

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Procedural Streamlining of Administrative Hearings
EB Docket No. 19-214

NOTICE OF PROPOSED RULEMAKING

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By the Commission: Commissioner O’Rielly issuing a statement.

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I. INTRODUCTION

1. We seek comment on procedural changes that, if adopted, would streamline many administrative hearings under the Communications Act of 1934, as amended (Communications Act or Act).¹ Currently, these hearings typically are conducted like trials in civil litigation and include, among other things, live testimony before an administrative law judge, cross-examination of witnesses, and an initial decision by the administrative law judge that is subject to review by the Commission.² The Commission has observed that such trial-type hearings are costly and impose significant burdens and delays on both applicants and the agency that may not be necessary.³

¹ See, e.g., 47 U.S.C. § 309(d)(2) (citing id. § 309(a), (e), (k) (licensing and permitting hearings)).

² See 47 CFR §§ 1.241, 1.248, 1.253, 1.254, 1.255, 1.267, 1.276, 1.277, 1.282.

³ See, e.g., Birach Broad. Corp., Hearing Designation Order, 33 FCC Rcd 852, 858-59, para. 15 & n.42 (2018) (Birach) (citing Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Further Notice of Proposed Rulemaking, 13 FCC Rcd 21167, 21171, para. 9 (1998) (“[T]raditional comparative hearings

(continued....)

2. The procedures outlined here are designed to supplement the Commission's current administrative law judge referral process and promote more efficient resolution of hearings. If adopted, 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. The proposed procedures would expedite the Commission's hearing processes consistent with the requirements of the Communications Act and the Administrative Procedure Act (APA)⁴ while ensuring transparency and procedural fairness.

II. BACKGROUND

3. Several provisions of the Communications Act require or permit the Commission to conduct an adjudicatory hearing to resolve a matter. These provisions generally do not identify particular procedures that the Commission must follow. For example,

- Section 309(e) requires the Commission, when a substantial and material fact is presented or when it is unable to make the public interest finding in section 309(a), to designate a license application for a “full hearing”;⁵
- Section 309(k)(3) requires a section 309(e) “full hearing” when the Commission is unable to make the requisite findings to grant a broadcast station renewal request;⁶
- Section 312(c) requires the Commission to conduct a “hearing” before revoking a station license or construction permit pursuant to section 312(a);⁷
- Section 316(a) and (b) provide that a “hearing” may be conducted before the Commission modifies a station license or construction permit;⁸
- Section 9(c)(3) requires a “hearing” before the Commission may revoke an instrument of authorization for failure to pay a regulatory fee if “the licensee’s response [to a notice of intent to revoke] presents a substantial and material question of fact”;⁹
- Section 204(a) authorizes the Commission to conduct a “hearing” concerning the lawfulness of a tariff;¹⁰

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can be cumbersome, costly, and delay service to the public without substantial offsetting public interest benefits.”); see also *Patrick Sullivan & Lake Broad.*, Memorandum Opinion and Order, 33 FCC Rcd 4360, 4366 (2018) (Statement of Commissioner Michael P. O’Rielly).

⁴ See 5 U.S.C. §§ 551–59.

⁵ 47 U.S.C. § 309(e).

⁶ *Id.* § 309(k)(3).

⁷ *Id.* § 312(c).

⁸ *Id.* § 316(a), (b); see also *id.* § 303(m)(2) (requiring the Commission, upon receipt of an “application for hearing,” to hold an order of suspension in abeyance until the conclusion of such hearing).

⁹ 47 U.S.C. § 159(c)(3).

¹⁰ 47 U.S.C. § 204.

- Sections 208 and 209 require the Commission to conduct a “hearing” to resolve a complaint that a common carrier engaged in unlawful conduct, and to award damages when appropriate;¹¹
- Section 214(b) grants a right “to be heard” to parties receiving Commission notice of a carrier request to construct, extend, acquire, operate, or discontinue service, and section 214(d) provides that the Commission may “after a full opportunity for hearing” require a carrier to provide itself with adequate facilities.¹²

4. The Commission has applied a variety of processes in these hearings. Traditionally, the Commission has designated most disputes concerning spectrum license applicants, permittees, or licensees under sections 309 and 312 for resolution in hearings before an administrative law judge using procedures similar to the formal adjudication provisions of the APA.¹³ By rule, the administrative law judge may grant a motion for summary decision on a written record only if “there is no genuine issue as to any material fact” and “a party is otherwise entitled to summary decision.”¹⁴ In contrast, the Commission has traditionally resolved section 204 hearings on the lawfulness of tariffs on a written record,¹⁵ and hearing rights for common carriers under section 214 are comparatively limited.¹⁶ The Commission has also delegated authority to the Enforcement Bureau to conduct hearings on section 208 complaints,¹⁷ in which all issues are resolved on a written record.¹⁸

5. Under certain circumstances, the Commission has taken steps to streamline its hearing processes even for spectrum licensing matters.¹⁹ In 1981, the Commission adopted a streamlined approach for evaluating competing initial cellular applications under section 309(e) on a written record.²⁰

¹¹ 47 U.S.C. §§ 208, 209 (authorizing the Commission to award damages “after hearing on a [Section 208] complaint”) (emphasis added).

¹² 47 U.S.C. § 214(b), (d).

¹³ See 47 CFR §§ 1.201-1.364; see also 5 U.S.C. §§ 554, 556-57.

¹⁴ 47 CFR § 1.251(d).

¹⁵ See, e.g., *July 1, 2018 Annual Access Charge Tariff Filings; South Dakota Network, LLC Tariff F.C.C. No. 1*, Memorandum Opinion and Order, 2019 WL 1033939 (2019).

¹⁶ The Commission has found that “hearing requirements applicable to Title III radio applications do not apply to Title II [S]ection 214 applications” for authority to operate, but that the Commission has discretion to designate for hearing issues raised in a Section 214 application. See *Application of Oklahoma W. Tel. Co.*, Order, 10 FCC Rcd 2243, 2243-44, para. 6 (1995) (finding no substantial public interest questions existed to justify hearing on Section 214 application) (citing *ITT World Commc’ns v. FCC*, 595 F.2d 897, 900-01 (2d Cir. 1979)). The Commission has determined that the term “heard” in Section 214(b) is not defined and that a trial-type hearing is not required under the APA. *Bell Atlantic New Zealand Holdings and Pacific Telecom Applications for Consent to Transfer Control*, Order and Authorizations, 18 FCC Rcd 23140, 23161-62, paras. 45-48 (IB, WCB, WTB 2003) (citing *AT&T Acquisition of ITT Commc’ns Serv. Subsidiaries*, Memorandum Opinion and Order, 2 FCC Rcd 3948, 3952, paras. 22, 23 (1987) (*AT&T/ITT Order*); but cf. *AT&T/ITT Order*, 2 FCC Rcd at 3952-53, para. 24 (hearing allowed in “circumstances involving a conflict over material questions of fact where witness credibility is critical to resolving the controversy”).

¹⁷ See 47 CFR §§ 0.111(a)(1), 0.311(a)(5).

¹⁸ See 47 CFR §§ 1.720-1.736.

¹⁹ See, e.g., *Radioactive, LLC*, Hearing Designation Order, 32 FCC Rcd 6392 (2017) (*Radioactive*).

²⁰ See *Inquiry into the Use of the Bands 825–845 MHz and 870–890 MHz for Cellular Communications Systems*, Report and Order, 86 FCC 2d 469, 499-501, paras. 65-70 (1981) (*Cellular Rulemaking*), modified 89 FCC 2d 58, further modified 90 FCC 2d 571 (1982), *pet. for review dismissed sub nom. United States v. FCC*, No. 82–1526 (D.C. Cir. 1983).

More recently, the Commission ruled that certain license renewal proceedings may be resolved in a written hearing proceeding administered by the Commission itself in lieu of an administrative law judge when there are no substantial issues of material fact or credibility issues.²¹ The Commission has likewise required parties to certain broadcast proceedings to submit all or a portion of their affirmative direct cases in writing where the presiding officer determines that doing so “will contribute significantly to the disposition of the proceeding.”²² The Commission also adopted expedited procedures under section 309(j)(5) permitting “employees other than [administrative law judges] to preside at the taking of written evidence.”²³ Relatedly, the Commission has delegated authority to particular operating Bureaus to act on certain licensing and permitting applications when the relevant Bureau determines that the application raises no “substantial and material questions of fact.”²⁴

III. DISCUSSION

6. To further streamline the Commission’s hearing processes, we propose to codify and expand the Commission’s use of hearings on a written record. The Commission’s hearing rules provide that “[a]ny hearing upon an application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate.”²⁵ The Commission has on numerous occasions curtailed the use of oral testimony and cross examination in particular proceedings in order to expedite the hearing process.²⁶ In our experience, disputes in Commission proceedings typically involve criticisms by one party of the evidence proffered by another party or the legal significance of that evidence, not actual conflicts in testimony between two witnesses concerning outcome determinative facts.²⁷ Section 208 formal complaint proceedings amply demonstrate this point.²⁸ We contemplate codifying and expanding

²¹ See, e.g., *Birach*, 33 FCC Rcd at 858-59, paras. 15-17 & n.42; *Radioactive*, 32 FCC Rcd at 6396, para. 10 (same).

²² See 47 CFR § 1.248(d)(2).

²³ See 47 CFR § 1.2108(d); see also 47 U.S.C. § 309(j)(5) (authorizing the Commission to “adopt procedures for the submission of all or part of the evidence in written form” and to “delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges”).

²⁴ See, e.g., *Comparative Consideration of Two Groups of Mutually Exclusive Applications for Permits to Construct New Noncommercial Educ. FM Stations*, Memorandum Opinion and Order, 31 FCC Rcd 2450, 2456-57, paras. 20-21 (2016) (delegating authority to Media Bureau staff).

²⁵ See 47 CFR § 1.254. In addition, “both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant except as otherwise provided in the order of designation.” *Id.*

²⁶ In certain broadcast cases involving applicants for new facilities, for example, the Commission’s rules limit oral testimony and cross-examination to cases where “material issues of decisional fact cannot be resolved without oral hearing evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings.” See 47 CFR § 1.248(d)(4); see also *id.* § 1.248(d)(2) (requiring parties to other broadcast proceedings to submit all or a portion of their affirmative direct cases in writing where the presiding officer determines that doing so “will contribute significantly to the disposition of the proceeding”); *Cellular Rulemaking*, 86 FCC 2d at 499-501, paras. 65-70 (adopting streamlined procedures for evaluating competing initial cellular applications on a written record); 47 CFR § 1.2108(d) (adopting expedited procedures under 47 U.S.C. § 309(i)(2) and (j)(5) permitting “employees other than [administrative law judges] to preside at the taking of written evidence”).

²⁷ See, e.g., *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615, 24628, 24631, 24632-33, paras. 31, 41, 42-43 (2003) (failure of Georgia Power to dispute the fact of delays in inspection or testimony estimating costs to replace poles, and lack of records to challenge evidence on inspection costs).

²⁸ See, e.g., *N. County Commc’ns v. Cricket Commc’ns*, 31 FCC Rcd 10739, 10741, para. 4 & n.16 (EB 2016); *Chelkowski v. AT&T Mobility*, 30 FCC Rcd 7227, 7228, para. 5 n.11 (EB 2015); *AT&T v. All American Tele.*, 28 FCC Rcd 3477, 3484, para. 17 & nn.62-64 (2013); *Qwest Commc’ns v. Farmers and Merch. Mut. Tele.*, 24 FCC Rcd 14801, 14805-10, paras. 11-21 (2009); *Commc’ns Vending v. Citizens Commc’ns*, 17 FCC Rcd 24201, 24229, para. 68 n.200 (2002); see also *Brooten v. AT&T*, 12 FCC Rcd 13343, 13350, para. 14 (Com. Car. Bur. 1997) (finding defendant’s explanation for backbilling credible based on “detailed information” in record).

the use of a written hearing process that can be used in most adjudicative proceedings, including those conducted by an administrative law judge. In particular, we propose to authorize the presiding officer to conduct a written hearing whenever factual disputes can be adequately resolved on a written record.

A. Written Hearing Procedures

7. We propose that the Commission may, in any order designating a matter for hearing (designation order), require the administrative law judge or other presiding officer to conduct a hearing on a written record. We also propose that, in the absence of such a directive in a designation order, the presiding officer may conduct the hearing on a written record on her own initiative or on motion of a party. The presiding officer should include the date for filing such a motion in the scheduling order issued following release of the designation order. We seek comment on these proposals and on whether any additional procedural safeguards are warranted in this regard. We note that our current hearing rules allow parties to take depositions, which enable parties to examine witnesses in a live setting and may render live testimony unnecessary at a hearing.²⁹

8. We propose that parties in written hearing proceedings be required to file pleadings that include all evidence and arguments that support their respective positions. Consistent with the Commission's rules on summary decision and its formal complaint rules, such written submissions must be supported by evidence in the form of sworn statements based on personal knowledge and supporting documentation.³⁰ The Commission, in its designation order, or the presiding officer will adopt a schedule for sequential filing of written evidentiary submissions. Enforcement Bureau staff will continue to represent the public interest in these proceedings and will have the opportunity, along with other interested parties, to file pleadings and submit evidence. We believe these procedures will expedite the resolution of hearing proceedings while safeguarding the rights of parties to a full and fair hearing. We seek comment on these proposals.

9. We also propose to require parties to demonstrate why oral argument may be necessary in a case. In our experience, oral argument does not materially aid in the resolution of the vast majority of cases, and routinely accommodating requests for oral argument unnecessarily prolongs the resolution of hearing proceedings.

10. *Selection of a Presiding Officer.* Each designation order will indicate whether the Commission itself, one or more Commissioners, or an administrative law judge will serve as the presiding officer.³¹ We tentatively conclude that the selection of a presiding officer should take into consideration who would "most fairly and reasonably accommodate" "the proper dispatch of [the Commission's] business and the ends of justice" in each case.³² To that end, we seek comment on if there are particular types of proceedings where it is or is not appropriate, on legal or policy grounds, for the Commission itself to serve as presiding officer. For example, if a case is likely to involve primarily interpretations of law or policy determinations, would the Commission itself be best suited to administer the hearing in such a case?

11. The APA provisions governing formal hearing proceedings generally identify only the agency, one or more agency heads, or one or more administrative law judges among those who may

²⁹ See 47 CFR § 1.315. The presiding officer will continue to have authority to request additional information it deems necessary to create a complete record on the issue(s) designated for hearing. See *id.* § 1.243.

³⁰ See 47 CFR §§ 1.251(a)(1), 1.721(d) ("Averred facts, claims, or defenses . . . must be supported by relevant evidence").

³¹ 47 CFR § 1.221 (content of hearing designation order).

³² See *WJR*, 337 U.S. at 282; see also, e.g., *Schreiber*, 381 U.S. at 289; 47 U.S.C. § 154(j).

preside at formal hearings,³³ but no such limitation applies to informal adjudications under the APA.³⁴ Similarly, although section 5(c)(1) of the Communications Act limits delegations of authority to conduct hearings to individuals identified in 5 U.S.C. § 556(b)(2) (members of the agency) and (b)(3) (administrative law judges), that limitation expressly applies only to hearings subject to APA formal hearing requirements.³⁵ Accordingly, although we are not proposing any rule changes in this regard, we seek comment on whether there are other officials on the Commission's staff who may serve as the presiding officer in suitable circumstances.³⁶ Would directing such individuals to administer hearing proceedings expedite our hearings process by making available additional neutral qualified personnel to conduct Commission hearings? We will address any proposed rule changes on this issue in a Further Notice of Proposed Rulemaking in this proceeding.

12. We also propose to direct the Chief of the Wireline Competition Bureau to exercise certain authority previously held by the Chief of the Common Carrier Bureau, the former's predecessor bureau, under section 214 of the Act. In particular, the Commission "delegate[d] to the Chief, Common Carrier Bureau, authority to issue orders revoking a common carrier's operating authority pursuant to [s]ection 214 of the Act, and to issue orders to cease and desist such operations, in cases where the Chief Administrative Law Judge, or the Presiding Officer designated, has issued a certification order to the Commission pursuant to [s]ection 1.92(c) of our rules that the carrier has waived its opportunity for hearing under that section."³⁷ We propose to direct the Chief of the Wireline Competition Bureau to issue such orders whenever the presiding officer assigned to a hearing proceeding determines that a common carrier has waived its opportunity for hearing. We seek comment on this proposal.

