

denied on similar grounds, except for petitions which could be granted under § 1.429(b); or

(9) Are untimely.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[GC Docket No. 10-43; FCC 10-31]

Amendment of Certain of the Commission's Ex Parte Rules and Other Procedural Rules

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, we begin a new proceeding to improve the transparency and effectiveness of the Commission's decisionmaking by reforming our *ex parte* rules. The *ex parte* process allows parties in most Commission proceedings to speak directly (or have written communications) with Commission staff and decisionmakers, providing a way to have an interactive dialogue that can root out areas of concern, address gaps in understanding, identify weaknesses in the record, discuss alternative approaches, and generally lead to more informed decisionmaking. Oral *ex parte* presentations are by their nature inaccessible to people who are not present at the meeting unless the presentations are publicly documented in some way. In this document, we seek comment on proposals to improve our *ex parte* and other procedural rules to make the Commission's decisionmaking processes more open, transparent, and effective.

DATES: Comments must be submitted by May 10, 2010, and reply comments must be submitted by June 8, 2010. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before May 24, 2010.

ADDRESSES: You may submit comments, identified by GC Docket No. 10-43, by any of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.
- **Federal Communications Commission's Web Site:** <http://fjallfoss.fcc.gov/ecfs2/>. Follow the instructions for submitting comments.

- **People with Disabilities:** Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202-418-0530 or TTY: 202-418-0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Julie Veach, Office of General Counsel, 202-418-1700. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to PRA@fcc.gov or contact Leslie Smith, OMD, 202-418-0217.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rulemaking*, FCC 10-31, adopted on February 18, 2010, and released on February 22, 2010. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121, May 1, 1998.

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/> or the Federal eRulemaking Portal: <http://www.regulations.gov>.

- **ECFS filers** must transmit one electronic copy of the comments for GC Docket No. 10-43. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail.

- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

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

Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW-A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com. Documents in GC Docket No. 10-43 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to the Federal Communications Commission via e-mail to PRA@fcc.gov and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to Nicholas.A.Fraser@omb.eop.gov or via fax at 202-395-5167.

I. Introduction

1. In this NPRM, we begin a new proceeding to improve the transparency and effectiveness of the Commission's decisionmaking by reforming our *ex parte* rules. The *ex parte* process allows parties in most Commission proceedings to speak directly (or have written communications) with Commission staff and decisionmakers, providing a way to have an interactive dialogue that can root out areas of concern, address gaps

in understanding, identify weaknesses in the record, discuss alternative approaches, and generally lead to more informed decisionmaking. (The Administrative Procedure Act (APA) defines “*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, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.” 5 U.S.C. 551(14). Consistent with that definition, the Commission’s rules define an *ex parte* presentation as “[a]ny presentation which: (1) If written, is not served on the parties to the proceeding; or (2) If oral, is made without advance notice to the parties and without opportunity for them to be present,” with “presentation” defined as “[a] communication directed to the merits or outcome of a proceeding, including any attachments to a written communication or documents shown in connection with an oral presentation directed to the merits or outcome of a proceeding.” Written *ex parte* presentations include, for example, data, memoranda making legal arguments, materials shown to or given to Commission staff during *ex parte* meetings, and e-mail communications to Commission staff directed to the merits or outcome of a proceeding. Oral *ex parte* presentations include, for example, meetings or telephone or relay calls with Commission staff where parties present information or arguments directed to the outcome of a proceeding. The definition excludes certain types of communications, such as status inquiries that do not state or imply a view on the merits or outcome of the proceeding. 47 CFR 1.1202(a), (b).) Oral *ex parte* presentations are by their nature inaccessible to people who are not present at the meeting unless the presentations are publicly documented in some way. In permit-but-disclose proceedings, our *ex parte* rules require just this documentation. Years of experience, however, have revealed a number of areas where our *ex parte* rules could be improved. In this NPRM, we seek comment on proposals to improve our *ex parte* and other procedural rules to make the Commission’s decisionmaking processes more open, transparent, and effective.

2. First, we propose reforms to our *ex parte* rules to require disclosure of every oral *ex parte* presentation in permit-but-disclose proceedings unless a specific exemption applies, and to require the filing of a notice that summarizes all data and arguments that were presented

(although the filer may refer to prior written filings for data and arguments that the filer has presented before). Second, we propose to codify a preference for electronic filing of all notices of *ex parte* presentations, in machine-readable formats, and we propose to require electronic filing of notices of *ex parte* presentations made during the Sunshine period within four hours of the presentation. Third, we seek comment on whether to amend the rules exempting certain communications from the ban on *ex parte* presentations during the Sunshine period or in restricted proceedings, and whether to begin the Sunshine period prohibition on *ex parte* presentations at midnight following the release of the Sunshine notice. Fourth, we seek comment on whether to require disclosure of ownership or other information about the entity making an *ex parte* presentation or filing any pleading with the Commission so that readers will better understand the filer’s interest in the proceeding. Finally, we propose minor changes to modernize or correct our current *ex parte* rules.

II. Background

3. The Commission’s *ex parte* rules recognize three types of proceedings, and the rules apply differently to each type. In “restricted” proceedings, *ex parte* presentations are generally prohibited. By contrast, in “exempt” proceedings, there are no restrictions on *ex parte* presentations. In “permit-but-disclose” proceedings—the category we primarily address in this rulemaking—*ex parte* presentations are allowed so long as they are disclosed in the record of the proceeding. Copies of written presentations and summaries of oral presentations must (as explained more fully below) be filed in the record.

