The following is a compendium of major communications law decisions handed down by courts of the United States in 1993.

ADMINISTRATIVE LAW ISSUES

Adams Telcom, Inc. v. FCC
997 F.2d 955 (D.C. Cir. 1993)

Issue:

Review of a Federal Communications Commission ("FCC" or "Commission") order dismissing petitioners' application for a "pioneer's preference" in obtaining licenses to provide personal communications services.

Holding:

The FCC's order measuring the 60-day review period from the order's release date, rather than the publication date, did not give applicants adequate notice of the deadline for seeking judicial review. Hence, the petitions for review, which were filed within 60 days of the publication date (but 88 days after the release date) were held to be timely.

Discussion:

According to 28 U.S.C. § 2344, petitions for review of an FCC order must be filed "within 60 days after its entry." Under 47 C.F.R. § 1.4(b)(1), the period for seeking judicial review "for documents in notice and comment rule making proceedings" begins the day after the document is published in the Federal Register; however, 47 C.F.R. § 1.4(b)(2) states that for "non-rulemaking documents," the 60-day review period begins the date of release, regardless of whether or not the document is published in the Federal Register.

The Commission argued that the order at issue was adjudicatory because it dismissed 39 pioneer's preference applications; however, the court found that because the Order was entitled "Amendment of the Commission's Rules . . . ," and because the order contained two internal references to "this rulemaking," the petitioners could reasonably have believed that the order pertained to a rulemaking proceeding.

The court further noted that after a careful reading of the Commission's rules, the distinction between petitions for review of Commission orders addressing requests for the pioneer's preference itself and rulemaking proceedings associated with the same request is not obvious. Under McElroy Electronics Corp. v. FCC, 990 F.2d 1351 (D.C. Cir. 1993), the D.C. Circuit held that where an agency fails to communicate its directives clearly, the court will not bind a party simply by what the agency intended. The court in the present case held that the petitions were timely and denied the FCC's motion to dismiss.

Aeronautical Radio, Inc. v. FCC
983 F.2d 275 (D.C. Cir. 1993)

Issue:

Whether the Federal Communications Commission ("FCC" or "Commission") had the statutory power to impose a consortium in lieu of holding comparative hearings in establishing a domestic mobile satellite system ("MSS") as required by 47 U.S.C. § 309(e).

Holding:

Because of the petitioners' lack of standing, the court never reached the issue of whether the FCC had the power to impose a consortium.

Discussion:

The D.C. Circuit dismissed the petitions for review because plaintiffs ARINC, Omnitel and intervenor TRW had no standing to challenge the rule. According to Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2136 (1991), to establish standing a litigant must prove: (1) an injury-in-fact that is both, (2) fairly traceable to the challenged actions, and (3) likely to be redressed by a favorable decision.

ARINC's MSS application had been dismissed years earlier, and ARINC had not filed another application. Because ARINC was not an MSS applicant, ARINC had no legitimate claim to standing.
Omninet had no standing, because it had voluntarily withdrawn its MSS application before entering its petition in this case. Intervenor TRW lacked standing because the original parties ARINC and Omninet had no standing.

**Arkansas AFL-CIO v. FCC**

**Issues:**

- Whether the Fairness Doctrine was codified by the 1959 amendment to section 315(a) of the Communications Act of 1934.
- Whether the elimination of the Fairness Doctrine was an appropriate exercise of the Federal Communications Commission's ("FCC" or "Commission") discretion in implementing the public interest requirement of the Communications Act.

**Holding:**

The United States Court of Appeals for the Eighth Circuit held that Congress did not codify the Fairness Doctrine in 1959. As such, the court's review was limited to whether the FCC's elimination of the Fairness Doctrine resulted from a reasonable interpretation of the statutory requirement that licensees operate in the public interest. The court ultimately held that the FCC's actions in this regard were reasonable and appropriate.

**Discussion:**

Before arriving at its decision, the court first ruled that because Congress did not codify the Fairness Doctrine, the court's review was limited to whether the FCC's action resulted from a reasonable interpretation of the statute. This concept was set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

*Chevron* mandated that a reviewing court must determine whether Congress directly addressed the precise question at issue. If the issue is directly addressed, the agency must act accordingly, and a reviewing court need not defer to the agency's interpretation. If Congress's intent is unclear, judicial deference to the agency becomes an issue. If the agency's action is judged as reasonable, the court must defer to the agency's judgment. In this case, because Congress's intent was unclear, the court had to determine whether the FCC was "reasonable" in eliminating the Fairness Doctrine.