13. *Selection of a Case Manager.* The Commission's current hearing rules provide that "[h]earings will be conducted by the Commission, by one or more commissioners, or by a law judge designated pursuant to section 11 of the [APA]."³⁸ We seek comment on directing designated Commission staff to perform specific case management functions when the Commission itself serves as the presiding officer in a hearing proceeding.³⁹ A case manager could issue scheduling orders, rule on discovery motions and other interlocutory matters, administer the intake of evidence, hold conferences in order to settle or simplify the issues, and certify the record for decision by the Commission at the conclusion of a hearing. Under this proposal, a case manager's responsibilities may include one or more of the duties that are typically performed by the presiding officer,⁴⁰ but a case manager would not have

³³ See 5 U.S.C. § 556(b)(1)-(3) (identifying individuals authorized to "preside at the taking of evidence" in formal adjudications as "(1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges [administrative law judges] appointed under [5 U.S.C. § 3105]").

³⁴ See 5 U.S.C. §§ 555, 558.

³⁵ See 47 U.S.C. § 155(c)(1) (limiting delegations of authority to conduct hearings to individuals identified in "paragraph (2) or (3) of [s]ection 556(b) of title 5" in "any hearing to which [section 556(b) of title 5] applies").

³⁶ 47 U.S.C. § 155(c)(1) ("[T]he Commission may, by published rule or by order, delegate any of its functions . . . to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining . . . or otherwise acting as to any work, business, or matter . . .").

³⁷ *CCN, Inc., et al.*, Order to Show Cause and Notice of Opportunity for Hearing, 13 FCC Rcd 13599, 13606, para. 13 (1998).

³⁸ See 47 CFR § 1.241(a); see also 5 U.S.C. § 3105 (appointment of administrative law judges under the APA). Relatedly, individuals authorized to review an initial decision and issue a final decision on the merits include the Commission *en banc*, individual commissioners, or a panel of commissioners. See 47 CFR §§ 0.201(a)(3), 1.271; cf. 47 U.S.C. § 155(c)(1), (c)(8) (person(s) authorized to perform review function include (1) the Commission; (2) a panel of Commissioners; (3) an individual Commissioner; or (4) an "employee board" consisting of two or more employees meeting specified criteria in 47 U.S.C. § 155(c)(8)).

³⁹ See *infra* Section III.A (seeking comment on written-only hearing procedures).

⁴⁰ See 47 CFR § 1.243 (describing the presiding officer's authority).

authority to resolve any new or novel issues or to issue orders on the merits resolving any issue designated for hearing in a case.⁴¹ We tentatively conclude that this proposal would significantly expedite our hearing processes when the Commission designates itself as the presiding officer. We seek comment on this tentative conclusion and on the relevance to this proposal, if any, of the Appointments Clause to the U.S. Constitution and the Supreme Court’s decision in *Lucia v. SEC*.⁴²

14. We recognize that designated staff must demonstrate sufficient training and expertise to act as a case manager.⁴³ We seek comment on the minimum training and qualifications, including adjudicatory and subject matter expertise, that individuals must possess to successfully perform this role. The Administrative Conference’s “best practice” pertaining to presiding officer qualifications recommends that agencies “use adjudicators—rather than agency heads, boards, or panels—to conduct hearings and provide initial decisions[.]”⁴⁴ Should this recommendation apply to Commission staff whose eligibility to act as a case manager is under consideration? We note that various staff within the Enforcement Bureau and the Commission’s Office of General Counsel have extensive adjudicatory experience, and we therefore seek comment on whether we should direct particular staff within the Enforcement Bureau⁴⁵ or Office of General Counsel⁴⁶ to act as a case manager in hearing proceedings. We similarly seek comment on the qualifications of staff within the Commission’s other bureaus to serve in this role.⁴⁷

15. The case manager in a hearing should be neutral.⁴⁸ In formal adjudications, the APA formal hearing provisions prohibit agency staff from performing both prosecutorial and decisional

⁴¹ In this regard, the proposed delegation of case management functions to Commission staff is narrower than the functions delegated in Section 0.251(c), to the extent that the latter permits Office of General Counsel staff to issue dispositive orders in certain types of cases. *Cf.* 47 CFR § 0.251(c) (delegating authority to the General Counsel in hearing proceedings that “are pending before the Commission *en banc* to act on all requests for relief, and to issue all appropriate orders, except those which involve final disposition on the merits of a previously specified issue concerning an applicant’s basic qualifications or two or more applicants’ comparative qualifications”).

⁴² *See* U.S. Const. art. II, § 2, cl. 2; *Lucia v. SEC*, 138 S.Ct. 2044 (2018).

⁴³ The presiding officer has authority to, among other things, administer oaths and affirmations, issue subpoenas, rule on questions of evidence, take or cause depositions to be taken, regulate the course of the hearing, dispose of procedural requests, and hold settlement conferences. *See* 47 CFR § 1.243(a)-(1) (presiding officer functions).

⁴⁴ Administrative Conference of the United States, Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94312, 94316 (2016) (ACUS Rec. 2016-4), available at <https://www.federalregister.gov/d/2016-31047/page-94312>.

⁴⁵ For example, the Enforcement Bureau’s Market Disputes Resolution Division mediates and adjudicates complex disputes and formal complaint proceedings brought pursuant to Section 208 of the Act (formal complaints) and Section 224 (pole attachment complaints). 47 U.S.C. §§ 208, 224.

⁴⁶ The Administrative Law Division of the Office of General Counsel serves as the chief legal advisor to the Commission and the Litigation Division of the Office of General Counsel represents the Commission in litigation. Under our current rules, the Office of General Counsel has “delegated authority in adjudicatory hearing proceedings which are pending before the Commission *en banc*” to act on requests for relief and issue appropriate orders, “except those which involve final disposition on the merits of a previously specified issue concerning an applicant’s basic qualifications or two or more applicants’ comparative qualifications.” *See* 47 CFR § 0.251(c).

⁴⁷ We note that, under our current rules, the Wireless Telecommunications Bureau is authorized to conduct hearings on “auctionable license applications and non-mutually exclusive non-auctionable license applications” if a case does not require oral testimony for its resolution. If oral testimony is required, an administrative law judge conducts the hearing. *See* 47 CFR §§ 1.945(f)(3), 0.131(a).

⁴⁸ M. Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act* at 23 (Nov. 10, 2016) (Asimow Report), available at <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.

activities.⁴⁹ This “separation of functions” principle shields agency decisionmakers from off-record presentations by staff who have presented evidence or argument on behalf of or against a party to a proceeding and prohibits such staff from participating in the hearing decision.⁵⁰ The separation of functions requirement in section 409(c)(1) of the Communications Act, which applies to both formal and informal adjudications, prevents a person who has participated in the presentation of a case at a hearing or upon review from making any additional presentation respecting such case to the presiding officer or to any authority within the Commission performing a review function, absent notice and opportunity for all parties to participate.⁵¹ The Administrative Conference recommends that agencies require internal separation of decisional and adversarial personnel in adjudications that are not subject to formal APA hearing requirements. In this context, an “adversary” refers to a staff member who took an active part in investigating, prosecuting, or advocating in the same case.⁵²

16. We propose to adopt the Administrative Conference’s recommendation to “prohibit staff who took an active part in investigating, prosecuting, or advocating in a case” from serving as a case manager and from advising or assisting the case manager “in that same case.”⁵³ Thus, we propose that staff who participated in identifying the specific issues designated for hearing; staff who take an active part in investigating, prosecuting, or advocating in a case; and staff who are expected to investigate and act upon petitions to deny (including administrative challenges thereto) may not serve as the case manager in that case.⁵⁴ We seek comment on these proposals.

17. Unless otherwise designated,⁵⁵ Commission hearings are “restricted” proceedings and thus *ex parte* presentations to or from Commission decision-making personnel are prohibited.⁵⁶ “Decision-making personnel” include “[a]ny member, officer, or employee of the Commission . . . who is or may reasonably be expected to be involved in formulating a decision, rule or order in a proceeding.”⁵⁷

⁴⁹ 5 U.S.C. § 554(d).

⁵⁰ *ITT World Commc'ns Required Rate of Return & ITT World Commc'ns Investigation into Rate Base & Expenses*, Memorandum Opinion & Order, 85 FCC.2d 561, 569-70, para. 24 (1981) (citing *Grolier v. FTC*, 615 F. 2d 1215, 1220 (9th Cir. 1980) (separation of functions principle prohibits commingling of prosecutorial and decisional activities “under circumstances where the will-to-win might improperly influence the decision or where off-the-record information might be used to reach that decision”).

⁵¹ See 47 U.S.C. § 409(c)(1) (applying to “any case of adjudication (as defined in section 551 of Title 5)”).

⁵² Asimow Report at 21 (“A staff adversary often develops a mindset opposed to the private party to the case that is inconsistent with the required impartiality of the decisionmaker; for that reason, adversaries should not serve as decisionmakers, or furnish *ex parte* advice to decisionmakers, in the same case in which they played adversarial roles.”).

⁵³ ACUS Rec. 2016-4, 81 Fed. Reg. at 94315.

⁵⁴ The Administrative Conference lists among the “mindsets” that should disqualify an individual from serving as a presiding officer, “[p]rejudgment of the adjudicative facts at issue in the proceeding.” See ACUS Rec. 2016-4, 81 Fed. Reg. at 94315; see also Asimow Report at 23.

⁵⁵ See 47 CFR § 1.1200(a).

⁵⁶ See 47 CFR § 1.1208 (“Proceedings in which *ex parte* presentations are prohibited, referred to as ‘restricted’ proceedings, include . . . all proceedings that have been designated for hearing[.]”); see also 47 U.S.C. § 409(c)(1) (“no person who has participated in the presentation or preparation for presentation of such case at the hearing or upon review shall (except to the extent required for the disposition of *ex parte* matters as authorized by law) directly or indirectly make any additional presentation respecting such case to the hearing officer or officers or to the Commission, or to any authority within the Commission to whom, in such case, review functions have been delegated by the Commission . . . , unless upon notice and opportunity for all parties to participate.”).

⁵⁷ 47 CFR § 1.1202(b), (c), (e) (defining “*ex parte* presentation,” “decision-making personnel,” and “matter designated for hearing,” among other terms). To the extent that certain of our rules apply exclusively to hearings conducted pursuant to APA formal hearing provisions, we propose to amend those rules to clarify their applicability

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Decision-making personnel also include “[u]nseparated Bureau or Office staff . . . with respect to decisions, rules, and orders in which their Bureau or Office participates in enacting, preparing, or reviewing.”⁵⁸ We tentatively conclude that any Commission staff serving as a case manager in a case should be considered “decision-making personnel” for purposes of our *ex parte* rules. Finally, we tentatively conclude that the existing definition of “*ex parte* presentation” in section 1.1202 of the Commission’s rules would continue to apply.⁵⁹ We seek comment on these tentative conclusions and on whether other or additional measures are needed to ensure the impartiality of staff serving as the case manager.

18. *Dispensing with Initial Decision When Appropriate.* Section 409(a) of the Communications Act generally requires that the presiding officer prepare an initial, tentative, or recommended decision.⁶⁰ With limited exceptions, the Commission’s rules likewise state that “the presiding officer shall prepare an initial (or recommended) decision” at the close of a hearing.⁶¹ Upon agreement of the parties or where the Commission finds “that due and timely execution of its functions imperatively and unavoidably so requires,” however, “the Commission may direct that the record in a pending proceeding be certified to it for initial or final decision.”⁶²

19. We seek comment on whether the Commission should forego initial decisions whenever it serves as the presiding officer at a hearing, including cases in which the Commission directs that the record of the proceeding be certified to it for decision. Initial decisions have no apparent utility when the Commission is the presiding officer. Dispensing with initial decisions under these circumstances would greatly promote efficient resolution of disputes. We seek comment on this proposal. Although the APA’s formal hearing requirements do not apply here, we note that they authorize agencies to require an administrative law judge to certify the record for decision by the agency without an initial decision.⁶³ We seek comment on whether a case manager could likewise certify the hearing record for decision directly by the Commission.

20. *Evidentiary Rules.* The Commission’s current hearing rules provide that the Federal Rules of Evidence (28 U.S.C. Rules 101-1103) govern Commission hearings, but that these rules may be “relaxed if the ends of justice will be better served by so doing.”⁶⁴ In practice, however, the Federal

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to all hearings. *See, e.g., id.* § 1.1202(e) (defining “*matter designated for hearing*” as “[a]ny matter that has been designated for hearing before an administrative law judge or which is otherwise designated for hearing in accordance with procedures in 5 U.S.C. 554”).

⁵⁸ *Id.* § 1.1202(c).

⁵⁹ 47 CFR § 1.1202(a), (b).

⁶⁰ 47 U.S.C. § 409(a), which provides:

In every case of adjudication (as defined in section 551 of Title 5) which has been designated by the Commission for hearing, the person or persons conducting the hearing shall prepare and file an initial, tentative, or recommended decision, except where such person or persons become unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.

⁶¹ 47 CFR § 1.267(a).

⁶² 47 CFR § 1.274(a).

⁶³ *See* 5 U.S.C. § 557(b).

⁶⁴ 47 CFR § 1.351 (“Except as otherwise provided in this subpart, the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearings. Such rules may be relaxed if the ends of justice will be better served by so doing.”). Under Federal Rule of Evidence 403, courts “may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the

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Rules of Evidence are not necessarily applied and instead serve merely as guidelines in determining the admissibility of evidence.⁶⁵ This lack of clarity as to the relevant evidentiary standard has the potential to cause confusion for parties and to lead to evidentiary disputes between those who expect the Federal Rules of Evidence to apply and those who seek to avoid their application in a particular case.⁶⁶

21. We propose to amend this rule and adopt the more permissive evidentiary standard in the formal APA hearing requirements, which states, in relevant part, that “the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.”⁶⁷ We seek comment on this proposal and on the conclusion of the Asimow Report that the more lenient standard in 5 U.S.C. § 556(d) will result in fewer time-consuming disputes over “esoteric rules of evidence, such as the many exceptions to the hearsay rule,” and will be simpler for self-represented parties to navigate.⁶⁸

22. *Proposed Rule Changes.* The Appendix hereto identifies the rule changes we propose in this proceeding. Specifically, we propose to add sections 1.370–1.377 to our Part 1 hearing rules to establish procedures for hearings to be resolved on a written record. We otherwise generally retain the current Part 0 and Part 1 hearing related rules with the following proposed modifications:

- substitute “presiding officer” for “Chief Administrative Law Judge” or “administrative law judge” where appropriate;
- add “proceeding” after “hearing” in various rules for internal consistency and to connote that a “hearing proceeding” begins with the issuance of a designation order and includes entry of appearances, discovery, and other matters, while a “hearing” is the phase of a “hearing proceeding” during which the parties submit evidence into the record concerning the merits of the issues designated for hearing;
- delete rule provisions related to comparative hearings as obsolete;
- delete sections 1.115(e)(1) and (e)(2), which overlap with section 1.301(b);
- delete sections 0.351 and 0.357;
- add new section 1.210 concerning electronic filing to codify current practice;
- delete section 1.227(b);
- amend section 1.241 to provide that the presiding officer shall be identified in the designation order;
- add new section 1.242 concerning assignment of a case manager;
- revise section 1.248 concerning status conferences;
- renumber section 1.258 as section 1.265;
- delete section 1.260 and incorporate its text into section 1.265;

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following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

⁶⁵ See, e.g., *Echostar Commc’ns Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002); *Wine Country Radio*, Memorandum Opinion and Order, 11 FCC Rcd 2333, 2334, para. 6 (1996).

⁶⁶ See Asimow Report at 31.

⁶⁷ 5 U.S.C. § 556(d); see Asimow Report at 31.

⁶⁸ Asimow Report at 31.

- amend section 1.263 to grant the presiding officer authority to decide whether parties may file proposed findings and conclusions;
- add new section 1.314 concerning submission of confidential information; and
- amend section 1.351 to adopt the APA’s evidentiary standard.

We seek comment on these proposed rules and on any other changes necessary to conform our rules to these proposals.

23. *Related Issues.* Finally, we seek comment on any other proposed rule changes that would streamline or expedite the Commission’s hearing processes. We may address any such proposals in a Further Notice of Proposed Rulemaking in this proceeding.

B. Legal Authority

24. The Commission has broad authority “[to] conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”⁶⁹ Congress “left largely to [the Commission’s] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate” the ends of justice.⁷⁰

25. In *PBGC v. LTV Corp.*, the Supreme Court identified three potential sources of procedural requirements for agency hearings—the APA, the agency’s governing statute, and the Due Process Clause.⁷¹ “[C]ourts are not free to impose upon agencies specific procedural requirements that have no basis in” those sources.⁷²

26. The APA prescribes procedural standards governing formal and informal adjudications before federal agencies.⁷³ The APA provisions governing formal adjudications appear in sections 554, 556, and 557 of title 5,⁷⁴ which require a formal hearing process that includes elements of a judicial trial in a civil action.⁷⁵ Informal adjudication commonly refers to procedures for conducting cases when

⁶⁹ 47 U.S.C. § 154(j).

