



## TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY .....	1
II.	THE PROPOSAL FOR EARLIER FILING OF <i>EX PARTE</i> PRESENTATIONS PROXIMATE TO THE SUNSHINE PERIOD SHOULD HELP ACHIEVE THE GOALS THE PROPOSAL IS DESIGNED TO ADVANCE .....	2
III.	THE COMMISSION ONLY SHOULD ADOPT THE PROPOSAL FOR EARLIER FILING OF <i>EX PARTE</i> PRESENTATIONS PROXIMATE TO THE SUNSHINE PERIOD IF, AT THE SAME TIME, IT EXPANDS AND CODIFIES THE PERIOD FOR PUBLIC REVIEW OF DRAFTS TO BE VOTED ON AT COMMISSION MEETINGS.....	4
A.	The Commission Only Should Adopt the Proposal for Earlier Filing of <i>Ex Parte</i> Presentations Proximate to the Sunshine Period if it Correspondingly Adds a Day of Public Review to the Front End of the Process .....	4
B.	The Commission Only Should Adopt the Proposal for Earlier Filing of <i>Ex Parte</i> Presentations Proximate to the Sunshine Period if it Codifies its Public Review Process, to Begin Three Weeks and One Day Prior to the Open Commission Meeting, as a Rule.....	10
C.	The Commission Possesses Authority to Adopt as a Rule Now the Process of Public Review of Meeting Item Drafts .....	13
IV.	IN ADOPTING THE PROPOSAL FOR EARLIER FILING OF <i>EX PARTE</i> PRESENTATIONS PROXIMATE TO THE SUNSHINE PERIOD, THE COMMISSION SHOULD MODIFY ITS DRAFT REVISED RULE LANGUAGE.	15
V.	CONCLUSION .....	16



First, in conjunction with adopting the *NPRM's* proposal, the Commission must expand by a day, to three weeks and one day, the date it makes available to the public drafts of documents to be voted on at Open Commission Meetings. While ACA Connects recognizes the benefits to the Commission's decision-making that should result from adoption of the *NPRM's* proposal, it does not believe these benefits must come at the expense of the public having one less day of advocacy. Second, the Commission should convert its practice of making drafts of documents to be voted on at Open Commission Meetings publicly available, as modified by adding a day on the front end, to a codified rule. Doing so will memorialize a successful practice that has now been in place for several years, help to ensure it remains in place, and overall contribute to the Commission's transparency and accountability. The Commission possesses authority to adopt ACA Connects' companion proposals, without seeking further comment, in an order responsive to the *NPRM*.

## **II. THE PROPOSAL FOR EARLIER FILING OF *EX PARTE* PRESENTATIONS PROXIMATE TO THE SUNSHINE PERIOD SHOULD HELP ACHIEVE THE GOALS THE PROPOSAL IS DESIGNED TO ADVANCE**

ACA Connects recognizes the benefits that would result from the proposal to require that memorialization of *ex parte* presentations made on the day before or of release of the Sunshine notice be filed before the day that the Sunshine period begins, with replies filed no later than the day the Sunshine period begins.<sup>3</sup> The extra time without a continued open record should give more meaning to the intended "period of

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<sup>3</sup> See *id.* at 6960, Appx., Proposed Rules (draft revision to 47 CFR § 1.1206(b)(2)(iv)). Because the Sunshine period begins the day after the Commission issues the Sunshine notice, the *NPRM's* proposal functionally would require that the *ex parte* filing in these circumstances be made no later than the same day that the Commission releases the Sunshine notice.

repose” for Commissioners and staff, and better enable them to evaluate the record and the relevant issues, thereby leading to better and more informed decisions.<sup>4</sup> Moreover, enhancing the Commission’s ability in this regard should lead to collateral improvements in its ability to release expeditiously documents adopted at Open Commission Meetings.<sup>5</sup> In these ways, it is true that adoption of the *NPRM*’s proposal should result in more productive deliberations within the Commission, further leading to more informed decisions and even more timely release of adopted documents.

