New Civil Liberties Alliance

November 6, 2019

VIA ECFS SUBMISSION

Ms. Lisa Boehley
Federal Communications Commission
445 12th St. SW
Room TW-A325
Washington, DC 20554

Re: FCC 19-86, EB Docket No. 19-214: Procedural Streamlining of Administrative Hearings Document No. 2019-20568

Dear Ms. Boehley,

The New Civil Liberties Alliance ("NCLA") submits the following comments in response to the Federal Communications Commission's (the "FCC" or the "Commission") proposed regulation, Procedural Streamlining of Administrative Hearings, FCC 19-86, EB Docket No. 19-214 (the "Streamlining Rule" or the "Proposed Rule"). NCLA appreciates this opportunity to comment and express its concerns regarding the Streamlining Rule.

I. Introduction & Summary

The Commission's stated purpose for proposing the Streamlining Rule is to "promote more efficient resolution of hearings." The goal of adjudication, however, is not to achieve *efficient* results—it is to achieve *just* results through a systematically thorough and fair process before an impartial tribunal. Moreover, even if the Proposed Rule's goal were defensible, which it is not, the Commission lacks the authority to adopt a rule that would rewrite two federal statutes.

The Streamlining Rule proposes to convert live-testimony hearings into written-record proceedings. Such a conversion would fundamentally reshape Congress' administrative adjudicatory scheme by altering the dynamics of probative inquiries into disputed facts. Perhaps most notably, it would take away a regulated party's ability to cross-examine and impeach adversarial witnesses in real time. Such a fundamental change cannot be lawfully accomplished through Administrative Procedure Act ("APA") rulemaking.

The APA requires a full hearing in every case where Congress has made agency adjudication mandatory. It is the compulsory nature of quasi-judicial administrative action, not magic words like

"on the record," that compels agencies to institute trial-like hearings. Thus, where the Communications Act requires hearings, the Commission must oblige and conduct trial-like hearings with all the attendant due process protections. Moreover, the Commission cannot regulate away statutory mandates established by Congress in the APA and the Communications Act—not to mention fundamental fairness protected by the Constitution—with APA rulemaking.

To be sure, the Streamlining Rule has other constitutional and practical defects. For instance, the Proposed Rule implicates the Appointments Clause to the extent that the proposal to elevate FCC staff to manage record development could make them inferior officers of the United States.[1] NCLA focuses its comment, however, on the Commission's lack of authority to implement the Proposed Rule.

NCLA reserves the right to comment further or to challenge the Proposed Rule's procedural, practical, or constitutional deficiencies in any appropriate venue of competent jurisdiction in the future, including on grounds not raised in this comment.

II. The New Civil Liberties Alliance's Statement of Interest

The New Civil Liberties Alliance is a nonprofit civil rights organization founded to defend constitutional rights against violations by the Administrative State. NCLA does so through original litigation, *amicus curiae* briefs, the filing of public comments to proposed regulations, and other means of advocacy. The "civil liberties" of the organization's name include rights at least as old as the Constitution itself, such as the due process of law, the right to trial by jury, and the right to live under laws made by elected lawmakers rather than by prosecutors or bureaucrats.

NCLA defends civil liberties by asserting constitutional constraints on the Administrative State at both the federal and state levels. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the framers sought to prevent. This unconstitutional Administrative State within the Constitution's United States violates more rights of more Americans than any other aspect of American law, and it is thus the focus of NCLA's efforts.

