

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON DC 20268-0001

EX PARTE COMMUNICATIONS

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Docket No. RM2016-4

COMMENTS OF  
MPA—THE ASSOCIATION OF MAGAZINE MEDIA

(February 29, 2016)

MPA—The Association of Magazine Media (“MPA”) respectfully submits these comments on the rules for ex parte communications proposed by the Commission in Order No. 3005.

As the national trade association for the consumer magazine industry, MPA represents approximately 175 domestic magazine media companies with more than 900 national publications, both print and digital, covering an enormous range of subjects. The magazine publishing industry plays a prominent role in culture, society and the economy by fulfilling readers’ desires for timely information and entertainment that appeal to a broad spectrum of personal interests. MPA members connect more than 90 percent of all adults in the United States with the print and digital magazine titles that consumers trust and value most.

The Commission’s decision to review and revise its current ex parte rules is reasonable. Two aspects of the proposed revisions, however, are problematic: (1) their failure to distinguish between on-the-record adjudications and more informal

proceedings, and (2) the proposed definition of the starting point for when a “matter” is first considered to be “before the Commission.”

(1)

Rejecting traditional practice, the Commission proposes to impose the same restrictions on ex parte communications in all Commission proceedings, whether on-the-record adjudications or more informal proceedings. Order No. 3005 at 3 (“all proceedings before the Commission should be treated the same”); *id.* at 5-6 (discussing proposed Rules 3008.1 and 3008.2); proposed § 3008.1(e) (reserving the right to apply ex parte rules to any matter before the Commission); proposed § 3008.3 (broadly defining matters before the Commission); Library Reference PRC-LR-RM2016-4/1 (proposed PRC policy on parte communications) at 4-5 (defining “matters before the Commission” to include Annual Compliance Reports, Competitive Product cases, Mail Classification cases, Market Test cases, Public Inquiry proceedings, rate cases, rulemaking proceedings, and tax computation cases as well as nature-of-postal-service adjudications under 39 U.S.C. § 3661, post office appeal cases under 39 U.S.C. §§ 404(d)(5), (6), and complaint cases under 39 U.S.C. § 3662).

The Commission acknowledges that the law requires the Commission to “place restrictions on ex parte communications” only “where the Commission must provide an opportunity for hearing on the record pursuant to 5 U.S.C. 556-557.” Order No. 3005 at 2; *accord, District No. 1 v. Maritime Administration*, 215 F.3d 37, 42-43 (D.C. Cir. 2000); Administrative Conference of the United States Recommendation 2014-4 (“ACUS Recommendation 2014-4”) at 1. As the Commission also recognizes, only a few of the many kinds of cases heard by the Commission are on-the-record proceedings in this

sense. The Commission contends, however, that applying the same *ex parte* restrictions to the rest of its docket is “consistent with the recommended approach for agency treatment of *ex parte* communications.” *Id.* at 2 & n. 2 (citing two publications of the Administrative Conference of the United States). This contention is mistaken.

The courts have long distinguished between on-the-record adjudications, in which agencies act as quasi-judicial bodies, and rulemakings and other informal proceedings, in which agencies act as quasi-legislative bodies. A leading D.C. Circuit case summarizes the reasons for this distinction:

Oral face-to-face discussions are not prohibited anywhere, anytime, in the [Administrative Procedure] Act. The absence of such prohibition may have arisen from the nature of the information rulemaking procedures Congress had in mind. Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among “conflicting private claims to a valuable privilege,” the insulation of the decisionmaker from *ex parte* contacts is justified by basic notions of due process to the parties involved. But where agency action involves informal rulemaking of a policymaking sort, the concept of *ex parte* contacts is of more questionable utility.

Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall. As judges we are insulated from these pressures because of the nature of the judicial process in which we participate; but we must refrain from the easy temptation to look askance at all face-to-face lobbying efforts, regardless of the forum in which they may occur, merely because we see them as inappropriate in the judicial context. Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups, and the public cannot be underestimated. Informal contacts may enable the agency to win needed support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs.

*Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981) (footnotes omitted). *Accord*, *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 327 (5th Cir. 2001).

The Administrative Conference of the United States has agreed. In Recommendation 77-3, the Conference “expressed the view that a general prohibition on ex parte communications in the context of informal rulemaking proceedings would be undesirable, as it would tend to undermine the flexible and non-adversarial procedure framework established by 5 U.S.C. § 553.” ACUS Recommendation 2014-4 at 2 (citing ACUS Recommendation 77-3). *See also* ACUS Recommendation 2014-4 at 2:

Ex parte communications, which may be oral or written, convey a variety of benefits to both agencies and the public. Although the rulemaking process has largely transitioned to electronic platforms in recent years, most ex parte contacts continue to take the form of oral communications during face-to-face meetings. These meetings can facilitate a more candid and potentially interactive dialogue of key issues and may satisfy the natural desire of interested persons to feel heard.

