1995

# Judicial Review of FCC Action

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TABLE OF CONTENTS



## INTRODUCTION

The Federal Communications Commission ("FCC") has faced relatively few major changes in its enabling statute[1] during the last sixty years. Its procedures largely have been preserved since New Deal days. More particularly, judicial review of FCC action has changed little since the adoption, over three decades ago, of general title 28 procedures for review of rulemaking and other non-

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[1] Communications Act of 1934, Pub. L. No. 73-416, §§ 1, 4-5, 48 Stat. 1064 (1934) (codified at 47 U.S.C. §§ 151, 154-155).

licensing decisions.[2]

The Communications Act's provisions for judicial review thus appear to represent fragments from past administrative law, especially with regard to the sometimes vague and often unjustified distinction between its procedures for review of licensing decisions and those for all other decisions, in particular those governing rulemaking proceedings. With the advent of the so-called "information superhighway," and tentative movement toward amendment of the Communications Act,[3] the time might be ripe to refine and rationalize the FCC's appellate procedure. The past system seems to have worked reasonably well, however, despite its inconsistencies and other warts.

To date, no secondary literature has addressed judicial review of FCC action in any detail. Because of increasing pressure for changes to the Commission's organic act, a brief review of this somewhat dry area may be useful. Moreover, appellate procedure is a difficult area for many FCC practitioners, partially because they encounter it so rarely. To begin with, it will be helpful to place the FCC's situation in context with general federal procedures for judicial review.

## I. JUDICIAL REVIEW OF FEDERAL ADMINISTRATIVE AGENCY ACTION IN GENERAL

Unlike some state systems, the federal judicial system has no general common law judicial review of administrative action. This is not to say, however, that all appeals must have a direct statutory basis. As discussed below,[4] other forms of indirect judicial review are available, although they rarely form the basis of review of FCC action. Nevertheless, some form of statute governs most agency review, including virtually every challenge to the Commission's actions. There are several forms of statutory judicial review in the federal system.

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[2] Communcations Act Amendments of 1952, Pub. L. No. 82-554, § 14, 66 Stat. 711, 718-20 (1952) (amending 47 U.S.C. § 402 (1988), to include by reference the provisions of chapter 158 of title 28).

[3] After a bruising battle over the provisions of the 103d Congress' comprehensive communications reform legislation, its sponsor and then chairman of the Senate Commerce Committee, Sen. Ernest Hollings, ultimately withdrew the contentious reform bill, the Communications Act of 1994, 1994 S. 1822, 103 S. 1822, 103d Cong., 2d Sess. (1994). *See* Nicholas W. Allard, *Must Carry and the Courts:* Bleak House, *the Sequel*, 13 CARDOZO ARTS & ENT. L.J. 139, 145 n.19 (1994). Senator Larry Pressler, the new chairman of the Senate Commerce Committee, is pushing for reform legislation to be passed early in the 104th Congress' tenure. *See* John Rendleman, *More Specifics Included in Latest Telecom-Reform Proposal*, COMMUNICATIONSWEEK, Feb. 6, 1995, at 4; *Communications: Pressler, Fields Outline New Communications Bill to Governors*, WASH. INSIDER (BNA), Jan. 31, 1995.

[4] *See infra* text accompanying notes 6-9.

First, an agency's enabling statute may specify a procedure for, as well as a standard of, review. Most commonly it is older agency enabling statutes, including the Communications Act, that contain such agency-specific provisions.

Second, an enabling act may incorporate a general statutory review procedure by reference. A common one, found in the Communications Act, is chapter 158 of title 28.[5]

Third, general statutes authorize both traditional and modern forms of "nonstatutory" relief.[6] For example, injunctive and declaratory relief may be available where no statutory remedy exists.[7] In addition, some of the traditional "great prerogative writs" may apply.

As their name implies, the writs were within the sovereign's discretion in exercising its prerogative powers over its courts. In the context of modern administrative law, the two most important writs are mandamus and certiorari. The former allows a court to require an administrative official to perform a non-discretionary action—for example, to issue a previously-approved license or certificate.[8] The Mandamus and Venue Act of 1962[9] resolved most questions regarding the applicability of federal mandamus. By contrast, certiorari directs an inferior tribunal—including an administrative agency—to transmit the record of a proceeding to a higher court for review. State courts use both mandamus and certiorari more intensively than do federal courts, since most states have relatively underdeveloped systems for judicial review.

Despite its name and scope, the Administrative Procedure Act[10] ("APA") does not create any right to judicial review.[11] Sec-

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5 28 U.S.C. §§ 2341-2351 (1988 & Supp. V 1993) (referred to in 47 U.S.C. § 402(a)).

6 These procedures are "nonstatutory" in the sense that—unlike the types of statutes discussed above—their details are not set out by law. Nevertheless, of course, their existence and applicability are defined by statute.

To a limited extent, of course, actions for damages function as a type of judicial review, since they allow a court to pass upon the legal validity of an agency's action and to impose the indirect sanction of monetary damages. Because these actions cannot *per se* change an agency's policy and because they are subject to the vagaries of sovereign immunity, however, they provide a relatively limited remedy.

7 Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (1988 & Supp. V 1993).

8 Indeed, the availability of mandamus reaches back as far as *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803), which recognized its existence while refusing on other grounds to issue an order to deliver a judicial commission.

9 Act of Oct. 5, 1962, Pub. L. No. 87-748, 76 Stat. 744 (inserting 28 U.S.C. § 1361).

10 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1988 & Supp. V 1993). The sections governing judicial review are 5 U.S.C. §§ 701-706.

11 Califano v. Sanders, 430 U.S. 99 (1977). The original 1947 Attorney General's manual on the APA stated that § 701 *et seq.* "not only does not supersede special statutory review proceedings, but also generally leaves the mechanics of judicial review to be governed by other statutes and by judicial rules." ATTORNEY GENERAL TOM C. CLARK, UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE

tion 702 expressly states that a party may secure judicial review if "adversely affected or aggrieved by agency action *within the meaning of a relevant statute*. . . ."[12] The statute then sets forth procedures for judicial review authorized by—but not specified in sufficient detail within—other statutes.

In addition, both general and local rules implement statutory review mechanisms. The Federal Rules of Appellate Procedure ("FRAP") set forth relatively specific procedural provisions for the Courts of Appeals.[13] The Supreme Court promulgates and amends the FRAP pursuant to its own statutory authority.[14] In addition, each circuit court may adopt local "housekeeping" rules, as long as the rules do not conflict with title 28 or the FRAP.[15]

Finally, the justiciability doctrines derived from constitutional litigation—e.g., standing, ripeness, mootness—naturally apply to review of administrative actions. They usually do not play a major role in administrative litigation, however, because the status of a formal agency "case" generally is clear. If an agency has followed its statute and rules on a proceeding, usually there is little question whether its action is moot, not ripe, etc. To the extent that justiciability questions do arise, the issue generally involves whether the action constitutes a "final order."

