



# Ex Parte Communications Policy

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The Postal Regulatory Commission (Commission) establishes the following policy in regard to ex parte communications. The policy applies to all interactions, oral or in writing (including electronic), between Commission decision-making personnel, and the United States Postal Service (Postal Service) or public stakeholders in matters before the Commission. 39 C.F.R. part 3000, subpart B. The policy seeks to provide additional guidance and explanation to the regulations set forth in 39 C.F.R. part 3008, as they relate to Commission employees' responsibilities.

The policy is organized into nine sections. Section I explains the purpose for an ex parte policy. Section II explains that the ex parte communications policy applies to all Commission proceedings, with three exceptions. Section III explains that the ex parte communications policy applies to those persons with an interest in a matter before the Commission. It divides interested persons into two groups: Commission decision-making personnel and all others. Section IV explains when matters are considered to be before the Commission. Section V explains when matters are no longer before the Commission. Section VI establishes a broad definition of ex parte communications and then limits the scope of that definition by providing specific exceptions. Section VII defines the limitations imposed upon ex parte communications. Section VIII describes the consequences for breaching the ex parte communications policy and provides remedies designed to ameliorate such breaches. Section IX describes special situations applicable to the Commission.

## **I. The Purpose of Establishing an Ex Parte Communications Policy**

An ex parte communications policy promotes transparency and openness in government concerning its interactions with public stakeholders and, in the case of the Commission, with the Postal Service. A principal goal of the policy is to prevent the perception that an entity may gain an unfair advantage over another by communicating with the Commission on an ex parte basis. Another goal is to reduce the risk that Commission decisions will be challenged in court based on alleged reliance on information obtained through inappropriate ex parte communications. The policy, by design, accounts for the varying nature of matters that come before the Commission, and the differing statutes, regulations, and case law applicable to each matter. In addition to this PRC Policy, the Commission has also published regulations which describe the statutory prohibitions on ex parte communications.

## **II. Proceeding Applicability of the Ex Parte Communications Policy**

The Commission's policy concerning ex parte communications is applicable to all Commission proceedings, except for:

- Public inquiry proceedings, undertaken to gather information and which are not intended to result in a binding Commission decision;
- International mail proceedings undertaken pursuant to part 3017; and
- Specifically identified proceedings upon written directive from the Commission.

*See* 39 C.F.R. § 3008.1.

Public inquiry proceedings are initiated to gather information, and may or may not lead to a binding Commission decision. Depending upon the subject matter, whether or not a binding decision will be issued is usually known at the time the proceeding is noticed.

Public inquiry dockets that are not intended to lead to a binding Commission decision are typically non-adversarial in nature. As such, the concerns regarding certain parties receiving an unfair advantage from ex parte communications are largely mitigated. The Commission's goal of information gathering, coupled with the fact that the proceeding is not contested by interested parties, justifies not applying ex parte restrictions to these types of proceedings.

Public inquiry proceedings that are intended to lead to a binding Commission decision may be adversarial in nature. An example of these proceeding types are the service performance measurement decisions pursuant to 39 U.S.C. § 3691(b)(2). These proceedings are adversarial because the Commission is deciding whether or not the Postal Service is permitted to take certain actions. Thus, ex parte communications restrictions will apply where the intent of the proceeding is to issue a binding Commission decision.

International mail proceedings involve extensive consultations with outside parties including the Postal Service, the United States Department of State, and private sector stakeholders. A restriction on these communications would hinder the deliberative and collaborative process that is required by these undertakings. Thus, ex parte communications restrictions will not apply to international mail proceedings.

Finally, there may be instances where the Commission can articulate a benefit to suspending ex parte communications restrictions. In these instances, the Commission may direct in writing the suspension of ex parte communications restrictions.

### **III. Personnel Applicability of the Ex Parte Communication Policy**

The ex parte communications policy only applies to Commission decision-making personnel, and all Commission decision-making personnel must abide by the policy in all interactions with the Postal Service and other public stakeholders. However, the policy mirrors the requirements imposed by regulation on all persons with an interest in a matter before the Commission as set forth in 39 C.F.R. part 3008. The policy applies to all interactions, oral or in writing (including electronic), between Commission decision-making personnel, and the Postal Service or public stakeholders. Any interaction between these groups concerning a matter before the Commission indicates an interest in a matter before the Commission. Persons included within the groups (A) Commission decision-making personnel, and (B) the Postal Service and public stakeholders, are described below.