The court found that the Commission's action was reasonable. In the 1989 case *Syracuse Peace Council v. WTVH*, 867 F.2d 654 (D.C. Cir. 1989), the FCC presented evidence that the Fairness Doctrine chilled speech. The Commission also provided data that the Fairness Doctrine was no longer necessary, because of the increased number of media outlets since implementation of the Doctrine in 1959.

In the present case, the court found the Commission's argument in *Syracuse Peace Council* an "undeniably reasonable" explanation for its elimination of the Fairness Doctrine. As a result, the court upheld the FCC's elimination of the Fairness Doctrine.

**McElroy Electronics Corp. v. FCC**
990 F.2d 1351 (D.C. Cir. 1993)

**Issue:**

Whether a 1987 Federal Communications Commission ("FCC" or "Commission") order could reasonably be construed to give potential cellular applicants adequate notice that applications for unserved cellular areas could not be filed until the FCC announced that it would begin receiving the applications for those areas, even though the initial service period had lapsed.

**Holding:**

The United States Court of Appeals for the District of Columbia Circuit held that a party will not be bound by what an agency intended, but failed to communicate. The court proclaimed that "an agency cannot ignore its primary obligation to state its directives in plain and comprehensible English."

**Discussion:**

In the early 1980s, the FCC began its initial cellular licensing. During this time, the Commission granted licenses to companies that intended to serve the larger part of a standard metropolitan statistical area ("MSA"). These companies were permitted to expand within their service areas for five years. After the five year period expired, competitors would be allowed to file applications to serve areas within the MSAs that were not being served.

The order, as codified in 47 C.F.R. § 22.31(a)(1)(i) (1987), stated: "We are establishing a period of five years from the date the first construction permit is granted in each MSA for licensees/permittees to expand their . . . MSAs. A date certain filing date will thus be established for each MSA..."
market.”

Petitioners were companies that filed after the five year period had ended; however, the Commission rejected their applications as “premature” because it had not yet given notice of the exact date for filing. The court reasoned that applicants could not be expected to understand that once the five year period had expired, they would have to wait for further instruction from the FCC before filing. The court’s analysis revealed that by deciding when the five year moratorium would end, the Commission did in fact establish a filing date. In other words, the “date certain” in the Commission’s order should be taken to mean an opening date from which applications may be received. This would commence when the initial five year period ended. The term should not, as the FCC argued, mean that a particular date was to be set by the Commission by which the applications must be received. Therefore, the court remanded the petitioners’ applications, with instructions to the FCC to reinstate the applications nunc pro tunc.

**Town of Deerfield v. FCC**
992 F.2d 420 (2d Cir. 1993)

**Issue:**

Whether the Federal Communications Commission (“FCC” or “Commission”) can incorporate in its regulations a policy requiring exhaustion of judicial remedies which modifies the jurisdiction of federal courts with respect to preemptive issues under 47 C.F.R. § 25.104.

**Holding:**

The United States Court of Appeals for the Second Circuit held that by requiring individual complainants to exhaust their judicial remedies before the FCC would consider a preemption issue, the FCC in effect reverted a legally binding judgment of a federal court into a purely advisory opinion, which violated the legal principle prohibiting a government agency from reviewing, altering, or preventing enforcement of federal court judgments.

**Discussion:**

This case arose from an incident wherein a resident of Deerfield, New York challenged a zoning ordinance which made it unlawful to install a satellite dish antenna on any residential lot of less than one-half acre. FCC regulations preempted local zoning regulations that differentiated between satellite receive-only antennas and other types of antenna facilities, unless the local regulation had a reasonable and clearly defined health, safety or aesthetic purpose, and did not impose unreasonable limitations or costs on the user.

Because the FCC refused to address the resident’s preemption claim until his legal remedies were exhausted, the resident sought relief in New York state court. The New York Supreme Court denied the resident’s claim and held that the zoning ordinance was not preempted by section 25.104. This ruling was upheld by the appellate division and Court of Appeals of New York as well as the New York District Court and the United States Court of Appeals for the Second Circuit.

