

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

In the Matter of
Updating of the Commission's Ex Parte Rules
GC Docket No. 20-221

NOTICE OF PROPOSED RULEMAKING

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By the Commission: Commissioner Rosenworcel concurring.

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I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (Notice), we begin a new proceeding to consider several modest but important updates to our ex parte rules. The ex parte rules govern when and how outside parties may communicate with the Commission about pending matters. These rules balance and promote two principal policy goals. First, the rules ensure that the Commission's decisions are transparent and that all parties are afforded a fair and equal opportunity to present their views and to respond to the views of others. Second, the rules enable discourse between Commission decisionmakers and parties, which can help the Commission identify areas of concern, address gaps in understanding, spot weaknesses in the record, develop alternative approaches, and generally render more informed decisions.

2. The Commission last updated its *ex parte* rules in 2011.¹ While these updated rules have served the Commission well, nearly ten years of experience with them has revealed a few areas in which they could be improved. This Notice proposes three such improvements: *First*, we seek comment on a proposal to exempt from our *ex parte* rules, in certain proceedings, government-to-government consultations between the Commission and federally recognized Tribal Nations. *Second*, we seek comment on a proposal to extend the exemption to our *ex parte* rules for communications with certain program administrators, such as the Universal Service Administrative Company, to include the Toll-Free Numbering Administrator and the Reassigned Numbers Database Administrator, and to clarify the conditions under which this exemption applies. *Third*, we seek comment on a proposal to require that all written *ex parte* presentations and written summaries of oral *ex parte* presentations (other than presentations that are permitted during the Sunshine period) be submitted before the Sunshine period begins and to require that replies to these *ex parte* presentations be filed within the first day of the Sunshine period.²

II. BACKGROUND

3. An *ex parte* presentation generally occurs when a party advocates to the Commission for its position in a pending proceeding outside the presence of other parties. 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.”³

4. To ensure fairness and transparency, the Commission's *ex parte* rules limit and place conditions on these communications. Because not all proceedings are alike, these limits and conditions vary depending on the type of proceeding.⁴ In a “restricted” proceeding, *ex parte* presentations are generally prohibited.⁵ And as its name suggests, a “permit-but-disclose” proceeding permits *ex parte* presentations, but requires that they be disclosed—typically, by filing a copy of written presentations and a summary of oral presentations in the record.⁶

5. Some presentations, however, are exempt from *ex parte* restrictions, due to either the proceeding in which they occur or the nature of the presentation. In an “exempt” proceeding, *ex parte* presentations are both freely permitted and generally exempt from disclosure requirements.⁷ Likewise,

¹ See *Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, GN Docket No. 10-43, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4517 (2011) (*2011 Report and Order*).

² Because the *ex parte* rules are procedural in nature, notice and comment are not required. See 5 U.S.C. § 553(b). We nevertheless provide notice and seek comment here, because we believe that public input will assist the Commission in shaping these proposals to further the underlying purpose of the *ex parte* rules—namely, to ensure the fairness and integrity of Commission decisionmaking.

³ 47 CFR § 1.1202(a), (b). 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 calls with Commission staff where parties present information or arguments directed to the outcome of a proceeding.

⁴ While the rules specify that certain types of proceedings are ordinarily treated as either exempt or permit-but-disclose, and all other proceedings are ordinarily restricted, the Commission or its staff may modify the rules applicable to a particular proceeding in the public interest. See 47 CFR § 1.1200.

⁵ See 47 CFR § 1.1208.

⁶ See 47 CFR § 1.1206.

⁷ See 47 CFR § 1.1204(b).

the rules exempt twelve *types* of presentations, such as certain presentations made to the General Counsel and his staff and presentations involving classified information.⁸ Among these exempted presentations are presentations made to the administrators of various Commission programs, such as the Universal Service Administrative Company and the TRS Numbering Administrator.⁹

6. Finally, the *ex parte* rules prohibit most presentations during the Sunshine period, which runs from the day after a proposed order is placed on a Sunshine notice, and ends when a matter is either released, removed from the Sunshine Agenda, or returned to staff for further consideration.¹⁰ Typically, the Sunshine notice is released seven days before an agenda meeting.¹¹ As we have previously explained, the purpose of the Sunshine period is 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.”¹² The prohibition also provides the Commissioners and staff a period to consider a fixed record, rather than continuing to analyze new data and arguments.¹³ Currently, however, the *ex parte* rules allow some *ex parte* presentations and replies to be submitted to the Commission after the “period of repose” has begun; the Commission does not apply the Sunshine prohibition to the filing of a written *ex parte* presentation or a memorandum summarizing an oral *ex parte* presentation made on the day the Sunshine notice is released (which is the day before the Sunshine period begins). In those cases, the *ex parte* filing must be submitted no later than the end of the next business day, and replies are due 24 hours after that.¹⁴

