

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

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

NOTICE OF PROPOSED RULEMAKING

Adopted: February 18, 2010

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Comment Date: [45 days after date of publication in the Federal Register]
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By the Commission: Chairman Genachowski and Commissioners Copps, McDowell and Clyburn issuing
separate statements

I. INTRODUCTION

1. In this Notice, we begin a new proceeding to improve the transparency and effectiveness of the
Commission's decisionmaking by reforming our ex parte rules. The ex parte process allows parties in
most Commission proceedings to speak directly (or have written communications) with Commission staff
and decisionmakers, providing a way to have an interactive dialogue that can root out areas of concern,
address gaps in understanding, identify weaknesses in the record, discuss alternative approaches, and
generally lead to more informed decisionmaking. Oral ex parte presentations are by their nature
inaccessible to people who are not present at the meeting unless the presentations are publicly
documented in some way. In permit-but-disclose proceedings, our ex parte rules require just this
documentation. Years of experience, however, have revealed a number of areas where our ex parte rules
could be improved. In this Notice, we seek comment on proposals to improve our ex parte and other

1 The Administrative Procedure Act (APA) defines "ex parte communication" as "an oral or written communication
not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not
include requests for status reports on any matter or proceeding covered by this subchapter." 5 U.S.C. § 551(14).
Consistent with that definition, the Commission's rules define an ex parte presentation as "[a]ny presentation which:
(1) If written, is not served on the parties to the proceeding; or (2) If oral, is made without advance notice to the
parties and without opportunity for them to be present," with "presentation" defined as "[a] communication directed
to the merits or outcome of a proceeding, including any attachments to a written communication or documents
shown in connection with an oral presentation directed to the merits or outcome of a proceeding." Written ex parte
presentations include, for example, data, memoranda making legal arguments, materials shown to or given to
Commission staff during ex parte meetings, and email communications to Commission staff directed to the merits or
outcome of a proceeding. Oral ex parte presentations include, for example, meetings or telephone or relay calls with
Commission staff where parties present information or arguments directed to the outcome of a proceeding. The
definition excludes certain types of communications, such as status inquiries that do not state or imply a view on the
merits or outcome of the proceeding. 47 C.F.R. § 1.1202(a), (b).

2 47 C.F.R. § 1.1200 et seq.

3 The Government Accountability Office (GAO) has recently examined the Commission's ex parte rules and
processes and made a number of recommendations, which are referenced below. See GAO, FCC MANAGEMENT,
(continued....)

procedural rules to make the Commission's decisionmaking processes more open, transparent, and effective.⁴

2. First, we propose reforms to our *ex parte* rules to require disclosure of every oral *ex parte* presentation in permit-but-disclose proceedings unless a specific exemption applies, and to require the filing of a notice that summarizes all data and arguments that were presented (although the filer may refer to prior written filings for data and arguments that the filer has presented before). Second, we propose to codify a preference for electronic filing of all notices of *ex parte* presentations, in machine-readable formats, and we propose to require electronic filing of notices of *ex parte* presentations made during the Sunshine period within four hours of the presentation. Third, we seek comment 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. Fourth, we seek comment on whether to require disclosure of ownership or other information about the entity making an *ex parte* presentation or filing any pleading with the Commission so that readers will better understand the filer's interest in the proceeding. Finally, we propose minor changes to modernize or correct our current *ex parte* rules.

II. BACKGROUND

3. The Commission's *ex parte* rules recognize three types of proceedings, and the rules apply differently to each type.⁵ In "restricted" proceedings, *ex parte* presentations are generally prohibited.⁶ By contrast, in "exempt" proceedings, there are no restrictions on *ex parte* presentations.⁷ In "permit-but-disclose" proceedings—the category we primarily address in this rulemaking—*ex parte* presentations are allowed so long as they are disclosed in the record of the proceeding.⁸ Copies of written presentations and summaries of oral presentations must (as explained more fully below) be filed in the record.⁹

(Continued from previous page) _____
Improvements Needed in Communication, Decision-Making Processes, and Workforce Planning, GAO-10-79, at 48 (Dec. 2009) (*GAO Management Report*).

⁴ Because the *ex parte* rules are procedural in nature, notice and comment are not required. See 5 U.S.C. § 553(b). Nonetheless, we believe that notice and comment here are desirable because one of the purposes of this proceeding, consistent with the underlying purpose of the *ex parte* rules, is to ensure the fairness and integrity of Commission decisionmaking. We believe that public comment will help achieve that end.

⁵ The Commission last made significant modifications to its *ex parte* rules in 1997. *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) (*Amendment of Ex Parte Rules*); *recon. denied*, Memorandum Opinion and Order, 14 FCC Rcd 18831 (1999) (denying two petitions for reconsideration and making minor revisions to the rules); see also *Ex Parte Presentations in Commission Proceedings*, Order, 15 FCC Rcd 8525 (Managing Dir. 1999) (making minor corrections).

⁶ See 47 C.F.R. § 1.1208. The APA prohibits *ex parte* communications in matters where the APA requires a hearing, such as formal rulemakings and adjudications. See 5 U.S.C. § 557(d).

⁷ See 47 C.F.R. § 1.1204(b).

⁸ *Id.* § 1.1206.

⁹ See *id.* § 1.1206(b)(1), (2). In general, if there is only one party to the proceeding, there is no requirement to disclose presentations. See *id.* § 1.1206(a) & note 3 to paragraph (a); *id.* § 1.1208 & note 1 to § 1.1208. Because the general public is defined as a party to rulemakings, however, all presentations in rulemakings are effectively subject to the *ex parte* rules. See *id.* § 1.1202(d)(5).

4. The filing of summaries of oral presentations (or “*ex parte* notices”) plays a key role in permit-but-disclose proceedings, because interested parties frequently meet with the Commissioners and their staffs and the staffs of relevant Bureaus and Offices to present their views on the issues involved in pending permit-but-disclose proceedings. The current rule applicable to the oral presentations made in these meetings attempts to strike a balance between the need to give the public and other interested persons fair notice of the content of *ex parte* meetings and the desirability of not requiring parties to file unnecessary paperwork. Specifically, the current rule requires that if a person makes an oral *ex parte* presentation that presents data or arguments that are not already in that person’s written filings in the proceeding, the person making the presentation must file a summary only of the new data or arguments. Indeed, if no new data or arguments are presented, no record of the oral *ex parte* presentation need be filed.¹⁰

5. On October 28, 2009, the Commission hosted a staff workshop on the *ex parte* process at which senior Commission staff and outside experts discussed whether our current rules address the needs of the Commission and the public.¹¹ Based on our own experience with the rules as well as the discussion at that workshop, we believe that two limitations in the current rules governing oral presentations in permit-but-disclose proceedings—lack of a filing documenting every oral *ex parte* presentation, and a lack of completeness about what was discussed in the meeting—reduce the transparency of the Commission’s decisionmaking to the detriment of Commission staff, outside parties, and the general public.¹² As mentioned above, if the oral presentation did not present any new data or arguments, there is currently no requirement to file any *ex parte* notice, so other parties may not even know that a meeting occurred. When filings are made, they often fail to give the reader sufficient information to know whether or not the *ex parte* discussion involved matters already on the record in the presenter’s written filings, and if so, what matters. For example, many summaries of oral *ex parte* presentations state in one or two sentences that a party met with Commission staff members and discussed a particular proceeding in a manner consistent with the party’s prior filings, without stating what the presentation was about, what data or arguments were presented, or whether particular data or arguments were characterized as especially important to the party’s position. Although the number of complaints about alleged *ex parte* rule violations received by the Commission in permit-but-disclose proceedings is small (generally not more than one or two a year) and we are unable to estimate the number of violations that are not complained about, there is reason to believe that some *ex parte* notices fail to comply with the rule by failing to provide an adequate summary of new data or arguments discussed in *ex parte* meetings.¹³

¹⁰ *Id.* § 1.1206(b)(2).

¹¹ A video recording of the workshop is available on the Commission’s web site. *See* Workshop on Improving Disclosure of Ex Parte Contacts, http://www.fcc.gov/live/2009_10_28-workshop.html.