## II. JUDICIAL REVIEW OF FCC ACTIONS—IN GENERAL

Virtually all challenges to Commission action arise under two provisions of the Communications Act, each of which provides for review at the circuit court level. The first, section 402(b),[16] is agency-specific, and governs appeals solely from licensing decisions; these matters are cognizable exclusively in the District of Columbia Circuit.

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ACT 93 (1947), *reprinted in* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK: STATUTES AND RELATED MATERIALS 159 (2d ed. 1992) [hereinafter ATTORNEY GENERAL'S MANUAL].

12 5 U.S.C. § 702 (emphasis added).

13 These provisions govern civil and criminal cases, as well as judicial review of administrative action. This discussion deals only with the FRAP's application to agency cases.

14 28 U.S.C. §§ 2072-2074 (1988 & Supp. V 1993). The Hobbs Administrative Orders Act was partially a product of the concern over reform of the administrative agencies after World War II, which also led to the Administrative Procedure Act and the ATTORNEY GENERAL'S MANUAL, *supra* note 11.

The Congress need not approve the FRAP explicitly. While proposed amendments must be submitted to the Congress, they automatically take effect if, after ninety days, Congress does not disapprove them, which it rarely does.

15 For example, the District of Columbia Circuit Rules ("D.C. CIR. R.") specifically state that they are "consistent with" the FRAP. D.C. CIR. R. 1.

16 47 U.S.C. § 402(b) (1988).

The second, section 402(a),[17] incorporates by reference chapter 158 of title 28, and encompasses all other FCC actions, including rulemaking proceedings, policy statements, and complaints. These cases may be heard in any circuit in which a petitioner can establish venue. As a rough generalization, review of any FCC formal action other than a licensing decision occurs pursuant to section 402(a).

By their terms, the two provisions thus are "mutually exclusive." As the Seventh Circuit has noted, "appeals from orders of the Commission in exercising its 'licensing powers' must be taken to the District of Columbia Circuit. All other orders fall within the general coverage of [section] 402(a). Sections 402(a) and (b) are mutually exclusive."[18]

Some confusion results where a moving party seeks review of both a licensing decision and a rulemaking proceeding. For example, in *Hubbard Broadcasting, Inc. v. FCC*,[19] a broadcaster sought increased coverage for its station as well as an amendment of the rules governing other stations' coverage. Hubbard filed its proceeding in the Eighth Circuit pursuant to section 402(a) on the theory that its appeal involved a rulemaking proceeding. The Eighth Circuit held that where a substantial licensing question also was involved, a case presumptively should go to the D.C. Circuit, noting that:

> [the] FCC's denial of Hubbard's "package" of applications was, as a matter of substance, the exercise by [the] FCC of its "radio-licensing power" reviewable under section 402(b); further, that to permit Hubbard to split off a part of the "package" in a transparent attempt to obtain jurisdiction in a forum other than the Court of Appeals for the District of Columbia . . . would frustrate the clear intent of Congress that judicial review of all cases involving FCC's "radio-licensing power" be limited to [that court].[20]

As discussed below,[21] review of FCC action also is subject to the FRAP and the relevant circuit court rules. While the D.C. Circuit's exclusive jurisdiction makes it the relevant court in all licensing cases, many rulemaking and other matters also end up in the D.C. Circuit. Geographically, it is the closest of the Courts of Ap-

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17 47 U.S.C. § 402(a).

18 Cook, Inc. v. United States, 394 F.2d 84, 86 (7th Cir. 1968) (footnote and citation omitted).

19 684 F.2d 594 (8th Cir. 1982).

20 *Id.* at 596-97.

21 *See infra* text accompanying notes 63-101.

peals to the FCC. Until recently,[22] this made it an easy target for races to the courthouse. Although this consideration is largely irrelevant today because of changes in venue statutes,[23] some litigants still prefer the D.C. Circuit over other Courts of Appeal, because of its perceived "pro-regulatory" jurisprudence—which may have waned somewhat in recent years.

Many aspects of section 402(b) appeals and 402(a) petitions for review are identical, under both the FRAP and D.C. Circuit Rules. In the interest of brevity, the following discussion cross-references those rules and doctrines of sections 402(b) and 402(a) that are identical.

In addition, some challenges to Commission decisions may be brought before district courts for injunctive or other relief.[24] Moreover, the Communications Act allows direct actions in district court against common carriers, as opposed to broadcasters; section 206[25] allows a district court to award damages and attorneys' fees for violation of the Communications Act common carrier provisions. By definition, this section does not apply to broadcasters or cable operators.

Finally, comparatively few justiciability problems arise, particularly under section 402(b). Although there has been surprisingly little discussion, most observers seem to assume that the relatively relaxed standing requirements for intervention in FCC broadcast licensing proceedings[26] also apply to appeals of both licensing and rulemaking decisions.[27] Financially affected firms, citizens groups, and others have little difficulty in meeting standing requirements on appeal. To the extent that issues regarding justiciability arise, they usually question the existence of a "final order," as discussed below.[28]

## III. Judicial Review of FCC Licensing Decisions

Sections 402(a) and 402(b) are discussed separately because

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22 *See infra* text accompanying notes 124-126.

23 *See infra* text accompanying notes 119-120.

24 For example, in *Writers Guild of America, West v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated and remanded*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 U.S. 824 (1980), the district court held that quasi-formal pressure by the Commission—and particularly its chairperson—for broadcasters to adopt a "family viewing policy" violated the First Amendment. The Court of Appeals held that the plaintiffs first should have presented their claims to the FCC, and the matter did not go any further.

25 The statute allows damages for "any act, matter, or thing in this chapter [Title II] prohibited or declared to be unlawful . . . ."

26 *See infra* text accompanying notes 85-89, 129.

27 *E.g.*, Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1000 n.8 (D.C. Cir. 1966).

28 *See infra* text accompanying notes 39-42.

they differ significantly in many respects. Many statutes and rules, however, apply to both—e.g., provisions as to briefs and appendices. Moreover, the D.C. Circuit, where many section 402(a) appeals ultimately are heard, treats the two types of proceedings identically. Similarities are noted as applicable.

### A. *Appealable Actions*

Section 402(b) applies only to appeals from the FCC. It governs virtually any Commission decision relating to a broadcast or other license to transmit over the air. It applies not just to licenses, but also to construction permits, the Commission's initial authorization to build a station before application for a final license.[29] Moreover, section 402(b) does not restrict appeals to applicants for a construction permit or license. Instead, it gives a laundry list of licensing decisions that parties are entitled to appeal:

> (1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
> (2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
> (3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
> (4) By any applicant for the permit required by [47 U.S.C. § 325] whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.
> (5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.
> (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1) to (4) of this subsection.
> (7) By any person upon whom an order to cease and desist has been served under [47 U.S.C. § 312].
> (8) By any radio operator whose license has been suspended by the Commission.[30]

Although section 402(b) may appear only to authorize appeals

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29 As discussed later, grant of a construction permit is the first step toward securing a license. Only after an applicant has built a station to satisfy the requirements in its construction permit may it apply for a final "covering license."

