

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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EX PARTE COMMUNICATIONS IN
INFORMAL RULEMAKING PROCEEDINGS

)
) Docket No. EP 739
)
)

**COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE**

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The Western Coal Traffic League (“WCTL”) submits these Comments in response to the Surface Transportation Board’s (“STB” or “Board”) notice served in this proceeding on September 28, 2017 (“EP 739 Notice” or “Notice”).

SUMMARY

Since it was founded in 1977, WCTL has actively participated in all major rulemaking proceedings related to western coal transportation conducted by the STB and its predecessor, the Interstate Commerce Commission (“ICC” or “Commission”). WCTL’s Comments are informed by its 40 years of experience in these proceedings.

Under current Board regulations, ex parte communications are prohibited in most proceedings. The Board states in its Notice that it believes these rules are too restrictive, and proposes to permit ex parte communications in “informal rulemaking proceedings.” WCTL submits that the better regulatory approach is one where the Board considers whether to allow ex parte communications in informal quasi-legislative rulemaking proceedings on a proceeding-by-proceeding basis, taking into account all relevant factors.

The factors WCTL recommends the Board consider include: additional costs shippers will incur if the Board considers ex parte communications; regulatory delays associated with consideration of ex parte communications; whether alternative means exist to supplement

records in a more efficient manner (*e.g.*, public technical conferences); whether consideration of ex parte communications will create an un-level playing field (or the perception thereof); the nature of the proceeding (*e.g.*, does it involve standards the Board intends to apply when deciding administrative adjudications); and the interests of Board Members in using ex parte communications to assist them in deciding issues raised in informal rulemaking proceedings.

WCTL also urges the Board to make several modifications and clarifications to its proposed rules, including: (i) confirming that ex parte communications will not be permitted in STB proceedings where the Board prescribes maximum reasonable rates or reasonable practices; (ii) modifying its proposed rules to provide that informal rulemaking proceedings initiated by an advance notice of proposed rulemaking (“ANPRM”) or a public hearing notice are subject to appropriate limits on ex parte communications; and (iii) directing that the Board’s new rules will not be retroactively applied to pending proceedings.

While WCTL seeks modifications to some of the Board’s proposed rules, WCTL supports others, such as: (i) changing the definition of ex parte communications to encompass communications made by non-parties to a proceeding; (ii) exempting environmental compliance and court-case related communications from ex parte communication disclosure requirements; (iii) revising the procedures to be followed when the Board receives a prohibited ex parte communication; and (iv) establishing a uniform set of procedures for the disclosure of permitted ex parte communications in informal rulemaking proceedings.

Finally, WCTL emphasizes that the Board’s proposed changes to its ex parte communication rules in informal rulemaking proceedings sidestep the major problem WCTL and other shippers have today with the Board’s administration of its informal rulemaking docket –

the Board’s decision to freeze any substantive actions in the rulemaking proceedings of most consequence to rail shippers until the Board has a “full complement” of Members.

Appended to these Comments are the changes the Board proposes to make to its current rules (Attachment 1) and WCTL’s proposed modifications to the Board’s proposed rules (Attachment 2) – both in track change format.

IDENTITY AND INTEREST

WCTL is a voluntary association whose membership is comprised exclusively of organizations that purchase and ship coal from origins west of the Mississippi River. On an annual basis, WCTL members collectively consume more than 125 million tons of coal transported by rail. Its members include investor-owned electric utilities, electric cooperatives, state power authorities, municipalities, and a non-profit fuel supply cooperative.

WCTL was formed in 1977 and, since that time, has actively participated in all major ICC and STB rulemaking proceedings involving the regulation of western coal transportation rates and service.

BACKGROUND

In 1977, the ICC adopted rules that, as construed by the ICC, generally precluded parties in pending ICC rulemakings and adjudications from engaging in ex parte communications with ICC Commissioners and staff concerning the merits of the issues raised in the pending proceedings.¹ These rules (with minor, non-substantive changes) remain in effect today, govern Board proceedings, and are codified at 49 C.F.R. § 1102.2.

The Board now proposes to change these rules. Pertinent background developments related to these proposals include the following:

¹ See *Revised Rules of Practice*, 358 I.C.C. 323, 345 (1977).

A. The 1977 ICC Rulemaking Proceeding

In its 1977 rulemaking proceeding, the ICC “firm[ly]” rejected the Association of American Railroads’ (“AAR”) request that ex parte communications be allowed in rulemaking proceedings, because the agency concluded that such communications were “improper:”

AAR asks that the prohibition against ex parte communications contained in [the ICC’s proposed rules] not be extended to rulemaking proceedings. As the comments in the Federal Register publication of November 8, 1976, indicate, rulemaking proceedings, to the extent permissible by law, are not subject to this prohibition. We are of the firm opinion, however, that ex parte communication during a rulemaking is just as improper as it is during any other proceeding. The Commission’s decisions should be influenced only by statements that are a matter of public record. AAR’s suggestion is, therefore, rejected.²

B. The ICCTA

In the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), Congress authorized the STB to use its discretion when allowing ex parte communications in major rail merger proceedings, provided that the ex parte communications were memorialized in the proceedings’ public dockets.³

Shortly after the ICCTA was enacted, a consulting firm filed a petition asking the Board whether the Board intended to allow ex parte communications in merger cases. In response, the Board held that “members and employees of the Board will not entertain ex parte communications in railroad merger cases.”⁴ The Board cited several factors in support of this conclusion:

² *Id.*

³ ICCTA, Pub. L. No. 104-88, 109 Stat. 803, 840–41 (1995) (codified at 49 U.S.C. § 11324(f)).

⁴ *Pet. of Fieldston Co., Inc., to Establish Procedures Regarding Ex Parte Commc’ns in R.R. Merger Proceedings*, 1 S.T.B. 1083, 1084 (1996) (“*Ex Parte Communications – Mergers*”).

- **Undue Delay.** The Board found that consideration of ex parte

communications would unduly delay its resolution of merger cases:

[I]n our view, engaging in, or entertaining, ex parte communications would impede, rather than promote, efficient processing of railroad merger proceedings. Entertainment of ex parte communications would place on Board members and staff the burden of reducing any oral communication to writing and placing it in the public docket. It would also likely lead to entertaining ex parte communications from all interested parties should the Board entertain them from anyone. . . . Entertaining comments at the initiative of anyone . . . would greatly complicate and delay the recordbuilding process and delay the Board's issuance of a prompt decision on the record.⁵

- **Perception of Unfair Process.** The Board found that allowing ex parte

communications would result in the perception that its merger review process was unfair:

[T]he principles of fairness are critical to the Board's rail merger procedures, both in terms of actual fairness and in terms of the public's perception of, and confidence in, the fairness of the process. . . . The requirements for fairness underlying all provisions of the ICCTA demand that the Board accord equal access to all members of the public and militate against a process under which the Board would decide issues based on any off-the-record considerations.⁶

- **Judicial Review Complications.** The Board found that judicial review

would become far more complicated if the Board considered ex parte communications in merger proceedings:

The courts have struck down agency decisions that appear to have been made on the basis of influences other than the merits of the case as set out in the record before the agency. . . . [M]ergers remain subject to requirements for procedural due process The courts have stated that there are due process constraints on agency actions whether or not they are subject to the ex parte rules of the Administrative Procedure Act.⁷

⁵ *Id.* at 1084–85.

