Before the
Federal Communications Commission
Washington, DC

In the Matter of:	)	
Amendment to Commission Rules	)	
Concerning Adjudication of Spectrum	)	RM-11750
Interference Disputes	)	

Reply of the

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Summary

The comments filed in response to our May 2015 petition for rulemaking show that the Commission should pursue the Administrative Law Judge (ALJ) option described in the petition. The ALJ option would provide a timely, transparent, and fact-based mechanism to help solve legal problems in conjunction with the current system of cooperation amongst engineers. Most commenters in the proceeding agree that significant problems exist with the Commission's current harmful interference dispute resolution mechanisms—i.e., field office investigations and formal Commission proceedings—and that these problems need to be addressed. The record further demonstrates a shared concern about the future of spectrum use and the rise of interference between parties.

The ALJ option would not foreclose or even discourage engineers from cooperating to find solutions to technical problems. However, spectrum interference disputes often rest on legal questions, not technical ones. Where two parties operate within the Commission's rules but one still experiences harmful interference, determining who bears the costs of resolving such complex issues is a legal matter that would best be solved by an ALJ.

While some commenters expressed concern over the ALJ option's potential to increase costs to spectrum users, the current system of interference dispute resolution is already complex and costly. The current regulatory regime for resolving harmful interference disputes financially burdens operators by denying them a private right of action. We believe the ALJ option is unlikely to increase costs significantly, if at all.

Furthermore, the ALJ option would reveal and resolve interference disputes that the current system obscures. It would also create greater transparency by providing a clear indication of trends that are causing or contributing to harmful interference, and highlight problems of general applicability that merit being addressed outside the context of individual adjudications.

The recent cutbacks to the Enforcement Bureau necessitate that the Commission consider the ALJ option and other alternative measures for spectrum interference dispute resolution. While some commenters assert that the ALJ option would burden the Commission's already-strained resources,

we believe that the combination of court fees and cost-shifting provisions would largely or entirely alleviate any burden. The nature of an open discovery process would also alleviate the demands on the Commission's technical experts and resources that would be required of a more centralized, Commission-driven dispute resolution process. The Commission has the resources to support the ALJ option, and doing so would more fairly apportion costs to the parties who benefit from dispute resolution without impacting the Commission's budget or putting public safety services at risk.

Commenters provided numerous ideas to help solve the problems inherent in the current spectrum interference dispute resolution process. We believe that many of them can be implemented or adopted in conjunction with the ALJ option. On the basis of this record, we urge the Commission to grant the petition and proceed with a rulemaking to reform the interference dispute resolution process.

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Discussion

The Samuelson-Glushko Technology Law and Policy Clinic (TLPC) at the University of Colorado and Pierre de Vries respectfully submit this reply to the comments filed in response to the above-referenced petition for rulemaking.[1] In the petition, we urged the Commission to establish a private right for parties to bring interference disputes directly to the Office of Administrative Law Judges to increase the timely, transparent, and fact based nature of the dispute resolution process.[2]

As we discussed in the petition, the Commission's current dispute resolution procedures often fail to adequately resolve spectrum interference disputes when they arise. This problem will only grow as spectrum use increases. Currently, licensees must deal with issues such as increased band fragmentation arising from assignment of spectrum into small geographic licenses, difficulties in range and fixed technologies co-existing, and the use of the spectrum by unlicensed users, among other things.[3] As a result, users are being packed more tightly together and the boundaries between bands are becoming increasingly fraught. Thus, parties will increasingly dispute the rights that correspond with their licenses.

One common Commission procedure to resolve interference disputes is field office investigations and the subsequent collaboration among parties to resolve problems once they are identified. However, as the Sirius XM/T-Mobile dispute exemplifies, these procedures are not always adequate in more complex cases where legal rights are in dispute; there seems to be agreement about

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[1] The Technology Law & Policy Clinic (TLPC) is a legal clinic at Colorado Law. 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. Pierre de Vries is a Senior 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. Based on a conversation with Commission staff, we believe this filing is authorized under the terms of Rule 1.405(c). *See* 47 C.F.R. § 1.405(c).

[2] *See generally* Samuelson-Glushko Technology Law & Policy Clinic (TLPC) and J. Pierre de Vries, Petition for Rulemaking: Spectrum Interference Dispute Resolution, Docket No. RM-11750 (May 8, 2015).

[3] J. Pierre de Vries & Philip J.Weiser, Unlocking Spectrum Value through Improved Allocation, Assignment, and Adjudication of Spectrum Rights, 11 (March 2014).

the causes of the harmful interference and existing Commission procedures, but no clear rules dictate who should bear the cost of addressing the issue.[4] Therefore, many of these complaints never get addressed and sit idly with no remedies available to the parties.

When the field offices cannot handle an interference dispute, the parties may still petition the Commission directly for answers. Unfortunately, rulemaking proceedings are slow and costly, particularly for parties that need quick resolution so that they may continue to operate. Furthermore, petitioning the Commission also includes the risk that the resolution of an interference dispute may be bundled with unrelated proceedings.[5]

As we noted in our petition, allowing parties to bring disputes to an administrative law judge (ALJ) who can decide the legal rights of the parties would allow for increased clarity and timely resolution.[6] The scope of our proposed rules is limited to cases where applicable Commission rules already exist, where all parties to the dispute are under the Commission's jurisdiction, and where one party claims that another party is causing harmful interference.[7]

Commenters generally agree that the current interference dispute resolution process needs to be improved. The ALJ option proposed in the petition can resolve legal issues in the situations where technological answers and collaboration fail. Furthermore, the ALJ option will both reduce costs to private parties as well as reduce the strain on existing Commission resources. While we believe that allowing parties to bring disputes directly before an ALJ best solves the issues with the current interference dispute resolution process, the Commission should at a minimum initiate a rulemaking to explore the ALJ option and other possible improvements to the dispute resolution process.

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[4] Thomas Gryta, *Sirius, T-Mobile Spat Over Airway Interference*, The Wall Street Journal (Sept. 30, 2015), http://www.wsj.com/articles/sirius-t-mobile-spat-over-airwave-interference-1443649368.

[5] *See* T. Randolf Beard, George S. Ford, Lawrence J. Spiwak, & Michael Stern, *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC* 1 (2015) ("[R]egulation 'as practiced' now may allow an administrative agency to expand greatly its power beyond its statutory mandate via 'voluntary' concessions by regulated firms that are only a part of a larger bargain across multiple issues (e.g., mergers and acquisitions, waiver requests, declaratory rulings).")

[6] *See generally* TLPC Petition.

[7] *Id.* at 10.

I. The record demonstrates consensus there are flaws with the current dispute resolution system that should be addressed by the Commission.