7. In its *2011 Report and Order*, the Commission amended the Commission’s *ex parte* rules to require parties to make additional disclosures in “permit-but-disclose” proceedings.¹⁵ The *Report and Order* amended the rules to require parties to file a notice in the record for every oral *ex parte* presentation—a change from the previous requirement that parties file a notice only where they presented the Commission with new data or arguments. The 2011 amendments also required more detailed disclosure in *ex parte* notices, including the identities of the parties who attended the *ex parte* meetings.¹⁶ To accommodate the additional burdens these new requirements imposed, the Commission afforded parties additional time to file *ex parte* notices.¹⁷ Importantly, the *2011 Report and Order* also allowed for replies to *ex parte* submissions to be filed during the Sunshine period for the first time.

III. DISCUSSION

8. We seek comment on three proposals: (1) exempting from our *ex parte* rules certain government-to-government consultations between Commission staff and leaders and official representatives of federally recognized Tribal Nations; (2) clarifying the *ex parte* exemption for the administrators of certain Commission programs and expanding that exemption to include the Toll-Free Numbering Administrator and the Reassigned Numbers Database Administrator; and (3) modifying the

⁸ See 47 CFR § 1.1204(a).

⁹ See 47 CFR § 1.1204(a)(12)(iii), (v).

¹⁰ See 47 CFR § 1.1203(b).

¹¹ See 5 U.S.C. § 552b(e)(1).

¹² 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).

¹³ See *Amendment of the Commission's Ex Parte Rules and Other Procedural Rules*, GC Docket No. 10-43, Notice of Proposed Rulemaking, 25 FCC Rcd 2403, 2411, para. 18 (2010).

¹⁴ See 47 CFR § 1.1206(b)(2)(iv).

¹⁵ *2011 Report and Order*, 26 FCC Rcd 4517.

¹⁶ *Id.* at 4526, para. 36.

¹⁷ *Id.* at 4532, para. 56.

filing deadlines for presentations made shortly before the beginning of the Sunshine period and replies to those presentations as set forth in section 1.1206(b)(2). We discuss these proposals in turn.

A. Exemption to *Ex Parte* Rules for Government-to-Government Tribal Consultations

9. The Commission's existing *ex parte* rules have no exemptions or provisions tailored to presentations to or from federally recognized Tribal Nations.¹⁸ Thus, in a permit-but-disclose proceeding, written presentations and summaries of oral presentations between a Tribal representative and Commission staff must be filed as prescribed in the rules, unless an exemption applies.¹⁹ In a restricted proceeding, *ex parte* presentations are forbidden, and those presentations that are permitted must be filed or summarized in the record.²⁰ In addition, the Sunshine period prohibitions apply fully to presentations to or from representatives of Tribal Nations.²¹

10. Outside the Tribal context, the Commission has created exemptions from the *ex parte* rules for communications with particular parties where the circumstances require a greater degree of confidentiality than the rules would otherwise permit. Many of these exemptions are subject to conditions appropriate to the circumstances of each exemption. For example, presentations involving a military or foreign affairs function of the United States or classified security information are exempt from disclosure requirements and Sunshine restrictions without limitation.²² Presentations to or from an agency or branch of the federal government involving a matter of shared jurisdiction with the Commission are similarly exempt, but this exemption is subject to the condition that the Commission disclose any new factual information adduced from these presentations that it relies on its decision-making.²³ In the case of presentations requested by the Commission or staff to clarify or adduce evidence or to resolve issues, any new information elicited must ordinarily be promptly disclosed, subject to certain exceptions.²⁴ In yet another variant, if an exempt presentation is made that directly relates to an emergency in which the safety of life is endangered or substantial loss of property is threatened, the presentation or a summary must be promptly placed in the record and disclosed to other parties "as appropriate."²⁵

11. The relationship between the United States Government and federally recognized Tribal Nations is unique. The federal government has a trust relationship with Indian Tribes,²⁶ and this historic

¹⁸ Throughout this Notice of Proposed Rulemaking, "Tribes" or "Tribal Nations" mean those Nations, including Alaska Native Villages, that have been granted federal recognition. See The Federally Recognized Indian Tribe List Act of 1994, Pub.L. 103-454, 108 Stat. 4791 (1994) (requiring Secretary of the Interior to publish in the Federal Register an annual list of all Indian Tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians).

