

Chapter Two

THE FCC

This chapter introduces the core statutory structure under which telecommunication services are regulated and also the primary administrative agency that implements those provisions.



§ 2.1 Introduction

There is a large and sometimes complex web of statutory provisions that govern the provision of telecommunications service in the United States. Throughout the book, we will be introducing the relevant provisions as they arise. Here, however, we thought it helpful to survey the landscape. Thus, the first section below sketches the basic flow and contours of the 1934 Communications Act and its many amendments.

After that, we offer a similarly high-level introduction to the Federal Communications Commission. The FCC is the federal agency that regulates most commercial uses of spectrum. We introduce some information about the operation of the Commission, and we outline the types of spectrum decisions the Commission makes. Subsequent chapters obviously flesh out all of those regulatory functions in richer detail.

§ 2.2 A Regulatory Overview

The governing statute for the regulation of telecommunications in the United States is the Communications Act of 1934, 47 U.S.C. §1 *et seq.*, and the governing agency which the Act established to implement its provisions is the Federal Communications Commission. The 1934 Act brings together under one legal umbrella and one administrative body the regulation of all sectors of the telecommunications industry—from television to telephones, from cable to satellites, and everything in between. The Communications Act of 1934 has been amended numerous times, and several of those amendments have been sufficiently extensive that they are often referred to as Acts in and of themselves, despite their being incorporated into the 1934 Act. Principal examples of such amendments are the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996, all of which amended (among other things) scattered sections of 47 U.S.C. In this book, we will often refer to those laws by their own names, but readers should understand that, as a technical matter, they are statutory amendments to the 1934 Act.

Communications Regulation Before 1934

The 1934 Act was not the first communications statute passed in the United States. It was, however, the first statute to bring different areas of the telecommunications industry under one statutory title and one administrative agency. Before 1934, telegraph, telephone, and radio communications were governed by separate laws and separate governmental bodies. Radio, for example, was first regulated by the Radio Act of 1912. That statute required all users of the radio spectrum to obtain a license and placed licensing authority with the U.S. Secretary of Commerce.¹ The thrust of the 1912 Act was to allocate different blocks of spectrum to different users—for example the military, commercial interests, and amateur radio operators—and to prioritize their access to the airwaves. Emergency signals such as marine distress calls had first priority for transmission, military signals came next, followed by commercial uses and, finally, amateur signals. Fifteen years later, Congress passed the Radio Act of 1927, which repealed the 1912 Act. Like its predecessor, the 1927 Act stipulated that spectrum could be used only upon grant of license; but it also formally declared the electromagnetic spectrum to be government property and moved the authority for issuing such licenses from the Secretary of Commerce to a new Federal Radio Commission.² The 1927 Act broadly defined radio communications as “any intelligence, message, signal, power, pictures, or communication of any nature transferred by electrical energy from one point to another without the aid of any wire connecting the points.” 44 Stat. at 1173. Of the activities it covered, the Act particularly targeted commercial broadcasting. Importantly, this was the legislation that formally introduced the requirement that licensees serve the “public interest, convenience, or necessity”—of which there will be considerably more discussion later in the book. 44 Stat. at 1167. The Act did not in any way address wireline communications like telegraphy or telephony.

Regulation of telephone and telegraph services developed separately from regulation of radio in the early 1900s. For a time, telephone service was not regulated. The first statute to regulate telephone service was the Mann-Elkins Act of 1910,³ passed more than 15 years after the original Bell telephone patents had expired and well after numerous independent telephone carriers had entered into competition with the Bell system. The Mann-Elkins Act assigned regulatory jurisdiction over telephony to the Interstate Commerce Commission, which already had regulatory authority over the railroads as well as other network services. The mandate of the Act was fairly narrow by current standards. The Act categorized telephone service providers as “common carriers”—i.e. carriers that were “obligated to provide service on request at just

¹ Ch. 287, 37 Stat. 302 (1912) (repealed 1927). Congress had previously passed the Wireless Ship Act, ch. 379, 36 Stat. 629 (1910) (repealed 1954), which required all passenger ships to carry wireless sets. Both statutes are discussed in Chapter One

² Ch. 169, 44 Stat. 1162 (1927) (repealed 1934).

³ Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539 (1910).

and reasonable rates, without unjust discrimination or undue preference.”⁴ The ICC’s charge was to enforce these common-carrier requirements. The Mann-Elkins Act, however, neither contained any requirement that telephone carriers file tariffs (rate plans) nor authorized the ICC to implement such a requirement. The Act thus gave the agency quite limited power, and it is perhaps not surprising that the ICC held only four proceedings to investigate telephone rates in the years from 1910 to 1934.⁵ While the ICC did try actively to regulate merger and acquisition behavior in the telephone industry, as an agency it was far more concerned with regulating railroads than with regulating telephones and, in the end, it played only a modest role in overseeing the performance of the telecommunications industry.

The ICC was not the only regulatory authority concerned with telecommunications, however. Unlike radio, telephony was subject not just to federal oversight, but to state regulation as well. State regulators reviewed rates, established accounting rules, and implemented service requirements related to local telephone service. As we will discuss in greater detail in Chapter Thirteen, the states’ regulatory sphere was strictly limited to intrastate telephone service and its related facilities. But given that the vast bulk of telephone calls have typically been “local,” this limitation did not mean that state commissions were weak or insignificant regulatory forces. Indeed, even today the boundary between state and federal regulatory jurisdiction over telephone carriers continues to be an area of both important and vigorous dispute.⁶

Regulatory Integration Under the 1934 Act

The Communications Act of 1934 thus accomplished an important organizational task. It extended jurisdiction over telecommunications to an expert agency rather than assigning such jurisdiction to entities, such as the ICC or the Department of Commerce, that had other concerns. But, instead of creating separate experts for each telecommunications field, the 1934 Act would ultimately be interpreted to have created a single expert agency with broad purview.⁷ The Radio Act of 1927 had created a focused agency for spectrum management (the Federal Radio Commission); the 1934 Act would now create a regulatory agency for telephony and charge that same agency with the duty to regulate the airwaves. That new agency was the Federal Communications Commission (FCC). The Act thus abolished the Federal Radio Commission, repealed the Mann-Elkins Act, and put an end to the fragmented jurisdiction that had existed until 1934:

⁴ Stat. 539, ch. 309 §§7, 12.

⁵ Peter W. Huber, Michael K. Kellogg and John Thorne, *Federal Telecommunications Law* 215 (2d ed. 1999).

⁶ We address jurisdictional issues primarily in Chapters Thirteen and Sixteen.

⁷ This was an open question in certain settings. For example, we will see in Chapter Eight that there was considerable doubt over whether the FCC had authority to regulate cable television under the 1934 Act. The Supreme Court ultimately held that it (for the most part) did, and Congress later amended the 1934 Act to make that authority explicit.

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority hereto granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the “Federal Communications Commission,” which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.⁸

The FCC was thus responsible for promulgating regulations to implement the 1934 Act, and for interpreting the many gaps and ambiguities that appeared throughout that lengthy statute. This implementing role was of immediate and substantial importance. For while the Act incorporated many aspects of preexisting regulation (like the licensing requirements for broadcasters, and common-carriage obligations for telephone companies), and the Act also preserved and even strengthened the jurisdiction of state regulators over intrastate telephony, it also markedly increased the scope of federal communications regulation. It was in the exercise of that new authority that the FCC would ultimately find its most significant powers.

The Structure of the 1934 Act

The 1934 Act is codified at Title 47 of the United States Code which, in turn, is divided into seven subchapters or “Titles” of its own. Titles I, IV, V, and VII set forth general provisions that relate either to the FCC itself or to issues that transcend any particular industry sector or category of service. Title I, for example, sets forth general provisions pertaining to the structure, jurisdiction, and operation of the Federal Communications Commission. 47 U.S.C. §§151-161. That title, as we discuss below, plays a special role as it provides the FCC with ancillary jurisdiction authority to act in a “common law-like” fashion to regulate new technologies. Titles IV and V, by contrast, address solely procedural matters, with the former focusing on enforcement jurisdiction and requirements for administrative proceedings and the latter focusing on penalties and forfeitures for violation of regulations under the Act. 47 U.S.C. §§410-416, 501-510. Title VII of the Act, which is entitled “Miscellaneous Provisions,” covers issues ranging from the President’s emergency powers in this area to closed captioning of video programming. 47 U.S.C. §§701-714.

⁸ 48 Stat. 1064, §1 (1934) (codified as amended at 47 U.S.C. §151). The section has been amended twice: in 1937 when the words “for the purpose of promoting safety of life and property through the use of wire and radio communication” were added, and in 1996, when the words “without discrimination on the bases of color, religion, national origin or sex” were added.

