

***Resolution Urging Congress to Improve Fairness in the Federal Communications
Commission's Informal Rulemaking Procedures***

WHEREAS, The Federal Communications Commission's (FCC) recent Connect America Fund (CAF) proceeding documents the agency's historical practice of "rulemaking by *ex parte* communication," where (a) public comments are often largely ignored and input is provided after the close of the notice-and-comment period, sometimes through undisclosed communications; (b) those involved then file a proposed "plan" in the record (mirroring the discussions), which is then noticed for further comment; (c) private meetings with FCC personnel intensify just before the Commission votes on the final rule, which limits the opportunities for any response from opposing interests; and (d) the final rule may not be released until days or even weeks later to allow staff to draft the rule to reflect last-minute negotiations; *and*

WHEREAS, FCC staff also supplements the rulemaking record with extensive lists of materials that may be relied upon without adequate opportunity for response; *and*

WHEREAS, Prior to and during the lengthy CAF proceeding, the State Members of the Federal-State Joint Board on Universal Service asked that federal USF high-cost reform be referred to the Board for a recommended decision because of the major changes suggested by, *inter alia*, the National Broadband Plan, but the Commission did not do so; *and*

WHEREAS, The November 2011 CAF *Order* also changed the FCC's Part 36 rules without complying with the Communications Act's mandate (47 U.S.C. § 410(c)) for a referral to the Separations Joint Board; *and*

WHEREAS, Even where such referrals for State commissioner and consumer input are not required, they are always prudent prerequisites to FCC action; *and*

WHEREAS, Fairness is fatally compromised when written comments may be negated by one-sided proposals advanced privately without fear of contrary argument; *and*

WHEREAS, Additional federal procedural rules are essential to revise the FCC's procedures to eliminate some of these practices and also assure that States are positioned to provide crucial record input as a basis for FCC decisions; *now therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2013 Winter Meetings in Washington, D.C., adopts the attached *White Paper on Key FCC Procedural Reforms*, and urges Congress to restrict oral and written communications of significant data or argument regarding the merits to agency personnel participating in decisions on a proposed rule following closure of the comment period, by adopting one or more of the following:

1. Specifying that the FCC cannot defend its decisions based on evidence not filed or incorporated by reference in the record of the proceeding even if the evidence is otherwise publicly available;
2. Revising the FCC's informal rulemaking procedures to require:

- Written responses to Notices of Inquiry and Notices of Proposed Rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. § 553, with all written comments and evidence of central relevance to the rulemaking docketed and posted on the agency’s website as soon as possible after filing, except for data exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552;
 - A prohibition on late-filed written responses following expiration of the comment period except for (a) good cause shown after notice and opportunity for opposing views, with timely “placeholder” comments followed by more substantive late-filed comments prohibited, and (b) responses to requests from FCC personnel, which shall be made in the form of ever-narrowing directed written questions, all filed in the public record, subject to FOIA disclosure exemptions;
 - A prohibition on oral *ex parte* communications after the comment period closes except for APA §553(c) oral presentations in public meetings scheduled to hear (a) elaborations/clarifications of written comments, (b) responses to FCC directed written questions, and (c) responses to questions posed by interested persons seeking to resolve, narrow, or clarify disputed issues, with the meetings webcasted and the hearing transcripts promptly posted on the Commission’s website, subject to FOIA disclosure exemptions;
 - Upon petition and for good cause shown, after notice and opportunity for opposing views, allowance of cross-examination by interested persons on factual allegations in oral or written communications;
 - Designation in the concise general statement of the final rule’s basis and purpose under APA § 553(c) of those parts that resulted from *ex parte* communications, with further designation of the person who made the communication and the time that the communication was made; *and*
 - Restriction of the record exclusively to the information required by APA § 553(b) and the required or permitted material/presentations discussed above, excluding any information or data disclosed by interested parties or agency personnel so close to the Sunshine Period as to prevent a meaningful opportunity for interested parties to respond through meetings or written communications.
3. Creating a better record for agency decisions assuring crucial State input by strengthening the Federal-State Joint Boards on Separations and Universal Service by:
- Requiring mandatory referrals for recommendations on all matters that significantly affect the definition, composition, funding, or use of the services that are supported by federal universal service support mechanisms and clarifying that failure to make mandatory referrals shall nullify any resulting promulgated rule;
 - Requiring both the FCC and State Members of the Joint Boards annually report to the appropriate congressional oversight committees on the frequency and substance of the discussions held and the results achieved from deliberations under 47 U.S.C. § 410(c); *and*

- Requiring two separate line items in the FCC's budget, of at least \$150,000 per annum (to be adjusted every year by the CPI) for each Joint Board to ensure State members have needed funding for meeting and travel costs, expert assistance, and discovery expenses.