¹⁹ See 47 CFR § 1.1206(b).

²⁰ 47 CFR § 1.1208; see also 47 CFR § 1.1202(b) (defining "*ex parte* presentation").

²¹ See 47 CFR § 1.1203.

²² 47 CFR § 1.1204(a)(4); see also, e.g., *id.* § 1.1204(a)(9) (presentations made pursuant to an express or implied promise of confidentiality to protect an individual from the possibility of reprisal, or where there is a reasonable expectation that disclosure would endanger the life or physical safety of an individual).

²³ 47 CFR § 1.1204(a)(5); see also *id.* § 1.1204(a)(6) (similar exemption for presentations to or from the U.S. Department of Justice or Federal Trade Commission relating to proceedings which have not been designated for hearing and in which the relevant agency is not a party or commenter).

²⁴ 47 CFR § 1.1204(a)(10)(ii), (iii).

²⁵ 47 CFR § 1.1204(a)(3).

²⁶ See, e.g., *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (citing *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831)); *United States v. Kagama*, 118 U.S. 375 (1886); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Tulee v. State of Washington*, 315 U.S. 681 (1942).

relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian Tribes.²⁷ Certain statutes also impose legal obligations on the Commission to consult with Tribal governments regarding categories of actions that could affect Tribal interests.²⁸ In recognition of this relationship, the Commission has established a policy to consult with Tribal governments, to the extent practicable, prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land and resources.²⁹ The consultation process implies a frank exchange of information and views, with the goal of reaching common understandings to the extent practicable.³⁰

12. In light of this unique relationship and to facilitate consultation, we propose to adopt a new exemption for government-to-government consultations with federally recognized Tribal Nations that relate to permit-but-disclose proceedings. While we encourage Tribal Nations and their representatives, like other parties, to file comments and reply comments that may be considered on the record in such proceedings, we recognize their interest in consulting on a government-to-government basis without concern about documenting such consultations on the rulemaking record in every case. Previously, we have modified the *ex parte* rules on a case-by-case basis in rulemaking proceedings that have significantly or uniquely affected Tribal Nations to enable government-to-government consultation outside of the public record while also ensuring that any facts and arguments on which the Commission relies in its decision-making process are placed in the record.³¹ Based on our experience in these proceedings, we now propose to codify this exemption for all permit-but-disclose proceedings. Specifically, under this proposed exemption, Commission staff and authorized representatives of Tribal governments could consult on a government-to-government basis without having to disclose the fact or content of their discussions through an *ex parte* filing in the record of any permit-but-disclose proceedings to which they relate. If, however, a Tribe were to wish the Commission to rely on views or materials presented during such consultations in its decision-making, it would need to disclose the relevant information in the record of the proceeding. If the Commission were to desire, on its own initiative, to rely on information presented during Tribal consultation, the Commission would coordinate with the Tribal government and obtain its consent to disclose such information. If such consent were denied, the Commission would forgo reliance on the information. Finally, new information could not be added to the record during the Sunshine period by a Tribal government (like any other party) unless requested or authorized by the Commission or its staff, or unless another exception were to apply.

13. We seek comment on this proposal. As an initial matter, we seek comment on whether codifying an exemption for all permit-but-disclose proceedings would be more efficient than continuing to modify the *ex parte* rules on a case-by-case basis. In particular, while not all rulemakings or other permit-but-disclose proceedings implicate issues that significantly or uniquely affect Tribal government interests, it is not always possible to predict in which proceedings such issues will arise. By proposing an exemption that would apply to all permit-but-disclose proceedings, we aim to avoid the need to promulgate special procedures during the course of a proceeding when Tribal interests come to light such that government-to-government consultation is appropriate. Furthermore, we are concerned that it may

²⁷ See, e.g., *United States v. Mitchell*, 463 U.S. 206 (1983).

²⁸ See, e.g., National Historic Preservation Act, 54 U.S.C. §§ 306102(b), 302706(b) (NHPA).

²⁹ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd 4078, 4081 (2000).

³⁰ See, e.g., 36 CFR § 800.16(f) (under the rules of the Advisory Council on Historic Preservation, “[c]onsultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process”).