Titles II, III, and VI—the subchapters with which this book will be primarily concerned—differ in that they prescribe distinct sets of regulation for ostensibly distinct categories of services, service providers, and technologies.

Title II of the Act governs common carriers, and thus contains the principal set of substantive provisions pertaining to telephony. The provisions of Title II cover a vast number of topics—from rates, competition, and network interconnection to harassing phone calls, services for the disabled, and the regulation of payphones. 47 U.S.C. §§201-276. Although neither Title II nor any other subchapter of the Communications Act explicitly regulates the Internet, Title II contains provisions that affect network infrastructure essential to the Internet. (Moreover, the FCC has also regulated the Internet under its Title I authority.) We will examine many aspects of regulation under Title II (especially Title II as it was amended by the Telecommunications Act of 1996) in Chapters Thirteen through Eighteen of this book. The relation of Title II to the Internet will be discussed in Chapters Nineteen and Twenty.

Title III of the Act establishes the regulatory regime for radio spectrum and broadcast services. It, too, covers substantial ground, ranging from the licensing of spectrum and construction of radio facilities to more particular regulation of the content of broadcast communications. 47 U.S.C. §§301-399. The most important aspects of Title III for our purposes are those that involve the allocation of spectrum and those that impose restrictions and conditions on the use of that spectrum. We address the many interesting issues arising under Title III in Chapters One through Seven.

Finally, Title VI addresses “cable services” and, obviously, governs the regulation of cable television as well as many other services provided over the cable infrastructure. 47 U.S.C. §§601-641. Some of the provisions here also extend either implicitly or explicitly to other multichannel video programming distribution (MVPD) systems, for example direct broadcast satellite service and video services delivered over the telephone network. 47 U.S.C. §§651-653. The current Title VI was not, of course, part of the original 1934 Act, because cable service did not then exist. It was added over time through amendments to the Act, notably in the 1984 and 1992 Cable Acts mentioned above. (Before that time, the FCC relied on its Title I authority to regulate cable television.) We examine the regulation of cable television and related MVPD services in Chapters Eight through Twelve.

Overall, the structure of the Act follows the deceptively simple outlines of the telecommunications industry as Congress found it in 1934. On one hand were the “natural monopolies”—the telephone and telegraph companies that transmitted information by wire, operated as common carriers, and should therefore, it was assumed, be subject to classic public utility regulation. This is the intuitive logic behind Title II of the Act, which envisions the FCC regulating the entry, rates, and services of common carriers of telephonic communications (especially Bell); auditing their books; and assuring that they provide nondiscriminatory access to all.

On the other hand, in 1934 AM radio was gaining popularity throughout the country and radio stations were just beginning to link up into networks. These stations broadcast through the airwaves, and so the prime danger envisioned here was that these stations would interfere with each other if not legally constrained from doing so. Radio stations did not behave as common carriers, meanwhile, but rather selected programs to appeal to listeners and then sold commercial time to advertisers who thereby gained access to those listeners. Title III of the Act is directed at this commercial radio phenomenon, and thus it portrays a Commission particularly concerned with the licensing process—deciding who should be licensed to broadcast, on what frequencies, and in which communities. In contrast to Title II, the Act says nothing about controlling rates or providing equal access to broadcast stations. In fact, Title III specifically forbids the FCC from subjecting broadcasters to common carrier obligations.

Today, of course, some firms act like broadcasters but transmit by wire (e.g., cable television), while other firms act like common carriers but transmit through the airwaves (e.g., mobile telephone). As we shall discuss, the phenomenon of providing similar services based on different technologies—say, provide telephone service both by wire and by air—is known as “technological convergence.” In the wake of technological convergence, different titles of the Act may thus apply to a single service, as in the case for mobile telephony where, for example, spectrum licensing provisions from Title III and network interconnection provisions from Title II are both relevant. And a single title of the Act may apply to multiple and very different services, as is plainly the case for Title III which, as we just pointed out, applies both to broadcast television and to cellular telephony. Moreover, in a classic case of technological convergence, networks that originally were used for one kind of service (e.g. video) are now increasingly capable of delivering multiple kinds of services (e.g. video and high-speed data transmission). In short, technology changes—and the Internet, in particular, which is a powerful force driving technological convergence—have ensured that neither the concepts of “broadcaster” nor “common carrier” has the unambiguous, objective implications assumed by Congress in 1934.