⁷⁰ See *FCC v. WJR, The Goodwill Station*, 337 U.S. 265, 282 (1949); see also, e.g., *FCC v. Schreiber*, 381 U.S. 279, 289 (1965); see also *Cellular Rulemaking*, 86 F.C.C.2d at 499-500, para. 67 (citing *Bell Tel. Co. v. FCC*, 503 F.2d 1250 (3rd Cir. 1974) (“The Commission has broad discretion to use differing procedures in differing contexts as required for the proper dispatch of business, and the types of hearing required must be analyzed in terms of the nature of the proceeding and the pertinent statutory provisions.”); *Inquiry into the Use of the Bands 825-845 Mhz & 870-890 Mhz for Cellular Commc’ns Sys.; Amendment of Parts 2 & 22 of the Commission’s Rules*, Memorandum Opinion and Order on Reconsideration, 89 F.C.C.2d 58, 94, para. 75 (1982) (*Cellular Reconsideration Order*) (“We have broad authority to structure our hearing process in the fashion best designed to resolve the issue at hand. There is little question that ‘the nature of the ‘full hearing’ required by [s]ection 309(e) [of the Act] turns on the type of factual questions raised.”) (quoting *United States v. FCC*, 652 F.2d 72, 90 (D.C. Cir. 1980)).

⁷¹ *PBGC v. LTV Corp.*, 496 U.S. 633, 654-56 (1990); see also *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1207 (2015); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524-25 (1978).

⁷² *LTV Corp.*, 496 U.S. at 654.

⁷³ See 5 U.S.C. §§ 551-558. The APA defines “adjudication” as an “agency process for the formulation of an order” and defines “order” as “a final disposition . . . of an agency in a matter other than a rule making but including licensing.” *Id.* § 551(6), (7). The term “licensing” “includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.” *Id.* § 551(9).

⁷⁴ See 5 U.S.C. §§ 554, 556-557.

⁷⁵ 5 U.S.C. §§ 554, 556-57. “[A] section 554 hearing includes the following procedural protections: an impartial and unbiased presiding officer, notice and opportunity to participate in the hearing, the right of the parties to appear with counsel, the right to present oral and written evidence (including rebuttal evidence) and to conduct such cross-

(continued....)

formal adjudication is not required.⁷⁶ The APA prescribes minimum procedural requirements for informal adjudications.⁷⁷ Section 555 of title 5 requires only that an agency afford participants the right to appear with counsel, the right to procure copies or transcripts of any evidence they have provided, and prompt notice of, and grounds for, the agency's denial of an application or petition.⁷⁸ Section 558(c) includes certain additional procedures specific to proceedings involving licenses or other agency authorizations.⁷⁹ That section generally requires an agency, prior to instituting proceedings to suspend or revoke a license, to provide the licensee with written notice of the facts that may warrant the agency's contemplated action and an opportunity to demonstrate compliance with all lawful requirements.⁸⁰

27. The APA, by itself, does not establish when agencies must follow the formal hearing procedures in Sections 554, 556, and 557. Instead, agencies must apply the APA in conjunction with the relevant enabling statute⁸¹ and use formal hearing procedures in "every case of adjudication required by statute to be determined *on the record* after opportunity for an agency hearing."⁸² Where an agency's enabling statute does not expressly require an "on the record" hearing and, instead, calls simply for a "hearing," a "full hearing," or uses similar terminology, the statute does not trigger the APA formal adjudication procedures absent clear evidence of congressional intent to impose the full panoply of trial-type procedures of a formal hearing.⁸³

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examination as is required for a full and true disclosure of the facts, the right to submit proposed findings, conclusions and exceptions, the compilation of an exclusive record upon which the agency must base its decision, and limitations on *ex parte* communications and on the combination of prosecutorial and adjudicative functions." *Friends of the Earth v. EPA*, 966 F.2d 690, 693 n.4 (D.C. Cir. 1992) (internal citations omitted).

⁷⁶ See *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 361 n.37 (D.C. Cir. 1981) ("The APA itself does not use the term 'informal adjudication.' Informal adjudication is a residual category including all agency actions that are not rulemaking and that need not be conducted through [formal] 'on the record' hearings.").

⁷⁷ See 5 U.S.C. § 555; see also *PBGC*, 496 U.S. at 655 (internal citation omitted) ("The determination in this case, however, was lawfully made by informal adjudication, the minimal requirements for which are set forth in the APA."); *Sw. Airlines Co. v. Transp. Sec. Admin.*, 650 F.3d 752, 757 (D.C. Cir. 2011) ("In informal adjudications like these, agencies must satisfy only minimal procedural requirements.") (internal quotation marks and brackets omitted).

⁷⁸ 5 U.S.C. § 555(b), (c), (e); *id.* § 555(e) (requiring each agency, "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, [to] proceed to conclude a matter presented to it," and to give "[p]rompt notice ... of the denial of a written application, petition, or other request of an interested person made in connection with any agency proceeding ... [with] a brief statement of the grounds for denial").

⁷⁹ See 5 U.S.C. § 558(c); see also *id.* § 551 (defining "license").

⁸⁰ See *id.* § 558(c); see also *City of West Chicago v. NRC*, 701 F.2d 632, 644-45 (7th Cir. 1983) (joining the majority of circuits that have addressed the nature of the hearing required by section 558(c) in holding that section 558(c) does not automatically require formal APA hearings and requires only such hearings as are otherwise required by law).

⁸¹ *Washington Ass'n for Television & Children v. FCC*, 665 F.2d 1264, 1270 (D.C. Cir. 1981).

⁸² 5 U.S.C. § 554(a) (emphasis added).

⁸³ See *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 234-38 (1973) (the words "after hearing" in the Interstate Commerce Act do not require formal APA adjudication); see also, e.g., *City of West Chicago*, 701 F.2d at 641 (statutory requirement of a "hearing" does not trigger formal, on-the-record hearing provisions of the APA); *Chem. Waste Mgmt. v. EPA*, 873 F.2d 1477, 1480-83 (D.C. Cir. 1989) (no presumption that "public hearing" means "on the record" hearing); *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1499 n.39 (D.C. Cir. 1984) ("after full hearing" is "not equivalent to the requirement of a decision 'on the record'") (internal citation omitted). Although several older cases adopted a presumption that a simple statutory reference to a "hearing," without more specific guidance from Congress, evinces an intention to require formal adjudicatory procedures, see, e.g., *Union of*

(continued....)

28. No express “on the record” language appears in the Communications Act’s hearing provisions that would trigger the APA formal adjudication requirements.⁸⁴ In addition, nothing in the text of the Act unambiguously requires trial-type hearings in all such proceedings.⁸⁵ When Congress intended to require the Commission to conduct formal adjudication under the APA, it said so explicitly—section 503 of the Communications Act authorizes the Commission to impose a forfeiture penalty on a person after “a hearing before the Commission or an administrative law judge thereof in accordance with section 554 of” the APA.⁸⁶ Consequently, we tentatively conclude that Commission hearings generally are subject only to the APA’s informal adjudication requirements.⁸⁷

29. We also believe that the streamlined procedures proposed in this NPRM comport with any constitutional due process requirements that may apply, as articulated by the Supreme Court in *Mathews v. Eldridge*.⁸⁸ The Fifth Amendment to the United States Constitution provides that “No person shall . . . be deprived of life, liberty, or property, without due process of law.”⁸⁹ The essential elements of due process are notice and an opportunity to be heard when a governmental decision places an individual’s “liberty” or “property” interests in jeopardy.⁹⁰ The government must give a party an

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Concerned Scientists v. NRC, 735 F.2d 1437, 1444 n.12 (D.C. Cir.1984); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 877 (1st Cir.1978); *Marathon Oil v. EPA*, 564 F.2d 1253, 1264 (9th Cir.1977), more recent cases have expressly rejected that view in light of the Supreme Court’s intervening decision in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). See, e.g., *Chem. Waste Mgmt.*, 873 F.2d at 1481-82 (formerly held presumption that a statutory reference to a “hearing” evinces congressional intent to require formal procedures effectively “truncates the *Chevron* inquiry” by treating a “facially ambiguous” statutory reference to a “hearing” as though it were an “unambiguous constraint upon the agency”).

⁸⁴ See, e.g., *Gencom v. FCC*, 832 F.2d 171, 174 n.2 (D.C. Cir. 1987) (nothing in section 309 of the Communications Act “uses the ‘on the record’ language necessary to trigger the full panoply of trial-like hearing requirements embodied in [5 U.S.C. § 554]”); *Inquiry into the Use of the Bands 825–845 MHz and 870–890 MHz for Cellular Communications Systems*, Report and Order, 86 F.C.C.2d 469, 500, para. 67 (1981) (*Cellular Rulemaking*), modified, 89 FCC 2d 58, further modified, 90 F.C.C.2d 571 (1982), pet. for review dismissed sub nom. *United States v. FCC*, No. 82–1526 (D.C. Cir. 1983); see also *Cellular Mobile Sys. of Pa., Inc. v. FCC*, 782 F.2d 197, 197-98 (D.C. Cir. 1985).

⁸⁵ See *United States v. Storer Broad. Co.*, 351 U.S. 192, 202 (1956) (holding that the “full hearing” required under section 309 of the Act “means that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts”) (emphases added); *Cellular Mobile Sys.*, 782 F.2d at 197 (citing *Storer Broad.*, 351 U.S. at 202 (“full hearing” under section 309 mandates that all interested parties be permitted to participate but “does not vouchsafe an inalienable right to cross-examination”).

⁸⁶ 47 U.S.C. § 503(b)(3)(A); see also *id.* § 503(b)(4)(A) (providing that, in the alternative, the Commission may impose a forfeiture after issuing a notice of apparent liability).

⁸⁷ See *Chem. Waste Mgmt.*, 873 F.2d at 1482 (“[A]n agency that reasonably reads a simple requirement that it hold a ‘hearing’ to allow for informal hearing procedures must prevail under the second step of *Chevron*”).

⁸⁸ 424 U.S. at 335 (discussing the factors that the government must consider in identifying “the specific dictates of due process”), 334 (“Due process is flexible and calls for such procedural protections as the particular situation demands”) (internal citation omitted), 348 (“The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that ‘a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.’”) (internal citation omitted); see also *Chevron*, 467 U.S. at 843 & n.11 (if a statute is “silent or ambiguous” as to the procedure to be used, courts must defer to any reasonable procedure provided by the agency).

⁸⁹ U.S. Const. amend. V.

⁹⁰ See *Eldridge*, 424 U.S. at 332.

opportunity to be heard at a meaningful time and in a meaningful manner before depriving the party of a protected interest.⁹¹ In *Mathews v. Eldridge*, the Supreme Court held that:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: [1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional . . . procedural safeguards; and [3] the Government's interest, including . . . the fiscal and administrative burdens that the additional . . . procedural requirement would entail.⁹²

30. Courts have applied the *Mathews v. Eldridge* balancing test to determine whether, in the absence of a statutory requirement to conduct a formal “on the record” APA hearing, due process requires a trial-type hearing. In *Chemical Waste Management*, the D.C. Circuit held that the Environmental Protection Agency was not required to conduct a trial-type hearing before issuing a “corrective action order” because “formal procedures do not promise a sufficient lowering of the risk of error to justify their significant expense to the Government.”⁹³ In *California ex rel. Lockyer v. FERC*, the Ninth Circuit upheld the Federal Energy Regulatory Commission’s approval of a utility’s reorganization in an informal hearing “[i]n light of the private interests affected, the small risk of erroneous deprivation through the procedures used, and the government’s strong interest in expedient decision making.”⁹⁴ And in *Blumenthal v. FERC*, the D.C. Circuit upheld FERC’s approval of a utility’s executive compensation plan without a trial-type hearing, noting that “[t]his Court has never held that an *in-person evidentiary* hearing is constitutionally required whenever FERC makes decisions. Indeed, we have frequently suggested the opposite.”⁹⁵

31. In other recent opinions, courts have found that agencies may resolve factual disputes on a written record. In a series of cases involving FERC, the D.C. Circuit has consistently held that “[e]ven when there are disputed factual issues, FERC does not need to conduct an evidentiary hearing if it can adequately resolve the issues on a written record.”⁹⁶ We therefore tentatively conclude that the Commission need not conduct an oral hearing if it can adequately resolve factual disputes on a written record.

⁹¹ *See id.* at 333.

⁹² *See id.* at 335; *see also id.* at 333 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970) (noting that “[i]n only one case, *Goldberg v. Kelly*, has the Supreme Court held that a hearing closely approximating a judicial trial is necessary”); *Goldberg*, 397 U.S. at 264 (stressing that “the crucial factor in this context—a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended—is that termination of [welfare benefits] pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits”).

⁹³ *Chem. Waste Mgmt.*, 873 F.2d at 1485.

⁹⁴ *California ex rel. Lockyer v. FERC*, 329 F.3d 700, 713 (9th Cir. 2003).

⁹⁵ *Blumenthal v. FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010); *see also Penobscot Air Servs. Ltd. v. FAA*, 164 F.3d 713, 723-24 (1st Cir. 1999).

⁹⁶ *Blumenthal*, 613 F.3d at 1145; *see also Nextera Energy Resources, LLC v. FERC*, 898 F.3d 14, 26 (D.C. Cir. 2018); *State Corp. Comm’n v. FERC*, 876 F.3d 332, 336 (D.C. Cir. 2017); *Minisink Residents v. FERC*, 762 F.3d 97, 114-15 (D.C. Cir. 2014); *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 959 (D.C. Cir. 2013); *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1119 (D.C. Cir. 2002); *Exxon Co, USA v. FERC*, 182 F.3d 30, 47 (D.C. Cir. 1999); *Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997); *Ill. Commerce Comm’n v. FERC*, 721 F.3d 764, 776 (7th Cir. 2013) (“FERC need not conduct an oral hearing if it can adequately resolve factual disputes on the basis of written submissions.”).

32. Although the D.C. Circuit has upheld an agency's resolution of an issue of intent on a written record,⁹⁷ the court has suggested in dicta in other cases that it may be inappropriate for an agency to resolve issues of intent or motive on a written record in certain circumstances.⁹⁸ We seek comment on what those circumstances may be. For example, we seek comment on when the Commission cannot, consistent with the *Mathews v. Eldridge* balancing test, decide a motive, intent, or credibility issue on a written record, bearing in mind that the existence of such an issue is but one factor to be considered in applying the due process balancing test.⁹⁹ We note that when an agency reviews an administrative law judge's initial decision, the agency is not bound by the judge's findings of fact,¹⁰⁰ and may reject the judge's credibility findings as long as the agency's decision is supported by substantial evidence.¹⁰¹ What is the additional benefit of a trial-type hearing when the Commission ultimately reviews initial decisions on a written record and can overrule an administrative law judge's credibility determinations when evidence in the written record supports the Commission's decision? We seek comment on whether that benefit, if any, outweighs the government's legitimate interests in expediting resolution of proceedings and avoiding the expense of a trial-type hearing.

33. We emphasize that when we designate a matter for hearing on a written record, we intend to give parties a "full" hearing, with ample notice of the issues under consideration, an opportunity to present all evidence and arguments that support the parties' respective positions, and an opportunity to confront and rebut opposing evidence and arguments. To that end, we seek comment on the Administrative Conference's recommended "best practices" for agency hearings that are not subject to APA formal hearing requirements (referred to herein as informal hearings), and whether and how to incorporate those recommendations in our rules.¹⁰²

IV. PROCEDURAL MATTERS

34. *Initial Regulatory Flexibility Act Certification.*—As required by the Regulatory Flexibility Act, see 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Certification reflecting its analysis that there will be no significant economic impact on small entities by the implementation of the policies and rules addressed in this NPRM. The Certification is set forth in Appendix B.

⁹⁷ See *Minisink*, 762 F.3d at 14-15.

⁹⁸ See *NRG Power*, 718 F.3d at 959 (FERC may "properly deny an evidentiary hearing if the issues, even disputed issues, may be adequately resolved on the written record, *at least where there is no issue of motive, intent or credibility*") (quoting *Pac. Gas & Elec.*, 306 F.3d at 1119) (emphasis added); *Exxon Co, USA v. FERC*, 182 F.3d at 46 (same); *Union Pac. Fuels*, 129 F.3d at 164 (same); see also *RKO Gen., Inc. v. FCC*, 670 F.2d 215, 225 (D.C. Cir. 1981) (Commission erred by failing to conduct live testimony to resolve whether a licensee had intentionally filed false financial reports, in the face of affidavits to the contrary).