⁶ *Id.* at 1085.

⁷ *Id.*

C. The Rail Service Reporting Proceedings

Following the start of BNSF Railway Company's service meltdown in 2013, the Board initiated a series of responsive proceedings, including some addressing service data reporting by major railroads. The Board issued a series of decisions directing major carriers to file service data on an interim basis while the Board considered permanent reporting requirements in Docket No. EP 724 (Sub-No. 4), *United States Rail Service Issues – Performance Data Reporting* (“*Service Data Reporting*”). The Board issued a notice of proposed rulemaking (“NPRM”) in *Service Data Reporting* on December 30, 2014, received opening comments on March 2, 2015, and reply comments on April 29, 2015.

Subsequently, in a decision served on November 9, 2015, the Board announced that it was waiving its rules prohibiting ex parte communications “for the limited purpose of permitting parties to have discussions with Board staff so that the agency may develop a more complete record with regard to technical issues”⁸ The Board stated that it was taking this action because *Service Data Reporting* was a “quasi-legislative”⁹ informal rulemaking proceeding, not an “adjudication,”¹⁰ and because it “believe[d] that having informal dialogue through meetings, rather than relying on a written record alone, will help the agency better understand these issues—including technical questions regarding the data—and ultimately develop better final rules than [it] could develop without these meetings.”¹¹

⁸ *Service Data Reporting*, EP 724 (Sub-No. 4), slip op. at 2 (STB served Nov. 9, 2015).

⁹ *Id.*

¹⁰ *Id.* at 2 n.4.

¹¹ *Id.* at 2.

The Board also adopted a set of “special procedures” to “ensure fairness and accessibility.”¹² Specifically, the Board directed that: the ex parte communications must take place within a specified three week time period; the communications could take place by phone or in person at the Board; the Board would prepare and post a meeting or call summary on its website; and the Board would reopen the record to allow interested parties to submit written comments responding to the summaries.¹³

Following its receipt of ex parte communications, the Board issued a supplemental notice of proposed rulemaking in *Service Data Reporting* on April 29, 2016, obtained opening and reply comments, and adopted final service performance reporting rules in a decision served on November 30, 2016.

D. The Reciprocal Switching Proceeding

In 2011, the National Industrial Transportation League (“NITL”) asked the Board to institute a rulemaking proceeding to consider and adopt changes to the Board’s reciprocal switching rules.¹⁴ NITL correctly observed that the changes it proposed were needed because the Board’s current reciprocal switching rules made it virtually impossible for any shipper to obtain reciprocal switching relief, in contravention of the Board’s statutory directives.¹⁵

Over five years later, the Board issued a decision responding to the merits of NITL’s petition.¹⁶ The Board agreed with NITL that the Board’s current reciprocal switching

¹² *Id.* at 3.

¹³ *Id.*

¹⁴ *Pet. for Rulemaking to Adopt Revised Competitive Switching Rules (“Reciprocal Switching”)*, EP 711 (Sub-No. 1), slip op. at 2 (STB served July 27, 2016).

¹⁵ *Id.* at 4-5.

¹⁶ *Id.*

rules “set an unrealistically high bar for shippers to obtain reciprocal switching”¹⁷ and proposed a new set of reciprocal switching rules for public comment. The Board also decided to issue a limited waiver of its rules governing ex parte communications because “[g]iven that there has been no significant change in agency policy regarding reciprocal switching in more than 30 years, the Board believes it would be beneficial to hear directly from stakeholders on these issues and ask follow-up questions.”¹⁸

The Board also adopted a set of “special procedures to maintain both fairness and accessibility.”¹⁹ Specifically, the Board directed that the parties were authorized to meet with Board members in person or by phone; the meetings would take place during a specified three week period immediately following the filing of reply comments; parties participating in these meetings prepare a meeting summary for Board member review and posting on the Board’s website; and a comment period would be established to permit parties to reply to the meeting summaries.²⁰

The Board received opening and reply comments on October 26, 2016 and January 13, 2017, respectively, but subsequently decided to extend indefinitely the time period for receipt of ex parte communications.²¹ That extension remains in effect today. The Board’s indefinite extension coincides with its decision to freeze any substantive actions in *Reciprocal Switching*, and several other pending major rulemaking proceedings, until it has a “full complement” of Board Members.

¹⁷ *Id.* at 8.

¹⁸ *Id.* at 28.

¹⁹ *Id.*

²⁰ *Id.* at 31.

²¹ *Reciprocal Switching*, slip op. at 1 (STB served Dec. 27, 2016).

E. The Board's EP 739 Notice

In its Notice, the Board observes that in 1977 the ICC “determined that the general prohibition on ex parte communications in proceedings should include the informal rulemaking proceedings” and “it has long been the agency’s practice to prohibit meetings with individual stakeholders on issues that are the topic of pending informal rulemaking proceedings.”²²

The Board states that it has “determined that it is appropriate to revisit the agency’s strict prohibition on ex parte communications in informal rulemaking proceedings” and cites three reasons in support of its determination: (i) case law “evol[ution]” since the late 1970s gives agencies “more flexibility to engage in [ex parte communications];” (ii) a 2014 recommendation from the Administrative Conference of the United States that “encourages greater use of ex parte communications in informal rulemaking proceedings;” and (iii) the Board’s recent experiences in *Service Data Reporting* and *Reciprocal Switching* – proceedings in which the Board concluded that its waiver of ex parte communication restrictions has “demonstrated that informal meetings between the Board and stakeholders can aid the Board’s decision-making process while still being conducted in a transparent and fair manner.”²³

The Board’s Notice contains a proposed rule that modifies the current ex parte communication rules set forth at 49 C.F.R. § 1102.2 to remove some of the current restrictions on ex parte communications in informal rulemaking proceedings, provide clarification, and make updates to these rules.

²² Notice, slip op. at 2.

²³ *Id.*

The specific changes the Board proposes are set forth in track change format in Attachment 1 (appended hereto). The Board proposes the following:

- Expand the definition of “ex parte communications” to include communications concerning the merits of a pending proceeding made by non-parties to the proceeding.²⁴
- Expand the list of ex parte communications that are not prohibited and need not be disclosed in any proceeding to include: (i) “[a]ny communication occurring in informal rulemaking proceedings prior to the issuance of a notice of proposed rulemaking;”²⁵ (ii) communications relating to compliance with the National Environmental Policy Act [NEPA] and related environmental laws;²⁶ and (iii) communications between the parties and the Board concerning judicial review of Board decisions.²⁷
- Following the issuance of an NPRM in an informal rulemaking proceeding, “ex parte communications with Board Members [or delegated Board staff] . . . are permitted . . . until 20 days before the deadline for reply comments . . . unless otherwise specified by the Board.”²⁸
- If a person engages in post-NPRM ex parte communications with the Board, the person must prepare a “sufficiently detailed”²⁹ summary of the ex parte

²⁴ *Id.* at 16.

