Before the

Federal Communications Commission

Washington, DC

In the Matter of:	)	
Amendment to Commission Rules Concerning Adjudication of Spectrum Interference Disputes	)))	**RM-_____**

Petition for Rulemaking:
Spectrum Interference Dispute Resolution

of

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Summary

The Samuelson-Glushko Technology Law & Policy Clinic (TLPC) at the University of Colorado Law School and Pierre de Vries respectfully request that the Commission initiate a rulemaking pursuant to Rule 1.401(a) to provide a fact-based, transparent, and timely adjudication process for spectrum interference disputes.[1]

Under the Commission's existing rules, an operator that brings a claim asserting that another operator is causing harmful interference cannot be certain whether, when, or how its claim will be resolved. Operators caught up in unresolved spectrum disputes are thereby unable to make full economic use of their spectrum and may ultimately suffer economic losses. To address this dynamic, the Commission should:

- Permit a private party to file a spectrum interference complaint against another private party directly with the Office of Administrative Law Judges, thereby providing operators with the option of a fact-based, transparent, and timely process to resolve harmful interference disputes at the Commission;
- Modify existing rules to add deadlines to the adjudication process; and
- Make resources available as and where needed such as providing support staff, hiring or loaning additional ALJs and a spectrum advisor, or engaging experts and policy advisors to ensure the adjudication process is fact-based and timely.

[1] 47 C.F.R. § 1.401.

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Discussion

Spectrum usage and the number of harmful interference incidents are increasing, but the Commission has not ensured that there is an efficient process to resolve spectrum interference disputes.[2] We urge the Commission to provide an alternative mechanism for private parties to resolve their disputes that is fact-based, transparent, and timely by granting this petition.[3]

Radio spectrum licenses are a limited and valuable resource.[4] The Commission is largely responsible for ensuring that operators are using their assigned spectrum within specifications and that the use of the spectrum serves the public interest.[5] When two private parties are unable to resolve a spectrum interference dispute through private negotiations, their only current recourse is for one or both parties to bring the dispute to the Commission for resolution in the

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[2] *See* Receivers and Spectrum Working Group, Interference Limits Policy 3-4 (2013), *available at* http://transition.fcc.gov/bureaus/oet/tac/tacdocs/WhitePaperTACInterferenceLimitsv1.0.pdf; *see generally* GREGORY L. ROSSTON, INCREASING WIRELESS VALUE: TECHNOLOGY, SPECTRUM, AND INCENTIVE (2013), *available at* http://siepr.stanford.edu/system/files/shared/pubs/papers/pdf/2013-2-24-Wireless-Expansion.pdf; *See generally* J. PIERRE DE VRIES & PHILLIP J. WEISER, UNLOCKING SPECTRUM VALUE THROUGH IMPROVED ALLOCATION, ASSIGNMENT, AND ADJUDICATION OF SPECTRUM RIGHTS, (2014), *available at* http://www.hamiltonproject.org/files/downloads_and_links/THP_DeVries-WeiserDiscPaper.pdf.

[3] The Technology Law & Policy Clinic student attorneys advocate for the public interest on technology law and policy matters in front of administrative agencies and work closely with individual professionals and public interest groups; *e.g.*, *Comments of the TLPC*, ET Dkt. No. 10-237 (Mar. 28, 2011), *available at* http://apps.fcc.gov/ecfs/document/view?id=7021235631.UniversityColoradoReplyCommentETDocketNo.10-237.pdf. Pierre de Vries is a Senior Adjunct Fellow at the Silicon Flatirons Center at the University of Colorado and Co-Director of its Spectrum Policy Initiative and serves as an adviser to the student attorneys.

[4] For example, Auction 73 sold 1,090 licenses to 101 bidders in the 700 MHz band (consisting of five blocks with a total bandwidth of 62 MHz) and returned nearly $19 billion in 2008. Auction of 700 MHz Band Licenses Closes, *Public Notice*, Report No. AUC-08-73-1 (Auction 73), 1-2 (2008), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-08-595A1.pdf.

[5] *See What We Do*, FCC, http://www.fcc.gov/what-we-do (last visited Dec. 5, 2014); *see Enforcement Bureau: About the Bureau*, FCC, http://www.fcc.gov/enforcement-bureau (last visited Dec. 5, 2014).

form of an interference complaint. However, current Commission practices do not guarantee a fact-based, transparent, and timely process to resolve these disputes. Moreover, the Commission is struggling to fulfill its responsibilities and may not have enough resources to devote to these disputes, which means that spectrum rights are not always used in the best interests of the public.[6]

We begin with background on the economic impact of interference disputes, the current process for handling such disputes at the Commission, and how some actual cases have been handled under the current process. Second, we propose the Commission adopt a rule that gives private parties the option to file harmful interference claims directly with the Office of Administrative Law Judges. Third, we ask the Commission to add rules that create timelines for the adjudication process. Finally, we discuss the need for adequate resources to support adjudications of spectrum disputes by ALJs.