Sponsored by the Committee on Telecommunications

Adopted by the NARUC Board of Directors, February 6, 2013

White Paper on Key FCC Procedural Reforms

Ex Parte Communications and the FCC's Connect America Fund Proceeding

The powers of the national government are limited by the principle of dual sovereignty in which two governments share power under federalism, with each operating within its respective sphere of sovereignty.¹ This principle of dual sovereignty, reflected in federalism and the Tenth Amendment, prevents the States from being treated as administrative agents of the federal government, “commandeered” into federal service. Congress may entice voluntary participation by the States so long as there is no direct or indirect coercion.² The “Constitution simply does not give Congress the authority to require the States to regulate”³ in strict accordance with some prescribed federal system, and “[t]hat is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.”⁴ The FCC—a creature of Congress—in its Connect America Fund (CAF) *Order*⁵ usurped the States’ intrastate access charge ratemaking role and “conscript[ed] state [utility commissions] into the [FCC’s] national bureaucratic army”⁶ for the implementation and enforcement of the *Order*’s explicit directives, assigning to the States “a critical role implementing and enforcing intercarrier compensation reforms” that the *Order* directs,⁷ and requiring State review and approval of numerous amended carrier interconnection agreements necessitated by the FCC’s changes to intrastate intercarrier compensation.⁸

As the CAF informal rulemaking proceeding⁹ amply demonstrated, the culture at the FCC is one of “rulemaking by *ex parte* communication.” Public comments in response to a

¹ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566, 2602, 2603 (2012) (*NFIB*).

² *Id.*, 132 S. Ct. at 2602.

³ *New York v. United States*, 505 U.S. 144, 178 (1992).

⁴ *NFIB*, 132 S. Ct. at 2602.

⁵ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, Report and Order and Further Notice of Proposed Rulemaking, released Nov. 18, 2011, 26 FCC Rcd. 17663 (2011).

⁶ *NFIB*, 132 S. Ct. at 2607 (quoting *FERC v. Mississippi*, 456 U.S. 742, 775 (1982) (O’Connor, J. concurring in judgment in part and dissenting in part)).

⁷ *Order* ¶ 813, slip op. at 277, 26 FCC Rcd. 17940.

⁸ *Order* ¶ 815, slip op. at 277-278, 26 FCC Rcd. 17940-17941.

⁹ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-

Notice of Proposed Rulemaking are often largely ignored, either because the Commission has predetermined its course of action,¹⁰ or because the valued input, typically from the largest, financially strongest, and most politically powerful interests, is provided in post-comment period *ex parte* communications (e.g., helpful arguments and rationales, data, calculations, tariffs, and implementing language supportive of their proposals). After the close of the notice-and-comment period, extensive, undisclosed conversations are held between FCC personnel and outside interests.¹¹ The outside interests then file a proposed “plan” (mirroring the results of these discussions) to resolve the rulemaking, which is then noticed for further comment (with a short comment period), perhaps with the inclusion of other suggested proposals submitted during the comment period.¹² To implement the previously agreed upon course of action, such

51, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554 (2011) (also referred to as the *USF/ICC Transformation NPRM*).

¹⁰ In this case, substantially implementing the National Broadband Plan. Federal Communications Commission, *Connecting America: The National Broadband Plan* (rel. Mar. 16, 2010). See also the FCC-issued staff working paper upon which the National Broadband Plan relied, the “Broadband Availability Gap,” a cost estimate for supporting broadband in unserved areas of the country. Omnibus Broadband Initiative, *The Broadband Availability Gap: OBI Technical Paper No. 1* (April, 2010).