²⁵ *Id.*

²⁶ *Id.* at 17.

²⁷ *Id.*

²⁸ *Id.* at 18.

²⁹ *Id.*

communications “no later than two business days after the ex parte communication.”³⁰ This summary will then “be posted on the Board’s website . . . within seven days of submission.”³¹

- In “on-the-record proceeding[s]”, non-exempt ex parte communications are prohibited.³²

F. The Board’s October 2017 Report to Congress

The Surface Transportation Board Reauthorization Act of 2015 (“STB Reauthorization Act”)³³ directs the Board to provide quarterly reports to Congress on the status of pending proceedings.³⁴ Via these reports, the public became aware of the Board’s internal decision to freeze substantive action in several pending STB rulemaking proceedings until the Board has a “full complement” of Members.³⁵

The proceedings subject to the Board’s regulatory freeze include *Rail Fuel Surcharges (Safe Harbor)* (“*Rail Fuel Surcharges*”),³⁶ *Railroad Revenue Adequacy*,³⁷ *InterVISTAS Study*,³⁸ and *Reciprocal Switching*.³⁹ These pending proceedings are the ones of

³⁰ *Id.* at 19.

³¹ *Id.*

³² *Id.* at 17.

³³ Pub. L. No. 114-110, 129 Stat. 2228 (2015).

³⁴ *Id.* at § 15(b), 129 Stat. 2238.

³⁵ STB Status Letter to U.S. Senate Committee on Commerce, Science and Transportation, at 2 (April 3, 2017) (“STB April 2017 Status Letter”), available at <https://www.stb.gov/stb/docs/Reauthorization/Quarterly%20Correspondence/STB%20Status%20Letter%20to%20U.S.%20Senate%20Committee%20on%20Commerce%20Science%20and%20Transportation%20April%203%202017.pdf>.

³⁶ EP 661 (Sub-No. 2).

³⁷ EP 722.

³⁸ EP 736.

³⁹ EP 711 (Sub-No. 1).

most consequence to shippers, because they involve proposed changes to the Board's rules that shippers have been advocating for years (or, in some cases, decades) to address fundamental inequities in the Board's current regulation of railroads. They are also among the oldest proceedings on the Board's docket.

WCTL filed a petition with the Board on August 11, 2017 asking the Board to immediately lift the freeze and return these four proceedings to its active docket, because, among other reasons, the Board's regulatory freeze was unfair to shippers and undermined one of the principal objectives of the STB Reauthorization Act – to expedite the Board's processing of pending proceedings.⁴⁰ WCTL's petition remains pending before the Board.

In its most recent quarterly report, dated October 2, 2017, the Board informed Congress that its regulatory freeze remained in effect⁴¹ and, in her cover letter accompanying the Board's report, Acting Chairman Begeman referenced this proceeding:

With respect to regulatory proceedings, I am very pleased to report that last week, the Board issued a notice of proposed rulemaking (NPRM) to ease some of the agency's long-standing restrictions on ex parte communications. . . . I believe that changing these rules would leave the Board in a better position to resolve its more controversial, significant proceedings. In the meantime, please be assured that the Board will continue to provide transparency regarding the agency's regulatory agenda in full compliance with the STB Reauthorization Act.⁴²

⁴⁰ See *Pet. by the Western Coal Traffic League to Terminate the Regulatory Freeze in Four Pending Proceedings*, EP 740, WCTL Pet. at 16-19 (Aug. 11, 2017).

⁴¹ See STB, *Report on Pending STB Regulatory Proceedings – Sept. 30, 2017*, at 2, 4-6 (Oct. 2, 2017), available at <https://www.stb.gov/stb/docs/Reauthorization/Quarterly%20Reports/Report%20on%20Unfinished%20Regulatory%20Proceedings,%20Third%20Quarter,%20October%202,%202017.pdf>.

⁴² See STB Status Letter to U.S. Senate Committee on Commerce, Science and Transportation, at 2 (Oct. 2, 2017) (“STB Oct. 2017 Status Letter”), available at <https://www.stb.gov/stb/docs/Reauthorization/Quarterly%20Correspondence/STB%20Status%20Letter%20to%20U.S.%20Senate%20Commerce%20Committee,%20October%202,%202017.pdf>

COMMENTS

I. The Board's Proposal Sidesteps the Regulatory Freeze

The Board states in its Notice that its purpose in proposing the new ex parte communications rules is to “enhance the Board’s deliberations and better enable it to issue the most appropriate regulations in accordance with a transparent and fair record-building process.”⁴³

Board Members have made similar observations in pre-Notice statements. For example, then-Vice Chairman Miller stated: “I believe the Board could increase our transparency and accountability through greater use of ex parte meetings.”⁴⁴ Similarly, Acting Chairman Begeman recently stated: “[t]he intent of the [Board’s] revised regulations is to enhance the Board’s ability to make informed decisions through increased stakeholder input while ensuring that the Board’s record-building process in its rulemaking proceedings remains transparent and fair.”⁴⁵

The Board and Board Member statements concerning the perceived benefits of ex parte communications sidestep the principal problem that shippers face at the Board concerning rulemaking proceedings – the Board’s decision to place a regulatory freeze on its most consequential rulemaking proceedings until the Board has a “full complement” of Board Members.

⁴³ Notice, slip op. at 8.

⁴⁴ *Freight Rail Reform: Implementation of the STB Reauthorization Act of 2015: Field Hearing before the S. Comm. on Commerce, Sci., & Transp.*, 114th Cong. 31, 32 (Aug. 11, 2016) (statement of Hon. Deb Miller, Vice Chairman, STB), available at <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg23228/pdf/CHRG-114shrg23228.pdf>.

⁴⁵ STB Oct. 2017 Status Letter, at 2.

WCTL respectfully submits that regardless of whether parties may agree or disagree about the positive attributes of ex parte communications, the adoption (or non-adoption) of the Board's proposals does not address the key problem shippers face today – the regulatory freeze. The most important way for the Board to advance its objectives of having a “transparent and fair process” is to end the freeze in *Reciprocal Switching*, *Railroad Revenue Adequacy*, *InterVISTAS Study*, and *Rail Fuel Surcharges*.