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<sup>4</sup> See *id.* at 6949, 6955, 6956, paras. 6, 27, 29. To illustrate, Commissioner O’Rielly has suggested that all initial edits to Open Meeting documents should be posted by Commissioners at least 48 hours in advance of the Meeting. See Commissioner Michael O’Rielly, *Further Improving the FCC’s Procedures*, FCC Blog (Dec. 20, 2018), <https://www.fcc.gov/news-events/blog/2018/12/20/further-improving-fccs-procedures> (stating that, in conjunction with suggestion that conversations about any edits should commence well in advance, suggestions had been “partially implemented”). Yet, in the example presented above, where the Open Commission Meeting will be on a Friday but replies to memorializations of *ex parte* presentations made proximate to the Sunshine period may not be filed until late Tuesday night and post to ECFS until sometime Wednesday morning, it might be impossible under the current rules for edits taking the replies into consideration to be made at least 48 hours in advance of the Meeting because the replies may not even be seen by Commissioners and staff until there is less than 48 hours until the Meeting.

<sup>5</sup> Cf. Commissioner Michael O’Rielly, *FCC’s Pre-Adoption Process Also Needs Work*, FCC Blog (Apr. 1, 2015), <https://www.fcc.gov/news-events/blog/2015/04/01/fccs-pre-adoption-process-also-needs-work> (having ultimate text that will be voted on at an Open Commission Meeting no later than 24 hours before the start of the meeting would speed up and improve the post-adoption process, enabling Commissioners to finalize their statements sooner and staff to make non-substantive technical and conforming edits more quickly, thereby promoting the release of documents without undue delay).

**III. THE COMMISSION ONLY SHOULD ADOPT THE PROPOSAL FOR EARLIER FILING OF *EX PARTE* PRESENTATIONS PROXIMATE TO THE SUNSHINE PERIOD IF, AT THE SAME TIME, IT EXPANDS AND CODIFIES THE PERIOD FOR PUBLIC REVIEW OF DRAFTS TO BE VOTED ON AT COMMISSION MEETINGS**

The *NPRM* references the Commission's current practice of announcing the tentative agenda for an Open Commission Meeting, and releasing drafts of the documents to be voted on, three weeks before the Meeting.<sup>6</sup> The fact that these actions remain "practices" is poignant, even the more so when juxtaposed with a proposed *rule* change that, if adopted, will curtail by a day the ability of interested parties to provide input on an item to be voted on by the Commission at an Open Meeting. ACA Connects submits that this juxtaposition shines a light on the appropriateness of the Commission *now* adopting these practices as actual rules to govern the Commission's processes, and in so doing, to also provide that the Commission will release draft items at least three weeks *and one day* prior to the Meeting. ACA Connects' support of the *NPRM*'s proposal is contingent upon the Commission adopting these companion measures in the same order.

**A. The Commission Only Should Adopt the Proposal for Earlier Filing of *Ex Parte* Presentations Proximate to the Sunshine Period if it Correspondingly Adds a Day of Public Review to the Front End of the Process**

The Commission suggests that adoption of the *NPRM*'s proposal should present no hardship, because interested parties can adjust their advocacy schedule by a day if they seek to avoid being rushed filing the requisite *ex parte* notice by the end of the day

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<sup>6</sup> See *NPRM*, 35 FCC Rcd at 6956, para. 28.

that the Sunshine notice is released.<sup>7</sup> The *NPRM*'s proposal, however, does more than just time shift the pre-Sunshine advocacy crunch up a day; it also could deprive interested parties of a day to respond to a draft document, and correspondingly deny Commissioners and staff some valuable inputs on the draft they might otherwise receive.

