

The FCC Rule Making Procedure

The Administrative Procedure Act

The establishment, amendment, or repeal of rules by the FCC is governed by the Administrative Procedure Act (APA). Congress in this statute set forth the procedures that must be followed by all federal administrative agencies such as the FCC when adopting, amending, or repealing rules. The APA also sets forth the procedures to be followed in adjudicatory hearings, such as when a license revocation is at issue.

The requirements that the FCC adheres to when engaged in rule making are relatively simple and straightforward. The APA requires that the FCC provide public notice of any proposals to consider new rules or changes to, or repeal of, existing rules; and that it provides an opportunity for interested parties to comment on the proposed changes. When considering whether to adopt the proposals or some amended form of them, t in the comments.

These requirements are colloquially referred to as “notice and comment” procedures. Comments must be submitted using the Commission’s Electronic Comment Filing System (ECFS), which is prominently linked on the FCC’s internet home page.

Several types of rules are exempt from public notice and comment. These primarily relate to agency organization and internal operation. Prior notice also need not be given if the agency for good cause finds that notice and comment are impractical, unnecessary, or contrary to the public interest.

Petitions for Rule Making

The Commission may propose rule changes on its initiative. Any interested person also may petition the Commission to adopt, amend, or repeal a rule or regulation. The petition must be sent to the Secretary, Federal Communications Commission, Washington, DC 20554. It can be mailed or, more commonly, submitted electronically online through the FCC’s website. The petition should set forth the text or substance of the proposed rule, the rule sought to be amended, or the rule sought to be repealed, together with the facts, views, arguments, and data deemed to support the action requested. The petition should indicate how the interests of the petitioner will be affected.

The FCC Secretary refers petitions for rulemaking to the appropriate bureau or office. If a review of a petition indicates that it meets the minimum requirements outlined above, or that a waiver of the requirement is warranted, the Commission will assign a file number to the petition and issue a Public Notice specifying the file number (beginning with the designation “RM”), the name of the petitioner, the date of filing, and a brief summary of the proposal. Such notices issued by the FCC relating to Amateur Radio are reviewed by ARRL FCC Counsel and brought to the attention of the ARRL Executive Committee.

Any interested person may file a statement in support of or in opposition to a petition, usually with a deadline of 30 days from the issuance of the FCC's Public Notice. Replies to those statements are permitted, usually for another 15 additional days past the comment deadline. All comments and reply comments are made available on the FCC's ECFS website, usually not later than 24 hours of their submission but most often within several hours if submitted during business hours.

Notices of Proposed Rule Making

If a petition has merit, or if the Commission itself wants to propose changes to its rules, a Notice of Proposed Rule Making (NPRM) will be adopted and issued by the Commission. Whenever possible, all petitions relating to a particular subject will be considered together and combined in a single NPRM under a single docket number. If a petition is deemed to lack merit, such as on a subject recently considered and decided, the petition will be denied. Substantial time may pass after public comment and a decision on a petition.

The Commission in an NPRM sets forth either the terms or substance of a proposed rule or a description of the subjects and issues involved, and the dates for filing comments and replies to comments. The NPRM will be published in the Federal Register after release by the Commission. All interested persons will have an opportunity to participate in the proceeding through the submission of written data, views, or arguments by filing comments using the Commission's online ECFS system (referenced above). All comments submitted are publicly available on the same ECFS system and an opportunity for replying to others' comments also is provided. The dates for comments and replies are prominently announced in the Commission's NPRM document when it is published in the Federal Register.

Occasionally, a Notice of Inquiry will be issued or combined with an NPRM. A Notice of Inquiry will set forth the Commission's concern over a particular matter and solicit comments and suggestions as to whether adoption, amendment, or repeal of a rule should be considered. The same notice and comment procedures are followed with a Notice of Inquiry as with an NPRM. If the Commission decides to proceed to propose a change, it will adopt and issue an NPRM and the process described above will be followed.