30 47 U.S.C. § 402(b).

by applicants denied construction permits or licenses, it allows a number of other parties to seek judicial review. The language in paragraph 6 about "any person . . . aggrieved" allows appeals by parties adversely affected by the Commission's actions, thus permitting appeals by many parties other than applicants, including those filing competing applications or petitions to deny. Nearly any party with standing before the Commission[31] may invoke section 402(b) to appeal the grant or denial of a construction permit or a license.

Although the Courts of Appeals tend to take a rather relaxed view of standing, they require a party to have participated in an agency's proceedings in order to appeal.[32] This issue arises most commonly in rulemaking proceedings; courts expect parties to participate in rulemaking, since considerably less effort is necessary to file comments than to enter into a full-blown licensing hearing. Just as the Courts of Appeals seem to use the final order rule as a substitute for the traditional justiciability doctrine, they use prior participation as a non-constitutional substitute for standing requirements.[33]

### B. *Exclusive Review by D.C. Circuit*

Perhaps section 402(b)'s most significant aspect is that it restricts review to the D.C. Circuit. Although the reasoning behind this provision may be lost in history, the apparent goal was to centralize judicial review of a then "new technology." Former Chief Justice Taft—who presided over the Supreme Court after the enactment of the Radio Act of 1927[34]—once complained that:

> Interpreting the law on this subject is something like trying to interpret the law of the occult. It seems like dealing with something supernatural. I want to put it off as long as possible in the hope that it becomes more understandable before the court passes on the questions involved.[35]

The need for this type of *de facto* specialized court is less than clear today. To be sure, the D.C. Circuit has developed a formidable amount of expertise in communications, and particularly broad-

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[31] *See infra* text accompanying note 129.

[32] *E.g.*, Sierra Club v. United States Regulatory Comm'n, 825 F.2d 1356 (9th Cir. 1987).

[33] *E.g.*, ACLU v. FCC, 774 F.2d 24, 25 (1st Cir. 1985); *Sierra Club*, 825 F.2d 1356.

[34] Act of Feb. 23, 1927, ch. 169, Pub. L. No. 69-632, 44 Stat. 1162.

[35] CLARENCE C. DILL, RADIO LAW 1-2 (1938). The Court's attitude does not seem to have changed dramatically over the years, as evidenced by its reluctance to make decisions in the area of high-technology—and particularly communications—law and policy. *See infra* text accompanying notes 146-151.

casting, cases. But other Courts of Appeals also have skills in this area. Petitions for review of rulemakings increasingly have ended up in other circuits under section 402(a). Most important, cases involving "new media" such as cable television have been brought in a number of circuits. Nevertheless, abandonment of the Communications Act's dedication of broadcast-related appeals to the D.C. Circuit seems unlikely to change in the near future.[36]

### C. *Filing Procedures under Section 402(b)*

Under section 402(b), the filing of a "notice of appeal" initiates review. A notice is a comparatively simple document. It need include only a "concise statement" of the "nature of the proceedings as to which the appeal is taken" and "the reasons on which the appellant intends to rely," as well as "proof of service of a true copy of said notice and statement upon the Commission."[37] Service upon "interested parties" is required within five days after filing of the notice of appeal.[38] A notice of appeal usually is extremely short—usually only one or two pages—and phrased in very conclusory terms. "Fact pleading" is not required.

In licensing cases, a notice of appeal must be filed within thirty days of the Commission's release of "public notice," which constitutes a "final order."[39] As with most deadlines for filing appeals, the deadline is jurisdictional, and cannot be extended by either the Commission or a reviewing court.[40] A "public notice" is not just a press release,[41] which the Commission also publishes on a regular basis. It is a short, one or two page descriptive document explaining the agency's action and rationale. As discussed later,[42] in many cases issuance of a public notice establishes the deadline for an appeal.

Although the FCC normally publishes a decision near the time it issues a public notice, in some situations there may be a delay between the latter and the former, particularly if a case is controversial and preparation of a consensus opinion takes time. If a decision is not released within thirty days of a public notice's issuance, an appellant may have to file a notice of appeal without

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36 Randall Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003 (1991) (suggesting that specialized courts have fallen out of favor with Congress).

37 47 U.S.C. § 402(c).

38 47 U.S.C. § 402(d).

39 47 U.S.C. § 402(c).

40 California Ass'n of the Physically Handicapped v. FCC, 833 F.2d 1333 (9th Cir. 1988); Hallstrom v. Tillamook County, 831 F.2d 889 (9th Cir. 1987).

41 Microwave Communications, Inc. v. FCC, 515 F.2d 385, 394 (D.C. Cir. 1974).

42 *See infra* text accompanying note 49.

having the full text of an action. Due to the notice of appeal's general nature, this usually is not a major problem. If the full text of the decision differs substantially from the public notice, however, an appellant can protect herself by filing an additional notice of appeal; the courts allow multiple notices of appeal from separate FCC documents.[43]

### D. *Requirement of a "Final Order"*

Although not by their own terms, both sections 402(a) and 402(b) allow appellate proceedings only from a "final order" of the Commission. Both provisions use the term "orders," rather than "final orders." As incorporated by reference in section 402(a), however, title 28 uses the "final order" language,[44] and the courts consistently have interpreted "order" in section 402(b) to mean "final order."

A final order usually is clear; if no further administrative proceedings are available and the action will affect a party, there is little room for confusion. In some cases, however, the status of a proceeding is less than clear.[45]

#### 1. Premature Filings

First, there may be some question as to whether the Commission's decision actually will have an affect on the appealing firm. This question also may implicate ripeness questions; ripeness and the final order doctrine are quite similar, since both focus on whether there is an immediate impact on the party that is seeking review. Courts thus often treat the issues together, and often reach identical conclusions.[46]

This result stems from courts' being fairly realistic about and receptive to claims that FCC action will have an impact on a party.

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[43] In petitions for review the Commission has made issuance of a public notice the "effective date" of an action in order to facilitate identifying the deadline. *See infra* text accompanying notes 106-107, 122.

[44] 28 U.S.C. § 2344 (1988).

[45] For a general discussion of the final order rule, see Romualdo P. Eclaves, Annotation, *What Constitutes Agency "Action," "Order," "Decision," "Final Order," "Final Decision," or the Like, Within Meaning of Federal Statutes Authorizing Judicial Review of Administrative Action—Supreme Court Cases*, 47 L. Ed. 2d 843 (1975).

[46] For example, in *Office of Communication of United Church of Christ v. FCC*, 911 F.2d 813 (D.C. Cir. 1990), the court had before it the Commission's denial of a rulemaking petition to reinstate the traditional "anti-trafficking" policy, a rule preventing the buyer of a broadcast station from selling it within three years of its acquisition. The court held that the FCC's action was final, even though the agency had reached an identical conclusion in prior proceedings several years before, and that the issue was ripe since the Commission had made its position clear. *Id.* at 816-17.

