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Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Comments on Advance Notice of Proposed Rulemaking, Petition for Rulemaking—Amendments to Regulations Governing Ex Parte Communications, Docket No. EP 782

To Whom It May Concern,

The Board recently proposed revisions to its regulations relating to both the definition and scope of ex parte communications as well as the role of board staff in and the timing of such communications during the informal rulemaking process. Petition for Rulemaking—Amendments to Regulations Governing Ex Parte Commc'ns, 91 Fed. Reg. 19090, 19093 (April 14, 2026) (ANPRM). The problem of *ex parte* communications has been described as “one of the most complex in the entire field of Government regulations. It involve[s] the elimination of *ex parte* contacts when those contacts are unjust to other parties, while preserving the capacity of an agency to avail itself of information necessary to decision.” John Robert Long, *Ex Parte Contacts in Informal Rulemaking: The “Bread and Butter” of Administrative Procedure*, 27 EMORY L.J. 293, 296 (1978).

Clarifying what types of communications do not implicate ex parte disclosure while providing a mechanism for the development of a robust rulemaking record will benefit all stakeholders. Defining the parameters for how the Board can access the benefits of ex parte communications in the informal rulemaking process without compromising transparency and fairness, however, is a complex endeavor. I appreciate the opportunity to respectfully submit these comments in response to the aforementioned ANPRM.

1. Status Requests and Procedural Issues

Current regulations do not explicitly exempt status requests and inquiries related to routine, procedural issues from the Board's definition of ex parte communications, whether within the context of or outside of informal rulemakings.

ANPRM, 91 Fed. Reg. at 19093. Historically, the Board’s policy governing such communications has been that they are not considered *ex parte* because such interactions “naturally do not concern the merits or substantive outcome of pending proceedings.” *Id.*

The proposed amendment would “clarify that routine, procedural communications are permitted.” *Id.* The rationale for the proposed amendment is that the clarification of the regulations to reflect existing Board policy would save time for both internal and external parties. *Id.* Board staff and public stakeholders would understand what type of inquiries are permitted without expending valuable resources just to figure out if a question may be asked. *Id.* Rather than offering a definition of the critical terms—“routine” and “procedural”—the Board “seeks ideas regarding such definitions.” *Id.*

The approach by the Federal Communications Commission (FCC) provides a useful reference point. FCC’s *ex parte* communications regulations define the terms “presentation” and “*ex parte* presentation.” 47 C.F.R. § 1.1202(a). But within the term “presentation,” the regulations exclude

communications which are inadvertently or casually made, inquiries concerning compliance with procedural requirements if the procedural matter is not an area of controversy in the proceeding, statements made by decisionmakers that are limited to providing publicly available information about pending proceedings, and inquiries relating solely to the status of a proceeding, including inquiries as to the approximate time that action in a proceeding may be taken.

Id. Acknowledging that there is not always a bright line between the procedural and substantive, the regulations explain that a status inquiry might “state[] or impl[y] a view as to the merits or outcome of the proceeding or a preference for a particular party,” or “state[] why timing is important to a particular party or indicate[] a view as to the date by which a proceeding should be resolved[.]” *Id.* In such cases, the status inquiry is not treated as a routine, procedural inquiry but rather as an *ex parte* presentation subject to the FCC’s policy regarding such contacts. *Id.* Finally, the FCC gives guidance about how external parties can properly structure an inquiry to ensure it is treated as a “permissible status inquiry”:

A communication expressing concern about administrative delay or expressing concern that a proceeding be resolved expeditiously will be treated as a permissible status inquiry so long as no reason is given as to why the proceeding should be expedited other than the need to resolve administrative delay, no view is expressed as to the merits or outcome of the proceeding, and no view is expressed as to a date by which the proceeding should be resolved.

Id.

