

Transpo Board Should Broaden Ex Parte Rules Further

By **Matthew Warren and Allison Davis** (August 20, 2024)

As in many things, balance is key to effective regulation. And one of the balances that administrative agencies must strike is the balance between, on the one hand, promoting open and transparent communications with stakeholders and, on the other, guarding against practices that could cast doubt on the agency's fairness and impartiality.

Both regulators and the regulated benefit from clear rules that allow regulators to directly interact with the entities affected by their regulations — while clearly delineating the kinds of ex parte communications that are impermissible.

The Surface Transportation Board has made good progress in revising antiquated ex parte communication rules, to improve its ability to communicate with stakeholders. But more is needed. This article reviews current STB rules for ex parte communications, and outlines some recommendations that the agency could consider to improve its processes.

For decades, the STB operated under a set of strict 1970s-era rules that barred most ex parte communications related to any STB proceeding — including informal rulemakings. The STB reformed those rules for informal rulemakings in 2018, correctly recognizing that they were not consistent with current best practices for administrative agencies.

But the STB should consider going further. In the informal rulemaking context, restrictive timelines make it difficult for parties and the agency to reap the full benefit of ex parte discussions about pending rulemakings. Outside of informal rulemakings, such as in licensing proceedings, the board should consider making additional changes to promote appropriate communications with staff.

Current STB Ex Parte Communication Rules

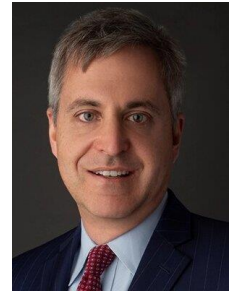
The STB's regulations on communications are located at Title 49 of the Code of Federal Regulations, Part 1102.

The regulations define "ex parte communication" to mean:

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.[1]

In 1977, the STB's predecessor, the Interstate Commerce Commission, adopted rules that barred such communications in any pending proceeding — including informal rulemaking proceedings.[2]

In 2018, the STB abandoned this complete prohibition in the context of informal



Matthew Warren



Allison Davis

rulemakings, driven in part by guidance to administrative agencies from the Administrative Conference of the United States recommending against a general prohibition on ex parte communications in informal rulemaking proceedings.[3]

For informal rulemaking proceedings, the new rules clarified that the ex parte prohibition does not apply to any communications occurring "prior to the issuance of a notice of proposed rulemaking." [4]

And after a notice of proposed rulemaking has been issued, the new rules explicitly permit ex parte communications, subject to requirements for disclosure of such meetings, up until 20 days prior to the due date for reply comments. After that point, no communications are permitted — with or without disclosure.[5]

The agency and the public have now operated under the revised ex parte rules for six years, and ex parte meetings have become an established part of the STB rulemaking process. But the STB should consider further changes to its rules, to ensure it obtains a thorough understanding of stakeholder positions — which should ultimately enable it to establish better regulations.

Why the STB Should Expand Use of Ex Parte Meetings in Informal Rulemakings

First, the STB should consider expanding the timeframe in which it allows ex parte meetings. The current rules only permit communications that occur at least 20 days prior to the due date for reply comments.

In theory, this provides a sufficient window of time for ex parte meetings, but in practice, ex parte meetings generally occur in the short period of time after opening comments and before the 20-day deadline.

This compressed schedule taxes both stakeholders — who are participating in ex parte meetings, while also reviewing and preparing replies to other parties' comments — and the agency.

Moreover, under the current practice, it is difficult for any ex parte meeting to effectively discuss ideas that might have been raised in another party's opening comments — and utterly impossible to discuss issues raised in reply comments.

Issues can and do arise in reply comments for which public engagement could be beneficial, especially in rulemakings in which technical data is sought and submitted. The current policy of prohibiting communications after the cutoff — even if such communications are disclosed — inhibits discussions on all of the issues in the record, which could clarify evidence and arguments presented.

These issues could be solved if the STB removed its bar on communications within 20 days of reply comments, and allowed such communications for a period of time after reply comments — as was suggested by some commenters in the STB's 2018 rulemaking. This would be in line with other agencies.

Since the board's 2018 rulemaking, the U.S. Department of Transportation's policies on ex parte communications have changed. For example, the DOT's prior policy discouraging ex parte communications after publication of a notice of proposed rulemaking was canceled.

And in 2022, the department issued guidance encouraging "public contacts," emphasizing

that these informal communications "provide a means to engage the public and obtain improved data and information and clarification of views that can assist the agency in making well-informed decisions." [6]

There are no explicit prohibitions against ex parte communications in DOT informal rulemakings. Such communications are permitted with appropriate process up until the publication of a final rule, with the department retaining the flexibility to provide additional opportunities for comment as may be appropriate. [7]

In the same vein, the Federal Energy Regulatory Commission's ex parte communication rules specifically exclude informal rulemakings. Thus, such communications are generally allowed, without any time limitation on when they occur. [8]

The STB previously was concerned that permitting ex parte communications after reply comments would add an additional round of comments. But the STB now has six years of its own experience to assess what procedures it should employ.