In the early case of *Columbia Broadcasting System v. United States*,[47] the Supreme Court held that the Commission's adoption of rules regulating network-affiliate relationships was sufficiently final—as well as ripe—to constitute a final order. The Court specifically rejected the notion that CBS needed to wait until the Commission actually enforced the rules against the affiliates. The Court noted:

> If a licensee renews his contract, the regulations . . . authorize the Commission to cancel his license. In a proceeding for revocation or cancellation of a license, the decisive question is whether the station, by entering into a contract, has forfeited its right to a license as the regulations prescribe. It is the signing of the contract which, by virtue of the regulations alone, has legal consequences to the stations and to appellant . . . . If an administrative order has that effect it is reviewable and it does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for non-compliance.[48]

Similarly, the Second Circuit has held that the Commission's adoption of a rule by a formal vote and issuance of a news release—but not a public notice—constituted a final order.[49] The court emphasized that "[t]he action taken at [the FCC public] meeting was regarded by all the participants as final."[50] Where the Commission issues a series of orders—as is not uncommon in hotly contested adjudications or rulemakings—the only safe approach may be to file against every order, and then let the reviewing court ultimately decide which one was final. This strategy is aided by some courts' willingness to allow a filing against the last order to include a challenge to all prior orders, even if they might be considered final.[51]

Nevertheless, a decision can have a substantial effect upon a party's procedural status and yet not be considered final. For example, where an order extended the filing deadline for new frequencies, it increased the number of competing applicants; it was not deemed final, however, since judicial review of the ultimate

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47 316 U.S. 407, 417 (1942).

48 *Id.* at 417-18.

49 ITT World Communications, Inc. v. FCC, 621 F.2d 1201 (2d Cir. 1980).

50 *Id.* at 1204.

51 *See, e.g.*, ACLU v. FCC, 486 F.2d 411, 413 (D.C. Cir. 1973) (noting that "even though during the proceeding the Commission intermittently issued several orders, each of which if considered alone might be considered final, but all of which preceded the ultimate order[,]. . . the statute reasonably construed authorizes a petition for review to be filed within sixty days from the date of the Commission's 'final order'. . . .").

license grant would be available.[52]

### 2. "Negative Order" Rule

Second, another problem area in the past involved "negative orders," Commission decisions not to take any action on a matter. To a large extent, the confusion seems to have arisen from reasoning by analogy to grants of mandamus. The courts failed to distinguish between inaction reflecting an agency's discretion, and failure to decide a *bona fide* controversy.

The Supreme Court largely put an end to the negative order doctrine in *Rochester Telephone Corp. v. United States.*[53] In that case a telephone company petitioned for review of a Commission order finding it to be an interstate carrier under the "control" of the New York Telephone Company, and thus not subject to the exemption from federal common carrier regulation for intrastate carriers. The Court held that the FCC's order reclassifying the company as interstate was not merely a refusal to take discretionary action, but rather a decision with immediate legal consequences, such as the filing of complex reports and forms.[54]

Although the negative order doctrine still occasionally crops up in FCC appeals, most courts reject it. For example, the Seventh Circuit has held that an order denying reply time under the fairness doctrine[55] was final, since it effectively defeated the complainant's ability to secure reply time.[56]

### 3. Timing Issues

Although the courts have become increasingly realistic in defining "final order," some degree of uncertainty still exists, creating difficulty for litigants in deciding when to seek judicial review. Several problems regarding timing exist.

First, a party may file after the Commission appears to have taken a final action. For example, in *Microwave Communications,*

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52 Little Rock Television Co. v. FCC, 646 F.2d 1271 (8th Cir. 1981).

53 307 U.S. 125 (1939).

54 *Id.* at 142-44.

55 The fairness doctrine required broadcast licensees to serve the public interest by covering controversial issues in the community, and also to provide balanced coverage of those issues. *See generally* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989) (sustaining the FCC's order repealing the doctrine upon its finding that the doctrine did not serve the public interest due to its chilling effect on speech), *cert. denied,* 493 U.S. 1019 (1990).

56 Maier v. FCC, 735 F.2d 220 (7th Cir. 1984). Judge Posner dissented on the ground, *inter alia,* that the Commission's denial of a complaint was in the nature of prosecutorial discretion—a position not derived from the negative order doctrine. *Id.* at 237-39.

*Inc. v. FCC*,[57] MCI filed a petition for review of a Commission rulemaking proceeding. MCI filed more than sixty days after an informal announcement of the agency's action, but less than sixty days after the Commission's order denying rehearing. The D.C. Circuit held that the petition was timely, reasoning that because "administrative reconsideration was timely sought, the filing period was extended to the sixtieth day after 'public notice was given' of the Commission's opinion and order . . . denying rehearing."[58]

On the other hand, courts are not sympathetic to parties' jumping the gun and filing premature appellate proceedings. The problem is not with filing after the sixty day "window," but rather that the petition is filed before that window even opens. In these types of cases, the D.C. Circuit consistently holds that appeals filed before a final order are untimely, even though technically they come within sixty days of issuance of a final order.[59]

Related problems arise when the FCC delays in issuing the final text of a decision. Although it may be difficult to state the grounds of an appeal without a textual decision in hand, it is wise to file a notice of appeal from a public notice—not a news release—if a window is about to close and the Commission has not released a final order. A party always can file a later notice of appeal from the text of the order. Some complicated cases with multiple orders thus generate several notices of appeal, because of the uncertainty involved.

The thirty and sixty day filing windows are jurisdictional in nature and may not be extended by either the Commission or a court.[60] Failure to make a timely filing results in dismissal of an appeal.[61] When in doubt as to the existence of a final order, it thus is wise to file.

Moreover, there is inherent confusion as to the timing of an appeal, since section 402(b) has a filing period of only thirty days, while section 402(a) allows sixty.[62] It is easy to assume that time is

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57 515 F.2d 385 (D.C. Cir. 1974).

58 *Id.* at 389.

59 *See, e.g.*, Western Union Tel. Co. v. FCC, 773 F.2d 375 (D.C. Cir. 1985); North Am. Telecommunications Ass'n v. FCC, 751 F.2d 207 (7th Cir. 1984).

60 *See supra* text accompanying notes 112-114.

61 *E.g.*, Waterway Communications Sys., Inc. v. FCC, 851 F.2d 401 (D.C. Cir. 1987). In that case, the appellant filed a "petition for review" (actually a notice of appeal) challenging the Commission's failure to hold a hearing regarding a grant of licenses to a competitor for marine telephone service. As luck would have it, the appeal was filed *before* the grant of licenses to appellant's competitors. It thus was untimely, because premature as to the license grant. *See also* National Black Media Coalition v. FCC, 760 F.2d 1297, 1298 (D.C. Cir. 1985).

62 28 U.S.C. § 2344.

not of the essence for a notice of appeal—with obviously embarrassing results. Even where deadlines are not at issue, experienced practitioners routinely caption notices of appeal as petitions for review, and *vice versa.*

### E. *Procedure on Judicial Review*

Many issues in this area are identical for sections 402(a) and 402(b). In most cases the statutory requirements are the same, and the FRAP and the D.C. Circuit Rules apply identically.

