REGULATED DIGITAL INDUSTRIES

THE LAW AND POLICY OF COMMUNICATIONS NETWORKS AND PLATFORMS

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INTRODUCTION

Welcome to *Regulated Digital Industries*. As this book's subtitle indicates, we will spend the next 600 pages or so on a journey through the law and policy of communications networks and platforms, one our most complex legal regimes, blending features of administrative law, antitrust law, and constitutional law (encompassing questions ranging from free speech to federalism). We'll encounter such questions as whether to require internet service providers to comply with net neutrality rules, how to ensure media representation of diverse voices, whether to regulate the content moderation practices of large platforms, and how copyright and accessibility concerns interact with video content platforms. These questions are profoundly important. The answers directly impact the structure of the telecommunications industry, from the companies that build telephone and broadband infrastructure to providers of online social media platforms. More fundamentally, these questions implicate matters of distribution, efficiency, fairness, monopoly power, and the structure of government. I hope you are as excited to dive in as I am!

This book is organized along two primary dimensions. First, it is organized by the "technology stack." By the stack, I mean to refer to layers of technological dependencies: using Google's search engine, for example, requires access to the internet; access to the internet depends upon certain physical infrastructure—cables and wires, for example—that are strung upon poles or thread through underground conduits. And so this book begins (in Chapter 2) by exploring the physical infrastructure that undergirds our modern world. In Chapter 3, we turn our attention to questions of internet access. And in Chapter 4, we examine the content, applications, and platforms that sit atop (and rely upon) the internet.

Hence, this book is also organized (roughly) chronologically. Because these cables and wires and radio infrastructure were deployed first (well before the internet was invented, let alone widely used), we begin with a study of, say, early telephone systems and legal regimes associated with them. These beginnings are important because, as we will see, path dependence can sometimes matter a great deal to understanding our modern legal and regulatory regimes.

Let's get to it.

CHAPTER 1: FUNDAMENTALS

Introductions and Frameworks

NBC v. United States
319 U.S. 190 (1943)

JUSTICE FRANKFURTER delivered the opinion of the Court.

On March 18, 1938, the FCC undertook a comprehensive investigation to determine whether special regulations applicable to radio stations engaged in chain broadcasting[1] were required in the "public interest, convenience, or necessity." The Commission's order directed that inquiry be made, inter alia, in the following specific matters: the number of stations licensed to or affiliated with networks, and the amount of station time used or controlled by networks; the contractual rights and obligations of stations under their agreements with networks; the scope of network agreements containing exclusive affiliation provisions and restricting the network from affiliating with other stations in the same area; the rights and obligations of stations with respect to network advertisers; the nature of the program service rendered by stations licensed to networks; the policies of networks with respect to character of programs, diversification, and accommodation to the particular requirements of the areas served by the affiliated stations; the extent to which affiliated stations exercise control over programs, advertising contracts, and related matters; the nature and extent of network program duplication by stations serving the same area; the extent to which particular networks have exclusive coverage in some areas; the competitive practices of stations engaged in chain broadcasting; the effect of chain broadcasting upon stations not licensed to or affiliated with networks; practices or agreements in restraint of trade, or in furtherance of monopoly, in connection with chain broadcasting; and the scope of concentration of control over stations, locally, regionally, or nationally, through contracts, common ownership, or other means.

On April 6, 1938, a committee of three Commissioners was designated to hold hearings and make recommendations to the full Commission. This committee held public hearings for 73 days over a period of six months, from November 14, 1938, to May 19, 1939. Station licensees, national and regional networks, and transcription and recording companies were invited to appear and give evidence. Other persons who sought to appear were afforded an opportunity to testify. 96 witnesses were heard by the committee, 45 of whom were called by the national networks. The evidence covers 27 volumes, including over 8,000 pages of transcript and more than 700 exhibits. The testimony of the witnesses called by the national networks fills more than 6,000 pages, the equivalent of 46 hearing days.

On May 2, 1941, the Commission issued its *Report on Chain Broadcasting*, setting forth its findings and conclusions upon the matters explored in the investigation, together with an order adopting the Regulations here assailed. Two members of the Commission

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[1] Chain broadcasting is defined as the "simultaneous broadcasting of an identical program by two or more connected stations." In actual practice, programs are transmitted by wire, usually leased telephone lines, from their point of origination to each station in the network for simultaneous broadcast over the air.

dissented from this action. Since October 30, 1941, when the present suits were filed, the enforcement of the Regulations has been stayed either voluntarily by the Commission or by order of court.

We turn now to the Regulations themselves, illumined by the practices in the radio industry disclosed by the Commission's investigation. The Regulations, which the Commission characterized in its Report as 'the expression of the general policy we will follow in exercising our licensing power,' are addressed in terms to station licensees and applicants for station licenses. They provide, in general, that no licenses shall be granted to stations or applicants having specified relationships with networks. Each Regulation is directed at a particular practice found by the Commission to be detrimental to the 'public interest', and we shall consider them seriatim. In doing so, however, we do not overlook the admonition of the Commission that the Regulations as well as the network practices at which they are aimed are interrelated: 'In considering above the network practices which necessitate the regulations we are adopting, we have taken each practice singly, and have shown that even in isolation each warrants the regulation addressed to it. But the various practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each taken singly.'

The Commission found that at the end of 1938 there were 660 commercial stations in the United States, and that 341 of these were affiliated with national networks. 135 stations were affiliated exclusively with the National Broadcasting Company, Inc., known in the industry as NBC. NBC was also the licensee of 10 stations, including 7 which operated on so-called clear channels with the maximum power available; in addition, NBC operated 5 other stations under management contracts with their licensees. 102 stations were affiliated exclusively with the Columbia Broadcasting System, Inc., which was also the licensee of 8 stations, 7 of which were clear-channel stations. 74 stations were under exclusive affiliation with the Mutual Broadcasting System, Inc. In addition, 25 stations were affiliated with both NBC and Mutual, and 5 with both CBS and Mutual. These figures, the Commission noted, did not accurately reflect the relative prominence of the three companies, since the stations affiliated with Mutual were, generally speaking, less desirable in frequency, power, and coverage. It pointed out that the stations affiliated with the national networks utilized more than 97% of the total night-time broadcasting power of all the stations in the country. NBC and CBS together controlled more than 85% of the total night-time wattage, and the broadcast business of the three national network companies amounted to almost half of the total business of all stations in the United States.

The Commission recognized that network broadcasting had played and was continuing to play an important part in the development of radio. 'The growth and development of chain broadcasting', it stated, 'found its impetus in the desire to give widespread coverage to programs which otherwise would not be heard beyond the reception area of a single station.' Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin. Furthermore, the access to greatly enlarged audiences made possible by chain broadcasting has been a strong incentive to advertisers to finance the production of expensive programs. But the fact that the chain broadcasting method brings benefits and advantages to both the listening public and to broadcast station licensees does not mean that the prevailing practices and policies of the networks and their outlets are sound in all respects, or that they should not be altered. The Commission's duty under the Communications Act of 1934

is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated.

The Commission found that several network abuses were amenable to correction within the powers granted it by Congress:

Regulation 3.101—Exclusive affiliation of station. The Commission found that the network affiliation agreements of NBC and CBS customarily contained a provision which prevented the station from broadcasting the programs of any other network. The effect of this provision was to hinder the growth of new networks, to deprive the listening public in many areas of service to which they were entitled, and to prevent station licensees from exercising their statutory duty of determining which programs would best serve the needs of their community. 'Restraints having this effect', the Commission observed, 'are to be condemned as contrary to the public interest ... A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable, and which, by closing the door of opportunity in the network field, adversely affect the program structure of the entire industry.'

Accordingly, the Commission adopted Regulation 3.101, providing as follows: 'No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.'

Regulation 3.102—Territorial exclusivity. The Commission found another type of 'exclusivity' provision in network affiliation agreements whereby the network bound itself not to sell programs to any other station in the same area. The effect of this provision, designed to protect the affiliate from the competition of other stations serving the same territory, was to deprive the listening public of many programs that might otherwise be available. If an affiliated station rejected a network program, the 'territorial exclusivity' clause of its affiliation agreement prevented the network from offering the program to other stations in the area. The Commission concluded that 'It is not in the public interest for the listening audience in an area to be deprived of network programs not carried by one station where other stations in that area are ready and willing to broadcast the programs. It is as much against the public interest for a network affiliate to enter into a contractual arrangement which prevents another station from carrying a network program as it would be for it to drown out that program by electrical interference.'