4. The filing of summaries of oral presentations (or *ex parte* notices) plays a key role in permit-but-disclose proceedings, because interested parties frequently meet with the Commissioners and their staffs and the staffs of relevant Bureaus and Offices to present their views on the issues involved in pending permit-but-disclose proceedings. The current rule applicable to the oral presentations made in these meetings attempts to strike a balance between the need to give the public and other interested persons fair notice of the content of *ex parte* meetings and the desirability of not requiring parties to file unnecessary paperwork. Specifically, the current rule requires that if a person makes an oral *ex parte* presentation that presents data or arguments that are not already in that person’s written filings in the

proceeding, the person making the presentation must file a summary only of the new data or arguments. Indeed, if no new data or arguments are presented, no record of the oral *ex parte* presentation need be filed.

5. On October 28, 2009, the Commission hosted a staff workshop on the *ex parte* process at which senior Commission staff and outside experts discussed whether our current rules address the needs of the Commission and the public. Based on our own experience with the rules as well as the discussion at that workshop, we believe that two limitations in the current rules governing oral presentations in permit-but-disclose proceedings—lack of a filing documenting every oral *ex parte* presentation, and a lack of completeness about what was discussed in the meeting—reduce the transparency of the Commission’s decisionmaking to the detriment of Commission staff, outside parties, and the general public. As mentioned above, if the oral presentation did not present any new data or arguments, there is currently no requirement to file any *ex parte* notice, so other parties may not even know that a meeting occurred. When filings are made, they often fail to give the reader sufficient information to know whether or not the *ex parte* discussion involved matters already on the record in the presenter’s written filings, and if so, what matters. For example, many summaries of oral *ex parte* presentations state in one or two sentences that a party met with Commission staff members and discussed a particular proceeding in a manner consistent with the party’s prior filings, without stating what the presentation was about, what data or arguments were presented, or whether particular data or arguments were characterized as especially important to the party’s position. Although the number of complaints about alleged *ex parte* rule violations received by the Commission in permit-but-disclose proceedings is small (generally not more than one or two a year) and we are unable to estimate the number of violations that are not complained about, there is reason to believe that some *ex parte* notices fail to comply with the rule by failing to provide an adequate summary of new data or arguments discussed in *ex parte* meetings.

III. Discussion

A. Completeness and Accuracy of Memoranda Summarizing Oral Ex Parte Presentations

1. Filing Notices of All Oral Ex Parte Presentations, and Disclosing All Facts and Arguments Presented

6. Oral *ex parte* presentations provide a valuable opportunity for parties to converse with Commission staff, addressing concerns and questions in an interactive manner that is not possible in written filings. Oral presentations, however, must be adequately documented for the Commission to rely on them in its decisionmaking and for other parties to respond to them. (We take this opportunity to eliminate a possible misperception by noting that our current rules do not except oral *ex parte* presentations from the disclosure requirements when they are made at the request of staff. Oral *ex parte* presentations that are made at the request of staff must be disclosed to the same extent as oral *ex parte* presentations that are made at the request of the presenter. See 47 CFR 1.1206(b)(2).) When for any reason the record does not adequately reflect the contents of oral *ex parte* presentations, the public is deprived of a fair opportunity to respond to oral communications with decisionmakers, and the Commission may lack an adequate administrative record to the extent that the Commission wishes to rely on information presented during an oral *ex parte* presentation.

7. These same issues prompted the Commission, when it last comprehensively revised the *ex parte* rules, to propose that *ex parte* notices summarize the contents of all oral presentations in permit-but-disclose proceedings, regardless whether the presentation involved new information. Commenters were divided over the merits of this proposal, and the Commission ultimately rejected it. The Commission found that that it was not necessary to require additional filings that would merely reiterate submissions already filed. Instead, the Commission chose to rely on enforcement of the existing requirement that new data or arguments be summarized. The Commission reiterated its intent to enforce the existing requirement by issuing a public notice three years later reminding the public of its responsibilities to summarize new data and arguments in permit-but-disclose proceedings. The Commission has also emphasized these requirements on its Web site.

8. The Commission's and the public's need for information about the contents of oral *ex parte* presentations now causes us to propose to require more disclosure. To address the two main limitations in our current rules described above, we propose rule changes that (1) require the filing of an *ex parte* notice for every oral *ex parte* presentation, not just presentations that present data or arguments not already reflected in the presenter's written comments, memoranda or other filings; and (2) require that to the extent the presentation concerned data or arguments already reflected in the presenter's written filings in the record, the notice either summarizes the data or arguments presented or explicitly states that the data and arguments are already reflected in prior written filings and provides specific references (including page or paragraph numbers) to the presenter's prior filings containing the data and arguments presented. As under the current rule, the *ex parte* notice would have to contain a summary of any new data or arguments presented at the *ex parte* meeting. (We note that our current rules already state that any "documents shown in connection with an oral presentation" are defined as a written *ex parte* presentation and must be filed. 47 CFR 1.1202(a), (b)(1).) See § 1.1206 of the proposed rules section of this document for proposed revised language.

9. We believe that requiring that a memorandum be filed after every oral *ex parte* presentation would make the Commission's processes more transparent. We also believe that by requiring more disclosure of what was said in the presentation, by summarizing all facts and arguments or referring to prior written submissions, the new approach would also give readers a better understanding of the content of the presentation. It would do so, however, without imposing the significantly increased burden on those filing notices of having to summarize both old and new information. For that reason, we believe the proposed rule properly balances the need for fairness and transparency in Commission proceedings with avoiding unnecessary burdens on parties.