⁹⁹ See *Mathews v. Eldridge*, 424 U.S. at 344-45.

¹⁰⁰ See 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision"); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496-97 (1951).

¹⁰¹ *Kay v. FCC*, 396 F.3d 1184, 1189 (D.C. Cir. 2005) ("The law is settled that an agency is not required to adopt the credibility determinations of an administrative law judge."); see also *NLRB v. Pinkston-Hollar Constr. Servs.*, 954 F.2d 306, 309-10 (5th Cir. 1992) ("We continue to apply the substantial evidence standard even though the [administrative law judge] and the Board have come to different conclusions"). Substantial evidence is "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn . . . is one of fact for the jury." *Kay*, 396 F.3d at 1188 (citations omitted).

¹⁰² See ACUS Rec. 2016-4, 81 Fed. Reg. at 94314-16. The Administrative Conference refers to statutorily required hearings that are not subject to formal APA hearing requirements as "Type B" adjudications. We refer to such proceedings as "informal" adjudications.

35. *Initial Paperwork Reduction Act Analysis.*—This document does not contain any proposed new information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

36. *Ex Parte Rules.*—This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹⁰³ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Section 1.1206(b) of the Commission’s rules. In proceedings governed by Section 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable.pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

37. *Filing Instructions.*—Pursuant to Sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.

¹⁰³ 47 CFR § 1.1200 *et seq.*

- U.S. Postal Service first class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

38. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C. 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

39. *People with Disabilities.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

40. *Additional Information.*—For additional information on this proceeding, contact Lisa Boehley of the Market Disputes Resolution Division, Enforcement Bureau, at Lisa.Boehley@fcc.gov or (202) 418-7395.

V. ORDERING CLAUSES

41. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in Sections 1, 4(i), 4(j), 5, 9, 214, 303, 309, 312, 316, and 409 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155, 159, 214, 303, 309, 312, 316, and 409, this Notice of Proposed Rulemaking **IS ADOPTED**.

42. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Notice of Proposed Rulemaking, including the **Initial Regulatory Flexibility Act Certification**, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A
Proposed Rules

For the reasons set forth above, Parts 0 and 1 of Title 47 of the Code of Federal Regulations are amended as follows:

Part 0-COMMISSION ORGANIZATION

1. The authority citation for Part 0 is revised to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 409, unless otherwise noted.

Subpart A – Organization

2. The authority citation for Subpart A is revised to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 409, unless otherwise noted.

3. Amend section 0.5 by revising paragraph (c) to read as follows:

§ 0.5 General description of Commission organization and operations.

* * * * *

(c) *Delegations of authority to the staff.* Pursuant to section 5(c) of the Communications Act, the Commission has delegated authority to its staff to act on matters which are minor or routine or settled in nature and those in which immediate action may be necessary. See subpart B of this part. Actions taken under delegated authority are subject to review by the Commission, on its own motion or on an application for review filed by a person aggrieved by the action. Except for the possibility of review, actions taken under delegated authority have the same force and effect as actions taken by the Commission. The delegation of authority to a staff officer, however, does not mean that the staff officer will exercise that authority in all matters subject to the delegation. The staff is at liberty to refer any matter at any stage to the Commission for action, upon concluding that it involves matters warranting the Commission's consideration, and the Commission may instruct the staff to do so.

* * * * *

4. Amend section 0.91 by adding paragraph (q) to read as follows:

WIRELINE COMPETITION BUREAU

§ 0.91 Functions of the Bureau

* * * * *

(q) Issue orders revoking a common carrier's operating authority pursuant to section 214 of the Act, and issue orders to cease and desist such operations, in cases where the presiding officer has issued a certification order to the Commission pursuant to § 1.92(c) of our rules that the carrier has waived its opportunity for hearing under that section.

* * * * *

5. Amend section 0.111 by revising paragraphs (a)(18) and (b) to read as follows:

ENFORCEMENT BUREAU

§ 0.111 Functions of the Bureau.

(a) * * *

(18) Issue or draft orders taking or recommending appropriate action in response to complaints or investigations, including, but not limited to, admonishments, damage awards where authorized by law or other affirmative relief, notices of violation, notices of apparent liability and related orders, notices of opportunity for hearing regarding a potential forfeiture, hearing designation orders, orders designating licenses or other authorizations for a revocation hearing and consent decrees. Issue or draft appropriate orders after a hearing proceeding has been terminated by the presiding officer on the basis of waiver. Issue or draft appropriate interlocutory orders and take or recommend appropriate action in the exercise of its responsibilities.

* * * * *

(b) Serve as trial staff in hearing proceedings conducted pursuant to § 1.201(a) regarding applications, revocation, forfeitures and other matters designated for hearing.

* * * * *

6. Revise section 0.151 to read as follows:

OFFICE OF ADMINISTRATIVE LAW JUDGES

§ 0.151 Functions of the Office.

The Office of Administrative Law Judges consists of as many Administrative Law Judges qualified and appointed pursuant to the requirements of 5 U.S.C. § 3105 as the Commission may find necessary. It is responsible for hearing and conducting adjudicatory cases designated for hearing other than those designated to be heard by the Commission en banc, or by one or more commissioners. The Office of Administrative Law Judges is also responsible for conducting such other hearing proceedings as the Commission may assign.

[61 FR 10689, Mar. 15, 1996]

Part 0-COMMISSION ORGANIZATION

Subpart B – Delegations of Authority

7. The authority citation for Subpart B is revised to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 409.

8. Amend the table of contents of Part 0, Subpart B by removing and reserving the headings for sections 0.351, and 0.357 and revising the heading for section 0.341 to read as follows:

* * * * *

ADMINISTRATIVE LAW JUDGES; PRESIDING OFFICERS

§ 0.341 Authority of Administrative Law Judges and other presiding officers designated under

§1.241.

* * * * *

§ 0.351 [Removed and reserved].**§ 0.357 [Removed and reserved].**

9. Amend section 0.201 by revising paragraph (a)(2) and removing the Note to paragraph (a)(2) to read as follows:

GENERAL**§ 0.201 General provisions.**

(a) * * *

(2) *Delegations to rule on interlocutory matters in hearing proceedings.* Delegations in this category are made to any person, other than the Commission, designated to serve as the presiding officer in a hearing proceeding pursuant to § 1.241.

* * * * *

10. Revise section 0.341 to read as follows:

ADMINISTRATIVE LAW JUDGES; PRESIDING OFFICERS**§ 0.341 Authority of Administrative Law Judges and other presiding officers designated under § 1.241.**

(a) After a presiding officer (other than the Commission) has been designated to conduct a hearing proceeding, and until he or she has issued an initial decision or certified the record to the Commission for decision, or the proceeding has been transferred to another presiding officer, all motions, petitions and other matters that may arise during the proceeding shall be acted upon by such presiding officer, except those which are to be acted upon by the Commission. See § 1.291(a)(1) of this chapter.

(b) Any question which would be acted upon by the presiding officer if it were raised by the parties to the proceeding may be raised and acted upon by the presiding officer on his or her own motion.

(c) Any question which would be acted upon by the presiding officer (other than the Commission) may be certified to the Commission on the presiding officer's own motion.

(d) Except for actions taken during the course of a hearing and upon the record thereof, actions taken by a presiding officer pursuant to the provisions of this section shall be recorded in writing and filed in the official record of the proceeding.

(e) The presiding officer may waive any rule governing the conduct of Commission hearings upon motion or upon the presiding officer's own motion for good cause, subject to the provisions of the Administrative Procedure Act and the Communications Act of 1934, as amended.

(f) The presiding officer may issue such orders and conduct such proceedings as will best conduce to the proper dispatch of business and the ends of justice.

(g)(1) For program carriage complaints filed pursuant to § 76.1302 of this chapter that the Chief, Media Bureau refers to a presiding officer for an initial decision, the presiding officer shall release an initial decision in compliance with one of the following deadlines:

(i) 240 calendar days after a party informs the presiding officer that it elects not to pursue alternative dispute resolution as set forth in § 76.7(g)(2) of this chapter; or

(ii) If the parties have mutually elected to pursue alternative dispute resolution pursuant to § 76.7(g)(2) of this chapter, within 240 calendar days after the parties inform the presiding officer that they have failed to resolve their dispute through alternative dispute resolution.

(2) The presiding officer may toll these deadlines under the following circumstances:

(i) If the complainant and defendant jointly request that the presiding officer toll these deadlines in order to pursue settlement discussions or alternative dispute resolution or for any other reason that the complainant and defendant mutually agree justifies tolling; or

(ii) If complying with the deadline would violate the due process rights of a party or would be inconsistent with fundamental fairness; or

(iii) In extraordinary situations, due to a lack of adjudicatory resources available at the time.

[29 FR 6442, May 16, 1964, as amended at 37 FR 19372, Sept. 20, 1972; 41 FR 14870, Apr. 8, 1976; 56 FR 792, Jan. 9, 1991; 62 FR 4170, Jan. 29, 1997; 76 FR 60671, Sept. 29, 2011]

11. Revise section 0.347 to read as follows:

§ 0.347 Record of actions taken.

The record of actions taken by a presiding officer, including initial and recommended decisions and actions taken pursuant to § 0.341, is available through the Commission's Electronic Comment Filing System (ECFS). ECFS serves as the repository for records in the Commission's docketed proceedings from 1992 to the present. The public may use ECFS to retrieve all such records, as well as selected pre-1992 documents. The Office of the Secretary maintains copies of documents that include nonpublic information.

[64 FR 60722, Nov. 8, 1999, as amended at 67 FR 13221, Mar. 21, 2002]

12. Remove and reserve sections 0.351 and 0.357.

§ 0.351 [Removed and reserved]

§ 0.357 [Removed and reserved]

Part 1-PRACTICE AND PROCEDURE

13. The authority citation for Part 1 is revised to read as follows:

Authority: 47 U.S.C. chs. 2, 5, 9, 13; 28 U.S.C. § 2461, unless otherwise noted.

Subpart A—General Rules of Practice and Procedure

14. Amend section 1.21 by revising paragraph (d) to read as follows:

§ 1.21 Parties.

* * * * *

(d) Except as otherwise expressly provided in this chapter, a duly authorized corporate officer or employee may act for the corporation in any matter which has not been designated for hearing and, in the

discretion of the presiding officer, may appear and be heard on behalf of the corporation in a hearing proceeding.

* * * * *

15. Amend section 1.49 by revising paragraphs (f)(1)(vii) and (f)(1)(viii), and by adding paragraph (f)(1)(ix) to read as follows:

§ 1.49 Specifications as to pleadings and documents.

* * * * *

(f)(1) * * *

(i) * * *

(vii) Domestic Section 214 discontinuance applications pursuant to §§ 63.63 and/or 63.71 of this chapter;

(viii) Notices of network change and associated certifications pursuant to § 51.325 *et seq.* of this chapter; and

(ix) Hearing proceedings under §§ 1.201 through 1.377.

* * * * *

16. Amend section 1.51 by revising paragraph (a) to read as follows:

§ 1.51 Number of copies of pleadings, briefs, and other material.

(a) In hearing proceedings, all pleadings, letters, documents, or other written submissions, shall be filed using the Commission’s Electronic Comment Filing System, excluding confidential material as set forth in § 1.314 of these rules. An original and one copy of each written submission that includes confidential material shall be filed, along with an additional copy for each additional presiding officer, if more than one. Additional courtesy copies of electronically filed submissions shall be e-mailed as directed by the Commission.

* * * * *

17. Amend section 1.80 by revising the introductory text of paragraph (g) and revising paragraphs (g)(1) and (g)(3) to read as follows:

§ 1.80 Forfeiture proceedings.

* * * * *

(g) *Notice of opportunity for hearing.* The procedures set out in this paragraph apply only when a formal hearing under section 503(b)(3)(A) of the Communications Act is being held to determine whether to assess a forfeiture penalty.

(1) Before imposing a forfeiture penalty, the Commission may, in its discretion, issue a notice of opportunity for hearing. The formal hearing proceeding shall be conducted by an administrative law judge under procedures set out in subpart B of this part, including procedures for appeal and review of initial decisions. A final Commission order assessing a forfeiture under the provisions of this paragraph is subject to judicial review under section 402(a) of the Communications Act.

* * * * *

(3) Where the possible assessment of a forfeiture is an issue in a hearing proceeding to determine whether a pending application should be granted, and the application is dismissed pursuant to a settlement agreement or otherwise, and the presiding judge has not made a determination on the forfeiture issue, the presiding judge shall forward the order of dismissal to the attention of the full Commission. Within the time provided by § 1.117, the Commission may, on its own motion, proceed with a determination of whether a forfeiture against the applicant is warranted. If the Commission so proceeds, it will provide the applicant with a reasonable opportunity to respond to the forfeiture issue (see paragraph (f)(3) of this section) and make a determination under the procedures outlined in paragraph (f) of this section.

* * * * *

18. Revise section 1.85 to read as follows:

§ 1.85 Suspension of operator licenses.

Whenever grounds exist for suspension of an operator license, as provided in § 303(m) of the Communications Act, the Chief of the Wireless Telecommunications Bureau, with respect to amateur and commercial radio operator licenses, may issue an order suspending the operator license. No order of suspension of any operator's license shall take effect until 15 days' notice in writing of the cause for the proposed suspension has been given to the operator licensee, who may make written application to the Commission at any time within the said 15 days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by the operator licensee, and from that time the operator licensee shall have 15 days in which to mail the said application. In the event that physical conditions prevent mailing of the application before the expiration of the 15-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be designated for hearing and said suspension shall be held in abeyance until the conclusion of the hearing proceeding. If the license is ordered suspended, the operator shall send his, her, or its operator license to the Mobility Division, Wireless Telecommunications Bureau, in Washington, DC, on or before the effective date of the order, or, if the effective date has passed at the time notice is received, the license shall be sent to the Commission forthwith.

[78 FR 23151, Apr. 18, 2013]

19. Amend section 1.87 by revising paragraphs (e) and (f), and revising the introductory text of paragraph (g) to read as follows:

§ 1.87 Modification of license or construction permit on motion of the Commission.

* * * * *

(e) In any case where a hearing proceeding is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission except that, with respect to any issue that pertains to the question of whether the proposed action would modify the license or permit of a person filing a protest pursuant to paragraph (c) of this section, such burdens shall be as described by the Commission.

(f) In order to utilize the right to a hearing and the opportunity to give evidence upon the issues specified in any order designating a matter for hearing, any licensee, or permittee, itself or by counsel, shall, within the period of time as may be specified in that order, file with the Commission a written appearance stating that it will present evidence on the matters specified in the order and, if required, appear before the presiding officer at a date and time to be determined.

(g) The right to file a protest or the right to a hearing proceeding shall, unless good cause is shown in a petition to be filed not later than 5 days before the lapse of time specified in paragraph (a) or (f) of this section, be deemed waived:

* * * * *

20. Amend section 1.91 by revising paragraphs (b), (c), and (d) to read as follows:

§ 1.91 Revocation and/or cease and desist proceedings; hearings.

* * * * *

(b) An order to show cause why an order of revocation and/or a cease and desist order should not be issued will designate for hearing the matters with respect to which the Commission is inquiring and will call upon the person to whom it is directed (the respondent) to file with the Commission a written appearance stating that the respondent will present evidence upon the matters specified in the order to show cause and, if required, appear before a presiding officer at a time and place to be determined, but no earlier than thirty days after the receipt of such order. However, if safety of life or property is involved, the order to show cause may specify a deadline of less than thirty days from the receipt of such order.

(c) To avail themselves of such opportunity for a hearing, respondents, personally or by counsel, shall file with the Commission, within twenty days of the mailing of the order or such shorter period as may be specified therein, a written appearance stating that they will present evidence on the matters specified in the order and, if required, appear before the presiding officer at a time and place to be determined. The presiding officer in his or her discretion may accept a late-filed appearance. However, a written appearance tendered after the specified time has expired will not be accepted unless accompanied by a petition stating with particularity the facts and reasons relied on to justify such late filing. Such petition for acceptance of a late-filed appearance will be granted only if the presiding officer determines that the facts and reasons stated therein constitute good cause for failure to file on time.

(d) Hearing proceedings on the matters specified in such orders to show cause shall accord with the practice and procedure prescribed in this subpart and subpart B of this part, with the following exceptions: (1) In all such revocation and/or cease and desist hearings, the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission; and (2) the Commission may specify in a show cause order, when the circumstances of the proceeding require expedition, a time less than that prescribed in §§ 1.276 and 1.277 within which the initial decision in the proceeding shall become effective, exceptions to such initial decision must be filed, parties must file requests for oral argument, and parties must file notice of intention to participate in oral argument.