NCLA would prefer not to bring a lawsuit to vindicate the civil liberties that the Proposed Rule would violate. Thus, NCLA encourages the Commission to curb its own unlawful exercise of power by establishing meaningful limitations on administrative rulemaking, adjudication, and enforcement. Courts are not the only government bodies with the duty to attend to the law. Even more immediately, agencies and agency heads have a duty to follow the law, not least by avoiding unlawful modes of governance such as denying regulated parties their right to full and fair hearings before impartial adjudicators. NCLA therefore asserts that all agencies and agency heads must

[1] In *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Supreme Court ruled that SEC ALJs were officers of the United States and subject to the Appointments Clause. 138 S. Ct. at 2055. The FCC's proposed case managers will hold significant adjudicatory power over FCC administrative hearings, most likely classifying them as "officers" under *Lucia*, regardless of whether the case managers issue final rulings or preside over the hearings. This would comport with the Court's reasoning in *Lucia*, as the Court examined the power wielded by the SEC ALJs over the adjudicatory process, irrespective of whether they issued final rulings. *See id.* at 2049.

examine whether their modes of rulemaking, enforcement, and adjudication comply with applicable statutory procedures and with the Constitution.

III. The New Civil Liberties Alliance's Objections to the Commission's Proposed Procedural Streamlining

The Streamlining Rule proposes to redefine "full hearings" under 47 U.S.C. § 309, "hearings" under 47 U.S.C. §§ 9, 204, 208, 209, 312, 316, and the "right to be heard" and "a full opportunity for hearing" under 47 U.S.C. § 214.[2] If adopted, the Proposed Rule will convert live hearings with their unique attendant due process protections—not the least of which is an opportunity to cross-examine witnesses—into an exercise in limited civil discovery and static memoranda filing.[3] The Commission's declaration that *none* of its hearings require oral testimony[4] is demonstrably wrong. Indeed, its claim is a disingenuous interpretation of the FCC's organic statute and the APA, and an obtuse reading of due process rights guaranteed under the United States Constitution.

A. The APA Requires the Commission to Conduct Trial-Like Hearings When It Engages in Quasi-Judicial Adjudication of Rights and Privileges Required by the Communications Act

The APA requires agencies to follow certain procedures "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing[.]"[5] According to the Proposed Rule, a "hearing" is something less than an on-the-record hearing which would trigger these formal adjudication requirements.[6] The Commission is incorrect.

The Supreme Court has recognized that when Congress requires an agency to hold a "full hearing," it confers on participants "the privilege of introducing testimony" and requires the agency to base its decision on the facts adduced at the hearing.[7] The Court expanded on this 25 years later, holding that a "full hearing" protects "those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature."[8] Indeed,

> [t]he maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. * * * [I]f these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.[9]

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[2] *See* Prop. FCC Reg., EB Docket No. 19-214 FCC 19-86, 84 Fed. Reg. 53355, 53356 (Oct. 7, 2019).

[3] *See id.*

[4] *See id.* at 53359 ("[W]e tentatively conclude that Commission hearings are subject only to the APA's informal adjudication requirements.").

[5] 5 U.S.C. § 554(a).

[6] *See* Prop. FCC Reg., at 53359.

[7] *ICC v. Louisville & Nash. Ry. Co.*, 227 U.S. 88, 91 (1913).

[8] *Morgan v. United States*, 304 U.S. 1, 19 (1938).

[9] *Id.* at 22.

The Supreme Court has already rejected the Commission's contention that the APA should be read so narrowly as to exempt agencies from conducting formal hearings wherever an organic statute omits the phrase "on the record." In *Yang Sung v. McGrath*, 339 U.S. 33 (1950), the Court explained further that the APA requires formal processes in *all* adjudicatory hearings "held by [statutory] compulsion."[10] This must be so, the court reasoned, because the constitutional requirement of procedural due process derives from the same source as Congress' power to legislate—it is interwoven into every statute enacted.[11]

Federal courts have followed the Supreme Court's lead by requiring agencies to provide full hearings even where organic statutes have not used words like "full" or phrases like "on the record" to describe "hearing." For example, the Ninth Circuit held that

> whether the formal adjudicatory hearing provisions of the APA apply to specific administrative processes does not rest on the presence or absence of the magical phrase 'on the record.' Absent congressional intent to the contrary, it rests on the substantive character of the proceedings involved.
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> The failure of Congress to provide for any hearing whatsoever within an administrative process may well be a valid indication that Congress either did not feel that it was providing for an 'adjudication' in the traditional sense of the word or did not intend the APA procedures to apply. However, if a statute provides for a hearing, similar weight should not typically be accorded to Congress' failure to specify that determinations must be made 'on the record.' The legislative history of the APA does not suggest that the specific words 'on the record,' or words of similar effect, must be contained in a statute in order to invoke the adjudicatory hearing requirements of the APA.[12]