¹² *See, e.g.*, Workshop Transcript at 24-27 (comments suggesting that *ex parte* memoranda do not disclose enough information).

¹³ In a report on the Commission’s rulemaking process, the GAO stated that it “found that most of the hundreds of *ex parte* filings in the four [rulemaking] case studies appeared to meet the requirements [of 47 C.F.R. § 1.1206(b)(2)], but several did not appear to be sufficient.” *See* GAO, *TELECOMMUNICATIONS, FCC Should Take Steps to Ensure Equal Access To Rulemaking Information*, GAO-07-1046, at 21-22 (Sept. 2007).

III. DISCUSSION

A. Completeness and Accuracy of Memoranda Summarizing Oral *Ex Parte* Presentations

1. Filing Notices of All Oral *Ex Parte* Presentations, and Disclosing All Facts and Arguments Presented

6. Oral *ex parte* presentations provide a valuable opportunity for parties to converse with Commission staff, addressing concerns and questions in an interactive manner that is not possible in written filings. Oral presentations, however, must be adequately documented for the Commission to rely on them in its decisionmaking and for other parties to respond to them.¹⁴ When for any reason the record does not adequately reflect the contents of oral *ex parte* presentations, the public is deprived of a fair opportunity to respond to oral communications with decisionmakers, and the Commission may lack an adequate administrative record to the extent that the Commission wishes to rely on information presented during an oral *ex parte* presentation.¹⁵

7. These same issues prompted the Commission, when it last comprehensively revised the *ex parte* rules, to propose that *ex parte* notices summarize the contents of all oral presentations in permit-but-disclose proceedings, regardless whether the presentation involved new information.¹⁶ Commenters were divided over the merits of this proposal, and the Commission ultimately rejected it. The Commission found that that it was not necessary to require additional filings that would merely reiterate submissions already filed.¹⁷ Instead, the Commission chose to rely on enforcement of the existing requirement that new data or arguments be summarized.¹⁸ The Commission reiterated its intent to enforce the existing requirement by issuing a public notice three years later reminding the public of its responsibilities to summarize new data and arguments in permit-but-disclose proceedings.¹⁹ The Commission has also emphasized these requirements on its website.²⁰

¹⁴ We take this opportunity to eliminate a possible misperception by noting that our current rules do not except oral *ex parte* presentations from the disclosure requirements when they are made at the request of staff. Oral *ex parte* presentations that are made at the request of staff must be disclosed to the same extent as oral *ex parte* presentations that are made at the request of the presenter. See 47 C.F.R. § 1.1206(b)(2).

¹⁵ See, e.g., *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 534-35 (D.C. Cir. 1978) (agency must disclose information relied upon in sufficient detail to allow for meaningful adversarial comment and judicial review).

¹⁶ See *Amendment of Ex Parte Rules*, 12 FCC Rcd at 7362-63, paras. 43-45.

¹⁷ See *id.* at 7362, para. 45.

¹⁸ See *id.*

¹⁹ See *Commission Emphasizes the Public's Responsibilities in Permit-But-Disclose Proceeding*, 15 FCC Rcd 19945 (2000).

²⁰ See FCC's *Ex parte* Rules, <<http://www.fcc.gov/ogc/xprte.html>> ("Persons orally presenting data or arguments not already reflected in their written submissions in the proceeding must file summaries of the new data or arguments. The summaries must describe the substance of the new data or arguments and not merely list the subjects discussed. Generally, more than a one or two sentence description is required. Where there is ambiguity about whether data or arguments are already in the public record, the spirit of our rules would counsel parties to briefly summarize the matters discussed at the meeting. See 47 C.F.R. § 1.1206(b)(2).").

8. The Commission's and the public's need for information about the contents of oral *ex parte* presentations now causes us to propose to require more disclosure.²¹ To address the two main limitations in our current rules described above,²² we propose rule changes that (1) require the filing of an *ex parte* notice for every oral *ex parte* presentation, not just presentations that present data or arguments not already reflected in the presenter's written comments, memoranda or other filings²³; and (2) require that to the extent the presentation concerned data or arguments already reflected in the presenter's written filings in the record, the notice either summarizes the data or arguments presented or explicitly states that the data and arguments are already reflected in prior written filings and provides specific references (including page or paragraph numbers) to the presenter's prior filings containing the data and arguments presented. As under the current rule, the *ex parte* notice would have to contain a summary of any new data or arguments presented at the *ex parte* meeting.²⁴ The proposed revised language of rule 1.1206 would provide that:

A person who makes an oral *ex parte* presentation subject to this section shall submit a memorandum that summarizes all data presented and arguments made during the oral *ex parte* presentation. If the oral *ex parte* presentation consisted in whole or in part of the presentation of data or arguments already reflected in that person's written comments, memoranda or other filings in the proceeding, the person who made such presentation may provide citations to such data or arguments in that person's prior comments, memoranda, or other filings in lieu of summarizing them in the memorandum.

9. We believe that requiring that a memorandum be filed after every oral *ex parte* presentation would make the Commission's processes more transparent. We also believe that by requiring more disclosure of what was said in the presentation, by summarizing all facts and arguments or referring to prior written submissions, the new approach would also give readers a better understanding of the content of the presentation. It would do so, however, without imposing the significantly increased burden on those filing notices of having to summarize both old and new information. For that reason, we believe the proposed rule properly balances the need for fairness and transparency in Commission proceedings with avoiding unnecessary burdens on parties.

10. We seek comment on whether to adopt this proposal. Given that the proposed rule would generally require more detailed *ex parte* notices than the current rule does, we seek comment on whether parties should (except with respect to exempt presentations during the Sunshine period as discussed below) have two business days after making an oral *ex parte* presentation to make a filing rather than the current one business day.

11. The Commission remains committed to enforcing its rules. We seek comment on whether more aggressive enforcement of our existing rules would address some of the issues we have described above with regard to adequate disclosure of oral *ex parte* presentations. For instance, if the Commission imposed harsher sanctions against parties that fail to disclose *ex parte* presentations or that file inadequate summaries of oral *ex parte* presentations under our existing rules, would any of the rule changes we

²¹ The GAO recently recommended that the Commission "modify[] its current guidance to further clarify FCC's criteria for determining what is a sufficient *ex parte* summary and address perceived discrepancies at the commission on this issue." *GAO Management Report* at 48.

²² *See supra* para. 5.

²³ *See* Workshop Transcript at 58-64 (comments of panelists generally expressing support for such an approach).

²⁴ We note that our current rules already state that any "documents shown in connection with an oral presentation" are defined as a written *ex parte* presentation and must be filed. 47 C.F.R. § 1.1202(a), (b)(1).

propose be unwarranted? We invite commenters to make specific enforcement-related proposals that would improve transparency of oral *ex parte* presentations in an efficient manner.²⁵

12. We do not propose to change the current treatment of status inquiries as described in rule 1.1202(a).²⁶ Rule 1.1202(a) defines the term “presentation,” and provides that:

Excluded from this term are . . . inquiries relating solely to the status of a proceeding, including inquiries as to the approximate time that action in a proceeding may be taken. However, a status inquiry which states or implies a view as to the merits or outcome of the proceeding or a preference for a particular party, which states why timing is important to a particular party or indicates a view as to the date by which a proceeding should be resolved, or which otherwise is intended to address the merits or outcome or to influence the timing of a proceeding is a presentation.²⁷

If a status inquiry falls within the exclusion defined in rule 1.1202, it is not an *ex parte* “presentation” and need not be disclosed.²⁸ We seek comment on this proposal to retain the current treatment of status inquiries.

2. Other Approaches

13. Nothing in the APA requires that agencies give the public the opportunity to make oral presentations in rulemaking proceedings or in adjudications that are not otherwise required to be conducted on the record after a hearing.²⁹ Not surprisingly, not all agencies have taken the same approach to oral *ex parte* communications.³⁰ For example, in rulemaking proceedings at the Federal Election Commission, if a commissioner or member of a commissioner’s staff receives an oral *ex parte* communication, the burden is on the commissioner or commissioner’s staff to provide a written summary to the commission’s Secretary for placement in the public record.³¹ When the Federal Trade Commission conducts informal rulemakings, oral *ex parte* presentations to commissioners and their staffs occur infrequently, but summaries or transcripts of oral communications must be placed on the public record.³² Adjudications at the Federal Trade Commission are conducted as formal adjudications and *ex parte* presentations are not permitted.³³ Other agencies, such as the Nuclear Regulatory Commission, favor

²⁵ We seek comment below on generally improving enforcement of current and proposed *ex parte* rules. *See infra* para. 32.

