

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

In the matter of)
)
Ex Parte Complaint of)
)
MARCUS SPECTRUM SOLUTIONS, LLC)
)

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 2011

Released: February 16, 2011

By the Commission:

1. By this Memorandum Opinion and Order, we deny an application for review filed by Marcus Spectrum Solutions, LLC (Marcus),¹ which appeals a decision by the Office of General Counsel (OGC)² denying Marcus's complaint that the Association of Maximum Service Television, Inc. (MSTV) violated the Commission's ex parte rules.³ We agree with OGC that Marcus's complaint against MSTV demonstrates only one minor violation of the ex parte rules.⁴ Accordingly, we deny the application for review.

I. BACKGROUND

2. Marcus and MSTV are participants in the Commission's "White Spaces Proceeding" (ET Docket No. 04-186), in which the Commission is addressing the operation of new, low power devices in the television broadcast spectrum where channels are not being used for authorized broadcast services.⁵ Marcus is affiliated with Adaptrum, a proponent of such a device.⁶ MSTV is an association of broadcasters that has expressed concerns about such devices. For purposes of the ex parte rules, ET

¹ Petition for Review, filed August 25, 2008, by Marcus (AFR). Also pending are an Opposition to Petition for Review, filed September 9, 2008, by MSTV (Opposition), a Reply to Opposition to Petition for Review, filed September 16, 2008, by Marcus (Reply), and an Opposition to Reply to Opposition to Petition for Review (Further Opposition), filed October 1, 2008, by MSTV.

² Letter from Joel Kaufman, Associate General Counsel to Dr. Michael J. Marcus (Jul. 28, 2008) (Decision).

³ 47 C.F.R. §§ 1.1200-1.1216.

⁴ As explained below, the Commission has recently adopted changes to certain of its ex parte rules. *See infra* paragraph 24; *Amendment of the Commission's Ex parte Rules and Other Procedural Rules*, FCC 11-11, GC Docket No. 10-43 (rel. Feb. 2, 2011) (*Ex Parte Reform Order*). We evaluate this matter in light of the ex parte rules that were in effect at the time of the relevant events.

⁵ *See* Unlicensed Operation in the TV Broadcast Bands, *Second Memorandum Opinion and Order* in ET Docket Nos. 04-186 and 02-380, FCC 10-174 (released Sept. 23, 2010) (finalizing rules to make unused spectrum in the TV bands available for unlicensed broadband wireless devices), corrected by *Erratum* (OET released Oct. 19, 2010); *see also* Unlicensed Operation in the TV Broadcast Bands, *Order* in ET Docket Nos. 04-186 and 02-380, DA 11-131 (OET released Jan. 26, 2011) (conditionally designating nine TV bands device database administrators).

⁶ *See, e.g.*, Letter from Haiyun Tang, Ph.D. to Marlene H. Dortch, Secretary (Aug. 24, 2008) (reporting an ex parte meeting in which Dr. Michael J. Marcus participated on behalf of Adaptrum).

Docket No. 04-186 is classified as a permit-but-disclose proceeding.⁷ Thus, ex parte presentations to decision-making personnel are permitted but must be disclosed on the record in accordance with the rules.⁸

3. Marcus has engaged in an extensive correspondence with OGC criticizing MSTV's compliance with the reporting requirement of 47 C.F.R. § 1.1206(b)(2), which reads in relevant part:

(2) *Oral presentations.* A person who makes an oral ex parte presentation subject to this section that presents data or arguments not already reflected in that person's written comments, memoranda or other filings in that proceeding shall, no later than the next business day after the presentation, submit to the Commission's Secretary, an original and one copy of a memorandum which summarizes the new data or arguments. . . . 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. . . .

4. Marcus initially contacted OGC on October 13, 2006, "to express concern over the inconsistent compliance of commenting parties with the FCC's *ex parte* rules."⁹ Marcus contrasted the allegedly superior compliance of the National Association of Broadcasters with that of MSTV and concluded:

I recommend that the Commission either advise commenting parties that it intends to enforce the rules that are in place or clarify or modify the rules so that they are enforceable. The fact that two well respected and well funded broadcast trade associations have such different interpretations of the rules, at the very least, shows confusion about what the rules are and your intent to enforce them.¹⁰

5. OGC responded that the Commission had made efforts to improve compliance with the ex parte rules, for example by issuing a public notice reminding parties of their responsibilities and by providing additional reporting guidance on the Commission's website.¹¹ OGC further indicated that the primary tool for helping to ensure compliance is complaints by other parties in the relevant proceeding. OGC noted that the Commission had received no complaints about MSTV.¹²

⁷ See 47 C.F.R. § 1.1206 (permit-but-disclose proceedings).