**A. Commission decision-making personnel**

Commission decision-making personnel include the following:

- The Commissioners and their staffs;
- The General Counsel and staff;
- The Director of the Office of Accountability and Compliance and staff;
- Contractors, consultants, and others hired by the Commission to assist with the Commission's analysis and decision; and
- Any other employee who may reasonably be expected to be involved in the decisional process.

*See* 39 C.F.R. § 3008.4(a).

**B. The Postal Service and public stakeholders**

The Postal Service includes all Postal Service employees, contractors, consultants, and others with an interest in a matter before the Commission. *See* 39 C.F.R. § 3008.4(b).

Public stakeholders include all other persons not previously described with an interest in a matter before the Commission. This includes Commission non-decision-making personnel.

Commission non-decision-making personnel include the following:

- All Commission personnel other than decision-making personnel;
- Commission personnel not participating in the decisional process owing to the prohibitions of 39 C.F.R. § 3001.8 regarding no participation by investigative or prosecuting officers;
- The Public Representative and other Commission personnel assigned to represent the interests of the general public pursuant to 39 U.S.C. § 505 in the specific case or controversy at issue (regardless of normally assigned duties); and
- Contractors, consultants, and others hired by the Commission to provide an independent analysis of issues before the Commission (and Commission employees assigned thereto).

*See* 39 C.F.R. § 3008.4(c).

#### **IV. When Matters are Before the Commission**

The Commission's *ex parte* communications policy is only applicable once a matter is considered "before the Commission."

In cases where the Commission must provide an opportunity for hearing on the record pursuant to 5 U.S.C. §§ 556-557, the determination of when a matter is considered before the Commission is governed by statute. As applicable to the Commission, this includes nature of postal services cases pursuant to 39 U.S.C. § 3661. Determining when such proceedings are before the Commission is governed by the following provision:

at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

5 U.S.C. § 557(d)(1)(E).

The Commission has made a policy decision to apply the above requirement to all proceedings before the Commission (with specific exceptions). The policy is implemented through the regulations set forth in 39 C.F.R. part 3008. The regulations specify that a matter is considered to be before the Commission the earlier of: (1) the Commission issuing a notice of proceeding or the filing of a request to initiate a proceeding; or (2) at such time as the person responsible for the communication has knowledge that a request to initiate a proceeding is expected to be filed. The regulations also provide the Commission with the discretion to consider a matter as being before the Commission at an earlier time if warranted. *See* 39 C.F.R. § 3008.3(a) and (b).

The Commission has placed bounds on the second specification: "at such time as the person responsible for the communication has knowledge that a request to initiate a proceeding is expected to be filed." 39 C.F.R. § 3008.3(b). The mere potential that a request may be filed does not place a matter before the Commission. An affirmative action announcing or actively preparing an actual request with the intent to file in a reasonable period of time must be present. 39 C.F.R. § 3008.3(d)(4).

Furthermore, the second specification has been waived where its application is impractical. For example, proceedings involving period reports (such as the Annual Compliance Review) occur on a regular predictable basis. There is always knowledge that such proceedings are forthcoming. However, there also is benefit to allowing the free flow of information after the conclusion of each report, to better prepare for the following year's report. Accordingly, proceedings involving statutorily required periodic reports will only be considered before the Commission upon the Commission issuing a notice of the proceeding. Mere knowledge of the eventual filing of a periodic report is deemed not sufficient to put the matter before the Commission.

## **V. When Matters are No Longer Before the Commission**

The Commission's ex parte communications policy is no longer applicable once a matter is "no longer before the Commission." This generally occurs upon the Commission's issuance of the final order or decision in a docketed matter. *See* 39 C.F.R. § 3008.3(d)(1).

However, after a final order or decision is issued, there are four instances in which the Commission may continue or impose further restrictions upon communications: (A) requests for reconsiderations; (B) during the window for filing for appellate review; (C) during an appellate review until a final appellate decision is reached; and (D) upon remand from an appellate court.

### **A. Request for Reconsideration**

An interested person, including the Postal Service, may ask for reconsideration of a Commission's decision or final order. Upon the filing of a request for reconsideration, the matter is again before the Commission and the policies regarding ex parte communications apply. The matter is no longer before the Commission upon resolution of the issue under reconsideration. *See* 39 C.F.R. § 3008.3(d)(2).