10. We seek comment on whether to adopt this proposal. Given that the proposed rule would generally require more detailed *ex parte* notices than the current rule does, we seek comment on whether parties should (except with respect to exempt presentations during the Sunshine period as discussed below) have two business days after making an oral *ex parte* presentation to

make a filing rather than the current one business day.

11. The Commission remains committed to enforcing its rules. We seek comment on whether more aggressive enforcement of our existing rules would address some of the issues we have described above with regard to adequate disclosure of oral *ex parte* presentations. For instance, if the Commission imposed harsher sanctions against parties that fail to disclose *ex parte* presentations or that file inadequate summaries of oral *ex parte* presentations under our existing rules, would any of the rule changes we propose be unwarranted? We invite commenters to make specific enforcement-related proposals that would improve transparency of oral *ex parte* presentations in an efficient manner.

12. We do not propose to change the current treatment of status inquiries as described in § 1.1202(a). Section 1.1202(a) defines the term "presentation," and provides that "Excluded from this term are * * * inquiries relating solely to the status of a proceeding, including inquiries as to the approximate time that action in a proceeding may be taken. However, a status inquiry which states or implies a view as to the merits or outcome of the proceeding or a preference for a particular party, which states why timing is important to a particular party or indicates a view as to the date by which a proceeding should be resolved, or which otherwise is intended to address the merits or outcome or to influence the timing of a proceeding is a presentation."

If a status inquiry falls within the exclusion defined in § 1.1202, it is not an *ex parte* "presentation" and need not be disclosed. We seek comment on this proposal to retain the current treatment of status inquiries.

2. Other Approaches

13. Nothing in the APA requires that agencies give the public the opportunity to make oral presentations in rulemaking proceedings or in adjudications that are not otherwise required to be conducted on the record after a hearing. Not surprisingly, not all agencies have taken the same approach to oral *ex parte* communications. For example, in rulemaking proceedings at the Federal Election Commission, if a commissioner or member of a commissioner's staff receives an oral *ex parte* communication, the burden is on the commissioner or commissioner's staff to provide a written summary to the commission's Secretary for placement in the public record. When

the Federal Trade Commission conducts informal rulemakings, oral *ex parte* presentations to commissioners and their staffs occur infrequently, but summaries or transcripts of oral communications must be placed on the public record. Adjudications at the Federal Trade Commission are conducted as formal adjudications and *ex parte* presentations are not permitted. Other agencies, such as the Nuclear Regulatory Commission, favor taking in oral information through informal public meetings, rather than individual *ex parte* meetings. Indeed, this Commission has considered, but not adopted, measures as strong as a complete prohibition on *ex parte* contacts in informal rulemaking proceedings.

14. We seek comment on whether adopting some practices of other agencies regarding oral presentations would improve transparency in our own proceedings. We also invite alternative proposals that would increase compliance with our *ex parte* rules.

B. Preference for Electronic Filings

15. When the Commission last reassessed its *ex parte* rules thirteen years ago, parties filed documents in Commission proceedings mostly on paper. Now, more often than not, parties file documents in Commission proceedings electronically. Many if not most of our permit-but-disclose proceedings are now docketed on the Commission's Electronic Comment Filing System or other electronic filing systems, where the records are available electronically, and the Commission has made it possible for parties to file many types of documents electronically. Moreover, we are taking steps to expand this capability. Indeed, filing *ex parte* notices is now very often done electronically, allowing the Commission staff, parties, and the general public to have easy and timely access to those documents online, and reducing the time that Commission staff must spend gathering record materials as they work to resolve Commission proceedings. Reducing the burdens of following Commission proceedings also supports our goals of transparency and public participation.

16. We propose to amend our *ex parte* rules generally to require that written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations in docketed proceedings be filed electronically on a Commission electronic comment filing system. We believe that most parties already do so; this rule would for the most part codify current practice. In those cases where a docket number has not been assigned to

a proceeding or the Commission has not provided a method for filing memoranda electronically, we propose that the person required to submit the memorandum shall file on paper an original and one copy with the Secretary's office. We also seek comment on whether these filings should be made in machine-readable format (e.g., Microsoft Word ".doc" format or non-copy protected text-searchable ".pdf" format for text filings, and "native formats" for non-text filings, such as spreadsheets in Microsoft Excel ".xml" format). We recognize that in some cases, electronic filing is not possible without undue hardship because the person making the oral *ex parte* presentation does not have access to a computer or the Internet or because the filing contains confidential business or financial information. We therefore propose to codify an exception. See § 1.206(b) of the proposed rules section of this document for proposed revised language.

17. We seek comment on these proposals. In particular, we seek comment on whether there are types of proceedings for which these procedures would be impractical, such that we should require paper filing or allow other methods for submitting *ex parte* notices.

18. We note a particular issue with regard to the filing of *ex parte* notices during the Sunshine period. The current *ex parte* rules prohibit most presentations, whether *ex parte* or not, during the Sunshine period, which begins when a proposed order is placed on a Sunshine notice and ends when the text of a decision is released or the draft returned to the staff. Typically, the Sunshine notice is released seven days before an agenda meeting. The Sunshine period prohibition is intended to provide decisionmakers "a 'period of repose' during which they can be assured that they will be free from last minute interruptions and other external pressures, thereby promoting an atmosphere of calm deliberation." The prohibition on most presentations during the Sunshine period is also meant to give the Commissioners and staff time to examine a record that is largely fixed, rather than continuing to analyze new data and arguments. We believe that a period of repose from both oral and written presentations before a Commission meeting continues to make sense in most circumstances and seek comment on this conclusion. We note in this regard that the Commission has and can in the future waive the prohibition where the public interest so requires.