I. Background

The next three subsections describe the overall background of spectrum interference disputes today. First, we discuss the economic impact of unresolved spectrum interference disputes. Second, we describe the current methods used by the Commission to address these disputes. Third subsection, we highlight concerns in three actual spectrum interferences cases that were addressed using the current process. Finally, we discuss the scope of cases to which our proposed rules would apply.

[6] *See* Paul Kirby, *LeBlanc Defends Proposal to Close Many Field Offices*, TR DAILY, Jan. 26, 2015. ("[LeBlanc] said that previously, a case was opened each time a complaint was filed, even though in many cases the FCC had no plans to pursue an action."). To address this problem, the Bureau has "implemented a system to focus on high-priority items," which may still leave many legitimate cases unresolved. *Id.* Our proposal would address some unresolved cases and alleviate the difficulty for the Enforcement Bureau to decide which cases are "high-priority."

A. Economic Impact of Spectrum Disputes

Operators caught up in unresolved spectrum disputes are not able to make full use of the spectrum assigned to them.[7] They may be reluctant to invest in innovative technologies or buy new spectrum if they do not know how the Commission will resolve disputes.[8] Unresolved spectrum disputes may mean that operators will either have to accept the harmful interference and risk service degradation—which could mean inability to complete their mission, or losing customers and thus returns on investment—or invest in alternatives to avoid the harmful interference.[9] Operators may not be able to secure capital to exploit their spectrum rights if investors are nervous about what will happen to their investment should the operator be caught in an unresolved dispute. Moreover, because the resolution of interference complaints by rulemaking, merger rules, or ad hoc enforcement does not set precedent, companies do not benefit from knowing the boundaries of licenses, which would allow them to make smarter business decisions on how to develop their company and products.[10]

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[7] *See generally* LOUIS-ALEXANDRE BERG & DEVAL DESAI, OVERVIEW ON THE RULE OF LAW AND SUSTAINABLE DEVELOPMENT FOR THE GLOBAL DIALOGUE ON RULE OF LAW AND THE POST-2015 DEVELOPMENT AGENDA 13-14 (2013) (explaining that having a rule of law that allows "[s]trengthening accountability and checks on power, and reducing corruption," correlates to economic growth).

[8] *Comments of The WCS Coalition*, GN Dkt. No. 09-157 & No. 09-51 4 (Nov. 5, 2009), *available at* http://apps.fcc.gov/ecfs/document/view?id=7020246041 (quoting "the WCS industry is proof of the importance of regulatory certainty as a spur to wireless innovation and investment. There is no denying that, despite the best efforts of WCS licensees to explore a variety of business plans, deployment in the band has been slow. But, as the Commission knows, that can be traced to ongoing uncertainty as to the power levels at which DARS terrestrial repeaters will be permitted to operate and the interference they will be permitted to cause to WCS.").

[9] For example, U.S. satellite companies had to move satellites and reserve additional spectrum due to an interference problem. *Common Ground: Putting the Brakes on Radar Detectors*, SATELLITETODAY (Apr. 1, 2001), http://www.satellitetoday.com/publications/via-satellite-magazine/2002/04/01/common-ground-putting-the-brakes-on-radar-detectors/.

[10] *See* Michelle Hersh, *A Study on the Role of Spectrum Usage Rights Within Disputes*, 12 COLO. TECH. L.J. 445, 457 (2014) ("[S]everal argue that more attention should be given to the role of spectrum usage rights, and how more defined rights and expectations would lead to decreased ambiguity within interference disputes . . . .").

The uncertainty created by the current dispute resolution process may also result in less competition. New entrants in the market—typically, smaller companies—may not have the resources or familiarity with the Commission's current resolution process to ensure that their interference disputes are resolved fairly.[11]

The consequences suffered by operators also affect the American public. Society's reliance on spectrum is only increasing with the use of smart phones, Wi-Fi, GPS, wireless enabled medical devices, and other innovations. Harmful interference, left unaddressed, can wreak havoc.[12] Even worse, when companies do not invest in new innovations, the public does not realize the benefits from new technology that can improve their lives and create wealth. The price of usable spectrum increases unnecessarily when disputes leaves valuable spectrum unused and that cost is passed on to consumers.[13]

B. Existing Spectrum Resolution Processes and Problems

Under the Commission's current rules, parties may file interference complaints with the Enforcement Bureau.[14] The Bureau has the authority to resolve these complaints, but there is no rule that instructs the Bureau on what method it should use to do so.[15] Because the Bureau has limited resources, it must be selective about whether, when, and how to address complaints. This

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[11] *See id.* at 469.