Frequently, *ex parte* filings memorializing presentations do more than merely summarize in a few sentences the general tenor of the presentation; in fact, the Commission's *ex parte* rules specifically provide that such filings "shall . . . summarize[] all data presented and arguments made during the oral *ex parte* presentation."<sup>8</sup> Beyond that, as the Commission is well aware, presentations in the days leading up to a Sunshine period routinely are limited to at most one half-hour to address numerous points raised in documents often dozens, if not hundreds, pages long. As such, parties frequently utilize the *ex parte* filing to expand upon points only touched upon in the oral presentation given the limited time, or to respond to questions raised by Commissioners or staff during the presentation that the parties did not have time, or were not fully able, to address in the moment. The end result is that potentially putting parties in a position to have to draft and submit such filings in a matter of hours may constructively force such parties to short-shrift substance that otherwise would be immensely helpful to inform the record.

Another consideration emanates from the fact that particularly with "high-profile" or controversial items, multitudes of interested parties already are vying for meetings in

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<sup>7</sup> See *id.*

<sup>8</sup> 47 CFR § 1.1206(b)(1).

a highly-compressed time period. To begin with, the reality is that this period is less than the theoretical two weeks,<sup>9</sup> because interested parties and Commissioner Offices alike need time to digest the draft and formulate their initial thoughts and positions prior to conducting meetings. Some Offices have, at times, maintained a practice where they won't accept any meetings until a week after receiving the draft.<sup>10</sup> Such a practice, while understandable, already slices nearly in half the available times over which these interested parties are competing for scarce meeting times with Commissioner Offices. This means that often it is not as simple as the *NPRM* suggests for parties to “schedule meetings earlier than the last permissible date if they choose to do so.”<sup>11</sup>

Furthermore, implementation of the *NPRM*'s proposal either will deter parties from seeking meetings on the last day before the Sunshine period begins, due to their pragmatic inability to timely craft an adequate *ex parte* filing, as discussed above, or they will be forced to expedite a bare bones *ex parte* filing that does little to nothing to illuminate the record. The latter outcome threatens to encourage skirting of the Commission's *ex parte* rule that such filings “must contain a summary of the substance of the *ex parte* presentation and not merely a listing of the subjects discussed,” generally entailing “[m]ore than a one or two sentence description of the views and arguments presented.”<sup>12</sup> And that, in turn, would especially leave in the dark other

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<sup>9</sup> That is, the period from when drafts become publicly available, three weeks prior to the Open Commission Meeting, until the day the Sunshine notice is released, a week prior to the Meeting.

<sup>10</sup> Notably, Offices that have maintained this practice actually are informally carving out a preliminary “period of repose” prior to the Sunshine period.

<sup>11</sup> *NPRM*, 35 FCC Rcd at 6956, para. 28.

<sup>12</sup> 47 CFR § 1.1206(b)(1).



interested parties and Commission personnel who were not in the room, thereby *detracting* from their ability to evaluate the record and the relevant issues.<sup>13</sup>

Therefore, while ACA Connects recognizes the benefits of the *NPRM's* proposal insofar as it should lead to a lengthening of the “period of repose” and thereby enhance Commission decision making, the Commission must, at the same time, expand by a day the period interested parties have to engage in meetings with Commission decisionmakers and respond to publicly-released draft documents. It would actually be the absence of this companion action that would “limit the ability of members of the public fully to evaluate the record.”<sup>14</sup>

Implementing ACA Connects’ companion proposal would ensure that interested parties functionally have the same amount of time as now to consider and respond to public drafts of documents to be voted on at Open Commission Meetings. Taken together with implementation of the *NPRM's* proposal, ACA Connects’ companion proposal will enable the Commission to benefit from the same degree of public input as it currently receives, while at the same time fostering more of a “period of repose” for the Commission to conduct its final deliberations based on a fixed record. Unlike the

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<sup>13</sup> *But cf. NPRM*, 35 FCC Rcd at 6956, para. 29 (seeking comment on whether the *NPRM's* proposal, ensuring a more complete “period of repose,” will “better enable Commission staff and the public to evaluate the record and the relevant issues”).