Recognizing that the 'territorial exclusivity' clause was unobjectionable in so far as it sought to prevent duplication of programs in the same area, the Commission limited itself to the situations in which the clause impaired the ability of the licensee to broadcast available programs. Regulation 3.102, promulgated to remedy this particular evil, provides as follows: 'No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to

which the station is granted the first call in its primary service area upon the programs of the network organization

Regulation 3.104—Option time. The Commission found that network affiliation contracts usually contained so-called network optional time clauses. Under these provisions the network could call upon its affiliates to carry a commercial program during any of the hours specified in the agreement as 'network optional time'. For CBS affiliates 'network optional time' meant the entire broadcast day. For 29 outlets of NBC on the Pacific Coast, it also covered the entire broadcast day; for substantially all of the other NBC affiliates, it included 8 1/2 hours on weekdays and 8 hours on Sundays. Mutual's contracts with about half of its affiliates contained such a provision, giving the network optional time for 3 or 4 hours on weekdays and 6 hours on Sundays.

In the Commission's judgment these optional time provisions, in addition to imposing serious obstacles in the path of new networks, hindered stations in developing a local program service. The exercise by the networks of their options over the station's time tended to prevent regular scheduling of local programs at desirable hours. The Commission found that 'shifting a local commercial program may seriously interfere with the efforts of a (local) sponsor to build up a regular listening audience at a definite hour, and the long-term advertising contract becomes a highly dubious project. This hampers the efforts of the station to develop local commercial programs and affects adversely its ability to give the public good program service. A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest. We conclude that national network time options have restricted the freedom of station licensees and hampered their efforts to broadcast local commercial programs, the programs of other national networks, and national spot transcriptions. We believe that these considerations far outweigh any supposed advantages from 'stability' of network operations under time options. We find that the optioning of time by licensee stations has operated against the public interest.'

Regulation 3.104 called for the modification of the option-time provision in three respects: the minimum notice period for exercise of the option could not be less than 56 days; the number of hours which could be optioned was limited; and specific restrictions were placed upon exercise of the option to the disadvantage of other networks. The text of the Regulation follows: 'No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a.m. to 1:00 p.m.; 1:00 p.m. to 6:00 p.m.; 6:00 p.m. to 11:00 p.m.; 11:00 p.m. to 8:00 a.m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.'

Regulation 3.106—Network ownership of stations. The Commission found that NBC, in addition to its network operations, was the licensee of 10 stations, 2 each in New York, Chicago, Washington, and San Francisco, 1 in Denver, and 1 in Cleveland. CBS was the licensee of 8 stations, 1 in each of these cities: New York, Chicago, Washington, Boston, Minneapolis, St. Louis, Charlotte, and Los Angeles. These 18 stations owned by NBC and

CBS, the Commission observed, were among the most powerful and desirable in the country, and were permanently inaccessible to competing networks. "Competition among networks for these facilities is nonexistent, as they are completely removed from the network-station market. It gives the network complete control over its policies. This 'bottling-up' of the best facilities has undoubtedly had a discouraging effect upon the creation and growth of new networks. Furthermore, common ownership of network and station places the network in a position where its interest as the owner of certain stations may conflict with its interest as a network organization serving affiliated stations. In dealings with advertisers, the network represents its own stations in a proprietary capacity and the affiliated stations in something akin to an agency capacity. The danger is present that the network organization will give preference to its own stations at the expense of its affiliates."

The Commission stated that if the question had arisen as an original matter, it might well have concluded that the public interest required severance of the business of station ownership from that of network operation. But since substantial business interests have been formed on the basis of the Commission's continued tolerance of the situation, it was found inadvisable to take such a drastic step. The Commission concluded, however, that 'the licensing of two stations in the same area to a single network organization is basically unsound and contrary to the public interest', and that it was also against the 'public interest' for network organizations to own stations in areas where the available facilities were so few or of such unequal coverage that competition would thereby be substantially restricted. Regulation 3.106 reads as follows: 'No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.'

The appellants attack the validity of these Regulations along many fronts. They contend that the Commission went beyond the regulatory powers conferred upon it by the Communications Act of 1934; that even if the Commission were authorized by the Act to deal with the matters comprehended by the Regulations, its action is nevertheless invalid because the Commission misconceived the scope of the Act, particularly §313 which deals with the application of the antitrust laws to the radio industry; that the Regulations are arbitrary and capricious; that if the Communications Act of 1934 were construed to authorize the promulgation of the Regulations, it would be an unconstitutional delegation of legislative power; and that, in any event, the Regulations abridge the appellants' right of free speech in violation of the First Amendment. We are thus called upon to determine whether Congress has authorized the Commission to exercise the power asserted by the Chain Broadcasting Regulations, and if it has, whether the Constitution forbids the exercise of such authority.

Prior to the World War, questions of radio interference arose only rarely because there were more than enough frequencies for all the stations then in existence. The war accelerated the development of the art, however, and in 1921 the first standard broadcast stations were established. They grew rapidly in number, and by 1923 there were several hundred such stations throughout the country. The number of stations increased so rapidly and the situation became so chaotic, that the Secretary of Commerce, upon the recommendation of the National Radio Conferences which met in Washington in 1923 and

1924, established a policy of assigning specified frequencies to particular stations. The entire radio spectrum was divided into numerous bands, each allocated to a particular kind of service. The frequencies ranging from 550 to 1500 kilocycles (96 channels in all, since the channels were separated from each other by 10 kilocycles) were assigned to the standard broadcast stations. But the problems created by the enormously rapid development of radio were far from solved. The increase in the number of channels was not enough to take care of the constantly growing number of stations. Since there were more stations than available frequencies, the Secretary of Commerce attempted to find room for everybody by limiting the power and hours of operation of stations in order that several stations might use the same channel. The number of stations multiplied so rapidly, however, that by November 1925, there were almost 600 stations in the country, and there were 175 applications for new stations. Every channel in the standard broadcast band was, by that time, already occupied by at least one station, and many by several. The new stations could be accommodated only by extending the standard broadcast band, at the expense of the other types of services, or by imposing still greater limitations upon time and power. The National Radio Conference which met in November 1925, opposed both of these methods and called upon Congress to remedy the situation through legislation.

The Secretary of Commerce was powerless to deal with the situation. It had been held that he could not deny a license to an otherwise legally qualified applicant on the ground that the proposed station would interfere with existing private or Government stations. On April 16, 1926, an Illinois district court held that the Secretary had no power to impose restrictions as to frequency, power, and hours of operation. This was followed on July 8, 1926, by an opinion of Acting Attorney General Donovan that the Secretary of Commerce had no power to regulate the power, frequency or hours of operation of stations. The next day the Secretary of Commerce issued a statement abandoning all his efforts to regulate radio and urging that the stations undertake self-regulation.

But the plea of the Secretary went unheeded until February 23, 1927, when Congress enacted the Radio Act of 1927. In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communication, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential.

The Radio Act of 1927 created the Federal Radio Commission, composed of five members, and endowed the Commission with wide licensing and regulatory powers. And in its essentials the Communications Act of 1934 (so far as its provisions relating to radio are concerned) derives from the Federal Radio Act of 1927. The objectives of the legislation have remained substantially unaltered since 1927.

Section 1 of the Communications Act states its 'purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges'. Section 301 particularizes this general purpose with respect to radio: 'It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.' To that end the Federal Communications Commission was created, with broad licensing and regulatory powers.

The criterion governing the exercise of the Commission's licensing power is the 'public interest, convenience, or necessity'. In addition, §307(b) directs the Commission that 'In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.'

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the 'public interest, convenience, or necessity', a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.' 'This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services.'

The 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio'. The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. 'An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts.' The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of 'public interest' were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of 'public interest, convenience, or necessity.'

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303(g) provides that the Commission shall 'generally encourage the larger and more effective use of radio in the public interest'; subsection (i) gives the Commission specific 'authority to make special regulations applicable to radio stations engaged in chain broadcasting'; and subsection (r) empowers it to adopt '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'.

These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest'. We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

In essence, the Chain Broadcasting Regulations represent a particularization of the Commission's conception of the 'public interest' sought to be safeguarded by Congress in enacting the Communications Act of 1934. The basic consideration of policy underlying the Regulations is succinctly stated in its Report: 'With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. The net effect (of the practices disclosed by the investigation) has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging 'the larger and more effective use of radio in the public interest' if we were to grant licenses to persons who persist in these practices.'

We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations. True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. 'Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.' In the context of the developing problems to which it was directed, the Act gave the Commission expansive powers. It was given a comprehensive mandate to 'encourage the larger and more effective use of radio in the public interest,' if need be, by making 'special regulations applicable to radio stations engaged in chain broadcasting.'

