**Comment on the Federal Communications Commission’s Proposal in the Procedural Streamlining of Administrative Hearings**

The government is notoriously slow when it comes to change. The Federal Communications Commission’s (FCC) proposed rule to streamline its hearing process could potentially provide a faster, more efficient way to resolve issues. Consistent with the requirements of the Communications Act and the Administrative Procedure Act (APA), the proposed procedures seem to allow procedural fairness and transparency for the public. The FCC employs only one Administrative Law Judge (ALJ), who does not hear many evidentiary “trial-type” hearings, as pointed out by Randolph May.[[1]](#footnote-1) These are the hearings that would be impacted the most by the proposed rule.

In fact, the type of proceeding which could be impacted the most is the agency’s review of proposed mergers and acquisitions. All mergers and acquisitions of communication-type companies must have the commission approve their proposed merger since they usually hold licenses through the agency. The Communications Act requires a “full hearing” for a license application when a “substantial and material fact” is presented that prevents the commission from making a decision in the public’s interest.[[2]](#footnote-2) In previous mergers and acquisitions when the FCC found a substantial and material fact, the ALJ would conduct an evidentiary trial-type hearing.[[3]](#footnote-3)

This is similar to a formal adjudications proceeding as described in the Administrative Procedure Act.[[4]](#footnote-4) May suggests that the proposed streamlined procedure may assist in lessening the chance of a merger being quashed because it will lessen the time it takes to be approved by the agency.[[5]](#footnote-5)

Additionally, it is important to point out that the agency’s proposal does not prevent factual issues going before an ALJ if the commission believes it is warranted. By using a written hearing process, as opposed to oral statements and cross-examinations, the commission believes that factual disputes can be “adequately resolved on a written record” by presiding officers, including the administrative law judge.[[6]](#footnote-6) According to the formal adjudication mandates of the APA, the proposed process complies with all necessary components.[[7]](#footnote-7) In fact, the commission seems to have found a way to make a long process more efficient while still conforming with all necessary guidelines.

As the commission points out, they have broad authority under the Communications Act to “conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice.”[[8]](#footnote-8) The Communications Act also states that any party “may appear before

the Commission and be heard *in person* or by attorney.”[[9]](#footnote-9) The term “in person” could imply that parties have the right to speak at a hearing in front of judge; however, being “heard” could also be loosely interpreted to include written comments. Written statements and comments can still allow parties to enter their opinions and information to the record for consideration by the presiding officer.

Additionally, the proposal cites *Pension Benefit Guaranty Corporation v. LTV Corp.* as legal authority.[[10]](#footnote-10) In this case, the Supreme Court identified three sources for procedural requirements for administrative agency hearings: the APA, the agency’s governing statute, and the Constitution’s Due Process Clause.[[11]](#footnote-11) The commission then explores why each of these courses provide them further authority. According to the APA’s minimal procedural requirements for informal adjudications, an agency has to allow parties the right to appear with counsel, the right to procure copies of any evidence they have provided, and prompt notice and reasoning for the agency’s denial of an application.[[12]](#footnote-12)

While the FCC’s proposal seems to comply with all applicable laws, there is a question about how this could affect judicial review. The idea of separation of functions within administrative agencies is meant to allow agencies to keep a “check” on themselves. Separation of functions helps to protect the independence and objectivity of adjudication within the agency. Normally, conducting hearings in front of an ALJ, who will have the final word in the matter,

would help separate the functions, but this may become a grey area with the streamlined process, or at least make the FCC’s actions questionable to the public.

In the early 2000s, the Department of Justice made an effort to streamline their immigration proceedings; however, this called their ethics into question.[[13]](#footnote-13) Before the reform, cases were heard by a three-person panel.[[14]](#footnote-14) After, a single board member could make a decision without any opinion or explanation to their ruling.[[15]](#footnote-15) While this made an overwhelming problem more efficient, it had a negative impact on those appearing in immigration courts and on the public’s view of the DOJ.[[16]](#footnote-16) It was argued that the DOJ’s streamlining rules “removed or weakened factors generally viewed as critical to the integrity of our legal system – reasoned, public decisions; panel deliberations; and time and resources.”[[17]](#footnote-17)

While judicial review has been an issue with streamlining rules in the past, the FCC’s proposed rule will likely not cause problems. The DOJ’s situation was different due to the amount of immigration cases being heard at the time. The FCC will likely have support of businesses and corporations who are in favor of a faster process. This will likely be especially supported in the case of mergers. If a merger takes longer than originally planned for, it may cause the companies to rescind their plans and offers to merge. These processes are often slowed down due to administrative hearings. Therefore, a streamlined process will likely be preferred unless any major issues arise. For example, the FCC has seen two recent proposed mergers terminate shortly after a

hearing designation order was announced.[[18]](#footnote-18) The proposed streamlined hearing process could have potentially saved these mergers. In fact, May believes the proposed rule may actually mitigate the possibility of “abuse in the context of the agency’s merger review proceedings.”[[19]](#footnote-19)