II. The Board Should Decide Whether to Permit Ex Parte Communications in Quasi-Legislative Informal Rulemaking Proceedings on a Proceeding-by-Proceeding Basis After Consideration of All Relevant Factors

The gravamen of the Board's proposals appears to be that the Board's current limitation on ex parte communications in informal rulemaking proceedings constitutes bad regulatory policy, and the proper fix is to remove these limitations in all informal rulemaking proceedings. WCTL submits that the better regulatory policy is one where the Board decides, on a proceeding-by-proceeding basis, whether receipt of ex parte communications is appropriate based on a consideration of all pertinent factors, including the following:

- **Cost.** Under current Board procedures, shippers can (and do) incur substantial costs in informal rulemaking proceedings. These costs take the form of counsel fees, expert witness fees, public hearing costs, and numerous others.

In many major STB informal rulemaking proceedings, shipper costs have run into the hundreds of thousands of dollars. These costs are incurred in preparing written opening comments, written reply comments and participating in Board oral hearings. These shipper costs are substantially greater in proceedings the Board first initiates by issuing an ANPRM or a public hearing notice, because shippers must usually file opening and reply comments responding to the ANPRM as well.

The Board's proposal adds another layer of expense to what is already a very expensive process for shippers. Under the Board's proposal, parties are entitled to make ex parte presentations to Board Members and staff in all informal rulemaking proceedings. Permitting ex parte communications in major rulemaking proceedings has led, and will continue to lead, to the exact result the Board predicted in 1996 when it rejected consideration of ex parte communications in merger proceedings:⁴⁶ a "we can't be left out mentality" that leaves most parties with little choice but to participate in the ex parte communication process or "be left out."

That has certainly been the case in the two proceedings where the Board has entertained ex parte communications – *Reciprocal Switching* and *Service Data Reporting*. Parties participating in the Board's ex parte communication process have incurred substantial additional expenses including the costs of preparing for meetings with the Board, travel for out-of-town participants, preparing meeting materials, preparing summaries, reviewing the meeting summaries prepared by other parties, and responding (as necessary) to ex parte communications made by other parties.

- **Delay.** The Board was also prescient in 1996 when it determined that considering ex parte communications would most likely result in substantial administrative delays.⁴⁷ That certainly was the case in *Service Data Reporting*. Seven months after receiving reply comments in this proceeding in April 2015, the Board reopened the record in November 2015 for receipt of ex parte communications.⁴⁸ During the next twelve months, Board staff conducted ex parte meetings with the parties; the Board issued a supplemental rulemaking

⁴⁶ *Ex Parte Communications – Mergers*, 1 S.T.B. at 1084-85.

⁴⁷ *Id.* at 1085.

⁴⁸ *See Service Data Reporting*, slip op. at 1 (STB served Nov. 9, 2015).

notice,⁴⁹ and received two additional rounds of comments before issuing a final decision in November 2016.⁵⁰

Similarly, in *Reciprocal Switching*, the ex parte communication period – which the Board initially set to take place during a three week period after reply comments were filed – has now been extended for almost one year (and counting).⁵¹ *Reciprocal Switching* is particularly instructive, since it shows that even in proceedings where the Board initially intends to limit the time-period for ex parte communications (as it does in its proposed rule), it is far more likely than not that the Board will need to extend the time periods.

- **Efficiency.** The Board’s proposal calling for multiple meetings with individual Board Members, followed by meeting summaries, followed by written comments on those summaries (in reply filings or elsewhere), can be a very inefficient administrative procedure and, in many proceedings, the Board may have far more efficient administrative tools to address record concerns.

For example, if the topics at issue in a rulemaking proceeding involve complex accounting or operational issues, the Board can convene a technical conference where Board Members, Board staff, and the public can meet to discuss the issues. This approach places all pertinent parties in the same room at the same time, is public, and can, in many instances, be a far more efficient process than the cumbersome ex parte procedures proposed by the Board.

As a second example, if the proceeding generally involves public policy issues or legal issues, the use of ex parte meetings can simply gum-up the record with repetitions of the

⁴⁹ *Id.* (STB served May 13, 2016).

⁵⁰ *Id.* (STB served Nov. 30, 2016).

⁵¹ *See Reciprocal Switching* (STB served Dec. 27, 2016).

same arguments *ad nauseam*.⁵² In such instances, the Board may be better served by receiving written comments and holding public hearings, rather than receive repetitive ex parte communications.

- **Level Playing Field.** Small shippers frequently lack the time and financial resources to participate in ex parte meetings.⁵³ On the other hand, large railroads have the resources to actively participate in these meetings. That can create the perception of a very un-level playing field where small shippers are frozen out while large railroads engage in non-public meetings with the Board Members and staff.

The Board proposes to address this concern, in part, by mandating that written summaries of post-NPRM ex parte communications be placed in the public docket. Unless the Board requires that ex parte sessions be video-taped and then makes the tapes publicly available, the perception may continue to be that deals are being done “behind closed doors,” not in open fora. Indeed, that is a principal reason why the ICC decided to adopt rules that, as interpreted by the ICC and later, the Board, generally precluded ex parte communications in all informal rulemaking proceedings.⁵⁴

⁵² See generally, Esa. L. Sferra-Bonistalli, *Ex Parte Communications in Informal Rulemaking, Final Report to the Administrative Conference of the United States*, at 15 (May 1, 2014) (“All interviewees, both public stakeholder and agency personnel, . . . agreed that post-NPRM *ex parte* meetings rarely involve new information. The public stakeholder usually reiterates information that will be or has been provided to the agency in written comments submitted to the docket during the comment period.”).

⁵³ See, e.g., *Regulatory Reform Task Force*, EP 738, Letter from Ann Warner, Executive Director, Freight Rail Customer Alliance to Rachel Campbell, Director, STB Office of Proceedings, at 2 (July 21, 2017) (expressing concerns about “proposal[s] to loosen or modify the ex parte communications rules” because “[m]ost shippers lack the resources to come to Washington to meet with Board Members and Board staff – they need to devote their resources to running their businesses, rather than meeting with an agency tasked with regulating one of their suppliers”).

⁵⁴ See *Revised Rules of Practice*, 358 I.C.C. at 345.

- **Adjudicative Standards.** Many Board informal rulemaking proceedings involve the consideration or promulgation of standards that the Board will apply in administrative adjudications. These proceedings usually pit railroads on one side and shippers on the other, and directly involve the standards the Board will apply when deciding what the Board characterizes in its Notice as “competing claims to a specific ‘valuable privilege.’”⁵⁵

How the standards themselves are set may in fact be dispositive in administrative adjudications, as is illustrated by the Board’s current rules governing reciprocal switching relief – rules the Board itself has acknowledged make it virtually impossible for shippers to obtain reciprocal switching relief.⁵⁶ The Board has recognized that ex parte communications in adjudicative proceedings involving competing claims for valuable privilege “trigger due process concerns.”⁵⁷ Similar due process concerns certainly should also be considered before permitting ex parte communications in informal rulemaking proceedings involving the substantive standards the Board intends to use to adjudicate rate, practice, and reciprocal switching cases.