While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had

taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

A totally different source of attack upon the Regulations is found in §311 of the Act, which authorizes the Commission to withhold licenses from persons convicted of having violated the antitrust laws. Two contentions are made—first, that this provision puts considerations relating to competition outside the Commission's concern before an applicant has been convicted of monopoly or other restraints of trade, and second, that in any event, the Commission misconceived the scope of its powers under §311 in issuing the Regulations. Both of these contentions are unfounded. Section 311 derives from §13 of the Radio Act of 1927, which expressly commanded, rather than merely authorized, the Commission to refuse a license to any person judicially found guilty of having violated the antitrust laws. The change in the 1934 Act was made, in the words of Senator Dill, the manager of the legislation in the Senate, because 'it seemed fair to the committee to do that.' The Commission was thus permitted to exercise its judgment as to whether violation of the antitrust laws disqualified an applicant from operating a station in the 'public interest.'

That the Commission may refuse to grant a license to persons adjudged guilty in a court of law of conduct in violation of the antitrust laws certainly does not render irrelevant consideration by the Commission of the effect of such conduct upon the 'public interest, convenience, or necessity.' A licensee charged with practices in contravention of this standard cannot continue to hold his license merely because his conduct is also in violation of the antitrust laws and he has not yet been proceeded against and convicted. By clarifying in §311 the scope of the Commission's authority in dealing with persons convicted of violating the antitrust laws, Congress can hardly be deemed to have limited the concept of 'public interest' so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce. Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the 'public interest,' merely because its misconduct happened to be an unconvicted violation of the antitrust laws.

Alternatively, it is urged that the Regulations constitute an *ultra vires* attempt by the Commission to enforce the antitrust laws, and that the enforcement of the antitrust laws is the province not of the Commission but of the Attorney General and the courts. This contention misconceives the basis of the Commission's action. The Commission's Report indicates plainly enough that the Commission was not attempting to administer the antitrust laws:

> 'This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. While many of the network practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the

> standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals. We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest.'

We conclude, therefore, that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting. There remains for consideration the claim that the Commission's exercise of such authority was unlawful.

The Regulations are assailed as 'arbitrary and capricious.' If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in *Board of Trade v. United States*, 314 U.S. 534, 548 (1942), is relevant here: 'We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission.' Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.

It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations. Its long investigation disclosed the existences of practices which it regarded as contrary to the 'public interest'. The Commission knew that the wisdom of any action it took would have to be tested by experience. If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

Since there is no basis for any claim that the Commission failed to observe procedural safeguards required by law, we reach the contention that the Regulations should be denied enforcement on constitutional grounds. The claim is made that the standard of 'public interest' governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional. But, it is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary.

We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among

applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different. The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of 'public interest'), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the 'public interest, convenience, or necessity.' Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

Affirmed.

JUSTICE BLACK and JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

JUSTICE MURPHY, with whom JUSTICE ROBERTS joins, dissenting.

I do not question the objectives of the proposed regulations, and it is not my desire by narrow statutory interpretation to weaken the authority of government agencies to deal efficiently with matters committed to their jurisdiction by the Congress. Statutes of this kind should be construed so that the agency concerned may be able to cope effectively with problems which the Congress intended to correct, or may otherwise perform the functions given to it. But we exceed our competence when we gratuitously bestow upon an agency power which the Congress has not granted. Since that is what the Court in substance does today, I dissent.

In the present case we are dealing with a subject of extreme importance in the life of the nation. Although radio broadcasting, like the press, is generally conducted on a commercial basis, it is not an ordinary business activity, like the selling of securities or the marketing of electrical power. In the dissemination of information and opinion radio has assumed a position of commanding importance, rivalling the press and the pulpit. Owing to its physical characteristics radio, unlike the other methods of conveying information, must be regulated and rationed by the government. Otherwise there would be chaos, and radio's usefulness would be largely destroyed. But because of its vast potentialities as a medium of communication, discussion and propaganda, the character and extent of control that should be exercised over it by the government is a matter of deep and vital concern. Events in Europe show that radio may readily be a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment. It may even be an instrument of oppression. In pointing out these possibilities I do not mean to intimate in the slightest that they are imminent or probable in this country, but they do suggest that the construction of the instant statute should be approached with more than ordinary restraint and caution, to avoid an interpretation that is not clearly justified by the conditions that brought about its enactment, or that would give the Commission greater powers than the Congress intended to confer.

The Communications Act of 1934 does not give the Commission power to regulate the contractual relations between the stations and the networks. It is only as an incident of the power to grant or withhold licenses to individual stations. But nowhere is there to be found by reasonable construction or necessary inference, authority to regulate the

broadcasting industry as such, or to control the complex operations of the national networks.

The power to control network contracts and affiliations by means of the Commission's licensing powers cannot be derived from implication out of the standard of 'public convenience, interest, or necessity'. We have held that the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel. If it had been the intention of the Congress to invest the Commission with the responsibility, through its licensing authority, of exercising far-reaching control—as exemplified by the proposed regulations—over the business operations of chain broadcasting and radio networks as they were then or are now organized and established, it is not likely that the Congress would have left it to mere inference or implication from the test of 'public convenience, interest, or necessity.'

It is quite possible, of course, that maximum utilization of the radio as an instrument of culture, entertainment, and the diffusion of ideas is inhibited by existing network arrangements. Some of the conditions imposed by the broadcasting chains are possibly not conducive to a freer use of radio facilities, however essential they may be to the maintenance of sustaining programs and the operation of the chain broadcasting business as it is now conducted. But I am unable to agree that it is within the present authority of the Commission to prescribe the remedy for such conditions. It is evident that a correction of these conditions in the manner proposed by the regulations will involve drastic changes in the business of radio broadcasting which the Congress has not clearly and definitely empowered the Commission to undertake.

Again I do not question the need of regulation in this field, or the authority of the Congress to enact legislation that would vest in the Commission such power as it requires to deal with the problem, which it has defined and analyzed in its report with admirable lucidity. It is possible that the remedy indicated by the proposed regulations is the appropriate one, whatever its effect may be on the sustaining programs, advertising contracts, and other characteristics of chain broadcasting as it is now conducted in this country. I do not believe, however, that the Commission was justified in claiming the responsibility and authority it has assumed to exercise without a clear mandate from the Congress.

To the extent that existing network practices may have run counter to the antitrust laws, the Congress has expressly provided the means of dealing with the problem. The enforcement of those laws has been committed to the courts and other law enforcement agencies. In addition to the usual penalties prescribed by statute for their violation, however, the Commission has been expressly authorized by §311 to refuse a station license to any person 'finally adjudged guilty by a Federal court' of attempting unlawfully to monopolize radio communication. Anyone under the control of such a person may also be refused a license. And whenever a court has ordered the revocation of an existing license, as expressly provided in §313, a new license may not be granted by the Commission to the guilty party or to any person under his control.

Insofar as the Congress deemed it necessary in this legislation to safeguard radio broadcasting against arrangements that are offensive to the antitrust laws or monopolistic

in nature, it made specific provision in §§311 and 313. If the existing network contracts are deemed objectionable because of monopolistic or other features, and no remedy is presently available under these provisions, the proper course is to seek amendatory legislation from the Congress, not to fabricate authority by ingenious reasoning based upon provisions that have no true relation to the specific problem.

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Notes and Questions.

1. Problems. One case can say a lot about the history, purpose, and effect of telecommunications regulation. *NBC* details the path from the Federal Radio Act to the Federal Communications Commission. But why even have a Federal Radio Act? What policy problem is Congress trying to solve? And looking beyond the Federal Radio Act, the regulations challenged in *NBC* were promulgated for some reason. What is it? What are the problems that this sort of regulation aims to address?

2. Powers. What is the source of the FCC's power to issue these regulations? What does the dissent think?

3. Limits. What are NBC's primary grounds for attacking the regulation? What limits does NBC perceive on the permissible scope of regulation? Does the Supreme Court agree?

4. Questions. The questions in Notes 1–3 are just that: Questions. At this stage, we're only beginning to frame the questions that we will address over the course of the semester. *NBC* thus gives us a useful framework to think about the regulation of digital industries (and a course on such regulation, too!). *First*, what are the policy aims of telecommunications regulation, and how have those policy goals changed over time? *Second*, what power do policymakers have to address these problems? Which of these policy problems are administrative agencies particularly well-suited to address? Which problems should fall to the courts or to Congress? *Third*, what other constraints operate on such regulation? What limits are imposed by, say, the Constitution or the Administrative Procedure Act? How do the more general antitrust laws and telecommunications-specific rules work together?

5. Some Themes. *NBC* also helps to preview several issues which will recur over the semester. Consider the following quotes and questions.
   - "It is as much against the public interest for a network affiliate to enter into a contractual arrangement which prevents another station from carrying a network program as it would be for it to drown out that program by electrical interference." Does this seem correct to you? Does this depend on the reason for the contract? On the mechanisms by which rights to broadcast over the airwaves are allocated? Both?
   - "A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life." How important is localism? How much should the agency account for such concerns?
   - "Common ownership of network and station places the network in a position where its interest as the owner of certain stations may conflict with its interest as a network organization serving affiliated stations. The danger is present that the network organization will give preference to its own stations at the expense of its affiliates." Are policymakers justifiably concerned that networks, or platforms, will favor their affiliates at the expense

of downstream (or upstream) competitors? And if so, how should the law address such concerns?