<sup>14</sup> *Id.* at para. 28. *Cf. id.* at paras. 28-29 (discussing impact on public of effect of *ex parte* rules on “period of repose”). ACA Connects does not quite grasp the *NPRM's* point here, because although technically true that the duration of the “period of repose” may influence the ability of members of the public “to evaluate the record and the relevant issues,” *id.* at para. 29, under both the current and proposed rules, members of the public are not and would not be afforded an opportunity to advocate based on their evaluations of the record during the “period of repose.” At most, they may reply to an *ex parte* submission, but under both the current and proposed rules they would only receive one additional day for that.

significant changes in the Commission’s internal processes that resulted from making drafts publicly available three weeks prior to an Open Commission Meeting – changes that were most welcome from the get-go<sup>15</sup> and remain so, but undoubtedly caused initial stress for Commission staff – ACA Connects’ proposal would only mean a one-day shift earlier in the staff’s preparation time. In fact, it may actually make no difference, as frequently, if not routinely, the Commissioner Offices already receive drafts of Open Commission Meeting items the day prior to their public disclosure.<sup>16</sup>

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<sup>15</sup> Ajit Pai, Chairman, FCC, Remarks at the American Enterprise Institute: “The First 100 Days: Bringing the Benefits of the Digital Age to All Americans” 5 (May 5, 2017) (Chairman Pai May 2017 AEI Speech) (“[W]e started making the text of items available to the public three weeks in advance of Commission meetings. Of all the things that we’ve done over the first 100 days, that’s one of the initiatives that I’ve heard the most positive feedback about.”); Chairman Ajit Pai, *Springing Forward for the Public Interest: the FCC’s March Agenda*, FCC Blog (Mar. 2, 2017), <https://www.fcc.gov/news-events/blog/2017/03/02/springing-forward-public-interest-fccs-march-agenda> (Chairman Pai Mar. 2017 Blog) (“I’m pleased to report that the initial stage of the pilot project [testing the public release of drafts three weeks prior to an Open Commission Meeting] was a success! We received overwhelmingly positive feedback from the public.”).

<sup>16</sup> See, e.g., Ajit Pai, Chairman, FCC, Remarks at the Information Technology and Innovation Foundation (Feb. 6, 2020) (announcing sharing the draft *C-Band Order* with his fellow Commissioners “minutes ago” for an Open Commission Meeting February 28); Press Release, FCC, Chairman Pai Tees Up \$20.4 Billion Rural Digital Opportunity Fund for Vote at FCC’s January Meeting (Jan. 8, 2020), <https://docs.fcc.gov/public/attachments/DOC-361763A1.pdf> (announcing Chairman Pai’s presentation to his colleagues that day of the draft *RDOF Order* that was to be voted on by the Commission at its January 30 Open Meeting); Chairman Ajit Pai, *Protecting National Security and Public Safety*, FCC Blog (Oct. 28, 2019), <https://www.fcc.gov/news-events/blog/2019/10/28/protecting-national-security-and-public-safety> (announcing his circulation that day of an order that was to be considered at the Commission’s November 19 Open Meeting, regarding the prohibition of use of Universal Service Fund dollars to purchase equipment or services from companies posing a national security threat); Press Release, FCC, Chairman Circulates Draft Order to Restore Internet Freedom and Eliminate Heavy-Handed Internet Regulations (Nov. 21, 2017), <https://www.fcc.gov/document/chairman-pai-proposes-restore-internet-freedom> (announcing Chairman Pai’s circulation to his fellow Commissioners that morning of draft *Restoring Internet Freedom Order*, which was to be voted on at December 14, 2017 Commission Open Meeting); Chairman Ajit Pai, *A Time to Give*  
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In other words, implementation of ACA Connects' companion proposal would just entail publicly issuing the drafts to be voted on at the forthcoming Open Commission Meeting on the same day the Commissioner Offices receive them. Commissioner O'Rielly, at a minimum, long has supported public release of drafts of the documents to be voted on at the upcoming Open Commission Meeting coincident with their distribution to Commissioner Offices.<sup>17</sup>