Secondary sources authored contemporaneously with the implementation of the APA further highlight Congress' intent to create a default position that quasi-judicial tasks exercised by agencies must be formal and trial-like. The Attorney General's APA Manual, published one year after the APA's passage, explains that according to the legislative history, Congress intended for agencies to

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[10] *Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950) (superseded by statute in the immigration context). The specific holding of *Yang Sang* has been superseded by statute, but the Court's reasoning remains an accurate representation of due process law vis-à-vis administrative hearings.

[11] *See id.* at 49 (superseded by statute in the immigration context).

[12] *Marathon Oil Co. v. E.P.A.*, 564 F.2d 1253, 1263 (9th Cir. 1977) (internal citations omitted) (declined to be followed by *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.2d 12, 15 (1st Cir. 2006) (applying *Chevron* interpretive methodology to yield to agency interpretations of APA adjudicatory requirements)). Federal courts often apply the *Marathon Oil* analysis when they interpret APA hearing requirements. *See, e.g.*, *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 877 (1st Cir. 1978) ("We are willing to presume that, unless a statute otherwise specifies, an adjudicatory hearing subject to judicial review must be on the record. The legislative history of the APA and its treatment in the courts bears us out.") (internal citations omitted); *Steadman v. SEC*, 450 U.S. 91, 96 n.13 (1981) (citing *Seacoast* for the proposition that "the absence of the specific phrase ['on the record'] . . . does not make the instant proceeding not subject to § 554"); *and Dantran, Inc. v. Dep't of Labor*, 246 F.3d 36, 46 (1st Cir. 2001) (stating that a statute's failure to "command a hearing 'on the record'—in the language of APA section 554—is of modest significance, as it has long been recognized that applicability of the APA does not turn on the presence or absence of the precise words 'on the record.'") (internal quotations omitted). *But see Brayton Point*, 443 F.2d at 15.

hold formal adjudications in every instance it specifically required the agency to hold an adjudicatory hearing—even when the statutory language does not say "on the record."[13] By contrast, a hearing may be informal and without live testimony only when the statutory authorization to hold the hearing is permissive, rather than mandatory.[14] Therefore, a statute permitting "such hearings as may be deemed necessary" does not implicate the trial-like process requirements that attach in a formal adjudicatory proceeding.[15] But a statute that requires "notice and full hearing" always requires formal adjudication with live testimony.[16]

The Commission cannot use APA notice-and-comment rulemaking to alter this statutory scheme. To do so would require rewriting of both the APA and the Communications Act—and maybe the Due Process Clause itself.

B. The Commission's "Tentative" Conclusion that Its Hearings Are Subject Only to APA Informal Adjudication Requirements Is Demonstrably Wrong

As explained above, judicial precedent and secondary authority demonstrate that the Commission is wrong to tentatively conclude that a formal hearing is required only when the words "on the record" appear in a statute.[17] A comparative analysis of the provisions of the Communications Act demonstrates that the streamlined procedures contemplated by the Proposed Rule are antithetical to the due process that the Commission is obligated to provide regulated parties.

Subsections 309(e) and (k)(3) of the Communications Act allow for a "full hearing" regarding licenses.[18] Subsection 312(c) requires a "hearing" before revoking a station license or a construction permit.[19] Subsections 316(a) and (b) require a "hearing" before the Commission can modify a station license or construction permit.[20] Subsection 9(c)(3) requires a "hearing" before the Commission can revoke a license for failure to pay a fee if the regulated party presents a substantial and material question of fact.[21] Subsection 204(a) requires a "hearing" regarding the lawfulness of a tariff.[22] Sections 208 and 209 require a "hearing" regarding common carrier conduct.[23] Subsection 214(b) grants the right "to be heard" and subsection (d) allows the Commission to rule on adequacy of facilities "after a full opportunity for hearing."[24]

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[13] *See* Attorney General's Manual on the Administrative Procedures Act, at 41 (1947) (the "APA Manual").