The majority of the commenters in this proceeding agree that problems exist within the Commission's current enforcement procedures that need to be addressed. Specifically, AT&T, Lockheed Martin Corporation (Lockheed Martin), the Enterprise Wireless Alliance (EWA), and the National Public Safety Telecommunications Council (NPSTC) generally agree with the petition's call for timely, transparent, and fact-based resolution to interference disputes.[8]

Lockheed Martin, Sirius XM, and AT&T all agree that harmful interference, when not timely addressed, adversely affects operators and reduces the efficacy of radiofrequency spectrum use.[9] Lockheed Martin emphasizes the need for updates to the current Commission procedures, explaining that "[i]ndustry, governments, and regulators around the world are under increasing pressure to intensify the use of the limited spectrum resource to meet rising demand and ever-expanding rate of innovation and automation" and that "resolution of the sharing and compatibility issues by the [FCC] and interested parties from industry . . . can take years to achieve."[10] Similarly, the Information Technology & Innovation Foundation (ITIF) agrees that "[t]he availability of

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[8] Comments of AT&T, at 2 (July 13, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001115011 ("AT&T agrees with Petitioners that interference dispute resolution process must be fact-based, transparent, and timely…"); Comments of the Enterprise Wireless Alliance, at 1-2 (July 13, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001114881 ("EWA also agrees that the current process for resolving interference problems is not entirely predictable either in terms of timing or outcome."); Comments of the National Public Safety Telecommunications Council, at 1 (July 13, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001114984 ("NPSTC fully supports the goal of fact-based, transparent, and timely process for interference resolution"); Letter from Sirius XM Radio Inc., at 1 (Aug. 10, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001121025 ("Sirius agrees with the Petitioners and other parties that improvements to the Commission's interference resolution processes are needed and long overdue…"); Comments of Lockheed Martin Corporation, at 1 (July 13, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001115056 ("Lockheed Martin concurs with the policy concern that undergirds the Petition—namely that harmful interference, particularly if not timely and effectively addressed, poses a serious threat to the efficacy of the use of the radiofrequency spectrum.")

[9] Lockheed Martin Comments at 1-2; AT&T Comments at 2; Sirius XM Letter at 2.

[10] Lockheed Martin Comments at 1-2.

simple mechanisms could streamline resolution of spectrum contentions that lie between the easy cases of wireless operators and the hard cases of large-scale interference to operations affected with the public interest."[11]

The Enterprise Wireless Alliance agrees that there is a lack of predictability in current interference dispute resolution processes in both the outcome and timing of resolution.[12] AT&T echoes these concerns, describing how field office procedures may vary from region to region—variability that makes it difficult for parties to understand how different procedures will be applied from one situation to the next. Sirius XM agrees that the current system for resolving interference disputes is particularly susceptible to external pressures that may be unrelated to the service degradation.[13]

Furthermore, commenters agree with the need for fact-based resolution processes. The Telecommunications Industry Association (TIA), for example, concurs that technical, fact-based approaches to spectrum management are necessary, noting that "[s]pectrum policy development is often a highly technical endeavor that relies on inputs from a wide range of stakeholders, including information about new scientific and technology developments, and information about products that may not yet have been brought to market."[14]

The record also demonstrates a shared concern about the future of spectrum use and the rise of interference between parties. AT&T notes that the volume of interference disputes will increase due to the use of wideband technologies that respond differently to interference sources than legacy networks; increased utilization of spectrum and minimization of guard bands in between adjacent

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[11] ITIF Comments, at 2 (July 14, 2015), http://apps.fcc.gov/ecfs/comment/view?id=60001092986.
[12] *See* EWA Comments at 2.
[13] Sirius XM Letter at 4; *see also* Reply Comments of T-Mobile, at 9 (July 28, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001118928 (T-Mobile disagrees with this assertion, arguing that no other party in this proceeding has expressed concerns about the Enforcement Bureau tying interference proceedings to other Commission proceedings.)
[14] Comments of the Telecommunications Industry Association, at 3 (July 13, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001115054.

services; public safety networks that use receiver technology that is not state of the art; and future allocations involving either shared or repurposed spectrum.[15] ITIF likewise worries that the historic trend of increased spectrum use will require coordination of an "increasing diversity of services, services that may well have different waveforms, different (and sometimes conflicting) business models, and different levels of familiarity with regulatory processes."[16]

Sirius XM similarly argues that the Commission's shift from site-based licensing towards geographic licensing with broad operating parameters only exacerbates these problems; scenarios where parties cannot solve interference issues by themselves will continue to increase as a result.[17] This dynamic is exemplified by Sirius XM's dispute with T-Mobile, discussed in more detail in the next section, where there seems to be agreement about the causes of the harmful interference and existing Commission procedures but no clear rules dictating who should bear the cost of addressing the issue.[18]

While these problems all present a challenge to the Commission, our proposal is a possible solution. However, even if the Commission does not adopt the ALJ option, these problems will not go away. Therefore, regardless of whether the Commission decides to pursue the ALJ option, the Commission should initiate a rulemaking to solicit comments on other possible solutions moving forward.[19]

II. The ALJ option promises to resolve legal issues in circumstances where technological answers and cooperation are insufficient.

Technical questions often surround harmful interference disputes between spectrum operators. Therefore, many spectrum disputes involve detailed technical analysis, and adjudicators may not be competent to resolve technical arguments.

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[15] AT&T Comments at 2.
[16] ITIF Comments at 1.
[17] *Id.*
[18] Gryta, *Sirius, T-Mobile Spat Over Airway Interference*.
[19] *See* discussion *infra* at Part IV.

The Satellite Industry Association (SIA) argues that the existing good faith coordination obligations between spectrum operators have proved sufficient over the years to resolve interference disputes.[20] There is no doubt that spectrum interference disputes can have a substantial technical component, and ideally engineers would work together to resolve these disputes before legal action is sought against another party.

However, under our proposal, any new dispute resolution process would still begin at the Enforcement Bureau's field offices. The ALJ option would not replace the current system of technical cooperation, and any dispute resolution mechanism would require consultation among engineers at the outset. We agree with TIA that Commission findings of fact should only be invoked when doing so will not discourage collaboration.[21]

The ALJ's role is not to decide complex technical matters, but rather to resolve the legal questions surrounding spectrum rights. The ALJ option would not foreclose the possibility of engineers adopting cooperative solutions to technical problems, but rather facilitate resolution of cases in which these cooperative solutions fail to provide adequate remedies.

For example, the technical causes of the interference at issue in the T-Mobile/Sirius XM dispute in New York are relatively well established. However, neither party concedes that it should bear the costs of resolving the issue.