#### 1. Motions, Record, and Appendices

After a notice of appeal or petition for review has been filed in the D.C. Circuit, the first step is to file a "docketing statement."[63] This gives general information about the case and the parties, on a form supplied by the Clerk of the Court.[64]

The next step commonly is motions by the parties or others—e.g., motions to strike a notice of appeal or petitions to intervene. While the FRAP do not have any general provisions as to motions, the D.C. Circuit's rules are quite extensive. Motions and petitions may not be longer than twenty pages, with replies limited to ten pages.[65] Both page and print size are specified.[66] The pleading cycle is on a fast track, with responses to motions due within seven days[67] and replies to responses within three days thereafter.[68] The Clerk of the Court has authority to dispose of "procedural motions."[69]

Under the FRAP, the first motion or brief filed must contain a "corporate disclosure statement," which informs the court of the parties and their relationships. The statement must identify "all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public."[70] The D.C. Circuit requires somewhat more information, including "the represented entity's general nature and purpose, insofar as relevant to the litigation, and if the entity is unincorporated . . . the names of any members of the entity that have issued shares or debt securities to the public."[71]

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63 D.C. CIR. R. 15(c).
64 D.C. CIR. R. 15(c)(2).
65 D.C. CIR. R. 27(a)(2).
66 D.C. CIR. R. 27(a)(3); FED. R. APP. P. 32.
67 D.C. CIR. R. 27(c).
68 D.C. CIR. R. 27(d).
69 D.C. CIR. R. 27(e)(1).
70 FED. R. APP. P. 26.1.
71 D.C. CIR. R. 26.1(b).

The Commission must file the record with the court within five days of the notice of appeal.[72] In some cases the "record" is quite short, in others monstrous. If the FCC has rejected a petition to deny a broadcaster's license renewal, the record will consist merely of the parties' pleadings and the Commission's usually brief decision—a few hundred pages in total. On the other hand, the record in a fully litigated comparative hearing often consists of extensive pleadings, transcripts of several dozen hearing days, and internal FCC appeals—often tens of thousands of pages.

For both petitions and notices of appeal, section 2112 of title 28[73]—which authorizes the Courts of Appeals to promulgate rules[74]—governs procedural aspects of the record. Most significantly, title 28 allows a "short form" filing procedure, which significantly reduces the size of the record on appeal. Section 2112 provides that rules of procedure "may authorize the agency . . . to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit [them] to the court, when and as required by it . . . ."[75] Generally, courts require submission of nothing more than the "certified list of record items" until after the briefs have been filed.[76] Rule 30 of the FRAP defers filing of briefs until twenty-one days after the filing of the appellee's brief.[77] The parties initially may file their briefs with page references to the original documents, and then substitute them with citations to the deferred appendix's pagination.[78] This can be somewhat expensive. Although a party must provide the court with only seven copies of its initial brief, it must file fifteen copies of its final brief with the court.[79]

The appellant or petitioner must serve upon opposing parties a list of items which it proposes to include in the appendix; if the appellee requests that other materials be included, the appellant must do so at its expense.[80] To ensure that appellees do not make unreasonable requests, the FRAP allow each circuit court to "provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix."[81]

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72 47 U.S.C. § 402(d) (1988).
73 28 U.S.C. § 2112 (1988).
74 Section 2112 governs both petitions for review and notices of appeal.
75 28 U.S.C. § 2112(a).
76 The D.C. Circuit also has adopted this provision. D.C. CIR. R. 17(b).
77 FED. R. APP. P. 30(c).
78 *Id.*; D.C. CIR. R. 30(c).
79 D.C. CIR. R. 31.
80 FED. R. APP. P. 30(b).
81 *Id.*

The D.C. Circuit has implemented this by providing that "[c]osts shall not be awarded for unnecessary reproduction" and "appropriate sanctions will be imposed . . . if the court finds counsel to have been unreasonable in including such material."[82] The loss of costs for a successful appellant is a significant deterrent.

The D.C. Circuit may waive the requirement of an appendix,[83] but this is rare in FCC proceedings, since the parties usually have ample resources. The Courts of Appeals always are free to take notice of public documents on file at the Commission or any other agency.

### 2. Intervention

Intervention is common in licensing proceedings, which usually involve disputes between competing operators or petitions by citizens groups to deny license renewals. If a competitor or a petitioner files an appeal, a licensee usually intervenes in order to protect its interests. Moreover, other entities involved in the proceeding—e.g., competitors—also may wish to become parties to the appeal. Although an *amicus curiae* brief in theory allows these parties to be heard, it restricts some of their procedural rights—most notably, their right to appellate argument. In addition, the D.C. Circuit generally does not allow individual parties to file *amicus* briefs; it requires them to join with other parties having similar interests.[84]

An "interested party"[85] may intervene by filing a "notice of intention to intervene" within thirty days after filing of the notice of appeal.[86] The time frame thus runs behind the deadline for appeal; the triggering event is the filing of the notice of appeal, while the window for filing a notice of appeal opens with the Commission's public notice. In theory, a third party could file a notice of appeal after a motion to intervene.

Like the notice of appeal, the notice of intention to intervene is a short pleading that may include highly conclusory statements. Unlike most modern federal pleadings, however, it must be supported by a "*verified statement* showing the nature of the interest of

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82 D.C. CIR. R. 30(b).

83 D.C. CIR. R. 30(d).

84 D.C. CIR. R. 29(d).

85 47 U.S.C. § 402(e) (1988). The statute defines "interested party" as "[a]ny person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of . . . ." *Id.* This generally includes all parties participating in the Commission's proceedings.

86 *Id.*

such party . . . ."[87] This is largely a formality, of course, and generally consists of a one-page affidavit from an official within the intervening entity stating that he or she believes the statements in the notice to be true.

This detail often is overlooked, and attracts motions to dismiss or to strike—often merely as a form of harassment. Failure to verify a notice of intervention is not jurisdictional, however, unlike failure to file a timely notice of appeal. It may be cured by an expeditious motion to file the required statement *nunc pro tunc*—a request that the D.C. Circuit routinely grants.