19. In those cases where an oral *ex parte* presentation is permitted to be

made during the Sunshine period but must still be disclosed, it is very important that the notice summarizing that presentation be available quickly to Commissioners, Commission staff, and interested outside parties. During the Sunshine period, the Commission is in the final stages of considering how to resolve a proceeding. When, as permitted under the current rules, notices of oral *ex parte* presentations are filed by the end of the following business day, as many as two working days may have elapsed between the conclusion of the oral presentation and the filing of the summary. An even longer delay in having the notice appear in the electronic docket may result if the summary is not filed electronically. At the end of a proceeding, when decisionmakers are making final judgments concerning the matter, this can be a great deal of time and the delay in filing may preclude sufficient consideration of the contents of the filing by Commissioners and Commission staff. In addition, if the rules were to be amended so that other parties were allowed to make responsive presentations during the Sunshine period, it would be necessary for them to see the summaries of other parties' presentations so that they can respond to the data or arguments that were presented.

20. Because of the problem of timing, we propose that *ex parte* notices summarizing oral *ex parte* presentations that were made during the Sunshine period must be filed electronically within four hours of the completion of the presentation, so that they are available quickly to all. We recognize that in some cases, this may be difficult for parties to accomplish because of sequential meetings, travel plans, or very occasionally a lack of access to a computer and the Internet. We believe that it is vitally important to the Commission's deliberations that as many *ex parte* notices as possible are filed electronically within four hours. Almost all proposed orders that are placed on a Sunshine notice are in proceedings for which electronic filing is available. If, however, the Commission were to place a proposal on the Sunshine notice for which § 1.1203 applied but for which no electronic filing mechanism was available, we propose that memoranda summarizing oral *ex parte* presentations that must be filed during the Sunshine period be sent by electronic mail (or, if electronic mail is not available, by facsimile) to all Commission staff who attended the presentation and to all parties who have provided such contact information

unless the Sunshine notice provides otherwise. We seek comment on these proposals.

21. Furthermore, to make it simpler for staff to determine whether the *ex parte* presentation was permissible and whether the notice was timely filed, we propose to require that the notice say in the first sentence why the *ex parte* presentation was permissible, and also on what day and at what time the oral presentation took place. See § 1.1206(b) of the proposed rules section of this document for proposed revised language.

22. We seek comment on these proposals. In particular, we seek comment on the four-hour filing period, and whether that will in most cases provide a sufficient filing opportunity. If not, we ask parties to propose a reasonable time for filing that takes into consideration the harm that delays in receiving the information can have on the Commission's resolution of its proceedings. We also seek comment on whether this requirement would be impracticable for certain filers, and whether and how we could craft an exception that would still make notices of these presentations available to the Commissioners, staff, and public quickly.

C. The Sunshine Period Prohibition and Exceptions

23. We also seek comment on whether the current exceptions to the Sunshine period restrictions ought to be modified. Exceptions to the Sunshine period prohibition include presentations "requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence, or for resolution of issues, including possible settlement." (We note that this exception allows *ex parte* presentations to be made when they would otherwise be prohibited, but it does *not* relieve the presenter from the burden of disclosing the contents of oral *ex parte* presentations. Even if an oral presentation is at the request of staff, disclosure requirements still apply. See 47 CFR 1.1204(a)(10)(iv).) We believe that information gathered through such permitted presentations can be important to the Commission's ability to reach the best possible decisions on proposed orders subject to a Sunshine period restriction. Nonetheless, the exception could be abused to shore up the record on one side of an argument without allowing responses on the other side. Indeed, during the workshop, some participants suggested that as a matter of fairness to all parties, the Sunshine period ought to be "all or nothing"—that is, it should either be a

period of strict repose or it should be eliminated to allow all presentations. Accordingly, we seek comment on whether this exception ought to be narrowed to prohibit an outside party from soliciting a request from staff for an *ex parte* presentation "for the clarification or adduction of evidence, or for the resolution of issues." We also seek comment on whether it is practical and consistent with having a "period of repose" to allow replies to presentations made pursuant to a Sunshine period exception. We seek comment on other possible resolutions.

24. While the settlement exception in § 1.1204(a)(10) of the rules serves an important function, we also seek comment on whether it is susceptible to misuse apart from its impact during the Sunshine period. For example, we seek comment on whether reliance on the provision of the rule exempting from disclosure "information relating to how a proceeding should or could be settled, as opposed to new information regarding the merits," sometimes has been applied in an overly broad manner to effectively permit the undisclosed discussion of the merits of proceedings. To the extent this may be so, we seek comment on how the rule should be amended to eliminate this problem, without constraining appropriate uses of the staff's ability to facilitate settlements in adjudicatory matters, such as formal complaint proceedings under section 208 of the Act and pole attachment complaint proceedings under section 224 of the Act.

25. We note one other complexity with regard to our Sunshine procedures. Under our current rules, the prohibition on *ex parte* communications begins with the release of the Sunshine notice. While Sunshine notices are almost always released seven days in advance of an Agenda Meeting, the time of day at which a Sunshine notice is released varies. This variability makes it difficult for outside parties to know up until what time they may make oral *ex parte* presentations or file written *ex parte* presentations. It also makes it difficult for Commission staff to analyze later whether a presentation that was made on the day a Sunshine notice was released was made before or after the notice was released. For these reasons, we seek comment whether we should modify § 1.1203(b) to make the prohibition on *ex parte* communications effective at midnight after a Sunshine notice is released, unless otherwise specified in the notice. See § 1.1203(b) of the proposed rules section of this document for proposed revised language. We seek comment on this proposal. In particular, we seek

comment on whether there are other ways to create a brighter line to mark the beginning of the period of repose that would not also shorten the period of repose.