While some facts regarding the interference are in dispute, there seems to be agreement about the core problem: that intermodulation of T-Mobile's AWS and PCS signals in Sirius XM's receivers cause radio service interruption at certain locations where T-Mobile transmitters deliver a lot of

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[20] *See* Comments of the Satellite Industry Association, at 2 (July 13, 2015) http://apps.fcc.gov/ecfs/document/view?id=60001115006.

[21] TIA Comments at 2. Indeed, the ALJ option can and should be structured in a way that prioritizes collaboration and negotiation over litigation. When an operator is experiencing harmful interference, the ALJ option could require that the parties first attempt to negotiate in good faith with each other as a condition precedent to initiating an action with the ALJ. The applicable standards for what constitutes "good faith" negotiation in interference disputes could be drawn from of good faith negotiation doctrines of contract law, for example. *See generally* Restatement (Second) or Contracts § 205 (1981).

power at street level. However, T-Mobile argues that the receivers are subpar and Sirius XM should bear the costs of upgrading them.[22]

Rather than subjecting this dispute to the costly and indeterminate interference dispute resolution process at the Enforcement Bureau or a rulemaking before the Commission at large, either Sirius XM or T-Mobile could, under the ALJ option, simply bring this issue directly to an ALJ who would quickly resolve it. Furthermore, the technical claims made by both sides could be substantiated during a discovery process, which would allow both large and small parties to resolve their issues fairly.

Lockheed Martin argues that there are no legal questions that can be answered by an ALJ.[23] However, many instances occur where legal analysis would benefit the current system of technical cooperation. The ALJ option could help provide clear legal guidance about the scope of ambiguous terms. For example, "harmful interference" lacks an unambiguous legal definition that can be mapped to the technical aspects of particular spectrum interference disputes. Does "harmful interference" relate to harm claim thresholds, as T-Mobile suggests, or are there legal or policy arguments that provide support for another definition?[24] The ALJ option would provide a clear path to defining ambiguous terms and provide clearer guidelines to engineers resolving technical disputes.

Relatedly, the ALJ option would provide transparency that the current system of cooperation amongst engineers cannot provide. An interference dispute resolution process overseen by an

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[22] Sirius XM Radio Letter, Exhibit 1.

[23] Lockheed Martin Comments at 2-3. ("Lockheed Martin, however, does not agree with the Petitioners that the solution to this constant pressure on use of the limited radiofrequency spectrum resource is to be found in the adoption of a new layer of rules and regulations that would rely on administrative law judges.")

[24] Letter from T-Mobile, at 2 (September 10, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001323739.

independent, quasi-judicial arbiter would ensure that the decisions are properly insulated from Commission business unrelated to enforcement proceedings.[25]

The Enforcement Bureau, on the other hand, uses "other related proceedings underway" as one of five criteria to determine its enforcement strategy.[26] Concepts of due process, fairness and justice become murky when a case is decided or heavily influenced by factors unrelated to the spectrum interference dispute. This may be problematic when a party to a dispute has fewer "related proceedings" at the Commission than its opponent and is thereby placed at a disadvantage in bargaining.[27]

Moreover, effective spectrum policy relies upon precedent. The use of issue bundling sharply attenuates the value of precedent because every outcome is a result of a bargain under the facts of each particular case.[28] An ALJ would calm concerns about issue bundling and provide additional transparency, fact-based and timely resolution in accordance with the basic principles of justice and due process.

Finally, as the Commission moves away from command-and-control regulation and introduces property-oriented regimes, clearly defined spectrum rights are necessary to facilitate Coasean bargaining and reduce uncertainty and costs to the industry when negotiating or litigating spectrum interference disputes.[29] A legal forum would provide answers to questions of property rights and

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[25] *See* Sirius Letter at 4. ("An interference resolution process overseen by an independent, quasi-judicial arbiter would ensure that the Commission's technical decisions are properly insulated from policy initiatives and other considerations.")

[26] *See* Tyler Cox & Megan Coontz-McAllister, *Getting Beyond Command-and-Control Regulation in Wireless Spectrum*, Conference Report 8 (April 2015), http://www.silicon-flatirons.org/documents/publications/report/201504SpectrumConferenceReport.pdf.

[27] Spiwak, Lawrence J., *How Congress lost control of the regulators.* (October 27, 2015), http://thehill.com/blogs/pundits-blog/technology/258175-how-congress-lost-control-of-the-regulators.

[28] *Id.*

[29] *See generally* McAfee, R. Preston and Tracey R. Lewis, *Introduction to Economic Analysis, v. 1.0*, found at http://catalog.flatworldknowledge.com/bookhub/13?e=mcafee-ch07_s05 (". . . bargaining can generally solve problems of externalities and . . . the real problem is ill-defined property rights.")

who bears the costs of fixing harmful interference, and would over time build a useful body of precedent.

III. The ALJ option will reduce costs for operators and facilitate innovation.

Some commenters express concerns over the ALJ option's potential to increase costs to spectrum users.[30] Although these commenters do not consistently identify potential harms, they seem generally concerned that the ALJ option would result in increased costs for both incumbent and prospective operators wishing to establish and protect their spectrum rights.

These concerns are unfounded. The Commission's current dispute resolution mechanisms for parties experiencing harmful interference arguably impose substantial costs on the industry already. Moreover, the ALJ option would be an improvement on those harmful interference dispute resolution processes. Finally, the ALJ option could be designed to limit needless costs.

A. The uncertainty of the current harmful interference dispute resolution process already imposes significant costs on the industry.

The most common objection to the ALJ option is that litigating disputes would be more costly and time-consuming to operators than the Commission's current enforcement and dispute resolution mechanisms.[31] However, this objection does not take into account the high costs that already exist within the Commission's current mechanisms.

Operators bear the cost of discovering the source of harmful interference, both in terms of time spent and resources expended. Once the source has been identified, there is typically no

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[30] T-Mobile Comments at 5; T-Mobile Letter at 2, 5-6; TIA Comments at 3-4; Lockheed Martin Comments at 4-5; NPSTC Comments at 6.

[31] T-Mobile notes that "…the ALJ option would likely harm private parties, particularly smaller businesses, because it would force them to incur substantial costs such as hiring attorneys, consultants, and other staff to engage in the complex ALJ process" and that "[t]he ALJ Option would also require private parties to undergo the highly time-consuming and resource-intensive task of engaging in the discovery process." T-Mobile Comments at 5. The TIA argues that under the ALJ option, even parties not immediately subject to any litigation would likely incur increased legal expenses; "[a]ppropriate stakeholders" would have to monitor ongoing interference dispute litigation so that they might timely intervene in cases whose precedents might affect their interests. TIA Comments at 3. T-Mobile echoed the same concern. T-Mobile Comments at 5.

requirement that parties negotiate with each other before bringing the dispute to the Commission.[32] The Enforcement Bureau is empowered to take action in the event of a violation of Commission rules, but these measures may not provide satisfactory relief to the party or parties experiencing harmful interference.

