NAB agrees with this suggestion.[116] NAB and NTCA also argue that industry associations should not be required to disclose information about every company included in their membership.[117]

80. We agree that, although some interested parties may be knowledgeable about the identities of the "parties behind the parties" supporting or opposing their positions, other parties and the general public may not be equally knowledgeable. We believe it would serve the public interest to have a disclosure requirement that addresses this problem without imposing undue burdens on the disclosing party or requiring duplicative filing of information already generally available from another source. This *Further Notice* solicits comment on what type of disclosure rule would balance those two interests, and how it should be applied.

81. Our initial question focuses on the range of proceedings to which new disclosure rules should apply. Typically, written *ex parte* presentations and notices of oral *ex parte* presentations are not the only filings in the record of a proceeding, and parties often do not make *ex parte* submissions at all. In this light, is it sufficient for any disclosure rule to apply to *ex parte* filings, or is it appropriate to have a

[111] NASUCA Reply Comments at 4-5.

[112] FP Reply Comments at 3-8.

[113] NASUCA Comments at 5-6. NASUCA also proposes that enhanced disclosure rules apply to all FCC filings, not just *ex parte* notices. *Id.* This proposal exceeds the scope of this rulemaking.

[114] D.C. Circuit Rule 26.1 requires a corporation, joint venture, partnership, syndicate, or other similar entity to file a disclosure statement identifying all parent companies and any publicly-held company that has a 10 percent or greater ownership interest. A revised corporate disclosure statement must be filed any time there is a change in corporate ownership that would affect the disclosures required by the rule. The disclosure statement must identify the represented entity's general nature and purpose. Unincorporated entities whose members have no ownership interests must disclose the names of any members that have issued shares or debt securities to the public. The rule does not require disclosure of the names of members of trade associations or professional associations. *See* D.C. CIR. R. 26.1; *see also Notice*, 25 FCC Rcd at 2413-14, para. 28.

[115] Verizon Comments at 4-5.

[116] NTCA Comments at 10; NAB Reply Comments at 4-5.

[117] *Id.*

broader disclosure rule that applies to some or all categories of Commission proceedings? If the latter, what categories of proceedings should be within the scope of the disclosure rule? Should the information required to be disclosed depend on the nature of the proceeding in which the filing is made? Conversely, are there any Commission proceedings that should be exempt from any new rule, either because disclosure would be unnecessary or unduly burdensome? Are the disclosure practices of other agencies instructive?

82. We also ask for further comment on the disclosure requirements that should apply to different categories of entities. Should trade associations be required to adhere to the same disclosure requirements as corporations, and if not, what different levels of disclosure should apply, and why? Should we include special provisions for nonprofit public interest, grassroots, or issue-oriented groups that are funded by contributions, and, if so, what should these be? Finally, if a party is submitting a comment under its own name that was given to it by another entity with the request that the party file it in the party's own name, should the filer be required to identify the source of the comment? What if an entity other than the filer paid for the preparation of the filing? Are any of the model disclosure rules cited in the *Notice*, such as Supreme Court Rules 29.6 and 37.6, Rule 26.1 of the Rules for the U.S. Court of Appeals for the D.C. Circuit, or the Lobbying Disclosure Act suitable for any of these purposes?[118]

83. Should we require disclosure in cases when the information to be disclosed can be found in existing records at this Commission, or when the information appears on an entity's website? If we were to rely on information already on file with the Commission, how can we ensure that this information is easily accessible and up-to-date? Should the Commission create a single electronically accessible source for all disclosure statements, and how often should filers be required to update this information? If we were to rely on information already provided by a party on its Internet site, how could the Commission assure itself that this information would be kept up-to-date?

84. We ask commenters responding to this *Further Notice* to address these and any other issues they believe are relevant for consideration.

## VI. PROCEDURAL MATTERS

85. Regulatory Flexibility Act. Our actions do not require notice and comment,[119] and therefore fall outside the Regulatory Flexibility Act of 1980, as amended, and require no initial or final regulatory flexibility analysis under Section 604 of that Act, 5 U.S.C. § 604. We nevertheless note that we anticipate that neither the rules we adopt today nor the alternatives examined in the *Further Notice* will have a significant economic impact on a substantial number of small entities or impose significant costs on parties to Commission proceedings. We will, however, send a copy of this Further Notice of Proposed Rulemaking to the Chief Counsel of Advocacy of the Small Business Administration

86. Paperwork Reduction Act. The rules adopted or modified in this proceeding have been analyzed with respect to the Paperwork Reduction Act of 1980 and (subject to the following qualification) have not been found to impose new or modified requirements or burdens on the public. The Further Notice may result in new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in the Further Notice of Proposed Rulemaking, as required by the Paperwork Reduction Act of 1995.[120] In addition, pursuant to

[118] *See Notice*, 25 FCC Rcd at 2413-14, para. 28.