³¹ See, e.g., *Accelerating Wireless Infrastructure Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, 32 FCC Rcd 3330, 3367, para. 103 (2017); *Rural Digital Opportunity Fund*, Notice of Proposed Rulemaking, 34 FCC Rcd 6778, 6811, para. 108 (2019); *Establishing a 5G Fund for Rural America*, Notice of Proposed Rulemaking, FCC 20-52, para. 211 (rel. Apr. 24, 2020).

inhibit consultation, and impose burdens on both Tribal governments and Commission staff, if the parties must be concerned about whether anything said during potentially wide-ranging consultations might implicate issues in any permit-but-disclose proceeding. We invite comment on whether an exemption applicable to all permit-but-disclose proceedings would appropriately and effectively avoid these harms. Are there offsetting considerations that counsel against applying this exemption to all permit-but-disclose proceedings? Are there any classes of rulemakings or other permit-but-disclose proceedings that should be excluded from the exemption, and if so, how can they be identified?

14. Consistent with our policy, we propose to limit the exemption to presentations in the course of consultation with leaders or authorized representatives of Tribal governments. Thus, it would not encompass presentations to or from an individual Tribal member, or an employee or official of a Tribally owned business, unless that person has been authorized by the Tribal government to represent its interests in the relevant matter.³² We seek comment on whether these conditions appropriately and sufficiently limit the scope of the exemption to government-to-government consultation. Is further specificity needed in defining the scope of the exemption, and if so, how should the definition be refined?

15. We further seek comment on our proposal that any information a Tribal government presents during an exempt consultation, including factual information, views, and arguments, would need to be disclosed on the record in order for the Commission to rely on that information when rendering a decision in any proceeding.³³ We believe this proposed disclosure requirement will ensure that our decisions are transparent and that all parties will have a reasonable opportunity to respond to information of decisional significance, as required under the Administrative Procedure Act,³⁴ while preserving the ability of Tribal governments to consult with the Commission in confidence if they so choose. Does this proposed disclosure provision effectively advance both of these ends and, if not, what alternative would serve those ends better? In addition, we propose that if the Commission wishes on its own initiative to rely on information originally presented by a Tribal Nation during exempt consultation, we would coordinate with the Tribal government before disclosing such information and would disregard any material it does not want disclosed.³⁵ We invite comment on this proposal.

16. We also seek comment on the timing of disclosure. Under the exemption that we propose, outside of the Sunshine period, Tribal governments could submit information originally presented during an exempt consultation into the record at any time. Thus, a Tribe that delays submitting such information into the record (like any party that chooses to wait until late in the process to make an *ex parte* presentation) would bear the risk of acting too late for the Commission to consider the information while affording other parties a reasonable opportunity to respond. To partially address this concern, the *ex parte* rules ordinarily require that a permissible written presentation, or a written summary of an oral presentation, be included in the record within a specified period of time after the presentation is made, usually two business days.³⁶ Should we similarly require that, in order to be considered, information must be submitted in the record within some time period after it is presented in consultation? If so, what should that time period be, and how might we best administer the requirement given that the same information

³² It also would not encompass a presentation to or from a Tribal government official that is not in the nature of consultation; *i.e.*, involving a matter significantly or uniquely affecting the Tribal government, its land and resources. For example, it would not include a presentation by a Tribal leader regarding the leader's personal financial interests.

³³ To the extent otherwise permitted under our rules, a Tribal Nation could submit confidential materials in the record with a request that they be withheld from public inspection. *See* 47 CFR § 1.1206(b)(2)(ii). Nothing in our proposal is intended to modify or restrict the availability of this procedure.

³⁴ 5 U.S.C. §§ 551 *et seq.*

³⁵ We note that our rules require a similar procedure with respect to federal agencies with which we share jurisdiction, the U.S. Department of Justice, and the Federal Trade Commission. *See* 47 CFR § 1.1204(a) Note 1.

³⁶ *See* 47 CFR § 1.1206(b)(2)(iii).

may be presented in multiple consultation sessions? Would such a requirement inhibit consultation by forcing Tribal governments to consider whether, by presenting information and views during consultation and not promptly submitting them in the record, they might preclude future consideration of such information and views as part of the Commission's decision-making process?

17. During the Sunshine period, however, we propose a different regime. Specifically, we propose that Commission officials and Tribal government representatives be permitted to continue consulting during the Sunshine period. However, unless another exemption applies, information presented during such consultation could be submitted into the record, and relied upon by the Commission, only if the Commission or its staff either requests its submission or approves its submission upon a Tribe's request.³⁷ Similarly, information presented prior to the Sunshine period in the course of exempt consultation could be entered into the record during the Sunshine period only upon the Commission's request or with its approval. We believe this proposal will advance both the Commission's policy of consulting with Tribal Nations regarding their interests and the policy underlying the Sunshine rules to afford a period of repose in the record before major decisions are made. We seek comment on this proposal. Would any other rule better balance the policy considerations underlying both government-to-government consultation and the Sunshine period?