[12] For example, 5 GHz WISP began jamming wind shear radars at airports. See Mitchel Lazarus, *Sometimes the FCC Says* Please, CommLawBlog (July 31, 2010), http://www.commlawblog.com/2010/07/articles/enforcement-activities-fines-f/sometimes-the-fcc-says-please/; *see* JOHN E. CARROOLL ET AL., NTIA REPORT SERIS, CASE STUDY: INVESTIGATION OF INTERFERENCE INTO 5 GHZ WEATHER RADARDS FROM UNLICENSED NATIONAL INFORMATION INFRASTRUCTURE DEVICES, PART III (2012), *available at* http://www.its.bldrdoc.gov/publications/2677.aspx.

[13] *See generally* Thomas W. Hazlett and Sarah Oh, *Exactitude in Defining Rights: Radio Spectrum and the "Harmful Interference" Conundrum*, 28 BERKELEY TECH. LAW JOURNAL 227, 233 (2013); *see* RECEIVERS AND SPECTRUM WORKING GROUP, INTERFERENCE LIMITS POLICY 6 (2013), *available at* http://transition.fcc.gov/bureaus/oet/tac/tacdocs/WhitePaperTACInterferenceLimitsv1.0.pdf.

[14] 47 C.F.R. § 0.111(a)(4).

[15] *See id.*

process to address disputes results in decisions that are not fact-based, transparent, and timely, as we argue here and in the next section

Dispute resolutions are not fact-based, transparent, or timely when the Bureau takes into consideration other activities at the Commission related to the dispute. For example, if a party to the dispute is part of a pending merger, the Bureau may leave it to the Commissioners to use the interference dispute as a bargaining chip to secure concessions in the merger deal, allowing the unpermitted interference to continue until the merger is completed.[16] The Bureau may also delay action if an existing rulemaking proceeding could change relevant rules in the adjudication. This is akin to a federal court delaying a proceeding because Congress is considering modifications to a related statute. In both scenarios, the Commission's decision is not based solely on the facts and current law of the dispute, so similar disputes may be decided differently and without transparent reasoning, remain pending for several years, or never reach resolution.

The Enforcement Bureau may also choose to direct an interference dispute to the Commission to resolve in a rulemaking, resulting in similarly negative outcomes. In rulemakings, parties may meet with the Commissioners to advocate for their interests, but they are not required to provide all relevant information.[17] Parties that have fewer financial resources or knowhow, particularly small companies and new entrants, are at a disadvantage in this

[16] For example, the Commission did not resolve an interference dispute between Sirius and XM, but rather required the two companies to pay large fines as part of their merger deal. Amy Schatz & Sarah McBride, *FCC Commissioners Will Approve XM-Sirius Deal*, THE WALL STREET JOURNAL (July 24, 2008), http://online.wsj.com/articles/SB121683130281477651.

[17] In non-restricted, permit-but-disclose proceedings, which include certain rulemaking proceedings, parties can meet with Commissioners to discuss the topic of the proceeding so long as they provide a public disclosure that gives a general sense of what was discussed. 47 C.F.R. § 1.1206. Existing rules require parties to provide truthful and accurate statements to the Commissioners at all times, but they do not specify that all relevant information must be provided. *See* 47 C.F.R. § 1.17.

process.[18] Moreover the Commission is under no obligation to complete rulemaking proceedings, meaning that the underlying dispute may remain unresolved.[19]

The Commission also has the discretion to send interference disputes to the Office of Administrative Law Judges for adjudication.[20] The Commission's current rules are comprehensive as to how ALJs must conduct adjudications. The rules are similar to traditional court procedures, which are meant to protect the interests of parties and ensure that a decision is based on the law and the facts before the judge: a formal complaint is filed, discovery is conducted, parties argue their side of the case, and the ALJ issues a decision.[21] After a ruling by an ALJ, a party may file a petition for review by the Commission.[22] Though this process is fact-based and transparent, we are not aware of any instances where the Bureau has exercised its authority to send interference disputes to the Office of Administrative Law Judges.[23]

Moreover, there is no rule that gives private parties the affirmative option to resolve spectrum interference disputes with other private parties using an adjudication proceeding.[24]