The proposed rule does not indicate that judicial review would be impossible at the conclusion of the adjudication through the agency. Due to the fact that the FCC likely hears less cases on average than the DOJ and immigration courts, judicial review will not be as difficult to undergo if necessary. Otherwise, the proposed rule does address the separation of functions issue, stating that a case manager must remain neutral and that their adjudicatory duties would be separate from issuing decisions.[[20]](#footnote-20) The case managers should remain neutral and not be allowed to make any final decisions in the matter they are working on; however, allowing them to make minor decisions to speed up a lengthy process does not appear to be an issue. If parties disagree with a decision made by a case manager, not matter how small, they should be allowed to appeal those

decisions. In addition, the case managers should be qualified to make such decisions. The commission should comply with the Administrative Conference’s “best practice” pertaining to presiding officer qualifications. If case managers are acting as a presiding officer would, they should be trained in the same manner to avoid any confusion or animosity from parties. This will also help avoid any further review or adjudication.

Overall, the FCC’s proposed rule is sound. The necessary law allows the agency to proceed in this manner due to the broadness of the language. Agencies may create rules to assist in making bureaucratic matters more efficient. While other agencies have received backlash and push back previously, the FCC ‘s proposed rule may be beneficial to those parties involved. It will help create a more efficient way for businesses to work, potentially eliminating merger and acquisition terminations. While these streamlined hearings may be the most efficient way to conduct business, the FCC has allowed room for cases to go in front of an ALJ if they see fit. The agency has managed to create to new, efficient system while maintaining a necessary contingent plan to return to an established, working system.

1. Randolph May, *Streamlining Adjudications at the FCC*, Yale Journal on Regulation: Notice & Comment (Sept. 20, 2019) <https://yalejreg.com/nc/streamlining-adjudications-at-the-fcc-by-randolph-may/>. (“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.”). [↑](#footnote-ref-1)
2. 47 U.S.C. §309. [↑](#footnote-ref-2)
3. Randolph May, *Streamlining Adjudications at the FCC*, Yale Journal on Regulation: Notice & Comment (Sept. 20, 2019) <https://yalejreg.com/nc/streamlining-adjudications-at-the-fcc-by-randolph-may/>. [↑](#footnote-ref-3)
4. 5 U.S.C. §554, §556-57. [↑](#footnote-ref-4)
5. Randolph May, *Streamlining Adjudications at the FCC*, Yale Journal on Regulation: Notice & Comment (Sept. 20, 2019) <https://yalejreg.com/nc/streamlining-adjudications-at-the-fcc-by-randolph-may/>. (“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…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.”). [↑](#footnote-ref-5)
6. Procedural Streamlining of Administrative Hearings, 84 Fed. Reg. 53355 (proposed Oct. 7, 2019). [↑](#footnote-ref-6)
7. 5 U.S.C. §554, §556-57. [↑](#footnote-ref-7)
8. 47 U.S.C. §154(j). [↑](#footnote-ref-8)
9. 47 U.S.C. §154(j) (emphasis added). [↑](#footnote-ref-9)
10. Procedural Streamlining of Administrative Hearings, 84 Fed. Reg. 53355 (proposed Oct. 7, 2019). [↑](#footnote-ref-10)
11. *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654-56. (“…[C]ourts are not free to impose upon agencies specific procedural requirements that have no basis in the APA.”). [↑](#footnote-ref-11)
12. 5 U.S.C. §555. [↑](#footnote-ref-12)
13. Shruti Rana, *“Streamlining” the Rule of Law: How the Department of Justice is Undermining Judicial Review of Agency Action*, U. of Illinois L. Rev. 829 (2009). [↑](#footnote-ref-13)
14. *Id.* pg. 833 [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. *Id.* [↑](#footnote-ref-16)
17. *Id.* pg. 848-49. [↑](#footnote-ref-17)
18. Randolph May, *Streamlining Adjudications at the FCC*, Yale Journal on Regulation: Notice & Comment (Sept. 20, 2019) <https://yalejreg.com/nc/streamlining-adjudications-at-the-fcc-by-randolph-may/>. (“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.”). [↑](#footnote-ref-18)
19. *Id.* (discussing the FCC’s decision to not close the proposed Sinclair-Tribune merger proceeding) (“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.”). [↑](#footnote-ref-19)
20. Procedural Streamlining of Administrative Hearings, 84 Fed. Reg. 53355 (proposed Oct. 7, 2019) (“Under this proposal, a case manager’s responsibilities may include one or more of the duties that are typically performed by the presiding officer, but a case manager would not have authority to resolve any new or novel issues or to issue order on the merits resolving any issue designated for hearing in a case.”) [↑](#footnote-ref-20)