

The Implications of Adjudicating Spectrum Usage Rights with ALJs

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The purpose of this paper is to briefly examine the implications of the FCC strengthening its enforcement of spectrum usage rights (SURs) through increasing the number of Administrative Law Judges (ALJs) adjudicating two parties' rights related to interference. One of the most important implications is that the costs likely outweigh the benefits in adjudicating spectrum rights through increased use of ALJs.

Concerning ALJs and adjudications at the FCC, two problems present themselves at the outset. First, does the FCC currently use ALJ's to adjudicate spectrum rights on a regular basis? Others have noted that recently the FCC rarely has more than two ALJs¹, and even then, they are often on loan to where the majority of ALJs in the federal government work, the Social Security Administration.² When they are employed by the FCC to adjudicate on potential regulatory violations, the FCC maintains a high level of involvement and micromanagement. Even when the FCC styles a hearing as adjudication, it often does not use any adjudicatory processes and instead mirrors its rulemaking process.³

Second, does the more frequent occurrence of Rulemaking and Orders (R&O's) to establish spectrum usage rights exhibit an institutional preference for using alternative or informal rights arbitration measures? A search of the relevant FCC databases reveals plenty of R&O's and forfeitures around spectrum interference in recent history and a lack of (search hits

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¹ Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 1, 31 (Mar. 2009), available at: http://works.bepress.com/phil_weiser/3.

² *Id.* at 31-33.

³ *Id.* at 31.

for) formal adjudications.⁴ Interestingly, from the 1930's and the days of the Federal Radio Commission to 2000, the number of staff at the FCC handling rulemaking and licensing has tripled, while the number of people handling enforcement of rights (field office employees among others) related to those rules and licenses has decreased slightly.⁵

The hypothetical increase in ALJs and its implications

Some have advocated for utilizing more ALJs in adjudications for spectrum usage rights pertaining to interference.⁶ Instead of using predictive models to protect against interference before the fact, ALJs could adjudicate on spectrum rights after interference has actually occurred using a regulatory framework based on precedent-based definitions of harmful interference, burden for presenting/rebutting facts or elements of claims, and mitigation obligations on certain parties.⁷ This would develop a rule of law with precedent and clear rules that parties could reasonably rely on in future conduct.

If the FCC took up the idea of expanding ALJ-run adjudications for interference claims, then we immediately run into a few problems. First, the FCC, like many other administrative agencies, does not have an infinite budget. ALJs are not cheap, starting at a salary of \$103,000 and ending at a maximum of \$150,000+ for the most experienced ones.⁸ Second, ALJs do not come into being as immediate experts on telecommunications law, much less an engineering and physics intensive area such as adjudicating spectrum usage rights. Thus, even if you were to hire a number of ALJs to enforce SURs, the FCC would have to spend several years getting them up

⁴ See FCC.gov (placeholder for this cite and other data until site back up)

⁵ Douglas A. Galbi, *Revolutionary Ideas for Radio Regulation*, 1, 18 (June 2002), available at <http://econpapers.repec.org/paper/wpawuwple/0304001.htm>.

⁶ Weiser, at 28.

⁷ Peter Tenhula, *Enforcement of Spectrum Usage Rights: Fair and Expedient Resolution of "Interference" Disputes*, 1, 6 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2032312.

⁸ OFFICE OF PERSONNEL MGMT., *Rates of Basic Pay for Administrative Law Judge Positions* (2012), <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2012/executive-senior-level/2012-rates-of-basic-pay-for-administrative-law-judge-positions/>

to speed on precedent, the technical understanding needed to adjudicate, and other aspects unique to the FCC.

Similarly, the vast majority of ALJs are currently housed in the Social Security Administration.⁹ If you didn't want to wait for training new ALJs, even importing them from an existing agency would not help much because their knowledge base and skill sets are unrelated to telecommunications law and the FCC's unique expertise as an agency governing communications.

Finally, there is the specter of prolonged adjudications much like the overloaded dockets in the court system. Will the FCC, or the parties that bring or defend claims brought to it tolerate prolonged adversarial hearings complete with selection of witnesses, evidence submitted under oath, discovery, and other delay tactics? How long will cases take to come to a decision (as opposed to the length FCC promulgated rules take)? Can they be appealed to someone or some part of the Commission that can maintain an unbiased authority like an ALJ?

On the other hand, the status quo of before-the-fact rules, ex parte meetings with connected lobbyists, and overly protective guard bands clearly frustrates efficient use of spectrum and the ability for parties to bargain for rights along clearly defined boundaries.¹⁰ Furthermore, a proposed solution of turning spectrum interference adjudications over to lay judges in the state court systems could be a disaster due to the technical nature of interference disputes. Regardless, there have been several instances of state courts declining to hear claims for tortious spectrum interference by one party, citing the pre-emption by the Federal

⁹ Stephen Ohlelacher, *Judges Sue Social Security over Case 'Quotas,'* HUFFINGTON POST (Apr. 19, 2013), http://www.huffingtonpost.com/2013/04/19/judges-social-security_n_3115363.html.

¹⁰ Philip J. Weiser & Dale N. Hatfield, *Spectrum Policy Reform and the Next Frontier of Property Rights*, 15 GEO. MASON L. REV. 549, 553 (2008).

Communications Act.¹¹ Finally, in a country where wireless broadband providers bid billions of dollars for use of spectrum, the additional expense and administrative headaches in transitioning to utilizing ALJs and adversarial hearings may be worth it to be able to rely on clear definitions of SURs and analyze data generated from precedent.

¹¹ Harbor Broadcasting, Inc. v. Boundary Waters Broadcasters, Inc., 636 N.W.2d 560 (2001); Monfort v. Larson, 257 A.D.2d 261, 693 N.Y.S.2d 286 (1999).