- **Board Member Needs.** The driving force behind changing the Board’s ex parte communication rules appears to be Board Member concerns. WCTL understands that both of the two current Board Members found the ex parte meetings in *Reciprocal Switching* and *Service Data Reporting* to be quite helpful in understanding the issues and the parties’ positions.

The Board Members decide proceedings, and it is very important that they decide issues using procedures they believe allow them to make the best decisions. This is certainly an important factor, and one that may prove to be dispositive, in many proceedings. However,

⁵⁵ Notice, slip op. at 7.

⁵⁶ See *Reciprocal Switching*, slip op. at 9 (STB served July 27, 2016).

⁵⁷ Notice, slip op. at 7 (footnote omitted).

WCTL suggests that rather than mandating this outcome, the Board should consider this factor, along with those previously discussed (*i.e.*, cost, delay, efficiency, level playing field, and issue type) in each individual proceeding before deciding whether to allow *ex parte* communications.

- **Suggested Alternative Text.** Attachment 2 (appended to these Comments) contains modifications to the text of the Board’s proposed rules that incorporates WCTL’s suggestion that the Board consider *ex parte* communications on a proceeding-by-proceeding basis.

III. The Board Should Make Other Changes and Clarifications to its Proposed Rules

WCTL also suggests that the Board make the following modifications and clarifications to the proposed rules:⁵⁸

A. The Board Should Amend the Definition of “On-the-Record Proceeding” to Specifically Include Rate Reasonableness and Reasonable Practice Adjudications

The Board’s proposed rules retain the current definition of “on-the-record proceeding.” These proceedings are generally defined to include formal rulemaking and formal adjudications as defined in the Administrative Procedure Act or other matters required to be “decided solely on the record made in a Board proceeding.”⁵⁹

WCTL suggests that the Board amend this definition to specifically state that STB reasonable rate and practice cases, as well as other adjudications involving specific valuable privilege, are “on-the-record proceeding[s]:”s

“On-the-record proceeding” means any matter described in Sections 556–557 of the Administrative Procedure Act (5 U.S.C. 556–557) or any matter required by the Constitution, statute, Board

⁵⁸ Specific text incorporating these proposed changes and modifications is set forth in Attachment 2.

⁵⁹ See 49 C.F.R. §1102.2(a)(1).

rule, or by decision in the particular case, that is decided solely on the record made in a Board proceeding **or any adjudicative proceeding involving competing claims for specific valuable privilege, including rate reasonableness and unreasonable practice cases.** (emphasis added).

WCTL makes this suggestion because STB rate and practice cases may not technically be formal “on-the-record” proceedings within the meaning of the Administrative Procedure Act.⁶⁰ And, while these cases arguably are ones that are otherwise required to be “decided solely on record,”⁶¹ adding the suggested text will remove any uncertainty.

WCTL’s suggested change is important because the Board’s rules, as amended, place strict prohibitions on ex parte communications only in “on-the-record” proceedings, and, as the Board correctly acknowledges in its Notice, due process requires that prohibitions on ex parte communications be strictly enforced in rate reasonableness and unreasonable practice cases.⁶²

B. Board Rules Governing Ex Parte Communications Should Apply In All Docketed Informal Rulemaking Proceedings Where Public Comments Are Sought

The Board proposes to allow “*unconstrained* ex parte communications in informal rulemaking proceedings until an NPRM is issued.”⁶³ The Board states that it is making this

⁶⁰ See, e.g., *Burlington N., Inc. v. United States*, 555 F.2d 637, 640 (8th Cir. 1977) (characterizing an ICC maximum rate prescription order as “a product of informal rulemaking”); *Arizona Grocery Co. v. Atchison, T. & S. F. Ry.*, 284 U.S. 370, 385-386 (1932) (when the ICC determines that a rate is unreasonable, “the function of the Commission [is] judicial in character,” and when the ICC prescribes a rate, it “is exercising a delegated power legislative in character”).

⁶¹ See *Nat’l Small Shipments Traffic Conf., Inc. v. ICC*, 590 F.2d 345, 351 (D.C. Cir. 1978) (construing the statutory hearing requirements governing ICC (now STB) governing ICC rate and practice complaint cases “impose[] certain minimum constraints on the procedure followed by the agency” with “[o]ne of those constraints [being] the disallowance of recourse to Ex parte communications”) (internal quotation marks and footnote omitted).

⁶² Notice, slip op. at 7 (“strict due process concerns . . . motivate ex parte restrictions [in rate reasonableness and unreasonable practice cases]”).

⁶³ *Id.* at 10 (emphasis in original).

proposal because “free-flowing communications with stakeholders should be encouraged during the exploratory, pre-NPRM phase of a rulemaking proceeding.”⁶⁴

WCTL submits the better approach is to apply ex parte communication rules (and limitations) to all publicly docketed STB informal rulemaking proceedings where the Board has sought public comments. For example, if the Board initiates a docketed proceeding using an ANPRM, the ex parte communication rules would apply starting when the proceeding is docketed. If the Board finds the proceeding is one where ex parte communications should be permitted, the net effect under the Board’s modified proposals would be that ex parte communications would be permitted, so long as the contents were properly memorialized in the public docket.

WCTL’s suggested approach should better advance the Board’s objective of “free flowing” communications by allowing all interested members of the public to see what others are saying in ex parte meetings and to then respond to these communications. Obviously, that cannot happen if the ex parte communications are secret, as the Board proposes.

In addition, the Board’s proposal would dis-incent the public from filing detailed comments responding to ANPRMs and similar forms of pre-NPRM notices. Parties could spend hundreds of thousands of dollars on detailed opening and reply comments responding to pre-NPRM notices, only to later find that the Board has decided to reject their contentions based on secret, behind-closed-doors discussions they neither knew about, nor had any opportunity to rebut.

Two examples stand out here. WCTL and other shippers have expended huge amounts of time and effort to present detailed public filings responding to pre-NPRM notices in

⁶⁴ *Id.*

Revenue Adequacy and *Rail Fuel Surcharges*. If the Board were to retroactively apply its proposed ex parte communication rules in these proceedings (which it should not do in any case), it appears to WCTL that the railroad parties could engage in secret meetings with Board Members and staff to lobby against WCTL's requests for relief. WCTL may not even know about, much less have any opportunity to respond to, these secret communications, despite the enormous time and effort it has already expended in these two proceedings. Nor could WCTL know whether the Board's responsive actions in these proceedings is based on the public record or some secret ex parte record.

The better approach is the one WCTL advocates here, as it allows a free flow of ideas that comports with fundamental principles of administrative fairness and due process, and is one that other agencies have followed.⁶⁵ WCTL also emphasizes that under its proposal, the Board remains free to engage in "unconstrained ex parte communications" in all quasi-legislative matters, except for those few where it has instituted a formally docketed informal rulemaking proceeding.