* * * * *

21. Amend section 1.92 by revising paragraphs (a) and (c) to read as follows:

§ 1.92 Revocation and/or cease and desist proceedings; after waiver of hearing.

(a) After the issuance of an order to show cause, pursuant to § 1.91, designating a matter for hearing, the occurrence of any one of the following events or circumstances will constitute a waiver of such hearing and the proceeding thereafter will be conducted in accordance with the provisions of this section.

(1) The respondent fails to file a timely written appearance as prescribed in § 1.91(c) indicating that the respondent will present evidence on the matters specified in the order and, if required by the order, that the respondent will appear before the presiding officer.

(2) The respondent, having filed a timely written appearance as prescribed in § 1.91(c), fails in fact to present evidence on the matters specified in the order or appear before the presiding officer in person or by counsel at the time and place duly scheduled.

(3) The respondent files with the Commission, within the time specified for a written appearance in §

1.91(c), a written statement expressly waiving his or her rights to a hearing.

* * * * *

(c) Whenever a hearing is waived by the occurrence of any of the events or circumstances listed in paragraph (a) of this section, the presiding officer shall, at the earliest practicable date, issue an order reciting the events or circumstances constituting a waiver of hearing and terminating the hearing proceeding. A presiding officer other than the Commission also shall certify the case to the Commission. Such order shall be served upon the respondent.

* * * * *

22. Amend section 1.93 by revising paragraph (a) to read as follows:

§ 1.93 Consent orders.

(a) As used in this subpart, a “consent order” is a formal decree accepting an agreement between a party to an adjudicatory hearing proceeding held to determine whether that party has violated statutes or Commission rules or policies and the appropriate operating Bureau, with regard to such party's future compliance with such statutes, rules or policies, and disposing of all issues on which the proceeding was designated for hearing. The order is issued by the officer designated to preside at the hearing proceeding.

* * * * *

23. Amend section 1.94 by revising paragraphs (d) and (g) to read as follows:

§ 1.94 Consent order procedures.

* * * * *

(d) If agreement is reached, it shall be submitted to the presiding officer, who shall either sign the order, reject the agreement, or suggest to the parties that negotiations continue on such portion of the agreement as the presiding officer considers unsatisfactory or on matters not reached in the agreement. If the presiding officer signs the consent order, the record shall be closed. If the presiding officer rejects the agreement, the hearing proceeding shall continue. If the presiding officer suggests further negotiations and the parties agree to resume negotiating, the presiding officer may, in his or her discretion, decide whether to hold the hearing proceeding in abeyance pending the negotiations.

* * * * *

(g) Consent orders, pleadings relating thereto, and Commission orders with respect thereto shall be served on parties to the proceeding. Public notice will be given of orders issued by the Commission or by the presiding officer. Negotiating papers constitute work product, are available to parties participating in negotiations, but are not routinely available for public inspection.

* * * * *

24. Amend section 1.104 by revising paragraph (a) to read as follows:

§ 1.104 Preserving the right of review; deferred consideration of application for review.

(a) The provisions of this section apply to all final actions taken pursuant to delegated authority, including final actions taken by members of the Commission’s staff on nonhearing matters. They do not apply to interlocutory actions of a presiding officer in hearing proceedings, or to orders designating a matter for hearing issued under delegated authority. See §§ 1.106(a) and 1.115(e).

* * * * *

25. Amend section 1.115 by removing paragraphs (e)(1) and (e)(2), redesignating paragraph (e)(3) as (e)(1), redesignating paragraph (e)(4) as (e)(2), and revising redesignated paragraph (e)(1) to read as follows:

§ 1.115 Application for review of action taken pursuant to delegated authority.

* * * * *

(e)(1) Applications for review of an order designating a matter for hearing that was issued under delegated authority shall be deferred until exceptions to the initial decision in the case are filed, unless the presiding officer certifies such an application for review to the Commission. A matter shall be certified to the Commission if the presiding officer determines that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation. A request to certify a matter to the Commission shall be filed with the presiding officer within 5 days after the designation order is released. A ruling refusing to certify a matter to the Commission is not appealable. Any application for review authorized by the presiding officer shall be filed within 5 days after the order certifying the matter to the Commission is released or such a ruling is made. Oppositions shall be filed within 5 days after the application for review is filed. Replies to oppositions shall be filed only if they are requested by the Commission. Replies (if allowed) shall be filed within 5 days after they are requested. The Commission may dismiss, without stating reasons, an application for review that has been certified, and direct that the objections to the order designating the matter for hearing be deferred and raised when exceptions in the initial decision in the case are filed.

* * * * *

Part 1-PRACTICE AND PROCEDURE

26. Revise the authority citation for Part 1 to read as follows:

Authority: 47 U.S.C. chs. 2, 5, 9, 13; 28 U.S.C. § 2461, unless otherwise noted.

27. Amend the table of contents of Part 1, Subpart B by removing and reserving sections 1.258 and 1.260, by adding headings for new sections 1.210, 1.242, and 1.265, by revising the headings for sections 1.244, 1.248, 1.249, 1.254, 1.274, 1.301, 1.302, and 1.321, and by adding headings for new Written Hearings rules in sections 1.370-1.377 to be inserted immediately following the heading for section 1.364, to read as follows:

Subpart B—Hearing Proceedings

Contents

* * * * *

§ 1.210 Electronic filing.

* * * * *

§ 1.242 Appointment of case manager when Commission is the presiding officer.

* * * * *

§ 1.244 Designation of a settlement officer.

* * * * *

§ 1.248 Status conferences.

§ 1.249 Presiding officer statement.

* * * * *

§ 1.254 Nature of the hearing proceeding; burden of proof.

* * * * *

§ 1.258 [Removed and reserved]

§ 1.260 [Removed and reserved]

* * * * *

§ 1.265 Closing the record

* * * * *

§ 1.274 Certification of the record to the Commission for decision when the Commission is not the presiding officer; presiding officer unavailability.

* * * * *

§ 1.301 Appeal from interlocutory rulings by a presiding officer other than the Commission or a case manager; effective date of ruling.

§ 1.302 Appeal from final ruling by presiding officer other than the Commission; effective date of ruling.

* * * * *

§ 1.321 Use of depositions in hearing proceedings.

* * * * *

WRITTEN HEARINGS

§ 1.370 Purpose.

§ 1.371 General pleading requirements.

§ 1.372 The affirmative case.

§ 1.373 The responsive case.

§ 1.374 The reply case.

§ 1.375 Other written submissions.

§ 1.376 Oral hearing or argument.

§ 1.377 Certification of the written hearing record to the Commission for decision.

* * * * *

28. Amend section 1.201 by adding Note 1 and redesignating and revising the current Note to read as follows:

§ 1.201 Scope.

* * * * *

Note 1 to § 1.201: For special provisions relating to hearing proceedings under this subpart that the Commission determines shall be conducted and resolved on a written record, see §§ 1.370-1.377.

Note 2 to § 1.201: For special provisions relating to AM broadcast station applications involving other North American countries see § 73.23.

[28 FR 12425, Nov. 22, 1963, as amended at 51 FR 32088, Sept. 9, 1986]

29. Revise section 1.202 to read as follows:

§ 1.202 Official reporter; transcript.

The Commission will designate an official reporter for the recording and transcribing of hearing proceedings as necessary. Transcripts will be transmitted to the Secretary for inclusion in the Commission's Electronic Comment Filing System.

30. Revise the text and authority citation of section 1.203 to read as follows:

§ 1.203 The record.

The evidence submitted by the parties, together with all papers and requests filed in the proceeding and any transcripts, shall constitute the exclusive record for decision. Where any decision rests on official notice of a material fact not appearing in the record, any party shall on timely request be afforded an opportunity to show the contrary.

(5 U.S.C. 556; 47 U.S.C. 154, 159, 208, 209, 214, 309, 312, 316, and 409)

31. Revise section 1.209 to read as follows:

§ 1.209 Identification of responsible officer in caption to pleading.

Each pleading filed in a hearing proceeding shall indicate in its caption whether it is to be acted upon by the Commission or, if the Commission is not the presiding officer, by the presiding officer. Unless it is to be acted upon by the Commission, the presiding officer shall be identified by name.

[29 FR 8219, June 30, 1964, as amended at 37 FR 19372, Sept. 20, 1972; 62 FR 4171, Jan. 29, 1997]

32. Add section 1.210 to read as follows:

§ 1.210 Electronic filing.

All pleadings filed in a hearing proceeding, as well as all letters, documents, or other written submissions, shall be filed using the Commission's Electronic Comment Filing System, excluding confidential material as set forth in § 1.314 of these rules. A courtesy copy of all submissions shall be contemporaneously provided to the presiding officer via electronic mail.

33. Amend section 1.221 by removing paragraphs (f) and (g), redesignating paragraph (h) as paragraph (f), revising paragraphs (b), (c), (d), and (e), revising redesignated paragraph (g), and revising the authority citation to read as follows:

§ 1.221 Notice of hearing; appearances.

* * * * *

(b) The order designating an application for hearing shall be mailed to the applicant and the order, or a summary thereof, shall be published in the FEDERAL REGISTER. Reasonable notice of hearing will be given to the parties in all proceedings.

(c) In order to avail themselves of the opportunity to be heard, applicants or their attorney shall file, within 20 days of the mailing of the order designating a matter for hearing, a written appearance stating that the applicant will present evidence on the matters specified in the order and, if required by the order, appear before the presiding officer at a date and time to be determined. Where an applicant fails to file such a written appearance within the time specified, or has not filed prior to the expiration of that time a petition to dismiss without prejudice, or a petition to accept, for good cause shown, such written appearance beyond expiration of said 20 days, the application will be dismissed with prejudice for failure to prosecute.

(d) The Commission will on its own motion name as parties to the hearing proceeding any person found to be a party in interest.

(e) In order to avail themselves of the opportunity to be heard, any persons named as parties pursuant to paragraph (d) of this section shall, within 20 days of the mailing of the order designating them as parties to a hearing proceeding, file personally or by attorney a written appearance that they will present evidence on the matters specified in the order and, if required by the order, appear before the presiding officer at a date and time to be determined. Any persons so named who fail to file this written appearance within the time specified, shall, unless good cause for such failure is shown, forfeit their hearing rights.

(f)(1) For program carriage complaints filed pursuant to § 76.1302 of this chapter that the Chief, Media Bureau refers to a presiding officer, each party, in person or by attorney, shall file a written appearance within five calendar days after the party informs the presiding officer that it elects not to pursue alternative dispute resolution pursuant to § 76.7(g)(2) of this chapter or, if the parties have mutually elected to pursue alternative dispute resolution pursuant to § 76.7(g)(2) of this chapter, within five calendar days after the parties inform the presiding officer that they have failed to resolve their dispute through alternative dispute resolution. The written appearance shall state that the party will appear for hearing and present evidence on the issues specified in the hearing designation order.

(2) If the complainant fails to file a written appearance by this deadline, or fails to file prior to the deadline either a petition to dismiss the proceeding without prejudice or a petition to accept, for good cause shown, a written appearance beyond such deadline, the presiding officer shall dismiss the complaint with prejudice for failure to prosecute.

(3) If the defendant fails to file a written appearance by this deadline, or fails to file prior to this deadline a petition to accept, for good cause shown, a written appearance beyond such deadline, its opportunity to present evidence at hearing will be deemed to have been waived. If the hearing is so waived, the presiding officer shall expeditiously terminate the proceeding and certify to the Commission the complaint for resolution based on the existing record. When the Commission has designated itself as the presiding officer, it shall expeditiously terminate the proceeding and resolve the complaint based on the existing record.

(5 U.S.C. 554; 47 U.S.C. 154, 159, 208, 209, 214, 309, 312, 316, and 409)

34. Revise section 1.223 to read as follows:

§ 1.223 Petitions to intervene.

(a) Where the order designating a matter for hearing has failed to notify and name as a party to the hearing proceeding any person who qualifies as a party in interest, such person may acquire the status of a party by filing, under oath and not more than 30 days after the publication in the FEDERAL REGISTER of the hearing issues or any substantial amendment thereto, a petition for intervention showing the basis of its interest. Where the person's status as a party in interest is established, the petition to intervene will be granted.

(b) Any other person desiring to participate as a party in any hearing proceeding may file a petition for leave to intervene not later than 30 days after the publication in the FEDERAL REGISTER of the full text or a summary of the order designating the matter for hearing or any substantial amendment thereto. The petition must set forth the interest of petitioner in the proceedings, must show how such petitioner's participation will assist the Commission in the determination of the issues in question, must set forth any proposed issues in addition to those already designated for hearing, and must be accompanied by the affidavit of a person with knowledge as to the facts set forth in the petition. The presiding officer, in his or her discretion, may grant or deny such petition or may permit intervention by such persons limited to a particular stage of the proceeding.

(c) Any person desiring to file a petition for leave to intervene later than 30 days after the publication in the FEDERAL REGISTER of the full text or a summary of the order designating the matter for hearing or any substantial amendment thereto shall set forth the interest of petitioner in the proceeding, show how such petitioner's participation will assist the Commission in the determination of the issues in question, must set forth any proposed issues in addition to those already designated for hearing, and must set forth reasons why it was not possible to file a petition within the time prescribed by paragraphs (a) and (b) of this section. If, in the opinion of the presiding officer, good cause is shown for the delay in filing, the presiding officer may in his or her discretion grant such petition or may permit intervention limited to particular issues or to a particular stage of the proceeding.

(Sec. 309, 48 Stat. 1085, as amended; 47 U.S.C. 309)

[28 FR 12425, Nov. 22, 1963, as amended at 29 FR 7821, June 19, 1964; 41 FR 14872, Apr. 8, 1976; 51 FR 19347, May 29, 1986]

35. Amend section 1.225 by revising paragraphs (b) and (c) to read as follows:

§ 1.225 Participation by non-parties; consideration of communications.

* * * * *

(b) No persons shall be precluded from giving any relevant, material, and competent testimony because they lack a sufficient interest to justify their intervention as parties in the matter.

(c) No communication will be considered in determining the merits of any matter unless it has been received into evidence. The admissibility of any communication shall be governed by the applicable rules of evidence in § 1.351, and no communication shall be admissible on the basis of a stipulation unless Commission counsel as well as counsel for all of the parties shall join in such stipulation.

36. Revise section 1.227 to read as follows:

§ 1.227 Consolidations.

The Commission, upon motion or upon its own motion, may, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate in a hearing proceeding any cases that involve the same applicant or substantially the same issues, or that present conflicting claims.

37. Amend section 1.229 by removing paragraphs (b)(1) and (e), redesignating paragraph (b)(2) as (b)(1), redesignating paragraph (b)(3) as (b)(2), redesignating paragraph (f) as paragraph (e), and revising paragraph (a) and redesignated paragraphs (b)(1), (b)(2), and (e) to read as follows:

§ 1.229 Motions to enlarge, change, or delete issues.

(a) A motion to enlarge, change or delete the issues may be filed by any party to a hearing proceeding. Except as provided for in paragraph (b) of this section, such motions must be filed within 15 days after the full text or a summary of the order designating the case for hearing has been published in the FEDERAL REGISTER.

(b)(1) For program carriage complaints filed pursuant to § 76.1302 of this chapter that the Chief, Media Bureau refers to a presiding officer, such motions shall be filed within 15 calendar days after the deadline for submitting written appearances pursuant to § 1.221(h), except that persons not named as parties to the proceeding in the designation order may file such motions with their petitions to intervene up to 30 days after publication of the full text or a summary of the designation order in the FEDERAL REGISTER. (See § 1.223).

(2) Any person desiring to file a motion to modify the issues after the expiration of periods specified in paragraphs (a) and (b)(1) of this section shall set forth the reason why it was not possible to file the motion within the prescribed period. Except as provided in paragraph (c) of this section, the motion will be granted only if good cause is shown for the delay in filing. Motions for modifications of issues which are based on new facts or newly discovered facts shall be filed within 15 days after such facts are discovered by the moving party.

* * * * *

(e) In any case in which the presiding officer grants a motion to enlarge the issues to inquire into allegations that an applicant made misrepresentations to the Commission or engaged in other misconduct during the application process, the enlarged issues include notice that, after hearings on the enlarged issue and upon a finding that the alleged misconduct occurred and warrants such penalty, in addition to or in lieu of denying the application, the applicant may be liable for a forfeiture of up to the maximum statutory amount. See 47 U.S.C. 503(b)(2)(A).

* * * * *

38. Revise section 1.241 to read as follows:

§ 1.241 Designation of presiding officer.