²⁶ 47 C.F.R. § 1.1202(a).

²⁷ 47 C.F.R. § 1.1202(a); *see also* 5 U.S.C. § 551(14) (“‘ex parte communication’ means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter”).

²⁸ The Note to paragraph (a) of rule 1.1202 elaborates on the status inquiry exception. *See* 47 C.F.R. § 1.1202(a) (Note); § 1.1204(a)(11). Nothing in our proposal would affect the explanation in the Note.

²⁹ 5 U.S.C. § 553(c) (requiring agencies to give interested persons the opportunity to participate in the rulemaking through written submissions “with or without opportunity for oral presentation”); *id.* § 554(a) (specifying procedures for adjudications “required by the statute to be determined on the record after opportunity for an agency hearing” with various exceptions).

³⁰ *See, e.g.*, Workshop Transcript at 27-29 (comments suggesting that the Commission should consider other agencies’ practices).

³¹ 11 C.F.R. § 201.4(a).

³² *See, e.g.*, Appliance Labeling Rule, 74 Fed. Reg. 57950, 57962-63; 16 C.F.R. § 1.26(b)(5).

³³ 16 C.F.R. § 4.7(b).

taking in oral information through informal public meetings, rather than individual *ex parte* meetings. Indeed, this Commission has considered, but not adopted, measures as strong as a complete prohibition on *ex parte* contacts in informal rulemaking proceedings.³⁴

14. We seek comment on whether adopting some practices of other agencies regarding oral presentations would improve transparency in our own proceedings. We also invite alternative proposals that would increase compliance with our *ex parte* rules.³⁵

B. Preference for Electronic Filings

15. When the Commission last reassessed its *ex parte* rules thirteen years ago, parties filed documents in Commission proceedings mostly on paper. Now, more often than not, parties file documents in Commission proceedings electronically.³⁶ Many if not most of our permit-but-disclose proceedings are now docketed on the Commission's Electronic Comment Filing System or other electronic filing systems, where the records are available electronically, and the Commission has made it possible for parties to file many types of documents electronically. Moreover, we are taking steps to expand this capability.³⁷ Indeed, filing *ex parte* notices is now very often done electronically, allowing the Commission staff, parties, and the general public to have easy and timely access to those documents online, and reducing the time that Commission staff must spend gathering record materials as they work to resolve Commission proceedings. Reducing the burdens of following Commission proceedings also supports our goals of transparency and public participation.

16. We propose to amend our *ex parte* rules generally to require that written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations in docketed proceedings be filed electronically on a Commission electronic comment filing system.³⁸ We believe that most parties already do so; this rule would for the most part codify current practice. In those cases where a docket number has not been assigned to a proceeding or the Commission has not provided a method for filing memoranda electronically, we propose that the person required to submit the memorandum shall file on paper an original and one copy with the Secretary's office. We also seek comment on whether these filings should be made in machine-readable format (*e.g.*, Microsoft Word ".doc" format or non-copy protected text-searchable ".pdf" format for text filings, and "native formats" for non-text filings, such as spreadsheets in

³⁴ See *Policies and Procedures Regarding Ex Parte Communications During Informal Rulemaking Proceedings*, Order, Notice of Inquiry, and Interim Policy Statement, FCC 78-405, 68 F.C.C.2d 804, 806, para. 11, 807, para. 15 (1978) (considering prohibiting *ex parte* communications in some or all informal rulemaking proceedings but deciding instead to allow *ex parte* communications subject to procedures "which would provide for the disclosure of, and the opportunity to respond to, all significant information and arguments presented to the agency on an *ex parte* basis); *amended by* Order and Further Notice of Inquiry, FCC 78-517, 68 F.C.C.2d 815 (1978); Report and Order, FCC 80-334, 78 F.C.C.2d 1384, 1393-96, paras. 28-35 (1980) (promulgating final rules, including affirming the prior interim decision to permit *ex parte* communications in informal rulemakings rather than adopting a flat ban, but also explaining that "disclosure is essential"); *pets. for recon. denied*, Memorandum Opinion and Order, FCC 83-167, 93 F.C.C.2d 1250 (1983).

³⁵ The GAO has recently recommended that the Commission "clarify[] FCC officials' roles in ensuring the accuracy of *ex parte* summaries and establish a proactive review process of these summaries." *GAO Management Report* at 48.

³⁶ Indeed, in our rulemaking on changes to our Part 1 general procedures, we seek comment on expanding the use of electronic filing in general. See *Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, FCC 10-32, at paras. 12-16 (rel. Feb. 19, 2010) (*Procedures NPRM*).

³⁷ See *id.* paras. 9-11.

³⁸ See, *e.g.*, Workshop Transcript at 43-44 (comments suggesting that the Commission should require electronic filing of all *ex parte* memoranda).

Microsoft Excel “.xml” format).³⁹ We recognize that in some cases, electronic filing is not possible without undue hardship because the person making the oral *ex parte* presentation does not have access to a computer or the Internet or because the filing contains confidential business or financial information. We therefore propose to codify an exception. Specifically, we propose the following language in rule 1.1206(b):

The memorandum required to be submitted to the Secretary under this subpart must be submitted no later than the next business day after the presentation. In proceedings governed by § 1.49(f) or for which the Commission has made available a method of electronic filing, the memorandum shall, when feasible, be filed through the electronic comment filing system available for that proceeding. In other proceedings or if filing through the electronic comment filing system would present an undue hardship, an original and one copy must be submitted to the Secretary and also sent on paper or via electronic mail to the Commissioners and Commission employees involved in the presentation.

....

Electronic Filing and Native Formats. 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 electronically, and shall be filed in native formats (i.e., .doc, .xml, .ppt, searchable .pdf). In cases where a filer believes that the document to be filed should be withheld from public inspection, the filer should file electronically a request that the information not be made routinely available for public inspection pursuant to § 0.459, and a copy of the document with such confidential information redacted. The filer should submit the original unredacted document to the Secretary as directed in § 0.459.

17. We seek comment on these proposals. In particular, we seek comment on whether there are types of proceedings for which these procedures would be impractical, such that we should require paper filing or allow other methods for submitting *ex parte* notices.

18. We note a particular issue with regard to the filing of *ex parte* notices during the Sunshine period. The current *ex parte* rules prohibit most presentations, whether *ex parte* or not, during the Sunshine period, which begins when a proposed order is placed on a Sunshine notice and ends when the text of a decision is released or the draft returned to the staff.⁴⁰ Typically, the Sunshine notice is released seven days before an agenda meeting.⁴¹ The Sunshine period prohibition is intended to provide decisionmakers “a ‘period of repose’ during which they can be assured that they will be free from last minute interruptions and other external pressures, thereby promoting an atmosphere of calm deliberation.”⁴² The

³⁹ We seek comment more generally on requiring electronic filings to be machine-readable in our rulemaking proceeding on Part 1 procedures. See *Procedures NPRM*, at para. 16.

⁴⁰ See 47 C.F.R. § 1.1203 (The Sunshine period prohibition “applies from the release of a public notice that a matter has been placed on the Sunshine Agenda until the Commission: (1) Releases the text of a decision or order related to the matter; (2) Issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) Issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first.”).

⁴¹ See 5 U.S.C. § 552b(e)(1).

⁴² See *Amendment of Subpart H, Part 1 of the Commission’s Rules and Regulations Concerning Ex parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 3011, 3020, para. 72 (1987).

prohibition on most presentations during the Sunshine period is also meant to give the Commissioners and staff time to examine a record that is largely fixed, rather than continuing to analyze new data and arguments. We believe that a period of repose from both oral and written presentations before a Commission meeting continues to make sense in most circumstances and seek comment on this conclusion. We note in this regard that the Commission has and can in the future waive the prohibition where the public interest so requires.