26. We take this opportunity to remind parties that the Commission and its staff have discretion to modify the applicable *ex parte* rules in a particular proceeding by "order, letter, or public notice." For example, staff may indicate that a particular licensing proceeding will be changed from a restricted proceeding to a permit-but-disclose proceeding because it raises policy issues on which broader public participation would benefit the public interest. Staff may choose to continue to require service of process in such a proceeding, and will so indicate in the document that changes the status of the proceeding.

D. Disclosure Statements

27. In many cases, a party filing a pleading or other document with the Commission or making an *ex parte* presentation may represent the interests of other entities, or the party's interest in the proceeding may otherwise be unclear. We are interested in whether the ability of both the Commission and the public to evaluate the positions taken in Commission proceedings would be improved if parties provided more information about themselves and their interests in the proceedings. We therefore seek comment on the desirability of requiring filers to submit a disclosure statement in connection with their filings in all Commission proceedings.

28. There are several possible models for a disclosure requirement. One possible model is Supreme Court Rule 29.6. That rule requires any nongovernmental corporation filing a document with the Court to include a corporate disclosure statement identifying the parent corporations and listing any publicly held company that owns ten percent or more of the corporation's stock. In addition, Supreme Court Rule 37.6 requires that amicus briefs (except those filed by certain government entities) "indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution." Another possible model is Rule 26.1 of the Circuit Rules for the U.S. Court of Appeals for the DC Circuit. That rule applies more broadly than the Supreme

Court Rule, to any corporation, association, joint venture, partnership, syndicate or other similar entity appearing as a party or *amicus curiae* in any proceeding. Like Supreme Court Rule 29.6, it requires these entities to file a disclosure statement that identifies all parent companies and any publicly held company that has a ten percent or greater interest in the entity, but it goes on to define "parent companies" to include all companies controlling the specified entity directly, or indirectly through intermediaries. The statement must also identify the represented entity's general nature and purpose, insofar as relevant to the litigation. If the entity is an unincorporated entity whose members have no ownership interests, the disclosure statement must include the names of any members who have issued shares or debt securities to the public. This last requirement does not apply to trade associations or professional associations, defining a trade association as a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership. A third possible model is the Lobbying Disclosure Act (LDA). The LDA requires the disclosure of the registrant's clients and any organizations that contribute more than \$5,000 in a quarterly period to the registrant's lobbying activities.

29. We seek comment on these alternatives and, more generally, whether to require disclosure of this type in filings with the Commission. We ask parties to comment on whether one of the models described would suit this objective, or whether a combination of these models or a different model would be better. We recognize that greater disclosure might discourage some entities from participating in our proceedings. We seek comment on whether a disclosure rule could be fashioned in a way that would avoid discouraging participation in our proceedings while still providing more information about the relevant interests of the parties. We also seek comment on what, if any, disclosure requirements would be appropriate for individuals. We also ask parties to identify whether there are types of entities or proceedings to which any disclosure requirement should not apply.

30. We recognize that the Commission currently requires some regulatees to submit certain ownership information. For example, commercial broadcaster licensees and entities that hold attributable interests in such licensees must file FCC Form 323 biennially, and also after various triggering events.

Filers of Form 323 identify their ownership interest as well as any other entities or individuals that have an attributable ownership interest. The filed forms are available to the public online through the Consolidated Database System (CDBS). Similarly, licensees and license applicants for wireless services subject to competitive bidding must have an updated FCC Form 602 on file upon certain triggering events, which include applying for or renewing a license and requesting authority to transfer control of a license. Among other things, the filer must disclose the real party or parties in interest, including the identity and relationship of persons or entities directly or indirectly controlling the applicant. Filers also must disclose information regarding persons or entities that directly or indirectly hold a ten percent or greater ownership interest or general partnership interest in the filer. Information from Form 602 is available to the public online through the Universal Licensing System (ULS).

31. We seek comment on whether this ownership information appropriately could be referenced by a party in its *ex parte* filing or pleading to satisfy part or all of any disclosure requirements that the Commission may adopt. Are there other publicly available sources of similar information that appropriately could be referenced or attached in a similar way? We invite any other suggestions on how to improve the Commission's and the public's understanding of a party's interest in a proceeding.

E. Other Issues

32. *Sanctions and Enforcement.* Even with perfect compliance with our existing rules, we tentatively believe our proposals would improve transparency by, for example, requiring disclosure of every *ex parte* presentation in permit-but-disclose proceedings, and requiring parties to identify or refer specifically to all data and arguments that they present. Above, however, we seek comment on whether stricter enforcement of our existing rules would lessen or eliminate the need for any of the changes to our rules that we propose in this Notice. In doing so, we do not suggest that the rule changes suggested here are a substitute for enforcement of the *ex parte* rules. Regardless of what amendments are adopted in this proceeding or when, we intend to place greater emphasis on enforcement against impermissible *ex parte* contacts. We will not hesitate to impose appropriate sanctions, including monetary forfeitures, for violations. In this regard, we seek comment on what types of

sanctions should be deemed appropriate with respect to different types of *ex parte* violations, and, in particular, what sanctions would be appropriate for the filing of inadequate *ex parte* notices. We specifically seek comment on the extent to which prejudice to other parties should be a principal factor in determining the appropriate sanction and any other factors we should consider in determining what sanctions are appropriate. We also seek comment on whether all *ex parte* sanctions, including admonitions, should be publicly announced.