[119] *See supra* note 10.

[120] Pub. L. No. 104-13.

the Small Business Paperwork Relief Act of 2002,[121] we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."[122]

87. Comment Filing Procedures. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments in the Further Notice of Proposed Rulemaking 45 days after publication in the Federal Register, and reply comments 30 days after the comment deadline. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121-01 (1998).

- Electronic Filers. Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/. Filers should follow the instructions provided on the website for submitting comments.

- ECFS filers must transmit one electronic copy of the comments for GC Docket No. 10-43. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail due to security measures). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered and/or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 Twelfth St. SW, Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 Twelfth Street, SW, Washington DC 20554.

88. Parties shall also serve one copy on the Commission's copy contractor, Best Copy and Printing, Inc. (BPCI), Portals II, 445 Twelfth Street SW, Room CY-B402, Washington, DC 20554, (202) 488-5300, or via email to fcc@bcpiweb.com. Documents in GC Docket No. 10-43 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 Twelfth Street SW, Room CY-A257, Washington, DC 20554. The documents may also be purchased from BCPI – telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

89. Ex Parte *Presentations.* The rulemaking the Further Notice continues shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.

[121] Pub. L. No. 107-198.

[122] 44 U.S.C. § 3506(c)(4).

90. *Accessible Formats.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0432 (tty).

## VII. ORDERING CLAUSES

91. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 303(r), that the proposed regulatory changes described above and detailed in the attached Appendix A ARE ADOPTED, effective 30 days after publication in the Federal Register.

92. IT IS FURTHER ORDERED, that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described in the Further Notice of Proposed Rulemaking above, and that COMMENT IS SOUGHT on these proposals.

93. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of the Further Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary

## APPENDIX A

## Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 0 and 1 as follows:

**PART 0 – COMMISSION ORGANIZATION**

**1. The authority.citation for part 0 continues to read as follows:**

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

**2. Section 0.111 is amended by redesignating paragraphs (a)(15) through (a)(23) as paragraphs (a)(16) through (a)(24) and by adding new paragraph (a)(15) to read as follows:**

§ 0.111 Functions of the Bureau.

(a) * * *

(15) Upon referral from the General Counsel pursuant to § 0.251(g), impose sanctions for violations of the Commission's ex parte rules including, but not limited to, the imposition of monetary forfeitures, consistent with § 0.311.

* * * * *

**3. Section 0.251 is amended by revising paragraph (g) to read as follows:**

§ 0.251 Authority delegated.

(g) The General Counsel is delegated authority to issue rulings on whether violations of the ex parte rules have occurred and to impose appropriate sanctions. The General Counsel shall refer to the Enforcement Bureau for disposition pursuant to § 0.311(b) any matter in which a forfeiture or a citation under 47 U.S.C. 503(b)(5) may be warranted. If the Enforcement Bureau determines that forfeiture or a citation is not warranted, the matter shall be referred back to the General Counsel for appropriate action.

* * * * *

**PART 1 – PRACTICE AND PROCEDURE**

**4. The authority citation for part 1 continues to read as follows:**

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309.

**5. In Section 1.1202, remove paragraph (d)(6).**

**6. Section 1.1203 is amended by revising paragraphs (a)(4) and (b) introductory text, and adding paragraph (c), to read as follows:**

§ 1.1203 Sunshine period prohibition.

(a) * * *

(4) The presentation is made by a member of Congress or his or her staff, or by other agencies or branches of the Federal government or their staffs in a proceeding exempt under § 1.1204 or subject to permit-but-disclose requirements under § 1.1206. Except as otherwise provided in § 1.1204(a)(6), if the presentation is of substantial significance and clearly intended to affect the ultimate decision, and is made in a permit-but-disclose proceeding, the presentation (or, if oral, a summary of the presentation) must be placed in the record of the proceeding by Commission staff or by the presenter in accordance with the procedures set forth in § 1.1206(b).

