

FCC Cases

The FCC's Subscription Television Rules (small case)

Background

The issue here was whether subscription TV should be classified as “broadcasting” under the terms of the Communications Act of 1934. The importance of this distinction is that activities so classified are subject to more FCC regulation than those that are not. If something is not broadcasting, for example, it is not subject to the FCC’s EEOC requirements and its regulations concerning campaign ads and other kinds of political speech.

Classification decisions such as these had been made on an *ad hoc* basis and were inconsistent. Although the FCC had designated STV as broadcasting about twenty years earlier, for example, it had classified subscription FM radio as “hybrid” and thus not subject to broadcast regulations such as those mentioned above. The Commission had been aware of this problem for several years and intended to do something about it, but the issue was moved to the forefront by a D.C. Circuit Court decision which reversed the FCC’s determination that direct broadcast satellite services were not broadcasting (*NAB v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984)). The Court held that if STV was broadcasting, then DBS had to be broadcasting as well.

The Case

The Circuit Court did not question the FCC’s authority to determine the meaning of broadcasting under the Communications Act, and the Commission’s original classification of STV was not representative of its “recent thinking.” Accordingly, the agency published an NPRM in January of 1986 (51 FR 1817) announcing its intention to address issues of inconsistency in the classification of services and soliciting public comment on how it should proceed. The NPRM announced the Commission’s tentative intent to reverse its earlier classification of STV as broadcasting.

The rule issued in March of 1987 (52 FR 6152) did this. It was based in part on the argument that, “In the context of the [Communications] Act and the understood usage of the time, broadcasting was used to designate radio services intended for the indeterminable public, as opposed to services intended for specific receive points.” It also argued that the policy effects of exempting STV from EEOC requirements and the regulation of political speech would be minimal. In the latter regard, it said that, “Such services generally do not carry political advertising, and, even if they did, subscribers would have ample access to other sources of information concerning candidates” (6153).

General Thoughts

Much FCC regulation involves conflict among well-organized interests. There must have been some conflict in this area given that NAB had sued the Commission over its classification of DBS licenses, but it seems relatively mild in relation to the other two FCC cases. This may fall under the category of dynamic rulemaking as policy adjustment. The FCC had been determining

whether particular types of services should be classified as broadcasting on an *ad hoc* basis, and it had become apparent that its classification of STV was inconsistent with its policies in related areas. Based on experience with STV as it had evolved and further reflection about the intent of the Communication Act and the goals of other programs, the agency decided that the best way to resolve this issue was to reclassify STV as not falling under the category of broadcasting.

The FCC's Financial Interest and Syndication Rules (medium case)

Background

This case is not so medium as it turns out. Issued in 1970, the Fin-Syn rules imposed restrictions on the major networks' ownership and control over syndicated TV programming. Their intent was break up vertical integration between distributors and producers and to reduce the concentration of economic power enjoyed by the three major networks. The FCC also hoped to encourage independent producers and thus increase the diversity of programming available to the public. This case involves subsequent FCC actions to loosen and ultimately rescind Fin-Syn regulations.

The economic arguments that supported the Fin-Syn rules were controversial from the outset. Some felt that market concentration within the TV industry had much more to do with entry costs than syndication, for example. Some also felt that the rules worked to the disadvantage of small producers who lacked the resources to develop programs at an initial loss (hoping to profit from syndication down the road). The economic rationale for the rules became increasingly suspect as the result of changes within the industry. These included the rise of cable and satellite TV and the emergence of additional networks, among other developments that led to more competition and diverse programming. The elimination of Fin-Syn drew support from the antiregulatory movement that began in the late 1970s and from the Chicago School of law and economics. (Richard Posner ended up playing a significant role.)

Like much FCC regulation, the struggle over the elimination of Fin-Syn pitted powerful business interests against one another. The most influential supporters of the regulations were the major producers, especially Hollywood studios, but the support coalition also included a variety of other groups. The most influential opponents of Fin-Syn were the networks, who were joined by the FTC and the Justice Department.

Events leading up to the regulations examined here include:

1970—The FCC issued the Fin-Syn rules.

1978—The FCC published its own analysis arguing that the Fin-Syn rules were no longer needed and should be rescinded because of developments in the industry alluded to above.