### **B. Window for Filing of Appellate Review**

An interested person, including the Postal Service, may seek appellate review of a Commission's decision or final order, within 30 days of issuing the decision or final order. *See* 39 U.S.C. § 3663. If it appears likely that an appeal will be filed, the Commission may upon the

advice of the Office of the General Counsel (in consultation with the Department of Justice) continue or impose further restrictions upon communications as the needs of litigation require.

**C. Once a Petition for Appellate Review is Filed**

If an appeal is filed, the Commission may, upon the advice of the Office of General Counsel (in consultation with the Department of Justice), continue or impose further restrictions upon communications as the needs of litigation require.

**D. Upon Remand from an Appellate Court**

If a final decision or opinion of the Commission is remanded to the Commission by an appellate court, the matter is again before the Commission and the policies regarding ex parte communications apply. The matter is no longer before the Commission upon resolution of the issue under remand. *See* 39 C.F.R. § 3008.3(d)(3).

**VI. Ex Parte Communications Defined**

The Commission adopts a broad definition of ex parte communications subject to specific exceptions.

Ex parte communications include all communications, oral or written (including electronic), between Commission decision-making personnel, and the Postal Service or public stakeholders regarding matters before the Commission.

*See* 39 C.F.R. § 3008.2(a).

The following shall not be considered ex parte communications: (A) material filed using the Commission's docketing system; (B) communications in the course of public Commission meetings, hearings, and other widely publicized Commission events; (C) questions regarding procedures, status, or scheduling; and (D) communications unrelated to the matter before the Commission.

**A. Material filed using the Commission's docketing system**

All material that is timely filed, and that is either required or permitted to be filed pursuant to a Commission order, ruling, notice, information request, directive, or rule shall not be considered an ex parte communication. This includes but is not limited to all timely filed

complaints, appeals, requests, notices, motions, answers, responses, discovery related material, reports, testimony and supporting material, comments, reply comments, briefs, reply brief, and other requests of the Commission. *See* 39 C.F.R. § 3008.2(b)(1).

**B. Commission meetings, hearings, and other widely publicized Commission events**

Communications occurring during the course of Commission meetings or hearings (both where the Commission is required to provide an opportunity for hearing on the record, and otherwise), or other widely publicized Commission events, shall not be considered ex parte communications when: (1) the Commission provides advance public notice of the event, indicating the matter to be discussed; (2) the event is open to all interested persons; and (3) a summary of the event is provided for the record. *See* 39 C.F.R. § 3008.2(b)(2).

For events that include presentation of non-public materials, interested persons may be limited to persons complying with provisions intended to protect non-public materials. For hearings that require formal intervention, interested persons may be limited to persons that have formally intervened, and to persons that are included in the proceeding without the requirement to formally intervene.

The summary of the event may consist of a transcript and/or an audio recording, but at a minimum must provide a summary of the major topics discussed and positions presented. Only items appearing in the summary of the event may be relied upon by the Commission.

**C. Procedural, status, and scheduling questions**

Communications concerning Commission procedures, the status of matters before the Commission, or the procedural schedule of a pending docket shall not be considered ex parte communications. *See* 39 C.F.R. § 3008.2(b)(4).

**D. Communications unrelated to the matters before the Commission**

Communications unrelated to a matter before the Commission shall not be considered ex parte communications. *See* 39 C.F.R. § 3008.2(b)(5).



## **VII. Limitations on Ex Parte Communications**

The general policy of the Commission is to prohibit all ex parte communications for matters that are before the Commission. *See* 39 C.F.R. § 3008.5. The prohibition operates in both directions, *i.e.*, neither Commission decision-making personnel, nor the Postal Service or a public stakeholder may initiate an ex parte communication. The onus is upon Commission decision-making personnel to inform the Postal Service or public stakeholder of this policy in the event of an attempt to initiate ex parte communications. The primary onus also is upon Commission decision-making personnel to inform the Commission of all breaches of this policy.

In cases in which the Commission must provide an opportunity for hearing on the record pursuant to 5 U.S.C. §§ 556-557, ex parte communications are prohibited by statute. As related to the Commission, the statutory prohibition is applicable only to nature of postal services cases pursuant to 39 U.S.C. § 3661.

The prohibition, as applicable to the Postal Service and public stakeholders, is stated as follows:

no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding.