We have outlined our understanding of the existing mechanisms for harmful interference dispute resolution in Figures 1-4 at the end of this document.[33] Figure 1 shows the general outline of the Commission's enforcement processes, with our proposed addition in the dashed boxes. Parties can file complaints directly with the spectrum enforcement division, outlined in Figure 2.[34] Complaints will be categorized based on their severity, and the local field office should respond to the entity within the time specified with relevant information and an expected timeframe for resolution.[35] The complainant may contact the Regional Director a week after this initial contact period and may contact the Field Director after two weeks.[36]

These procedures do not establish concrete deadlines for actually resolving disputes. If a field office is able to resolve a harmful interference issue, such office will use the processes outlined in Figure 3.[37] However, harmful interference may occur even when all parties are operating within the Commission's rules.

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[32] *See* 47 C.F.R. § 27.64.

[33] *See infra* at Figures 1-4. The ALJ option and related proposed additions are drawn in dashed boxes.

[34] *Interference Complaints*, FCC Guides, https://www.fcc.gov/guides/interference-complaints (last visited Nov. 30, 2015).

[35] *See* Enforcement Bureau Enhances Procedures for Public Safety and Industry Interference Complaints, Public Notice, 30 FCC Rcd. 8574, 8575 (Aug. 17, 2015)

[36] *Id.*

[37] Enforcement tools available to the field offices include Notice of Violations and Forfeiture Proceedings. 47 C.F.R. §§ 1.80, 1.89. After these procedures are utilized by the field offices to come to a decision, parties may file an application for review of a decision by a delegated authority. 47 C.F.R. § 1.115. Actual enforcement of a forfeiture order is handled by the Department of Justice. 47 C.F.R. § 1.80(f)(5).

Consequently, some harmful interference disputes are currently resolved by the Commissioners through more formal Commission action, as outlined in Figure 4.[38] Because the rulemaking process is expensive and time-consuming, there are often long delays between requests for rulemakings and the creation of a rule. Furthermore, the results of the rulemaking process are often for-this-day-only/for-these-parties-only rules that do not clarify the vague definition of harmful interference. This lack of precedent perpetuates uncertainty faced by operators using the same spectrum in other geographic areas, or operating similar services in other spectrum bands; possibly the spectrum bands of potential new entrants. In short, the Commission rarely gives guidance about how to avoid similar disputes in the future.

We believe the current dispute resolution regime financially burdens operators by denying them both clarity about their rights and a private right of action. If the Commission chooses not to act when resolving a dispute, operators experiencing harmful interference suffer damage to their business both in terms of reduced customer retention and a lower likelihood of receiving further capital from investors. Without a defined right of action, errant operators are able to impose substantial costs on others when causing harmful interference.

The ALJ option will encourage operators to go through the comparatively simple ALJ process in applicable cases, which is included in the dashed boxes within Figure 1.[39] The parties would participate in a trial, which could then be appealed to the Commission like any decision made by a

[38] Parties generally have three options to address the Commission directly. First, the party may file a petition for rulemaking to establish new rules that would clarify the operating rights. *See* 47 C.F.R. §§ 1.399-1.430. Second, the party can petition the Commission to make a declaratory ruling which would not establish any new rule, but rather interpret existing rules to clarify their meaning. 47 C.F.R. § 1.2. Finally, a party may simply petition for a waiver, which would waive them from specific rules governing their case. 47 C.F.R. § 1.3. Petitions for reconsideration of rulemakings may be filed under Rule 1.429, and petitions for non-rulemaking proceedings may be filed under Rule 1.106. 47 C.F.R. §§ 1.429, 1.106.

[39] TLPC Petition at 10-11.

delegated authority.[40] Doing so will facilitate the resolution of harmful interference issues in a timely, transparent, and fact-based manner with only marginal—and perhaps even reduced—burden.

B. The ALJ option will yield more effective allocation of operator resources.

Concerns about the ALJ option increasing costs are unfounded. The ALJ option may well result in an increase in *adjudications*—because there would be, for the first time, a private right of action for spectrum disputes. But an increase in the number of formal processes of spectrum dispute *resolution* should not be mistaken for causing an increase in spectrum *disputes*. Spectrum disputes already occur, and will increase as more operators enter the spectrum.

Many of these disputes may remain unresolved—with ongoing actual and opportunity costs—because there is no satisfactory way for parties experiencing harmful interference to obtain resolution from the Commission. In a recent survey, 20 of 32 field office staffers said that the field offices were very slow to make critical decisions.[41] The commenters who oppose the ALJ option have not established—and the record does not reflect—that any incremental net costs associated with a private right of action would be more than marginal compared to the costs of the current harmful interference dispute resolution mechanisms.

We believe that providing an elective private right of action for operators experiencing harmful interference would assure fact-based, transparent, and timely decision-making that the current system lacks.[42] These improvements will lead to more effective allocation of operator resources and promote, rather than inhibit, operators' ability to innovate. Even where a party experiencing harmful interference receives an adverse ruling, we believe that the party would be better positioned than under the uncertain timeline of current dispute resolution processes. Parties who suffer damage to their businesses because of ongoing harmful interference will be better equipped to repair their

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[40] 47 C.F.R. § 1.115.

[41] *Enforcement Field Agents Had Widespread Complaints about FCC*, Communications Daily, WLNR 34446773 (Nov. 17, 2015).

[42] The alternative proposal offered in AT&T's comment to our petition would similarly assure timeliness of decisions. AT&T Comments at 4-6. However, for the reasons stated in Section V, *infra*, we believe that this proposal, while sound, would not be practicable in the current budgetary climate.

businesses' viability with certainty about what they must do to reorder their technological plans to accommodate the ruling. In short, timely decisions would come with the benefit of finality.[43]

Transparent decisions would also provide a clearer indication of trends that are causing or contributing to harmful interference, which may merit attention by the Commission through rulemaking or declaratory ruling proceedings outside the context of individual adjudications. Giving industry and the public a perspective on common harmful interference issues will diminish costs by alerting operators and investors about interference risks to their enterprise, and how the Commission might respond to them.

Designing adequate procedures for spectrum interference disputes up-front will be less expensive and time-consuming for the Commission than continuing the current process of addressing individual interference disputes with ad hoc, for-this-day/for-these-parties-only rulemakings. Since rulemakings and other enforcement procedures already take place, their costs are already being incurred. Under our proposal, some of these costs will be shifted to adjudication, but the total costs should decrease over time. An ALJ option will reduce the need for some time-consuming and expensive rulemakings, and will establish precedent that would apply to similarly situated parties in the future.