18. We do not propose to extend any exemption from the *ex parte* rules for presentations made in government-to-government consultation to restricted proceedings. We recognize that adjudications or other restricted proceedings may significantly affect the governments, land, and resources of individual Tribal Nations. For example, a contested licensing proceeding may overlap with consideration of the effects of an undertaking on a historic property of traditional religious and cultural importance to one or more Tribal Nations, which requires consultation under the NHPA.³⁸ Nonetheless, we believe that the nature of private party interests in many restricted proceedings, for example, license application proceedings, counsels against routinely permitting undisclosed consultations that may bear upon the issues in those proceedings.³⁹ We seek comment on this analysis. Is there any objectively identifiable subset of restricted proceedings for which the benefits of undisclosed consultation outweigh the potential for harm?

19. To be clear, although we are not proposing any general exemption applicable to restricted proceedings, Commission staff would retain flexibility in specific proceedings to modify the applicable *ex parte* rules in the public interest.⁴⁰ For example, staff could designate an otherwise restricted proceeding as permit-but-disclose. Under the exemption that we propose, such designation would both enable Commission staff to engage in dialogue with Tribal governments and other entities without inviting other parties to be present, subject to disclosure, and allow undisclosed consultation with Tribal governments, provided the Commission does not rely in rendering its decisions on any undisclosed information presented.⁴¹ Alternatively, or in addition, members of the Office of Native Affairs and Policy, or other Commission staff, could be designated as non-decisionmakers in any proceeding. This designation would allow the separated staff to communicate with Tribal government representatives outside of the *ex parte* restrictions, but they would not be able to have *ex parte* communications with decision-making staff

³⁷ See 47 CFR § 1.1204(a)(10)(iv).

³⁸ See 54 U.S.C. §§ 302706(b), 306102(b)(4).

³⁹ A Tribal Nation could request confidential treatment for material submitted into the record of a restricted proceeding to the extent permitted under our rules. See 47 CFR §§ 0.457, 0.459.

⁴⁰ See 47 CFR § 1.1200(a).

⁴¹ See 47 CFR § 1.1208(a) (prohibition of *ex parte* presentations in restricted proceedings applies “[u]nless otherwise provided by the Commission or its staff pursuant to § 1.1200(a)”).

except as otherwise permitted.⁴²

20. We believe that given the unique nature of each restricted proceeding, it will be most efficient for staff to continue modifying the *ex parte* rules as needed on a case-by-case basis. We seek comment on this tentative conclusion and on whether we should instead promulgate rules or guidelines. For example, should any class of proceedings that is currently restricted be presumptively designated permit-but-disclose so as to facilitate government-to-government consultation? Should we designate the Office of Native Affairs and Policy as presumptively separated staff in restricted proceedings, or some subset of restricted proceedings, so that they can speak off the record with Tribal Nations but cannot communicate with decision-making staff except to the extent permitted under the *ex parte* rules? Instead of *ex ante* rules, should we issue guidelines to inform staff in exercising their discretion whether to modify the *ex parte* rules for any particular restricted proceeding?

21. Finally, we recognize that our rules governing Tribal consultation and Tribal participation in Commission proceedings themselves significantly or uniquely affect Tribal governments, their land and resources. We therefore direct the Office of Native Affairs and Policy, Consumer and Governmental Affairs Bureau, to arrange opportunities for consultation appropriate to the nature and circumstances of this proceeding. In addition, to facilitate consultation, we modify the *ex parte* rules for this proceeding as described in the Procedural Matters section of this Notice.

B. Exemption for Presentations Between Commission Staff and Program Administrators

22. We also seek comment on two proposed revisions to section 1.1204(a)(12) of the rules. That section currently classifies as exempt presentations between Commission staff and the Interstate Telecommunications Relay Services Fund administrator, the North American Numbering Plan Administrator, the Universal Service Administrative Company, the Local Number Portability Administrator, the TRS Numbering Administrator, and the Pooling Administrator relating to their administrative functions. The exemption permits the various administrators to engage in the frequent and close communications with Commission staff necessary to exercise their administrative functions efficiently.

23. We propose that the exemption be expanded to include the Toll-Free Numbering Administrator and the Reassigned Numbers Database Administrator. The relationship between the Toll-Free Numbering Administrator and the Commission in the administration of the Toll-Free Number Database is substantially the same as that of the other administrators to the Commission in the performance of their administrative responsibilities. Likewise, the relationship between the Reassigned Numbers Database Administrator and the Commission in the administration of the Reassigned Numbers Database is substantially the same as that of the other administrators to the Commission in the performance of their administrative responsibilities. Accordingly, we believe that presentations involving the Toll-Free Numbering Administrator and Reassigned Numbers Database Administrator should be treated the same as those involving the other administrators. We propose to amend section 1.1204(a)(12) accordingly, and we seek comment on this proposal. Should the Toll-Free Numbering Administrator and the Reassigned Number Database Administrator be included among those subject to the exemption? Are there other administrators that should also be included?