Other Relevant Statutes and Agencies

To be sure, the Communications Act of 1934 (including its amendments) is not the only statute relevant to the regulation of U.S. telecommunications. As we will see, antitrust and copyright laws have also been very important. The Copyright Act of 1976 specifically created compulsory licenses that allow cable operators to retransmit copyrighted content at regulated rates. And the Satellite Home Viewer Improvement Act of 1999 amended the Copyright Act to recognize a similar, but not quite identical, compulsory license in providers of direct broadcast satellite service. These provisions of the Copyright Act are considered in Chapter Nine. Similarly, one of the most important events in the history of American telecommunications—the breakup of the Bell Telephone System in 1984—resulted not from anything in the 1934 Act, but from an

antitrust suit under the Sherman Antitrust Act. That suit is considered in significant detail in Chapter Fourteen.

Just as the Communications Act is not the only law relevant for telecommunications in the United States, the FCC is not the only relevant federal agency or authority. The case that broke up Bell was brought by the Antitrust Division of the U.S. Department of Justice (although the FCC was involved). Since 1996, the Department of Justice also has had primary responsibility for reviewing mergers and acquisitions in all sectors of the communications industry. The respective roles of the antitrust agencies and the FCC in telecom mergers will be discussed in Chapter Twenty-One.

In addition, another Executive Branch entity, the National Telecommunications and Information Administration (NTIA) located within the Department of Commerce, plays two important roles. First, NTIA and the FCC together determine what parts of the electromagnetic spectrum will be reserved for federal government use. *See* 47 U.S.C. §902. (NTIA then manages all the spectrum assigned to the government.) In discharging these responsibilities, NTIA relies heavily on advice from the Interdepartment Radio Advisory Committee, which is composed of representatives from the various federal agencies that use the spectrum extensively. Second, NTIA bears principal responsibility for determining presidential policy on telecommunication issues. To this end, NTIA has a substantial research staff and frequently submits comments on major FCC policymaking proceedings.

The above agencies operate within the United States, but one international entity bears mention. Radio waves do not respect geopolitical boundaries, so it is necessary for spectrum allocation in the United States to conform to rules established by the International Telecommunications Union (ITU), an organization established by treaty. Particularly for terrestrial transmission of radio waves, ITU regulations are not typically very confining. Usually, within any range of the spectrum, international standards permit a wide variety of uses. Further, international law does not restrict any spectrum usage within a country so long as that use does not radiate into other countries.

While it is important to note the role of other agencies and government departments in regulating telecommunications, the FCC has the overwhelming share of authority in this domain. So, while other regulatory or enforcement entities will enter into the discussions in this book, our principal focus will be on the Federal Communications Commission and its activities—a topic to which we now turn.

§ 2.3 The Federal Communications Commission

Government regulation of the spectrum could have been achieved through a number of different mechanisms—utilizing courts, legislatures, and/or agencies, on the federal or state level. Admittedly, some approaches would have been more complicated than others. For example, leaving spectrum regulation to state entities might have introduced significant coordination, compliance, and enforcement costs because, whether intentional or no,

telecommunication broadcasts frequently cross state lines.⁹ Even assuming a preference for regulators with a national purview, there were still a number of options on the federal level. Spectrum regulation could have been left up to Congress, for example, or to a specialized federal court with national jurisdiction (like the Court of Appeals for the Federal Circuit, which hears all patent appeals). Regulatory authority could have been vested in an agency directly controlled by the President, for that matter, rather than the more independent FCC that eventually was created.¹⁰

There is of course no easy answer to this question of institutional design, but the main arguments that carried the day back in 1927 were, first, that an independent administrative agency could develop relevant expertise; and, second, that using an independent agency was the only way to sufficiently insulate spectrum decisions from the political process. As to expertise, the argument was that judges are generalists with too few resources at hand, and, though Congress and the executive branch have greater resources at their disposal, they lack the narrow focus that was thought to enhance the development of sound regulation in this complicated area.¹¹ As for insulation, an even bigger concern than their lack of expertise was the worry that both Congress and the executive branch were too political. During the time when the FRC and later the FCC were created, there was a widespread belief that politically insulated expert administrators would do a better job of managing complex regulatory undertakings than would their masters in Congress and the White House.¹²

Congress could have given commissioners life tenure and the further accouterments of even greater independence. But that likely would have seemed to be too much insulation. One person's insulation, after all, is another's unaccountability. So Congress settled upon a multi-member commission, currently with five commissioners each serving a five-year term of

⁹ Some commentators argue that the benefits of regulation by common-law courts outweigh the costs. *See* Peter Huber, *Law and Disorder in Cyberspace* (1997). And it is worth reflecting on the argument about state versus national borders. Spectrum does not respect national boundaries either, and yet we are governed by a federal commission and not a global one.