¹¹ See, e.g., in the CAF (or *USF/ICC Transformation NPRM*) proceeding, the Motion of the National Association of Regulatory Utility Commissioners for Extension of Time, Aug. 5, 2011, at 4 (“The industry has been briefing the FCC for literally months on the discussions that led to the filing of the ABC proposal. However, though apparently, quite a bit of detail of the proposals was relayed to FCC representatives, absolutely no detail was included in any of the *ex parte* notices. See, e.g., the April 27, 2011 notice of *ex parte* contacts involving Windstream, AT&T, Verizon, Frontier and Fairpoint, filed by Jonathan Banks, available online at:

<http://fjallfoss.fcc.gov/ecfs/document/view?id=7021341228>.”).

<http://apps.fcc.gov/ecfs/document/view?id=7021700813>.

¹² On July 29, 2011, beyond the comment period, the US Telecom Association, on behalf of AT&T, Verizon, CenturyLink, Windstream, Frontier, FairPoint Communications, and three rural telephone trade associations, after prior verbal consultation with the FCC, advanced their “America’s Broadband Connectivity Plan” (ABC Plan). During the comment period, the State Members of the Federal-State Board on Universal Service filed their State Plan, and the Joint Rural Associations filed their RLEC Plan.

<http://apps.fcc.gov/ecfs/document/view?id=7021698690>;

<http://apps.fcc.gov/ecfs/document/view?id=7021698691>;

<http://apps.fcc.gov/ecfs/document/view?id=7021698692>;

<http://apps.fcc.gov/ecfs/document/view?id=7021698693>;

<http://apps.fcc.gov/ecfs/document/view?id=7021698694>;

<http://apps.fcc.gov/ecfs/document/view?id=7021698695>;

<http://apps.fcc.gov/ecfs/document/view?id=7021698696>.

The ABC Plan contained multiple parts, including a “Consumers Benefits Paper,” a “Legal Authority White Paper,” and the summary results of a sophisticated computer model for deriving federal USF support levels and broadband deployment—the CostQuest Associates Broadband Analysis Tool (CQBAT model).

On August 3, 2011 – *only three business days after the ABC Plan submission* – the FCC published a 19-page Notice establishing the extremely abbreviated deadlines of August 24, 2011, for the submission of initial further comments and the subsequently modified deadline of September 6, 2011, for the filing of further reply comments on the ABC Plan, the State Plan, and the RLEC Plan. The FCC also

meetings intensify just before the Commission votes on the final rule, with the effect of restricting or entirely preventing adequate responses by other interested parties.¹³ To incorporate

propounded a number of questions in its August 3, 2011 Notice. FCC Public Notice, *Further Inquiry into Certain Issues in the Universal Service Intercarrier Compensation Proceeding*, WC Docket No. 10-90 *et al.*, DA 11-1348, released Aug. 3, 2011: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1348A1.pdf; *In re Connect America Fund, et al.* (FCC, August 29, 2011), WC Docket No. 10-90 *et al.*, Order by the Chiefs of the Wireless Telecommunications Bureau and Wireline Competition Bureau, DA 11-1471, released Aug. 29, 2011: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1471A1.pdf.

The CQBAT model was made available only on the industry consultant's computer in Cincinnati, Ohio, for a fee, and only after signing a confidentiality agreement that severely limited the use of any results obtained. The FCC subsequently abandoned reliance on this model and sought comment on the appropriate model, but interested persons were required to respond to the model during the thirty-four-day abbreviated comment period. *See* National Association of Regulatory Utility Commissioners (NARUC), WC Docket No. 10-90 *et al.*, Corrected *Ex Parte*, September 26, 2011, and accompanying affidavit of Dr. Robert Loube: <http://apps.fcc.gov/ecfs/document/view?id=7021711172>; <http://apps.fcc.gov/ecfs/document/view?id=7021711173>; <http://apps.fcc.gov/ecfs/document/view?id=7021711174>; <http://apps.fcc.gov/ecfs/document/view?id=7021711175> (Dr. Loube Affidavit).

On October 27, 2011, the FCC adopted, with only slight modifications, most of the major points of the ABC Plan.

The time frame for interested persons to assess, procure expert analysis, and even to access the proposed computer model for determining the level of federal USF support was grossly inadequate. Moreover, the FCC requested comments on the three enormously complex proposals without ever stating that one, or some combination thereof, would encompass its final rules.

¹³ On September 28, 2011, the proponents of the ABC Plan apparently felt confident enough with the outcome that they filed an *ex parte* discussion draft of rules to implement universal service components of the ABC Plan and informed the Commission that the Coalition “continues its work on drafting proposed rules to implement the ABC Plan’s transitional access replacement mechanism and the intercarrier compensation components of the ABC Plan.” <http://apps.fcc.gov/ecfs/document/view?id=7021711629>.