- "The Commission stated that if the question had arisen as an original matter, it might well have concluded that the public interest required severance of the business of station ownership from that of network operation. But since substantial business interests have been formed on the basis of the Commission's continued tolerance of the situation, it was found inadvisable to take such a drastic step." How should policymakers account for such reliance interests? How should we trade the reasonable reliance interests of private parties against the Commission's assessment of the public good?
- "The facilities of radio are limited and therefore precious…. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license." What is the best way to deal with the scarce nature of the spectrum resource? How much regulatory power, or leeway, should such scarcity grant the Commission?
- "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission. Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress." How closely should the courts scrutinize the agencies' technical decisions? When should courts defer?

And these are only a few to get us started…

Origins of Telecommunications Regulation

1913 Annual Report of the Directors of the American Telephone & Telegraph Co. to the Shareholders (The Kingsbury Commitment)

LEGAL.

The work of the Legal Department includes not only the routine work incident to the business of the Company as an operating company, but also the rendition of service along legal lines to the associated companies. The department endeavors to keep advised upon all legal and collateral subjects which are of special interest to the associated companies, and to disseminate this information promptly and effectively. It has continued the issuance to the associated companies of periodical bulletins calling attention to current decisions of the courts which may be of value. It issues in book form the telephone and telegraph cases decided by commissions and a compilation of the statutory law relating to telephone and telegraph companies.

We were advised during the year 1913 that criticism had been directed against the Bell System with respect to certain matters which were national in their scope. We therefore entered into negotiations with the Attorney General of the United States for the purpose of adjusting such matters to meet the views and wishes of the Federal Administration. After a series of interviews and negotiations, all of the suggestions of the Attorney General were accepted by the Directors of the American Telephone and Telegraph Company, and the following correspondence is here printed in order to show the attitude of the Administration and of the American Telephone and Telegraph Company:

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December 19, 1913

The Attorney General
Washington, D.C.

Sir:

Wishing to put their affairs beyond fair criticism, and in compliance with your suggestions formulated as a result of a number of interviews between us during the last sixty days, the American Telephone and Telegraph Company, and the other companies in what is known as the Bell System, have determined upon the following course of action:

First. The American Telephone and Telegraph Company will dispose promptly of its entire holdings of stock of the Western Union Telegraph Company in such way that the control and management of the latter will be entirely independent of the former, and of any other company in the Bell System.

Second. Neither the American Telephone and Telegraph nor any other company in the Bell System will here after acquire, directly or indirectly, through purchase of its physical property or of its securities or otherwise, dominion or control over any other telephone company owning, controlling, or operating any exchange or line which is or may be operated in competition with any exchange or line included in the Bell System, or which

constitutes or many constitute a link or portion of any system so operated or which may be so operated in competition with any exchange or line included in the Bell System.

Provided, however, that where control of the properties or securities of any other telephone company heretofore has been acquired and is now held by or in the interest of any company in the Bell System and no physical union or consolidation has been effected, or where binding obligations for the acquisition of the properties or securities of any other telephone company heretofore have been entered into by or in the interest of any company in the Bell System and no physical union or consolidation has been effected, the question as to the course to be pursued in such cases will be submitted to your Department and to the Interstate Commerce Commission for such advice and directions, if any, as either may think proper to give, due regard being had to public convenience and to the rulings of the local tribunals.

Third. Arrangements will be made promptly under which all other telephone companies may secure for their subscribers toll service over the lines of the companies in the Bell System in the ways and under the conditions following:

(1) Where an independent company desires connection with the toll lines of the Bell System it may secure such connection by supplying standard trunk lines between its exchanges and the toll board of the nearest exchange of the Bell operating company.

(2) When the physical connection has been made by means of standard trunk lines, the employees of the Bell System will make the toll line connections desired, but in order to render efficient service it will be necessary that the entire toll circuit involved in establishing the connection shall be operated by, and under the control of, the employees of the Bell System.

(3) Under the conditions outlined above, any subscriber of any independent company will be given connection with any subscriber of any company in the Bell System, or with any subscriber of any independent company with which the Bell System is connected, who is served by an exchange which is more than fifty miles distant from the exchange in which the call originates.

(4) The subscribers of the independent company having toll connections described above, shall pay for such connections the regular toll charge of the Bell Company, and in addition thereto, except as hereinafter provided, a connection charge of ten cents for each message which originates on its lines and is carried, in whole or in part, over the lines of the Bell System.

The charges incident to such service shall be made by the Bell Company against the independent company whose subscriber makes the call, and such charges shall be accepted by the independent company as legal and just claims.

(5) Under this arrangement the lines of the Bell System shall be used for the entire distance between the two exchanges thus connected, provided the Bell System has lines connecting the two exchanges. Where the Bell System has no such lines, arrangements can be made for connecting the lines of the Bell System with the lines of some independent company in order to make up the circuit, but such connections will not be made where the Bell System has a through circuit between the two exchanges.

(6) Any business of the kind commonly known and described as "long lines" business offered for transmission over the lines of the American Telephone and Telegraph

Company shall be accepted for any distance, that is, on such "long lines" business calls shall be accepted where the point of destination is less than fifty miles from the exchange where the call originates as well as where the point of destination is greater than fifty miles therefrom.

(7) Any business of the kind commonly known and described as "long lines" business offered for transmission over the lines of the American Telephone and Telegraphy Company shall be accepted at the regular toll rate and no connecting charge shall be required. But such calls shall be handled under the same operating rules and conditions as apply to calls over the local toll lines.

Very Respectfully Yours,
American Telephone and Telegraph Company,
by N.C. Kingsbury, *Vice President*

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December 19, 1913

Mr. N.C. Kingsbury, Vice President.
American Telephone and Telegraph Company,
15 Dey Street, New York City.

Dear Sir:

Permit me to acknowledge, with expressions of appreciation, your letter of December 19, outlining the course of action which the telephone companies composing the Bell System obligate themselves to follow in the future.

Your frank negotiations in respect of these matters compel the belief that what you propose will be carried out in good faith; and it seems to me clear that such action on your part will establish conditions under which there will be full opportunity throughout the country for competition in the transmission of intelligence by wire.

May I take this occasion to say that the Administration earnestly desires to co-operate with and to promote all business conducted in harmony with law; and that, without abating the insistence that the statutes must be obeyed, it will always welcome opportunity to aid in bringing about whatever adjustments are necessary for the re-establishment of lawful conditions without litigation.

Very Truly Yours,
J. C. McReynolds
Attorney General

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December 19, 1913

My Dear Mr. Attorney General:

Thank you for letting me see the letter from the American Telephone and Telegraph Company. It is very gratifying that the company should thus volunteer to adjust its business to the conditions of competition.

I gain the impression more and more from week to week that the business men of the country are sincerely desirous of conforming with the law, and it is very gratifying indeed to have occasion, as in this instance, to deal with them in complete frankness and to be able to show them that all that we desire is an opportunity to cooperate with them. So long as we are dealt with in this spirit we can help to build up the business of the country upon sound and permanent lines.

Cordially and Sincerely Yours,
Woodrow Wilson

* * *

Notes and Questions.

1. Three Commitments. AT&T makes three primary commitments to the Government. What are they? First, AT&T promises to divest its interest in Western Union's telegraph business. Second, AT&T agrees to refrain from continuing to buy up its putative competitors (to both its long-distance and local services). And third, AT&T agrees to interconnect its long-distance service with independent local telephone service carriers.

2. Policy Problems? Why are these the commitments that the Government wants? And why does AT&T agree to them? What policy problems is the Government trying to solve?

3. J.C. McReynolds. James Clark McReynolds served as Attorney General in the Wilson Administration until he was appointed, by Wilson, to the Supreme Court in 1914. On the Court, Justice McReynolds developed a reputation for being a "continual grouch." He was also notably anti-Semitic: He refused to speak with Justice Brandeis, the first Jewish member of the Court. And he opposed the appointment of Justice Cardozo, asking the White House to not "afflict the Court with another Jew."

Institutional and Statutory Structure

<u>The Federal Communications Commission</u>

47 U.S.C. §151

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 the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, 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, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore 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.

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47 U.S.C. §152

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio.

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47 U.S.C. §154

(a) Number of commissioners; appointment—

The Federal Communications Commission (in this chapter referred to as the "Commission") shall be composed of five commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman.

(b) Qualifications—

(1) Each member of the Commission shall be a citizen of the United States.

. . .

(5) The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission.