⁸ An ex parte presentation is a communication directed to the merits or outcome of a proceeding, which, if written, is not served on the parties to the proceeding and, if oral, is made without giving advance notice to the parties and an opportunity to be present. See 47 C.F.R. §§ 1.1202(a) (defining presentations), 1.1202(b) (defining ex parte presentations). Because the general public is deemed a party to rulemakings, all presentations in rulemakings are effectively subject to the ex parte rules. See *id.* § 1.1202(d)(5) (with certain exceptions, parties to a proceeding include "members of the general public after the issuance of a notice of proposed rulemaking").

⁹ See Letter from Michael J. Marcus to Sam Feder, Esq., [then] General Counsel (Oct. 13, 2006) (October 13, 2006 Letter) at 1.

¹⁰ *Id.* at 3.

¹¹ See Letter from Joel Kaufman, Associate General Counsel to Dr. Michael J. Marcus (Mar. 30, 2007) (March 30, 2007 Letter) at 1; see also *Commission Emphasizes the Public's Responsibilities in Permit-But-Disclose Proceedings*, 15 FCC Rcd 19945, 19945 (2000); <http://www.fcc.gov/ogc/xprte.html>.

¹² See March 30, 2007 Letter at 1. Marcus's October 13, 2006 letter contained a list of 16 allegedly deficient notices filed by MSTV during an earlier time period. See October 13, 2006 Letter, Attachment. OGC believed that the October 13 Letter was intended to express general concern about ex parte compliance and that the list of asserted violations had been presented merely as examples. Accordingly, OGC did not rule on whether the listed notices

(continued....)

6. Marcus subsequently submitted three complaints (including the present one) in which it faulted specific *ex parte* notices that MSTV had filed.¹³ OGC concluded that the first two of these complaints did not reveal any *ex parte* violations except a non-prejudicial one-day delay in filing an *ex parte* notice and a possible but immaterial failure of a notice to summarize one subsidiary point.¹⁴ Marcus did not seek review of OGC's dispositions of these complaints within the filing window established by the Commission's rules.¹⁵

II. THE COMPLAINT AT ISSUE

7. On April 25, 2008, Marcus filed its third complaint, which is the subject of this AFR.¹⁶ The complaint raised three "cases" in which Marcus alleged that *ex parte* notices filed on behalf of MSTV "appear to violate the *ex parte* rules."¹⁷ In "Case 1," Marcus alleged that MSTV's notice of a February 5, 2008 *ex parte* meeting between David Donovan and Bruce Franca of MSTV and former FCC Commissioner Jonathan Adelstein and two of his legal advisors was filed on February 8, 2008 – two days late.¹⁸ OGC found that, although the notice was filed two days late, Marcus did not show how this delay prejudiced it.¹⁹ OGC declined to impose sanctions for this violation.

8. In "Case 2," Marcus complained about an *ex parte* notice timely filed on February 11, 2008, the next business day after a February 8, 2008 meeting between MSTV's Bruce Franca and Victor Tawil and personnel within the Commission's Office of Engineering and Technology.²⁰ The notice stated: "OET's testing of white spaces devices was discussed, and in particular, MSTV's [previously filed] October 15, 2007, letter to [OET Chief] Julius Knapp on this subject." OGC found no reason to doubt MSTV's assertion, made in a response to Marcus's complaint, that the matters discussed at the meeting were those already reflected in MSTV's filings and, consequently, 47 C.F.R. § 1.1206(b)(2) did not require that these matters be further summarized.²¹

9. In "Case 3," Marcus complained that MSTV's notice of a March 27, 2008 *ex parte* meeting between MSTV's David Donovan and Bruce Franca and former Chairman Martin and his legal

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violated the *ex parte* rules. Marcus did not seek timely reconsideration of OGC's treatment of the listed notices nor did he file a timely application for review of OGC's treatment of those notices. See 47 C.F.R. §§ 1.106 (petitions for reconsideration); 1.115 (applications for review); Letter from Joel Kaufman, Associate General Counsel to Dr. Michael J. Marcus (Oct. 15, 2007) at 2-3; Letter from Joel Kaufman, Associate General Counsel to Dr. Michael J. Marcus (Dec. 3, 2007) at 1.