On October 20, 2011, Verizon disclosed its October 19, 2011 telephone conversation with the FCC General Counsel regarding the access recovery charge (ARC). <http://apps.fcc.gov/ecfs/document/view?id=7021716010>. The FCC materially relied on this disclosed October 19, 2011 *ex parte* telephone conversation in its final *Order* adopted on October 27, 2011, and provided holding companies with the freedom to allocate ARC amounts among their subsidiary ILECs operating in various States as they saw fit. *Order* ¶ 910, slip op. at 326 n.1791, 26 FCC Rcd. 17990.

On October 21, 2011 (the first day of the “Sunshine” or blackout, period before the Commission’s vote), Verizon electronically submitted two *ex parte* disclosures, including one of a meeting with an FCC Commissioner to “discuss the [FCC] draft universal service and intercarrier compensation reform order *now circulating*, as well as America’s Broadband Connectivity Plan submitted by a coalition of companies including Verizon.” (Emphasis added.) <http://apps.fcc.gov/ecfs/document/view?id=7021717159> (discussing FCC elimination of “legacy ‘eligible telecommunications carrier’ universal service obligations for voice services when the [FCC] eliminates high-cost support to particular carriers,” or State regulated carrier of last resort or COLR obligations); <http://apps.fcc.gov/ecfs/document/view?id=7021717208> (“In particular we discussed potential application of... sections 251 and 252 of the Act under the [ICC] system contemplated by the draft order now circulating” and “the potential role of both the FCC and state commissions, the jurisdiction of traffic

these last minute one-sided “suggestions,” the final rule may not be released until days or weeks after the vote in order to allow FCC staff to draft the rule suitably.¹⁴

The Need to Assure Informed State Input in the Record for FCC Decisionmaking

In discussions with the FCC commissioners prior to and during the CAF proceeding, the State Members of the Federal-State Joint Board on Universal Service¹⁵ requested that the issue of federal USF high-cost reform be referred for recommended decision because of the major changes suggested by, *inter alia*, the National Broadband Plan, but the Commission did not do so. Also, suggested major revisions to the universal service concept, including support for broadband-capable networks, were not referred for a recommendation of the Joint Board. 47 U.S.C. §§ 254(c)(1)(C) & 254(c)(2). The CAF *Order* also changed the FCC’s Part 36 rules without complying with 47 U.S.C. § 410(c)’s mandate for a specific referral to the Separations Joint Board and a recommended decision as a basis for such change.¹⁶ Referrals for State

(including VoIP traffic)... We also discussed the need for default intercarrier compensation rates that apply on a uniform basis across states.”).

AT&T alone made five *ex parte* submissions dated October 21, 2011, on vital issues that were reflected in the final *Order*, including intercarrier compensation (ICC), quantitative analysis of high-cost support through the federal USF mechanism, the upper limit for the federal subscriber line charge (SLC), and potential Commission-prescribed obligations for eligible telecommunications carriers (ETCs).

<http://apps.fcc.gov/ecfs/document/view?id=7021716987> (October 20, 2011, AT&T meeting with Office of FCC Commissioner Robert McDowell — “We urged the [FCC] to reform the federal obligations associated with [ETCs] to ensure that ETC obligations exist only in areas and for entities that receive funding from the [USF]”);

<http://apps.fcc.gov/ecfs/document/view?id=7021717080> (October 20, 2011, AT&T meeting with Office of FCC Commissioner Michael Copps);

<http://apps.fcc.gov/ecfs/document/view?id=7021716864> (October 20, 2011, AT&T meeting with Office of FCC Commissioner Mignon Clyburn);

<http://apps.fcc.gov/ecfs/document/view?id=7021716846> (October 19, 2011, AT&T and other ABC Plan coalition members meeting with FCC Wireline Competition Bureau and Office of General Counsel Staff — distribution of interim \$300 million CAF support, use of regression analysis for this purpose for price cap carriers, accompanying regression analysis statistical results table);

<http://apps.fcc.gov/ecfs/document/view?id=7021716814> (October 19, 2011, AT&T and other ABC Plan coalition members telephone conference with FCC Wireline Competition Bureau and Office of General Counsel Staff — “We recommended that the [FCC] treat residential and business lines the same for purposes of allocating revenues rebalanced from access charges to end user charges, and we urged the [FCC] to set an upper limit of \$11 on subscriber line charges”).