24. As a related matter, in reviewing section 1.1204(a)(12), we note an anomaly. As applied to five of the six administrators covered, the exemption is categorical. However, section 1.1204(a)(12)(iv) applies only if the Local Number Portability Administrator “has not filed comments or otherwise participated in the proceeding.”

25. We can think of no reason to treat one administrator differently from the others and

⁴² See 47 CFR § 1.1202(c) (“[a]ny person who has been . . . excluded from the decisional process shall not be treated as a decisionmaker with respect to that proceeding”).

attribute the discrepancy to an apparent oversight. When we enacted the first four subsections of the rules, we intended the caveat to apply to all the administrators.⁴³ Consistent with this intent, the caveat was drafted to apply to “the relevant administrator” and was apparently intended to follow, but not to be part of, what was then the final subsection of section 1.1204(a)(12). Subsequently, however, when the final two administrators were added, the caveat was not moved to the end of the subsection, making it appear that the caveat applied only to the Local Number Portability Administrator.

26. We believe that applying the caveat to all the administrators would both effectuate our original intent and constitute sound policy. It is consistent with the overall philosophy of the *ex parte* rules to distinguish between situations in which an administrator is acting as a consultant or co-decisionmaker and situations in which the administrator is acting as a party. Except where there is an overriding reason to do so, the *ex parte* rules generally do not treat presentations involving a party as exempt. We therefore propose to revise the rule to make clear that the caveat is applicable to all the administrators. We seek comment on this proposal. Should the exclusion from the exemption for filing comments or otherwise participating as a party be applied to all administrators? Alternatively, should the exclusion be eliminated? Is there any reason to treat one administrator differently from another?

C. Amendment to Commission’s Sunshine Period *Ex Parte* Rules

27. A Sunshine Agenda or Sunshine notice is typically released seven days before a Commission meeting and lists the items that will be presented to the Commission.⁴⁴ The period between the release of the Sunshine Agenda and the Commission meeting is intended to provide decision-makers a “period of repose” during which they can consider the upcoming items free from outside interruptions.⁴⁵ Although the Commission intended to establish a week-long “period of repose,” the existing rules do not in fact ensure a week-long period without changes to the record. Generally, the Commission prohibits *ex parte* communications made during the Sunshine period.⁴⁶ As an exception to the rule, however, the Commission does not apply the Sunshine prohibition to the filing of a written *ex parte* presentation or a memorandum summarizing an oral *ex parte* presentation made on the day the Sunshine notice is released. In those cases, the *ex parte* filing must be submitted no later than the end of the next business day, and replies are due 24 hours after that.⁴⁷ For example, assume a party makes an *ex parte* presentation in a permit-but-disclose proceeding to a Commissioner on a Friday. That same day, the Commission’s Secretary releases the Sunshine Agenda for the next Commission meeting and that proceeding appears on the Agenda. The Sunshine period begins as of Saturday, and therefore the presenting party must file its *ex parte* notice by the end of the day (11:59:59 p.m.) on Monday, the next business day. Importantly, an entity making an *ex parte* presentation two days before the start of Sunshine would also have to submit its *ex parte* notice by the end of the day that the Sunshine period begins. Using the example from the text above, if an *ex parte* presentation is made on a Thursday and the Sunshine period begins Saturday, the *ex parte* notice would have to be submitted by 11:59:59 p.m. on Monday. In either event, a reply would be due by the end of the day (11:59:59 p.m.) on Tuesday. Importantly, if an *ex parte* notice is filed at 11:59:59 p.m. on Tuesday, it will not be available to Commission staff and the public until early Wednesday morning.

28. Given that filings vital to the proceeding may not be available to Commission staff and

⁴³ See *Amendment of 47 C.F.R. 1.1200 et seq.*, 14 FCC Rcd 18831, 18538-39, para. 30 (1999) (“We will amend the *ex parte* rules to provide expressly that presentations between Commission staff and the administrators are exempt, provided that the relevant administrator has not filed comments or otherwise participated as a party in the proceeding.”).

⁴⁴ *2011 Report and Order*, 26 FCC Rcd at 4527 n.38.