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[18] *See* J. Brad Bernthal, *Procedural Architecture Matters*, 1 TEX. A&M L. REV. 615, 643 (2014).
[19] *See generally* 47 C.F.R. §§ 1.411-1.429 (rules do not specify when a rulemaking proceeding must be concluded).
[20] *See* 47 C.F.R. § 0.151.
[21] Formal complaints are "generally resolved on a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments." 47 CFR §1.720; *see* 47 C.F.R. § 1.311.
[22] 47 C.F.R. §§ 1.301-1.302. The Bureau can also send disputes to its "Market Dispute and Resolution Division" where they can be resolved through alternative dispute resolution, settlement, or a full adjudication. *See Enforcement Bureau Organization*, FCC, http://www.fcc.gov/encyclopedia/enforcement-bureau-organization (last visited Apr. 15, 2015).
[23] We searched the Commission's Electronic Document Management System (EDOCS) for Administrative Law Judge proceedings and only found 31 unique proceedings between 1982 and 2014, none of which were related to spectrum interference disputes. Electronic Document Management System (EDOCS), FCC, https://apps.fcc.gov/edocs_public/result.do?parm=all (only 31 of the 48 results are unique ALJ proceedings). Based on our research, we could not find any ALJ proceeding that addressed spectrum interference disputes.
[24] Disputes may also occur between private parties and the federal government. Because government spectrum is managed under the NTIA, a separate federal entity, we do not address
(continued…)

When parties seek assistance from the Commission to resolve interference, they are limited to the Enforcement Bureau's chosen course of action. There is no way for parties to be certain whether, when, or how the Bureau will choose to address their complaint, and no mechanism to formulate a complaint as a dispute with another party. As a result, their dispute resolution may not be fact-based, transparent, or timely.

C. Past Cases Under the Current Process

The following examples illustrate how key problems with the current process lead to outcomes that are not fact-based, transparent, and timely.[25]

- **Cellular Signal Boosters** (*not transparent* / *not timely*). Many cellular signal boosters were designed in a way that had the potential to cause harmful interference.[26] Beginning in 2005, several petitions were filed to outline the need for technical and operational requirements on the use of signal boosters in cellular bands, but the Commission did not publicly disclose or discuss them.[27] Private firms, the CTIA-The Wireless Association, and the National Public Safety and Telecommunications Council urged the Commission to act. The lack of technical guidance resulted in interference that had the potential to disrupt wireless networks and phone calls, including emergency and

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those disputes in this petition. This type of dispute would likely benefit from an independent Court of Spectrum Claims. *See generally* De Vries & Weiser, *supra* note 2.

[25] These examples highlight cases when harmful interference is already occurring. This petition does not address disputes that occur when a new entrant seeks a license to use adjacent spectrum or share spectrum with an incumbent. However, these disputes may also lack consistency, transparency, and fact-based decisions. We encourage the Commission to consider seeking comment on these types of disputes when it opens a rulemaking proceeding for this petition. For an example of this type of dispute, see the M2Z/T-Mobile case. Kit Eaton, *M2Z's Free, Wireless Nationwide Broadband Plan Killed: Thank the FCC*, FAST COMPANY (Sept. 2, 2010), http://www.fastcompany.com/1686542/m2zs-free-wireless-nationwide-broadband-plan-killed-thank-fcc.

[26] Mike Marcus, *Delay at FCC*, SPECTRUMTALK (Jan. 14, 2010), http://www.marcus-spectrum.com/Blog/files/52bba26b5235f6491ab06844a44fdc66-3.html.

[27] For example, the CTIA petition could only be found on the CTIA's website, but not within the Commission's document system. *Id.*

911 calls. The CTIA filed a petition for declaratory rulemaking in 2007 to address the use of signal boosters.[28] However, the Commission did not issue a Notice of Proposed Rulemaking until 2011, and a Report & Order until 2013.[29] If a private party experiencing interference from cellular boosters could have brought an interference case directly to the ALJ, the ALJ would have had to make a decision based on the current rules and thus would have created precedent for other parties to follow. The option to bring a case to the ALJ combined with required timelines during adjudication (discussed in Section IV, *infra*) would probably have provided a faster solution than simply waiting for the Commission to clarify its rules.

- **Radar Detectors** (*not timely*). In the early 1990s, in-vehicle radar detectors began causing harmful interference to Very Small Aperture Terminal (VSAT) networks, including satellite tracking, telemetry, and control.[30] This prevented small airports from receiving weather updates and affected gas stations that rely on VSAT to transmit payment information from credit card terminals.[31] The interference forced some operators to move dishes and to reserve additional spectrum.[32] The Commission did not act for almost a decade, only issuing a Report & Order in 2002 after the Satellite Industry Association posted a press release urging the Commission to act.[33] Again, if private parties experiencing interference, such as an airport or a trade association representing