19. In those cases where an oral *ex parte* presentation is permitted to be made during the Sunshine period but must still be disclosed, it is very important that the notice summarizing that presentation be available quickly to Commissioners, Commission staff, and interested outside parties.⁴³ During the Sunshine period, the Commission is in the final stages of considering how to resolve a proceeding. When, as permitted under the current rules, notices of oral *ex parte* presentations are filed by the end of the following business day, as many as two working days may have elapsed between the conclusion of the oral presentation and the filing of the summary. An even longer delay in having the notice appear in the electronic docket may result if the summary is not filed electronically. At the end of a proceeding, when decision-makers are making final judgments concerning the matter, this can be a great deal of time and the delay in filing may preclude sufficient consideration of the contents of the filing by Commissioners and Commission staff. In addition, if the rules were to be amended so that other parties were allowed to make responsive presentations during the Sunshine period, it would be necessary for them to see the summaries of other parties' presentations so that they can respond to the data or arguments that were presented.

20. Because of the problem of timing, we propose that *ex parte* notices summarizing oral *ex parte* presentations that were made during the Sunshine period must be filed electronically within four hours of the completion of the presentation, so that they are available quickly to all.⁴⁴ We recognize that in some cases, this may be difficult for parties to accomplish because of sequential meetings, travel plans, or very occasionally a lack of access to a computer and the Internet. We believe that it is vitally important to the Commission's deliberations that as many *ex parte* notices as possible are filed electronically within four hours. Almost all proposed orders that are placed on a Sunshine notice are in proceedings for which electronic filing is available. If, however, the Commission were to place a proposal on the Sunshine notice for which rule 1.1203 applied but for which no electronic filing mechanism was available, we propose that memoranda summarizing oral *ex parte* presentations that must be filed during the Sunshine period be sent by electronic mail (or, if electronic mail is not available, by facsimile) to all Commission staff who attended the presentation and to all parties who have provided such contact information unless the Sunshine notice provides otherwise. We seek comment on these proposals.

21. Furthermore, to make it simpler for staff to determine whether the *ex parte* presentation was permissible and whether the notice was timely filed, we propose to require that the notice say in the first sentence why the *ex parte* presentation was permissible, and also on what day and at what time the oral presentation took place. Specifically, we propose the following new language in rule 1.1206(b):

If the memorandum summarizing an oral presentation required to be submitted under this subpart results from an oral *ex parte* presentation that is made pursuant to an exception to the Sunshine period prohibition, the memorandum shall be submitted through the Commission's electronic comment filing system, and shall be submitted within four

⁴³ See, e.g., Workshop Transcript at 34-35 (comments regarding need for *ex parte* memoranda to be available more quickly).

⁴⁴ See *id.* at 101-05. The GAO recently recommended that the Commission "creat[e] a mechanism to ensure all commissioners are promptly notified of substantive filings made on items that are on the Sunshine Agenda." *GAO Management Report* at 48. Our proposal addresses that recommendation.

hours of the presentation to which it relates. The memorandum shall also identify plainly on the first page the specific exception in § 1.1203(a) on which the presenter relies. The memorandum shall also state the date and time at which the oral *ex parte* presentation was made.

22. We seek comment on these proposals. In particular, we seek comment on the four-hour filing period, and whether that will in most cases provide a sufficient filing opportunity. If not, we ask parties to propose a reasonable time for filing that takes into consideration the harm that delays in receiving the information can have on the Commission's resolution of its proceedings. We also seek comment on whether this requirement would be impracticable for certain filers, and whether and how we could craft an exception that would still make notices of these presentations available to the Commissioners, staff, and public quickly.

C. The Sunshine Period Prohibition and Exceptions

23. We also seek comment on whether the current exceptions to the Sunshine period restrictions ought to be modified. Exceptions to the Sunshine period prohibition include 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.”⁴⁵ We believe that information gathered through such permitted presentations can be important to the Commission's ability to reach the best possible decisions on proposed orders subject to a Sunshine period restriction. Nonetheless, the exception could be abused to shore up the record on one side of an argument without allowing responses on the other side. Indeed, during the workshop, some participants suggested that as a matter of fairness to all parties, the Sunshine period ought to be “all or nothing”—that is, it should either be a period of strict repose or it should be eliminated to allow all presentations.⁴⁶ Accordingly, we seek comment on whether this exception ought to be narrowed to prohibit an outside party from soliciting a request from staff for an *ex parte* presentation “for the clarification or adduction of evidence, or for the resolution of issues.”⁴⁷ We also seek comment on whether it is practical and consistent with having a “period of repose” to allow replies to presentations made pursuant to a Sunshine period exception. We seek comment on other possible resolutions.

24. While the settlement exception in section 1.1204(a)(10) of the rules serves an important function,⁴⁸ we also seek comment on whether it is susceptible to misuse apart from its impact during the Sunshine period. For example, we seek comment on whether reliance on the provision of the rule exempting from disclosure “information relating to how a proceeding should or could be settled, as opposed to new information regarding the merits,” sometimes has been applied in an overly broad manner to effectively permit the undisclosed discussion of the merits of proceedings. To the extent this may be so, we seek comment on how the rule should be amended to eliminate this problem, without constraining appropriate uses of the staff's ability to facilitate settlements in adjudicatory matters, such as formal

⁴⁵ See 47 C.F.R. §§ 1.1203(a)(1); 1.1204(a)(10). We note that this exception allows *ex parte* presentations to be made when they would otherwise be prohibited, but it does *not* relieve the presenter from the burden of disclosing the contents of oral *ex parte* presentations. Even if an oral presentation is at the request of staff, disclosure requirements still apply. See *id.* § 1.1204(a)(10)(iv).

⁴⁶ See Workshop Transcript at 87-101.

⁴⁷ 47 C.F.R. §§ 1.1203(a)(1); 1.1204(a)(10).

⁴⁸ The original purpose of the exception was to avoid constraints on agency staff in attempting to reach settlement agreements. See *New York Tel. Co., New England Tel. & Tel. Co.*, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 3303, 3305, para. 19 (1991), *aff'd sub nom. New York State Dep't of Law v. FCC*, 984 F.2d 1209 (D.C. Cir. 1993).

complaint proceedings under section 208 of the Act and pole attachment complaint proceedings under section 224 of the Act.

25. We note one other complexity with regard to our Sunshine procedures. Under our current rules, the prohibition on *ex parte* communications begins with the release of the Sunshine notice.⁴⁹ While Sunshine notices are almost always released seven days in advance of an Agenda Meeting, the time of day at which a Sunshine notice is released varies. This variability makes it difficult for outside parties to know up until what time they may make oral *ex parte* presentations or file written *ex parte* presentations. It also makes it difficult for Commission staff to analyze later whether a presentation that was made on the day a Sunshine notice was released was made before or after the notice was released. For these reasons, we seek comment whether we should modify rule 1.1203(b) to make the prohibition on *ex parte* communications effective at midnight after a Sunshine notice is released, unless otherwise specified in the notice. Specifically, we propose the following language:

(b) The prohibition set forth in paragraph (a) of this section applies beginning at midnight following the release of a public notice that a matter has been placed on the Sunshine Agenda until the Commission: . . .

We seek comment on this proposal. In particular, we seek comment on whether there are other ways to create a brighter line to mark the beginning of the period of repose that would not also shorten the period of repose.

26. We take this opportunity to remind parties that the Commission and its staff have discretion to modify the applicable *ex parte* rules in a particular proceeding by “order, letter, or public notice.”⁵⁰ For example, staff may indicate that a particular licensing proceeding will be changed from a restricted proceeding to a permit-but-disclose proceeding because it raises policy issues on which broader public participation would benefit the public interest. Staff may choose to continue to require service of process in such a proceeding, and will so indicate in the document that changes the status of the proceeding.