33. *New Media.* The Commission is beginning to make use of new media technologies in some of its proceedings. For example, the Commission has three new Web sites that are dedicated to particular issues—broadband.gov for the proceeding to create a National Broadband Plan, OpenInternet.gov for the proceeding to preserve and promote the open Internet, and reboot.fcc.gov to solicit and discuss ideas on general Commission reform. These Web sites and the Commission's more familiar Web site provide information about the Commission and its proceedings, but they also allow the public to comment on various issues through new media such as blogs, Facebook, and IdeaScale. Some of the issues on which the public provides input are the subjects of permit-but-disclose proceedings and are therefore subject to our *ex parte* rules. The Commission to date has modified its *ex parte* rules to accommodate the use of new media on a case-by-case basis pursuant to § 1.1200(a). We expect to continue to do so as we and the public gain experience with the use of new media.

34. We do not, at this time, propose specific rules regarding the *ex parte* implications of new media, but we welcome any comments on the issue. In particular, we are interested in comments as to whether and how we should account for any differences in access to these new media by different segments of the public, such as those whose homes or communities are not served by broadband or those who have not subscribed to broadband.

35. *Minor Changes.* We seek comment on a number of additional proposed changes:

36. First, we seek comment on eliminating § 1.1202(d)(6) as it appears to be an exact duplicate of § 1.1202(d)(5).

37. Second, we seek comment on amending § 1.1204(a)(6) regarding communications between the Department of Justice or Federal Trade Commission and this Commission to reflect that the matter be related to

“communications” generally rather than “telecommunications,” and to delete the word “competition.” We believe that referring to “communications” rather than “telecommunications,” which is a defined term under the Act, would reflect more accurately the types of discussions that are intended to be exempt under this rule, and would avoid any appearance that we intend to limit the scope of the exemption to communications regarding “telecommunications” as defined in the Act, as opposed to, for example, cable services. We also propose to delete the word “competition” to reflect that communications between our agencies may touch on matters such as consumer protection or law enforcement, which may not be directly linked to competition. We seek comment on these proposals.

38. Third, we propose to add the Pooling Administrator and the TRS Numbering Administrator to the list of entities in § 1.1204(a)(12) with which communications are exempt from the *ex parte* rules. This would be consistent with the exemptions for other numbering administrators such as the North American Numbering Plan Administrator and the Number Portability Administrator. The Commission established the framework for selecting the national Pooling Administrator in 2000, and created the TRS Numbering Administrator in 2008; these proposed changes would bring the *ex parte* rules up to date with regard to these entities. We seek comment on these proposals.

39. Fourth, we propose to delete from the list of permit-but-disclose proceedings in § 1.1206(a) Bell Operating Company applications under section 271 of the Act. All Bell Operating Companies have applied for and received authority under section 271 in all their relevant states. If for some reason in the future a Bell Operating Company were to reapply for authority under section 271, the staff could designate the proceeding as a permit-but-disclose proceeding under § 1.1200(a). We seek comment on this proposal.

40. Fifth, we propose to codify the practice whereby staff may at its discretion file an *ex parte* summary of a meeting attended by many parties, thereby relieving the parties of the obligation to file individually. This would be at the staff's option. We seek comment on this proposal.

41. Sixth, we propose a change to our rules regarding oral presentations in restricted proceedings. Under our current rules, *ex parte* presentations are generally not permitted in restricted

proceedings. An oral presentation is not *ex parte*, however, if it is made with advance notice to all the parties to the proceeding with an opportunity for them to be present. If a party makes a permissible oral presentation, our rules currently do not require the party to file a summary in the record of the proceeding. We propose to require a summary to the same extent as in permit-but-disclose proceedings. We believe that having a summary in the record of the proceeding would facilitate review of the record by Commission staff as well as the parties to the proceeding. A draft of a revised § 1.1203(b) is provided. We seek comment on the proposal.

42. Seventh, we propose to make it more plain that our rules already require that documents that are shown to or given to Commission staff during *ex parte* meetings are themselves written *ex parte* presentations and must be filed. A draft of a proposed clarification to § 1.1206(b)(1) is provided. We seek comment on the proposed language.

43. Eighth, we propose to clarify a point regarding inter-governmental *ex parte* presentations that are permitted during the Sunshine period. Current § 1.1203(a)(4) permits presentations from members of Congress, their staff, or other agencies or branches of the Federal government in exempt and permit-but-disclose proceedings during the Sunshine period, when most presentations are not permitted. The rule also states that significant presentations must be placed in the record consistent with § 1.1206(b). Section 1.1204(b), however, provides that *ex parte* presentations in exempt proceedings need not be disclosed at all. To remedy this inconsistency, we propose to clarify in § 1.1203(a)(4) that the requirement to disclose presentations that are made during the Sunshine period only applies to presentations made in permit-but-disclose proceedings. We seek comment on this proposal.

44. Ninth, we propose to clarify that the Sunshine period prohibition does not affect parties' obligation to file a written *ex parte* presentation or memorandum summarizing an oral *ex parte* presentation for presentations that are made on the last day before the Sunshine period begins, even though new *ex parte* presentations are not permitted unless they are made pursuant to an exception to the prohibition on *ex parte* presentations. A proposed clarification to § 1.1203 is provided.

45. Finally, we propose in general to reorganize § 1.1206 to make it clearer and easier to understand, and to make

various conforming edits. A draft of a proposed improved § 1.1206 is provided. We seek comment on these proposed changes.