1983—The FCC issued a *Tentative Decision* proposing revisions that would repeal most of the Fin-Syn regulations. There was an intense lobbying campaign against the *Tentative Decision* by the motion picture industry, which had come to dominate the syndication market as the result of the Fin-Syn rules. The FCC did not follow through on *Tentative Decision* because of pressure

from Congress and the White House. (One account alleges that Ronald Reagan intervened at the behest of his Hollywood buddies, notwithstanding his general opposition to regulation.)

1990—Fox Broadcasting requests an exemption from the Fin-Syn rules, prompting the FCC to hold en-banc hearings on the issue. This set the agenda for a series of actions that led to the virtual elimination of the regulations.

The Case

The FCC issued an NPRM in March of 1990 in response to the petition from Fox. The proposal offered five alternative options but also encouraged other suggestions for relaxing the current Fin-Syn rules. The Commission issued a further notice in October of 1990 soliciting comments on several of the specific proposals developed in response to the NPRM. It solicited more comment in March of 1991 on two comprehensive rule-change proposals.

Commenters opposing deregulation included the Coalition to Preserve the Financial Interest and Syndication Rule (over 200 production companies, studios, program distributors, independent TV stations, industry associations, labor and consumer groups, and public interest groups), the Program Producers and Distributors Committee, and the Writers Guild of America. Commenters favoring deregulation included the networks, DOJ, and FTC. (The Department of Commerce also participated, but it appears as if it fell somewhere in between. A plausible explanation is that it had important constituents in both camps.)

Commenters disagreed on a number of issues:

- Had changes in video marketplace been so sweeping as to render unnecessary rules promoting diversity of program sources?
- Should the FCC continue to be concerned about the danger that networks might abuse their power in the programming marketplace?
- Had changes in the video marketplace created genuine alternatives for TV program producers—new outlets in which “syndication value” could be created?

The comments on these and other issues produced a “voluminous record.”

The FCC issued a final rule in June of 1991. (*Broadcast Services: Financial Interest and Syndication Rules*, 56 FR 26242.) Although it eased the restrictions imposed by the 1970 regulations in significant ways, the rule attempted to strike a compromise between “... alternative views of the television programming world so starkly and fundamentally at odds with one another that the virtually defy reconciliation” (26244). The goal of the rule was to “... enhance the ability of existing and emerging networks to compete effectively in today’s video marketplace, but not dominate it unfairly” (26244). Among its provisions were the following:

- It deleted restrictions on network ownership and syndication of network programming to all non-entertainment programming (news and sports) and to all programs other than primetime.
- Networks could acquire financial interests, domestic syndication rights, and foreign syndication rights in any outside productions aired on its prime time entertainment

schedule, provided access to its schedule is not conditioned on its acquisition of those rights.

- Networks could retain rights to all in-house productions.
- Networks could not favor their affiliates of unduly delay the syndication of those in-house productions they distribute domestically.
- Networks could fill up to 40 percent of their primetime schedule with in-house productions.
- Networks could acquire all rights, including financial interests, domestic syndication rights, and foreign syndication rights, in outside productions, subject to certain safeguards.
- Networks could engage in foreign syndication without limitation.
- Networks could participate in first-run syndication.

The rule also provided for a thorough review of its provisions in four years.

The FCC issued a follow-up rule in December of 1991 in response to petitions that it reconsider its June regulation. (*Petitions for Reconsideration Broadcast Services: Evaluation of the Syndication and Financial Interest Rules*, 56 FR 64207.) These were filed by both sides of participants in that proceeding. This rule affirmed the June regulations: “After carefully reviewing all petitions for reconsideration, the Commission finds no new evidence warranting fundamental changes in the rules as adopted. The reconsideration petitions in many respects repeat points already presented and considered in early phases of this proceeding” (64208). The rule also clarified language and made technical corrections in response to petitions. Among the clarifications were those involving the definition of co-production, the distinction between a foreign and domestic production entity, and the application of syndication safeguards to a new network. Although these changes were made without an NPRM, the petitions to which they responded had been placed in the docket. The FCC also allows *ex parte* communications at any time, and these are also supposed to be docketed (and they usually are according to a GAO report on FCC rulemaking). To the extent that the clarifications might have been important, therefore, it is likely that affected interests had an opportunity to weigh in.