D. Disclosure Statements

27. In many cases, a party filing a pleading or other document with the Commission or making an *ex parte* presentation may represent the interests of other entities, or the party’s interest in the proceeding may otherwise be unclear. We are interested in 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 interests in the proceedings.⁵¹ We therefore seek comment on the desirability of requiring filers to submit a disclosure statement in connection with their filings in all Commission proceedings.

28. There are several possible models for a disclosure requirement. One possible model is Supreme Court Rule 29.6.⁵² That rule requires any nongovernmental corporation filing a document with the Court

⁴⁹ 47 C.F.R. § 1.1203(b).

⁵⁰ *Id.* § 1.1200(a) (“Where the public interest so requires in a particular proceeding, the Commission and its staff retain the discretion to modify the application *ex parte* rules by order, letter, or public notice.”); *see also id.* § 1.1208, Note 2 (“Consistent with § 1.1200(a), the Commission or its staff may determine that a restricted proceeding not designated for hearing involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties and specify that the proceeding will be conducted in accordance with the provisions of § 1.1206 governing permit-but-disclose proceedings.”).

⁵¹ *See, e.g.*, Workshop Transcript at 105-08.

⁵² SUP. CT. R. 29.6.

to include a corporate disclosure statement identifying the parent corporations and listing any publicly held company that owns ten percent or more of the corporation's stock.⁵³ In addition, Supreme Court Rule 37.6 requires that amicus briefs (except those filed by certain government entities) "indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution."⁵⁴ Another possible model is Rule 26.1 of the Circuit Rules for the U.S. Court of Appeals for the D.C. Circuit.⁵⁵ That rule applies more broadly than the Supreme Court Rule, to any corporation, association, joint venture, partnership, syndicate or other similar entity appearing as a party or amicus curiae in any proceeding.⁵⁶ Like Supreme Court Rule 29.6, it requires these entities to file a disclosure statement that identifies all parent companies and any publicly held company that has a ten percent or greater interest in the entity,⁵⁷ but it goes on to define "parent companies" to include all companies controlling the specified entity directly, or indirectly through intermediaries.⁵⁸ The statement must also identify the represented entity's general nature and purpose, insofar as relevant to the litigation. If the entity is an unincorporated entity whose members have no ownership interests, the disclosure statement must include the names of any members who have issued shares or debt securities to the public. This last requirement does not apply to trade associations or professional associations, defining a trade association as a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.⁵⁹ A third possible model is the Lobbying Disclosure Act (LDA).⁶⁰ The LDA requires the disclosure of the registrant's clients and any organizations that contribute more than \$5,000 in a quarterly period to the registrant's lobbying activities.⁶¹

29. We seek comment on these alternatives and, more generally, whether to require disclosure of this type in filings with the Commission. We ask parties to comment on whether one of the models described would suit this objective, or whether a combination of these models or a different model would be better. We recognize that greater disclosure might discourage some entities from participating in our proceedings. We seek comment on whether a disclosure rule could be fashioned in a way that would avoid discouraging participation in our proceedings while still providing more information about the relevant interests of the parties. We also seek comment on what, if any, disclosure requirements would be appropriate for individuals. We also ask parties to identify whether there are types of entities or proceedings to which any disclosure requirement should not apply.

30. We recognize that the Commission currently requires some regulatees to submit certain ownership information. For example, commercial broadcaster licensees and entities that hold attributable interests in such licensees must file FCC Form 323 biennially, and also after various triggering events. Filers of Form 323 identify their ownership interest as well as any other entities or individuals that have

⁵³ *Id.*

⁵⁴ SUP. CT. R. 37.6.

⁵⁵ D.C. CIR. R. 26.1.

⁵⁶ D.C. CIR. R. 26.1(a).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ D.C. CIR. R. 26.1(b).

⁶⁰ *See* 2 U.S.C. § 1603(b).

⁶¹ *See* 2 U.S.C. § 1.1603(b)(3)(A).

an attributable ownership interest.⁶² The filed forms are available to the public online through the Consolidated Database System (CDBS). Similarly, licensees and license applicants for wireless services subject to competitive bidding must have an updated FCC Form 602 on file upon certain triggering events, which include applying for or renewing a license and requesting authority to transfer control of a license.⁶³ Among other things, the filer must disclose the real party or parties in interest, including the identity and relationship of persons or entities directly or indirectly controlling the applicant.⁶⁴ Filers also must disclose information regarding persons or entities that directly or indirectly hold a ten percent or greater ownership interest or general partnership interest in the filer. Information from Form 602 is available to the public online through the Universal Licensing System (ULS).

31. We seek comment on whether this ownership information appropriately could be referenced by a party in its *ex parte* filing or pleading to satisfy part or all of any disclosure requirements that the Commission may adopt. Are there other publicly available sources of similar information that appropriately could be referenced or attached in a similar way? We invite any other suggestions on how to improve the Commission's and the public's understanding of a party's interest in a proceeding.

E. Other Issues

32. *Sanctions and Enforcement.* Even with perfect compliance with our existing rules, we tentatively believe our proposals would improve transparency by, for example, requiring disclosure of every *ex parte* presentation in permit-but-disclose proceedings, and requiring parties to identify or refer specifically to all data and arguments that they present.⁶⁵ Above, however, we seek comment on whether stricter enforcement of our existing rules would lessen or eliminate the need for any of the changes to our rules that we propose in this Notice. In doing so, we do not suggest that the rule changes suggested here are a substitute for enforcement of the *ex parte* rules. Regardless of what amendments are adopted in this proceeding or when, we intend to place greater emphasis on enforcement against impermissible *ex parte* contacts. We will not hesitate to impose appropriate sanctions,⁶⁶ including monetary forfeitures, for violations. In this regard, we seek comment on what types of sanctions should be deemed appropriate with respect to different types of *ex parte* violations, and, in particular, what sanctions would be appropriate for the filing of inadequate *ex parte* notices. We specifically seek comment on the extent to which prejudice to other parties should be a principal factor in determining the appropriate sanction and any other factors we should consider in determining what sanctions are appropriate. We also seek comment on whether all *ex parte* sanctions, including admonitions, should be publicly announced.

33. *New Media.* The Commission is beginning to make use of new media technologies in some of its proceedings. For example, the Commission has three new websites that are dedicated to particular issues – broadband.gov for the proceeding to create a National Broadband Plan,⁶⁷ OpenInternet.gov for the proceeding to preserve and promote the open Internet,⁶⁸ and reboot.fcc.gov to solicit and discuss ideas on general Commission reform.⁶⁹ These websites and the Commission's more familiar website⁷⁰ provide

⁶² See 47 C.F.R. § 73.3615(a)-(c).

⁶³ See 47 C.F.R. § 1.919.

⁶⁴ *Id.* § 1.2112(a)(1).

⁶⁵ See *supra* part III.A.1.

⁶⁶ See *id.* § 1.1216 (identifying possible sanctions for violating the *ex parte* rules, including disqualification from further participation in a proceeding).

⁶⁷ <http://www.broadband.gov>.

⁶⁸ <http://www.openinternet.gov>.

⁶⁹ <http://reboot.fcc.gov>.

information about the Commission and its proceedings, but they also allow the public to comment on various issues through new media such as blogs, Facebook, and IdeaScale.⁷¹ Some of the issues on which the public provides input are the subjects of permit-but-disclose proceedings and are therefore subject to our *ex parte* rules. The Commission to date has modified its *ex parte* rules to accommodate the use of new media on a case-by-case basis pursuant to rule 1.1200(a).⁷² We expect to continue to do so as we and the public gain experience with the use of new media.

34. We do not, at this time, propose specific rules regarding the *ex parte* implications of new media, but we welcome any comments on the issue.⁷³ In particular, we are interested in comments as to whether and how we should account for any differences in access to these new media by different segments of the public, such as those whose homes or communities are not served by broadband or those who have not subscribed to broadband.⁷⁴

35. *Minor Changes.* We seek comment on a number of additional changes proposed in the attached Appendix:

36. First, we seek comment on eliminating rule 1.1202(d)(6) as it appears to be an exact duplicate of rule 1.1202(d)(5).

37. Second, we seek comment on amending rule 1.1204(a)(6) regarding communications between the Department of Justice or Federal Trade Commission and this Commission to reflect that the matter be related to “communications” generally rather than “telecommunications,” and to delete the word “competition.” We believe that referring to “communications” rather than “telecommunications,” which

(Continued from previous page) _____
⁷⁰ <http://www.fcc.gov>.