C. The ALJ option can and should be designed to limit frivolous or needless costs associated with litigation.

Concerns that the ALJ option could be used as a tool of harassment or other improper purposes could easily be addressed with basic procedural controls designed to limit groundless or frivolous claims.[44] Much like other judicial proceedings, the ALJ option could include rules of

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[43] There is an appeals process, which applies to all Commission decisions, that can delay finality. *See* Figure 1. However, that process carries the benefit of greater public confidence in administrative rulings by exposing them to renewed scrutiny. Where final appellate rulings are broadly contested as a matter of policy, it alerts the Commission to the need for a rulemaking that would abrogate or change the judgment. We believe that the appeals process as applied to the ALJ option would bring similar benefits, as well as result in greater expediency than the current dispute resolution process.

[44] *See* T-Mobile Letter at 5("Not only would the ALJ Option promote instances of "efficient (continued…)

procedure that limit suits for which no claim for relief can be stated or no reasonable question of material fact exists.[45] The ALJ option could similarly provide for sanctions against complainants bringing claims with no legal or factual basis.[46] Rules to limit frivolous suits would gain force over time as a body of precedent developed.[47]

Several commenters also raised concerns that the ALJ option could be abused by parties that should not have standing to bring claims.[48] While our recommendations on standing in the petition were intentionally drawn broadly so that we would not exclude any relevant stakeholders, we agree that the Commission should carefully consider the issue of standing to ensure that frivolous litigation does not result from the ALJ option.

Given the technical complications that can cause harmful interference, the ALJ option could include pleading standards that require specific technical evidence that establishes the existence of and source of interference. If the plaintiff prevails or a settlement is reached, the costs associated with these preliminary investigations could be included in damages or negotiated as part of the settlement. Where the source of interference is unidentified—either due to technical complications or because the party experiencing harmful interference is a small operator lacking the expertise or resources to conduct or pay for the investigation—the ALJ option could include provisions allowing

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breach," but it would encourage parties to . . . exploit the FCC's legal processes by filing frivolous claims and engaging parties in protracted adjudication processes in one proceeding to coerce a favorable outcome in a separate, unrelated proceeding"); *see also* T-Mobile Comments at 3; Lockheed Martin Comments at 3-4; NPSTC Comments at 7.

[45] Fed. R. Civ. P. 12(b)(6), 56. An open discovery process could enhance the usefulness of such rules. *See* Fed. R. Civ. P. 27-36.

[46] Fed. R. Civ. P. 11.

[47] The introduction of harm claim thresholds through a rulemaking could also accelerate the ability to eliminate groundless or otherwise avoidable claims. *See generally* Spectrum / Receiver Performance Working Group, FCC Technological Advisory Council, Interference Limits Policy and Harm Claim Thresholds: An Introduction (Mar. 5, 2014), https://transition.fcc.gov/oet/tac/tacdocs/reports/TACInterferenceLimitsIntrov1.0.pdf.

[48] NPSTC Comments at 4-5; Lockheed Martin Comments at 5.

the Enforcement Bureau—or another Bureau, if appropriate—to act as a neutral investigator of technical issues.[49] Costs could similarly be recovered in damages or a settlement agreement.

Moreover, we believe the burden of tracking the development of ALJ decisions would be marginal.[50] Operators already bear the burden of monitoring the development of Commission rulemakings for the purpose of interceding where the operator's interests may be affected. Because rulemakings typically do not set precedent for the contours of harmful interference outside of the specific dispute, stakeholders may pay attorney fees to monitor and comment on these proceedings only to still have little sense of how the rule may affect them. By comparison, the transparent, fact-based, and (importantly in this context) precedent-setting nature of ALJ decisions would mean interested parties would gain a more meaningful window into the potential implications of a decision. Additionally, we believe the cost of monitoring ALJ rulings would diminish as the ALJ system generates an established body of harmful inference precedent.[51]

IV. The ALJ option will reduce the strain on the Commission's resources and allow for costs to be fairly distributed amongst adversarial parties.

Some commenters believe that enacting and enforcing the ALJ option would strain or divert Commission resources from other areas of important public and industry need.[52] However, these

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[49] TLPC Petition at 17 (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).

[50] TIA argues that the expenses of adjudication under the ALJ Option would cost not only incumbent operators, but would also inhibit the entry of new players into the telecommunications market as more attorneys would be needed to sift through the "ever-evolving body of ALJ precedential decisions." TIA Comments at 4.

[51] *See supra* at III.B.

[52] Comments of Lockheed Martin at 4 ("[t]his diversion of technical expertise from the Commission's bureaus and offices would result in delays in the already lengthy and technically-intensive proceedings that are designed to establish conditions for spectrum use free from harmful interference in the first instance.") The NPSTC expressed concern that engineering staff would need to be shuffled from other areas of the Enforcement Bureau, thus limiting the technical resources available to other areas of the FCC. NPSTC Comments at 5-6; *see also* T-Mobile Comments at 3.

concerns ignore that the Commission has recently announced cutbacks to Enforcement Bureau field offices and staff.[53]

We believe that the ALJ option would shift a number of routine problems away from the Bureau, freeing the Bureau's resources for higher-priority projects. Using the Office of the Administrative Law Judges to its full potential will re-assign some work within the Commission, but should not result in substantial additional costs.

We do not expect there will be so much litigation that the Commission's resources will be diverted inappropriately. Similar to the assignment of costs in most American court systems, the ALJ option could be funded in part by revenue from its operation. This could include court fees, as well as revenue generated from violation of procedural rules designed to curb meritless claims.[54] With such mechanisms, the Commission would take on only modest additional litigation that would not affect its other regulatory and enforcement priorities.

The nature of an open discovery process would alleviate the demands on the Commission's technical experts and resources that would be required of a more centralized, Commission-driven dispute resolution process. Moreover, in judgments or settlements, damages or settlement costs could include paying the Commission for services it provides during the adjudication. This is not the only conceivable method by which the Commission might recover its costs in resolving harmful interference disputes, but it is one feasible method to do so.

Finally, the ALJ option would more fairly apportion costs to the parties who benefit from dispute resolution. Under the current system, the Commission bears the brunt of the costs associated with discovery and dispute resolution and serves as an unbiased mediator. The ALJ option would shift these costs onto industry, forcing operators to bear costs if they trigger a long discovery process.

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[53] *See* Reorganization of the Enforcement Bureau's Field Operations, 30 FCC Rcd. 7649, 7650 (July 16, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-81A1_Rcd.pdf.
[54] *See* discussion *supra*, at Part III(B), (C).