The Seventh Circuit overturned the 1991 rule in November of 1992. (*Schurz Communications v. FCC* 982 F.2d 1043 (1992)). Judge Posner questioned whether the Fin-Syn rules ever made sense and argued that developments over the intervening twenty years had rendered them even more suspect. In any case, he held that the FCC has not provided an adequate explanation for its actions. Drawing a distinction between substantive due process and the more exacting standard of review applied to administrative actions, he noted that:

It is not enough that a rule might be rational [under some hypothetical set of facts]; the statement accompanying its promulgation must show that it is rational.... The new rule flunks this test. The Commission’s articulation of its grounds is not adequately reasoned. Key concepts are left unexplained, key evidence is overlooked, arguments that formerly persuaded the Commission and that time has only strengthened are ignored, contradictions within and among Commission decisions are passed over in silence. The impression created is of unprincipled compromises of Rube Goldberg complexity among

contending interest groups viewed merely as clamoring suppliants who have somehow to be conciliated (1050, 51).

In January of 1993 the FCC sought additional public comment in response to issues cited in the Court's decision. (Second Further Notice of Proposed Rulemaking 58 FR 4139.)

The FCC issued a final rule in May of 1993 that all but eliminated any remaining Fin-Syn restrictions (*Broadcast Services: Syndication and Financial Interest Rules* (Second Report and Order) 58 FR 28927).

In sum, by eliminating the finsyn restrictions on network acquisition of financial interests and syndication rights in network programming, we have needed the *Schurz* Court's criticism of our attempt in 1991 to justify continued regulations in this area. We thus have confronted the arguments against such regulation that come from various sources that the Court said we could not ignore, including the Department of Justice, the Federal Trade Commission, and our own 1983 *Tentative Decision* (28929).

In August of 1993, the Commission issued a rule confirming the effective date of the rule it had issued in May. (*Confirmation of Effective Date. Broadcast Service: Financial Interest and Syndication Rule* 58 FR 45842). The networks had petitioned the FCC to reconsider certain reporting requirements that had been imposed upon them by the May rule. The purpose of this August amendment was to delay the effective dates of those particular requirements until the FCC had a chance to review and rule on the petitions.

The FCC issued a final rule in November of 1993 concerning petitions that had been filed in response to its May rule. (*Final Rule: Petitions for Reconsideration. Financial Interest and Syndication Rules* 58 FR 62547. *Memorandum Opinion and Order*). These petitions had been submitted by supporters as well as opponents of Fin-Syn regulations. The Commission did not make any major changes in this rule:

After careful review, the Commission finds no new evidence warranting fundamental changes in the rules as adopted. To the extent that new arguments have [been] made... the Commission is, with a few minor exceptions, also unpersuaded that the rules should be changed. Thus, by the Memorandum Opinion and Order, the Commission denies most aspects of the petitions before it. The Commission does, however, make minor adjustments to the reporting requirements set forth in ... its rules, and makes a technical correction to the language.... In addition, the Commission has decided to codify ... the approach adopted in its second R&O towards scheduling the expiration of finsyn rules.

General Thoughts

This case may fall under the category of dynamic rulemaking as policy adjustment. Although it also deregulation, the retrenchment is not driven by well-organized business interests at the expense of diffuse public interests. In part, the curtailment and then abandonment of Fin-Syn was driven by new technologies and other commercial developments that arguably precluded the need for those regulations, as well as by increased knowledge and a shift in opinion concerning

the effects of the rules. One suspects that these explanations were intertwined with broader changes in the political and intellectual environment of regulation that had occurred since 1970.

The FCC's Low-Power FM Rules (large case)

Background

These rules were intended to promote LPFM radio. They were based on the assumptions that LPFM stations would promote diversity and serve communities of interest defined by relatively narrow geographical boundaries and by interests or needs that were unlikely to be met by full-power commercial or public radio. LPFM stations might target audiences ranging from educational and religious groups, to labor unions, to the disabled, to university students, to linguistic minorities, to those interested in local public affairs or a particular kind of music. The FCC's decision to encourage LPFM was a departure from its long-standing policy of according absolute primacy to full-power broadcasting.