¹³ See Letter from Michael J. Marcus, Sc.D., F-EEE, to Office of General Counsel (Aug. 9, 2007); Letter from Michael J. Marcus, Sc.D., F-EEE, to Office of General Counsel (Jan. 25, 2008). The docket in ET Docket No. 04-186 lists over 20 notices filed by MSTV during that time period (August 8, 2007 to March 31, 2008).

¹⁴ See Letter from Joel Kaufman, Associate General Counsel to Dr. Michael J. Marcus (Oct. 15, 2007), *citing* Letter from Michael J. Marcus, Sc.D., F-EEE to Mr. Joel Kaufman, Associate General Counsel (Sept. 11, 2007); Letter from Joel Kaufman, Associate General Counsel to Dr. Michael J. Marcus (May 7, 2008).

¹⁵ See 47 C.F.R. §§ 1.106 (petitions for reconsideration), 1.115 (applications for review).

¹⁶ See Letter from Michael J. Marcus, Sc.D., F-EEE to Office of General Counsel (Apr. 25, 2008) (Complaint).

¹⁷ *Id.* at 1.

¹⁸ See *id.*; see also Letter from David Donovan, President to Ms. Marlene H. Dortch, Secretary (Feb. 8, 2008).

¹⁹ See Decision at 2.

²⁰ See Complaint at 2; Letter from Bruce Franca, VP, Policy and Technology to Ms. Marlene Dortch, Secretary (Feb. 11, 2008).

²¹ See Decision at 3.

advisor was filed two days late, on March 31, 2008.²² OGC found that MSTV had made a timely filing on March 28, inadvertently omitting an attachment. MSTV remedied this omission by refileing the notice on March 31, this time including the attachment.²³

10. OGC summarized its conclusions regarding Marcus's complaint, by stating:

We have now reviewed your complaints about five specific filings by MSTV, and our examination of these filings has revealed, at most, slight deviations from the requirements of the ex parte rules that do not warrant sanctions. While we expect all parties to comply with the ex parte rules, we remind you that the purpose of the rules is to give parties a fair opportunity to respond to arguments made by the other parties in a proceeding, not to create a secondary "battle zone" over minor infractions that do not significantly affect other parties' ability to respond to the merits of a dispute. Accordingly, please be advised that future allegations may, if the facts warrant, be handled in a more summary fashion.²⁴

11. In its application for review, Marcus faults OGC's analysis of the three violations alleged in the Complaint. With respect to Case 1, Marcus criticizes OGC for finding that Marcus had not shown that the two-day delay in filing prejudiced Marcus.²⁵ Marcus argues that the ex parte rules do not require a showing of prejudice and that if OGC was concerned about prejudice it should have requested such a showing. As to Case 2, Marcus questions OGC's finding that there was no reason to doubt MSTV's representation that the matters discussed at the meeting were matters already reflected in MSTV's filings in the docket. Marcus asserts that OGC should have consulted with the other participants at the meeting before making such a finding and that MSTV's February 11 ex parte notice on its face raises "serious questions" because of its terseness.²⁶ Finally, with respect to Case 3, Marcus finds it "odd" that MSTV neither mentioned that its second filing was intended to correct its earlier filing (which omitted the attachment) nor sought leave to file an amended filing.²⁷ Marcus asks "how many late filed marginally compliant . . . filings must one make in a year before one receives a warning . . . ?"²⁸ Marcus also objects to OGC's characterization of its efforts against MSTV as a secondary battle zone over minor infractions and faults the Commission's enforcement of the ex parte rules generally.

²² See Complaint at 2.

²³ See Decision at 3. Compare Letter from Jonathan D. Blake to Marlene H. Dortch, Secretary (Mar. 28, 2008) with Letter from Jonathan D. Blake to Marlene H. Dortch, Secretary (Mar. 31, 2008).

²⁴ See Decision at 4 (footnote within original omitted).

²⁵ See AFR at 6; Decision at 2.

²⁶ See AFR at 7; Decision at 3.

²⁷ See AFR at 7; Decision at 3.