¹⁰ Recall that the original plan was for the Federal Radio Commission to regulate for just one year, and then for the Secretary of Commerce to take over.

¹¹ It is of course unclear whether a narrow focus is preferable. Do you want a regulating entity to have a broad perspective that looks at the whole economy or one that concentrates more narrowly on a given industry? Your answer may vary depending on the situation (and which answer aids your cause). What looks like admirable focus to one person may look like blinders to another. And note that, precisely because a narrowly focused agency deals with a smaller number of regulated entities than would an agency with a broader purview, the potential for capture by an interested party may be greater in the case of the narrowly focused agency.

¹² Although the FRC was created before the New Deal and the FCC was created during it, one commonality between the periods was a belief in the wisdom of governance via independent regulatory commissions. *See* Joseph B. Eastman, *The Place of the Independent Commission*, 12 *Const. Rev.* 95 (1928); James M. Landis, *The Administrative Process* (1938).

office. Replacements for commissioners who leave during their term serve only for the unexpired portion, and there can be no more than a bare majority (three, currently) of commissioners from any one political party. The President nominates commissioners and they are confirmed by the Senate, and the President designates one to serve as Chair, which means that the Chair is almost always from the President's party. These structural details are codified at 47 U.S.C. §154.

The Commission enjoys considerable discretion when it comes to guiding spectrum policy. Indeed, section 303 of the Communications Act of 1934 broadly states:

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

- (a) Classify radio stations;
- (b) Prescribe the nature of the services to be rendered by each class of licensed stations and each station within any class;
- (c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;
- (f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations; [and]
- (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention.

This might sound like an enormous degree of discretion—and it is—but, in practice, there are constraints. First, courts have interpreted the “public interest, convenience, and necessity” as itself imposing some limitations on the FCC; indeed, they had to, as otherwise this would have been an unconstitutional delegation of the legislative power to an entity outside the legislative branch.¹³ Second, Congress can, and often does, give the FCC more specific mandates in particular contexts, such as legislation enacted in the 1990s requiring that spectrum be assigned via auction (which we discuss in Chapter Four). Third,

¹³ This issue was directly addressed in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), where the Supreme Court rejected the argument that “public interest, convenience, or necessity” was unconstitutionally broad. The Court concluded that “the ‘public interest, convenience, or necessity’ is a criterion which is as concrete as the complicated factors for judgment in such a field of delegated authority permit,” and that the terms do not convey unlimited powers to the FCC, as they indicate that the FCC should be guided by, for example, “the ability of the licensee to render the best practicable service to the community reached by his broadcasts.” *Id.* at 216.

other statutes—most notably the Administrative Procedure Act¹⁴—impose additional constraints on agency actions and give individuals the right to sue the agency if it runs afoul of these requirements. So, for example, the FCC is required to follow certain rulemaking procedures that, among other things, give the public ample opportunity to comment on proposed regulations. The Government in the Sunshine Act similarly prohibits three or more Commissioners from deliberating on Commission business unless they announce the meeting seven days in advance and hold the meeting in public.¹⁵ Fourth and finally, the political branches can exercise control over the agency via ad hoc levers, such as reducing the FCC’s budget, refusing to confirm newly appointed commissioners, or subjecting FCC actions to intensive public hearings and debate.

Within these guidelines, what sort of actions does the FCC take? As with all other administrative agencies, the FCC’s formal actions fall primarily into one of two categories: adjudication and rulemaking. The division between the two can sometimes be murky, but the key distinguishing characteristics are generality versus specificity, and to a lesser extent prospectivity versus retrospectivity. Adjudications usually involve specific actions aimed at the past behavior of a small number of particular named parties, and rulemakings are broader orders that apply across-the-board and prospectively to a class of activities or people that are defined but not enumerated.

