

Comments on Petition for Rulemaking—Amendments to Regulations Governing Ex Parte Communications

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Need for Draft Definitions Before Any Rule Is Finalized

The NPRM repeatedly states that the Board is “considering” definitions of terms such as “routine,” “procedural,” and “technical and clarifying.” These concepts are central to the scope of the proposed changes, yet no draft regulatory text is provided. Without proposed definitions, it is difficult for the public to assess and comment on the risk of procedural due process violations or the narrowing of substantive debate due to a lack of notice, so publishing draft language is essential for meaningful public comment.

Several commenters responding to the original petition raised similar concerns about clarity and scope, highlighting the need to define these terms before any rule is finalized.

Prohibiting the Introduction of New Factual Data in Private Settings

Ex parte meetings should clarify the existing record, not expand it with new factual or technical material that has not first been filed in the public docket. The Board should explicitly prohibit parties from presenting new ‘significant new information’ during ex parte sessions that have not been previously filed in the public docket. Allowing such data privately denies other parties their statutory right to a meaningful opportunity for rebuttal. The Board should further clarify that these prohibitions apply equally to informal technical conferences or environmental (NEPA) staff interactions when such communications involve the merits of the proceeding.

To ensure compliance, the Board should require meeting participants to include a certification in their summary stating that no new factual or technical data beyond the existing record was introduced. Allowing new evidence to be introduced privately undermines the APA requirement that the public be given a meaningful opportunity to comment. Any data presented orally should be limited to clarifying or highlighting information already subject to public scrutiny.

Protecting the Integrity of the Record When Adjusting Timing Rules

The NPRM acknowledges that extending ex parte meetings beyond the reply comment deadline could encourage parties to withhold arguments from the public docket and present them privately instead. The NPRM “strongly discourages” this practice, but discouragement is not a sufficient safeguard. If the Board chooses to allow ex parte meetings after reply comments, it should require the requesting party to file a formal justification explaining why the information was not available during the public comment period. It should also require public filing of a transcript or detailed recording and provide a mandatory 10-day window for others to respond. This would protect the rulemaking record and ensure that no late-breaking evidence remains unrebutted.

Modernizing Disclosure and Accessibility

The existing disclosure process in § 1102.2(g)(4) is an insufficient safeguard because it relies on unverified, self-authored summaries. To ensure transparency, the Board should reserve the right for participating staff to formally supplement or correct any summary they find to be inaccurate or incomplete. Also, transparency is hindered when stakeholders must manually monitor dozens of dockets to track agency influence. The Board should supplement individual docket filings with a centralized, searchable "Ex Parte Communication Log" on its public website. This log should be updated within 24 hours of any meeting and include the docket number, the parties involved, and a link to the certified summary.

Ensuring Fair Access When Expanding Staff Meetings

Allowing ex parte meetings with decisional Board staff may improve efficiency but raises concerns about unequal access. Well-resourced parties are better positioned to request multiple meetings across different offices, while resource-constrained stakeholders lack the "boots on the ground" to achieve similar parity. This creates a risk that repeated private meetings by a small number of well-resourced parties gradually shape the agency's internal understanding and final decision-making in ways others cannot match. The Board should address these concerns by centralizing the process for requesting staff meetings, limiting the number of meetings per party per proceeding, and ensuring that staff participation is coordinated through a single office of record.

If the Board cannot accommodate all requests for private meetings on a high-stakes issue, it should consider holding a single, informal public meeting in lieu of multiple private sessions to ensure all stakeholders hear the same information simultaneously.

Considering Impacts on Small Entities

The NPRM does not address how expanded ex parte channels may disadvantage small shippers, short lines, or other resource-constrained participants. These stakeholders rely on the public docket. The Board should conduct a small entity impact analysis under the Regulatory Flexibility Act to understand how the proposed changes could create the appearance of a "pay-to-play" atmosphere that excludes smaller voices.

Outreach to Ensure Balanced Perspectives

While the NPRM focuses on the mechanics of meetings, it doesn't address the inherent "imbalance of initiative." In the Board's experience, larger stakeholders frequently initiate these meetings, while many smaller entities may not even be aware the opportunity exists. To maintain viewpoint neutrality and protect the final rule from procedural challenges, the Board should adopt a policy of targeted public notification. If the Board or its staff grants an ex parte meeting to a party representing a specific industry interest, it should immediately post a notice of the meeting request to the public docket, allowing opposing stakeholders a short window to request a similar or joint session. This helps ensure the Board's informed decision-making is based on a

balanced exchange rather than an un rebutted record, reducing the risk of protracted litigation or the need to reopen the comment period.

Ensuring Procedural Consistency Across High-Stakes Proceedings

In Class I merger proceedings, the Board has historically maintained strict limits on ex parte communications to preserve efficiency, fairness, and public confidence. While mergers are adjudicatory, many informal rulemakings—such as those involving reciprocal switching or market dominance—have similarly profound and industry-wide economic consequences. The NPRM should establish clear, consistent criteria for determining when a rulemaking’s public significance warrants the same high "gold standard" of transparency currently reserved for mergers. Without such criteria, the Board risks an uneven approach that could undermine trust in its most impactful regulatory decisions.

Given the practical impact of the Board’s decisions across the freight network, clear and even-handed procedures help sustain confidence in the agency’s work.

Conclusion

To modernize its ex parte rules without compromising public confidence, the Board should publish draft definitions, strengthen documentation requirements with provisions for staff oversight and correction, adopt clear safeguards for timing and staff meetings, and conduct a formal small entity impact study under the Regulatory Flexibility Act. Taken together, these steps would allow the Board to update its ex parte framework while preserving the transparency and fairness that public confidence depends on.

Thank you for considering these comments.

Michael Ravnitzky
Silver Spring, Maryland