Federal Communications Law Journal

Volume 47 | Issue 2 Article 32

12-1994

Reinventing FCC Adjudication

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This issue of the *Federal Communications Law Journal* adds a scholarly encore to other commemorative activities[1] of its co-sponsor, the Federal Communications Bar Association (FCBA), marking the sixtieth anniversary of the Communications Act of 1934[2] and the Federal Communications Commission (FCC or Commission).

EXPANSION OF COMMISSION RESPONSIBILITIES

In 1934 the Commission regulated telephone, telegraph, and fewer than 600 broadcast stations—all AM.[3] Today the Commission regulates a vastly larger and more advanced system of telephone communications[4] and more than 21,000 broadcast stations, including AM, FM, TV, and LPTV.[5] Its regulatory responsibilities now include cable television, microwave, land mobile services, private and citizens band radio, cellular, satellite, personal communications, fiber-optic communications, computers, and other

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1. On October 6, 1994, a gala anniversary reception in Washington, D.C. addressed by the FCBA President and FCC Chairman was attended by more than 500 persons. The FCBA announced at the reception an outreach program sponsoring small-group tours of communications facilities for Washington, D.C., high school students as part of an annual Career Day. More than 75 students toured four facilities on that day.

2. Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064.

3. Richard Wiley, Remarks at the FCBA-hosted 40th Anniversary Dinner 1 (Nov. 15, 1974) (copy on file with the *Federal Communications Law Journal*). Mr. Wiley, who was FCC Chairman in 1974, and the first Chairman, Eugene O. Sykes, are the only FCC Chairmen to have served also as Presidents of the FCBA (Sykes in 1942, and Wiley in 1986-87).

4. In 1934, there were 17 million telephones in the United States. *See* FCC, 25TH ANNUAL REPORT/FISCAL YEAR 57 (1959). Today there are more than 127 million. 1992 U.N. Stat. Y.B. 719 (based on a 1990 figure).

5. *Broadcast Station Totals As of Aug. 31, 1994* (Mimeo. No. 44901), FCC News, Sept. 27, 1994, at 1.

technologies that were either unheard of or only in early experimental stages in 1934. The Commission has acquired major responsibilities under acts in addition to or amendment of the Communications Act of 1934.[6] In the agency's first year, it had 233 employees and a budget of $1 million. Today, it has more than 1900 employees and a budget of $160 million.[7] Yet the number of Commissioners has decreased, from seven in 1934 to five today.[8]

FUNCTIONS OF COMMISSIONERS

Members of the Commission serve many functions. They determine communications policy for the nation, consistent with congressional directives. They interrelate with foreign governments and their regulatory bodies in seeking to facilitate and standardize the development of global communications.[9] They provide an audience to representatives of regulated industries, companies, and consumers about specific concerns.[10] They address the more general concerns of such parties through speeches and other personal appearances.[11] They seek to inform themselves about matters for which they have responsibility through travel and field

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6. *See, e.g.*, Omnibus Budget Reconciliation Act of 1993, 47 U.S.C.A. § 309(j) (West Supp. 1994); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C. §§ 521-611 (Supp. 1992)); Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (codified at 47 U.S.C. §§ 303a-303b, 393a, 394 (1992); and Communications Satellite Act of 1962, Pub. L. No. 87-624, 76 Stat. 421 (codified at 47 U.S.C. § 721(a) (1988))

7. *FCC Celebrates 60th Birthday*, FCC News, Sept. 30, 1994. The budget for fiscal year 1995 is $185 million. Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies 1995 Appropriations and 1994 Supplemental Appropriations, Pub. L. No. 103-317, 108 Stat. 1724, 1737 (1994).

8. Communications Act of 1934, ch. 652, § 4(a), 48 Stat. 1064, *as amended by* Pub. L. No. 97-253, § 501(b)(1), 96 Stat. 805 (1982) (reducing the number of Commissioners to five).