While title 28 does not contain any specific provisions as to intervention, rule 15 of the FRAP covers the issue for section 402(a) cases. It requires a motion to intervene—not verified—containing a "concise statement of the interest of the moving party and the grounds upon which intervention is sought."[88] As under section 402(e), it must be filed within thirty days of the petition for review.[89]

### 3. Briefs and Oral Arguments

Under both sections 402(a) and 402(b), briefs are fairly conventional. The FRAP specify general requirements as to size of paper and type, and require the covers of briefs for appellants to be blue, for appellees red, for intervenors green, and for reply briefs gray.[90] They also set forth general requirements as to jurisdictional statements and related matters.[91] An interesting 1993 amendment requires a brief to state the "standard of review."[92]

The D.C. Circuit's rules are somewhat more specific. A brief must contain a "Certificate as to Parties, Rulings, and Related Cases,"[93] including the certificate as to corporate parties,[94] as well as a description of the agency proceeding under review[95] and of any related litigation before any court.[96] Excluding introductory materials such as certificates, tables, and the like, principal briefs may not be longer than 12,500 words, or, if prepared by typewriter, fifty typewritten pages. Reply briefs are limited to 6,250 words or

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87 *Id.* (emphasis added).
88 FED. R. APP. P. 15(d).
89 *Id.*
90 FED. R. APP. P. 32(a).
91 FED. R. APP. P. 28(a)(2).
92 FED. R. APP. P. 28(a)(5).
93 D.C. CIR. R. 28(a)(1).
94 D.C. CIR. R. 28(a)(1)(A). *See supra* text accompanying notes 70-71.
95 D.C. CIR. R. 28(a)(1)(B).
96 D.C. CIR. R. 28(a)(1)(C).

twenty-five typewritten pages.[97] The D.C. Circuit seems to take its page limitations seriously, "disfavor[ing]" motions that exceed the page limits.[98]

The FRAP also have general requirements as to oral arguments.[99] Among other grounds, a court may decline to hear argument if it believes that it can decide the case adequately on the briefs.[100] Argument is fairly conventional, with the appellant's beginning and concluding the argument.[101]

## IV. JUDICIAL REVIEW OF OTHER FCC ACTIONS

As noted above, section 402(a) provides that appeals of Commission decisions in proceedings other than licensing cases are governed by chapter 158 of title 28.[102] Section 2342(1) applies to all FCC "final orders" other than those in licensing cases. It thus is the primary review mechanism for rulemaking actions, policy statements, declaratory rulings, and a wide variety of other decisions.

As noted, there are differences and similarities between review under section 402(a) and 402(b). To begin with, the basic nomenclature differs. A section 402(a) proceeding is initiated through a "petition for review" rather than a "notice of appeal."[103]

Even seasoned practitioners often miscaption a "notice" as a "petition," and *vice versa.* Aside from problems with the relevant filing period, this type of mistake normally makes no substantial difference, and a reviewing court usually ignores it. Nevertheless, it shows the need for thought in filing an appeal from FCC actions.

Section 402(a) has a more generous filing deadline than section 402(b)—sixty rather than thirty days. Under title 28, "[a]ny party aggrieved by [an agency's] final order may . . . file a petition to review the order" in any Court of Appeals with proper venue.[104]

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97 D.C. CIR. R. 28(d). Intervenors and *amici curiae* are limited to 8,750 words or 35 typewritten pages, and briefs must be filed within the time limitations described in FED. R. APP. P. 29. D.C. CIR. R. 28(e)(3).

98 D.C. CIR. R. 27(h)(3) & D.C. CIR. R. 28(f)(1). "[S]uch motions will be granted only for extraordinarily compelling reasons." *Id.*

99 FED. R. APP. P. 34(a).

100 FED. R. APP. P. 34(a)(3).

101 FED. R. APP. P. 34(c).

102 28 U.S.C. § 2342 (1988 & Supp. V 1993). This section also governs appeals from the Secretary of Agriculture, the Secretary of Transportation, the Federal Maritime Commission, the Atomic Energy Commission, and the Interstate Commerce Commission.

The general section 2342 review scheme first was enacted in 1966—thirty-two years after § 402(b)—and is somewhat more in line with contemporary judicial review procedures.

103 These terms are a bit obfuscatory, since a "petition for review" is the means of reviewing many agencies' adjudicatory as well as rulemaking decisions. The distinction at the FCC largely is historical.

104 28 U.S.C. § 2344 (1988). For a discussion as to timeliness of petitions for review in

As noted below,[105] the choice of venue may be quite broad under section 402(a), as opposed to the exclusive D.C. Circuit jurisdiction under section 402(b).

As with section 402(b), the triggering event under section 402(a) is a "final order."[106] This requirement may be met, however, by the Commission's issuance of a "public notice" as to an action before release of its opinion.[107]

A petition under section 402(a) may be somewhat general. It need include only:

> a concise statement of
>
> (1) the nature of the proceedings as to which review is sought;
> (2) the facts on which venue is based;
> (3) the grounds on which relief is sought; and
> (4) the relief prayed.[108]

The Clerk of the Court then serves a copy of the petition upon the Commission and the Attorney General.[109]

The petitioner need attach only copies of the agency actions involved in its challenge. As under section 402(b), the Commission need not file all documents in the proceeding, but rather just a "certified list of record items."[110] Upon filing of a petition for review, the moving party must file a copy, date-stamped by the court clerk, with the Commission's General Counsel.[111]

As soon as the petition is filed, the Court of Appeals has jurisdiction to vacate stay orders or other temporary relief previously granted,[112] or, if there would otherwise be irreparable harm to the petitioner, to issue such an order.[113] Temporary relief is effective for a maximum of sixty days after the Commission's order, "pending the hearing on the application for the interlocutory injunction, in which case the order of the Court of Appeals shall contain a

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general, see Robin C. Larner, Annotation, *When Petition for Review of Administrative Order Under 28 USCS § 2344 is Timely Commenced*, 84 ALR Fed. 369 (1987).

105 *See infra* text accompanying note 118.

106 28 U.S.C. § 2344.

107 ITT World Communications, Inc. v. FCC, 621 F.2d 1201 (2d Cir. 1980). For a discussion of "public notices" and filing deadlines, see *supra* text accompanying notes 41-65.

108 28 U.S.C. § 2344.

109 *Id.*

110 *See supra* text accompanying note 76.

111 FCC General Rules of Practice and Procedure, 47 C.F.R. § 1.13 (1993). This provision is designed to assist in situations with multiple petitions for review. *See supra* text accompanying note 60.

112 28 U.S.C. § 2349(a) (1988).

113 28 U.S.C. § 2349(b).

specific finding based on evidence" of irreparable damage.[114] Once a petition is filed, the Commission loses its power to issue stays; only the reviewing court has jurisdiction over temporary relief.

The FCC's enabling statute, and not title 28, specifies the substantive standard for judicial review under section 402(a). The statute states merely that a Court of Appeals may "make and enter . . . a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency."[115]

A Court of Appeals has a wide variety of procedural options under title 28. If the Commission did not hold a hearing below, the court may: (1) remand for a hearing, when a hearing is required by law; (2) "pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits . . . that no genuine issue of material fact is presented"; or (3) transfer the proceedings to an appropriate district court for a hearing, when a hearing is not required by law and a genuine issue of material fact is presented.[116] The last option rarely is used. Similarly, a court may "adduce additional evidence" *de novo* if the court finds that it is "material" and that there "were reasonable grounds for failure" to introduce it before the FCC.[117]

### A. *Venue*

As noted above, questions sometimes arise in cases involving both licensing decisions and rulemaking issues. The quick answer seems to be that the D.C. Circuit's exclusive jurisdiction governs, and that both matters must be reviewed there—subject to section 402(b)'s thirty-day deadline.