V. The Commission should initiate a rulemaking to develop the numerous ideas in the record for improving the current dispute resolution system.

The record plainly demonstrates that the Commission's current interference dispute resolution system is inadequate to handle disputes as the intensity of spectrum use continues to increase. Some commenters propose addressing the issues by other means. We support some of these proposals, although we believe that they are a complement to, not a substitute for, the ALJ option.

For example, AT&T agrees with our contention that the Commission should improve the transparency, timeliness, and fact-based nature of the interference dispute resolution process by updating and reforming the Commission's field offices.[55] Some of AT&T's ideas to improve the transparency of the process include universal forms, categorization of the severity of the service degradation, acknowledgment of the receipt of complaints, and periodic updates.[56] Furthermore, AT&T endorses deadlines on the resolution proceedings and suggests they be applied to the field offices.[57]

The Enforcement Bureau recently adopted portions of AT&T's proposals to ensure that the interference complaint process will allow for parties to stay informed of the status of complaints.[58] Specifically, the recent updates will enhance the transparency of the initial complaint process, and timelines for the initial responses will vary based on the severity of the interference.

However, the updates fail to create adequate mechanisms for the field offices to resolve complex harmful interference issues. We support the goal of the Commission to continue with improvements to the field offices, but these reforms do not address situations that deal with legal questions. Therefore, field office enhancements should work in tandem with our proposed ALJ option.

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[55] See AT&T Comments at 3-4.
[56] Id. at 4-5 (The proposal outlines different levels of interference: High: Complete blockage of a signal; Medium: Frequent degradation of a signal; Low: Intermittent degradation).
[57] Id. at 5-6.
[58] *See generally* Enforcement Bureau Enhances Procedures for Public Safety and Industry Interference Complaints, 30 FCC Rcd. 8574.

Furthermore, even if the field offices were situated to resolve these complex cases, one pre-requisite that AT&T identifies for its proposal to be effective is that "Field Offices should be supplied with the resources needed—be they travel funding or updated equipment—to make appropriate, timely, and fact based determinations."[59] Again, the Commission's cutbacks to the Enforcement Bureau's funding put constraints on the field offices' enforcement capabilities. While the Commission has stated that streamlined processes will compensate for the limited resources, reducing the staff and presence of the field offices will undoubtedly limit the ability for the field offices to handle the increasing volume of interference disputes.[60]

The ALJ option could benefit from similar streamlining processes such as deadlines and utilization of the severity categorization designated by the field offices, and the Commission should seek comment on how best to implement such ideas. AT&T's proposal for variable timelines based on the severity of the degradation provides an interesting opportunity to handle spectrum disputes.[61]

We believe, as AT&T suggests, that treating complaints where there is intermittent degradation of a signal in the same way as a complete blockage of a signal would further impose burdens on companies who can no longer operate due to harmful interference. However, these changes to the field offices will only create more legal questions about where the actual boundaries of categorization lie for specific services.

An ALJ could answer these questions, setting a precedent that the field offices can follow. Once established, differential timelines on the ALJ process could be established based on these categories. Therefore, the Commission should seek comment on utilizing the field office severity categories when establishing deadlines for the ALJ process.

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[59] AT&T Comments at 6.

[60] *Id.*

[61] *See* TLPC Petition at 16 (examples of deadlines in other agencies).

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Given the clear record in support of improving the Commission's process for resolving interference dispute, the Commission should explore the ALJ option and related proposals by initiating a rulemaking and seeking further comment from other interested parties. As harmful interference disputes increase over the coming years, the Commission will need to ensure that parties can adequately resolve these issues in a timely, transparent and fact-based manner. The ALJ option for operators is one solution to ensuring that future spectrum interference disputes are resolved. However, the Commission should initiate rulemaking so that this, and other options, can be adequately explored.

Respectfully submitted,

/s/

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Charles Cooper, Enforcement Bureau
Roger Sherman, Wireless Telecommunications Bureau
Brian Regan, Wireless Telecommunications Bureau
Joel Taubenblatt, Wireless Telecommunications Bureau
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Figure 1: Current Dispute Resolution Process