* * * * *

(b) The prohibition set forth in paragraph (a) of this section begins on the day (including business days and holidays) after the release of a public notice that a matter has been placed on the Sunshine Agenda until the Commission:

* * * * *

(c) The prohibition set forth in paragraph (a) of this section shall not apply to the filing of a written ex parte presentation or a memorandum summarizing an oral ex parte presentation made on the day before the Sunshine period begins, or a permitted reply thereto.

**7. Section 1.1204 is amended by revising paragraphs (a)(6) and (a)(12)(iv), and adding new paragraphs (a)(12)(v) and (a)(12)(vi) to read as follows:**

§ 1.1204 Exempt ex parte presentations and proceedings.

(a) * * *

(6) The presentation is to or from the United States Department of Justice or Federal Trade Commission and involves a communications matter in a proceeding which has not been designated for hearing and in which the relevant agency is not a party or commenter (in an informal rulemaking or Joint board proceeding) provided that, any new factual information obtained through such a presentation that is relied on by the Commission in its decision-making process will be disclosed by the Commission no later than at the time of the release of the Commission's decision;

* * * * *

(12) * * *

(iv) The Number Portability Administrator relating to the administration of local number portability pursuant to 47 U.S.C. 251(b)(2) and (e), provided that the relevant administrator has not filed comments or otherwise participated as a party in the proceeding;

(v) The TRS Numbering Administrator relating to the administration of the TRS numbering directory pursuant to 47 U.S.C. 225 and 47 U.S.C. 251(e); or

(vi) The Pooling Administrator relating to the administration of thousands-block number pooling pursuant to 47 U.S.C. 251(e).

* * * * *

**8. Section 1.1206 is amended by revising paragraph (a)(12), removing paragraph (a)(13) and redesignating paragraph (a)(14) as (a)(13), and revising paragraph (b) to read as follows:**

§ 1.1206 Permit-but-disclose proceedings.

(a) * * *

(12) A modification request filed pursuant to § 64.1001 of this chapter; and

* * * * *

(b) The following disclosure requirements apply to ex parte presentations in permit but disclose proceedings:

(1) Oral presentations. A person who makes an oral ex parte presentation subject to this section shall submit to the Commission's Secretary a memorandum that lists all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and summarizes all data presented and arguments made during the oral ex parte presentation. Memoranda 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. If the oral ex parte presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum.

NOTE 1 TO PARAGRAPH (b)(1): Where, for example, presentations occur in the form of discussion at a widely attended meeting, preparation of a memorandum as specified in the rule might be cumbersome. Under these circumstances, the rule may be satisfied by submitting a transcript or recording of the discussion as an alternative to a memorandum. Likewise, Commission staff in its discretion may file an *ex parte* summary of a multiparty meeting as an alternative to having each participant file a summary.

(2) Written and oral presentations. A written ex parte presentation and a memorandum summarizing an oral ex parte presentation (and cover letter, if any) shall clearly identify the proceeding to which it relates, including the docket number, if any, and must be labeled as an ex parte presentation. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and, accordingly, must be filed consistent with the provisions of this section. Consistent with the requirements of § 1.49(a) and (f), additional copies

of all written ex parte presentations and notices of oral ex parte presentations, and any replies thereto, shall be mailed, e-mailed or transmitted by facsimile to the Commissioners or Commission employees who attended or otherwise participated in the presentation.

(i) In proceedings governed by § 1.49(f) or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, shall, when feasible, be filed through the electronic comment filing system available for that proceeding, and shall be filed in a native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). If electronic filing would present an undue hardship, the person filing must request an exemption from the electronic filing requirement, stating clearly the nature of the hardship, and submitting an original and one copy of the written ex parte presentation or memorandum summarizing an oral ex parte presentation to the Secretary, with a copy by mail or by electronic mail to the Commissioners or Commission employees who attended or otherwise participated in the presentation.

(ii) Confidential Information. In cases where a filer believes that one or more of the documents or portions thereof to be filed should be withheld from public inspection, the filer should file electronically a request that the information not be routinely made available for public inspection pursuant to § 0.459 of this chapter. Accompanying any such request, the filer shall include in paper form a copy of the document(s) containing the confidential information, and also shall file electronically a copy of the same document(s) with the confidential information redacted. The redacted document shall be machine-readable whenever technically possible. Where the document to be filed electronically contains metadata that is confidential or protected from disclosure by a legal privilege (including, for example, the attorney-client privilege), the filer may remove such metadata from the document before filing it electronically.