[28] *Signal Boosters*, FCC, http://wireless.fcc.gov/signal-boosters/faq.html (last visited Dec. 12, 2014); *Id.*
[29] *Id.*
[30] *Common Ground*, *supra* note 9.
[31] Paul Davidson, *New Radar Detectors Zing Small Satellite Systems*, USA TODAY (June 16, 2002), http://usatoday30.usatoday.com/money/tech/2002-06-17-radar.html.
[32] While radar detectors were supposed to be passive devices falling under Part 15 rules, many radar detectors effectively swept through police radar bands. *Id.*
[33] *Review of Part 15 and other Parts of the Commission's Rules*, First Report and Order, ET Docket 01-278, FCC 02-211(Rel. Jul. 19, 2002); Letter from Richard DalBello, Exec. Director, Satellite Industry Association (Feb.13, 2002), *available at* http://www.sia.org/wp-content/uploads/2010/PR020213.pdf.

the fuel retailing industry, could have brought a case to the ALJ, the ALJ would have had to decide the case based on the current rules and in the course of doing so would have shed further light on the specifics of the rules not addressed by the Commission.

- **FM/LTE** (*not fact-based / not transparent*)**.** In 2012, cellular operators found that incidental signal leakage from FM stations was interfering with LTE signals.[34] FM stations appeared to be complying with the requirements of their spectrum licenses.[35] However, the Commission did not allow the FM stations to provide additional facts or counterargument and instead issued a Notice of Violation to the FM stations without explaining why it was contradicting its prior pseudo-precedent.[36] If the parties had been able to bring a case to the ALJ, the ALJ instead would have made a reasoned and specific decision based on an explanation of the existing rules. The precedent provided could have been beneficial to other FM stations and LTE operators.

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[34] Peter Tannenwald, *Harmonic Convergence? FM Interference to 700 MHz LTE Service*, COMMLAWBLOG (June 25, 2013), http://www.commlawblog.com/2013/06/articles/broadcast/harmonic-convergence-fm-interference-to-700-mhz-lte-service.

[35] *Willpower Radio, L.L.C. Licensee of Radio Station WKZE-FM*, Notice of Violation, NOV No. V201332380007 (Rel. June 19, 2013), *available at* http://www.fhhlaw.com/WillpowerRadioNOV.2013.06.19.pdf; The Notice of Violation holds the FM station liable without explanation and without allowing FM stations to provide evidence of their compliance with the rules. Tannenwald, *supra* note 37. ("If the Bureau really thinks that the FM station's equipment doesn't satisfy the rules, it should say why it thinks that").

[36] *Id*. By "pseudo-precedent" we mean that in the past the FCC has traditionally given an incumbent operator preference in an interference dispute with a newer operator. While the FCC has never formally made this a precedent, it was a custom that operators may have relied upon. *Id*. ("[f]or the last several decades, at least, the Commission has imposed a "last-in" policy to handle interference problems that arise when one spectrum user's newly-commenced operation causes or receives interference from other nearby spectrum users. If all the various players are using gear that complies with all applicable rules, the "last-in" policy calls for the new kid on the block to fix things").

II. The Commission should adopt an "ALJ Option" rule that allows a private party to file a spectrum interference complaint against another party directly with the Office of Administrative Law Judges.

The Commission should adopt a new "ALJ option" rule that allows a private operator to file a spectrum interference complaint against another private operator directly with the Office of Administrative Law Judges (Office).[37] Currently, there is no direct way for parties to bring a case to the Office. The Commission would only need to create a new rule to allow a party to bring a case directly to the ALJ, but the Commission would not need to create a new set of rules to govern adjudication as these rules already exist. The next four subsections discuss the benefits of this rule to operators, the benefits to the Commission, how the rule could have been beneficial in the example cases we highlighted above, and checks and balances that should be provided in the rule to prevent abuse.

A. Proposed Scope

The scope of our proposed rules is limited, and the ALJ option would not be appropriate in all cases.

Cases that would fall within scope are those where appropriate FCC rules already exist, where both parties are under the FCC's jurisdiction, and where one private party claims that another private party is causing harmful interference. Parties eligible to file claims would include licensees, unlicensed operators who believe they have rights of protection against harmful interference, and representative groups such as trade associations. Defendants could include licensed and unlicensed operators of radio systems, operators of incidental radiators, and equipment manufacturers, distributors, and vendors. Cases might include the aforementioned cellular licensees against FM broadcasters and a VSAT operator trade association against radar jammer manufacturers or distributors, or cellular licensees acting against building owners using

[37] We explored but rejected the possibility of defining categories of disputes that would be automatically routed to an ALJ. We determined that it would be too difficult to determine the standards that would be used to evaluate the cases. Furthermore, an option-based approach will allow parties to make the most appropriate decision for their circumstances.

interfering fluorescent light systems or contending Wireless Communications Services (WCS) and Satellite Digital Radio System (SDARS) licensees.[38]

The ALJ option would not be appropriate for disputes between the government and private parties or disputes where rules are not yet in place. Our proposed rules would not benefit operators that experience interference from parties not amenable to an ALJ's imposed fine or ruling (i.e. pirate radio station operators). Parties under the jurisdiction of the NTIA, and parties that are already bound by a contract that provides for dispute resolution, would not be able to avail themselves of the ALJ option.