The FCC's regulations could be used as a model for defining "routine" and "procedural" matters in the Board's proposed rule. While this approach may not resolve every instance of whether an inquiry is routine or procedural, it will at least provide some broad guidelines, which is an improvement over the lack of any such guidance in the current regulations. The FCC explicitly warns parties that a substantive inquiry disguised as a status inquiry will be treated as an ex parte presentation. The Board should do the same. While a definition resembling the FCC's might be lengthy, the Board should consider the long-term benefits to internal and external parties of providing clear and comprehensive guidance as to what constitutes "routine" or "procedural" communications. A more comprehensive definition in the regulations could ensure that the Board achieves its goals of clarifying which communications are not subject to the ban on ex parte communications and promote the Board's goal of "expeditious handling and resolution of proceedings [.]" ANPRM, 91 Fed. Reg. at 19093.

2. Technical and Clarifying Communications

The current structure of the STB provides two different mechanisms for parties seeking resolution of "technical" or "clarifying" questions related to submitted evidence and compliance with existing Board orders: (1) Board proceedings in the form of a hearing, motion, or technical conference; or (2) communication with the Rail Customer Public Assistance (RCPA) service. *Id.* at 19093. RCPA "provide[s] stakeholders with informal, nonbinding guidance on complying with the Board decisions." *Id.* at 19093–94. Many technical or clarifying questions from stakeholders, however, may be too narrow or "case-specific" for RCPA and yet not substantial enough to justify a technical conference or formal Board proceeding. *Id.* at 19094.

The proposed amendment seeks to add a third avenue for "resolv[ing] technical questions related to evidence submitted in a proceeding or compliance with an order to supplement the record[.]" *Id.* The Board seeks to permit Board staff to respond to such inquiries "via a brief ex parte discussion" as another means of enhancing efficiency. *Id.* Any discussions with Board staff related to technical, clarifying questions would be subject to the same disclosure requirements applicable to ex parte communications during the informal rulemaking process codified at 49 C.F.R. 1102(g)(4). *Id.* Board staff members, especially those who may already be directly involved with a particular proceeding, may be better positioned than the Board or the RCPA service to respond to these technical, clarifying questions. *Id.* The Board fails to offer a definition of what would constitute a "technical" or "clarifying" question for the purposes of the proposed amendment and seeks ideas for drafting the specific language of the rule. *Id.*

Once again, the FCC’s regulations provide a useful reference point. They govern the presentation of information “requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence, or resolution of issues.” 47 C.F.R. § 1.1204(a)(10). Such “presentations” are generally exempt from the ban on ex parte communications subject to specific limitations, including disclosure under certain conditions. 47 C.F.R. § 1.1204(a)(10).

The FCC’s language could be used as a model for describing “technical and clarifying questions” related to submitted evidence or compliance with existing Board orders. Providing this intermediate level of access to parties seeking to resolve a technical question related to an existing matter could enhance the efficiency of the Board’s operations. Ensuring that such inquiries are subject to the Board’s existing disclosure requirements for ex parte communications in informal rulemakings codified at 49 C.F.R. § 1102.2(g)(4) could provide transparency to other stakeholders. Subjecting improper inquiries to the existing sanction provisions for prohibited ex parte communication codified at 49 C.F.R. § 1102.2(g) might deter unsolicited technical inquiries that extend beyond the scope of permitted technical, clarifying questions.

3. Ex Parte Meetings in Informal Rulemakings—Role of Board Staff
4. Timing for Ex Parte Meetings in Informal Rulemakings

Current regulations permit Board staff to engage in ex parte communications during an informal rulemaking when a Board Member is in attendance “unless the entire Board formally delegates its participation to Board staff. 49 C.F.R. § 1102.2(g)(1); ANPRM, 91 Fed. Reg. at 19094. In addition, current regulations have a default cutoff date for ex parte communications during informal rulemakings of 20 days before the reply comment deadline, “unless otherwise specified by the Board in procedural orders governing the proceeding.” 49 C.F.R. § 1102.2(g)(1). Finally, ex parte contacts after the issuance of a notice of proposed rulemaking (NPRM) are subject to disclosure. 49 C.F.R. § 1102.2(g)(4).