(iii) Filing dates outside the Sunshine period. Except as otherwise provided in paragraph (b)(2)(iv) and (v) of this section, all written ex parte presentations and all summaries of oral ex parte presentations must be filed no later than two business days after the presentation. As

set forth in § 1.4(e)(2), a "business day" shall not include a holiday (as defined in § 1.4(e)(1)). In addition, for purposes of computing time limits under the rules governing ex parte presentations, a "business day" shall include the full calendar day (*i.e.*, from 12:00 a.m. Eastern Time until 11:59:59 p.m. Eastern Time).

Example: On Tuesday a party makes an ex parte presentation in a permit-but-disclose proceeding to a Commissioner. The second business day following the ex parte presentation is the following Thursday (absent an intervening holiday). The presenting party must file its ex parte notice before the end of the day (11:59:59 p.m.) on Thursday. Similarly, if an ex parte presentation is made on Friday, the second business day ordinarily would be the following Tuesday, and the ex parte notice must be filed no later than 11:59:59 p.m. on that Tuesday.

(iv) Filing dates for presentations made on the day that the Sunshine notice is released. For presentations made on the day the Sunshine notice is released, any written ex parte presentation or memorandum summarizing an oral ex parte presentation required pursuant to § 1.1206 or § 1.1208 must be submitted no later than the end of the next business day. Written replies, if any, shall be filed no later than two business days following the presentation, and shall be limited in scope to the specific issues and information presented in the ex parte filing to which they respond.

Example: On Tuesday, a party makes an ex parte presentation in a permit-but-disclose proceeding to a Commissioner. That same day, the Commission's Secretary releases the Sunshine Agenda for the next Commission meeting and that proceeding appears on the Agenda. The Sunshine period begins as of Wednesday, and therefore the presenting party must file its ex parte notice by the end of the day (11:59:59 p.m.) on Wednesday. A reply would be due by the end of the day (11:59:59 p.m.) on Thursday.

(v) Filing dates during the Sunshine Period. If an ex parte presentation is made pursuant to an exception to the Sunshine period prohibition, the written ex parte presentation or memorandum summarizing an oral ex parte presentation required under this paragraph shall

be submitted by the end of the same business day on which the ex parte presentation was made. The memorandum shall identify plainly on the first page the specific exemption in § 1.1203(a) on which the presenter relies, and shall also state the date and time at which any oral ex parte presentation was made. Written replies to permissible ex parte presentations made pursuant to an exception to the Sunshine period prohibition, if any, shall be filed no later than the next business day following the presentation, and shall be limited in scope to the specific issues and information presented in the ex parte filing to which they respond.

Example: On Tuesday, the Commission's Secretary releases the Sunshine Agenda for the next Commission meeting, which triggers the beginning of the Sunshine period on Wednesday. On Thursday, a party makes an ex parte presentation to a Commissioner on a proceeding that appears on the Sunshine Agenda. That party must file an ex parte notice by the end of the day (11:59:59 p.m.) on Thursday. A reply would be due by the end of the day (11:59:59 p.m.) on Friday.

(vi) If a notice of an oral ex parte presentation is incomplete or inaccurate, staff may request the filer to correct any inaccuracies or missing information. Failure by the filer to file a corrected memorandum in a timely fashion as set forth in paragraph (b) of this section, or any other evidence of substantial or repeated violations of the rules on ex parte contacts, should be reported to the General Counsel.

(3) Notwithstanding paragraphs (b)(1) and (b)(2) of this section, permit-but-disclose proceedings involving presentations made by members of Congress or their staffs or by an agency or branch of the Federal Government or its staff shall be treated as ex parte presentations only if the presentations are of substantial significance and clearly intended to affect the ultimate decision. The Commission staff shall prepare written summaries of any such oral presentations and place them in the record in accordance with paragraph (b) of this section and also place any written presentations in the record in accordance with that paragraph.

(4) Notice of ex parte presentations. The Commission's Secretary shall issue a public notice listing any written ex parte presentations or written summaries of oral ex parte presentations

received by his or her office relating to any permit-but-disclose proceeding. Such public notices generally should be released at least twice per week.

NOTE 2 TO PARAGRAPH (b): Interested persons should be aware that some ex parte filings, for example, those not filed in accordance with the requirements of this paragraph (b), might not be placed on the referenced public notice. All ex parte presentations and memoranda filed under this section will be available for public inspection in the public file or record of the proceeding, and parties wishing to ensure awareness of all filings should review the public file or record.