Implementing ACA Connects' companion proposal of adding on the front end one day of public review of drafts to be voted on at the forthcoming Open Commission Meeting will help fulfill one of the fundamental policy goals underlying the Commission's *ex parte* rules, namely, to "enable discourse between Commission decisionmakers and parties, which can help the Commission identify areas of concern, address gaps in understanding, spot weaknesses in the record, develop alternative approaches, and generally render more informed decisions."<sup>18</sup> In addition, making such drafts publicly

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*Thanks*, FCC Blog (Nov. 22, 2017), <https://www.fcc.gov/news-events/blog/2017/11/22/time-give-thanks> (draft *Restoring Internet Freedom Order* is "on the Commission's website and [publicly] available . . . more than three weeks before our scheduled vote").

<sup>17</sup> Commissioner Michael O'Rielly, *Update on Advance Posting of Commission Meeting Items*, FCC Blog (Jan. 16, 2015), <https://www.fcc.gov/news-events/blog/2015/01/16/update-advance-posting-commission-meeting-items> (Commissioner O'Rielly Jan. 2015 Blog) (renewing his call "to post the draft text of Commission meeting items on [the Commission's] website at the same time that they are circulated to Commissioners").

<sup>18</sup> *NPRM*, 35 FCC Rcd at 6947, para. 1. See also Press Release, FCC, Statement of FCC Chairman Ajit Pai: Announces Pilot Program to Release Commission Documents to the Public (Feb. 2, 2017), <https://www.fcc.gov/document/chairman-pai-announces-pilot-program-release-documents-public> (stating that a goal of releasing in advance drafts of documents to be voted on at an upcoming Open Commission Meeting is for "this Commission to be as . . . accessible as possible to the American people"); Commissioner Michael O'Rielly, *Post Text of Meeting Items in Advance*, FCC Blog

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available one day earlier than is currently done presents no burdens to the Commission given the already-existing timing for distribution to Commissioner Offices of drafts to be voted on at Open Commission Meetings, but will confer the benefit of maximizing the helpful exchanges between Commission decisionmakers and interested parties, as well as the focused input from interested parties that so often leads to stronger output from the Commission. And adding an extra day on the front end of the public review process of drafts to be considered at Open Commission Meetings will help to ensure that implementation of the *NPRM*'s proposal will not be “unduly burdensome for parties meeting with the Commission.”<sup>19</sup>

**B. The Commission Only Should Adopt the Proposal for Earlier Filing of *Ex Parte* Presentations Proximate to the Sunshine Period if it Codifies its Public Review Process, to Begin Three Weeks and One Day Prior to the Open Commission Meeting, as a Rule**

In addition to adding a day on the front end of the public review process of drafts to be considered at Open Commission Meetings in order to counterbalance the day of advocacy that would be lost if the Commission implements the *NPRM*'s proposal, codifying the public review practice as a rule will ensure that the benefits to the

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(Aug. 7, 2014), <https://www.fcc.gov/news-events/blog/2014/08/07/post-text-meeting-items-advance> (Commissioner O’Rielly Aug. 2014 Blog) (making drafts of documents to be voted on at an upcoming Open Commission Meeting publicly available offers interested parties “the chance to digest the actual text and provide valuable critique before starting our official Sunshine period,” enhancing the Commission’s ability to “obtain useful suggestions before the final rules are locked in,” as “the more reviews a regulatory item receives before going out the door, the better”); Commissioner O’Rielly Jan. 2015 Blog (making publicly available the actual text of documents to be voted on at upcoming Open Commission meetings promotes a “fulsome exchange” and leads to “focused input that could strengthen the reasoning and ultimately the legal sufficiency of the item”).

<sup>19</sup> *NPRM*, 35 FCC Rcd at 6956, para. 29.