Regardless, the ALJ option would be ideal for small bilateral disputes, while rulemaking by the Commission would be more appropriate for multi-party disputes and single-party cases that highlight broader problems. The outcomes of bilateral disputes resolved by an ALJ might often lay the groundwork for a rulemaking. Our examples and proposed scope is not meant to be exhaustive and we urge the Commission to seek comment on the appropriate scope.

B. Benefits to Private Parties

The ALJ option rule would give operators the option to take advantage of existing rules that provide for fact-based and transparent adjudications in front of an ALJ. These rules specify the use of a comprehensive discovery process and require parties to provide complete and truthful information throughout the proceeding.[39] As such, parties would not be able to withhold details in

[38] Mitchell Lazarus, *Bulbs Behind Bars II: FCC Goes After Hair Salon Lighting Fixture*, COMMLAWBLOG (Oct. 29, 2014), http://www.commlawblog.com/2013/10/articles/enforcement-activities-fines-f/bulbs-behind-bars-ii-fcc-goes-after-hair-salon-lighting-fixture/print.html; Stephen Lawson, *LA Building's Lights Interfere With Cellular Network, FCC Says*, PCWORLD (Feb. 7, 2014), http://www.pcworld.com/article/2095940/la-buildings-lights-interfere-with-cellular-network-fcc-says.html.

[39] 47 C.F.R. §§ 1.201-1.298.

hopes of achieving a favorable decision from the Commission. Instead, the ALJ would have the necessary information to reach a decision based on the facts and applicable rules in the case.[40]

The ALJ option rule would not replace current options available to parties experiencing interference disputes as parties can still take their cases to the Enforcement Bureau or the Commission.[41] Furthermore, the parties would still have the option to take their complaint to the Enforcement Bureau where the Bureau could send the case to Alternative Dispute Resolution.[42] If the ALJ option rule proves to be effective, parties will avail themselves of it.[43]

If parties use the ALJ option rule, ALJ decisions and adjudication records will create precedent that is beneficial to other operators. In most cases, the Commission's action on interference disputes does not create precedent, as when the Commission resolves disputes through merger conditions and through rulemaking processes.[44] Precedent helps operators define the boundaries of their spectrum assignments and could guide future parties through similar disputes.[45]

The consistency of a fact-based and transparent adjudication process will promote investment, innovation, and competition. Increased certainty will give companies and investors greater confidence on how they can invest and innovate to make full economic use of their spectrum. Competition will benefit because new entrants and smaller companies that do not have the resources or know-how to navigate the current process will not be forced out of the market

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[40] 47 C.F.R. §1.267(b).
[41] *See* 47 C.F.R. § 1.401.
[42] *EB – Interference Complaints*, FCC, http://transition.fcc.gov/eb/interference (last visited Dec. 5, 2014); C.F.R. § 0.111(19), (20).
[43] Other options outside of the FCC still exist; for example, parties can resolve harmful interference issues bilaterally, which keeps transaction costs low and does not tie up limited Commission resources. Parties may also hire their own mediator or arbitrator.
[44] Schatz & McBride, *supra* note 19.
[45] *See* Fahed Fanek, *Uncertainty Hurts Investment, Growth*, THE JORDAN TIMES (Sept. 9, 2012), http://jordantimes.com/uncertainty-hurts-investment-growth.

by decisions that, due to a lack of transparency, seem not to be based on the facts. This increased investment, innovation, and competition will ultimately benefit the American public.

C. Benefits to the Commission

The Commission would also benefit from this rule change. ALJ decisions could highlight ambiguous or problematic rules that may require action by the Commission. If an ALJ determines that both parties are operating within the rules, yet there is still harmful interference, then the ALJ can make the best decision possible based on the facts, circumstances, and precedent. If the Commission disagrees with an ALJ's decision, it has the option to review the record and overrule the decision, so long as it provides justification.[46] The Commission may also initiate a rulemaking to change or clarify the rules that caused the problem in the first place.[47]

The ALJ option rule may in fact facilitate dispute resolution before adjudication proceedings. Because operators will no longer be able to be selective in their disclosure of information to obtain favorable decisions when faced with the prospect of a fact-based proceeding, they will have additional incentives to reach a fair bilateral agreement. Furthermore, ALJs can encourage a mediated alternative dispute resolution process before formal adjudication begins.[48] Alternative dispute resolutions may incentivize parties to reach agreements before coming to the Commission and may disincentivize parties from trying to drive up costs for an opponent by filing complaints to force them into adjudication. Even if those options fail, parties may be more inclined to settle after the discovery process brings to light the facts of the situation. A decision by an ALJ is likely to be the exception rather than the rule since cases will be settled before that stage is reached.