Under the proposed amendments, any ex parte communications with Board staff occurring after the issuance of an NPRM would be subject to the existing disclosure requirements applicable to Board Members codified at 49 C.F.R. § 1102.2(g)(4). ANPRM, 91 Fed. Reg. at 19094. The proposed amendments, however, represent a “multi-dimensional” expansion of the role of ex parte communications in the informal rulemaking process. Parties could engage in ex parte meetings with a much broader audience within the agency, beyond the current scope of three current—or the statutory maximum of five—Board Members. *Id.* at 19094–95. In addition, parties might be able to engage in such contact over a longer period of time by default, because the Board would establish the cutoff date for ex parte communications in an informal rulemaking on a case-by-case basis. *Id.* at 19095.

The Board denied a similar request to allow ex parte meetings with Board staff without a member present in its 2018 rule permitting ex parte communications during informal rulemakings. *Id.* at 19094. The denial was “based on concerns that stakeholders would attempt to meet individually with multiple staff members during each rulemaking proceeding, thereby dramatically increasing the number of ex parte contacts and complicating the disclosure process.” *Id.* at 19094. As described in the 2018 rule’s preamble, “ex parte communications with any Board staff could render the disclosure process—which is essential to maintaining fairness and transparency—unduly complicated.” Ex Parte Commc’ns in Informal Rulemaking Proceedings, 83 Fed. Reg. 9222, 9230 (March 5, 2018) (codified at 49 C.F.R. 1102) (2018 Rule). The Board explicitly noted that “the number of potential stakeholder meetings could increase exponentially,” and each meeting would generate a separate summary disclosure filing posted to the docket that would then require review and response, as applicable, by other stakeholders. *Id.* at 9230.

The Board openly acknowledges that it denied the now-proposed amendment in 2018 due to concerns about how it might complicate the disclosure process and the subsequent implications for fairness and transparency. ANPRM, 91 Fed. Reg. at 19094. But the Board does not describe how circumstances have changed such that these concerns no longer tip the scales against allowing such contact to occur. Rather, the ANPRM merely states: “Considering the pros and cons,” the Board is exploring this amendment and believes “[this] change has the potential to promote efficiency and improve decision-making.” *Id.* at 19094. There is no indication, however, that the overall expansion of opportunities for ex parte communications during informal rulemakings would result in enhanced transparency in the informal rulemaking process, or at least *no less* transparency.

The proposed amendments do not reference any alterations in the existing disclosure process, which seems ill-equipped to handle an exponential increase in the volume of submissions into a rulemaking docket. The current regulations recommend that any party seeking an ex parte meeting contact the Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) or Board Member office to schedule a meeting. 49 C.F.R. § 1102.2(g)(2). After the meeting, any person—i.e., non-Board representative—engaged in the meeting must submit a written summary of the meeting within two business days. 49 C.F.R. § 1102.2(g)(4)(i), (v). The summary must include the date, time, location, attendees, and “data and arguments presented” along with any material “shown or given to Board Members or Board staff during the meeting.” 49 C.F.R. § 1102.2(g)(4)(i). The summary “must be sufficiently detailed to describe the substance of the presentation[,]” and may be returned for editing and resubmission if deemed inadequate by the Board. 49 C.F.R. § 1102.2(g)(4)(ii). If a party wishes to seek protection for confidential information, the party must request a protective order at the time of submission and submit a public version and confidential version of the summary. 49 C.F.R. § 1102.2(g)(4)(iv). The Board then has

five days—days, not business days—to review the summary, assess any claim of confidentiality, and post it to the public docket. 49 C.F.R. § 1102.2(g)(4)(vi).