Policy debate focused in part on unresolved technical issues. For example, at what antenna height, wattage, distance, and proximity on the electromagnetic spectrum would LPFM and full-power stations interfere with one another? Debate also focused on unresolved economic, behavioral, and social issues. Who would apply for LPFM licenses, what kinds of programming would they air, and how did this relate to the public's needs?

LPFM regulation involves the allocation of a scarce resource among competing interests. As such, it presents two broad types of issues. What criteria should be used to discriminate among competitors for LPFM licenses and what standards should constrain LPFM licensees? More importantly, how should the FCC allocate spectrum among different kinds of broadcasters who were competing for the same spectrum. In addition to LPFM (which was represented effectively by several advocacy groups), these included full-power commercial and public stations as well as FM translator stations that used satellite technology to transmit full-power broadcasts to other locations on a different frequency (maybe KUT to San Angelo, for example).

Events leading up to the rules considered here include:

1980s—Elimination of Class D licenses (which had been created for LPFM in 1948) in favor of full-power broadcasting.

1980s—Subsequent rise of “free radio movement” or “pirate radio” as technological advances facilitated LPFM broadcasting. A lot of this was driven by “anti-establishment” political causes.

In 1998, the FCC posted two petitions for rules that would promote LPFM.

In 1999, the FCC published an NPRM on LPFM regulation that was partly an open-ended solicitation of advice but that contained some specific proposals as well.

The Case

The FCC issued the parent rule in January of 2000. (*Low Power Radio Service* (65 FR 7616). This regulation reiterated the primacy of full-power broadcasting but established a legal basis for LPFM. It was generally viewed as a victory for LPFM.

The FCC issued a *Memorandum Opinion and Order on Reconsideration* issued in September of 2000 (65 FR 67289). This contained lots of clarifications and filled in information that was missing from the January rule, but actual changes to the January Report and Order were modest. They were made in response to petitions which were contained in the docket but not published as NPRMs. The FCC:

- established complaint procedures in the event that LPFM interfered with full-power stations on third-adjacent frequencies. NPR and others disputed engineering studies relied up by the FCC which indicated that such interference would not occur.
- preserved protections from LPFM interference with full-power reading services. NPR was also the petitioner here.
- made rules more flexible to accommodate various public entities such as universities and government organizations concerned with safety and transportation.
- clarified ownership requirements for Indian tribes, student organizations, universities with multiple campuses, and other entities.

The FCC issued a *Final Rule Correction* in November of 2000 (65 FR 69458). This essentially corrected a typo.

Congress passed and President Clinton (reluctantly) signed the Radio Broadcasting Preservation Act (which was included in a D.C. appropriations bill) in December of 2000. This legislation was passed in response to lobbying by full-power broadcasters and translators.

The FCC issued a new rule in May of 2001 (*Creation of Low Power Radio Service*. 66 FR 23861. Second Report and Order). This modified its 2000 regulations in order to comply with the Preservation Act. It:

- Imposed minimum distance separation requirements between LPFM and both full-power and translator stations that LPFM applicants must meet.
- Prohibited LPFM licensing if applicants had engaged in unlicensed broadcasting in the past. This was aimed at those who had engaged in the Pirate Radio movement.
- Required an independent study of second- and third-adjacent channel interference.

The FCC issued a new rule combined with an NPRM in July of 2005. (*Creation of Low Power Radio Service* 70 FR 39182. *Second Order on Reconsideration and Further Notice of Proposed Rulemaking* July 2005.) This instituted some minor changes that were based in part on information obtained at LPFM Forum held in February 2005. The purpose of the forum was to assess experience with LPFM after five years and to identify problems associated with implementation. Conference attendees consisted of LPFM advocates and changes reflected their desire to facilitate its growth. One of the changes was also in response to a petition for reconsideration filed by the Office of Communications of the United Church of Christ. None of the changes below appear to have been vetted through an NPRM. The rule:

- Clarified the definition of locally originated programming for purpose of resolving mutually exclusive LPFM applications. This was a response to petition by the United Church of Christ (which was docketed).
- Contained minor modifications giving licensees more flexibility in changing sites.
- Established standards for waiver of the 18-month construction deadline for LPFM permits
- Established a six-month freeze on the granting of FM translator new construction permits

The Report and Order was accompanied by a further notice that identified a number of issues.