²⁸ See AFR at 8. Marcus offers, as a model of the type of warning he seeks, a letter issued by the former Cable Services Bureau mainly addressing an applicant's failure to provide information requested by the bureau in a timely manner and secondarily addressing a nine-calendar-day delay in filing an ex parte notice. See AFR at 2, 8; Letter from W. Kenneth Ferree to Pantelis Michaelopoulos and Gary M. Epstein (March 7, 2002), available online at <http://www.fcc.gov/transaction/echostar-directv/fccextensionletter030702.pdf> (Ferree Letter). As to the latter point, the Ferree Letter states: "[Y]ou are reminded that . . . you are required to file written notice of an oral presentation to Commission staff no later than the next business day following the presentation. . . . [V]iolations of the ex parte rules may result in sanctions, including forfeitures. We admonish the applicants to comply with the ex parte rules on a going forward basis, and caution that future violations will be referred to the Office of General Counsel for further action" See *id.* at 2.

III. DISCUSSION

12. **Procedural matter.** In its Opposition, MSTV contends that Marcus violated the Commission's rules by not serving its AFR on MSTV.²⁹ Marcus replies that it is uncertain that the rule was violated, that any violation did not result in any prejudice to MSTV, and that any violation was inadvertent because Marcus is not represented by counsel.³⁰ Marcus apologizes and promises future compliance with the rules and asks for a waiver of the rules to permit the Commission to consider its AFR.³¹ MSTV disputes that Marcus's violation did not prejudice it. MSTV points out that it learned of the AFR only because OGC sent MSTV a courtesy copy. MSTV asserts that this goes to the heart of the ex parte rules, which is to provide interested parties with notice and an opportunity to respond, and asks the Commission to dismiss Marcus's AFR.³²

13. We agree with MSTV that Marcus violated the ex parte rules by not serving the AFR on MSTV. Complaint proceedings are classified as restricted under the ex parte rules.³³ In such proceedings, ex parte presentations are prohibited, and therefore written presentations must be served on all parties to the proceeding.³⁴ MSTV became a party to Marcus's complaint by serving Marcus with its response to the complaint.³⁵ Consequently, Marcus's unserved AFR violated the Commission's ex parte rules, as well as the service requirement of 47 C.F.R. § 1.115(f).³⁶

14. We nevertheless decline MSTV's suggestion that we dismiss the AFR on those grounds. While we admonish all prospective filers that they must abide by the requirement to serve all parties to a restricted proceeding, we find that the public interest would be better served in the instant case by addressing the merits of the AFR.³⁷ This disposition will not prejudice MSTV given that OGC subsequently provided MSTV with a copy of the Marcus complaint, to which MSTV responded.

15. **Analysis of the Three Cases of Alleged Noncompliance.** We find no error in OGC's rulings. In ruling on Case 1, OGC correctly found that Marcus had not demonstrated that it had been prejudiced by MSTV's two-day delay in filing. While we expect parties to comply with the letter and spirit of the ex parte rules, prejudice is a material factor in evaluating the seriousness of an ex parte

²⁹ See Opposition at 3.

³⁰ See Reply at 3.

³¹ See *id.*

³² See Further Opposition at 1-2.

³³ See 47 C.F.R. § 1.1208 (proceedings not otherwise classified are restricted).

³⁴ See *id.*

³⁵ See *id.* § 1.1202(d)(1) (defining as a party any person filing a written submission referencing a pending filing and served on the filer). MSTV's response to Marcus's Complaint indicates that the response was served on Marcus. See Letter from Jennifer Johnson and Jodi Steiger to Mr. Joel Kaufman, Associate General Counsel (May 29, 2008) at 3.

³⁶ See 47 C.F.R. § 1.115(f) ("The application for review shall be served upon the parties to the proceeding.").

³⁷ Marcus contends that review of OGC's Decision is warranted by 47 C.F.R. § 1.115(b)(2)(ii), which authorizes review of an action under delegated authority where "[t]he action involves a question of law or policy which has not previously been resolved by the Commission." See AFR at 2. We agree with MSTV that neither OGC's Decision nor Marcus's AFR has raised any new question of law or policy. See Opposition at 1-2. The rule, however, also provides for review of an action where "[t]he action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy." See 47 C.F.R. § 1.115(b)(2)(i). We find that Marcus is arguing in effect that OGC's Decision is inconsistent with Commission policy on the enforcement of the ex parte rules. Thus, review under Section 1.115(b)(2)(i) is proper.