(c) Terms of office; vacancies—

Commissioners shall be appointed for terms of five years and until their successors are appointed and have been confirmed and taken the oath of office . . . . No vacancy in the Commission shall impair the right of the remaining commissioners to exercise all the powers of the Commission.

. . .

(i) Duties and powers—

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

(j) Conduct of proceedings; hearings—

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

. . .

(n) Use of communications in safety of life and property—

For the purpose of obtaining maximum effectiveness from the use of radio and wire communications in connection with the safety of life and property, the Commission shall investigate and study all phases of the problem and the best methods of obtaining the cooperation and coordination of these systems.

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47 U.S.C. §155

(a) Chairman; duties; vacancy—

The member of the Commission designated by the President as chairman shall be the chief executive officer of the Commission. It shall be his duty to preside at all meetings and sessions of the Commission, to represent the Commission in all matters relating to legislation and legislative reports, except that any commissioner may present his own or minority views or supplemental reports . . . . In the case of a vacancy in the office of the chairman of the Commission, or the absence or inability of the chairman to serve, the Commission may temporarily designate one of its members to act as chairman until the cause or circumstance requiring such designation shall have been eliminated or corrected.

(b) Organization of staff—

From time to time as the Commission may find necessary, the Commission shall organize its staff into (1) integrated bureaus, to function on the basis of the Commission's principal workload operations, and (2) such other divisional organizations as the Commission may deem necessary.

(c) Delegation of functions; exceptions to initial orders; force, effect and enforcement of orders; administrative and judicial review—

(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions (except functions granted to the Commission by this paragraph and by paragraphs (4), (5), and (6) of this subsection) to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter. . . . Any such rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office.

. . .

(3) Any order, decision, report, or action made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4) of this subsection, shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

(4) Any person aggrieved by any such order, decision, report or action may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission. The Commission, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or action made or taken pursuant to any delegation under paragraph (1) of this subsection.

(5) In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board, or individual employee has been afforded no opportunity to pass.

(6) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with section 405 of this title.

(7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection.

(d) Meetings—

Meetings of the Commission shall be held at regular intervals, not less frequently than once each calendar month, at which times the functioning of the Commission and the handling of its work load shall be reviewed and such orders shall be entered and other action taken as may be necessary or appropriate to expedite the prompt and orderly conduct of the business of the Commission . . . .

Introducing the Statutory Structure of the FCC's Jurisdiction

47 U.S.C. §201

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . .

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47 U.S.C. §202

(a) Charges, services, etc.—

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

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47 U.S.C. §301

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio

. . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

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47 U.S.C. §302a

(a) Regulations—

The Commission may, consistent with the public interest, convenience, and necessity, make reasonable regulations (1) governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications; and (2) establishing minimum performance standards for home electronic equipment and systems to reduce their susceptibility to interference from radio frequency energy. Such regulations shall be applicable to the manufacture, import, sale, offer for sale, or shipment of such devices and home electronic equipment and systems, and to the use of such devices.

(b) Restrictions—

No person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.

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47 U.S.C. §303

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

(a) Classify radio stations;

(b) Prescribe the nature of the service 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 to carry out the provisions of this chapter. . . .

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

. . .

(m) Have authority to suspend the license of any operator upon proof sufficient. . . .

. . .

(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 chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

. . .

(v) Have exclusive jurisdiction to regulate the provision of direct-to-home satellite services. As used in this subsection, the term "direct-to-home satellite services" means the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite.

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47 U.S.C. §305

(a) Frequencies—

Radio stations belonging to and operated by the United States shall not be subject to the provisions of sections 301 and 303 of this title. All such Government stations shall use such frequencies as shall be assigned to each or to each class by the President.

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47 U.S.C. §332

(c) Regulatory treatment of mobile services—

(1) Common carrier treatment of commercial mobile services—(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title…. (B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title.

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47 U.S.C. §521

The purposes of this subchapter are to—

(1) establish a national policy concerning cable communications;

(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;

(3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

(4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;

(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and

(6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

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47 U.S.C. §902

(a) Establishment—

(1) Administration—There shall be within the Department of Commerce an administration to be known as the National Telecommunications and Information Administration.

(2) Head of administration—The head of the NTIA shall be an Assistant Secretary of Commerce for Communications and Information, who shall be appointed by the President, by and with the advice and consent of the Senate.

(b) Assigned functions—

(2) Communications and information functions—Subject to section 904(d) of this title, the functions [assigned to NTIA] (1) include … (A) The authority delegated by the President to the Secretary to assign frequencies to radio stations or classes of radio stations belonging to and operated by the United States, including the authority to amend, modify, or revoke such assignments, but not including the authority to make final disposition of appeals from frequency assignments.

Technological Change and Statutory Gaps

United States v. Southwestern Cable Co.
392 U.S. 157 (1968)

JUSTICE HARLAN delivered the opinion of the Court.

These cases stem from proceedings conducted by the Federal Communications Commission after requests by Midwest Television for relief under the rules promulgated by the Commission for the regulation of community antenna television (CATV) systems. Midwest averred that respondents' CATV systems transmitted the signals of Los Angeles broadcasting stations into the San Diego area, and thereby had, inconsistently with the public interest, adversely affected Midwest's San Diego station. Midwest sought an appropriate order limiting the carriage of such signals by respondents' systems. After consideration of the petition and of various responsive pleadings, the Commission restricted the expansion of respondents' service in areas in which they had not operated on February 15, 1966, pending hearings to be conducted on the merits of Midwest's complaints. On petitions for review, the Court of Appeals for the Ninth Circuit held that the Commission lacks authority under the Communications Act of 1934 to issue such an order. We granted certiorari to consider this important question of regulatory authority. For reasons that follow, we reverse.

I

CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers. CATV systems characteristically do not produce their own programming, and do not recompense producers or broadcasters for use of the programming which they receive and redistribute. Unlike ordinary broadcasting stations, CATV systems commonly charge their subscribers installation and other fees.

The Commission has on various occasions attempted to assess the relationship between community antenna television systems and its conceded regulatory functions. Although it found that CATV is 'related to interstate transmission,' the Commission reasoned that CATV systems are neither common carriers nor broadcasters, and therefore are within neither of the principal regulatory categories created by the Communications Act. The Commission declared that it had not been given plenary authority over 'any and all enterprises which happen to be connected with one of the many aspects of communications.' It refused to premise regulation of CATV upon assertedly adverse consequences for broadcasting, because it could not 'determine where the impact takes effect, although we recognize that it may well exist.'

The Commission instead declared that it would forthwith seek appropriate legislation 'to clarify the situation.' Such legislation was introduced in the Senate in 1959, favorably reported, and debated on the Senate floor. The bill was, however, ultimately returned to committee.

Despite its inability to obtain amendatory legislation, the Commission has, since 1960, gradually asserted jurisdiction over CATV. In 1962, it conducted a rulemaking proceeding in which it reevaluated the significance of CATV for its regulatory responsibilities. The Commission found that 'the likelihood or probability of (CATV's) adverse impact upon potential and existing service has become too substantial to be dismissed.' It reasoned that the importation of distant signals into the service areas of local stations necessarily creates 'substantial competition' for local broadcasting. The Commission acknowledged that it could not 'measure precisely the degree of impact,' but found that 'CATV competition can have a substantial negative effect upon station audience and revenues.'

The Commission attempted to 'accommodat[e]' the interests of CATV and of local broadcasting by the imposition of two rules. First, CATV systems were required to transmit to their subscribers the signals of any station into whose service area they have brought competing signals. Second, CATV systems were forbidden to duplicate the programming of such local stations for periods of 15 days before and after a local broadcast. These carriage and nonduplication rules were expected to 'insur[e] many stations' ability to maintain themselves as their areas' outlets for highly popular network and other programs.'

The Commission in 1965 issued additional notices of inquiry and proposed rulemaking. After further hearings, the Commission held that the Act confers adequate regulatory authority over all CATV systems. It promulgated revised rules, applicable both to cable and to microwave CATV systems, to govern the carriage of local signals and the nonduplication of local programming. Further, the Commission forbade the importation by CATV of distant signals into the 100 largest television markets, except insofar as such service was offered on February 15, 1966, unless the Commission has previously found that it 'would be consistent with the public interest.' Finally, the Commission created 'summary, nonhearing procedures' for the disposition of applications for separate or additional relief. Thirteen days after the Commission's adoption of the Second Report, Midwest initiated these proceedings by the submission of its petition for special relief.

II

We must first emphasize that questions as to the validity of the specific rules promulgated by the Commission for the regulation of CATV are not now before the Court. The issues in these cases are only two: whether the Commission has authority under the Communications Act to regulate CATV systems, and, if it has, whether it has, in addition, authority to issue the prohibitory order here in question.