In that time, the STB has had to waive the new rules in several proceedings — both to allow further engagement to ensure that it understood issues in the comments, and to extend the default ex parte meeting period. These formal actions would not be necessary if the board retained the flexibility to have meetings with stakeholders regarding the full record.

Finally, the STB should also encourage more ex parte communications in rulemakings with STB staff, who often have particular expertise in technical or reporting issues. The current rules assume as a default that ex parte communications would occur with board members. [9]

While the rules permit the STB to delegate its participation in such communications to board staff, in practice this rarely happens. By contrast, at other agencies, staff frequently engage in ex parte communications in informal rulemaking proceedings.

The board should not require a delegation for staff to be able to communicate with the public in informal rulemakings, so long as those communications are subject to the disclosure procedures in Part 1102. Especially on technical issues, these communications would promote efficiency — and ultimately, better decision making.

Additional Changes on Permissible Communications With Staff

Outside of the rulemaking context, the STB should consider whether allowing ex parte communications with appropriate protections would promote efficiency in other proceedings — particularly in licensing proceedings.

For example, a significant number of proceedings before the STB fall under the expedited class exemption process, in which the board sometimes has as little as 16 calendar days to evaluate a pleading and issue a notice. These proceedings are often uncontested, but even then, questions can arise regarding information that is provided as part of a class exemption notice.

Unwritten practice permits some level of communications with stakeholders in uncontested class exemption proceedings, but the scope of what is permissible and what is not is unclear. Clarifying this practice would benefit both stakeholders and staff.

FERC, for example, clarifies that its ex parte regulations apply to contested on-the-record-

proceedings, and excludes proceedings in which no party disputes any material issue.[10]

These types of communications with staff can be essential for the STB in meeting its regulatory deadlines, as the alternative has been to rely on written decisions and responsive filings. Stakeholders likewise benefit from prompt communications that can ensure they are receiving timely decisions.

Effective communications with staff could be beneficial in other licensing proceedings as well. Currently, the only mechanism available for parties and board staff to communicate involves the practice of requiring written motions for technical conferences.

That practice has not been productive, with some staff conferences being held months after a request has been submitted. And even then, the constrictive way these conferences are held have not furthered efficiency in proceedings.

One option the STB could consider in the context of Class I licensing proceedings is revisiting its precedent in *Fieldston*. Under Title 49 of the U.S. Code, Section 11324(f)(1), ex parte communications are permitted in consolidation proceedings involving at least one Class I carrier, subject to disclosure requirements.

Notwithstanding this statutory provision, the board adopted a decision in 1997 in *Fieldston* choosing to prohibit such communications, even with disclosure.[11] But the justifications for this decision may no longer be valid.

For example, in *Fieldston*, the STB expressed a concern about reducing oral communications to writing and placing it in the public docket. But for several years now, the board has had in place procedures where stakeholders draft the summary of the ex parte communication, which is then reviewed by the agency and placed in the record.

This process works well, minimizes the use of agency resources, and is employed by other agencies as well.

The STB also expressed a concern about whether entertaining such communications might delay the process and inhibit the board's ability to issue decisions promptly. The STB should rightly be interested in ensuring that it meets its regulatory and statutory deadlines, but it is possible that engagement with the public in certain cases could help expedite proceedings.

That particularly could be true in situations where technical information could best be explained to board staff who are subject matter experts.

Conclusion

The STB's 2018 ex parte rule reform was an important step in increasing agency engagement with stakeholders.

But the board should explore ways to build on that progress, by expanding the windows for communications in informal rulemakings, encouraging more communications with staff, and considering whether to permit some ex parte communications in licensing proceedings, in appropriate circumstances and with safeguards.

Matthew Warren is a partner and co-leader of the rail sector team at Sidley Austin LLP.

Allison Davis is counsel at Sidley. She previously served as a senior adviser to two chairmen and director of the Office of Proceedings at the STB.

Disclosure: At the time of the STB's ex parte rulemaking discussed in the article, Allison Davis served as legal and policy adviser to former STB Chairman Ann Begeman.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] 49 C.F.R. §1102.2(a)(5).

[2] Revised Rules of Practice, 358 I.C.C. 189 (1977).

[3] Ex Parte Communications in Informal Rulemaking Proceedings, Ex Parte 739 (STB served Feb. 28, 2018).

[4] 49 C.F.R. §1102.2(b)(2).

[5] 49 C.F.R. §1102.2(g)(1).

[6] Guidance on Communication with Parties outside of the Federal Executive Branch (Ex Parte Communications) (April 19, 2022).

[7] 49 C.F.R. §5.5.

[8] 18 C.F.R. § 385.2201. FERC's website explains that while ex parte communications are generally allowed in informal rulemakings, agencies must still avoid any appearances of impropriety or bias that could undermine the integrity of the rulemaking process. <https://www.ferc.gov/OPP/rulemaking-explainer>.

[9] 49 C.F.R. §1102.2(g)(1).

[10] 18 C.F.R. § 385.2201(c)(1).

[11] Petition of Fieldston Co. Inc. to Establish Procedures Regarding Ex Parte Communications in Railroad Merger Proceedings, Docket No. EP619 (Jan. 8, 1997).