violation and whether sanctions are appropriate.³⁸ The purpose of the ex parte rules is to ensure the fairness and integrity of Commission decision-making.³⁹ Thus, we are principally concerned about ex parte violations that deprive interested persons of notice and an opportunity to respond to the violator's presentations. In this case, Marcus's failure to make any showing of prejudice due to the two-day delay is underscored by the fact that the Commission's ultimate decision in the White Spaces proceeding was made more than six months after MSTV's delayed filing. Further, although Marcus suggests that OGC might have requested a showing of prejudice,⁴⁰ Marcus never offered any evidence of prejudice either before or after OGC's finding, and in any event, OGC was not required under our rules to make this request for supplemental briefing in order to resolve the complaint. We agree with OGC that under all the circumstances the violation reflects a minor infraction on MSTV's part.⁴¹

16. In ruling on Case 2, OGC did not indicate that it received confirmation of the accuracy of MSTV's filing (*i.e.*, MSTV's representation that the matters discussed were already reflected in written filings) from the Commission participants at the meeting. OGC, however, informs us that it sent copies of Marcus's complaint to the Commission personnel who attended the meetings and received no indication that the complaint was justified. Although OGC's affirmative confirmation would have been helpful, we agree with OGC that the absence of support for Marcus's complaint by the pertinent Commission staff tends to confirm MSTV's claim that its ex parte notice was in compliance with the rules.

17. We find no reason to take exception with OGC's discussion of Case 3. Although MSTV's notice, as refiled on March 31, did not spell out the reason for refiling in detail, it was designated: "Re: Ex parte Communication (REVISED)."⁴² An interested person easily could see the relationship between the revised notice and the original, filed one business day earlier, which obviously lacked the "attached chart" referred to in the notice.⁴³ Further, the rules do not impose any requirement for MSTV to have sought leave to refile the notice. There is thus nothing inappropriate in MSTV's action promptly correcting its failure to include the attachment.⁴⁴ Indeed, we expect parties to take such timely corrective action when errors are made.

18. **Concluding Paragraph of OGC Decision – Findings Regarding MSTV's Compliance.** Marcus objects to OGC's observations that the purpose of the ex parte rules "is not to create a secondary 'battle zone' over minor infractions that do not significantly affect other parties' ability

³⁸ In evaluating the effect of an ex parte violation, courts typically focus on five factors indicating whether an agency's decision-making process has been irrevocably tainted by ex parte contacts so as to make the ultimate judgment of the agency unfair. *Professional Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 564-65 (D.C. Cir. 1982). Among these factors is whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond. *See also Power Auth. of N.Y. v. FERC*, 743 F.2d 93, 110 (2nd Cir. 1984) (one must look particularly to whether the communications contain factual matter or other information outside the record, which the parties did not have an opportunity to rebut.) Thus, courts as well as the Commission have focused on the prejudice caused by the violation.

³⁹ *See* 47 C.F.R. § 1.1200(a).

⁴⁰ *See* AFR at 6.

⁴¹ MSTV explains that it sometimes takes a day to obtain confirmation from the participants that the ex parte notice is accurate and complete. *See* Opposition at 4. Furthermore, the two-day delay in filing here is significantly less than the nine-day delay found in the Ferree Letter, cited by Marcus.

⁴² *See* Letter from Jonathan D. Blake to Marlene H. Dortch, Secretary (Mar. 31, 2008).

⁴³ *See* Letter from Jonathan D. Blake to Marlene H. Dortch, Secretary (Mar. 28, 2008).

⁴⁴ Under established Commission policy, one of the factors relevant to assessing the significance of any misconduct is efforts taken to remedy the violation. *See infra* note 50.

to respond to the merits of a dispute” and that “future allegations [by Marcus] may, if the facts warrant, be handled in a more summary fashion.”⁴⁵ Marcus accuses OGC of having “shown a disinterest in enforcing” the ex parte rules and of taking a “shoot the messenger” approach towards Marcus.⁴⁶ Marcus observes that 47 C.F.R. § 1.1214 provides that “Any party to a proceeding or any Commission employee who has substantial reason to believe that any violation of this subpart has been solicited, attempted, or committed shall promptly advise the Office of General Counsel in writing of all the facts and circumstances which are known to him or her.” Marcus asserts that it should not be criticized for complying with this rule and that it is responding to MSTV’s pattern of infractions.⁴⁷ Marcus asks that the last paragraph of the OGC letter be “withdrawn.”⁴⁸