46. *Other.* We invite commenters to propose any other modifications to the *ex parte* rules that would enhance the transparency, fairness, and efficiency of the decisionmaking process.

IV. Procedural Matters

47. *Ex Parte Presentations.* The rulemaking this NPRM initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required. Other requirements pertaining to oral and written presentations are set forth in § 1.1206(b) of the Commission's rules.

48. *Accessible Formats:* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

49. *Regulatory Flexibility Act.* Our action does not require notice and comment, and therefore falls outside of the Regulatory Flexibility Act of 1980, as amended. We will send a copy of this Notice of Proposed Rulemaking to the Chief Counsel of Advocacy of the SBA.

50. *Paperwork Reduction Act.* This proceeding may result in new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we seek specific comment on how we might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

V. Ordering Clauses

51. *Accordingly, it is ordered,* pursuant to sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), and 303(r), that *notice is hereby given* of the proposed regulatory changes described

above, and that *comment is sought* on these proposals.

52. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 1

Administrative practice and procedure, Government employees, Lawyers, Penalties, Reporting and recordkeeping requirements, Telecommunications.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 1 to read as follows:

PART 1—PRACTICE AND PROCEDURE

1. The authority citation for part 1 continues to read as follows:

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 303(r), and 309.

§ 1.202 [Amended]

2. Section 1.202 is amended by removing paragraph (d)(6).

3. Section 1.203 is amended by revising paragraphs (a)(4) and (b) introductory text, and adding a new paragraph (c) to read as follows:

§ 1.203 Sunshine period prohibition.

(a) * * *

(4) The presentation is made by a member of Congress or his or her staff, or by other agencies or branches of the Federal government or their staffs in a proceeding exempt under § 1.204 or subject to permit-but-disclose requirements under § 1.206. If this presentation is of substantial significance and clearly intended to affect the ultimate decision, and is made in a permit-but-disclose proceeding, the presentation (or, if oral, a summary of the presentation) must be placed in the record of the proceedings by Commission staff or by the presenter in accordance with the procedures set forth in § 1.206(b).

(b) The prohibition set forth in paragraph (a) of this section applies beginning at midnight following the release of a public notice that a matter has been placed on the Sunshine Agenda until the Commission:

* * * * *

(c) Nothing in this section prevents a party from submitting a written *ex parte* presentation or a memorandum summarizing an oral *ex parte* presentation on the first business day of the Sunshine period prohibition to the extent that § 1.206 or § 1.208 requires submission of such a presentation or memorandum to reflect an *ex parte* presentation that was made on the last day before the beginning of the Sunshine period.

4. Section 1.204 is amended by revising paragraphs (a)(6), (a)(12)(iii), and (a)(12)(iv), and adding new paragraphs (a)(12)(v) and (a)(12)(vi) to read as follows:

§ 1.204 Exempt *ex parte* presentations and proceedings.

(a) * * *

(6) The presentation is to or from the United States Department of Justice or Federal Trade Commission and involves a communications matter in a proceeding which has not been designated for hearing and in which the relevant agency is not a party or commenter (in an informal rulemaking or joint board proceeding) provided that, any new factual information obtained through such a presentation that is relied on by the Commission in its decisionmaking process will be disclosed by the Commission no later than at the time of the release of the Commission's decision;

* * * * *

(12) * * *

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

(iv) The Number Portability Administrator relating to the administration of local number portability pursuant to 47 U.S.C. 251(b)(2) and (e); provided that the relevant administrator has not filed comments or otherwise participated as a party in the proceeding;

(v) The TRS Numbering Administrator relating to the administration of the TRS numbering directory pursuant to 47 U.S.C. 225 and 47 U.S.C. 251(e); or

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

* * * * *

5. Section 1.206 is amended by revising paragraph (a)(12), removing paragraph (a)(13), redesignating paragraph (a)(14) as (a)(13) (Note 3 to paragraph (a) remains unchanged), and revising paragraph (b) to read as follows:

§ 1.206 Permit-but-disclose proceedings.

(a) * * *

(12) A modification request filed pursuant to § 64.1001 of this chapter; and

* * * * *

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

(1) *Written presentations.* A person who makes a written *ex parte* presentation subject to this section, including giving or showing a document to Commission staff, shall, no later than the next business day after the presentation, submit two copies of the presentation to the Commission's Secretary under separate cover for inclusion in the public record. The presentation (and cover letter) shall clearly identify the proceeding to which it relates, including the docket number, if any, shall indicate that an original and one copy have been submitted to the Secretary or that one copy has been filed electronically, and must be labeled as an *ex parte* presentation. If the presentation relates to more than one proceeding, two copies (or an original and one copy, or one copy if filed electronically) shall be filed for each proceeding.

(2) *Oral presentations.*

(i) A person who makes an oral *ex parte* presentation subject to this section shall submit a memorandum that summarizes all data presented and arguments made during the oral *ex parte* presentation. If the oral *ex parte* presentation consisted in whole or in part of the presentation of data or arguments already reflected in that person's written comments, memoranda or other filings in the proceeding, the person who made such presentation may provide citations to such data or arguments in that person's prior comments, memoranda, or other filings in lieu of summarizing them in the memorandum. Memoranda must contain a summary of the substance of the *ex parte* presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. The memorandum (and cover letter, if any) shall clearly identify the proceeding to which it relates, including the docket number, if any, shall indicate that an original and one copy have been submitted to the Secretary or that one copy has been filed electronically, and must be labeled as an *ex parte* presentation. If the presentation relates to more than one proceeding, two copies of the memorandum (or an original and one copy, or one copy if filed electronically) shall be filed for each proceeding.