IV. New Ex Parte Communication Rules Should Not Be Retroactively Applied to Pending Proceedings

WCTL requests that the Board not retroactively apply any new ex parte communication rules it may adopt to pending proceedings, particularly to the *Rail Fuel*

⁶⁵ See, e.g., Office of the General Counsel, Department of Energy ("DOE"), *Guidance on Ex Parte Communications*, 74 Fed. Reg. 52795 (Oct. 19, 2009) (DOE ex parte communication rules apply to "informal rulemaking proceedings upon release of an advanced notice of proposed rulemaking, a notice of public meeting or, if neither of these documents are utilized, the notice of proposed rulemaking"); see generally Richard Murphy, *Enhancing the Role of Public Interest Organizations in Rulemaking Via Pre-Notice Transparency*, 47 Wake Forest L. Rev. 681, 693 (2012) (discussing the "well-known fact of administrative life that most of the real policymaking in legislative rulemaking occurs well before an agency publishes an NPRM in the Federal Register") (footnote omitted).

Surcharges and *Revenue Adequacy* proceedings that are currently in the pre-NPRM stage. These proceedings are subject to the Board's regulatory freeze, have already been substantially delayed, and should not be subject to additional delays and complications that would surely ensue if the Board were to retroactively permit parties to engage in ex parte communications.

In addition, the new rules would not work if applied in the pending *Reciprocal Switching* proceeding. The Board proposes to cut-off ex parte communications prior to the filing of reply comments. In *Reciprocal Switching*, reply comments have been filed, but the Board has already extended the ex parte communication period well beyond the cut-off date set forth in its proposed rules.

V. WCTL Supports Several Other Changes Proposed By the Board

WCTL supports several of the changes proposed by the Board, including the following:

- WCTL supports the Board's proposal to modify the definition of "ex parte communication."⁶⁶ WCTL agrees with the Board that ex parte communications can be made by non-parties and the definition of "ex parte communication" should encompass communications made by these non-parties.
- WCTL agrees with the Board's proposals to exempt from ex parte communication prohibitions, communications that the Board formally rules may be made on an ex parte basis, communications concerning NEPA compliance, and communications concerning judicial appeals of STB decisions.⁶⁷ WCTL sees no need to limit these forms of ex parte communications, nor any reason why such communications need to be publicly disclosed.

⁶⁶ See Notice, slip op. at 9.

⁶⁷ *Id.* at 10-11.

- WCTL agrees with the Board’s proposal to clarify the procedures the Board should follow if a Board Member, or Board staffer, receives a prohibited ex parte communication.⁶⁸ WCTL also agrees with Board’s proposals to adopt a standardized set of disclosure procedures to apply when parties make permitted ex parte communications in informal rulemaking proceedings,⁶⁹ though, as discussed above, WCTL is requesting that the Board make changes to its proposed rules governing when these communications are permitted.

CONCLUSION

WCTL respectfully requests that the Board revise its proposed rules in the manner set forth above.

Respectfully submitted,

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Dated: November 1, 2017

⁶⁸ *Id.* at 12.

⁶⁹ *Id.* at 12-14.

The STB's Proposed Changes to 49 C.F.R. § 1102.2

§ 1102.2 Procedures governing ~~e~~Ex parte communications; ~~prohibited; penalties provided.~~

(a) *Definitions.*

(1) “On-the-record proceeding” means any matter described in Sections 556–557 of the Administrative Procedure Act (5 U.S.C. 556–557) or any matter required by the Constitution, statute, Board rule, or by decision in the particular case, that is decided solely on the record made in a Board proceeding.

(2) “Informal rulemaking proceeding” means a proceeding to issue, amend, or repeal rules pursuant to 5 U.S.C. § 553 and part 1110 of this chapter.

(3) “Covered proceedings” means on-the-record proceedings and informal rulemaking proceedings following the issuance of a notice of proposed rulemaking.

~~(42)~~ “Person who intercedes in any proceeding” means any person, partnership, corporation, or association, private or public, outside of the Board which is neither a party nor party’s agent, that volunteers a communication that it has reason to know may advance or adversely affect the interest of a party or party’s agent in any proceeding before the Board.

~~(53)~~ “Ex Parte communication” ~~concerning the merits~~ means an oral or written communication that concerns the merits or substantive outcome of a pending proceeding; by or on the behalf of a party which is made without notice to all parties and without an opportunity for all parties to be present; and the knowledge or consent of any other party that could or is intended to influence anyone who participates or could reasonably be expected to participate in the decision.

(b) Ex parte communications that are not prohibited and need not be disclosed.
~~Communications that are not prohibited.~~

(1) Any communication ~~that to which all the parties to the proceeding agree, or on which the Board formally rules;~~ may be made on an ex parte basis;

(2) Any communication occurring in informal rulemaking proceedings prior to the issuance of a notice of proposed rulemaking;

~~(32)~~ Any communication of facts or contention which has general significance for a regulated industry if the communicator cannot reasonably be expected to have known that the facts or contentions are material to a substantive issue in a pending ~~covered-on-the-record~~ proceeding in which it is interested;

~~(43)~~ Any communication by means of the news media that in the ordinary course of business of the publisher is intended to inform the general public, members of the organization

involved, or subscribers to such publication with respect to pending ~~covered-on-the-record~~ proceedings:-

(5) Any communications related solely to the preparation of documents necessary for the Board's implementation of the National Environmental Policy Act and related environmental laws, pursuant to part 1105 of this chapter;

(6) Any communication concerning judicial review of a matter that has already been decided by the Board made between parties to the litigation and the Board or Board staff who are involved in that litigation.

(c) General Prohibitions.

(1) Except to the extent permitted by these rules, n~~No~~ party, counsel, agent of a party, or person who intercedes in any ~~on-the-record covered~~ proceeding shall engage in any ex parte communication ~~concerning the merits of the proceeding~~ with any Board Member, hearing officer, or Board ~~employee of the Board~~ who participates, or who may reasonably be expected to participate, in the decision in the proceeding.

(2) No Board Member, hearing officer, or Board ~~employee of the Board~~ who participates, or is reasonably expected to participate, in the decision in an ~~on-the-record covered~~ proceeding shall invite or knowingly entertain any ex parte communication ~~concerning the merits of a proceeding~~ or engage in any such communication to any party, counsel, agent of a party, or person reasonably expected to transmit the communication to a party or party's agent.

(d) *When prohibitions take effect.* In on-the-record proceedings, t~~The~~ prohibitions against ex parte communications ~~concerning the merits of a proceeding~~ apply from the date on which the first filing or Board decision in a proceeding is posted to the public docket by the Board, noticed for oral hearing or for the taking of evidence by modified procedure, or when the person responsible for the communication has knowledge that ~~the proceeding will be so noticed such a filing has been filed~~, or at any time the Board, by rule or decision, specifies, whichever occurs first. In informal rulemaking proceedings, except as provided in paragraph (g) of this section, the prohibitions against ex parte communications apply following the issuance of a notice of proposed rulemaking. The prohibitions in covered proceedings continue until the proceeding is no longer subject to administrative reconsideration under 49 U.S.C. § 1322(c) or judicial review.