(a) Hearing proceedings will be conducted by a presiding officer. The designated presiding officer will be identified in the order designating a matter for hearing. Only the Commission, one or more commissioners, or an administrative law judge designated pursuant to 5 U.S.C. 3105 may be designated as a presiding officer. Unless otherwise stated, the term *presiding officer* will include the Commission when the Commission designates itself to preside over a hearing proceeding.

(b) If a presiding officer becomes unavailable during the course of a hearing proceeding, another presiding officer will be designated.

(5 U.S.C. 556; 47 U.S.C. 154, 159, 208, 209, 214, 309, 312, 316, and 409)

39. Add section 1.242 to read as follows:

§ 1.242 Appointment of case manager when Commission is the presiding officer.

When the Commission designates itself as the presiding officer in a hearing proceeding, it may delegate authority to a case manager to develop the record in a written hearing (see §§ 1.370–1.377). The case manager must be a staff attorney who qualifies as a neutral under 5 U.S.C. 571 and 573. The Commission shall not designate any of the following persons to serve as case manager in a case, and they may not advise or assist the case manager: staff who participated in identifying the specific issues designated for hearing; staff who have taken or will take an active part in investigating, prosecuting, or advocating in the case; or staff who are expected to investigate and act upon petitions to deny (including challenges thereto). A case manager shall have authority to perform any of the functions generally performed by the presiding officer, except that a case manager shall have no authority to resolve any new or novel issues, to issue an order on the merits resolving any issue designated for hearing in a case, to issue an order on the merits of any motion for summary decision filed under § 1.251, or to perform any other functions that the Commission reserves to itself in the order appointing a case manager.

40. Amend section 1.243 by revising the introductory text, paragraphs (g), (i)-(l), and the authority citation, and adding new paragraphs (m) and (n) to read as follows:

§ 1.243 Authority of presiding officer.

From the time the presiding officer is designated until issuance of the presiding officer's decision or the transfer of the proceeding to the Commission or to another presiding officer, the presiding officer shall have such authority as granted by law and by the provisions of this chapter, including authority to:

* * * * *

(g) Require the filing of memoranda of law and the presentation of oral argument with respect to any question of law upon which the presiding officer or the Commission is required to rule during the course of the hearing proceeding;

* * * * *

(i) Dispose of procedural requests and ancillary matters, as appropriate;

(j) Take actions and make decisions in conformity with governing law;

(k) Act on motions to enlarge, modify or delete the hearing issues;

(l) Act on motions to proceed in forma pauperis pursuant to § 1.224;

(m) Decide a matter upon the existing record or request additional information from the parties; and

(n) Issue such orders and conduct such proceedings as will best conduce to the proper dispatch of business and the ends of justice.

(5 U.S.C. 556; 47 U.S.C. 154, 159, 208, 209, 214, 309, 312, 316, and 409)

* * * * *

41. Amend section 1.244 by revising the heading and paragraphs (a), (b), (c), and (d), and adding paragraph (e) to read as follows:

§ 1.244 Designation of a settlement officer.

(a) Parties may request that the presiding officer appoint a settlement officer to facilitate the resolution of the case by settlement.

(b) Where all parties in a case agree that such procedures may be beneficial, such requests may be filed with the presiding officer no later than 15 days prior to the date scheduled for the commencement of hearings or, in hearing proceedings conducted pursuant to §§ 1.370-1.377, no later than 15 days before the date set as the deadline for filing the affirmative case. The presiding officer shall suspend the procedural dates in the case pending action upon such requests.

(c) If, in the discretion of the presiding officer, it appears that the appointment of a settlement officer will facilitate the settlement of the case, the presiding officer shall appoint a “neutral” as defined in 5 U.S.C. 571 and 573 to act as the settlement officer.

(1) The parties may request the appointment of a settlement officer of their own choosing so long as that person is a “neutral” as defined in 5 U.S.C. 571 and 573.

(2) The appointment of a settlement officer in a particular case is subject to the approval of all the parties in the proceeding.

(3) Neither the Commission, nor any sitting members of the Commission, nor the presiding officer shall serve as the settlement officer in any case.

(4) Other members of the Commission’s staff who qualify as neutrals may be appointed as settlement officers. The presiding officer shall not appoint a member of the Commission’s staff as a settlement officer in any case if the staff member’s duties include, or have included, drafting, reviewing, and/or recommending actions on the merits of the issues designated for hearing in that case.

(d) The settlement officer shall have the authority to require parties to submit their written direct cases for review. The settlement officer may also meet with the parties and/or their counsel, individually and/or at joint conferences, to discuss their cases and the cases of their competitors. All such meetings will be off-the-record, and the settlement officer may express an opinion as to the relative merit of the parties’ positions and recommend possible means to resolve the proceeding by settlement. The proceedings before the settlement officer shall be subject to the confidentiality provisions of 5 U.S.C. 574. Moreover, no statements, offers of settlement, representations or concessions of the parties or opinions expressed by the settlement officer will be admissible as evidence in any Commission proceeding.

* * * * *

42. Amend section 1.245 by revising paragraphs (a), (b)(1), (b)(2), (b)(3), and the authority citation to read as follows:

§ 1.245 Disqualification of presiding officer.

(a) In the event that a presiding officer (other than the Commission) deems himself or herself disqualified and desires to withdraw from the case, the presiding officer shall immediately so notify the Commission.

(b) * * *

(1) The person seeking disqualification shall file with the presiding officer an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification.

(2) The presiding officer may file a response to the affidavit; and if the presiding officer believes he or she is not disqualified, he or she shall so rule and continue with the hearing proceeding.

(3) The person seeking disqualification may appeal a ruling denying the request for withdrawal of the presiding officer, and, in that event, shall do so within five days of release of the presiding officer's ruling. Unless an appeal of the ruling is filed at this time, the right to request withdrawal of the presiding officer shall be deemed waived.

* * * * *

(5 U.S.C. 556; 47 U.S.C. 154, 159, 208, 209, 214, 309, 312, 316, and 409)

* * * * *

43. Amend section 1.248 to read as follows:

§ 1.248 Status conferences.

(a) The presiding officer may direct the parties or their attorneys to appear at a specified time and place for a status conference during the course of a hearing proceeding, or to submit suggestions in writing, for the purpose of considering, among other things, the matters set forth in paragraph (c) of this section. Any party may request a status conference at any time after release of the order designating a matter for hearing. During a status conference, the presiding officer may issue rulings regarding matters relevant to the conduct of the hearing proceeding including, *inter alia*, procedural matters, discovery, and the submission of briefs or evidentiary materials.

(b) The presiding officer shall schedule an initial status conference promptly after written appearances have been submitted under § 1.91 or § 1.221. At or promptly after the initial status conference, the presiding officer shall adopt a schedule to govern the hearing proceeding. If the Commission designated a matter for hearing on a written record under §§ 1.370–1.376, the scheduling order shall include a deadline for filing a motion to request an oral hearing in accordance with § 1.376. If the Commission did not designate the matter for hearing on a written record, the scheduling order shall include a deadline for filing a motion to conduct the hearing on a written record. Except as circumstances otherwise require, the presiding officer shall allow a reasonable period prior to commencement of the hearing for the orderly completion of all prehearing procedures, including discovery, and for the submission and disposition of all motions.

(c) In status conferences, the following matters, among others, may be considered:

(1) Clarifying, amplifying, or narrowing issues designated for hearing;

(2) Scheduling;

(3) Admission of facts and of the genuineness of documents (see § 1.246), and the possibility of stipulating with respect to facts;

(4) Discovery;

(5) Motions;

(6) Hearing procedure;

(7) Settlement (see § 1.93); and

(8) Such other matters that may aid in resolution of the issues designated for hearing.

(d) Status conferences may be conducted in person or by telephone conference call or similar technology, at the discretion of the presiding officer. An official transcript of all status conferences shall be made unless the presiding officer and the parties agree to forego a transcript, in which case any rulings by the presiding officer during the status conference shall be promptly memorialized in writing.

(e) The failure of any attorney or party, following reasonable notice, to appear at a scheduled status conference may be deemed a waiver by that party of its rights to participate in the hearing proceeding and shall not preclude the presiding officer from conferring with parties or counsel present.

* * * * *

44. Revise the heading and text of section 1.249 to read as follows:

§ 1.249 Presiding officer statement.

The presiding officer shall enter upon the record a statement reciting all actions taken at a status conference convened under § 1.248 and incorporating into the record all of the stipulations and agreements of the parties which were approved by the presiding officer, and any special rules which the presiding officer may deem necessary to govern the course of the proceeding.

[28 FR 12425, Nov. 22, 1963. Redesignated at 33 FR 463, Jan. 12, 1968]

45. Revise section 1.250 to read as follows:

§ 1.250 Discovery and preservation of evidence; cross-reference.

For provisions relating to prehearing discovery and preservation of admissible evidence in hearing proceedings under this Subpart B, see §§ 1.311 through 1.325.

[33 FR 463, Jan. 12, 1968]

46. Amend section 1.251 by revising paragraphs (a)(1) and (a)(2), adding new paragraph (a)(3), and revising paragraphs (d), (e), (f)(1), (f)(2), and (f)(3) to read as follows:

§ 1.251 Summary decision.

(a)(1) Any party to an adjudicatory proceeding may move for summary decision of all or any of the issues designated for hearing. The motion shall be filed at least 20 days prior to the date set for commencement of the hearing or, in hearing proceedings conducted pursuant to §§ 1.370-1.377, at least 20 days before the date that the presiding officer sets as the deadline for filing the affirmative case. See § 1.372. The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination in the hearing proceeding.

(2) A party may file a motion for summary decision after the deadlines in subsection (a)(1) of this section only with the presiding officer's permission, or upon the presiding officer's invitation. No appeal from an order granting or denying a request for permission to file a motion for summary decision shall be allowed. If the presiding officer authorizes a motion for summary decision after the deadlines in subsection (a)(1), proposed findings of fact and conclusions of law on those issues which the moving party believes can be resolved shall be attached to the motion, and any other party may file findings of

fact and conclusions of law as an attachment to pleadings filed by the party pursuant to paragraph (b) of this section.

(3) Motions for summary decision should be addressed to the Commission in any hearing proceeding in which the Commission is the presiding officer and it has appointed a case manager pursuant to § 1.242. The Commission, in its discretion, may defer ruling on any such motion until after the case manager has certified the record for decision by the Commission pursuant to § 1.377.

* * * * *

(d) The presiding officer may, in his or her discretion, set the matter for argument and may call for the submission of proposed findings, conclusions, briefs or memoranda of law. The presiding officer, giving appropriate weight to the nature of the proceeding, the issue or issues, the proof, and the need for cross-examination, if any, may grant a motion for summary decision to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is otherwise entitled to summary decision. If it appears from the affidavits of a party opposing the motion that the party cannot, for good cause shown, present by affidavit or otherwise facts essential to justify the party's opposition, the presiding officer may deny the motion, may order a continuance to permit affidavits to be obtained or discovery to be had, or make such other order as is just.

(e) If all of the issues (or a dispositive issue) are determined on a motion for summary decision, the hearing proceeding shall be terminated. When a presiding officer (other than the Commission) issues a Summary Decision, it is subject to appeal or review in the same manner as an Initial Decision. See §§ 1.271 through 1.282. If some of the issues only (including no dispositive issue) are decided on a motion for summary decision, or if the motion is denied, the presiding officer will issue a memorandum opinion and order, interlocutory in character, and the hearing proceeding will continue on the remaining issues. Appeal from interlocutory rulings is governed by § 1.301.

(f) The presiding officer may take any action deemed necessary to assure that summary decision procedures are not abused. The presiding officer may rule in advance of a motion that the proceeding is not appropriate for summary decision, and may take such other measures as are necessary to prevent any unwarranted delay.

(1) Should it appear to the satisfaction of the presiding officer that a motion for summary decision has been presented in bad faith or solely for the purpose of delay, or that such a motion is patently frivolous, the presiding officer will enter a determination to that effect upon the record.

(2) If, on making such determination, the presiding officer concludes that the facts warrant disciplinary action against an attorney, the matter, together with any findings and recommendations, will be referred to the Commission for consideration under § 1.24.

(3) If, on making such determination, the presiding officer concludes that the facts warrant a finding of bad faith on the part of a party to the proceeding, the presiding officer will certify the matter to the Commission, with findings and recommendations, for a determination as to whether the facts warrant the addition of an issue to the hearing proceeding as to the character qualifications of that party.

* * * * *

47. Revise section 1.253 to read as follows:

§ 1.253 Time and place of hearing.

The presiding officer shall specify the time and place of oral hearings. All oral hearings will take place at Commission Headquarters unless the presiding officer designates another location.

48. Revise section 1.254 to read as follows:

§ 1.254 Nature of the hearing proceeding; burden of proof.

Any hearing upon an application shall be a full hearing proceeding in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant except as otherwise provided in the order of designation.

(Sec. 309, 48 Stat. 1085, as amended; 47 U.S.C. 309)

49. Remove and reserve section 1.258.

§ 1.258 [Removed and reserved]

50. Remove and reserve section 1.260.

§ 1.260 [Removed and reserved]

51. Revise section 1.261 to read as follows:

§ 1.261 Corrections to transcript.

At any time during the course of the proceeding, or as directed by the presiding officer, but not later than 10 days after the transmission to the parties of the transcript of any oral conference or hearing, any party to the proceeding may file with the presiding officer a motion requesting corrections to the transcript, which motion shall be accompanied by proof of service thereof upon all other parties to the proceeding. Within 5 days after the filing of such a motion, other parties may file a pleading in support of or in opposition to such motion. Thereafter, the presiding officer shall, by order, specify the corrections to be made in the transcript, and a copy of the order shall be served upon all parties and made a part of the record. The presiding officer may *sua sponte* specify corrections to be made in the transcript on 5 days' notice.

[40 FR 51441, Nov. 5, 1975]

52. Amend section 1.263 by revising paragraph (a) and the authority citation to read as follows:

§ 1.263 Proposed findings and conclusions.

(a) The presiding officer may direct any party to file proposed findings of fact and conclusions, briefs, or memoranda of law. If the presiding officer does not so order, any party to the proceeding may seek leave to file proposed findings of fact and conclusions, briefs, or memoranda of law. Such proposed findings of fact, conclusions, briefs, and memoranda of law shall be filed within the time prescribed by the presiding officer.

* * * * *

(5 U.S.C. 557; 47 U.S.C. 154, 159, 208, 209, 214, 309, 312, 316, and 409)

53. Add section 1.265 to read as follows:

§ 1.265 Closing the record.

At the conclusion of hearing proceedings, the presiding officer shall promptly close the record after the parties have submitted their evidence, filed any proposed findings and conclusions under § 1.263, and submitted any other information required by the presiding officer. After the record is closed, it shall be certified by the presiding officer and filed in the Office of the Secretary. Notice of such certification shall be served on all parties to the proceedings.

54. Amend section 1.267 by revising paragraphs (a) and (c) to read as follows:

§ 1.267 Initial and recommended decisions.

(a) Except as provided in §§ 1.94, 1.251 and 1.274, when the proceeding is terminated on motion, or when the presiding officer is the Commission, the presiding officer shall prepare an initial (or recommended) decision, which shall be transmitted to the Secretary of the Commission. In the case of rate making proceedings conducted under sections 201-205 of the Communications Act, the presumption shall be that the presiding officer shall prepare an initial or recommended decision. The Secretary will make the decision public immediately and file it in the docket of the case.

* * * * *

(c) When the Commission is not the presiding officer, the authority of the presiding officer over the proceedings shall cease when the presiding officer has filed an Initial or Recommended Decision, or if it is a case in which the presiding officer is to file no decision, when they have certified the case for decision: *Provided*, however, That the presiding officer shall retain limited jurisdiction over the proceeding for the purpose of effecting certification of the record and corrections to the transcript, as provided in §§ 1.265 and 1.261, respectively, and for the purpose of ruling initially on applications for awards of fees and expenses under the Equal Access to Justice Act.

* * * * *

55. Revise section 1.273 to read as follows:

§ 1.273 Waiver of initial or recommended decision.

When the Commission serves as the presiding officer, it will not issue an initial or recommended decision. When the Commission is not the presiding officer, at any time before the record is closed all parties to the proceeding may agree to waive an initial or recommended decision, and may request that the Commission issue a final decision or order in the case. If the Commission has directed that its review function in the case be performed by a commissioner or a panel of commissioners, the request shall be directed to the appropriate review authority. The Commission or such review authority may in its discretion grant the request, in whole or in part, if such action will best conduce to the proper dispatch of business and to the ends of justice.

[28 FR 12425, Nov. 22, 1963, as amended at 62 FR 4171, Jan. 29, 1997]

56. Revise the heading and text of section 1.274 to read as follows:

§ 1.274 Certification of the record to the Commission for decision when the Commission is not the presiding officer; presiding officer unavailability.