Title 28 does not restrict review to the D.C. Circuit, but instead sets venue in potentially any Court of Appeals, describing venue as in "the judicial circuit in which the petitioner resides or has its principal office, or, the United States Court of Appeals for the District of Columbia Circuit."[118] Unlike section 402(b), section 402(a) thus opens up a wide variety of potential fora. Until recently, this encouraged forum shopping. This was particularly noteworthy during the 1980s, since the tension between regulation

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114 *Id.* If the Court of Appeals finds that irreparable damage would result, it can extend any temporary relief until its final decision.

115 28 U.S.C. § 2349(a).

116 28 U.S.C. § 2347(b) (1988).

117 28 U.S.C. § 2347(c).

118 28 U.S.C. § 2343 (1988).

and deregulation added increasingly heavy ideological overlays to Commission decisions. Courts of Appeals were perceived as having "political" agendas—for example, the D.C. Circuit as a "liberal," pro-regulation court, and the Seventh Circuit as a "conservative," pro-marketplace court.

The availability of multiple venues inevitably creates problems when two or more petitioners petition for review of the same order in different Courts of Appeals. At one point, this resulted in a straight race to the courthouse. Law firms had associates wait at the Commission for release of a public notice or order, and then race to the airport in attempt to be the first to file in a venue of choice. This often resulted in creating venue in the D.C. Circuit, the closest circuit court.

A 1988 amendment to title 28 rendered most of this totally irrelevant, by prescribing procedures for choosing a court when there are multiple petitions for review filed.[119] The courts encouraged the Commission to promulgate rules for determining the earliest time at which a petition may be filed.[120] This gives all potential petitioners notice of when a petition can be filed, and thus reduces the incentive to stage a race—even if that still were relevant under the 1988 legislation.

The Commission responded to the courts' invitation for uniform rules by pinning release of final orders to relatively easily ascertainable dates. The FCC did so by defining the "effective date" of most non-licensing decisions.[121] This scheme naturally does not and could not change the statutory definition of a "final order." Nevertheless, the two concepts generally seem very similar; an order presumably is not "final" until it is "effective." In theory, a Commission order might be final even if it did not meet the rules' definition of "effective date"—as noted before, in situations where courts accept the FCC's public announcement of a new policy as a "final order." But this situation does not appear to have arisen.

Under the rules, the date of public notice is 3:00 p.m. Eastern Standard Time on the day after any of the dates below:

> (1) For documents in notice and comment rule making proceedings[,]. . . the date of publication in the *Federal Register.*

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119 Act of Jan. 8, 1988, Pub. L. No. 100-236, § 1(3), 101 Stat. 1731, 1731-32 (amending 28 U.S.C. § 2112(a)).

120 ITT World Communications, Inc. v. FCC, 621 F.2d 1201 (2d Cir. 1980). In that case, one petition for review was filed on the day that the Commission adopted its decision, and two others when the full text was released. The court held that the first date governed, since the agency's action was complete in substantive terms at that time.

121 FCC General Rules of Practice and Procedure, 47 C.F.R. § 1.4 (1993).

> (2) For non-rulemaking documents released by the Commission or staff, whether or not published in the *Federal Register*, the release date. A document is "released" by making the full text available to the press and public in the Commission's Office of Public Affairs. The release date appears on the face of the document.
> (3) For rule makings of particular applicability, if the rule making document is to be published in the *Federal Register* and the Commission so states in its decision, the date of public notice will commence on the day of the *Federal Register* publication date. If the decision fails to specify *Federal Register* publication, the date of public notice will commence on the release date, even if the document is subsequently published in the *Federal Register*. *See Declaratory Ruling*, 51 [Fed. Reg.] 23,059 (June 25, 1986).
> (4) If the full text of an action document is not to be released by the Commission, but a descriptive document entitled "Public Notice" describing the action is released, the date on which the descriptive "Public Notice" is released.
> (5) If a document is neither published in the *Federal Register* nor released, and if a descriptive document entitled "Public Notice" is not released, the date appearing on the document sent (e.g., mailed, telegraphed, etc.) to persons affected by the decision.[122]

The FCC expressly reserves the right, however, to establish an earlier or later date in a particular case. Although it rarely does so, it occasionally changes the date in order to ensure that the parties and the public are informed adequately of a major rulemaking action.[123]

Although these rules previously would have left room for a race to the courthouse, today such an effort has no value. The 1988 amendments effectively took away from the Courts of Appeals any value of priority in filing.

Under section 2112,[124] if an agency receives petitions for review in two or more Courts of Appeal, it must notify the Judicial Panel on Multidistrict Litigation. In turn, the Panel "shall, by means of *random selection*, designate one court of appeals . . . in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals."[125] Being first in time thus has little or no value today. Although the Courts of Appeals presumably still retain their inherent power to transfer a

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122 47 C.F.R. § 1.4(b).
123 *Id.*
124 28 U.S.C. § 2112(a)(3) (1988).
125 *Id.* (emphasis added).

case for the convenience of the parties,[126] in appellate cases there usually are no compelling circumstances; after all, only an oral argument—rather than examination of witnesses or property—is involved.

The same provisions as to filing of the record apply under section 402(a) as under section 402(b).[127] The whole record thus need not be filed with the brief; instead, the FCC files only a "certified list of record items," followed by a joint appendix after filing of the briefs.

As with section 402(b) proceedings, intervention is available in section 402(a) appeals. Title 28 allows the Attorney General to intervene "as of right."[128] More generally, it allows any "party in interest" to appear if its "interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended."[129] Since there are virtually no cases under this provision, its interpretation is unclear. It seems reasonable to assume, however, that the relatively lenient type of standards under section 402(b) would apply, at least to any party having filed comments in a rulemaking or other proceeding at the Commission.

### B. *Rehearing in Banc*

Finally, in both section 402(a) and 402(b) cases, a losing party before a three-judge panel may seek a rehearing in banc, before all of the judges in a circuit. The filing must be made within fourteen days after the three-judge panel's decision.[130] A party may initiate this procedure by filing a "suggestion" of the "appropriateness of a hearing or rehearing in banc."[131] A majority vote of all active judges is required to grant a rehearing.[132] A "rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of

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126 The venue provisions of chapter 158, 28 U.S.C. § 2343, are silent as to transfers for the convenience of the parties. Section 1404 applies only to district courts. Neither provision, however, seems to negate the Courts of Appeals' traditional *forum non conveniens* powers.

127 28 U.S.C. § 2346 specifies that the filing of the record is governed by § 2112(a)—the same provision applicable to the record on appeal under § 402(b).

128 28 U.S.C. § 2348 (1988).

129 *Id.* The statute also specifies that "[c]ommunities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order." *Id.* The difference between this clause and the provision in the same paragraph as to "parties in interest" is less than clear, and very well may be non-existent.

130 FED. R. APP. P. 35(c), 40(a).

131 FED. R. APP. P. 35(b).

132 FED. R. APP. P. 35(a).

exceptional importance."[133] A rehearing in banc thus is an extremely rare form of relief to secure. Aside from its disfavored status, the extremely tight filing deadline of fourteen days makes it logistically difficult.

If a party has lost before a three-judge panel and has been unable to secure rehearing in banc, its only—albeit unlikely—remedy is a petition for certiorari to the Supreme Court.