19. We agree with Marcus that the ex parte rules are important, and we expect all parties to comply with them.⁴⁹ We do not fault Marcus for complying with 47 C.F.R. § 1.1214 by reporting what it believed to be violations of the ex parte rules. Not every deviation from these rules, however, warrants being treated as a serious violation worthy of sanctions.⁵⁰ Our review of Marcus’s complaints against MSTV – including for this purpose not only the complaint addressed here but also the two complaints that are not before us because no timely application for review was filed – substantiates OGC’s conclusion that MSTV’s conduct involves, at most, slight deviations from the requirements of the rules that warrant no specific sanctions. The facts also lend credence to OGC’s suspicion that Marcus’s complaints represent a “secondary battle zone” between Marcus and MSTV in the White Spaces Proceeding. We note that OGC did not direct Marcus not to file any further complaints; it merely stated that it might deal with subsequent complaints by Marcus in a more summary fashion “if the facts warrant.”⁵¹ The

⁴⁵ See AFR at 8-9; Decision at 4. Marcus also faults OGC for only addressing the five specific filings summarized at paragraphs 7-9, *supra*, and not addressing whether the 16 earlier filings noted at footnote 11, *supra*, violated the ex parte rules. See AFR at 8. Marcus did not timely seek reconsideration or review of OGC’s original decision that addressed these earlier filings after Marcus first mentioned them, and we decline to address them further at this late date. Marcus also faults OGC for not searching for other late-filed MSTV filings. See AFR at 8. This suggestion of a mandatory administrative obligation would put an unreasonable burden on OGC, and we reject it.

⁴⁶ *Id.*

⁴⁷ See *id.* at 4, 9. Marcus alleges that MSTV’s compliance has improved in recent months but that MSTV has filed five additional late-filed notices in 2008 “in various proceedings.” See *id.* at 8, Appendix. Three were one day late and two were two days late. See *id.* MSTV indicates that one of these notices could not be filed on time because of its extreme complexity and that another was not required by the rule and was filed only as a courtesy. See Opposition at 3-4. These additional matters were not before OGC and are thus beyond the scope of Marcus’s AFR. See 47 C.F.R. § 1.115(c) (no application for review will be granted if it relies on question of fact or law on which the designated authority has been afforded no opportunity to pass).

⁴⁸ See AFR at 10.

⁴⁹ In this regard, we are fully in accord with Marcus’s emphasis on the importance that the ex parte rules play in fostering transparency in Commission decision-making. See AFR at 4-5.

⁵⁰ The factors to be taken into account in determining what sanctions are appropriate in the case of noncompliance with the ex parte rules are those that apply to violations of the Commission’s rules generally. These include: (1) whether the misconduct was isolated or recurring, inadvertent or deliberate, and recent or remote; (2) the seriousness of the violation; (3) the nature of the participation, if any, of managers and owners; (4) efforts to remedy the wrong; (5) the party’s overall record of compliance with Commission rules and policies; and (6) deterrence. See, e.g., *Character Qualifications*, 102 FCC 2d 1179, 1225-29 ¶¶ 96-106 (1986) (outlining factors for analysis in determining the significance of misconduct) (subsequent history omitted). Of course, this list is not exhaustive. Nor must the list be applied in a formulaic fashion. Thus, if a violation is determined to be minor, it may be appropriate to refrain from expending resources weighing all the other factors. The Character Policy Statement, originally formulated to evaluate the misconduct of broadcast applicants, has since been applied to the misconduct of Commission regulatees generally. See, e.g., *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 534 n.14 (1985) (character qualifications adopted in the broadcast context can provide guidance in the common carrier context).

⁵¹ Decision at 4.

Commission's rules do not specify any formal procedure for handling ex parte complaints. Accordingly, under the circumstances of this case and given the limits of our staff resources, we think it is appropriate for OGC to use its discretion in deciding what steps to take in handling future complaints, including using summary means to handle complaints that appear to raise at most minor compliance issues.