(a) When the Commission is not the presiding officer, and where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires, the Commission may direct that the record in a pending proceeding be certified to it for decision.

(b) When a presiding officer becomes unavailable to the Commission after the taking of evidence has been concluded, the Commission shall direct that the record be certified to it for decision. In that event, the Commission shall designate a new presiding officer in accordance with § 1.241 for the limited purpose of certifying the record to the Commission.

(c) In all other circumstances when the Commission is not the presiding officer, the presiding officer shall prepare and file an initial or recommended decision, which will be released in accordance with §1.267.

(d) When a presiding officer becomes unavailable to the Commission after the taking of evidence has commenced but before it has been concluded, the Commission shall designate another presiding officer in accordance with § 1.241 to continue the hearing proceeding. Oral testimony already introduced shall not be reheard unless observation of the demeanor of the witness is essential to the resolution of the case.

* * * * *

57. Revise section 1.279 to read as follows:

§ 1.279 Limitation of matters to be reviewed.

(a) Upon review of any initial decision, the Commission may, in its discretion, limit the issues to be reviewed to those findings and conclusions to which exceptions have been filed, or to those findings and conclusions specified in the Commission's order of review issued pursuant to § 1.276(b).

(b) No party may file an exception to the presiding officer's ruling that all or part of the hearing be conducted and resolved on a written record, unless that party previously filed an interlocutory motion to request an oral hearing in accordance with § 1.376.

58. Revise section 1.291 to read as follows:

§ 1.291 General provisions.

(a)(1) The Commission acts on petitions to amend, modify, enlarge or delete the issues in hearing proceedings which involve rule making matters exclusively.

(2) All other interlocutory matters in hearing proceedings are acted on by the presiding officer.

(3) Each interlocutory pleading shall identify the presiding officer in its caption. Unless the pleading is to be acted upon by the Commission, the presiding officer shall be identified by name.

(b) All interlocutory pleadings shall be submitted in accordance with the provisions of §§ 1.4, 1.44, 1.47, 1.48, 1.49, 1.50, 1.51, and 1.52.

(c)(1) Procedural rules governing interlocutory pleadings are set forth in §§ 1.294-1.298.

(2) Rules governing appeal from, and reconsideration of, interlocutory rulings made by the presiding officer are set forth in § 1.301.

(3) Petitions requesting reconsideration of an interlocutory ruling will not be entertained.

(d) No initial decision shall become effective under § 1.276(e) until all interlocutory matters pending before the Commission in the proceeding at the time the initial decision is issued have been disposed of and the time allowed for appeal from interlocutory rulings of the presiding officer has expired.

(Secs. 4(i), 303(r) and 5(c)(1) of the Communications Act of 1934, as amended; 47 CFR 0.61 and 0.283)

[29 FR 6443, May 16, 1964, as amended at 29 FR 12773, Sept. 10, 1964; 37 FR 19372, Sept. 20, 1972; 41 FR 14873, Apr. 8, 1976; 49 FR 4381, Feb. 6, 1984; 62 FR 4171, Jan. 29, 1997]

59. Revise section 1.294 to read as follows:

§ 1.294 Oppositions and replies.

(a) Any party to a hearing proceeding may file an opposition to an interlocutory request filed in that proceeding.

(b) Except as provided in paragraph (c) of this section or as otherwise ordered by the presiding officer, oppositions to interlocutory requests shall be filed within 4 days after the original pleading is filed, and replies to oppositions will not be entertained.

(c) Additional pleadings may be filed only if specifically requested or authorized by the person(s) who is to make the ruling.

* * * * *

60. Amend section 1.298 by revising paragraph (b) to read as follows:

§ 1.298 Rulings; time for action.

* * * * *

(b) In the discretion of the presiding officer, rulings on interlocutory matters may be made orally to the parties. The presiding officer may, in his or her discretion, state reasons therefor on the record if the ruling is being transcribed, or may promptly issue a written statement of the reasons for the ruling, either separately or as part of an initial decision.

* * * * *

61. Amend section 1.301 by revising the heading and paragraphs (a), (b), and (c)(1) to read as follows:

§ 1.301 Appeal from interlocutory rulings by a presiding officer, other than the Commission, or a case manager; effective date of ruling.

(a) *Interlocutory rulings which are appealable as a matter of right.* Rulings listed in this paragraph are appealable as a matter of right. An appeal from such a ruling may not be deferred and raised as an exception to the initial decision.

(1) If a ruling denies or terminates the right of any person to participate as a party to a hearing proceeding, such person, as a matter of right, may file an appeal from that ruling.

(2) If a ruling requires testimony or the production of documents, over objection based on a claim of privilege, the ruling on the claim of privilege is appealable as a matter of right.

(3) If a ruling denies a motion to disqualify the presiding officer or case manager, the ruling is appealable as a matter of right.

(4) A ruling removing counsel from the hearing is appealable as a matter of right, by counsel on his own behalf or by his client. (In the event of such ruling, the presiding officer will adjourn the hearing proceeding for such period as is reasonably necessary for the client to secure new counsel and for counsel to become familiar with the case).

(b) *Other interlocutory rulings.* Except as provided in paragraph (a) of this section, appeals from interlocutory rulings shall be filed only if allowed by the presiding officer. Any party desiring to file an appeal shall first file a request for permission to file appeal. The request shall be filed within 5 days after the order is released or (if no written order) after the ruling is made. Pleadings responsive to the request shall be filed only if they are requested by the presiding officer. If the presiding officer made the ruling, the request shall contain a showing that the appeal presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception. If a case manager made the ruling, the request shall contain a showing that the appeal presents a question of law or policy that the case manager lacks authority to resolve. The presiding officer shall determine whether the showing is such as to justify an interlocutory appeal and, in accordance with his determination, will either allow or disallow the appeal or modify the ruling. Such ruling is final: *Provided, however,* That the Commission may, on its own motion, dismiss an appeal allowed under this section on the ground that objection to the ruling should be deferred and raised after the record is certified for decision by the Commission or as an exception to an initial decision.

(1) If an appeal is not allowed, or is dismissed by the Commission, or if permission to file an appeal is not requested, objection to the ruling may be raised after the record is certified for decision by the Commission or on review of the initial decision.

(2) If an appeal is allowed and is considered on its merits, the disposition on appeal is final. Objection to the ruling or to the action on appeal may not be raised after the record is certified for decision by the Commission or on review of the initial decision.

(3) If the presiding officer modifies their initial ruling, any party adversely affected by the modified ruling may file a request for permission to file appeal, pursuant to the provisions of this paragraph.

(c) *Procedures, effective date.* (1) Unless the presiding officer orders otherwise, rulings made shall be effective when the order is released or (if no written order) when the ruling is made. The Commission may stay the effect of any ruling that comes before it for consideration on appeal.

* * * * *

62. Amend section 1.302 by revising the heading to read as follows:

§ 1.302 Appeal from final ruling by presiding officer other than the Commission; effective date of ruling.

* * * * *

63. Amend section 1.311 by revising the introductory text, revising paragraph (a), removing the introductory text immediately after paragraph (c), removing paragraph (c)(1), redesignating paragraph (c)(2) as (c)(1), redesignating paragraph (c)(3) as (c)(2), revising the text of redesignated paragraph (c)(1), removing paragraph (d), redesignating paragraph (e) as paragraph (d), and revising the text of redesignated paragraph (d) to read as follows:

§ 1.311 General.

Sections 1.311 through 1.325 provide for taking the deposition of any person (including a party), for

interrogatories to parties, and for orders to parties relating to the production of documents and things and for entry upon real property. These procedures may be used for the discovery of relevant facts, for the production and preservation of evidence for use in a hearing proceeding, or for both purposes.

(a) *Applicability.* For purposes of discovery, these procedures may be used in any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for hearing. For the preservation of evidence, they may be used in any case which has been designated for hearing and is conducted under the provisions of this subpart (see § 1.201).

* * * * *

(c)(1) Except as provided by special order of the presiding officer, discovery may be initiated after the initial conference provided for in § 1.248(b) of this part.

(2) In all proceedings, the presiding officer may at any time order the parties or their attorneys to appear at a conference to consider the proper use of these procedures, the time to be allowed for such use, and/or to hear argument and render a ruling on disputes that arise under these rules.

(d) *Stipulations regarding the taking of depositions.* If all of the parties so stipulate in writing and if there is no interference to the conduct of the proceeding, depositions may be taken before any person, at any time (subject to the limitation below) or place, upon any notice and in any manner, and when so taken may be used like other depositions. A copy of the stipulation shall be filed using the Commission's Electronic Comment Filing System, and a copy of the stipulation shall be served on the presiding officer or case manager at least 3 days before the scheduled taking of the deposition.

* * * * *

64. Add a new section 1.314 to read as follows:

§ 1.314 Confidentiality of information produced or exchanged.

(a) Any information produced in the course of a hearing proceeding may be designated as confidential by any parties to the proceeding, or third parties, pursuant to §§0.457, 0.459, or 0.461 of these rules. Any parties or third-parties asserting confidentiality for such materials must:

(1) Clearly mark each page, or portion thereof, for which a confidential designation is claimed. The parties or third parties claiming confidentiality should restrict their designations to encompass only the specific information that they assert is confidential. If a confidential designation is challenged, the party or third party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the materials designated as confidential fall under the standards for nondisclosure enunciated in the FOIA and that the designation is narrowly tailored to encompass only confidential information.

(2) File with the Commission, using the Commission's Electronic Comment Filing System, a public version of the materials that redacts any confidential information and clearly marks each page of the redacted public version with a header stating "Public Version." The Public Version shall be machine-readable whenever technically possible. Where the document to be filed electronically contains metadata that is confidential or protected from disclosure by a legal privilege (including, for example, the attorney-client privilege), the filer may remove such metadata from the Public Version before filing it electronically.

(3) File with the Secretary's Office an unredacted hard copy, meaning an unredacted version of the materials containing confidential information that clearly displays on each page of the unredacted version

a header stating “Confidential Version.” The unredacted version must be filed on the same day as the Public Version.

(4) Serve one hard copy of the Public Version and one hard copy of the Confidential Version on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or e-mail, together with a proof of such service in accordance with the requirements of § 1.47(g). A hard copy of the Public Version and Confidential Version shall also be served on the presiding officer as identified in the caption.

(b) An attorney of record for any party or any party that receives unredacted materials marked as confidential may disclose such materials solely to the following persons, only for use in prosecuting or defending a party to the hearing proceeding, and only to the extent necessary to assist in the prosecution or defense of the case:

(1) Employees of counsel of record representing the parties in the hearing proceeding;

(2) Officers or employees of the receiving party who are directly involved in the prosecution or defense of the case;

(3) Consultants or expert witnesses retained by the parties; and

(4) Court reporters and stenographers in accordance with the terms and conditions of this section.

(c) The individuals identified above in paragraph (b) shall not disclose information designated as confidential to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the hearing proceeding. Each such individual who is provided access to the information shall sign a declaration or affidavit stating that the individual has personally reviewed the Commission’s rules and understands the limitations they impose on the signing party.

(d) Parties may make copies of materials marked confidential solely for use by the Commission or persons designated in paragraph (b) of this section. Each party shall maintain a log recording the number of copies made of all confidential material and the persons to whom the copies have been provided.

(e) The presiding officer may adopt a protective order as appropriate.

(f) Upon final termination of a hearing proceeding, including all appeals and applications for review, the parties shall ensure that all originals and reproductions of any confidential materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the confidential materials of an opposing or third party shall be destroyed.

65. Amend section 1.315 by revising paragraph (a) and deleting paragraph (e) to read as follows:

§ 1.315 Depositions upon oral examination—notice and preliminary procedure.

(a) *Notice.* A party to a hearing proceeding desiring to take the deposition of any person upon oral examination shall give a minimum of 21 days’ notice to every other party, to the person to be examined, and to the presiding officer or case manager. A copy of the notice shall be filed with the Secretary of the Commission for inclusion in the Commission’s Electronic Comment Filing System. Related pleadings shall be served and filed in the same manner. The notice shall contain the following information:

* * * * *

66. Remove and reserve section 1.316.

§ 1.316 [Removed and reserved]

67. Amend section 1.319 by replacing the word “telegraph” in paragraph (c)(2) with the word “provide,” and by replacing the words “by telephone” in paragraph (c)(3) with the word “expeditiously.”

68. Amend section 1.321 by revising the heading and revising paragraphs (b) and (d)(3) to read as follows:

§ 1.321 Use of depositions in hearing proceedings.

* * * * *

(b) Except as provided in this paragraph and in § 1.319, objection may be made to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

* * * * *

(d) * * *

(3) The deposition of any witness, whether or not a party, may be used by any party for any lawful purpose.

* * * * *

69. Amend section 1.323 by revising paragraph (a) to read as follows:

§ 1.323 Interrogatories to parties.

(a) *Interrogatories.* Any party may serve upon any other party written interrogatories to be answered in writing by the party served or, if the party served is a public or private corporation, partnership, association, or similar entity, by any officer or agent, who shall furnish such information as is available to the party. Copies of the interrogatories, answers, and all related pleadings shall be filed with the Commission and served on the presiding officer and all other parties to the hearing proceeding.

* * * * *

70. Amend section 1.325 by revising paragraph (a)(1) to read as follows:

§ 1.325 Discovery and production of documents and things for inspection, copying, or photographing.

(a) * * *

(1) Copies of the request shall be filed with the Commission and served on the presiding officer and all other parties to the hearing proceeding.

* * * * *

71. Revise section 1.331 to read as follows:

§ 1.331 Who may sign and issue.

Subpenas requiring the attendance and testimony of witnesses, and subpenas requiring the production of any books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation or hearing, may be signed and issued by the presiding officer.

72. Amend section 1.338 by revising paragraph (a) to read as follows:

§ 1.338 Subpena forms.

(a) Subpena forms are available on the Commission's internet site, www.fcc.gov, as FCC Form 766. These forms are to be completed and submitted with any request for issuance of a subpena.

* * * * *

73. Revise section 1.351 to read as follows:

§ 1.351 Rules of evidence.

In hearings subject to this Subpart B, any oral or documentary evidence may be adduced, but the presiding officer shall exclude irrelevant, immaterial, or unduly repetitious evidence.

74. Revise section 1.362 to read as follows:

§ 1.362 Production of statements.

After a witness is called and has given direct testimony in an oral hearing, and before he or she is excused, any party may move for the production of any statement of such witness, or part thereof, pertaining to his or her direct testimony, in possession of the party calling the witness, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be directed to the presiding officer. If the party declines to furnish the statement, the testimony of the witness pertaining to the requested statement shall be stricken.

[33 FR 466, Jan. 12, 1968]

75. Add a new heading and new sections 1.370-1.377 immediately after section 1.364 to read as follows:

HEARINGS ON A WRITTEN RECORD**§ 1.370 Purpose.**

Hearings under this Subpart B that the Commission or one of its Bureaus, acting on delegated authority, determines shall be conducted and resolved on a written record are subject to §§ 1.371 - 1.377. If an order designating a matter for hearing does not specify whether those rules apply to a hearing proceeding, and if the proceeding is not subject to 5 U.S.C. 554, the presiding officer may, in their discretion, conduct and resolve all or part of the hearing proceeding on a written record in accordance with §§ 1.371 - 1.377.

§ 1.371 General pleading requirements.

Written hearings shall be resolved on a written record consisting of affirmative case, responsive case, and reply case submissions, along with all associated evidence in the record, including stipulations and agreements of the parties and official notice of a material fact.

(a) All pleadings filed in any proceeding subject to these written hearing rules must be submitted in conformity with the requirements of §§ 1.4, 1.44, 1.47, 1.48, 1.49, 1.50, 1.51(a), and 1.52.

(b) Pleadings must be clear, concise, and direct. All matters should be pleaded fully and with specificity.

(c) Pleadings shall consist of numbered paragraphs and must be supported by relevant evidence. Assertions based on information and belief are prohibited unless made in good faith and accompanied by a declaration or affidavit explaining the basis for the party's belief and why the party could not reasonably ascertain the facts from any other source.

(d) Legal arguments must be supported by appropriate statutory, judicial, or administrative authority.

(e) Opposing authorities must be distinguished.

(f) Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies. In addition, copies of state authorities relied upon shall be provided.

(g) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner before a decision is rendered on the merits.

(h) Pleadings shall identify the name, address, telephone number, and e-mail address for either the filing party's attorney or, where a party is not represented by an attorney, the filing party. Pleadings may be signed by a party's attorney.