[14] *See id.*

[15] *See id.*

[16] *See id.* at 42.

[17] *See* Prop. FCC Reg., at 53359 ("[W]e *tentatively* conclude that Commission hearings generally are subject only to the APA's informal adjudication requirements.") (emphasis added). Given the import of this conclusion, it is peculiar that the Commission can only *tentatively* conclude that its hearings need only be informal. The Commission should have waited to propose the Streamlining Rule until such time as the Commission made a decision one way or the other on this foundational issue.

[18] *See id.*, at 53356 (citing 47 U.S.C. § 309(e) & (k)(3)).

[19] *See id.* (citing 47 U.S.C. § 312(c)).

[20] *See id.* (citing 47 U.S.C. § 316(a) & (b)).

[21] *See id.* (citing 47 U.S.C. § 9(c)(3)). This section has been reorganized and replaced by 47 U.S.C. § 159a(C).

[22] *See id.* (citing 47 U.S.C. § 204(a)).

[23] *See id.* (citing 47 U.S.C. §§ 208 & 209).

[24] *See id.* (citing 47 U.S.C. §§ 214(b)).

The APA Manual directly addresses these types of proceedings, categorizing "[l]icensing proceedings, including the grant, denial, renewal, revocation, suspension, etc. of, for example, radio broadcasting licenses, certificates of public convenience and necessity, airman certificates, and the like[,]" as adjudicatory administrative activities, which require a full hearing.[25] Thus, the Communications Act's mandate that the Commission conduct licensure adjudications requires APA formal adjudication procedures. The Communications Act need not contain talismanic language to afford regulated parties the due process protections of full live-testimony hearings—it is enough that the Act requires quasi-judicial licensure hearings.[26]

C. The Commission Must Not Rely Upon Judicial Acquiescence to Advance a Rule the Commission Knows, or Should Know, to Be Unlawful

As discussed above, the Commission's organic statute and the APA require the FCC to provide complete trial-like hearings with oral testimony and cross-examination whenever the Commission performs mandatory quasi-judicial functions. This is the current state of the law regardless of the uncertainty that *Chevron* deference has created with respect to federal courts' willingness to look the other way when agencies act unlawfully.

Due to the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in *Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989), the D.C. Circuit Court declined to follow controlling precedent regarding statutory mandates for adjudicatory hearings.[27] In total abdication of the court's nondelegable duty "to say what the law is,"[28] the D.C. Circuit declined "to presume that a statutory reference to a 'hearing,' without more specific guidance from Congress, evinces an intention to require formal adjudicatory procedures[.]"[29] The D.C. Circuit deferred to the agency's interpretation that it could substitute an informal hearing for a formal one.[30]

The court was wrong to rule this way, and in the 30 years since the circuit court departed from long-established precedent, judicial abdication may be falling out of favor. Indeed, the Supreme Court appears to have reached a consensus that a statutory word or phrase is not ambiguous for *Chevron* or other deference doctrine purposes just because an agency says so, or because it is not defined in statute.[31] To discern the implicit meaning of a statutory term or mandate, courts rely on traditional interpretive terms—beginning with the text's plain meaning, read harmoniously in the greater context

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[25] *See* APA Manual, at 16 (distinguishing legislative actions from adjudicatory actions).

[26] *See id.*, at 41 (explaining that SEC licensure requires a formal hearing because the statute requires "notice and opportunity for hearing" despite that the SEC Act "does not expressly require orders of denial or revocation of registration to be made 'on the record[.]'").

[27] *See Chem. Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1482 (D.C. Cir. 1989).

[28] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[29] *Chem. Waste Mgmt.*, 873 F.2d at 1482.

[30] *See id.* at 1483.