⁷¹ For a consolidated look at the Commission’s use of new media, see <http://www.fcc.gov/connect>. There, the Commission provides links to its blogs for the Open Internet and National Broadband Plan proceedings, its Facebook page, its Myspace page, its IdeaScale pages, its Flickr page, its Twitter page, its RSS feeds, and its YouTube page.

⁷² See, e.g., Revised Sunshine Notice, FCC To Hold Open Commission Meeting Thursday, October 22, 2009 (rel. Oct. 16, 2009) (Revised Sunshine Notice) (“The Commission waives the Sunshine Period Prohibition on *ex parte* contacts with the Commission to the extent that those contacts are made through the Open Internet Blog [<http://blog.openinternet.gov>].”); see also News Release, FCC Expands Use of Web 2.0 Tools for Open Internet Inquiry (rel. Oct. 27, 2009) (“Also available at [OpenInternet.gov](http://blog.openinternet.gov) is a blog at <http://blog.openinternet.gov/>, which provides an additional forum for public comment and debate. Comments from the blog and the Ideascale page (other than anonymous comments) will be included in the official public record of the Open Internet inquiry, along with comments filed through traditional channels at the FCC.”).

⁷³ See, e.g., Workshop Transcript at 108-17.

⁷⁴ At least one group has raised these issues with the Commission. In the Revised Sunshine Notice, the Commission waived the Sunshine period prohibition on *ex parte* contacts before its October 22, 2009 Meeting to the extent that *ex parte* presentations were made via the Commission’s Open Internet blog. See Revised Sunshine Notice, *supra* note 72. A group of civil rights organizations filed an emergency motion asking the Commission either to rescind the waiver and prohibit *ex parte* presentations on the blog during the Sunshine period, or to waive the Sunshine period prohibition with regard to all types of *ex parte* presentations, not just those on the blog. See Asian American Justice Center *et al.*, Emergency Motion to Correct or Amend the Commission’s October 16, 2009 Revised Sunshine Notice, *Preserving the Open Internet*, WC Docket No. 07-52 (filed Oct. 19, 2009). The Office of General Counsel responded in December indicating that the motion was moot. See Letter from Joel Kaufman, Associate General Counsel, to David Honig, Minority Media and Telecommunications Council, WC Docket No. 07-52 (Dec. 2, 2009). The League of United Latin American Citizens is seeking review of the decision not to grant the original motion. Application for Review of Decision Denying the Emergency Motion To Correct or Amend the Commission’s October 16, 2009 Revised Sunshine Notice, GN Docket No. 09-191, WC Docket No. 07-52 (filed Jan. 4, 2010).

is a defined term under the Act,⁷⁵ would reflect more accurately the types of discussions that are intended to be exempt under this rule, and would avoid any appearance that we intend to limit the scope of the exemption to communications regarding “telecommunications” as defined in the Act, as opposed to, for example, cable services. We also propose to delete the word “competition” to reflect that communications between our agencies may touch on matters such as consumer protection or law enforcement, which may not be directly linked to competition. We seek comment on these proposals.

38. Third, we propose to add the Pooling Administrator and the TRS Numbering Administrator to the list of entities in rule 1.1204(a)(12) with which communications are exempt from the *ex parte* rules. This would be consistent with the exemptions for other numbering administrators such as the North American Numbering Plan Administrator and the Number Portability Administrator.⁷⁶ The Commission established the framework for selecting the national Pooling Administrator in 2000, and created the TRS Numbering Administrator in 2008;⁷⁷ these proposed changes would bring the *ex parte* rules up to date with regard to these entities. We seek comment on these proposals.

39. Fourth, we propose to delete from the list of permit-but-disclose proceedings in rule 1.1206(a) Bell Operating Company applications under section 271 of the Act. All Bell Operating Companies have applied for and received authority under section 271 in all their relevant states.⁷⁸ If for some reason in the future a Bell Operating Company were to reapply for authority under section 271, the staff could designate the proceeding as a permit-but-disclose proceeding under rule 1.1200(a).⁷⁹ We seek comment on this proposal.

40. Fifth, we propose to codify the practice whereby staff may at its discretion file an *ex parte* summary of a meeting attended by many parties, thereby relieving the parties of the obligation to file individually. This would be at the staff’s option. We seek comment on this proposal.

41. Sixth, we propose a change to our rules regarding oral presentations in restricted proceedings. Under our current rules, *ex parte* presentations are generally not permitted in restricted proceedings. An oral presentation is not *ex parte*, however, if it is made with advance notice to all the parties to the proceeding with an opportunity for them to be present.⁸⁰ If a party makes a permissible oral presentation, our rules currently do not require the party to file a summary in the record of the proceeding. We propose to require a summary to the same extent as in permit-but-disclose proceedings. We believe that having a summary in the record of the proceeding would facilitate review of the record by Commission staff as well as the parties to the proceeding. A draft of a revised rule 1.1203(b) is included in the Appendix. We seek comment on the proposal.

⁷⁵ When the Commission adopted this exemption in 1994, “telecommunications” was not a defined term. *See Amendment of the Commission’s Ex Parte Rules*, Order, 9 FCC Rcd 6108 (1994) (adopting, without notice and comment, rule 1.1204(a)(6)); *see also* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 3(a) (adopting definition of “telecommunications” now codified at 47 U.S.C. § 153(43)).

⁷⁶ *See* 47 U.S.C. § 1.1204(a)(12)(ii), (iv).

⁷⁷ *See Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd 7574 (2000) (subsequent history omitted); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, E911 Requirements for IP-Enabled Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 11591 (2008) (subsequent history omitted).

⁷⁸ *See* BOC Authorization to Provide In-region, InterLATA Services Under Sections 271 and 272, http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications/.

⁷⁹ 47 C.F.R. § 1.1200(a) (“Where the public interest so requires in a particular proceeding, the Commission and its staff retain the discretion to modify the applicable *ex parte* rules by order, letter, or public notice.”).

⁸⁰ *See id.* §§ 1.1208; 1.1202(b)(2).

42. Seventh, we propose to make it more plain that our rules already require that documents that are shown to or given to Commission staff during *ex parte* meetings are themselves written *ex parte* presentations and must be filed. A draft of a proposed clarification to rule 1.1206(b)(1) is included in the Appendix. We seek comment on the proposed language.

43. Eighth, we propose to clarify a point regarding inter-governmental *ex parte* presentations that are permitted during the Sunshine period. Current rule 1.1203(a)(4) permits presentations from members of Congress, their staff, or other agencies or branches of the Federal government in exempt and permit-but-disclose proceedings during the Sunshine period, when most presentations are not permitted. The rule also states that significant presentations must be placed in the record consistent with rule 1.1206(b).⁸¹ Rule 1.1204(b), however, provides that *ex parte* presentations in exempt proceedings need not be disclosed at all.⁸² To remedy this inconsistency, we propose to clarify in rule 1.1203(a)(4) that the requirement to disclose presentations that are made during the Sunshine period only applies to presentations made in permit-but-disclose proceedings. We seek comment on this proposal.

44. Ninth, we propose to clarify 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 for presentations that are 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* presentations. A proposed clarification to rule 1.1203 is included in the Appendix.

45. Finally, we propose in general to reorganize rule 1.1206 to make it clearer and easier to understand, and to make various conforming edits. A draft of a proposed improved rule 1.1206 is included in the Appendix. We seek comment on these proposed changes.

46. *Other.* We invite commenters to propose any other modifications to the *ex parte* rules that would enhance the transparency, fairness, and efficiency of the decisionmaking process.

IV. PROCEDURAL MATTERS

47. *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 and reply comments on or before the dates indicated on the first page of this document. 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 (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

⁸¹ *Id.* § 1.1203(a)(4).

⁸² *Id.* § 1.1204(b).

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 12th 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 12th Street, SW, Washington, D.C. 20554.

48. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street SW, Room CY-B402, Washington, D.C. 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 12th Street SW, Room CY-A257, Washington, D.C. 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.

49. *Ex Parte Presentations*. The rulemaking this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.⁸³ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required.⁸⁴ Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.⁸⁵

50. *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 202-418-0530 (voice), 202-418-0432 (tty).

51. *Regulatory Flexibility Act*. Our action does not require notice and comment,⁸⁶ and therefore falls outside of the Regulatory Flexibility Act of 1980, as amended.⁸⁷ We will send a copy of this Notice of Proposed Rulemaking to the Chief Counsel of Advocacy of the SBA.

⁸³ 47 C.F.R. § 1.1200 *et seq.*

⁸⁴ *See id.* § 1.1206(b)(2).

⁸⁵ *Id.* § 1.1206(b).

⁸⁶ *See supra* note 4.

⁸⁷ *See* 5 U.S.C. §§ 601(2), 603(a).

52. *Paperwork Reduction Act.* This proceeding 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 this document, as required by the Paperwork Reduction Act of 1995.⁸⁸ In addition, pursuant to the Small Business Paperwork Relief Act of 2002,⁸⁹ we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”⁹⁰

V. ORDERING CLAUSES

53. 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 NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁸⁸ Pub. L. No. 104-13.

⁸⁹ Pub. L. No. 107-198.

⁹⁰ 44 U.S.C. § 3506(c)(4).

APPENDIX**Proposed Rules**

Part 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 1 – Practice and Procedure

1. 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.

2. Section 1.1202 is amended by deleting paragraph (d)(6).

3. Section 1.1203 is amended by revising paragraphs (a)(4) and (b) and adding a new paragraph (c) to read as follows:

§ 1.1203 Sunshine period prohibition.

(a) With respect to any Commission proceeding, all presentations to decisionmakers concerning matters listed on a Sunshine Agenda, whether *ex parte* or not, are prohibited during the period prescribed in paragraph (b) of this section unless:

(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. If this 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 proceedings 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 applies beginning at midnight following the release of a public notice that a matter has been placed on the Sunshine Agenda until the Commission:

(c) Nothing in this section prevents a party from submitting a written *ex parte* presentation or a memorandum summarizing an oral *ex parte* presentation on the first business day of the Sunshine period prohibition to the extent that § 1.1206 or § 1.1208 requires submission of such a presentation or memorandum to reflect an *ex parte* presentation that was made on the last day before the beginning of the Sunshine period.

4. Section 1.1204 is amended by revising paragraphs (a)(6), (a)(12)(iii), 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 decisionmaking process will be disclosed by the Commission no later than at the time of the release of the Commission's decision;

(12) *****

(iii) The Universal Service Administrative Company relating to the administration of universal service support mechanisms pursuant to 47 U.S.C. 254;

(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).

5. Section 1.1206 is amended by revising paragraph (a)(12), deleting paragraph (a)(13), renumbering existing 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

(13) Petitions for Commission preemption of authority to review interconnection agreements under § 252(e)(5) of the Communications Act and petitions for preemption under § 253 of the Communications Act.

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

(1) *Written presentations.* A person who makes a written *ex parte* presentation subject to this section, including giving or showing a document to Commission staff, shall, no later than the next business day after the presentation, submit two copies of the presentation to the Commission's Secretary under separate cover for inclusion in the public record. The presentation (and cover letter) shall clearly identify the proceeding to which it relates, including the docket number, if any, shall indicate that an original and one copy have been submitted to the Secretary or that one copy has been filed electronically, and must be labeled as an *ex parte* presentation. If the presentation relates to more than one proceeding, two copies (or an original and one copy, or one copy if filed electronically) shall be filed for each proceeding.

(2) *Oral presentations.*

(i) A person who makes an oral *ex parte* presentation subject to this section shall submit a memorandum that summarizes all data presented and arguments made during the oral *ex parte* presentation. If the oral *ex parte* presentation consisted in whole or in part of the presentation of data or arguments already reflected in that person's written comments, memoranda or other filings in the proceeding, the person who made such presentation may provide citations to such data or arguments in that person's prior comments, memoranda, or other filings in lieu of summarizing them in the memorandum. 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. The memorandum (and cover letter, if any) shall clearly identify the proceeding to which it relates, including the docket number, if any, shall indicate that an original and one copy have been submitted to the Secretary or that one copy has been filed electronically, and must be labeled as an *ex parte* presentation. If the presentation relates to more than one proceeding, two copies of the memorandum (or an original and one copy, or one copy if filed electronically) shall be filed for each proceeding.

NOTE 1 TO PARAGRAPH (b)(2)(i): 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.

(ii) The memorandum required to be submitted to the Secretary under this subpart must be submitted no later than the next business day after the presentation. In proceedings governed by § 1.49(f) or for which the Commission has made available a method of electronic filing, the memorandum shall, when feasible, be filed through the electronic comment filing system available for that proceeding. In other proceedings or if filing through the electronic comment filing system would present an undue hardship, an original and one copy must be submitted to the Secretary and also sent on paper or via electronic mail to the Commissioners and Commission employees involved in the presentation.

(iii) If the memorandum summarizing an oral presentation required to be submitted under this subpart results from an oral *ex parte* presentation that is made pursuant to an exception to the Sunshine period prohibition, the memorandum shall be submitted through the Commission's electronic comment filing system, and shall be submitted within four hours of the presentation to which it relates. The memorandum shall also identify plainly on the first page the specific exception in § 1.1203(a) on which the presenter relies. The memorandum shall also state the date and time at which the oral *ex parte* presentation was made.

(3) *Electronic Filing and Native Formats.* 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 electronically, and shall be filed in native formats (i.e., .doc, .xml, .ppt, searchable .pdf). In cases where a filer believes that the document to be filed should be withheld from public inspection, the filer should file electronically a request that the information not be made routinely available for public inspection pursuant to § 0.459, and a copy of the document with such confidential information redacted. The filer should submit the original unredacted document to the Secretary as directed in § 0.459.

(4) Notwithstanding paragraphs (b)(1) and (b)(2) of this section, in permit-but-disclose proceedings 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 a written summary of any such oral presentation and place it in the record in accordance with paragraph (b)(2) of this section and place any such written presentation in the record in accordance with paragraph (b)(1) of this section.

(5) *Notice of ex parte presentations.* The Commission's Secretary or, in the case of non-docketed proceedings, the relevant Bureau or Office shall place in the public file or record of the proceeding written *ex parte* presentations and memoranda reflecting oral *ex parte* presentations. The 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 should generally be released at least twice per week.

6. Section 1.1208 is amended to read as follows:

Unless otherwise provided by the Commission or its staff pursuant to § 1.1200(a) of this section, *ex parte* presentations (other than *ex parte* presentations exempt under § 1.1204(a) of this section) 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) of this section 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 an oral presentation in a restricted proceeding, on a non-*ex parte* basis, must file a summary of the presentation in the record of the proceeding using procedures consistent with those specified in § 1.1206.

**STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI**

Re: *In the Matter of Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, GC Docket No. 10-43; *In the Matter of Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, GC Docket No. 10-44

These two Notices propose reforms that should make the Commission's procedural rules more effective and fairer. By increasing the use of electronic filing, refining our rules on *ex parte* presentations, and making other commonsense changes, we intend make it easier for interested parties to participate in our proceedings and easier for the public to understand the processes we use and the reasons for our decisions.

The growing importance of communications to our daily lives and our economy has expanded the range of issues before the Commission and the number of parties that file pleadings with us. Our processes and systems must be up to the job. Yet the Commission lags behind many other agencies, as well as federal and state courts, that have already implemented e-filing for all their proceedings. This Commission should lead, not follow, in using electronic filing, because it will reduce costs, speed the resolution of pending issues, and make our proceedings easier for the public to follow. I look forward to implementing the rule changes that will bring this about.

Nothing is more critical to assuring the integrity of our proceedings than the way we document *ex parte* communications. Over thirty years ago, the D.C. Circuit's *Home Box Office* decision struck down Commission cable rules in part because hundreds of undocumented *ex parte* contacts had occurred. While noting that it was not illegal for the Commission to entertain *ex parte* contacts, the Court instructed that the records of Commission proceedings must reveal all the information made available *ex parte* so that it can be understood and debated. *Home Box Office v. FCC*, 567 F.2d 9, 118 (1977).