The Commission's authority to regulate broadcasting and other communications is derived from the Communications Act of 1934, as amended. The Act's provisions are explicitly applicable to 'all interstate and foreign communication by wire or radio.' 47 U.S.C. §152(a). The Commission's responsibilities are no more narrow: it is required to endeavor to 'make available to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.' 47 U.S.C. §151. The Commission was expected to serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.' It was for this purpose given 'broad authority.' The Act's terms, purposes, and history all indicate that Congress 'formulated a unified and comprehensive regulatory system for the (broadcasting) industry.'

Respondents do not suggest that CATV systems are not within the term 'communication by wire or radio.' Indeed, such communications are defined by the Act so as to encompass 'the transmission of signals, pictures, and sounds of all kinds,' whether by radio or cable, 'including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.' 47 U.S.C. §§ 153(a), (b). These very general terms amply suffice to reach respondents' activities.

Nonetheless, respondents urge that the Communications Act, properly understood, does not permit the regulation of CATV systems. First, they emphasize that the Commission in 1959 and again in 1966 sought legislation that would have explicitly

authorized such regulation, and that its efforts were unsuccessful. In the circumstances here, however, this cannot be dispositive. The Commission's requests for legislation evidently reflected in each instance both its uncertainty as to the proper width of its authority and its understandable preference for more detailed policy guidance than the Communications Act now provides. We have recognized that administrative agencies should, in such situations, be encouraged to seek from Congress clarification of the pertinent statutory provisions.

Second, respondents urge that §152(a) does not independently confer regulatory authority upon the Commission, but instead merely prescribes the forms of communication to which the Act's other provisions may separately be made applicable. Respondents emphasize that the Commission does not contend either that CATV systems are common carriers, and thus within Title II of the Act, or that they are broadcasters, and thus within Title III. They conclude that CATV, with certain of the characteristics both of broadcasting and of common carriers, but with all of the characteristics of neither, eludes altogether the Act's grasp.

We cannot construe the Act so restrictively. Nothing in the language of §152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The section itself states merely that the 'provisions of (the Act) shall apply to all interstate and foreign communication by wire or radio.' Similarly, the legislative history indicates that the Commission was given 'regulatory power over all forms of electrical communication.' Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission. that it conferred upon the Commission a 'unified jurisdiction' and 'broad authority.' Thus, 'underlying the whole (Communications Act) is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.' Congress in 1934 acted in a field that was demonstrably 'both new and dynamic,' and it therefore gave the Commission 'a comprehensive mandate,' with 'expansive powers.' *NBC v. United States*, supra. We have found no reason to believe that §152 does not confer regulatory authority over all interstate communication by wire or radio.

Moreover, the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities. Congress has imposed upon the Commission the 'obligation of providing a widely dispersed radio and television service, with a 'fair, efficient, and equitable distribution' of service among the 'several States and communities.' 47 U.S.C. §307(b). The Commission has, for this and other purposes, been granted authority to allocate broadcating zones or areas, and to provide regulations 'as it may deem necessary' to prevent interference among the various stations. 47 U.S.C. §§303(f), (h). The Commission has concluded, and Congress has agreed, that these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that 'all communities of appreciable size (will) have at least one television station as an outlet for local self-expression.'

The Commission has reasonably found that the achievement of each of these purposes is 'placed in jeopardy by the unregulated explosive growth of CATV.' Although

CATV may in some circumstances make possible 'the realization of some of the (Commission's) most important goals,' its importation of distant signals into the service areas of local stations may also 'destroy or seriously degrade the service offered by a television broadcaster,' and thus ultimately deprive the public of the various benefits of a system of local broadcasting stations. In particular, the Commission feared that CATV might, by dividing the available audiences and revenues, significantly magnify the characteristically serious financial difficulties of some broadcasters. The Commission acknowledged that it could not predict with certainty the consequences of unregulated CATV, but reasoned that its statutory responsibilities demand that it 'plan in advance of foreseeable events, instead of waiting to react to them.' We are aware that these consequences have been variously estimated, but must conclude that there is substantial evidence that the Commission cannot discharge its overall responsibilities without authority over this important aspect of television service.

The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population. The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems. We have elsewhere held that we may not, 'in the absence of compelling evidence that such was Congress' intention prohibit administrative action imperative for the achievement of an agency's ultimate purposes.' There is no such evidence here, and we therefore hold that the Commission's authority over 'all interstate communication by wire or radio' permits the regulation of CATV systems.

There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under §152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.' 47 U.S.C. §303(r).

III

We must next determine whether the Commission has authority under the Communications Act to issue the particular prohibitory order in question in these proceedings. In its Second Report and Order, the Commission concluded that it should provide summary procedures for the disposition both of requests for special relief and of 'complaints or disputes.' It feared that if evidentiary hearings were in every situation mandatory they would prove 'time consuming and burdensome' to the CATV systems and broadcasting stations involved. The Commission considered that appropriate notice and opportunities for comment or objection must be given, and it declared that 'additional procedures, such as oral argument, evidentiary hearing, or further written submissions' would be permitted 'if they appear necessary or appropriate. It was under the authority of these provisions that Midwest sought, and the Commission granted, temporary relief.

The Commission, after examination of various responsive pleadings but without prior hearings, ordered that respondents generally restrict their carriage of Los Angeles signals to areas served by them on February 15, 1966, pending hearings to determine

whether the carriage of such signals into San Diego contravenes the public interest. The order does not prohibit the addition of new subscribers within areas served by respondents on February 15, 1966; it does not prevent service to other subscribers who began receiving service or who submitted an 'accepted subscription request' between February 15, 1966, and the date of the Commission's order; and it does not preclude the carriage of San Diego and Tijuana, Mexico, signals to subscribers in new areas of service. The order is thus designed simply to preserve the situation as it existed at the moment of its issuance.

The Commission has acknowledged that, in this area of rapid and significant change, there may be situations in which its generalized regulations are inadequate, and special or additional forms of relief are imperative. It has found that the present case may prove to be such a situation, and that the public interest demands 'interim relief limiting further expansion,' pending hearings to determine appropriate Commission action. Such orders do not exceed the Commission's authority. This Court has recognized that 'the administrative process (must) possess sufficient flexibility to adjust itself' to the 'dynamic aspects of radio transmission.' Thus, the Commission has been explicitly authorized to issue 'such orders, not inconsistent with this (Act), as may be necessary in the execution of it functions.' 47 U.S.C. §154(i). See also 47 U.S.C. §303(r). In these circumstances, we hold that the Commission's order limiting further expansion of respondents' service pending appropriate hearings did not exceed or abuse its authority under the Communications Act.

The judgments of the Court of Appeals are reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE DOUGLAS and JUSTICE MARSHALL took no part in the consideration or decision of these cases.

JUSTICE WHITE, concurring in the result.

My route to reversal is somewhat different from the Court's. Section 2(a) of the Communications Act, 47 U.S.C. s 152(a), says that '[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio.' I am inclined to believe that this section means that the Commission must generally base jurisdiction on other provisions of the Act. This position would not, however, require invalidation of the assertion of jurisdiction before us today. 47 U.S.C. §301, gives the Commission broad authority over broadcasting, and 47 U.S.C. §303, confers authority to '(m)ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter' and also the authority to establish areas or zones to be served by any station. The Commission has ample power under these provisions to prevent a Los Angeles television broadcaster from interfering with broadcasting in San Diego. For example, the Commission could stop a Los Angeles television station from owning and operating a wire CATV system which carried the station's signals into San Diego. The Commission should also be able to prevent a third party from disrupting Commission-licensed broadcasting in the San Diego market.

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Notes and Questions.

1. Prior to the regulations at issue, the Commission sought "amendatory legislation" from Congress in order to clarify the agency's power to regulate CATV (a precursor to modern cable television systems). But no such legislation was enacted before *Southwestern Cable*. So how did the Commission win? What statutory authority supports the Commission's regulatory actions? What does Justice White think?

2. The Supreme Court explains that (or defers to the agency finding that) the agency's statutory mission is "placed in jeopardy by the unregulated explosive growth of CATV." When technologies change, how much leeway do agencies have to catch up? *Southwestern Cable* suggests that they have quite a bit. How much should they have?

CHAPTER 2: REGULATING PHYSICAL NETWORKS

Common Carrier (Wireline) Regulation

Rate Regulation

Global Tel*Link v. Federal Communications Commission
866 F.3d 397 (D.C. Cir. 2017)

EDWARDS, Senior Circuit Judge.

The Communications Act of 1934 authorized the Federal Communications Commission to ensure that interstate telephone rates are "just and reasonable," 47 U.S.C. § 201(b), but left regulation of intrastate rates primarily to the states. In the Telecommunications Act of 1996, Congress amended the 1934 Act to change the Commission's limited regulatory authority over intrastate telecommunication so as to promote competition in the payphone industry.