Complying with these disclosure rules requires the Board to dedicate internal resources to review, approve, and post any submission in a short period of time. This may be manageable in the current system in which parties can only schedule ex parte meetings in informal rulemakings with three different Board Members, regardless of the number of Board staff in attendance. The ANPRM, however, gives no indication as to how many of the 120 FTEs on staff as of September 30, 2025, would now be eligible to conduct such meetings without the presence of a Board Member. Surface Transportation Board, Fiscal Year 2027 Budget Request 51 (2026) (2027 Budget Request). If, for instance, the number of eligible Board representatives included 25% – 50% of the current staff, the number of individuals with whom ex parte meetings could be scheduled would mushroom from three Board Members to between 29 – 57 Board Members and Board staff. In addition to accounting for the larger audience for such meetings, there could be an extended period for conducting such meetings, because the ANPRM proposes abolishing the default cutoff date for ex parte meetings of 20 days before the reply comment due date.

It would be helpful to understand how the Board plans to accommodate the increased burden associated with complying with its disclosure process under the proposed amendments. This is particularly relevant given the Board's reliance on the disclosure process to mitigate concerns about fairness and transparency associated with an expansion of the use of ex parte contacts by the Board, ANPRM, 91 Fed. Reg. at 19094–95. Will parties seeking meetings still contact OPAGAC? Currently, only eight of the Board's 120 FTEs are attributed to OPAGAC, and the scope of OPAGAC's responsibilities is vast. 2027 Budget Request at 48, 51. In the year ended September 30, 2025, OPAGAC employees working for the RCPA service responded to over 1,300 inquiries. 2027 Budget Request at 38. The RCPA service, however, is just one of the many functions of the Board's operations for which OPAGAC is accountable. *Id.* at 48.

OPAGAC serves as the STB's principal point of contact for the U.S. Congress, Federal agencies, foreign, state and local governments, interested stakeholders, the public, and the media. OPAGAC's mission is to aid the public, to disseminate accurate information concerning the agency and its work, and to help the public understand the law and the agency's decisions. This office is responsible for external operations including governmental affairs, communications, and compliance. It is also responsible for monitoring rail operations, service analysis, maintaining tariffs, the monitoring and analysis of certain passenger rail matters, and mediation coordination. OPAGAC is also responsible for the management of Rail Customer and Public Assistance [RCPA], which assists interested stakeholders and the public by answering

questions pertaining to Board regulations and procedures and facilitating informal private-sector dispute resolution of rail operational and service-related issues and other matters.

Id. at 48–49.

Even if the Board were prepared to process a potentially exponential increase in the number of ex parte meetings in informal rulemakings, scheduling the meeting, reviewing the submitted meeting summary, and disclosing the summary to the public via the rulemaking docket are just the beginning of the process. Stakeholders need to have confidence that the public docket accurately reflects the full range of ex parte contacts after issuance of the NPRM. To that end, stakeholders would benefit from assurance that the Board employs some sort of oversight and review process to ensure that all meetings are documented; all meeting summaries are received within two business days; insufficient meeting summaries are properly flagged and returned to the submitter for revision; confidentiality requests are appropriately granted or denied; summaries are posted within five days of receipt; and the docket ultimately reflects a complete account of all ex parte contact for the rulemaking.

In addition, the mere existence of an opportunity for a stakeholder to meet privately with agency personnel during the rulemaking process gives rise to concerns about actual impropriety or the appearance of impropriety. Esa L. Sferra-Bonistalli, *Ex Parte Commc'ns in Informal Rulemaking Final Report 20* (May 1, 2014) (prepared for consideration of the Admin. Conference of the U.S.), <https://www.acus.gov/report/final-ex-partecommunications-report> (Final Report). As a result, the Administrative Conference of the United States (ACUS), which Congress endowed with the authority to recommend agency best practices, recommends ex parte communication policies “ensure that access to agency personnel is provided in a balanced, viewpoint-neutral manner.” *Ex Parte Commc'ns in Informal Rulemaking*, 79 Fed. Reg. 35988, 35995 (June 25, 2014) (2014 ACUS Recommendation). Current disclosure procedures do not appear to require the Board to disclose how it decides whether to accept or deny an ex parte meeting request. The Board should consider reporting this information about meeting requests on a periodic basis to provide additional transparency in the rulemaking process.