**9. Section 1.1208 is amended by revising the introductory text to read as follows:**

§ 1.1208 Restricted proceedings.

Unless otherwise provided by the Commission or its staff pursuant to § 1.1200(a) ex parte presentations (other than ex parte presentations exempt under § 1.1204(a)) to or from Commission decision-making personnel are prohibited in all proceedings not listed as exempt in § 1.1204(b) or permit-but-disclose in § 1.1206(a) until the proceeding is no longer subject to administrative reconsideration or review or judicial review. Proceedings in which ex parte presentations are prohibited, referred to as "restricted" proceedings, include, but are not limited to, all proceedings that have been designated for hearing, proceedings involving amendments to the broadcast table of allotments, applications for authority under Title III of the Communications Act, and all waiver proceedings (except for those directly associated with tariff filings). A party making a written or oral presentation in a restricted proceeding, on a non-ex parte basis, must file a copy of the presentation or, for an oral presentation, a summary of the presentation in the record of the proceeding using procedures consistent with those specified in § 1.1206.

* * * * *

**10. Section 1.1216 is amended by revising paragraph (a) and adding paragraph (d), to read as follows:**

§ 1.1216 Sanctions.

(a) Parties. Upon notice and hearing, any party to a proceeding who directly or indirectly violates or causes the violation of any provision of this subpart, or who fails to report the facts and circumstances

concerning any such violation as required by this subpart, may be subject to sanctions as provided in paragraph (d) of this section, or disqualified from further participation in that proceeding. In proceedings other than a rulemaking, a party who has violated or caused the violation of any provision of this subpart may be required to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected. In any proceeding, such alternative or additional sanctions as may be appropriate may also be imposed.

* * * * *

(d) A party who has violated or caused the violation of any provision of this subpart may be subject to admonishment, monetary forfeiture, or to having his or her claim or interest in the proceeding dismissed, denied, disregarded, or otherwise adversely affected. In any proceeding, such alternative or additional sanctions as may be appropriate also may be imposed. Upon referral from the General Counsel following a finding of an ex parte violation pursuant to § 0.251(g) of this chapter, the Enforcement Bureau shall have delegated authority to impose sanctions in such matters pursuant to § 0.111(a)(15) of this chapter.

# APPENDIX B

## List of Commenters

### NPRM Comments

| Commenter | Abbreviation |
|---|---|
| American Cable Association | ACA |
| AT&T Inc. | AT&T |
| Pierre de Vries | de Vries |
| Federal Communications Bar Association Access to Records Committee | FCBA Committee |
| Independent Telephone & Telecommunications Alliance | ITTA |
| Marcus Spectrum Solutions LLC | Marcus |
| Media Access Project | MAP |
| National Association of State Utility Consumer Advocates | NASUCA |
| National Association of Telecommunications Officers and Advisors | NATOA |
| National Telecommunications Cooperative Association | NTCA |
| Public Knowledge and Consumer Federation of America | PK and CFA |
| Qwest Corporation | Qwest |
| Sprint Nextel Corporation | Sprint |
| Verizon and Verizon Wireless | Verizon |

### NPRM Reply Comments

| Reply Commenter | Abbreviation |
|---|---|
| AT&T Inc. | AT&T |
| Free Press | FP |
| National Association of Broadcasters | NAB |
| National Association of State Utility Consumer Advocates | NASUCA |

## STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: *In the Matter of Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, Report and Order and Further Notice of Proposed Rulemaking, GC Docket No. 10-43.

Today the Commission makes true improvements to the transparency and openness of its work. Back in 1913, Justice Brandeis wisely commented that "sunshine is said to be the best disinfectant." I am a strong believer in that old adage. That is why, as Acting Chairman, I initiated the drafting of the *Notice of Proposed Rulemaking* to reform our *ex parte* rules. I commend Chairman Genachowski for his leadership in bringing this proceeding to a sound conclusion. Strong *ex parte* rules are critical to ensuring that everyone has a fair opportunity to respond to arguments made in oral communications with the Commission. Decisions of this agency should always be based on the public interest—not the interests of lobbyists who come in for closed-door meetings. I have seen far too many instances where *ex parte* filings simply reference that a meeting took place on a given topic, without nearly enough detail on the arguments or data presented to allow the public or interested parties to meaningfully respond. No more. I am confident that the reforms we make to our *ex parte* rules—combined with rigorous enforcement—will usher in a new era of transparency, openness and credibility to our work.