Note 1 to paragraph (b): Where, for example, presentations occur in the form of discussion at a widely attended meeting, preparation of a memorandum as specified in the rule might be cumbersome. Under these circumstances, the rule may be satisfied by submitting a transcript or recording of the discussion as an alternative to a memorandum.

(ii) The memorandum required to be submitted to the Secretary under this subpart must be submitted no later than the next business day after the presentation. In proceedings governed by § 1.49(f) or for which the Commission has made available a method of electronic filing, the memorandum shall, when feasible, be filed through the electronic comment filing system available for that proceeding. In other proceedings or if filing through the electronic comment filing system would present an undue hardship, an original and one copy must be submitted to the Secretary and also sent on paper or via electronic mail to the Commissioners and Commission employees involved in the presentation.

(iii) If the memorandum summarizing an oral presentation required to be submitted under this subpart results from an oral *ex parte* presentation that is made pursuant to an exception to the Sunshine period prohibition, the memorandum shall be submitted through the Commission's electronic comment filing system, and shall be submitted within four hours of the presentation to which it relates. The memorandum shall also identify plainly on the first page the specific exception in § 1.1203(a) on which the presenter relies. The memorandum shall also state the date and time at which the oral *ex parte* presentation was made.

(3) **Electronic Filing and Native Formats.** In proceedings governed by § 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, shall, when feasible, be filed electronically, and shall be filed in native formats (i.e., .doc, .xml, .ppt, searchable .pdf). In cases where a filer believes that the document to be filed should be withheld from public inspection, the filer should file electronically a request that the information not be made routinely available for public inspection pursuant to § 0.459, and a copy of the document with such confidential information redacted. The filer should submit the

original unredacted document to the Secretary as directed in § 0.459.

(4) Notwithstanding paragraphs (b)(1) and (b)(2) of this section, in permit-but-disclose proceedings presentations made by Members of Congress or their staffs or by an agency or branch of the Federal Government or its staff shall be treated as *ex parte* presentations only if the presentations are of substantial significance and clearly intended to affect the ultimate decision. The Commission staff shall prepare a written summary of any such oral presentation and place it in the record in accordance with paragraph (b)(2) of this section and place any such written presentation in the record in accordance with paragraph (b)(1) of this section.

(5) **Notice of *ex parte* presentations.** The Commission's Secretary or, in the case of non-docketed proceedings, the relevant Bureau or Office shall place in the public file or record of the proceeding written *ex parte* presentations and memoranda reflecting oral *ex parte* presentations. The Secretary shall issue a public notice listing any written *ex parte* presentations or written summaries of oral *ex parte* presentations received by his or her office relating to any permit-but-disclose proceeding. Such public notices should generally be released at least twice per week.

Note 2 to paragraph (b): Interested persons should be aware that some *ex parte* filings, for example, those not filed in accordance with the requirements of this paragraph (b), might not be placed on the referenced public notice. All *ex parte* presentations and memoranda filed under this section will be available for public inspection in the public file or record of the proceeding, and parties wishing to ensure awareness of all filings should review the public file or record.

Note 3 to paragraph (b): As a matter of convenience, the Secretary may also list on the referenced public notices materials, even if not *ex parte* presentations, that are filed after the close of the reply comment period or, if the matter is on reconsideration, the reconsideration reply comment period.

6. Section 1.1208 is revised to read as follows:

§ 1.1208 Restricted proceedings.

Unless otherwise provided by the Commission or its staff pursuant to § 1.1200(a) of this section, *ex parte* presentations (other than *ex parte* presentations exempt under § 1.1204(a)) to or from Commission decision-making personnel are prohibited in all proceedings not listed as exempt in § 1.1204(b) or permit-but-disclose in § 1.1206(a) until the proceeding is no

longer subject to administrative reconsideration or review or judicial review. Proceedings in which *ex parte* presentations are prohibited, referred to as "restricted" proceedings, include, but are not limited to, all proceedings that have been designated for hearing, proceedings involving amendments to the broadcast table of allotments, applications for authority under Title III of the Communications Act, and all waiver proceedings (except for those directly associated with tariff filings). A party making an oral presentation in a restricted proceeding, on a non-*ex parte* basis, must file a summary of the presentation in the record of the proceeding using procedures consistent with those specified in § 1.1206.

Note 1 to § 1.1208: In a restricted proceeding involving only one "party," as defined in § 1.1202(d), the party and the Commission may freely make presentations to each other because there is no other party to be served with a right to have an opportunity to be present. See § 1.1202(b). Therefore, to determine whether presentations are permissible in a restricted proceeding without service or notice and an opportunity for other parties to be present the definition of "party" should be consulted.

Examples: After the filing of an uncontested application or waiver request, the applicant or other filer would be the sole party to the proceeding. The filer would have no other party to serve with or give notice of any presentations to the Commission, and such presentations would therefore not be "ex parte presentations" as defined by § 1.1202(b) and would not be prohibited. On the other hand, in the example given, because the filer is a party, a third person who wished to make a presentation to the Commission concerning the application or waiver request would have to serve or notice the filer. Further, once the proceeding involved additional "parties" as defined by § 1.1202(d) (e.g. an opponent of the filer who served the opposition on the filer), the filer and other parties would have to serve or notice all other parties.

Note 2 to § 1.1208: Consistent with § 1.1200(a), the Commission or its staff may determine that a restricted proceeding not designated for hearing involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties and specify that the proceeding will be conducted in accordance with the provisions of § 1.1206 governing permit-but-disclose proceedings.

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