Even if Board staff accommodated every request for ex parte contact during an informal rulemaking, the result might not be a “balanced, viewpoint-neutral” slate of meetings because some types of public stakeholders are more likely to engage in ex parte meetings than others. Final Report at 22. To address this “uneven representation,” or in the event an agency is unable to accommodate all requests for ex parte meetings during an informal rulemaking, ACUS recommends an agency “consider holding a public meeting . . . in lieu of or in addition to individual, private meetings.” 2014 ACUS Recommendation at 7.

It is unclear, however, whether the Board is expanding opportunities for Board Members and Board staff to interact with stakeholders in both private and public settings during informal rulemakings. While the proposed amendments would expand its opportunities to engage in ex parte communication, the Board's strategy for engaging with stakeholders outside of ex parte meetings is not discussed in the ANPRM. Data from the Board's 2027 Budget Request provides some useful information. In FY 2025, the Board had a performance goal of "Provid[ing] for transparency and public participation in Board decisions and policymaking to the extent practicable." 2027 Budget Request at 36. As a measure of progress towards this goal, the Board set a target of 225 "meetings hosted to discuss emerging challenges and industry trends with various stakeholder groups" for FY 2025. 2027 *Id.* Actual performance in FY 2025 was only 164 such meetings. *Id.* Furthermore, the Board reported engaging in 52 "Public Forum" meetings during FY 2025, in addition to the 164 aforementioned stakeholder meetings. *Id.* at 47. But in the next two fiscal years, the Board proposes only 7 "Public Forum" meetings per year. *Id.* While these numbers may be unrelated to the Board's proposed expansion of opportunities for ex parte communication, the data suggest that the Board may be reducing its public engagement efforts while simultaneously and exponentially expanding its opportunities for private stakeholder meetings via the proposed amendments.

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The Board has adopted many of the ACUS best practices for using ex parte communications in informal rulemakings. The Board maintains a written ex parte communications policy codified in the CFR; allows ex parte meetings before the issuance of the NPRM without disclosure; requires disclosure for ex parte meetings after the issuance of an NPRM; provides procedures for disclosing ex parte communications during informal rulemakings and invoking protections for confidential information in disclosures; provides sanctions for violations of its ex parte communications rules; and describes the process for publishing ex parte meeting summaries in the public docket for an informal rulemaking. *See, generally*, 2014 ACUS Recommendation.

The Board should consider expanding its disclosure provisions for permitted ex parte communications alongside its proposed expansion of the opportunities for ex parte communications. Sifting through the individual dockets to identify ex parte meeting summaries is tedious even now, without the proposed expansion of meeting opportunities. The Board should explain how it will manage the increased burden on its internal resources arising from a potentially exponential increase in ex parte meetings during informal rulemakings. The Board should further define the process for requesting an ex parte meeting and encourage all requestors to use the same meeting request process. The Board should describe how it evaluates compliance with its existing ex parte communications rules. The Board should identify additional opportunities for engaging publicly with stakeholders, particularly those who might

be unlikely to engage in ex parte meetings. Finally, the Board should publish a list of all ex parte meetings requested, accepted, and denied during an informal rulemaking.

When regulating the use of ex parte communications, agencies face daunting challenges. Often times, the regulated community has the best information to support the development of workable regulation which in turn helps to ensure a higher rate of compliance with a regulation. It is clear from the current ANPRM and prior rulemakings that the Board is conscious of the need to balance the use of ex parte communications within informal rulemakings with the concerns about fairness and transparency that stem from such a practice. I offer these comments as a suggestion of additional measures the Board might consider in the proposed informal rulemaking. Thank you for the opportunity to share my recommendations about how the Board might amend its regulations governing ex parte communications.

Respectfully submitted,

/s/ Elizabeth Gray Gregory