## V. SUPREME COURT REVIEW

Under title 28, any "final judgment of the court of appeals" in a section 402(a) proceeding is "subject to review by the Supreme Court on a writ of certiorari."[134] A petitioner must file an application for a writ "within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be."[135]

A writ of certiorari, of course, is totally discretionary with the Supreme Court. The Court's rules provide that:

> A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following . . . indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
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> . . .
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> (c) When a . . . United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.[136]

A petition for certiorari is relatively straightforward. The petitioner must file its application within ninety days of "entry of judgment" by the court below.[137] In addition to the usual tables and

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133 *Id.*

134 28 U.S.C. § 2350(a) (1988); 28 U.S.C. § 1254(1) (1988) (allowing the Supreme Court to review a matter by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree").

135 28 U.S.C. § 2350(a).

136 SUP. CT. R. 10.

137 SUP. CT. R. 13.1. The Supreme Court's proposed revised rules add that petitions for certiorari are timely when filed within the ninety day period "unless otherwise provided by law," recognizing that Congress may modify that time period. Proposed Revised Rules of

summaries, the petition must contain a "*concise* statement of the case."[138] If the petitioner is a corporation, the filing must include a statement similar to the certificate required by the FRAP and D.C. Circuit.[139] The petition must be served by mail on all parties to the proceeding below.[140]

A respondent has thirty days from receipt of the petition in which to file an opposing brief, which also must be served on all of the parties below.[141] Both a petition and a reply brief are limited to thirty printed or sixty-five typewritten pages, exclusive of index, tables, and the like.[142]

In the event that certiorari is granted, petitioner's brief on the merits is due within forty-five days of the order, and a reply brief within thirty days of the principal brief.[143] A deferred appendix is available, as under the FRAP and D.C. Circuit Rules.[144] Briefs on the merits by petitioner and respondent are limited to fifty typeset or 110 typewritten pages, not including tables, summaries, etc.[145]

The chances of securing a grant of certiorari, of course, are quite slim. Aside from its normal reluctance to hear many cases, the Court seems to shy away from high-technology cases in general, and communications cases in particular. The situation thus may not have changed too much from former Chief Justice Taft's refusal to take radio cases.

Even when the Court grants certiorari, it often renders less than comprehensive opinions. Perhaps the most striking example of this phenomenon is the *Preferred Communications*[146] saga.

In that case, Preferred brought suit under section 1983[147] challenging the constitutionality of Los Angeles' policy to award only one cable television franchise in each geographic area, as well as various City programming requirements. The district court dis-

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the Supreme Court of the United States, Rule 13.1 (Mar. 13, 1995) (proposed effective July 3, 1995) [hereinafter Proposed Sup. Ct. R.].

138 SUP. CT. R. 14.1(g) (emphasis in original).

139 SUP. CT. R. 29.1; *see supra* text accompanying notes 70-71; *see also* Proposed Sup. Ct. R. 29.6.

140 SUP. CT. R. 12.4; *see also* Proposed Sup. Ct. R. 12.6.

141 SUP. CT. R. 15.2. *But see* Proposed Sup. Ct. R. 15.3 (establishing a known-to-all rule by allowing respondents thirty days from the date that a petition "is placed on the docket").

142 SUP. CT. R. 33. *But see* Proposed Sup. Ct. R. 33.1 (requiring all documents to "be prepared using professional typesetting" rather than typewriting except in cases provided for under Proposed Sup. Ct. R. 33.2).

143 SUP. CT. R. 25.1 & .3.

144 SUP. CT. R. 26.4. *But see* Proposed Sup. Ct. R. 26.4 (stating that "[d]eferal of the joint appendix is not favored").

145 SUP. CT. R. 24.3 & .4; SUP. CT. R. 33.3; *see also* Proposed Sup. Ct. R. 34.

146 City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986).

147 42 U.S.C. § 1983 (1988).

missed the case, only to be reversed by the Ninth Circuit.[148] When the Supreme Court granted certiorari, some observers thought that it would define cable operators' First Amendment rights.[149] The Court wrote an extremely brief opinion, however, noting that:

> Respondent's proposed activities [building a cable system] would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found to fall within the ambit of the First Amendment. . . . We do not think, however, that it is desirable to express any more detailed views on the proper resolution of the First Amendment question raised by respondent's complaint and the City's responses to it without a fuller development of the disputed issues in the case. We think that we may know more than we know now about how the constitutional issues should be resolved when we know more about the present [operation of cable systems].[150]

The Court therefore affirmed the Ninth Circuit's decision, remanding the case to the district court for a full trial. After a trial, the district court concluded that some of the franchise provisions were constitutionally suspect, but that Preferred had not shown substantial monetary damages. In early 1994, the Ninth Circuit once again reversed the district court and remanded the case for further hearings as to the damages issue[151]—more than seven years after the Court's decision.

A statistical comparison of the Court's willingness to review communications as opposed to other cases is impossible. It seems fair to conclude, however, that the Court is more receptive to cases involving the constitutionality of federal statutes than of federal rules or state statutes. In any event, a litigant's chances of a grant of certiorari certainly are no greater in communications cases than in the general run of cases—that is, virtually non-existent.

## CONCLUSION

Judicial review of FCC action is a bit more complex than that of other regulatory agencies, if only because of the Communica-

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148 Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985).

149 The Court had refused to do so in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). In invalidating the FCC's "access" rules, the Court ruled solely on the statutory rather than First Amendment questions raised by the Eighth Circuit.

150 476 U.S. at 494-95; *see also* Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994), *vacating and remanding* 819 F. Supp. 32 (D.D.C. 1993) (in which the Court remanded to the district court a constitutional challenge to the Must Carry provisions of the Cable Consumer Protection Act of 1992).

151 Preferred Communications v. City of Los Angeles, 13 F.3d 1327 (9th Cir. 1994).

tions Act's somewhat hoary procedures. The greatest difficulty lies not in briefing or arguing a case, but rather in getting it into an appellate court in the first place, for two reasons.

First, the dividing line between "appeals" of licensing decisions and "petitions for review" of other actions sometimes is less than clear, and practitioners often do not take the time to determine the proper procedure.

Second, it sometimes is difficult to identify the proper document on which to base judicial review, and thus the appropriate timing of review. Concepts such as "final order" and the like continue to plague appellate practice, with no apparent administrative relief in sight.

When an appeal or petition has been accepted in an appropriate court, the process becomes much easier. Title 28's general procedures usually govern, dictating the relatively familiar and straightforward procedure for appendices, briefs, and other similar matters.

After sixty years, the system seems largely to have sorted itself out. But this only raises the question whether—in light of possible substantive amendments to the Communications Act to accommodate new technologies—procedural changes are in order.

At this relatively early point, no major changes appear to be necessary. To be sure, developments such as "convergence" very well may make obsolete the Communications Act's basic distinction between licensing and other decisions. But these substantive trends still are too tentative to justify major procedural changes. Despite the existence of some flaws and inconsistencies in the present system, it may make sense to leave it unchanged until the form of substantive developments in emerging communications solidifies.