20. As an additional matter, Marcus contends that OGC should dispense with its practice of referring Marcus's ex parte complaints to MSTV for explanation and should, instead, automatically issue a warning letter in every case where a notice has been filed late or contains a one- or two-line description of a meeting.⁵² Marcus also asks us to presume that all ex parte notices filed with the Commission were required to be filed and that any notice that does not have at least three sentences of summary is deficient.⁵³ Section 1.1206(b)(2) required the filing of a notice only where an ex parte presentation involves new data or arguments.⁵⁴ Our understanding, however, is that many parties have filed brief notices to make a record of ex parte meetings even where they believed that no new information was presented and no filing was required. We find no reason to disapprove or penalize the practice of filing ex parte summaries even where they are not strictly required, as the practice has tended to create a more complete public record. The rule in effect at the time of the alleged violation, moreover, did not require a party filing a summary to state if any new data or arguments were presented. We are not persuaded at this time that a practice of issuing an automatic warning letter in every case where a notice has been filed late would be an effective use of Commission resources.⁵⁵

21. **Ex Parte Enforcement Policy – Sanctions.** Much of Marcus's AFR suggests general dissatisfaction with OGC's and the Commission's overall approach to enforcing the ex parte rules. Marcus criticizes the standards OGC employed in evaluating Marcus's complaints and in failing to adopt the sanctions that Marcus proposes. More specifically, Marcus contends that in evaluating the complaints, the Commission and OGC have applied policies that are not documented in the Commission's rules, case law, or other sources. According to Marcus, these include:

- a requirement that only parties with standing in a proceeding can file complaints;
- an unspecified "statute of limitations" on the timeliness of complaints;
- a standard of compliance that is the practice of other parties in the same proceeding;
- attaching importance to the presence of multiple complaints; and
- a requirement that the complainant prove substantial harm.⁵⁶

22. As to sanctions, Marcus states that it is not requesting specific sanctions but "only constructive efforts to improve compliance and send a message to other parties that ex parte compliance is actually expected in Commission proceedings."⁵⁷

23. As discussed above, we agree with OGC that Marcus's complaints have failed to demonstrate significant non-compliance with the ex parte rules by MSTV under the applicable standards.

⁵² See AFR at 9.

⁵³ See Reply at 4-5.

⁵⁴ 47 C.F.R. § 1.1206(b)(2). But see paragraph 24, *infra*, regarding the recent amendments to section 1.1206.

⁵⁵ The Commission addressed improving enforcement of the ex parte rules in the *Ex Parte Reform Order*, ¶¶ 62-67.

⁵⁶ See *id.* at 3. We note that, except perhaps for the final bullet, the OGC Decision did not even arguably assert such policies, and we accordingly do not address issues that were not discussed therein.

⁵⁷ See *id.* at 10. 47 C.F.R. § 1.1216 sets forth the sanctions that may be applied for violation of the ex parte rules, including dismissal or other adverse action against a violator's claim or interest in a proceeding, or other appropriate sanction (including, where appropriate, forfeiture).

We therefore find no need to consider, in this adjudicatory context, the general ex parte review advocated by Marcus. We note, however, that as part of agency-wide reform the Commission has issued a Report and Order and Further Notice of Proposed Rulemaking concerning the ex parte rules and their enforcement, which addresses, among other things, issues of the type raised by Marcus.⁵⁸ In particular, the Commission has amended its rules to apply more stringent reporting requirements for oral presentations in permit-but-disclose proceedings.⁵⁹ The Commission has also: (1) implemented procedures for close coordination between the Office of General Counsel and the Enforcement Bureau in cases where the issuance of a forfeiture or citation would be an appropriate sanction for an ex parte violation and granted the Enforcement Bureau specific authority to impose forfeitures for ex parte violations; (2) provided for notice via the Internet of the filing and disposition of ex parte complaints; and (3) stated that it will monitor the Commission's enforcement program to assure the program's effectiveness in deterring future violations.⁶⁰

IV. ORDERING CLAUSE

24. ACCORDINGLY, IT IS ORDERED that the Petition for Review filed August 25, 2008 by Marcus Spectrum Solutions, LLC IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁸ See *Ex Parte Reform Order*.

⁵⁹ See *id.* at ¶¶ 33-36. Under the amended rule, summaries must be filed for all oral presentations, not only those containing new data or arguments. Further, data or arguments previously presented in written submissions must now be summarized or cited by reference to the page or paragraph of the written submission.

⁶⁰ See *id.* at ¶¶ 66-67. The *Ex Parte Reform Order* provided that the rule revisions will become effective thirty days following publication in the *Federal Register*.