9. For example, Commissioners attended the World Telecommunication Development Conference in Buenos Aires, Argentina, in March 1994, and the International Telecommunication Union (ITU) Plenipotentiary Conference in Kyoto, Japan, in September 1994.

10. The Commissioners often remark publicly about the frequency of such appearances, commonly referred to as "lobbying." *See* Rachelle B. Chong, FCC Commissioner, Comments at Broadcasting & Cable/FCBA Interface conference (Oct. 4, 1994); Susan Ness, FCC Commissioner, Remarks to Federal Communications Bar Association (Sept. 22, 1994) (copy on file with the *Federal Communications Law Journal*). The Commission regularly publishes public notices of oral presentations in nonrestricted proceedings. *See, e.g.*, Ex Parte Presentations and Post-Reply Comment Period Filings in Non-Restricted Proceedings, *Public Notice* (Oct. 6, 1994).

11. FCC News Releases reflect ten speeches by the Chairman during September-October 1994, nine speeches by the other Commissioners, and eight appearances by one or more Commissioners on panels.

observation.[12] They prepare reports and recommendations to Congress[13] and the executive branch.[14] They continually evaluate and reevaluate their procedural and substantive regulations.[15] And they adjudicate disputes.

THE COMMISSION'S ADJUDICATIVE FUNCTION

It is to the Commission's adjudicative function that this article is addressed. In resolving disputes, the Commissioners act as appellate judges. Yet they face demands on their time that appellate judges do not face, they perform functions that appellate judges do not perform, and they operate in an environment that provides less time for quiet contemplation than that in which appellate judges operate. An immense number of adjudicative matters wind their way through the Commission processes and ultimately to the five Commissioners. The result can be considerable delay in disposition.[16]

The thesis of this Essay is that the Commission should reform its adjudicative process so that the five Commissioners can maximize the effectiveness of the time they are able to spend on adjudication. They could do this by acting as the highest court in a two-tier appellate system, with a lower tribunal such as the existing Review Board adjudicating most

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12. FCC releases also show that during September-October 1994, Commissioners attended official functions in New York, Connecticut, Michigan, California, the State of Washington, Ireland, Russia, and Japan.

13. *See, e.g., In re* Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992; Inquiry into Sports Programming Migration, 9 FCC Rcd. 3440 (1994).

14. *See, e.g., In re* Report to Ronald H. Brown, Secretary, U.S. Dept. of Commerce, Regarding the Preliminary Spectrum Reallocation Report, 75 Rad. Reg. 2d (P & F) 1141 (1994).

15. *See, e.g., In re* Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Services, *Notice of Proposed Rule Making and Order*, 9 FCC Rcd. 2578 (1994).

16. *See, e.g.*, In Re Application of Quinnipiac College for Construction Permit to Modify the Facilities of Noncommercial Educational FM Station WQAQ, *Memorandum Opinion and Order*, 8 FCC Rcd. 6285 (1993) (decision more than four years after application for review); In Re Applications of Charisma Broadcasting Corp. et al., *Memorandum Opinion and Order*, 8 FCC Rcd. 864 (1993) (decision 19 months after application for review).

On June 8, 1989, the FCBA filed at the FCC a study of 39 adjudicatory matters decided in the period from October 1986 to May 1989. It found that the average time between the filing of an application for review and release of a decision by the Commission was 13.5 months. Four cases cited in that study involved delays at the Commission level of more than 30 months. Supplement to the Comments of the Federal Communications Bar Association to *In re* Amendment of the Commission's Rules to Allow the Selection from Among Competing Applicants for New AM, FM and TV Stations by Random Selection (Lottery) in MM Dkt. No. 89-15 (June 8, 1989).

disputes while the Commissioners select for themselves only those cases that they consider of greatest precedential importance. The Commission should also provide for a formal record of pleadings and correspondence in all disputes, not just those that result in docketed proceedings. And it should keep and publish statistics each year on the time it takes for adjudicative matters to pass through the various stages of the administrative process, thereby providing accountability within the agency for delay and information on which to base procedural reform.