Adjudications are a significant part of the FCC’s docket, as they include actions on possible rule violations, licensing disputes, and other proceedings focused on specific acts or actors. An example would be a hearing to determine whether the broadcast of a particular television program violated the Commission’s rules barring indecency. When the FCC implements a statute, however, it usually does so via rulemaking. Congress enacts the statute and leaves some aspect of the statute’s administration to the FCC, and the Commission assumes that responsibility by launching a rulemaking process. The materials in this textbook skew heavily toward rulemaking documents, as they are the main vehicle through which telecommunications regulation is implemented.

The rulemaking process formally begins with the Commission issuing a Notice of Proposed Rulemaking (“NPRM”) or a Notice of Inquiry (“NOI”). An NPRM contains a discussion of the issues to be addressed and a proposed set of rules to address them, usually with some explanation of the basis for those proposals. The NPRM requests comments from interested parties on the proposed course of action. Of course, parties often communicate with the Commission before it issues an NPRM in the hope of influencing these proposals; but there is a statutorily mandated comment period after an NPRM is issued, so that even uninvolved parties have an opportunity to comment before any regulation takes effect. An NOI, meanwhile, raises the issue to be

¹⁴ 5 U.S.C. §551 et seq. (establishing processes and standards for agency decisionmaking as well as standards for judicial review of agency decisions).

¹⁵ 5 U.S.C. §552b.

addressed and invites comments but usually does not propose any particular rules. An NPRM generally follows an NOI. After either an NPRM or an NOI, the FCC receives comments and sifts through them, and afterwards issues a rulemaking (often called a “Report and Order”) in which it responds to the comments, issues final rules, and provides a statement of the basis and purpose of those rules.

This sounds streamlined, but often it is not. Frequently the FCC will issue an NPRM or NOI and later (sometimes in response to comments, sometimes on its own initiative, sometimes in response to external events) decide to issue a further NPRM or NOI, which creates a new round of comments and responses but on a refined set of issues. On the back end, a final order might not resolve all outstanding issues and might instead request comment on some additional matters. The result is that many orders are final orders as to some matters and an NPRM or NOI as to others. The possibility of multiple NPRMs and multiple orders, combined with the opportunities for communications to the Commission not only during the official comment period but also before a rulemaking formally commences, make for a more fluid rulemaking process than one might imagine from merely reading the statutory provisions that govern FCC behavior.

When a final Report and Order is issued, even that is not the end of the process. A party can petition the FCC for reconsideration, but the Commission rarely grants such requests. That is not surprising, as the whole point of soliciting comments after the issuance of proposed rules is to allow parties to present their arguments before final rules are issued. Other avenues for reconsideration are more promising, however. First, Congress can overturn an FCC decision by legislation. A second, and more common, path is that an aggrieved party can file suit challenging the agency action as inconsistent with federal law.

The rules governing suits against the FCC are, by and large, the same as those employed more generally in administrative law. This means that most agency final actions (whether rulemaking or adjudications), and some decisions not to act, can be appealed to a federal court. By statute, the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to hear challenges to most licensing decisions made by the FCC. See 47 U.S.C. §402(b). Almost all other final FCC actions (including, notably, rulemaking proceedings) can be challenged in any United States Court of Appeals, though a disproportionate share are heard by the appeals court in the District of Columbia, which is where the FCC is located. See 47 U.S.C. §402(a), 28 U.S.C. §2342(1).

Most agency findings of fact, exercises of discretion, and policy judgments are subject to “arbitrary and capricious” review, under the catch-all provision of the Administrative Procedure Act that empowers courts to “set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §706(2)(A). This is fairly lenient review, in which the court will inquire whether the agency

based its decision on substantial evidence, considered arguments on the opposite side, and explained the basis of its decision. The courts do not (or at least are not supposed to) substitute their judgments on the merits for those of the agency; that would defeat the purpose of having an expert agency in the first place.

Legal interpretations made by the agency are subject to a slightly different form of review. When, as is usually the case, the Commission makes such interpretations in a rulemaking, the interpretations are subject to Chevron analysis, named for the case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, the court first determines “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter” and there will be no deference to the agency’s determination. *Id.* at 842. But “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute,” which entails quite considerable deference to the agency. *Id.* at 843. If the Commission makes a legal interpretation in a more informal context (such as an informal adjudication), then the deference accorded by a federal court will “depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)).