⁴⁵ *Id.*

⁴⁶ See 47 CFR § 1.1203(a)

⁴⁷ See 47 CFR § 1.1206(b)(2)(iv).

the public until well into the “period of repose,” the Commission and its staff have periodically encountered challenges fully evaluating all relevant filings in the limited time before a Commission meeting. Similarly, we expect that the effective shortening of the period of repose may limit the ability of members of the public fully to evaluate the record. As a result, we propose to require parties to file *ex parte* notices of all presentations, other than presentations permissibly made during the Sunshine period pursuant to some other exception, before the Sunshine period begins, with replies due 24 hours after that.⁴⁸ Because the dates of Commission Open Meetings are publicly available, and because the Sunshine notice is routinely released seven days before the Commission meeting, we expect parties will know ahead of time whether their *ex parte* meetings will fall on the date before the Sunshine period is due to begin, and thus have foreknowledge that their *ex parte* notices would be due at the end of that day. Furthermore, given the Commission’s practice of announcing the tentative agenda and releasing draft items three weeks before the meeting date, parties should have ample time to prepare their arguments and schedule meetings earlier than the last permissible date if they choose to do so.

29. We seek comment on our proposal. For example, will ensuring a more complete “period of repose” better enable Commission staff and the public to evaluate the record and the relevant issues, thereby leading to better and more informed decisions? What steps, if any, should the Commission take to ensure that parties making presentations to the Commission on the day before the Sunshine period begins are aware that they must file their *ex parte* notices in a timely manner? Will requiring that *ex parte* notices be submitted before the Sunshine period begins be unduly burdensome for parties meeting with the Commission? Assuming this rule is adopted, if a party fails to submit an *ex parte* notice by the required time, should the party be sanctioned by the Commission or should its notice not be included in the record?

IV. PROCEDURAL MATTERS

30. *Paperwork Reduction Act Analysis.*—This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

31. *Regulatory Flexibility Act.* This proposed action does not require notice and comment,⁴⁹ and therefore falls outside of the Regulatory Flexibility Act of 1980, as amended.⁵⁰

32. *Filing Requirements.*—Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 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). *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://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each

⁴⁸ Here, we apply the prior example to the proposed rule change. A party makes an *ex parte* presentation in a permit-but-disclose proceeding to a Commissioner on a Friday. That same day, the Commission’s Secretary releases the Sunshine Agenda for the next Commission meeting and that proceeding appears on the Agenda. The Sunshine period begins as of Saturday (*see* 47 CFR § 1.1203(b)), and therefore the presenting party must file its *ex parte* notice by the end of the day (11:59:59 p.m.) on Friday. A reply would be due by the end of the day (11:59:59 p.m.) on Monday (*see* 47 CFR § 1.4(j)).

⁴⁹ *See supra* note 1.

⁵⁰ *See* 5 U.S.C. §§ 601(2), 603(a).

filing.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID-19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy*, Public Notice, DA 20-304 (March 19, 2020). <https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy>.
- During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

33. *People with Disabilities*.—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).

34. *Availability of Documents*.—Comments, reply comments, and *ex parte* submissions will be publicly available online via ECFS.⁵¹

35. *Ex Parte Presentations*.—This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission's *ex parte* rules.⁵² Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 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, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

36. In light of the Commission's trust relationship with Tribal Nations and our commitment to engage in government-to-government consultation with them, we find the public interest requires a limited modification of the *ex parte* rules in this proceeding.⁵³ Tribal Nations, like other interested

⁵¹ Documents will generally be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

⁵² 47 CFR §§ 1.1200 *et seq.*

⁵³ *See id.* § 1.1200(a).

parties, should file comments, reply comments, and *ex parte* presentations in the record to put facts and arguments before the Commission in a manner such that they may be relied upon in the decision-making process consistent with the requirements of the Administrative Procedure Act.⁵⁴ However, at the option of the Tribe, *ex parte* presentations made during consultations by elected and appointed leaders and duly appointed representatives of federally recognized Indian Tribes and Alaska Native Villages to Commission decision makers shall be exempt from the rules requiring disclosure in permit-but-disclose proceedings⁵⁵ and exempt from the prohibitions during the Sunshine Agenda period.⁵⁶ To be clear, while the Commission recognizes consultation is critically important, we emphasize that the Commission will rely in its decision-making only on those presentations that are placed in the public record for this proceeding.

37. *Additional Information.*—For additional information on this proceeding, contact Max Staloff, (202) 418-1764.

V. ORDERING CLAUSES

38. IT IS ORDERED, pursuant to the authority found in 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 this *Notice of Proposed Rulemaking* IS HEREBY ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁴ 5 U.S.C. §§ 551 *et seq.*

⁵⁵ *See generally* 47 CFR § 1.1206.