Commission and interested parties alike are maintained. Over six years ago, Commissioner O’Rielly emphasized that allowing public access to the draft text of Open Meeting items before a vote would be a “common sense update to the non-disclosure rules,” and “is the right thing to do from a good government perspective.”<sup>20</sup> ACA Connects concurs.

Although the incremental rollout of the practice, to post three weeks before an Open Commission Meeting public drafts of documents to be voted on at the Meeting, played out in unusually public fashion,<sup>21</sup> typically the public has little to no visibility into the Commission’s internal processes. In fact, to the extent it has any, such insights generally have been through the diligent efforts of Commissioner O’Rielly, and also Chairman Pai, to shed light on these processes via blog posts and other unofficial releases<sup>22</sup> – underscoring that these practices and processes still are not official Commission pronouncements that interested parties may rely upon to safeguard their own interests in participating in Commission proceedings. As Commissioner O’Rielly has described, this has become a matter of lack of transparency and, to some degree, even accountability.<sup>23</sup>

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<sup>20</sup> Commissioner O’Rielly Aug. 2014 Blog.

<sup>21</sup> See, e.g., *supra* notes 15, 18.

<sup>22</sup> *Id.*

<sup>23</sup> Commissioner Michael O’Rielly, *Fixing Flawed and Non-Existent “Editorial Privileges”*, FCC Blog (Mar. 9, 2015), <https://www.fcc.gov/news-events/blog/2015/03/09/fixing-flawed-and-non-existent-editorial-privileges> (Commissioner O’Rielly Mar. 2015 Blog) (FCC internal procedural guides “are only updated periodically . . . and some procedures were set forth by memoranda of understanding (MOU) or other intra-agency documents long ago . . . Moreover, many of the processes have never been reduced to writing. That means they can change from item to item . . .” As a result, “the FCC really ought to take a fresh look at *all* of its procedures, actually codify the specific ones that

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The antidote to these deficiencies is to codify as rules the Commission's practices related to making drafts of Open Commission Meeting items publicly available in advance. Again, as Commissioner O'Rielly articulated:

[I]n Congress, the committees adopt rules of procedure with each new Congress. Those procedures are part of the public record and are typically posted on committee websites as well. The FCC should do no less. We should take time now to consider, adopt, and post official rules of procedure. They should be codified in the Code of Federal Regulations for the public to see. And we should update them as necessary.<sup>24</sup>

That was over five years ago. Subsequent to that pronouncement, and now over three-and-a-half years ago, Chairman Pai instituted the practice of posting drafts publicly three weeks before an Open Commission Meeting, and the practice roundly has been hailed as a success. Therefore, there should be no institutional reticence to adopt the practice as a rule in order to help ensure Commission processes remain more transparent in this regard, and the Commission remains accountable to them. As Chairman Pai stated shortly after publicly declaring the public release of drafts three weeks before Open Commission Meetings to be a practice that would guide all such Meetings under his tenure, "now that we let the sunlight in, it's hard to even remember why this was such a controversial idea."<sup>25</sup> Converting this practice to a rule will help to

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still make sense, and post them so that the official process is more transparent and better understood by all." (emphasis in original). Cf. Chairman Pai Mar. 2017 Blog (making drafts of documents to be voted on at an upcoming Open Commission Meeting publicly available was "another step towards shedding more sunlight on the FCC's operations").

<sup>24</sup> Commissioner O'Rielly Mar. 2015 Blog.

<sup>25</sup> Chairman Pai May 2017 AEI Speech at 5. See also Press Release, FCC, The First 100 Days Under FCC Chairman Ajit Pai: Bringing the Benefits of the Digital Age to all Americans (May 5, 2017), <https://www.fcc.gov/document/first-100-days-pai-chairmanship> (enumerating, under section captioned "Increasing Agency Transparency (continued...)

ensure that interested parties and the Commission alike benefit from the opportunity for public input that the rule will—and already does, in the form of a practice—foster, and will further ensure that these benefits are not lost to future myopia or benign neglect.