Suits challenging FCC actions are frequently filed in response to major FCC actions, and sometimes they meet with success. A sizable percentage of the judicial opinions excerpted in this book, in fact, were brought as challenges to FCC rulemakings.

§ 2.4 An Overview of Spectrum Management

The FCC is in charge of regulating the private use of spectrum. But what exactly does it mean to regulate spectrum use?

The Commission’s first step is to determine which services it will allow on which frequencies, and how many users it will allow to provide those services. This process (called allocation) entails the FCC deciding what services it is going to permit and the quantity and wavelengths of frequencies at which it will allow those services. As an example, the Commission might decide to authorize FM radio broadcasting on the 20 megahertz between 88 MHz and 108 MHz. In any given allocation, the FCC can permit one service, several services, or any service, and can make its rules accordingly. And it can choose to grant licenses to one entity, a number of designated entities, or to leave a set of frequencies completely open for unlicensed use.

Once the Commission has determined the quantity and particular set of frequencies to allocate for a given service or services, it determines how (if at all) to allot licenses for the service, and what sort of service rules it will impose. That is, the Commission decides how big a range of frequencies each license

will cover (e.g., 100 licenses covering 20 kilohertz each, which totals 2 megahertz, or 20 licenses covering 100 kilohertz each, also totaling 2 megahertz); how much area each license is authorized to cover (e.g., Indiana alone, Indiana plus Ohio, or the entire United States); what the limits are on the power levels of the transmitters; and whether and how it will create buffers between users or between services to avoid interference. Taken together, these decisions are sometimes called the band plan.

The Commission's next step is to create rules for the assignment, transfer, renewal, and termination of licenses to use spectrum in ways consistent with the band plan. Over time, the Commission has varied its approach tremendously with respect to this task. In the beginning, licensees were chosen in merit-based hearings where each licensee was evaluated in terms of its ability to provide the service in question. Licenses lasted for a few years, after which time a licensee had to petition the Commission for renewal. Transfer was cumbersome and termination was a real threat. More recently, by contrast, the Commission typically assigns licenses using an auction mechanism where the license goes to the highest bidder. Renewals are almost never questioned, and licensees are for the most part free to transfer their licenses during the license term. Termination is unheard of.

Finally, a third task before the Commission is the articulation of any public trustee obligations that might come along with license ownership. Public trustee obligations can, in theory, be applied to any type of license. The most salient obligations, however, have been those aimed at broadcast licensees. Such obligations were in some sense the "price" of license ownership back when licenses were distributed at no charge. A licensee would receive his license at no monetary cost but, in exchange, the government would impose a set of obligations on the licensee—for example, to air educational programs for children and to present balanced news coverage. Public interest obligations have been part of spectrum regulation since the start; as we will see, however, in recent years many of these obligations have been significantly pared back.

The following three chapters focus on allocation (Chapter Three), assignment (Chapter Four), and public interest obligations (Chapter Five). We do not offer a separate chapter on allotment and service rules. Instead, we introduce those concepts more fully below, and then we further develop them as appropriate in the context of the other discussions.

NOTES AND QUESTIONS

1. The Land Analogy. In the chapters that follow, we will obviously say much more about each of these Commission tasks. For now, however, can you articulate comparable tasks that must be accomplished with respect to the allocation and use of land? Are zoning regulations the equivalent of the band plan? What are the rules that govern the initial assignment, transfer, and renewal of rights to land? Are there any public interest obligations imposed on land owners, akin to the public interest obligations imposed on spectrum licensees?

2. Left Hands and Right. What relationships do you see between the various tasks that the Commission performs? For example, if transfer is relatively easy to accomplish and not at all subject to Commission review, does it matter how the Commission initially assigns licenses? Whoever receives the licenses at first will simply turn around and sell it to the highest bidder, right? Similarly, if initial assignment is done by auction, is there any reason to in addition impose public interest obligations? After all, under an auction the government garners the full value of the license; why not use that money to fund educational television, subsidize telephone service, or accomplish any other public interest goal?

3. Neither Fish nor Fowl. FCC Commissioners sometimes view their job as akin to a federal judge. Other times, FCC Commissioners believe they are extensions of the legislative branch. Yet other times, FCC Commissioners believe they work for the President and are, in effect, an extension of the administration. What role do you think is appropriate? What are the advantages and disadvantages of each? Given the tasks before the Commission, can an FCC Commissioner be too political or not political enough in her orientation?