The FCC issued another new rule that was accompanied by an NPRM in 2008. (*Creation of Low Power Radio Service*. 73 FR 3202. *Third Report and Order and Second Further Notice of Proposed Rulemaking*. This rule:

- Eased various licensing and ownership requirements. Public comment was almost universally supportive of this.
- Changed rules permanently to disallow multiple ownership and limit LPFM licenses to local entities. Great majority of commenters had supported this.
- At the suggestion of the Prometheus Project and other LPFM advocates, refined the definition of “local origination” by proscribing automated programming and by relaxing its geographical-proximity criteria for ownership in rural areas.
- Proscribed for-profit sale of LPFM authorizations. There was disagreement within the LPFM community on this and FCC sided with Prometheus.
- Deferred decision on whether LPFM should be given primacy over translators pending the collection of more information. The issue of whether LPFM better served community interests was hotly debated and was contested by both translators and full-power interests such as NAB and NPR.
- Limited to ten the number of translator applications an individual entity could have on file.
- Authorized waivers of full-power primacy in cases where subsequently authorized modifications of full-power stations would eliminate LPFM licenses or construction permits. This was pushed by LPFM advocates such as Prometheus, MAP, and REC Networks and stridently opposed by full-power interests. The waivers would be a last resort and would be based on a case-by-case weighing of community interests. The waiver “policy” was presented as an interim measure.
- Authorized waiving minimum-distance-separation requirements between LPFM and full-power on second adjacent channels at behest of LPFM advocates. This was highly controversial because the Radio Broadcasting Preservation Act explicitly imposed such requirement for third-adjacent channels. Commission’s decision was based in part on the findings of the independent study that the act had also required. The waivers would be a last resort and would be based on a case-by-case weighing of community interests. The waiver “policy” was presented as an interim measure.

- The last two changes—the two waiver provisions—were not proposed or mentioned as possible options in the 2005 NPRM. The NAB challenged the 2008 rule based in part on the argument that the FCC in this way had failed to provide adequate notice. The D.C. Circuit did not buy this, holding that the waivers involved a rebuttable presumption and were therefore more akin to interpretive than substantive rules.

This regulation addressed some but not all of the issues raised in the 2005 notice. Among the issues it did not address was the question of whether LPFM should enjoy primacy over translator stations:

As demonstrated by the comments filed on this issue, the LPFM and FM translator services are each valuable components of the nation's radio infrastructure. We agree with the advocates of each of these services regarding the important programming that these stations can provide to their local communities. We do not reach the merits of the priority rules between these two services here. Instead, we seek further comment in the attached *Second Further Notice of Proposed Rulemaking* to develop a better record on whether and how our current rule affects our core goals of localism, diversity, and competition. The current rules will remain in effect until the Commission resolves the issue in that proceeding (FCC 2007, 21).

General Thoughts

The FCC had to confront an interrelated set of empirical and political issues in its regulation of LPFM. The former involved unanswered questions about electromagnetic interference and about the economic and other behavioral consequences of different policy alternatives. To what extent would LPFM stations operating on third- and second-adjacent channels interfere with full-power broadcasts. What kinds of programming would LPFM stations offer and how would this serve community needs? The latter involved competition among groups over the allocation of a scarce resource as well as competing definitions of the public interest as it related to programming and ownership. I am not sure if you can make a distinction here between diffuse “public interests” and “regulated interests,” and this seems to be true of much FCC policy making. All three sets of interests—LPFM, full-power, and translators—were being regulated in what was perceived to be a zero-sum game and all were effectively represented.

This might be an example of iterative rulemaking as the kind of incremental policy development that is associated with limited knowledge about cause and effect relationships (or bounded rationality) and conflict over goals. In response, the FCC felt its way along through a series of reports and orders (rules) combined with further notices that resolved some issues and deferred others pending the collection of more information. Even the 2008 rule kicked several important issues down the road. It is also interesting that the two most controversial elements of that rule were only “policies” in the sense that they permitted waivers to be granted on a case-by-case basis.