⁵⁶ *See id.* § 1.1203.

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: 47 U.S.C. 151, 154(i), 154(j), 155, 157, 160, 201, 225, 227, 303, 309, 310, 332, 1403, 1404, 1451, 1452, and 1455.

2. Section 1.1204 is amended by revising the introductory paragraph of paragraph (a)(12) and paragraphs (a)(12)(iii), (iv), (v), and (vi), adding new paragraphs (a)(12)(vii) and (viii), and adding new paragraph (a)(13) to read as follows:

§ 1.1204 Exempt ex parte presentations and proceedings.

(a) Exempt ex parte presentations. The following types of presentations are exempt from the prohibitions in restricted proceedings (§ 1.1208), the disclosure requirements in permit-but-disclose proceedings (§ 1.1206), and the prohibitions during the Sunshine Agenda period prohibition (§ 1.1203):

(12) The presentation is between Commission staff and any of the following administrators relating to the following subjects, *provided that* the relevant administrator has not filed comments or otherwise participated as a party in the proceeding:

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

(iv) The Local Number Portability Administrator relating to the administration of local number portability pursuant to 47 U.S.C. 251(b)(2) and (e);

(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);

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

(vii) The Toll-Free Numbering Administrator relating to the administration of Toll-Free Number Database pursuant to 47 U.S.C. 251(e); or

(viii) The Reassigned Numbers Database Administrator relating to administration of the Reassigned Numbers Database pursuant to [47 CFR 64.1200(l)-(m)].

(13)(i) The presentation is in a permit-but-disclose proceeding and is made in the course of government-to-government consultation between a representative of the Commission and an elected or appointed leader or duly authorized representative of the government of a federally recognized Tribal Nation, *provided that* the Commission may not rely in its decision-making process on any such presentation that is not disclosed in the record, either by the Tribal government or by the Commission after coordination pursuant to paragraph (a)(13)(iii) of this section.

(ii) A presentation made pursuant to paragraph (a)(13) of this section may be disclosed on the record during the period of the Sunshine Agenda prohibition, and relied upon by the Commission, only at the request of or with the advance approval of the Commission pursuant to paragraph (a)(10) of this section,

unless permitted under another exception.

(iii) The Commission will disclose a presentation made under paragraph (a)(13) of this section or information obtained through such a presentation only after advance coordination with the Tribal government involved in order to ensure that the Tribal government involved retains control over the timing and extent of any disclosure that may have an impact on that Tribal government's jurisdictional responsibilities. If the Tribal government involved does not wish such presentation or information to be disclosed, the Commission will not disclose it and will disregard it in its decision-making process, unless it fits within another exemption not requiring disclosure. The fact that a Tribal government's views are disclosed under paragraph (a)(13) does not preclude further discussions pursuant to, and in accordance with, the exception.

3. Section 1.1206 is amended by revising paragraph (b)(2)(iv) to read as follows:

§ 1.1206 Permit-but-disclose proceedings.

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

(2) Written and oral presentations. A written *ex parte* presentation and a memorandum summarizing an oral *ex parte* presentation (and cover letter, if any) shall clearly identify the proceeding to which it relates, including the docket number, if any, and must be labeled as an *ex parte* presentation. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and, accordingly, must be filed consistent with the provisions of this section. Consistent with the requirements of § 1.49 paragraphs (a) and (f), additional copies of all written *ex parte* presentations and notices of oral *ex parte* presentations, and any replies thereto, shall be mailed, e-mailed or transmitted by facsimile to the Commissioners or Commission employees who attended or otherwise participated in the presentation.

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

Example 1: On Tuesday, a party makes an *ex parte* presentation in a permit-but-disclose proceeding to a Commissioner. That same day, the Commission's Secretary releases the Sunshine Agenda for the next Commission meeting and that proceeding appears on the Agenda. The Sunshine period begins as of Wednesday, and therefore the presenting party must file its *ex parte* notice by the end of the day (11:59:59 p.m.) on Tuesday. A reply would be due by the end of the day (11:59:59 p.m.) on Wednesday.

Example 2: On Monday, a party makes an *ex parte* presentation in a permit-but-disclose proceeding to a Commissioner. On Tuesday, the Commission's Secretary releases the Sunshine Agenda for the next Commission meeting and that proceeding appears on the Agenda. The Sunshine period begins as of Wednesday, and therefore the presenting party must file its *ex parte* notice by the end of the day (11:59:59 p.m.) on Tuesday. A reply would be due by the end of the day (11:59:59 p.m.) on Wednesday.