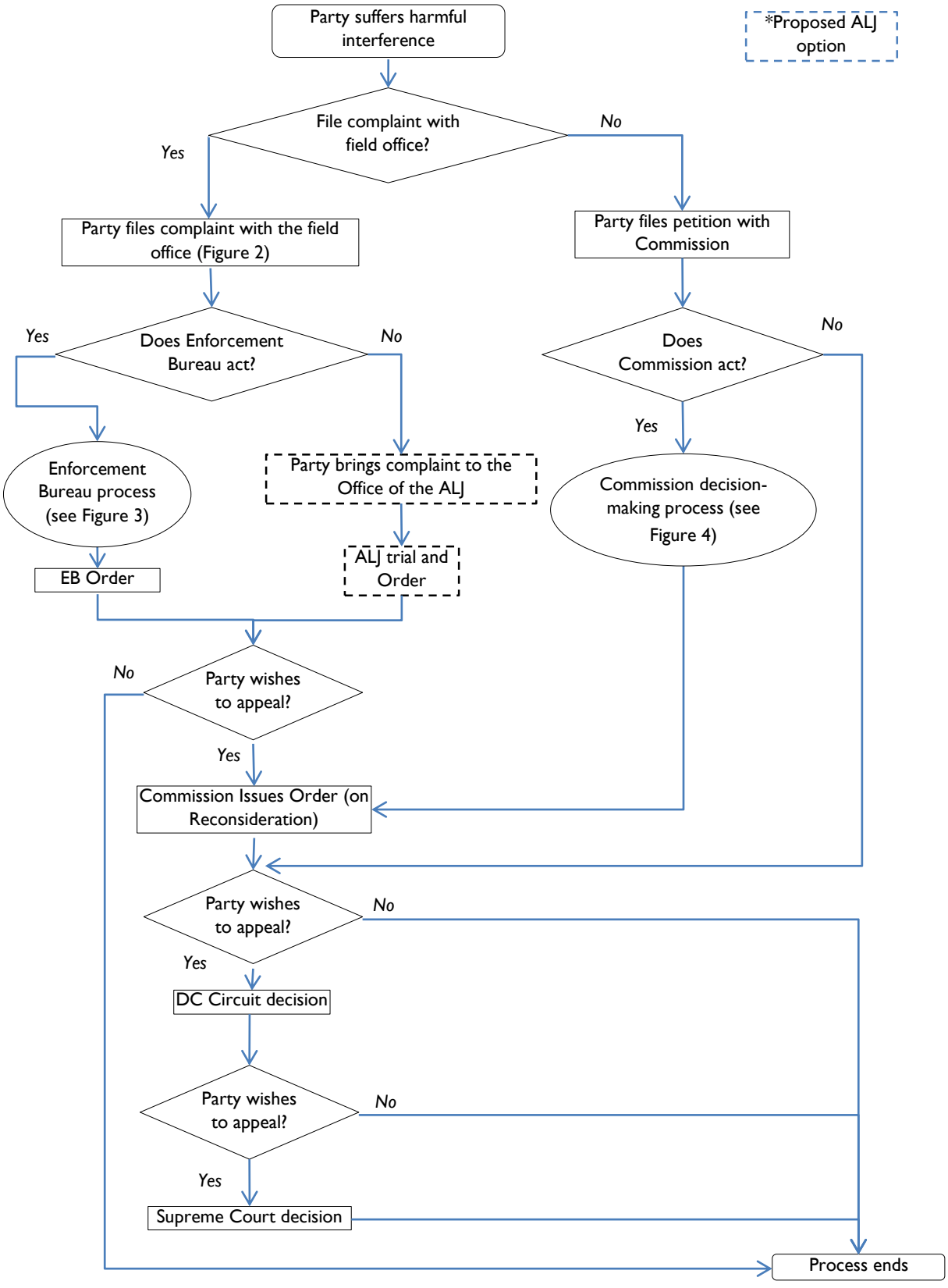


Figure 2: Field Office Escalation Process

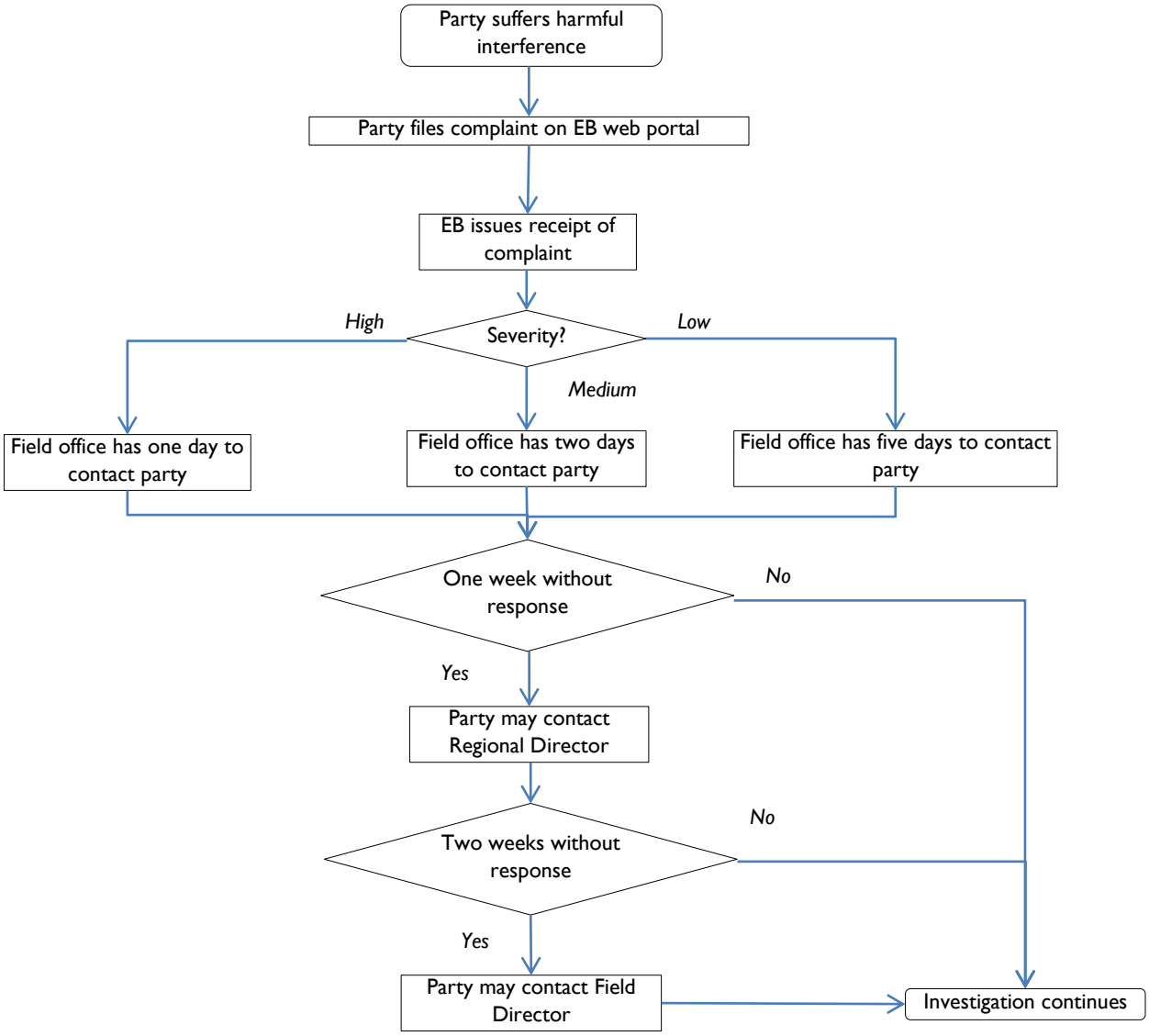


Figure 3: Enforcement Bureau Resolution Process

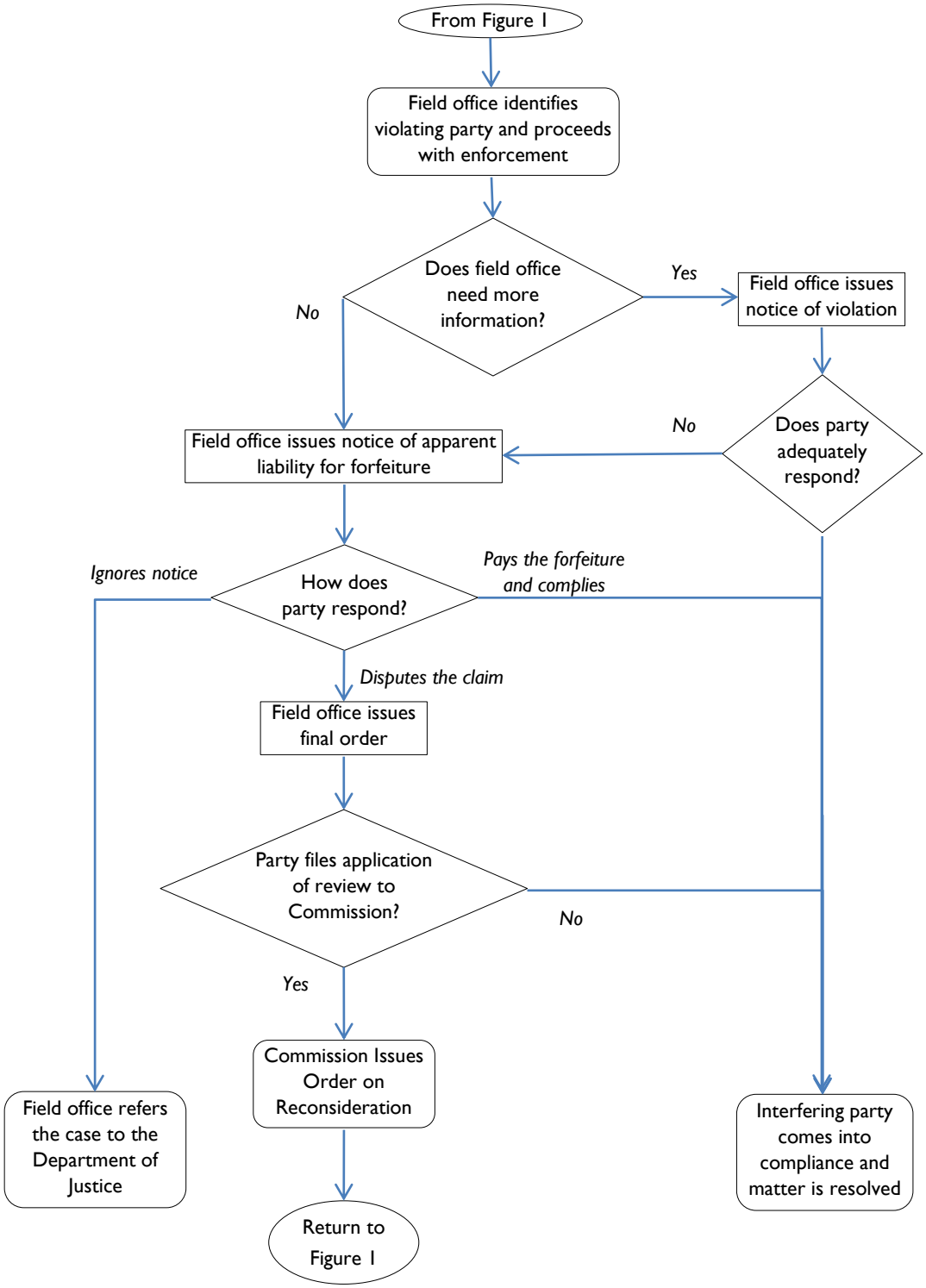
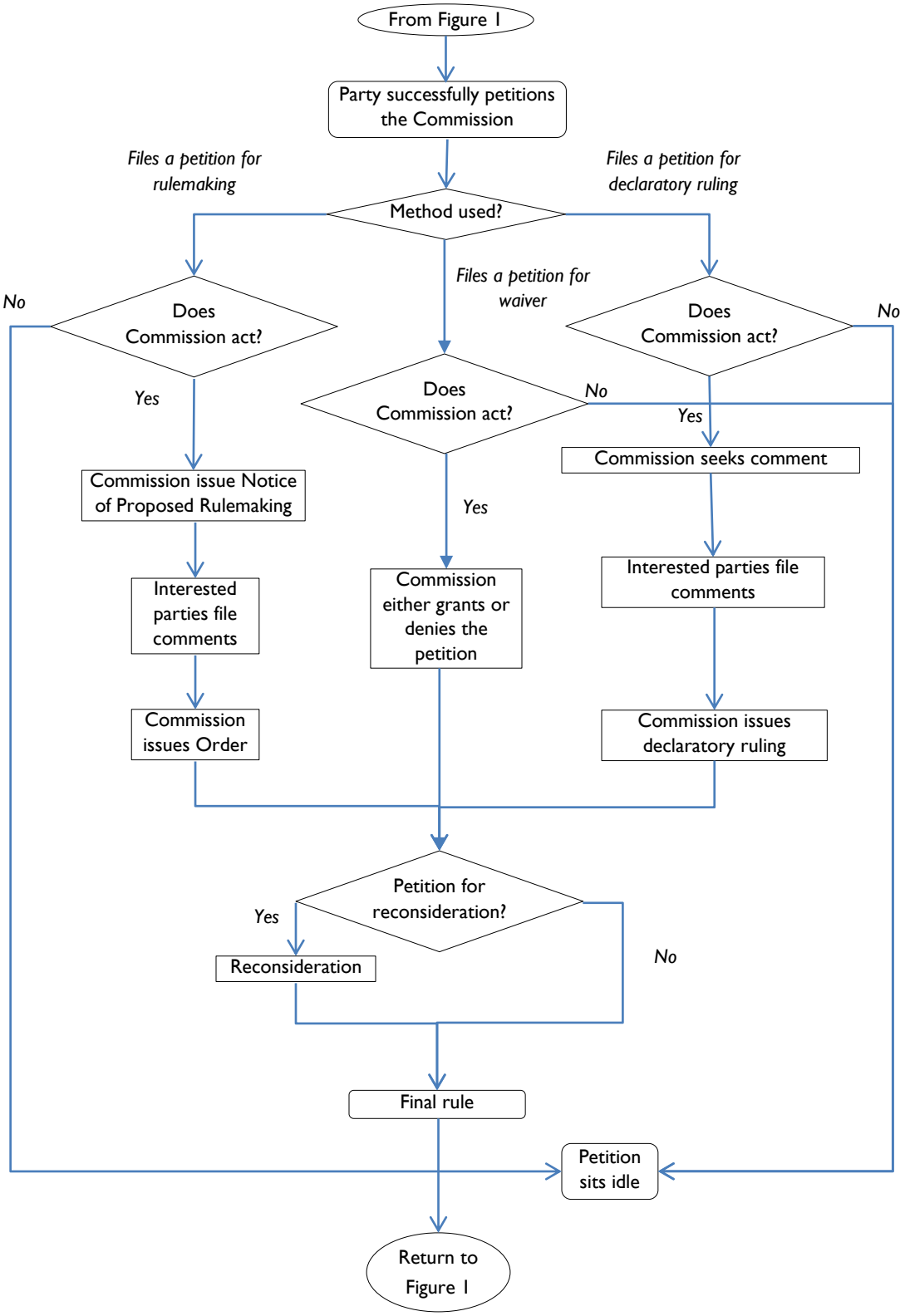


Figure 4: Commission Resolution Process



Certificate of Service

Pursuant to Rules 1.405(b)-(c) and 1.47(d), I, Jodie Hoke, certify that on December 11, 2015 I served copies of this filing on the following parties *via* U.S. mail:

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