¹⁴ The Commission voted only six days after the Sunshine Period began, but its staff continued to draft the 751-page *Order* for another twenty-two days, ample time to take into account the last minute suggestions made by Verizon and AT&T.

¹⁵ See 47 U.S.C. § 254(a).

¹⁶ Part 36 of the FCC’s rules (47 C.F.R. §36.1 *et seq.*) implements the requirement that a carrier’s revenues and costs must be split between State and federal jurisdictions. The *Order*, at Appendix A (pp. 495-499), revises Part 36 rules that impact intrastate revenue requirements without a referral to the Separations Joint Board on the changes and a recommended decision mandated by 47 U.S.C. §410(c).

commissioner and consumer advocate input even where not required,¹⁷ are prudent prerequisites to FCC action.

***The Corrosive Effect on Fairness of Undisclosed, Inadequately Disclosed,
and 11th Hour Disclosed Ex Parte Communications***

As noted by former FCC Commissioner Glen O. Robinson, “*Ex parte* contacts are an old problem for the FCC.”¹⁸ The FCC’s long history of “backdoor” rulemaking has prompted substantial federal appellate court criticism.¹⁹ Indeed, the D.C. Circuit, in *Home Box Office*

¹⁷ Communications Act § 410(a) provides generally for discretionary (“may”) FCC-institution of a “joint board” and referral of “any matter arising in the administration of this Act” to the joint board. Section 410(c) provides for mandatory (“shall”) referral “regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations” and discretionary (“may”) referral of “any other matter, relating to common carrier communications of joint Federal-State concern, to a Federal-State Joint Board.” Section 254(a)(1) requires the FCC to “institute and refer to a Federal-State Joint Board [on Universal Service] “a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) [relating to provision of universal service] of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms.” See *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 328 n.7 (5th Cir. 2001) (“The statute requires consultation with the Joint Board for only the initial implementation of § 254’s universal service requirement. Any consultation afterwards is permissive.” (citation omitted)). Finally, § 254(c)(1) recognizes that “[u]niversal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section,” and provides criteria for “[t]he Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms.” Apparently without the need for a referral, the Universal Service Joint Board “may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.” 47 U.S.C. § 254(c)(2).

¹⁸ Glen O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 Va. L. Rev. 169, 224 (1978). The federal Administrative Procedure Act (APA) defines an *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.” 5 U.S.C. § 551(14).

Former FCC Chairman Richard E. Wiley tactfully described the substance of these *ex parte* contacts: “Compromises, fall-back positions, and the so-called ‘real facts’ are often reserved for supplemental filings, and perhaps subsequent visits to Commission offices.” Speech by FCC Chairman Richard E. Wiley to the Federal Communications Bar Association (April 30, 1974), FCC Mimeo 21343 (April 30, 1974) at 4, reprinted in part in *Hearings on the Open Communications Act of 1975*, S.1289, before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. at 100 (1976).

¹⁹ See, e.g., *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d 55, 66-67 (D.C. Cir. 1958) (secret attempts to influence FCC vitiate licensing proceeding); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (finding *ex parte* contacts in an FCC rulemaking to assign television channels violated “basic fairness, [which] requires such a proceeding to be carried on in the open,” and ordering the proceeding reopened); *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) (reaffirming and extending the doctrine of *Sangamon Valley*, *id.* at 51-59, while holding that the secrecy of *ex parte* industry contacts was inconsistent with “fundamental notions of fairness implicit in due process” and with the idea of reasoned decision making on the merits which undergirds all of our administrative law, *id.* at 56).

(while leveling harsh criticism for the FCC’s improper use of *ex parte* communications), correctly recognized that “informal contacts between agencies and the public are the ‘bread and butter’ of the process of administration and are completely appropriate *so long as they do not* frustrate judicial review or *raise serious concerns of fairness.*”²⁰

The FCC has responded to its critics, not with tighter controls, but with more disclosure.²¹ It now posts required²² written descriptions of “permit but disclose”²³ *ex parte* contacts on its website.²⁴ Although salutary, these postings are often opaque and cannot possibly record every significant utterance or intended meaning, telling body language, or implicit understandings. And, of course, the meeting summaries posted on the FCC’s website are prepared by the maker(s) of the communication, not by its receiver(s). Moreover, the FCC’s disclosure rules are limited to “in-bound” *ex parte* communications from industry or the public but not “out-bound” communications from the FCC to industry or the public.