5 U.S.C. § 557(d)(1)(A). The prohibition, as applicable to Commission decision-making personnel, is stated as follows:

no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding.

5 U.S.C. § 557(d)(1)(B).

The Commission effectively incorporates the same prohibition when considering all other matters before the Commission (with limited exceptions). The regulations are consistent with

the following policy concerns: (1) the simplicity, consistency, and understandability of having one general policy covering all types of matters before the Commission; (2) the expenditure of the least amount of Commission resources in administering the policy; (3) the presentation of the least legal risk; and (4) the most favorable perception of fairness and equity to persons interacting with the Commission.

Because of the remedies and penalties applicable to breach of the ex parte communications policy, the prohibition has a different significance when applied to nature of postal service cases, appeal of post office closing, and complaint cases than it has when applied to most other proceeding types. For nature of postal service cases, appeal of post office closing, and complaint cases the prohibition combined with the potential severe penalties acts as a strong deterrent to ex parte communications.

For all other matters, the penalty is effectively the requirement to disclose the communications, or risk that the communications will not be considered in the final decision. Although the policy is still intended to discourage ex parte communications, it effectively is a permit-but-disclose policy.

There is one important caveat to the ex parte communications policy. Nothing in this policy constitutes authority to withhold information from Congress.

### **VIII. Remedies and Penalties**

Violation of the ex parte communications policy could result in court challenges to Commission decisions, which may lead to a decision being overturned, sent back to the Commission for reconsideration, or possibly other sanctions. Violation of the policy also may foster a perception that the Commission is providing an unfair advantage to one entity over another by allowing “secret” communications.

For these reasons, when an ex parte communication occurs, every attempt should be made to remedy the situation. Unless a sufficient remedy is implemented, Commission decision-making personnel shall not rely on any information obtained through ex parte communications in any decision of the Commission. The primary remedy for an ex parte communications is prompt disclosure. The Commission will treat known sensitive material

contained within an ex parte communications as confidential, subject to the Freedom of Information Act requirements. For example, the Commission may not allow outside persons access to information provided by the Postal Service and identified as exempt from public disclosure. Once the communication is disclosed, the provisions of 39 C.F.R. part 3007 may be applied to further protect the confidentiality of the material.

#### **A. Remedy**

As a preliminary step, Commission decision-making personnel shall inform others attempting to initiate ex parte communications of the Commission's policy prohibiting ex parte communications. This may include providing procedural information on how to appropriately submit material so as to not raise ex parte communications issues. *See* 39 C.F.R. § 3008.6(a).

If ex parte communications cannot be discouraged and occur regardless of warning, the primary remedy for ex parte communications begins with prompt disclosure of those communications to all interested persons. *See* 39 C.F.R. § 3008.6(b). Statutory guidance is provided for matters where the Commission is required to provide an opportunity for hearing on the record, *i.e.*, nature of postal services cases. The Commission shall follow this same guidance in all matters before the Commission.

[A] member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

- (i) all such written communications;
- (ii) memoranda stating the substance of all such oral communications; and
- (iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph.

5 U.S.C. § 557(d)(1)(C).

The typical method of disclosure shall be by filing of notice with the Commission. The notice shall identify the persons involved in the ex parte communication, the time period the ex parte communication occurred, and a copy of all associated material (either filed with the notice or separately). If the ex parte communication included oral conversation, a summary of the conversation must be included. The onus is upon Commission decision-making personnel to ensure that proper disclosure occurs. In some instances it may be acceptable to have the Postal Service or public stakeholder prepare and make the actual disclosure.

After disclosure, the Commission shall decide what, if any, additional steps are necessary. Additional steps typically are driven by fairness and due process concerns. Where the opportunity does not already exist, the Commission shall consider providing all interested persons an opportunity to respond to the disclosed material. *See* 39 C.F.R. § 3008.6(c).

## **B. Penalty**

In most instances, an ex parte communication in violation of Commission policy will be remedied by prompt disclosure, with an appropriate opportunity to respond. However, in some instances, the breach of policy will be so severe as to detrimentally affect the rights of other interested participants. In these instances, the Commission may consider the imposition of additional penalties directed towards the breaching party.