1. Discretionary Review

Of the fifty states, thirty-nine have permanent intermediate appellate courts.[17] That is the structural solution to docket overload and its attendant delay recommended by the American Bar Association (ABA)[18] and the National Center for State Courts.[19]

The ABA has set a standard of 280 days, slightly over nine months, for the issuance of a judicial opinion after the filing of a notice of appeal.[20] The Communications Act sets a more ambitious standard for the Commission: a final decision is to be rendered within three months from the filing of an application that does not go to hearing, or within six months from the final date of hearing in all cases that do go to hearing.[21]

That is simply not achievable, and has largely not been achieved, in disputes where the Commissioners themselves perform the adjudicative function. To alleviate that problem, the Commission should, instead, delegate to the Review Board the task of deciding most disputes, following the appellate structure recommended for courts by the ABA and in effect in most states.[22] The lower adjudicative body would sit in panels rather than en banc, and its membership could be expanded or contracted as necessary to service its caseload.

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17. All but Delaware, Maine, Montana, North Dakota, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming have intermediate appellate courts. *See* 1993 D.C. CTS. ANN. REP. 17; 1990 ST. CT. CASELOAD STAT. ANN. REP. 50, 186-237.

18. 1 STANDARDS RELATING TO COURT ORGANIZATION § 1.13 commentary at 40 (ABA Judicial Admin. Div. 1990).

19. JAMES R. JAMES ET AL., 1 APPELLATE DELAY IN THE D.C. COURT OF APPEALS 28 (July 1986) (study by National Center for State Courts).

20. STANDARDS RELATING TO APPELLATE DELAY REDUCTION § 3.52 commentary at 11 (ABA Judicial Admin. Div. 1988).

21. 47 U.S.C. § 155(d) (1988).

22. This is also the structure of the federal courts, where there is a right to mandatory review by the courts of appeals but in most cases only a right to discretionary review by the U.S. Supreme Court. 28 U.S.C. §§ 1254, 1291 (1988).

While an analysis of whether the reforms proposed in this Essay are wholly achievable without new legislation or rulemaking is beyond the scope of the Essay,[23] there is ample authority in the existing Act for discretionary Commission review. Section 5(c) of the Act[24] permits the Commission to delegate its adjudicative functions within the agency,[25] with any decision made by delegatees to have the same effect as if made by the Commission unless further review is undertaken by the Commission. Section 5 also provides for review by the Commission of decisions by delegated authority. But it provides that the Commission may deny any applications for review without specifying reasons for the denial.[26] Thus, the Commission has authority under the Act to exercise only a "certiorari" type jurisdiction if it so chooses. That is in fact the type of review that the Act seems to contemplate.[27]

The most effective system of discretionary review by a state court of last resort with an intermediate appellate court is the "cert first" system employed in Massachusetts and Maryland.[28] In that system, the highest court reaches down and takes for review cases pending in the intermediate court that it considers of greatest importance before they are ever decided by the intermediate court. There is ordinarily only one appellate review.

If the Commission adopted that system, it could concentrate on the "law declaring" function while leaving to the lower adjudicative body the "error correcting" function in most cases.[29] Failure of the Commission to review, like failure of the Supreme Court to grant certiorari, would not connote endorsement of the result reached by the lower adjudicative body. It would indicate only that the case was not then deemed of sufficient importance to warrant Commission review. The Commission should also

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23. *See In re* Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, *Report and Order*, 6 FCC Rcd. 157, para. 44 n.27 (1990) (where the Commission may have suggested, though without analysis, that legislation would be required).

24. 47 U.S.C. § 155(c) (1988).

25. Indeed, the Commission performs most of its duties by delegation. *See, e.g.*, 47 C.F.R. § 0.283 (1993); *see also* 47 C.F.R. § 0.365 (1993).

26. 47 U.S.C. § 155(c)(4), (5) (1988).