[31] *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) (Kagan, J.) ("[I]t must come within the zone of ambiguity the court has identified after employing all its interpretive tools."), 2424 (Roberts, J. concurring) ("The majority catalogs the prerequisites for, and limitations on, *Auer* deference: The underlying regulation must be genuinely ambiguous[,]") 2447 (Gorsuch, J., concurring) ("I would stop this business of making up excuses for judges to abdicate their job of interpreting the law[.]"), & 2448 (Kavanaugh, J., concurring) ("Importantly, the majority borrows from footnote 9 of this Court's opinion in *Chevron* to say that a reviewing court must 'exhaust all the 'traditional tools' of construction' before concluding that an agency rule is ambiguous and deferring to an agency's reasonable interpretation.").

of the statute in question.[32] *Chevron* will not afford the Commission safe harbor, should the Commission adopt the Proposed Rule.

Moreover, *Chevron* deference—as odious an interpretive methodology as it is[33]—does not go so far as to require judicial deference to agencies' interpretations of what is constitutionally adequate due process. The Commission does, however, have a constitutional duty to attend the law and support the Constitution. It cannot advance the notion that courts should defer to its determination as to what process is due because the Commission knows that it does not have the authority to make such weighty determinations of the sufficiency of civil liberty protections.

IV. NCLA's Specific Recommendations & Conclusion

The Commission claims that live testimony hearings impose significant burdens and delays on the agency and regulated parties.[34] That may very well be true in some cases. The Commission also claims that the Proposed Rule would expedite the Commission's hearing process, and that in some circumstances, live testimony is unnecessary.[35] That, too, may be true. But if the Commission truly wants to enhance efficiency in its adjudicatory system "while ensuring transparency and procedural fairness,"[36] it should advance a rule that permits regulated parties to voluntarily waive their right to full hearings on their own initiative and only then adjudicate by written record—instead of mandating such an approach.

The problem with the proposed Streamlining Rule is that regulated parties have no choice as to whether they are afforded a live hearing to plead their case, despite that they have a statutory and constitutional right to do so. If the Commission is genuinely concerned about the mutual burdens faced by the agency and regulated parties where live hearings are not necessary, a voluntary regime would better protect the parties' interests. NCLA suggests a voluntary Procedural Streamlining of Administrative Hearings rule such as this:

> All regulated parties subject to a statutorily mandated hearing may opt for adjudication on the written record, or they may exercise their right to a full hearing without penalty.

The benefit of this simple rule is that the party to be tried by the Commission can choose to use live testimony, cross-examination, and other features of trial-like hearings to persuade the Commission or choose a written record review.[37] The Commission can thereby enhance efficiency without infringing on due process rights. The Commission must be a good steward of public

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[32] *See Yang Sung*, 339 U.S. at 50.

[33] The practice of "*Chevron* deference" violates the Constitution for two separate and independent reasons. First, *Chevron* requires judges to abandon their duty of independent judgment, in violation of Article III and the judicial oath. *See* Philip Hamburger, *Is Administrative Law Unlawful?*, at 316 (Univ. Chicago Press 2014). Second, *Chevron* violates the Due Process Clause by commanding judicial bias toward a litigant. *See id.*

[34] *See* Prop. FCC Reg., at 53356.

[35] *See id.* at 53356-57.

[36] *See id.* at 53356.

[37] Of course, this waiver rule could be abused if the agency were to threaten or cajole regulated parties into making a choice that suits the agency, rather than exercise the due process rights of regulated parties to which they are entitled. Such regulatory abuse would be subject to external policing by lawsuits.

resources, but it may not prioritize efficiency over statutorily and constitutionally protected principles of fundamental fairness. The Commission should withdraw the Streamlining Rule and propose a voluntary rule such as the one proposed here.

Thank you again for the opportunity to provide NCLA's perspective on these important issues. If you have any questions, comments or concerns, please feel free to contact NCLA at mike.degrandis@ncla.legal.

Very truly yours,

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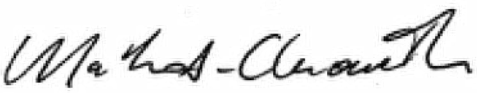

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