The Wireless Telecommunications Bureau within the FCC is responsible for the regulations that govern the Radio Amateur Service -- Part 97 of the FCC's Rules -- and for most related Amateur Radio matters. There are, however, rules that affect amateur radio contained in other rules parts that are the responsibility of other bureaus. For example, spectrum allocation matters, such as those proposed in the NPRM in ET Docket No. 23-120 with regard to the 60-meter band, are the responsibility of the FCC's Office of Engineering and Technology (OET) because frequency allocations affect multiple services and are in Part 2 of the Commission's rules, which is within OET's responsibility. Similarly, application fees are in FCC Rules Part 1 and are the responsibility of the Office of the Managing Director. The responsible bureau is identified by the two or three letter abbreviation at the beginning of the docket number. "ET Docket" identifies the proceeding as the responsibility of OET; "WT Docket" is the responsibility of the Wireless Bureau; and "MD Docket" is the responsibility of the Office of Managing Director, etc. Of course, as in every organization, staff from other bureaus may be involved in reaching a decision on certain matters. Ultimately the five Commissioners decide by vote what changes, if any, to adopt to the rules.

Report and Order

Comments and replies to an NPRM are reviewed by staff in the responsible FCC bureau or office (described above). A report summarizing the comments and recommending a course of action will be prepared by the staff for consideration by the Commissioners. After general agreement has been reached, the Commissioners will vote and if adopted, the rules changes will take effect at a future announced date.

The rule changes as finally adopted need not be identical to those proposed but notice of the subject matters to be addressed must have been sufficient in the NPRM to give adequate notice. If adequate notice is not given, or if the Commission decides to make additional changes outside the scope of the NPRM, it will issue a "Further" NPRM in which it will detail its current thinking and new proposals and solicit new comments from the public.

Petitions for Reconsideration

Any party to a rule making proceeding or "any other person aggrieved or whose interests are adversely affected" by any order (including new, amended, or deleted rules) has the right to petition the Commission for reconsideration of all or part of its decision. If the petitioner did not file comments in the rule making proceeding, "good reason" must be shown why it was not possible to participate in the earlier stages of the proceeding. A petition for reconsideration is a condition precedent to an appeal to the Courts only if the questions to be presented to the Court had not been presented to the Commission at some stage of the proceeding.

A petition for reconsideration must be filed within 30 days of the public notice of the order or action. The Commission will issue a public notice announcing the petition for reconsideration and define a comment and reply comment period during which any interested party may submit comments on the issues raised in the reconsideration petition.

Note that the effective date of a new or amended rule is not automatically postponed by the filing of a petition for reconsideration. If postponement is desired, a separate petition must be filed. Such requests for a stay of an effective date are seldom granted and require a convincing show of harm.

Court of Appeals

Judicial review may be sought in the United States Court of Appeals in the judicial circuit in which the petitioner resides or in the United States Court of Appeals for the District of Columbia Circuit. The Court may either affirm the action of the Commission or return the case to the Commission for further consideration. Courts seldom set aside a rule making action of the Commission unless the court is convinced that the Commission exceeded the authority delegated to it by Congress, or that there was a prejudicial procedural error. The Court traditionally has followed the policy of not substituting its judgment for that of the Commission because Congress has designated the Commission to use its expert judgment to decide substantive matters.

If the Court remands a rule making case back to the Commission, usually, but not always, the additional work will be handled by the same office that handled the matter originally since that is where the particular expertise is located. Although procedural errors may be corrected, the possibility of obtaining substantive changes as a result usually does not result.

If the Court affirms the Commission, a petition for *writ of certiorari* may be filed with the Supreme Court of the United States. However, few cases are accepted and require presentation of a basic Constitutional question.

Other Courses of Action

Petitions for reconsideration and judicial appeals usually are not successful in bringing about changes in rules adopted by rule making. Except in rare circumstances, courts defer to agency expertise on substantive issues, but they will order those procedural flaws be corrected. But that means that if the agency's opinion is not changed by new information, it has only to correct the procedural flaws and articulate the reasons those corrections do not change its decision on the substance.

If experience under the new rules indicates that change is needed, then a new petition for rule making must be filed and the procedure described above re-starts. However, note that the Commission may deny any such petition if, in its opinion, the rules were "recently" adopted and there would be no reason to open a new proceeding on subjects recently decided.

If the new or amended rule is ambiguous, an informal request for clarification or a formal petition for a declaratory ruling may be filed with the Commission. This frequently will result in clarifying ambiguity or policy.

Finally: informal staff advice also may be sought and often is relied upon, but ultimately, compliance with the rules is the responsibility of each licensee notwithstanding any staff advice. Especially if advice originates from an FCC staff member not directly responsible for the rule or subject in question, the Commission will accord little or no deference if an issue is raised later. The advice is most likely to be correct and reliable only if obtained from the specific official or officials directly charged with the issue or matter, but even then, the Commission reserves the right to disregard the advice given to an outside party by its staff and to make a different determination.