(i) Attachments to any pleading shall be Bates-stamped or otherwise identifiable by party and numbered sequentially. Parties shall cite to Bates-stamped or otherwise identifiable page numbers in their pleadings.

(j) Unless a schedule is specified in the order designating a matter for hearing, at the initial status conference under §1.248(b), the presiding officer shall adopt a schedule for the sequential filing of pleadings required or permitted under these rules.

(k) Pleadings shall be served on all parties to the proceeding in accordance with § 1.211 and shall include a certificate of service. All pleadings shall be served on the presiding officer or case manager, as identified in the caption.

(l) Each pleading must contain a written verification that the signatory has read the submission and, to the best of their knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding. If any pleading or other submission is signed in violation of this provision, the Commission may upon motion or upon its own initiative impose appropriate sanctions.

(m) Any party to the proceeding may file a motion seeking waiver of any of the rules governing pleadings in written hearings. Such waiver may be granted for good cause shown.

(n) Any pleading that does not conform with the requirements of the applicable rules may be deemed

defective. In such case, the presiding officer may strike the pleading or request that specified defects be corrected and that proper pleadings be filed with the Commission and served on the presiding officer or case manager and all parties within a prescribed time as a condition to being made a part of the record in the proceeding.

(o) Any party that fails to respond to official correspondence, a request for additional information, or an order or directive from the presiding officer or case manager may be subject to appropriate sanctions.

§ 1.372 The affirmative case.

(a) Within 30 days after the completion of the discovery period as determined by the presiding officer, unless otherwise directed by the presiding officer, any party to the proceeding with the burden of proof shall file a pleading entitled “affirmative case” that fully addresses each of the issues designated for hearing. The affirmative case submission shall include:

(1) A statement of relevant material facts, supported by sworn statements based on personal knowledge, documentation, or by other materials subject to consideration by the presiding officer, and a full legal analysis of each of the issues designated for hearing;

(2) Citation to relevant sections of the Communications Act or Commission regulations or orders; and

(3) The relief sought.

(b) The affirmative case submission shall address all factual and legal questions designated for hearing, and state in detail the basis for the response to each such question. Responses based on information and belief are prohibited unless made in good faith and accompanied by a declaration or affidavit explaining the basis for the party’s belief and why the party could not reasonably ascertain the facts. When a party intends in good faith to deny only part of a designated question in the affirmative case, that party shall specify so much of it as is true and shall deny only the remainder.

(c) Failure to address in an affirmative case submission all factual and legal questions designated for hearing may result in inferences adverse to the filing party.

§ 1.373 The responsive case.

(a) Any other party may file a responsive case submission in the manner prescribed under this section within 30 calendar days of the filing of the affirmative case submission, unless otherwise directed by the presiding officer. The responsive case submission shall include:

(1) A statement of relevant material facts, supported by sworn statements based on personal knowledge, documentation, or by other materials subject to consideration by the presiding officer, and a full legal analysis of any issues designated for hearing.

(2) Citation to relevant sections of the Communications Act or Commission regulations or orders; and

(3) Any relief sought.

(b) The responsive case submission shall respond specifically to all material allegations made in the affirmative case submission. Every effort shall be made to narrow the issues for resolution by the presiding officer.

(c) Statements of fact or law in an affirmative case filed pursuant to § 1.372 are deemed admitted when not rebutted in a responsive case submission.

§ 1.374 The reply case.

(a) Any party who filed an affirmative case may file and serve a reply case submission within 15 days of the filing of any responsive case submission, unless otherwise directed by the presiding officer.

(b) The reply case submission shall contain statements of relevant material facts, supported by sworn statements based on personal knowledge, documentation, or by other materials subject to consideration by the presiding officer, and a full legal analysis that responds only to the factual allegations and legal arguments made in any responsive case. Other allegations or arguments will not be considered by the presiding officer.

(c) Failure to submit a reply case submission shall not be deemed an admission of any allegations contained in any responsive case.

§ 1.375 Other written submissions.

(a) The presiding officer may require or permit the parties to file other written submissions such as briefs, proposed findings of fact and conclusions of law, or other supplementary documents or pleadings. The presiding officer may limit the scope of any such pleadings to certain subjects or issues.

(b) The presiding officer may require the parties to submit any additional information deemed appropriate for a full, fair, and expeditious resolution of the proceeding.

§ 1.376 Oral hearing or argument.

(a) Notwithstanding any requirement in the designation order that the hearing be conducted and resolved on a written record, a party may file a motion to request an oral hearing pursuant to § 1.291. Any such motion shall be filed after the submission of all the pleadings but no later than the date established in the scheduling order. *See* §§ 1.372-1.374, 1.248. The motion shall contain a list of genuine disputes as to outcome-determinative facts that the movant contends cannot adequately be resolved on a written record and a list of witnesses whose live testimony would be required to resolve such disputes. The motion also shall contain supporting legal analysis, including citations to relevant authorities and parts of the record. If the presiding officer finds that there is a genuine dispute as to an outcome-determinative fact that cannot adequately be resolved on a written record, the presiding officer shall conduct an oral hearing limited to testimony and cross-examination necessary to resolve that dispute.

(b) The presiding officer may, on his or her own motion following the receipt of all written submissions, conduct an oral hearing to resolve a genuine dispute as to an outcome-determinative fact that the presiding officer finds cannot adequately be resolved on a written record. Any such oral hearing shall be limited to testimony and cross-examination necessary to resolve that dispute.

(c) Oral argument shall be permitted only if the presiding officer determines that oral argument is necessary to resolution of the hearing.

§ 1.377 Certification of the written hearing record to the Commission for decision.

When the Commission is the presiding officer and it has appointed a case manager under §1.242, the case manager shall certify the record for decision to the Commission promptly after the hearing record is closed. Notice of such certification shall be served on all parties to the proceeding.

Part 1-PRACTICE AND PROCEDURE**Subpart H-Ex Parte Communications**

76. Amend section 1.1202 by revising paragraphs (c) and (e) to read as follows:

§ 1.1202 Definitions.

* * * * *

(c) *Decision-making personnel.* Any member, officer, or employee of the Commission, or, in the case of a Joint Board, its members or their staffs, who is or may reasonably be expected to be involved in formulating a decision, rule, or order in a proceeding. Any person who has been made a party to a proceeding or who otherwise has been excluded from the decisional process shall not be treated as a decision-maker with respect to that proceeding. Thus, any person designated as part of a separate trial staff shall not be considered a decision-making person in the designated proceeding. Unseparated Bureau or Office staff shall be considered decision-making personnel with respect to decisions, rules, and orders in which their Bureau or Office participates in enacting, preparing, or reviewing. Commission staff serving as the case manager in a hearing proceeding in which the Commission is the presiding officer shall be considered decision-making personnel with respect to that hearing proceeding.

* * * * *

(e) *Matter designated for hearing.* Any matter that has been designated for hearing before a presiding officer.

* * * * *

Part 1-PRACTICE AND PROCEDURE

Subpart I-Procedures Implementing the National Environmental Policy Act of 1969

77. Amend section 1.1319 by revising the introductory language to paragraph (a) and paragraphs (a)(1) and (a)(2) to read as follows:

§ 1.1319 Consideration of the environmental impact statements.

(a) If the action is designated for hearing:

(1) In rendering an initial decision, the presiding officer (other than the Commission) shall utilize the FEIS in considering the environmental issues, together with all other non-environmental issues.

(2) When the Commission serves as the presiding officer or upon its review of an initial decision, the Commission will consider and assess all aspects of the FEIS and will render its decision, * * *

* * * * *

Part 1-PRACTICE AND PROCEDURE

Subpart K-Implementation of the Equal Access to Justice Act (EAJA) in Agency Proceedings

78. The authority citation for Part 1, Subpart K continues to read as follows:

Authority: Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 (5 U.S.C. 504(c)(1)), unless otherwise noted.

79. Amend section 1.1504 by revising paragraph (f) to read as follows:

§ 1.1504 Eligibility of applicants.

* * * * *

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the presiding officer, as defined in 47 CFR § 1.241, determines that such treatment would be unjust and contrary to the purposes of the EAJA in light of the actual relationship between the affiliated entities. In addition, the presiding officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

* * * * *

80. Amend section 1.1506 by revising the introductory text in paragraph (c) to read as follows:

§ 1.1506 Allowable fees and expenses.

* * * * *

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the presiding officer shall consider the following:

* * * * *

81. Amend section 1.1512 by revising the final sentence of paragraph (a) and by revising paragraph (b) to read as follows:

§ 1.1512 Net worth exhibit.

(a) * * * The presiding officer may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the presiding officer in a sealed envelope labeled “Confidential Financial Information”, accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on Bureau counsel, but need not be served on any other party to the proceeding. If the presiding officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Commission’s established procedures under the Freedom of Information Act, §§ 0.441 through 0.466 of this chapter.

82. Amend section 1.1513 by revising the final sentence to read as follows:

§ 1.1513 Documentation of fees and expenses.

* * * The presiding officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

* * * * *

83. Amend section 1.1514 by revising paragraph (c)(1) to read as follows:

§ 1.1514 When an application may be filed.

* * * * *

(c) * * *

(1) The date on which an initial decision or other recommended disposition of the merits of the proceeding by a presiding officer (other than the Commission) becomes administratively final;

* * * * *

84. Amend section 1.1522 by revising the second sentence of paragraph (b) to read as follows:

§ 1.1522 Answer to application.

* * * * *

(b) * * * The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the presiding officer upon request by Bureau counsel and the applicant.

* * * * *

85. Amend section 1.1524 by revising the second sentence to read as follows:

§ 1.1524 Comments by other parties.

* * * A commenting party may not participate further in proceedings on the application unless the presiding officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

* * * * *

86. Amend section 1.1525 by revising the final sentence to read as follows:

§ 1.1525 Settlement.

* * * If a presiding officer (other than the Commission) approves the proposed settlement, it shall be forwarded to the Commission for final determination. If the Commission is the presiding officer, it shall approve or deny the proposed settlement.

87. Amend section 1.1526 by revising the second sentence of paragraph (a) and by revising paragraph (b) to read as follows:

§ 1.1526 Further proceedings.

(a) * * * However, on request of either the applicant or Bureau counsel, or on her own initiative, the presiding officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or, as to issues other than excessive demand or substantial justification, an evidentiary hearing. * * *

(b) A request that the presiding officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

* * * * *

88. Amend section 1.1527 by revising the heading and the first sentence, and adding a new final sentence to read as follows:

§ 1.1527 Initial Decision.

A presiding officer (other than the Commission) shall issue an initial decision on the application as soon as possible after completion of proceedings on the application. * * * When the Commission is the presiding officer, the Commission may, but is not required to, issue an initial or recommended decision.

89. Amend section 1.1528 by revising the final sentence to read as follows:

§ 1.1528 Commission review.

* * * If review is taken, the Commission will issue a final decision on the application or remand the application to the presiding officer (other than the Commission) for further proceedings.

* * * * *

Part 1-PRACTICE AND PROCEDURE

Subpart L-Random Selection Procedures for Mass Media Services

90. The authority for subpart L continues to read as follows:

Authority: 47 U.S.C. 309(i).

91. Amend section 1.1604 by revising paragraphs (b) and (c) to read as follows:

§ 1.1604 Post-selection hearings.

* * * * *

(b) If, after such hearing proceeding as may be necessary, the Commission determines that the “tentative selectee” has met the requirements of § 73.3591(a) it will make the appropriate grant. If the Commission is unable to make such a determination, it shall order that another random selection be conducted from among the remaining mutually exclusive applicants, in accordance with the provisions of this subpart.

(c) If, on the basis of the papers before it, the Commission determines that a substantial and material question of fact exists, it shall designate that question for hearing. Hearing proceedings shall be conducted by a presiding officer. See § 1.241.

* * * * *

A. Part 76- MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

Subpart A-General

92. Amend section 76.7 by revising paragraph (g)(2) to read as follows:

§ 76.7 General special relief, waiver, enforcement, complaint, show cause, forfeiture, and declaratory ruling procedures

* * * * *

(g) * * *

(2) Before designation for hearing, the staff shall notify, either orally or in writing, the parties to the proceeding of its intent to so designate, and the parties shall be given a period of ten (10) days to elect to resolve the dispute through alternative dispute resolution procedures, or to proceed with an adjudicatory hearing. Such election shall be submitted in writing to the Commission.

APPENDIX B

Initial Regulatory Flexibility Certification

1. The Regulatory Flexibility Act of 1980, as amended (RFA),¹ requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”² The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”³ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁴ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁵

2. In this NPRM, the Commission seeks comment on proposals to expedite and streamline the Commission’s hearing processes. The proposed rule changes stem from longstanding criticisms of the Commission’s current trial-type hearings as costly, burdensome, and, in many cases, unnecessary.⁶ The proposals upon which the NPRM seeks comment are designed to supplement the Commission’s current formal hearing processes by allowing the Commission to select the personnel and procedures that are best suited to the issues raised in a particular case and that will achieve the purposes of that hearing without undue cost or delay. These procedures, if adopted, would establish an alternative path for resolving hearing proceedings in appropriate cases.

3. The Commission estimates that the rule changes proposed in this NPRM would reduce the time and attendant costs associated with hearing proceedings for the Commission and for applicants, petitioners, and other parties. In particular, the NPRM proposes to (1) codify and expand the use of a “written hearing” process that would rely on written testimony and documentary evidence in lieu of live testimony and cross-examination unless the designated presiding officer determines that oral testimony is needed to resolve any issues; (2) direct designated Commission staff to act as a case manager that would supervise the development of the written hearing record when the Commission designates itself as the presiding officer in a hearing proceeding; and (3) dispense with the preparation of an intermediate opinion whenever the record of a proceeding can be certified to the Commission for final decision. The NPRM tentatively concludes that the proposed procedures will expedite the Commission’s hearing processes while ensuring appropriate standards of transparency and procedural fairness. It seeks comment on various aspect of these proposals and on any alternative approaches.

4. The Commission believes that the proposals on which it seeks comment in this NPRM

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² 5 U.S.C. § 605(b).

³ *Id.* § 601(6).

⁴ *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁵ 15 U.S.C. § 632.

⁶ See, e.g., Radioactive, LLC, Hearing Designation Order, 32 FCC Rcd at 6402 (Statement of Commissioner Michael P. O’Reilly) (noting delays in the resolution of various administrative law judge-administered licensing hearings).

would reduce costs and burdens currently shouldered by parties to hearing proceedings in certain cases, including small entities. Because only a small percentage of matters before the Commission necessitate a hearing, we anticipate that the number of small entities impacted would not be substantial for RFA purposes. In addition, the proposed modifications to the hearing rules in this NPRM do not propose substantive new responsibilities for regulated entities or for potential parties to Commission hearings. Therefore, we certify that the proposals in this NPRM, if adopted, will not have a significant economic impact on a substantial number of small entities.

5. The Commission will send a copy of the NPRM, including a copy of this Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.⁷ This initial certification will also be published in the Federal Register.⁸

⁷ 5 U.S.C. § 605(b).

⁸ *Id.*

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *In the matter of Procedural Streamlining of Administrative Hearings*, EB Docket No. 19-214.

I applaud today's action seeking comment on reforming and streamlining the Commission's administrative hearing procedures. While I may be willing to go even further than contemplated here, this item's direction is consistent with process reform recommendations that I have endorsed and advocated for over the last many years. Further, we expand upon the Commission's precedent, starting with the decision in *Radioactive, LLC*,¹ and the efforts of applicable FCC Bureau and Office staff to utilize a "paper" hearing process, instead of referring matters to the administrative law judge (ALJ).

The Commission's current process is not only burdensome, expensive, and time consuming, but it is also inefficient and has resulted in harmful outcomes. As I have stated before, time and time again, we have gone through the charade of a lengthy proceeding to determine that a hearing is needed, followed by a protracted trial-like hearing before an ALJ, just to have the matter reconsidered yet again by the Commission. And, the Commission has oftentimes overruled the ALJ's recommendations, making the process a waste of everyone's time and effort. The biggest problem with such futility is that, beyond taking years to complete, the simple threat of a referral to the ALJ has been used to unilaterally quash pending mergers of Commission licensees. In other words, it has been used with nefarious intent to kill mergers without providing any recourse or challenge. By proposing to move most cases to paper hearings, we take the first step to end this flawed process, while ensuring that the Commission is able to obtain the factual information it needs, that parties have access to due process, and that final decisions and court review are timely.

I thank the Chairman for commencing this important process reform proceeding. I approve and look forward to its conclusion.

¹ *Application of Radioactive, LLC for Renewal of License Station WRAX(FM), Lake Isabella, MI*, MB Docket No. 17-198, Hearing Designation Order, 32 FCC Rcd 6392 (2017).