Finally, arguably such codifying is long overdue anyway given the embedding of the practice over three years ago. Section 19.735-203 of the Commission’s rules, which has not been amended since 2000, still provides that “[t]he content of agenda items . . . shall not be disclosed, directly or indirectly, to any person outside the Commission.”<sup>26</sup> Updating the Commission’s rules to avoid conflict with its actual practices is another reason why the practices should be adopted as rules. An agency’s avoidance of routinely being in technical violation of its own rules also helps to safeguard the accord outside entities pay to the agency’s rules.<sup>27</sup>

**C. The Commission Possesses Authority to Adopt as a Rule Now the Process of Public Review of Meeting Item Drafts**

There is no legal impediment to the Commission adopting *now* a rule governing the process of public review of Open Commission Meeting item drafts. Although the Commission elected to receive public input on the *NPRM*’s proposal, it noted that because the *ex parte* rules are procedural in nature, notice and comment are not

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and Reforming Agency Process,” that he instituted a practice of making public the text of proposals and orders to be voted upon at the Commission’s monthly meetings three weeks in advance of the Commission’s vote).

<sup>26</sup> 47 CFR § 19.735-203(a),(a)(1).

<sup>27</sup> Although the rule provides an exception where “authorized by the Commission,” nowhere has the Commission “authorized” the practice *per se*, even though the practice appears to have found favor amongst all the Commissioners. Under the rule, authorization “by the Commission” also is clearly distinguishable from action “by the Chairman.” *Id.* Notably, the rule also provides an exception where “authorized by . . . [the Commission’s] rules,” *id.*, which is exactly what ACA Connects is urging here.

required.<sup>28</sup> By their very nature, the same considerations certainly apply to ACA Connects' companion proposal to codify a procedure as a rule, and to slightly modify that procedure by adding a day to it in order to compensate for a day that functionally would be lost if the Commission adopts the *NPRM's* proposal. And even if somehow the Commission was to determine that notice and comment theoretically was required for ACA Connects' companion proposal, notice and comment should be excused in actuality anyway due to ACA Connects' companion proposal constituting "logical outgrowth" from the *NPRM's* proposal.<sup>29</sup> Indeed, it would be ironic if the provisions of the Administrative Procedure Act were wielded as a basis to delay the Commission from being more accountable for its procedures. This is especially so where, as here, not only would no party be prejudiced or harmed from conversion of the incumbent agency practice, slightly modified, to a rule, but all parties would benefit.

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<sup>28</sup> See *NPRM*, 35 FCC Rcd at 6948, para. 2 n.2 (citing 5 U.S.C. § 553(b)).

<sup>29</sup> See, e.g., *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986); see also *NPRM*, 35 FCC Rcd at 6956, para. 29 (seeking comment on whether the *NPRM's* proposal, adoption of which would curtail public input by a day, will "better enable Commission staff and the public to evaluate the record and the relevant issues, thereby leading to better and more informed decisions," and whether the timing considerations would be "unduly burdensome for parties meeting with the Commission"). If the Commission were to adopt the *NPRM's* proposal, adding a day to the front end of the public review process would help to safeguard the public record evaluation benefits associated with the incumbent practice and mitigate potential advocacy timing crunch burdens on interested parties and the Commission alike. Moreover, converting the public review process to a rule would bolster the safeguard and mitigation effects of adding a day to the front end.