Before the passage of the 1996 Act, Bell Operating Companies ("BOCs") had dominated the payphone industry to the detriment of other providers. Congress sought to remedy this situation by authorizing the Commission to adopt regulations ensuring that all payphone providers are "fairly compensated for each and every" interstate and intrastate call. 47 U.S.C. § 276(b)(1)(A). "Payphone service" expressly includes "the provision of inmate telephone service in correctional institutions, and any ancillary services." Id. § 276(d). The issues in this case focus on inmate calling services ("ICS") and the rates and fees charged for these calls.

Following the passage of the 1996 Act, the Commission avoided intrusive regulatory measures for ICS. And prior to the Order under review in this case, the Commission had never sought to impose rate caps on intrastate calls. Rather, the FCC consistently construed its authority over intrastate payphone rates as limited to addressing the problem of under-compensation for ICS providers.

Due to a variety of market failures in the prison and jail payphone industry, however, inmates in correctional facilities, or those to whom they placed calls, incurred prohibitive per-minute charges and ancillary fees for payphone calls. In the face of this problem, the Commission decided to change its approach to the regulation of ICS providers. In 2015, in the Order under review, the Commission set permanent rate caps and ancillary fee caps for interstate ICS calls and, for the first time, imposed those caps on intrastate ICS calls. Rates for Interstate Inmate Calling Services ("Order"), 30 FCC Rcd. 12763 (Nov. 5, 2015). The Commission also proposed to expand the reach of its ICS regulations by banning or limiting fees for billing and collection services—so-called "ancillary fees"—and by regulating video services and other advanced services in addition to traditional calling services.

Five inmate payphone providers, joined by state and local authorities, now challenge the Order's design to expand the FCC's regulatory authority. In particular, the Petitioners challenge the Order's proposed caps on intrastate rates, the imposition of ancillary fee caps, among other requirements.

For the reasons set forth below, we grant in part and deny in part the petitions for review, and remand for further proceedings with respect to certain matters.

Background

Statutory Background

The 1934 Act, 47 U.S.C. § 151, *et seq.*, established a system of regulatory authority that divides power between individual states and the FCC over inter- and intra-state telephone communication services. Under this statutory scheme, the Commission regulates interstate telephone communication. This regulatory authority includes ensuring that all charges "in connection with" interstate calls are "just and reasonable." 47 U.S.C. § 201(b). "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out" these provisions. *Id.*

The FCC, however, "is generally forbidden from entering the field of intrastate communication service, which remains the province of the states." Section 152(b) of the 1934 Act erects a presumption against the Commission's assertion of regulatory authority over intrastate communications. This is "not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction" in interpreting the Act's provisions. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373 (1986).

The 1996 Act "fundamentally restructured the local telephone industry" by changing the FCC's authority with respect to some intrastate activities and "remov[ing] a significant area from the States' exclusive control." Nevertheless, the states still primarily reign supreme over intrastate rates. "Insofar as Congress has remained silent ... § 152(b) continues to function. The Commission could not, for example, regulate any aspect of intrastate communication not governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction."

Although the strictures of § 152 remain in force, the changes imposed by the 1996 Act were significant. Evidence of this is seen in the "Special Provisions Concerning Bell Operating Companies." 47 U.S.C. §§ 271–76. In § 276, Congress clearly aimed to "promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(1). Covered payphone services include "inmate telephone service in correctional institutions, and any ancillary services." § 276(d). Section 276 of the 1996 Act authorizes the Commission "to prescribe regulations consistent with the goal of promoting competition. One such step is to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone," and to prescribe regulations to establish this compensation plan. § 276(b)(1).

Factual and Procedural Background

Over the years, payphone providers have sought to provide inmate calling services to inmates in prisons and jails nationwide. ICS providers now compete with one another to win bids for long-term ICS contracts with correctional facilities. In awarding contracts to providers, correctional facilities usually give considerable weight to which provider offers the highest site commission, which is typically a portion of the provider's revenue or profits. Site commissions apparently range between 20% and 63% of the providers' profits, but can exceed that amount. And ICS providers pay over $460 million in site commissions annually.

Once a long-term, exclusive contract bid is awarded to an ICS provider, competition ceases for the duration of the contract and subsequent contract renewals. Winning ICS providers thus operate locational monopolies with a captive consumer base of inmates and the need to pay high site commissions. After a decade of industry consolidation, three specialized ICS firms now control 85% of the market. And ICS per-minute rates and ancillary fees together are extraordinarily high, with some rates as high as $56.00 for a four-minute call.

In reviewing this market situation, the FCC found that inmate calling services are "a prime example of market failure." In its brief to this court, the FCC aptly explains the seriousness of the situation:

> Inmates and their families cannot choose for themselves the inmate calling provider on whose services they rely to communicate. Instead, correctional facilities each have a single provider of inmate calling services. And very often, correctional authorities award that monopoly franchise based principally on what portion of inmate calling revenues a provider will share with the facility—i.e., on the payment of "site commissions." Accordingly, inmate calling providers compete to offer the highest site commission payments, which they recover through correspondingly higher end-user rates. If inmates and their families wish to speak by telephone, they have no choice but to pay the resulting rates.

In 2003 and in 2007, Martha Wright and others petitioned the Commission for rulemaking to regulate ICS rates and fees. The record compiled by the Commission fairly clearly supports its determination that ICS charges raise serious concerns. As noted in the FCC's brief to the court:

> Excessive rates for inmate calling deter communication between inmates and their families, with substantial and damaging social consequences. Inmates' families may be forced to choose between putting food on the table or paying hundreds of dollars each month to keep in touch. When incarcerated parents lack regular contact with their children, those children—2.7 million of them nationwide—have higher rates of truancy, depression, and poor school performance. Barriers to communication from high inmate calling rates interfere with inmates' ability to consult their attorneys, impede family contact that can "mak[e] prisons and jails safer spaces," and foster recidivism.

Petitioners do not seriously contest these facts. Nevertheless, Petitioners—ICS providers Global Tel*Link; Securus Technologies, Inc.; CenturyLink Public Communications, Inc.; Telmate, LLC; and Pay Tel Communications—petitioned for review. Various state and local correctional authorities, governments, and correctional facility organizations petitioned and/or intervened on behalf of Petitioners. And Martha Wright's putative class and various inmate-related legal organizations ("Intervenors") intervened on behalf of the Commission.

Analysis

<u>Permanent Rate Caps for Intrastate ICS Calls</u>

In the disputed Order, the Commission asserted authority to impose rate caps on intrastate ICS calls for the first time. It did so under the guise of § 276 of the 1996 Act, which requires the Commission to "establish a per call compensation plan to ensure that

all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone," and to prescribe regulations to establish this compensation plan. 47 U.S.C. § 276(b)(1), (b)(1)(A). Petitioners assert that the provision in § 276, requiring the Commission to ensure that ICS providers are "fairly compensated," does not override the command of § 152(b), which forbids the FCC from asserting jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." 47 U.S.C. § 152(b) (emphasis added). Petitioners also contend that § 276 does not give the Commission ratemaking authority comparable to the authority that it has under § 201 to regulate and cap interstate rates. We agree with Petitioners that, on the record in this case, § 276 did not authorize the Commission to impose intrastate rate caps as prescribed in the Order.

First, as noted above, § 152(b) of the 1934 Act erects a presumption against the Commission's assertion of regulatory authority over intrastate communications. *La. Pub. Serv. Comm'n*, 476 U.S. at 373, 106 S.Ct. 1890 (making it clear that this is "not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction" in interpreting the Act's provisions). The Order in this case does not come close to overcoming this presumption in proposing to cap intrastate rates.

Second, the Order erroneously treats the Commission's authority under § 201 and § 276 as coterminous. Section 201 imbues the Commission with traditional ratemaking powers over interstate calls, including the imposition of rate caps. The statute explicitly directs the FCC to ensure that interstate rates are "just and reasonable," and to "prescribe such rules and regulations as may be necessary in the public interest" to carry out these provisions. 47 U.S.C. § 201(b). Section 276, however, does not give the Commission authority to determine "just and reasonable" rates. Rather, § 276 merely directs the Commission to "ensure that all [ICS] providers are fairly compensated" for their inter- and intrastate calls. 47 U.S.C. § 276(b)(1)(A).

The language and purpose of § 201 in the 1934 Act are fundamentally different from the language and purpose of § 276 in the 1996 Act. The Order glosses over these differences in declaring that the Commission has authority to ensure that rates are "just, reasonable and fair." This is not what § 201(b) and § 276 say. And once the Order misquotes the language of § 201(b) and § 276, it goes on to conclude that these provisions in their combined effect authorize the FCC to set rate caps to ensure that both inter- and intrastate rates are "'just and reasonable' and do not take unfair advantage of inmates, their families, or providers consistent with the 'fair compensation' mandate of section 276." In other words, in ignoring the terms of § 276, the Order conflates two distinct statutory grants of authority into a synthetic "just, reasonable and fair" standard. This is impermissible.