Consistent with these principles, some of the Commission’s peer agencies impose no restrictions at all on ex parte communications in notice-and-comment rulemakings and other proceedings that are not on record. *See, e.g.*, 18 C.F.R. § 385.2201(c)(1)(ii) (excluding notice-and-comment rulemakings and other proceedings not on the record from the ex parte restrictions of the Federal Energy Regulatory Commission); 49 C.F.R. §§ 1102.2(a)(1), (c) (drawing same distinction in proceedings before the Surface Transportation Board). The Commission need not go this far, however. A common alternative is to permit ex parte communications but require public disclosure of their substance. The Federal Communications Commission uses this permit-but-disclose approach. 47 C.F.R. § 1.1206. The Administrative Conference has proposed several variations of same approach. ACUS Recommendation 2014-4 at ¶¶ 4-13. These

procedures would strike a better balance of the public interests in open communications and fairness to all parties than would an outright ban on most ex parte communications.

(2)

The second problem in the proposed rules involves the definition of the point when a “matter” is considered to be “before the Commission.” The ex parte rules of most agencies do not consider a matter to be before the agency until it has issued a formal notice of the commencement of the proceeding, an interested person has filed a complaint or formal request that the agency begin the proceeding, or a person has actual knowledge that the proceeding will be noticed. See, e.g., 18 C.F.R. § 385.2201(d)(1) (FERC); 49 C.F.R. § 1102.2(d) (Surface Transportation Board); *Century Federal, Inc. v. FCC*, 846 F.2d 1479, 1482 (D.C. Cir. 1988); ACUS Recommendation 2014-4 at 3 (“Before an agency issues a Notice of Proposed Rulemaking (NPRM), few if any restrictions on ex parte communications are desirable.”); *id.* at 6 ¶ 4 (“Agencies should not impose restrictions on ex parte communications before an NPRM is issued.”).

Under the proposed rules, however, the restrictions on ex parte communications would take effect as soon as the party responsible for a communication was deemed to have “knowledge that a request to initiate a proceeding is *expected to be* filed.” Proposed Rule 3008.3(b) (emphasis added). This restriction would forbid the very class of ex parte communications that the Administrative Conference has recognized to be most desirable.

Moreover, the proposed test is hopelessly subjective. It would define a future Commission proceeding as “before the Commission” whenever a person responsible for a communication to the Commission “has knowledge that” a request to initiate a

proceeding “is expected to be filed.” Proposed Rule 3008.3(b). Such knowledge would be imputed to a party if it was “actively preparing” a request for a proceeding at the time of the communication and intended “to file [the request] within a reasonable period of time” after the communication. Proposed Rule 3008.3(c)(4). The proposed rules do not, however, define what minimum level of certainty is required to elevate a potential future filing to an “expected” filing; what level of preparatory work constitutes “actively preparing”; or what time interval is short enough to constitute a “reasonable period of time.” The Commission’s explanations of proposed Section 3008.3 merely repeat these undefined terms. Order No. 3005 at 6; Library Reference PRC-LR-RM2016-4/1 at 4.

Furthermore, determining whether a later request for a Commission proceeding was “expected” by the communicating party, whether the party’s preparation of the request was “active” at the time of the communication, and whether the party had an “intent to file” a request for a proceeding “within a reasonable period of time” when making the Communication would require the Commission to resolve collateral disputes about the subjective mental state of the communicating party at the moment of the communication. The ambiguity and subjectivity of these standards, coupled with the potentially draconian consequences of an adverse Commission finding (Proposed Rule 3008.7(b)), would likely deter all but the hardest parties from relying on the Commission’s assurance that the “mere potential that a request may be filed does not place a matter before the Commission” (proposed Rule 3008.3(c)(4)).

For these reasons, the Commission should withdraw its proposed restrictions on ex parte communications before the commencement of Commission proceedings. If the Commission concludes when instituting a proceeding that fairness to other parties

requires public disclosure of the substance of pre-filing ex parte communications, the Commission can make such disclosure when it institutes the docket, or order the communicating parties to file disclosures of the communications themselves.

Respectfully submitted,

A handwritten signature in black ink that reads "David M. Levy". The signature is written in a cursive, slightly slanted style.

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