(e) *Procedure required of Board members and* Board staff-employees upon receipt of prohibited ex parte communications ~~concerning the merits of a proceeding~~.

(1) Any Board Member, hearing officer, or Board employee-person who receives an ex parte communication not permitted by these regulations concerning the merits of a proceeding must promptly transmit either the written communication, or a written summary of the oral communication with an outline of the surrounding circumstances to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board. The Section Chief shall

promptly place ~~all of~~ the written material or summary in the correspondence section of the public docket of the proceeding with a designation indicating that it is a prohibited ex parte communication that is not part of the decisional record.

(2) Any Board Member, hearing officer, or Board employee who is the~~A~~ recipient of such ex parte communication,~~who has doubt as to the nature of the communication,~~ may request a ruling~~on the question~~ from the Board's Designated Agency Ethics Official as to whether the communication is a prohibited ex parte communication. The Designated Agency Ethics Official shall promptly reply to such requests. The Chief, Section of Administration, Office of Proceedings, shall promptly notify the Chairman of the Board of such ex parte communications sent to the Section Chief. The Designated Agency Ethics Official shall promptly notify the Chairman of all requests for rulings sent to the Designated Agency Ethics Official. The Chairman may require that any communication be placed in the correspondence section of the docket when fairness requires that it be made public, even if it is not a prohibited communication. The Chairman may direct the taking of such other action as may be appropriate under the circumstances.

(f) Sanctions.

(1) The Board may censure, suspend, or revoke the privilege of practicing before the agency of any person who knowingly and willfully engages in or solicits prohibited ex parte communication,~~concerning the merits of a proceeding.~~

(2) The relief or benefit sought by a party to a covered proceeding may be denied if the party, or the party's~~his~~ agent knowingly and willfully violates these~~se foregoing~~ rules.

(3) The Board may censure, suspend, dismiss, or institute proceedings to suspend or dismiss any Board employee who knowingly and willfully violates these~~se foregoing~~ rules.

(g) Ex parte communications in informal rulemaking proceedings; disclosure requirements.

(1) Notwithstanding paragraph (c) of this section, ex parte communications with Board Members in informal rulemaking proceedings are permitted after the issuance of a notice of proposed rulemaking and until 20 days before the deadline for reply comments set forth in the notice of proposed rulemaking, unless otherwise specified by the Board in procedural orders governing the proceeding. The Board may delegate its participation in such ex parte communications to Board staff. All such ex parte communications must be disclosed in accordance with paragraph (g)(4) of this section. Any person who engages in such ex parte communications must comply with any schedule and additional instructions provided by the Board in the proceeding. Communications that do not comply with this section or with the schedule and instructions established in the proceeding are not permitted and are subject to the procedures and sanctions in paragraphs (e) and (f) of this section.

(2) To schedule ex parte meetings permitted under paragraph (g)(1) of this section, parties should contact the Board's Office of Public Assistance, Governmental Affairs, and

Compliance or the Board Member office with whom the meeting is requested, unless otherwise specified by the Board.

(3) Parties seeking to present confidential information during an ex parte communication must inform the Board of the confidentiality of the information at the time of the presentation and must comply with the disclosure requirements in paragraph (g)(4)(iv) of this section.

(4) The following disclosure requirements apply to ex parte communications permitted under paragraph (g)(1) of this section:

(i) Any person who engages in ex parte communications in an informal rulemaking proceeding shall submit to the Board Member office or delegated Board staff with whom the meeting was held a memorandum that states the date and location of the communication; lists the names and titles of all persons who attended (including via phone or video) or otherwise participated in the meeting during which the ex parte communication occurred; and summarizes the data and arguments presented during the ex parte communication. Any written or electronic material shown or given to Board Members or Board staff during the meeting must be attached to the memorandum.

(ii) Memoranda must be sufficiently detailed to describe the substance of the presentation. Board Members or Board staff may ask presenters to resubmit memoranda that are not sufficiently detailed.

(iii) If a single meeting includes presentations from multiple parties, counsel, or persons, a single summary may be submitted so long as all presenters agree to the form and content of the summary.

(iv) If a memorandum, including any attachments, contains information that the presenter asserts is confidential, the presenter must submit a public version and a confidential version of the memorandum. If there is no existing protective order governing the proceeding, the presenter must, at the same time the presenter submits its public and redacted memoranda, file a request with the Board seeking such an order pursuant to § 1104.14 of this chapter.

(v) Memoranda must be submitted to the Board in the manner prescribed no later than two business days after the ex parte communication.

(vi) Ex parte memoranda submitted under this section will be posted on the Board's website in the docket for the informal rulemaking proceeding within seven days of submission. If a presenter has requested confidential treatment for all or part of a memorandum, only the public version will appear on the Board's website. Persons seeking access to the confidential version must do so pursuant to the protective order governing the proceeding.

WCTL's Suggested Modifications to the Board's Proposals

§ 1102.2 Procedures governing ex parte communications.

(a) Definitions.

(1) "On-the-record proceeding" means any matter described in Sections 556–557 of the Administrative Procedure Act (5 U.S.C. 556–557) or any matter required by the Constitution, statute, Board rule, or by decision in the particular case, that is decided solely on the record made in a Board proceeding or any adjudicative proceeding involving competing claims for specific valuable privilege, including rate reasonableness and unreasonable practice cases.

(2) "Informal rulemaking proceeding" means a proceeding to consider, issue, amend, or repeal rules pursuant to 5 U.S.C. § 553 and part 1110 of this chapter, including proceedings initiated with an advance notice of proposed rulemaking, a public hearing notice, or a notice of proposed rulemaking.

(3) "Covered proceedings" means on-the-record proceedings and informal rulemaking proceedings following the issuance of a notice of proposed rulemaking.

(4) "Person who intercedes in any proceeding" means any person, partnership, corporation, or association, private or public, outside of the Board which is neither a party nor party's agent, that volunteers a communication that it has reason to know may advance or adversely affect the interest of a party or party's agent in any proceeding before the Board.

(5) "Ex parte communication" means an oral or written communication that concerns the merits or substantive outcome of a pending proceeding; is made without notice to all parties and without an opportunity for all parties to be present; and could or is intended to influence anyone who participates or could reasonably be expected to participate in the decision.