The Order at issue in this case is legally infirm because it purports to cap intrastate rates based on a "just, reasonable and fair" test that is not enunciated in the statute, conflates distinct grants of authority under § 201 and § 276, and misreads our judicial precedent and the FCC's own prior orders to support capping already compensatory rates under the guise of ensuring providers are "fairly compensated."

The FCC's belief that lower ICS calling rates reflect desirable social policy cannot justify regulations that exceed its statutory mandate. Section 276 of the Communications Act authorizes the FCC to ensure that ICS providers are not deprived of fair compensation for the use of their payphones; § 201 authorizes it to ensure that rates for and in connection

with interstate telecommunications services are just and reasonable. The FCC may not ignore these statutory limits to advance its preferred correctional policy.

We therefore reverse and vacate the provision in the Order that purports to cap intrastate rates as beyond the statutory authority of the Commission. We need not decide the precise parameters of the Commission's authority under § 276. We simply hold here that the agency's attempted exercise of authority in the disputed Order cannot stand.

Ancillary Fee Caps

Contrary to Petitioners' contentions, the Order's imposition of ancillary fee caps in connection with *interstate* calls is justified. The Commission has plenary authority to regulate interstate rates under § 201(b), including "practices ... for and in connection with" interstate calls. The Order explains that ICS providers use ancillary fees as a loophole in avoiding per-minute rate caps. Furthermore, ancillary fees for *interstate* calls satisfy the test of the Commission's authority under § 201(b) as they are "in connection with" interstate calls.

These considerations, however, do not fully answer the question whether the disputed imposition of ancillary fee caps is permissible.

As noted above, we have found that, on the record in this case, the Order's imposition of intrastate rate caps fails review under § 276. Therefore, we likewise hold that the FCC had no authority to impose ancillary fee caps with respect to intrastate calls. However, we cannot discern from the record whether ancillary fees can be segregated between interstate and intrastate calls. We are therefore obliged to remand the matter to the FCC for further consideration.

In accordance with the foregoing opinion, we grant in part and deny in part the petitions for review, vacate certain provisions in the disputed Order, and remand for further proceedings with respect to certain matters.

So ordered.

PILLARD, Circuit Judge, dissenting in part.

The administrative record is full of compelling evidence of dysfunction in the inmate-calling marketplace, with harsh consequences for inmates and their families. The record shows that these high prices impair the ability of inmates, by definition isolated physically from the outside world, to sustain fragile filaments of connection to families and communities that they might hope to rejoin. The majority's decision scuttles a long-term effort to rein in calling costs that are not meaningfully subject to competition and that profit off of inmates' desperation for connection.

The majority's path to that result is flawed. I cannot agree that a company is "fairly compensated" under 47 U.S.C. § 276(b)(1)(A) when it charges inmates exorbitant prices to use payphones inside prisons and jails, shielded from competition by a contract granting it a facility-wide payphone monopoly. The majority does not question that Congress enacted the Telecommunications Act of 1996 to combat phone monopolies, facilitate competition, and thereby ensure better service at lower prices to consumers. Consistent with the 1996 Act's general approach of "replac[ing] a state-regulated monopoly system with a federally facilitated, competitive market," section 276 of the Act specifically

addressed defects in the intrastate and interstate payphone market (now largely obsolete except in cellphone-free environments such as prisons).

The majority holds it beyond debate that "fairly compensated" is not about fairness to the consumer. It sees no statutory support for the FCC's effort to require fairer intrastate rates for inmates because it reads section 276's fair-compensation mandate as unambiguously one-sided, only empowering the FCC to enhance unfairly low, not to reduce unfairly high, compensation for calls. That reading is truncated. As it typically does, Congress responded to a particular problem by enacting a law that speaks in more general terms: here, by requiring that payphone calls in prisons and elsewhere be "fairly compensated." It did so for the stated purpose—fully relevant here—of promoting competition among payphone providers to expand the availability of payphone services to consumers. 47 U.S.C. § 276(b)(1).

The FCC reasonably interpreted section 276 to "authorize the Commission to impose intrastate rate caps as prescribed in the Order." Congress instructed the FCC to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone[s]." 47 U.S.C. § 276(b)(1)(A). To begin with, nobody contests that authority to establish "a per call compensation plan" includes some authority over end-user calling rates. Indeed, this court already so held. And the plain text of the statute grants that authority over both intrastate and interstate payphone services, including "inmate telephone service in correctional institutions." 47 U.S.C. § 276(d). Thus, the only dispute is whether the word "fairly" implies an ability to reduce excesses, as well as bolster deficiencies, in the compensation that payphone providers would otherwise receive.

Importantly, Congress chose "fairly" rather than, say, "adequately," "sufficiently," or "amply." Those words have different meanings. Had it used any of the latter three terms, I would agree that Congress only authorized regulation to prevent under-compensation, but its choice of the word "fairly" denotes no such limitation. If a grocer demanded $20 for a banana, we might call that price adequate, sufficient, or ample—but nobody would call it fair.

The statutory context shows that Congress' choice of the word "fairly" reasonably connotes its concern for unfairly excessive as well as deficient compensation. Elsewhere in the Communications Act, Congress used the term "fair" in conjunction with "just" and "reasonable"—familiar terms of art used in connection with rate-setting authority. See 47 U.S.C. § 205(a) (authorizing the FCC to prescribe "what classification, regulation, or practice will be just, fair, and reasonable").

The purpose and history behind the congressional action here comport with this reading of the statutory text and context. In passing the 1996 Telecommunications Act, Congress aimed to "promot[e] competition in the payphone service industry. To be sure, the immediate anti-competitive malfunction confronting Congress at the time was that certain payphone providers were, under certain circumstances, under-compensated. But the central aim was to advance competition to the benefit of the end users of payphone services.

Consistent with that pro-competitive agenda, the FCC and this court have long assumed that section 276 provides tools for addressing monopoly power and market failure in the payphone market. For instance, in *Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997), the state petitioners argued that the FCC had unlawfully ignored the

problem of "locational monopolies," that is, situations in which a payphone provider "obtains an exclusive contract for the provision of all payphones at an isolated location, such as an airport, stadium, or mall, and is thereby able to charge an inflated rate for local calls made from that location." We recognized that the FCC had not ignored the problem of locational monopolies; it had simply "concluded that it would deal with them if and when specific [providers] are shown to have substantial market power." Now, twenty years later, the FCC has identified a discrete area where payphone providers do have substantial market power: prisons and jails. The inmate-calling market is, the FCC found, "a prime example of market failure" because, instead of competing to reduce rates and improve services for callers, providers compete to offer ever-higher site commissions to correctional facilities so as to gain monopoly access to a literally captive consumer base.

Nevertheless, the majority cites several considerations that influenced its rejection of the FCC's claimed authority over intrastate inmate calling services. None is compelling.

First, the majority notes that section 152(b) "erects a presumption against the Commission's assertion of regulatory authority over *intrastate* communications." That is true, but section 276, by its plain terms, "overcom[es] this presumption." Congress instructed the FCC to ensure fair compensation for *all* payphone calls—interstate and intrastate. 47 U.S.C. § 276(b)(1)(A). To that end, Congress expressly provided for preemption of inconsistent state regulation. Id. § 276(c).

Second, the majority says that "the Order erroneously treats the Commission's authority under § 201 and § 276 as coterminous." My colleagues appear to draw that conclusion from the FCC's repeated use of the phrase "just, reasonable, and fair"—an amalgam of the two provisions' key terms. As I read the Order, the bundling of those three words simply reflects that the FCC's authority over inmate calling derives from the sum of those authorizations. The majority's inference that the Order fails to respect the difference between sections 201 and 276, and in particular, fails to appreciate that section 201 applies only to interstate rates, has no support in the record.

None of this is to suggest that the FCC has the same "broad plenary authority to regulate and cap intrastate rates" that it has over interstate rates. Notably, whereas section 201 broadly requires that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate] communication service[ ] shall be just and reasonable," section 276 is more narrowly focused on "compensation." The FCC simply did not need "broad plenary authority" to conclude that inmate calling service providers charging as much as $56.00 for a four-minute call, see, were not being "fairly compensated."

Because the majority shortchanges the FCC's authority to reduce excessive, monopoly-driven rates, finding implausible the agency's reasoned approach to a grave problem, I respectfully dissent.

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Notes and Questions.

1. Market Failure. What is the policy problem that the FCC is trying to solve? Does the court agree that there is a problem—or is this Order a solution in search of a problem? The court's extended quotations from the Order seem to suggest that there are several problems worth investigating.