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# Streamlining Adjudications at the FCC

**by**

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On September 3, 2019, the Federal Communications Commission released a Notice of Proposed Rulemaking intended, as the caption of the proceeding has it, to promote "streamlining of administrative hearings." The agency declares that the "procedures outlined here are designed to supplement the Commission's current administrative law judge referral process and promote more efficient resolution of hearings." Perhaps the most significant salutary impact of the streamlined procedures will be to reduce the likelihood that a formal trial-type adjudication process will be used by the Commission as a sure-fire "kill mechanism" to bury proposed mergers without the agency ever having to reach a decision on the merits of the proposed transaction.

Specifically, the NPRM states the proposals would: "(a) codify and expand the use of a process that would rely on written testimony and documentary evidence in lieu of live testimony and cross-examination; (b) enable Commission staff to act as a case manager that would supervise development of the written hearing record when the Commission designates itself as the presiding officer at a hearing; and (c) dispense with the preparation of an intermediate opinion whenever the record of a proceeding can be certified to the Commission for final decision."

According to the Commission, the proposed revised procedures will "expedite the Commission's hearing processes consistent with the requirements of the Communications Act and the Administrative Procedure Act (APA) while ensuring transparency and procedural fairness."

In my view, the proposed "streamlined" procedures are welcome for the reasons proffered by the Commission. But truth be told, these days the FCC conducts relatively few evidentiary "trial-type" proceedings before Administrative Law Judges, the type of proceedings in which the Commission's streamlining proposals, in theory, might have the most practical impact. Indeed, the Commission employs only one ALJ, and she is not overworked.

The type of Commission adjudicative proceeding in which the proposed changes could be particularly consequential and could have a significant positive impact is in the context of the agency's review of proposed mergers or acquisitions. The Commission must determine whether transactions involving transfers or acquisitions of broadcast licenses and certain other authorizations, such as certificates for common carriers, are in the public interest before such transactions may be consummated. In other words, media, satellite, telephone, and other communications companies – firms that hold FCC licenses or authorizations – must obtain Commission approval before closing on a deal. The proposed T-Mobile – Sprint merger is a current example of a proposed transaction subject to Commission approval.

Section 309(e) of the Communications Act requires the Commission to designate a license application for a "full hearing" when a "substantial and material fact is presented" that prevents the agency from making the requisite public interest determination. In the context of proposed mergers, in the past, when the Commission has determined that a substantial and material fact existed, it has issued a "hearing designation order" or "HDO" referring the matter to an ALJ. Typically, the ALJ then conducts a trial-type evidentiary proceeding, akin to the formal adjudication procedures mandated by Sections 554 and 556-557 of the Administrative Procedure Act, before rendering an initial decision. In light of the delay invariably associated with these adjudications before an ALJ, the mere referral to the ALJ of the hearing designation order has been sufficient to squash the merger. The likely timeline for the conduct and ultimate resolution of the adjudicative proceeding is almost always considered to be inconsistent with the timeline agreed to by the merger proponents.

There are more, but two illustrative examples come readily to mind. In 2011, then-FCC Chairman Julius Genachowski announced he was proposing to send an HDO to an ALJ to determine factual questions relating to AT&T's proposed acquisition of T-Mobile. And in 2018, FCC Chairman Ajit Pai abruptly issued an HDO relating to Sinclair Broadcasting Group's proposed acquisition of Tribune Media Company. In both instances, the proposed mergers were terminated shortly after the HDO announcements. In the Sinclair-Tribune case, the harm was compounded because, rather than simply directing the ALJ to dismiss the hearing designation order and end the adjudication after the transaction was squelched, the Commission let the proceeding remain open with the ALJ. It was not until six months later that the ALJ finally got around to dismissing the HDO and terminating the adjudication – and then only after commenting, gratuitously, on factual issues on which no determinations were ever made. So, even if the agency's proposed revisions of its procedures governing administrative hearings have

no other impact – and they almost surely will – they likely will have a salutary effect in reducing the opportunity for abuse in the context of the agency's merger review proceedings.

Nothing in the NPRM prevents the Commission from referring factual issues to an ALJ for a trial-type hearing, including cross-examination of witnesses, in a case in which the agency determines that such an evidentiary hearing is warranted. But the Commission's Notice clearly contemplates that, absent a directive to the contrary, most often factual disputes, even those involving motive, intent, or credibility issues, should be susceptible to resolution on a written record rather than in an oral hearing conducted by the administrative law judge or other presiding officer.

The Commission points out that in Pension Benefit Guaranty Corporation v. LTV Corp., the Supreme Court has identified three potential sources of procedural requirements relating to agency hearings – the APA, the agency's governing statute, the Constitution's Due Process Clause. According to PBGC, courts are not free to impose upon agencies specific procedural requirements that have no basis in those three sources. In seeking comment on its proposed streamlining, the Notice discusses the pertinent textual and judicial authorities relevant to each of the three sources, including the leading cases of United States v. Florida East Coast Railway Co. and Mathews v. Eldridge.

Like most modern administrative agencies, the vast majority the FCC's significant regulatory activity and policymaking is conducted by rulemaking. If the proposed procedures for streamlining hearings are adopted, perhaps we will witness a revival of adjudicative activity at the Commission that promotes efficiency, fairness, and sound administration.

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