§ 2.5 Regulatory Tradeoffs and Allotment

The FCC has often articulated the goals of broadcast regulation to be competition and diversity. *See, e.g.,* 1998 Biennial Regulatory Review, 13 FCC Rcd. 11,276 ¶4 (1998) (“For more than a half century, the Commission’s regulation of broadcast service has been guided by the goals of promoting competition and diversity.”). A third goal that the Commission sometimes includes with competition and diversity is localism. *See, e.g.,* Broadcast Localism, 19 FCC Rcd. 12,425 ¶1 (“As with competition and diversity, localism has been a cornerstone of broadcast regulation for decades.”).

These three goals are in tension with one another. Treating diversity as a goal separate and distinct from competition must mean that, in some cases, (small amounts of) competition should be sacrificed to achieve (larger amounts of) diversity. Such a concern with diversity might be justified either because of the perceived failure of competition to work adequately or because of a view that diversity may be more important than efficient competition.

The conflict between localism and the other goals, meanwhile, has been significant and foundational. The best example arises out of the allotment of broadcast television stations. The FCC chose to place at least one television station in as many communities as possible. The FCC could have designated single nationwide licenses as opposed to ones based in local communities. By so doing, a single firm could broadcast on channel 2 in a more effective fashion and without the need for as many empty stations that ensue when one firm broadcasts on channel 2 from, say, New York City and another firm broadcasts on channel 3 from Philadelphia. Because of interference concerns where two rival channel 2 stations might overlap (say, in Princeton, New Jersey), the result

of this policy is that large swaths of territory will not be within range of a channel 2 signal (New York City) or a channel 3 signal (Philadelphia). Creating nationwide licenses would have given individuals access to more stations (by avoiding interference problems created through assigning stations to each city).

The FCC's decision not to maximize the number of stations but instead to focus on ensuring local stations in each community thus meant that individuals would be able to see local news and weather, but it also reduced the number of broadcast networks that could be created—ensuring that, for decades, there would be only three commercial broadcast television networks. Even as of 1980, an FCC study found that although 92% of U.S. households could receive at least three commercial television channels, only 64% could receive a fourth channel, making it hard for a fourth network to compete.¹⁶ The irony is that the existence of only three national broadcast networks led the Commission to regulate the networks' behavior. The FCC, concerned that the existence of only three networks did not ensure adequate competition, imposed a series of restraints on the networks' relationships with their affiliates and their program suppliers (discussed in Chapter Seven).

This is not to suggest that the Commission necessarily made a mistake in focusing on localism, but rather than the goals of competition, diversity, and localism are in tension with one another.¹⁷ With this as with every other decision that the FCC (or anyone else) makes, there are tradeoffs.

That said, some decisions on how to design the scope of spectrum licenses are widely recognized, in retrospect, to have been mistakes. There is broad agreement, for example, that regulators erred when they followed a local model for cellular providers. In that case, the decision to create a large number of locally-based licenses proved highly inefficient, because users wanted national service, and the FCC's initial decision was eventually overcome through market consolidation. But the FCC's decision to create local cellular licenses created inefficiencies and stalled the development of a more advanced infrastructure.

¹⁶ See 1 FCC Final Report, *New Television Networks: Entry, Jurisdiction, Ownership, and Regulation* 68 (1980); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 *Geo. L.J.* 245, 275-79, 279 n.175 (2003).

¹⁷ For a more negative view of the FCC's allotment decisions, see Thomas G. Krattenmaker & L. A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 *Yale L.J.* 1719, 1736 (1995) (noting that the FCC's allocation plan "gave great weight to factors such as placing at least one transmitter in as many communities (and, therefore, congressional districts) as possible..., and for almost forty years guaranteed that there would be but three national networks. The allocation plan sacrificed viewer interests in access and diversity to narrow political concerns and entrenched industry goals.").

NOTES AND QUESTIONS

1. Broader Applications. The Commission has not emphasized localism or diversity in its regulation of telephony. Is that a mistake? How might they apply in the context of telephone regulation?

2. Principles. Is there any metric for the FCC to use in trading off among competition, diversity, and localism? Should it add other goals to those three, or subtract one or two? On what basis should it decide whether to do so?