#### IV. IN ADOPTING THE PROPOSAL FOR EARLIER FILING OF *EX PARTE* PRESENTATIONS PROXIMATE TO THE SUNSHINE PERIOD, THE COMMISSION SHOULD MODIFY ITS DRAFT REVISED RULE LANGUAGE

In support of the *NPRM*'s proposal, the Commission proposes to revise Section 1.1206(b)(2)(iv) of its rules to include the following language: "Written replies, if any, shall be filed no later than the end of the day that the Sunshine period begins, and shall be limited in scope to the specific issues and information presented in the *ex parte* filing to which they respond."<sup>30</sup> The text of the *NPRM*, however, illustrates precisely why this language is problematic.<sup>31</sup>

Specifically, Section 1.1206(b)(2)(iv) currently provides that a memorandum summarizing an oral *ex parte* presentation made on the day that the Sunshine notice is released must be submitted no later than the end of the next *business* day. Similarly, any written reply would be required to be filed no later than two *business* days following the presentation. The draft revision to Section 1.1206(b)(2)(iv), however, does not contain the qualifier that the reply would be due on a *business* day. This presents the possibility that, under the proposed revision to Section 1.1206(b)(2)(iv), if the Commission releases a Sunshine notice on a Friday, any *ex parte* notice in a proceeding listed on the Sunshine notice is due no later than 11:59:59 PM that Friday, and the reply no later than 11:59:59 PM that Saturday. Among other problems, this would contravene Section 1.4(g) of the Commission's rules, which provides that if a

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<sup>30</sup> *NPRM*, 35 FCC Rcd at 6960, Appx.

<sup>31</sup> See *id.* at 6955, para. 27.

filing period is less than 7 days, “intermediate holidays”—such as Saturdays and Sundays—“shall not be counted in determining the filing date.”<sup>32</sup>

To rectify this flaw, ACA Connects urges the Commission to modify its proposed last sentence of revised Section 1.1206(b)(2)(iv) as follows: “Written replies, if any, shall be filed no later than the end of the ~~day that the Sunshine period begins~~ next business day after the Sunshine notice is released, and shall be limited in scope to the specific issues and information presented in the *ex parte* filing to which they respond.” This modification also is consistent with the proposed first sentence of revised Section 1.1206(b)(2)(iv), pursuant to which the due date for *ex parte* filings is established by way of reference to the day the Sunshine notice is released.<sup>33</sup>

## V. CONCLUSION

ACA Connects recognizes the benefits of the Commission’s proposal to enhance its decision-making process by requiring the filing a day earlier of *ex parte* notices memorializing presentations proximate to the Sunshine period, thereby infusing greater meaning to the Sunshine period normative “period of repose.” Adoption of this

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<sup>32</sup> 47 CFR § 1.4(g). Even if Section 1.4(g) and draft revised Section 1.1206(b)(2)(iv) may be read together to imply a business day qualifier in the latter rule, making the change ACA Connects advocates below will help to avert unnecessary ambiguity in the Commission’s rules.

<sup>33</sup> See *NPRM*, 35 FCC Rcd at 6960, Appx. While the same concern regarding the lack of a business day qualifier may be expressed with respect to the draft revision of the first sentence of Section 1.1206(b)(2)(iv) requiring the filing of the *ex parte* notice “before the Sunshine period begins,” see *id.*, and it would be preferable if that provision also included a “business day” qualifier and ACA Connects encourages the Commission to add one, because, as a pragmatic matter, the Commission does not release Sunshine notices on Saturdays or Sundays, the chances of the lack of a business day qualifier in that provision presenting prejudice or harm to a party having made an *ex parte* presentation are remote.

proposal, however, in the absence of corresponding process modifications, will trade one procedural improvement for a procedural regression. Therefore, as conditions to ACA Connects' support of the *NPRM's* proposal, and to ensure the result is procedural improvements all around, the Commission must adopt ACA Connects' companion proposal to extend by a day on the front end the public review period of Open Commission Meeting item drafts. Doing so will not burden Commission staff, but will safeguard maximizing the benefits attendant to public input on such drafts by ensuring the same amount of time to review such drafts as interested parties are currently afforded. And as matters of safeguarding these procedural improvements for the future, as well as transparency, accountability, and overall good government, the Commission also must codify these procedures as rules in its order in response to the *NPRM*.

Respectfully submitted,



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