[46] 47 C.F.R. §1.276 (b); 47 C.F.R. §1.282.
[47] *See* 47 C.F.R. § 1.411.
[48] 47 C.F.R. §1.18(a).

D. Benefits in Previous Cases

The ALJ option rule would have had significant benefits in the cases highlighted above. In the Cellular Signal Boosters and Radar Detectors cases, where interference was caused by a lack of technical rules and inadequate requirements on operators, the parties would not have needed to file multiple petitions or rely on the power of industry associations in order to force an action. They would have only needed to file a complaint with the Office of Administrative Law Judges to initiate a proceeding, which ultimately would have resulted in a quicker resolution of the interference disputes. A transparent adjudication in the Cellular Signal Boosters case would have also ensured that the filings were publicly disclosed. Additionally, the FM stations in the FM/LTE case would have benefitted from the ability to take their case directly to an ALJ, whose reasoning would have been fact-based and transparent. The ALJ's reasoning in a judgment would have provided guidance for other parties in similar circumstances.

E. Checks and Balances

We acknowledge that allowing one party to file a complaint against another party directly with the ALJ has the potential to be misused. We propose that the Commission provide procedural checks and balances that will prevent frivolous cases from being brought. For example, the Commission could prescribe pleading requirements, allow one party to move for summary judgment, or allow for sanctions.[49] The Commission can also look to the Administrative Procedure Act, supplemented by the Federal Rules of Civil Procedure, for guidance, and seek comments from the public.[50] Furthermore, if and when several cases are brought before the ALJ, then the Commission can revisit the procedural rules and adjust them as needed.

[49] *See* 5 U.S.C. §§ 554(e), 588. *See* Fed. R. Civ. P. 8.
[50] 5 U.S.C. §§ 554-558.

An ALJ's inability to order the offending party to pay damages or order an injunction against the offending party may lead some parties to practice efficient breach.[51] We do not have a proposed remedy at this time, and ask that the Commission to consider remedies and to seek comment from the public to address this issue.

III. The Commission should set deadlines throughout ALJ adjudications for spectrum interference disputes.

The Commission should adopt rules that set deadlines throughout the interference dispute adjudication process. Existing rules for adjudications do not include deadlines to ensure that decisions are issued in a timely manner. The Commission's current process to address interference complaints also does not include deadlines and this has resulted in significant delays in the issuance of decisions. Implementing deadlines to govern disputes from the moment a complaint is filed to the moment a decision is issued would ensure that disputes are taken up quickly and resolved in a timely manner. The process described above for reviewing and overruling an ALJ's decision could also benefit from having deadlines in place to ensure that the review process is efficient.

Implementation of deadlines for adjudications is common. The Commission need look no further than its own rules for program carriage complaints to find such deadlines.[52] Other federal, state, and foreign agencies also have deadlines for their adjudicatory processes. The examples below could provide the Commission with guidance to develop deadlines for spectrum adjudications. The Commission should also seek comment to develop deadlines that ensure adjudications are completed in a timely manner.

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[51] *See* 47 C.F.R. § 1.267(c) ("The authority of the Presiding Officer over the proceedings shall cease when he has filed his Initial or Recommended Decision . . . ."); efficient breach occurs when one party voluntarily breaches its contract because it is economically better for the party to breach than to continue to participate in the contract. *See* 11-55 Corbin on Contracts § 55.15 (2014). In the case of spectrum interference a party may not fix the interference problem because it is economically better for the party to pay fines rather than solve the problem.

[52] 47 C.F.R. § 0.341; 47 C.F.R. § 76.1302; 47 C.F.R. § 1.248.

- At FERC, the agency has made an effort to streamline the adjudication process by developing a timeline for disputes based on the dispute's complexity.[53]
- In California, the PUC's rules state that "adjudication cases shall be resolved within 12 months of initiation unless the commission makes findings why that deadline cannot be met and issues an order extending that deadline."[54]
- The Austrian Telecommunications Act requires the Telecom-Control-Commission (TKK) to issue decisions within six weeks, with a possible four months for delay.[55]
- In France, the national regulator must act within three months with the possibility of a six-month extension.[56]
- In Germany, disputes must be resolved in six weeks, with a possible extension of four weeks.[57]

These timelines would have benefitted the parties in the actual cases highlighted above.[58] It took the Commission more than six years to resolve the Radar Detectors and Cellular Signal Boosters cases. If the parties had used the ALJ option, including timelines for adjudications, a decision would have been reached in substantially less time.