The Commission is required to consider the application of penalties where the Commission is required to provide an opportunity for a hearing on the record, *i.e.*, nature of postal services proceedings. The Commission also applies by regulation the same consideration of penalties to appeal of post office closing and complaint cases. Significant rights may be affected in these proceedings, which warrant the availability of penalties. *See* 39 C.F.R. § 3008.7.

The statutory requirement for the consideration of penalties, as applicable to the Postal Service and public stakeholders, is stated as follows:

upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the

agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation;

5 U.S.C. § 557(d)(1)(D). Again, the statutory requirement applicable to nature of postal services proceedings are extended to the appeal of post office closing and complaint cases by regulation.

For notice and comment type proceedings, which encompass most other matters before the Commission, the penalties made available either by statute or regulation do not apply. The level of rights affected when considering these matters typically do not warrant the availability of penalties. However, the Commission reserves the right to consider the weight of the evidence when considering ex parte material in these matters, even when the communications is disclosed.

Commission decision-making personnel wholly or partially responsible for breaching the ex parte communication policy may also incur sanctions, where disclosure appears to be an insufficient remedy. Based upon the seriousness of the breach, sanctions may range from a warning, all the way through recusal from participating further in the matter before the Commission.

## **IX. Special Situations**

The following situations require special consideration: (A) consultations between the Commission and the Postal Service; (B) briefings by the Postal Service; (C) internal case specific Commission briefings; and (D) technical conferences.

### **A. Consultations between the Commission and the Postal Service**

The Commission and the Postal Service regularly consult (at the highest organizational levels) to share information of interest concerning the operations of both organizations. These non-decisional sessions are limited to the sharing of information for the purpose of familiarizing each entity with the operations of the other organization. This may include reporting on the status of major initiatives within each organization. The consultations involve two-way conversations between the entities. The consultations are not open to the public.

The policy on ex parte communications is applicable to consultations. For the purpose of consultations, all Commission personnel in attendance shall be considered decision-making personnel. Pending or anticipated matters before the Commission (as previously described in this policy) shall not be discussed, nor deliberations or decisional discussions take place, during these sessions. Public notice of the consultations shall be made following the session.

#### **B. Briefings by the Postal Service to the Commission**

Periodically, the Postal Service briefs the Commission (at all organizational levels) on matters of interest to provide the Commission with a more in depth understanding of specific subject matter. The briefings typically are a one-way provision of information, with Commission personnel in a “listening mode.” The briefings are not open to the public.

The policy on ex parte communications is applicable to briefings. For the purpose of briefings, all Commission personnel in attendance shall be considered decision-making personnel. Pending or anticipated matters before the Commission (as previously described in this policy) shall not be discussed, nor deliberations or decisional discussions take place, during these sessions.

#### **C. Internal case specific Commission briefings**

Periodically, Commission decision-making personnel brief Commissioners and other Commission decision-making personnel on matters before the Commission. The briefings are not open to the public. Commission non-decision-making personnel shall be excluded from Commission briefings concerning matters before the Commission. Attendance by the Public Representative (including assigned staff) in the specific matter before the Commission that is being briefed is a violation of this ex parte communication policy. Inadvertent attendance by non-decision-making personnel, other than the Public Representative and assigned staff, changes the status of that person to Commission decision-making personnel until the matter is no longer before the Commission.

#### **D. Technical Conferences**

Commission decision-making personnel may host or attend technical conferences concerning matters that are, or likely to be, before the Commission provided that: (1) advance

public notice of the technical conference is provided, and (2) the technical conference is open to all interested persons. Technical Conferences shall be considered outside the scope of the ex parte communications policy. *See* 39 C.F.R. §.3008.2(b)(3).

Typically, technical conferences related to a matter before the Commission are conducted off the record. The purpose of a technical conference is to facilitate a technical understanding of material. It is not to probe policy decisions, or to persuade that one approach is superior to another. To promote free discussion, presented material is not included in the record, and may not be referred to outside of the technical conference. This does not prohibit separate discovery to formulate record evidence based upon what was disclosed during a technical conference.

In dockets that require formal intervention, interested persons may be limited to persons that have formally intervened, and to persons that are included in the proceeding without the requirement to formally intervene. In dockets that include non-public materials, interested persons may be limited to persons complying with provisions intended to protect non-public materials.

Technical conferences may take other forms than what is described above. Before hosting or attending such a technical conference, the potential host or attendee should seek the opinion of the Office of General Counsel on whether or not attendance is permissible or advisable.