27. Comments of the Federal Communications Bar Association to *In re* Proposals to Reform the Commission's Comparative Hearing Process in Gen. Dkt. No. 90-264, at 42 (Sept. 14, 1990) (where the FCBA advocated this type of review).

28. *See* MASS. ANN. LAWS ch. 211A, §§ 10-12 (Law Co-op. 1994); *see also* MASS. R. APP. P. 27.1; 1993 ANN. REP. OF THE MD. JUDICIARY 24-25 ("A monthly review of appellants' briefs from cases pending in the Court of Special Appeals [the intermediate court] is conducted by the Court of Appeals to identify cases suitable for consideration by the higher court.").

29. STANDARDS RELATING TO APPELLATE COURTS § 3.00 commentary at 4 (ABA Comm'n on Standards of Jud. Admin., Approved Draft 1977).

provide by rule a specific time period, e.g., sixty days after any application for review that follows a Review Board decision, during which it must pass on any such application.[30]

2. Adjudicative Record

The Commission maintains a formal docket and record in all cases that have been designated for hearing.[31] But in cases involving disputes that are never designated for hearing, the applications, amendments, pleadings, and correspondence that form the basis on which the Commission makes its decision are never listed on a docket nor placed in an official record.

The result is that in a disputed case a Commission decision declining to designate an application for hearing can go to the court of appeals without a docket or contemporaneously maintained official record. Indeed, the record sent to the court of appeals may have to be compiled from the files of counsel.[32] If a hearing has been held, the Commission may have to deal with conflicting claims as to facts that were documented in the pre-hearing stage of a proceeding but somehow omitted from the hearing record.[33]

Since many disputes are adjudicated by the Commission without ever going to hearing, a formal record of filings by the parties with whatever officer or appellate body is delegated the power to adjudicate the dispute should be maintained from the time the existence of a dispute is identified. That would bring together in one place the record that the Commissioners and their staff need to make a judgment as to exercise of discretionary review, whether before or after the single mandatory appellate adjudication.

3. Case Management Statistics

A docket of all filings in disputes adjudicated or to be adjudicated by the Commission would enable it to quantify the number of such disputes pending at the end of each year and the average length of time they have

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30. This should be feasible with only a certiorari-type review, particularly if the case has already been rejected for "cert first" review. The Commission should also impose on itself a discipline like that of the Supreme Court's "term" system. The Court's policy is to decide all cases argued in any term before the term ends, which requires that the Court not take more cases than it can decide in a timely fashion.

31. *See* 47 C.F.R. § 1.203 (1993).

32. This was the method used to send the record in Tele-Media Corp. v. FCC, 697 F.2d 402 (D.C. Cir. 1983).

33. *See generally* In Re Applications of Charisma Broadcasting Corp. et al., 8 FCC Rcd. 864 (1993).

been pending. It would also enable the Commission to identify and deal with delays at various stages of the adjudicative process.

Many courts compile and publish annual statistics on their backlogs, average times for disposition, and average times at various stages of adjudication.[34] This enables the courts to identify yearly trends, both overall and at particular stages of the adjudicative process. If the FCC were to implement such record-keeping and annual reporting, it would provide the data necessary to determine how long it takes to obtain adjudication of disputes, whether the trend is toward greater or less delay, and at what points in the process steps need to be taken to try to reduce delay.

CONCLUSION

This Essay suggests adoption, for the FCC's adjudicative function, of procedures that recognized authorities in the field of judicial administration recommend for expediting the adjudicative process. Those procedures, if adapted by the Commission to its own processes, would "reinvent" FCC adjudication. They would free the Commissioners from routine adjudications, enable them to devote their limited time and resources to those adjudications of greatest relative importance, speed the adjudicative process, provide accountability to the public for delay, and provide data to the Commission with which to address and combat unnecessary delay.

34. *See, e.g.*, 1993 D.C. CTS. ANN. REP. 38-39; *see also* 1990 W. VA. SUP. CT. OF APPEALS STAT. ACTIVITY 3, 10-11.