(b) *Ex parte communications that are not prohibited and need not be disclosed.*

(1) Any communication that the Board formally rules may be made on an ex parte basis;

~~(2) Any communication occurring in informal rulemaking proceedings prior to the issuance of a notice of proposed rulemaking;~~

~~(23)~~ Any communication of facts or contention which has general significance for a regulated industry if the communicator cannot reasonably be expected to have known that the facts or contentions are material to a substantive issue in a pending covered proceeding in which it is interested;

~~(34)~~ Any communication by means of the news media that in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publication with respect to pending covered proceedings;

(45) Any communications related solely to the preparation of documents necessary for the Board's implementation of the National Environmental Policy Act and related environmental laws, pursuant to part 1105 of this chapter;

(56) Any communication concerning judicial review of a matter that has already been decided by the Board made between parties to the litigation and the Board or Board staff who are involved in that litigation.

(c) General Prohibitions.

(1) Except to the extent permitted by these rules, no party, counsel, agent of a party, or person who intercedes in any covered proceeding shall engage in any ex parte communication with any Board Member, hearing officer, or Board employee who participates, or who may reasonably be expected to participate, in the decision in the proceeding.

(2) No Board Member, hearing officer, or Board employee who participates, or is reasonably expected to participate, in the decision in a covered proceeding shall invite or knowingly entertain any ex parte communication or engage in any such communication to any party, counsel, agent of a party, or person reasonably expected to transmit the communication to a party or party's agent.

(d) *When prohibitions take effect.* In on-the-record proceedings, the prohibitions against ex parte communications apply from the date on which the first filing or Board decision in a proceeding is posted to the public docket by the Board, or when the person responsible for the communication has knowledge that such a filing has been filed, or at any time the Board, by rule or decision, specifies, whichever occurs first. In informal rulemaking proceedings, except as provided in paragraph (g) of this section, the prohibitions against ex parte communications apply following the issuance of a notice ~~commencing the proceeding of proposed rulemaking~~. The prohibitions in covered proceedings continue until the proceeding is no longer subject to administrative reconsideration under 49 U.S.C. § 1322(c) or judicial review.

(e) Procedure required of Board members and Board staff upon receipt of prohibited ex parte communications.

(1) Any Board Member, hearing officer, or Board employee who receives an ex parte communication not permitted by these regulations must promptly transmit either the written communication, or a written summary of the oral communication with an outline of the surrounding circumstances to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board. The Section Chief shall promptly place the written material or summary in the correspondence section of the public docket of the proceeding with a designation indicating that it is a prohibited ex parte communication that is not part of the decisional record.

(2) Any Board Member, hearing officer, or Board employee who is the recipient of such ex parte communication may request a ruling from the Board's Designated Agency Ethics Official as to whether the communication is a prohibited ex parte communication. The Designated Agency Ethics Official shall promptly reply to such requests. The Chief, Section of Administration, Office of Proceedings, shall promptly notify the Chairman of the Board of such

ex parte communications sent to the Section Chief. The Designated Agency Ethics Official shall promptly notify the Chairman of all requests for rulings sent to the Designated Agency Ethics Official. The Chairman may require that any communication be placed in the correspondence section of the docket when fairness requires that it be made public, even if it is not a prohibited communication. The Chairman may direct the taking of such other action as may be appropriate under the circumstances.

(f) *Sanctions.*

(1) The Board may censure, suspend, or revoke the privilege of practicing before the agency of any person who knowingly and willfully engages in or solicits prohibited ex parte communication.

(2) The relief or benefit sought by a party to a covered proceeding may be denied if the party, or the party's agent knowingly and willfully violates these rules.

(3) The Board may censure, suspend, dismiss, or institute proceedings to suspend or dismiss any Board employee who knowingly and willfully violates these rules.

(g) *Ex parte communications in informal rulemaking proceedings; disclosure requirements.*

(1) Notwithstanding paragraph (c) of this section, ex parte communications with Board Members in informal rulemaking proceedings designated by the Board pursuant to paragraph (g)(5) of this section are permitted after the issuance of a notice commencing the proceeding of proposed rulemaking and until 20 days before the deadline for reply comments set forth in the notice commencing the proceeding of proposed rulemaking, unless otherwise specified by the Board in procedural orders governing the proceeding. The Board may delegate its participation in such ex parte communications to Board staff. All such ex parte communications must be disclosed in accordance with paragraph (g)(4) of this section. Any person who engages in such ex parte communications must comply with any schedule and additional instructions provided by the Board in the proceeding. Communications that do not comply with this section or with the schedule and instructions established in the proceeding are not permitted and are subject to the procedures and sanctions in paragraphs (e) and (f) of this section.

(2) To schedule ex parte meetings permitted under paragraph (g)(1) of this section, parties should contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance or the Board Member office with whom the meeting is requested, unless otherwise specified by the Board.

(3) Parties seeking to present confidential information during an ex parte communication must inform the Board of the confidentiality of the information at the time of the presentation and must comply with the disclosure requirements in paragraph (g)(4)(iv) of this section.

(4) The following disclosure requirements apply to ex parte communications permitted under paragraph (g)(1) of this section:

(i) Any person who engages in ex parte communications in an informal rulemaking proceeding shall submit to the Board Member office or delegated Board staff with whom the meeting was held a memorandum that states the date and location of the communication; lists the names and titles of all persons who attended (including via phone or video) or otherwise participated in the meeting during which the ex parte communication occurred; and summarizes the data and arguments presented during the ex parte communication. Any written or electronic material shown or given to Board Members or Board staff during the meeting must be attached to the memorandum.

(ii) Memoranda must be sufficiently detailed to describe the substance of the presentation. Board Members or Board staff may ask presenters to resubmit memoranda that are not sufficiently detailed.

(iii) If a single meeting includes presentations from multiple parties, counsel, or persons, a single summary may be submitted so long as all presenters agree to the form and content of the summary.

(iv) If a memorandum, including any attachments, contains information that the presenter asserts is confidential, the presenter must submit a public version and a confidential version of the memorandum. If there is no existing protective order governing the proceeding, the presenter must, at the same time the presenter submits its public and redacted memoranda, file a request with the Board seeking such an order pursuant to § 1104.14 of this chapter.

(v) Memoranda must be submitted to the Board in the manner prescribed no later than two business days after the ex parte communication.

(vi) Ex parte memoranda submitted under this section will be posted on the Board's website in the docket for the informal rulemaking proceeding within seven days of submission. If a presenter has requested confidential treatment for all or part of a memorandum, only the public version will appear on the Board's website. Persons seeking access to the confidential version must do so pursuant to the protective order governing the proceeding.

(5) The Board's notice commencing an informal rulemaking proceeding shall state whether the Board has designated the proceeding as one that will be governed by the ex parte communication rules set forth in paragraph (g)(1) of this section. The Board will make this designation if the Board determines the designation is appropriate based on its consideration of all relevant factors including party compliance costs, the potential for regulatory delay, administrative efficiency, fairness to small shippers, whether the proceeding involves adjudicative standards, and the administrative interest in developing a complete record using ex parte communications.

(h) Pending Proceedings. Informal rulemaking proceedings that were commenced prior to the effective date of these rules will be governed by the provisions of 49 C.F.R § 1102.2 in effect prior to the effective date of these rules.