IV. The Commission should allocate sufficient resources to facilitate an effective adjudication process.

The Commission should ensure that the Office of Administrative Law Judges has enough ALJs and support staff to ensure timely and effective spectrum interference adjudications.

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[53] For example, a Simple Case, or Track I case, will have an initial decision 29.5 weeks after the Commission issues an order designating the presiding judge. *Summary of Procedural Time Standards for Hearing Cases*, FERC, http://www.ferc.gov/legal/admin-lit/time-sum.asp (last updated June 28, 2010).

[54] Cal. Pub. Util. Code § 1701.2(d).

[55] Telecommunications Act 2003 [tkg 2003] BGBl i No. 70/2003 §§ 50, 121 (Austria).

[56] Robert R. Bruce et al., *Dispute Resolution in the Telecommunications Sector* 102 (2004), *available at* http://www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf.

[57] *Id.*

[58] *See* discussion *supra*, part I.I.C..

Furthermore, the Commission should make a spectrum technical advisor to the ALJ by hiring or by temporarily reassigning a staff member internally from another unit such as the Office of Engineering or the Wireless Bureau.

Implementing the ALJ option rule will not automatically and immediately result in a burdensome amount of work for the Office of Administrative Law Judges. We were not able to identify any past or pending spectrum related proceedings before the Office of Administrative Law Judges.[59] As such, the Office may be able to handle initial complaints that are filed immediately after the ALJ option rule is implemented. In addition, current rules allow individual Commissioners to preside over hearings, which could be a temporary solution if there is a high volume of disputes.[60]

The Commission should hire or reallocate staff from the Wireless Telecommunication Bureau, the Enforcement Bureau, or Office of Engineering & Technology when needed. As parties begin to use the ALJ option, staffing changes will be necessary to ensure that disputes are resolved effectively and in accordance with the timelines prescribed above. A spectrum technical advisor would ensure effective resolution of disputes because the advisor can explain the technical details of a harmful interference case to ensure decisions are fact-based. The spectrum technical advisor should have engineering expertise.

In one model, the technical adviser would review only the technical information filed by the parties and provide an unbiased assessment of the interference issues. Alternatively, the technical adviser could act as a "Special Master" and have a more substantial role in the proceeding, which can be modelled on the Federal Rules of Civil Procedure Rule 53.

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[59] *Organizational Chart*, Office of Administrative Law Judges, FCC, http://transition.fcc.gov/oalj/orgchart.pdf (last visited Dec. 5, 2014); Electronic Document Management System.

[60] 47 C.F.R. § 0.218(a).

Alternatively, if hiring or reallocating staff is not a current option, the Commission can designate an existing staff member from the Wireless Telecommunications Bureau, the Enforcement Bureau, or Office of Engineering & Technology to serve as a temporary or as-needed adviser to the ALJ. Furthermore, the ALJ could benefit from advisory opinions from one or more of the Bureaus, and should be empowered to request them. We encourage the Commission to seek comments from the public on the options provided and to solicit alternative ideas.

Additional support staff will help adjudications run efficiently and timely, as they can handle all administrative tasks and logistics for the ALJ. The Commission could look to FERC as an example of how these changes can be implemented and how they will be beneficial. FERC currently has eight support staff and an energy industry advisor to assist with adjudications.[61]

Conclusion

Under the Commission's existing interference resolution procedure, operators cannot be certain whether, when, or how a harmful interference claim will be resolved. Without the ability to lodge a dispute directly against another operator, they have to rely on the Commission taking action. Operators caught up in unresolved disputes cannot make full use of their spectrum operating rights and may suffer economic and other losses.

The Commission should provide a fact-based, transparent, and timely process to handle spectrum interference disputes. To achieve this, the Commission should adopt the ALJ option rule, which would allow private parties to file spectrum interference complaints against other private parties directly with the Office of Administrative Law Judges. Furthermore, the Commission should modify existing rules to add deadlines to the adjudication process. Finally, the Commission should hire new support staff, ALJs, and a spectrum technical advisor to facilitate an effective adjudication process.

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[61] *Office of Administrative Law Judges and Dispute Resolution*, FERC, http://www.ferc.gov/about/offices/oaljdr/org-oaljdr.asp (last updated Sept. 12, 2014).

We have demonstrated how our proposed rule changes and clarifications would have benefitted the actual cases we highlighted. These rules will benefit the Commission and private parties that bring future spectrum interference disputes to the Commission as well. A fact-based, transparent, and timely adjudication process will promote investment, innovation, and competition, ultimately benefitting the American public.

Respectfully submitted,

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