Given the complexity and importance of the issues that come before us, *ex parte* communications remain an essential part of our deliberative process. It is essential that industry and public stakeholders know the facts and arguments presented to us in order to express informed views. The modified *ex parte* rules we propose today will help achieve that. When all written *ex parte* materials and summaries of all oral *ex parte* communications are substantive, complete, filed quickly in the record, and immediately available online, special interests are revealed and no party has unfair access to inside information. This is the essence of transparency, and I look forward to implementing the rule changes that will help bring it about.

Finally, I would like to express my appreciation of the fine work done by the FCC Reform Team and the Office of General Counsel in bringing these proposals to us for a vote today. As these two Notices reinforce, strong procedural rules are indispensable to achieving openness, transparency, and timeliness in our substantive decisions.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *In the Matter of Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, GC Docket No. 10-43; *In the Matter of Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, GC Docket No. 10-44

Reform has clearly come to the FCC. In my first week as Acting Chairman last year, I had the privilege of addressing the Commission staff on the need to revitalize and reenergize the operations of the agency. I said then we must always strive to improve our lines of communication, enhance the level of transparency in our work and bring to our daily decisions the kind of openness that gives true credibility to everything we do. We have made progress. Today's presentation makes that clear, even as it makes clear that we have much more work ahead in many key areas. I want to thank Mary Beth Richards and Austin Schlick for their thoughtful comments, and would particularly like to commend Chairman Genachowski for his focus on the issue and also for his good judgment in designating Mary Beth as Special Counsel on FCC Reform.

Today's two specific Notices of Proposed Rulemaking make an essential down-payment on the broader reform agenda. First, at long last, we launch a proceeding to improve the transparency and effectiveness of our decision-making process by reforming our *ex parte* rules. Sound *ex parte* rules are critical to ensuring that everyone has a fair opportunity to respond to the arguments made or positions set forth in oral communications with the Commission. We all welcome the opportunity for face-to-face meetings with outside experts. That said, we realize that Commission decisions should always rest upon the solid foundation of the public interest—not the interests of lobbyists discussed in closed-door meetings. Too many times we receive *ex parte* filings that simply reference that a meeting took place on a given topic—without remotely approaching a sufficient level of detail on the arguments or data presented to allow the public or interested parties to respond. That is why I am pleased to support proposals to make disclosure more robust in more cases, and to begin aggressively enforcing our *ex parte* rules.

Second, by proposing revisions to certain procedural and organizational rules, we are taking steps to modernize and improve the efficiency of the agency. For example, we propose to delegate authority to the expert Bureaus to dismiss or deny procedurally defective petitions for reconsideration of Commission action. Steps like these can help provide the full Commission with more time and energy to address the many critical issues confronting us.

I would like to thank the staff in the Office of General Counsel and the Office of Managing Director for their work on today's Notices of Proposed Rulemaking. I look forward to working with the Chairman and my colleagues on these and further reforms.

I also want to express my appreciation for efforts in Congress led by Representatives Bart Stupak, Anna Eshoo and Mike Doyle to reform the work of the agency by proposing to eliminate the statutory prohibition on more than two Commissioners talking together outside a public meeting. My experience tells me very clearly that this bar has had seriously pernicious and unintended consequences—stifling collaborative discussions among colleagues, delaying timely decision-making by the agency, discouraging collegiality and short-changing the public interest. This proposed legislation would constitute as major a reform of Commission procedures as any I can contemplate. Put that together with the work Mary Beth is helping us do and we'd have a record of historic procedural reform here at the FCC.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: *In the Matter of Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, GC Docket No. 10-43; *In the Matter of Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, GC Docket No. 10-44

Thank you to Mary Beth Richards, Steve Van Roekel, Austin Schlick, Paul de Sa, and your teams for your efforts in reforming our agency. We are grateful for your energy, enthusiasm and creativity. Reform is not necessarily a flashy topic, but it is important work.

As you know, I have sought reform for some time now, first sharing my thoughts with then-Acting Chairman Copps last January, followed several months later with a letter to then-new Chairman Genachowski.

I applaud your efforts to boost employee morale and create a more collaborative decision-making process. We have published Commission meeting dates for the entire year. We have provided opportunities for comment from the public, as well as the Commission staff (anonymously). I also appreciate the ongoing efforts to update the Commission's IT and web systems, which were especially helpful during the government shut down due to the recent blizzards. And I am pleased to have had the opportunity to provide suggestions and to receive updates on the progress. Thank you also for your work to analyze the financial aspects of our agency. This is long overdue. I look forward to learning more about the KPMG audit, as well as the internal review of universal service funding systems.

Turning to today's notices, I thank my colleagues for supporting my suggestions to clarify and improve them. Needless to say, I am eager to engage with interested parties as we receive comments and suggestions. With respect to the notice regarding the Commission's *ex parte* rules, I'd like to flag a few issues.

At the outset, I will say that I am not convinced that our *ex parte* rules need to be changed. I am convinced, however, that we can and must step up our enforcement of the rules. During my tenure here, there have been some obvious examples of deficient filings. I hope, at long last, we will actually take formal action in those instances that merit doing so. I would imagine that tougher consequences would do more to deter bad behavior than any new rules.

Along these lines, I am interested in learning more about the consequences of not proposing rule changes that would address the *ex parte* implications of new media. I question whether we have created a back-door invitation for *ex parte* presentations that would otherwise be prohibited. What is the difference between a filing made during the Sunshine prohibition period through the Commission's electronic filing system and the same filing posted to one of our blogs?

Similarly, I am interested in learning more about the proposal to require the filing of ownership disclosures along with *ex parte* notices. First, the Commission currently requires several sets of licensees to regularly submit ownership information. Second, corporate ownership data is readily available not only within the FCC's own licensing systems, but also through SEC filings. Indeed, in the Internet age, one need only make a few additional clicks to find meaningful information on an unlimited number of topics. Finally, I wonder whether our proposals will treat participating parties in a neutral manner? In other words, will those entities with corporate form bear a heavier burden than those groups that may be structured and funded differently? How will this effect participation in the Commission's processes? I look forward to exploring answers to these and many other questions to see whether we need to act further.

Thanks again to everyone that is assisting with our reform efforts. I appreciate your care and diligence, and look forward to future presentations.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

Re: *In the Matter of Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, GC Docket No. 10-43; *In the Matter of Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, GC Docket No. 10-44

When Chairman Genachowski assumed the helm of the agency, he made clear that one of his top priorities was to “reboot” the FCC. These two items fulfill his commitment to improve our processes in a manner that benefits the Commission staff, individuals and entities that interact with the Commission, and ultimately, consumers.

One of the most important steps the Chairman has taken in seeking to reform our internal procedures is to look, well, inward. Mary Beth Richards and Steve VanRoekel have solicited feedback from employees throughout the agency who are intimately familiar with the challenges of keeping things running smoothly. As a result, we were able to identify a number of material measures designed to improve and modernize the agency.

I am particularly interested in receiving comments on our Notice concerning the Commission's ex parte rules. It is essential that the substance of *ex parte* presentations are made public in an accessible manner. This is imperative not only for purposes of judicial review, but also to encourage meaningful public participation. If we are serious about increasing transparency – and I believe each of us is – it is critical that we give the public a window into the information we receive. That window must not only illuminate exactly what was covered in those meetings, but must also be opened in a timely fashion. Our rules must account equally for sophisticated repeat players and those who are seeking to register input with the Commission for the first time.

The Sunshine period is another significant area of inquiry. I would like to know how commenters believe we can best balance our need for information with legitimate concerns about the potential for abuse. While it can be useful for Commission staff to touch base with outside parties during the days immediately preceding an important vote, there undoubtedly are valid concerns about the nature and disclosure of such contacts. These are areas worthy of our undivided attention.

I thank the Chairman and his staff, as well as the Offices of the Managing Director and General Counsel for producing this thoughtful item.