The FCC’s requirement that post-communication summaries be filed and posted on its website reflects the recommendations of several commentators for “docketing,” “placing in a public file,” “logging,” or “recording” such communications, but such public disclosure requirements alone have proven woefully inadequate, as the recent CAF *Order* rulemaking demonstrates.

Section 553(c) of the federal Administrative Procedure Act (APA), 5 U.S.C. § 553(c), provides that “[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.” Public participation “improves the quality of agency rulemaking by exposing regulations to diverse public comment, ensures fairness to affected parties, and provides a well-developed record that enhances the quality of judicial review.”²⁵

As former FCC Commissioner Robinson observed, “when interested persons – without providing notice to others – are able to present their facts and arguments to individual agency members and staff, the rulemaking process imposes no check on the reliability of information

²⁰ *Home Box Office, Inc. v. FCC*, 567 F.2d at 57 (emphasis added).

²¹ 47 C.F.R. § 1.1200 *et seq.* See <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=07461177b1b4ef32391acbb1bcfa81c0&ty=HTML&h=L&n=47y1.0.1.1.2.8&r=SUBPART>.

²² 47 C.F.R. § 1.1206(b)(1)&(2) (relating to disclosure requirements applicable to oral presentations and written and oral presentations).

²³ See 47 C.F.R. § 1.1206(a) (providing that *ex parte* presentations are permissible in certain proceedings, including informal rulemakings under APA § 553, but must be disclosed in the manner provided in § 1.1206(b)).

²⁴ See <http://apps.fcc.gov/ecfs/> (the FCC’s Electronic Comment Filing System (ECFS)).

²⁵ *Sprint v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003).

presented to the decisionmakers. ... Allowing unfettered *ex parte* communications also undermines the incentive for interested persons to submit carefully prepared studies and briefs because their work is lost so easily in the shuffle of off-the-record encounters....even the most careful written commentary of one party may be negated by the offhand, *ex parte* criticism of another.”²⁶

Two things are clear. First, as noted by former FCC Chairman Richard Wiley, if interested persons know that they can present their cases in private to agency decisionmakers, following the comment period, they are unlikely to disclose their positions fully in the public proceeding.²⁷ Second, fairness is fatally compromised when even the most careful rulemaking written comments of one party may be negated by one-sided proposals advanced privately without fear of contrary argument, or submitted so close to or on the beginning of the Sunshine Period²⁸ as to be incontestable.

In the past, the FCC has defended its lack of accountability on the ground that a rule is legitimate as long as it can be defended on the basis of publicly available information, even though the public is unable to determine the rationality of a rule in light of all of the significant data and arguments that the FCC took into account.²⁹ The FCC’s failure to fully disclose the sum and substance of oral *ex parte* communications creates a situation at odds with the widespread demand for open government, specifically the public’s desire for a complete picture of agency lobbying (especially by regulated entities), thereby providing a perspective on the legitimacy of the agency’s action.³⁰

²⁶ Robinson, *supra* note 18, at 229. The court in *Home Box Office* went even further: “If actual positions were not revealed in public comments, ...and, further, if the Commission relied on these apparently more candid private discussions in framing the final ... rules, then the elaborate public discussion in these dockets has been reduced to a sham.” *Home Box Office, Inc. v. FCC*, 567 F.2d at 53-54.

²⁷ Wiley, *supra* note 18.

²⁸ The period “from the release of a public notice that a matter has been placed on the Sunshine Agenda until the Commission: [releases the text of a decision or order on the matter or issues a public notice removing the item from the Sunshine Agenda or announcing that the matter has been returned to staff for further consideration]” during which all presentations to decisionmakers concerning matters listed on a Sunshine Agenda, whether *ex parte* or not, are prohibited. 47 C.F.R. § 1.1203. See also 47 C.F.R. § 1.1206(b)(2)(iii)&(iv) (relating to filing dates for presentations outside the Sunshine period and on the day that the Sunshine notice is released).

²⁹ See Sidney A. Shapiro, *Two Cheers for HBO: The Problem of the Nonpublic Record*, 54 Admin. L. Rev. 853, 867 (2002).

³⁰ *Id.*