Thereafter, the FCC rejected the collateral estoppel arguments and held that its regulations preempted the local zoning ordinance. On appeal, the Second Circuit stated that an administrative agency cannot simply ignore a federal court judgment, nor could it revise, overturn, or refuse full faith and credit. The court found that the FCC did not have the power to request or require a federal court to render an opinion that is merely advisory and that the FCC must recognize the conclusive effect of the New York District Court’s judgment, which had proper jurisdiction over the matter.

**CABLE SERVICES ISSUES**

**FCC v. Beach Communications, Inc.**
113 S. Ct. 2096 (1993)

**Issue:**

Whether the common-ownership distinction in the Cable Communications Policy Act of 1984, section 602(7)(B), which exempted certain cable operators from federal franchise regulations, was rationally related to a legitimate government purpose so as to be constitutional under the equal protection guarantee of the Fifth Amendment’s Due Process Clause.

**Holding:**

The Supreme Court held that the common-ownership distinction is rationally related to a legitimate government purpose and thus constitutional.

**Discussion:**

The Cable Communications Policy Act of 1984 attempted to establish a national framework for reg-
ulating cable television. In furtherance of the Act, Congress provided for the franchising of cable systems by local governmental authorities and prohibited any person from operating a cable system without a franchise, subject to certain exemptions, 47 U.S.C. §§ 541(a), (b), 621(a), (b).

Under the federal rules, a cable system means any facility designed to provide video programming to multiple subscribers through “closed transmission paths,” but does not include “a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities use any public right-of-way,” 47 U.S.C.A. § 522(7)(B) (Supp. 1993). In applying this exemption, the Federal Communications Commission (“FCC” or “Commission”) ruled that a satellite master antenna television (“SMATV”) system, which serves multiple buildings via a network of interconnected physical transmission lines, is a cable system if its lines interconnected separately owned and managed buildings or used or crossed any public right-of-way. Thus, a SMATV system would be subject to the franchise requirement. Respondents, SMATV operators, petitioned for review.

The Court stated that equal protection is “not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” The Court concluded that the common-ownership distinction is constitutional on two bases.

First, the Court determined that the existing section 602(7)(B) is derived from pre-Cable Act regulations. Thus, it is possible that Congress simply adopted the FCC’s earlier legislative rationale. Under that rationale, common ownership was to be indicative of systems in which costs of regulation outweighed the benefits to owners. Due to the fact that subscriber numbers would be an equivalent indicator, the FCC decided to exempt those cable facilities which served fifty or fewer subscribers.

Secondly, the Court suggested that a distinction between facilities could negate the monopoly power of SMATV operators who gain a “foothold” by contracting and installing a satellite dish on one building and connecting additional buildings for the cost of a few feet of cable. Without regulation, a SMATV operator could charge substantially less for the additional buildings than a competing SMATV operator who would have to recover the cost of his own satellite headend facility. Therefore, the Court concluded that because the two rationales were “arguable,” they satisfied the rational basis review.

COMMON CARRIER ISSUES

California v. FCC
4 F.3d 1505 (9th Cir. 1993)

Issue:

Review of four Federal Communications Commission (“FCC” or “Commission”) orders approving access arrangements, known as Open Network Architecture (“ONA”), to the entire U.S. telephone network.

Holding:

The court upheld the FCC’s orders and denied the petitions for review.

Discussion:

The United States Court of Appeals for the Ninth Circuit divided the petitions for review into two major groups, MCI and the California petitions. In its petitions, MCI argued that the Commission’s ONA orders did not provide sufficient protection from the Bell Operating Companies (“BOCs”) discrimination against competitors in light of the imminent elimination of structural separation of the BOCs’ basic telephone services from their enhanced services. MCI contended that the Commission’s approval of these orders violate the Administrative Procedure Act (“APA”) (5 U.S.C.A. § 706(2)(A)) by not adequately explaining why the FCC departed from its prior policy and by not considering evidence of the ineffectiveness of the ONA with respect to the aforementioned discrimination.

The court rejected MCI’s petitions by holding that the FCC did not depart “from any previously approved ONA concepts.” The court noted that the FCC’s four orders, which basically mandate the implementation of ONA in a piecemeal, “evolutionary” manner, were not significantly different from those that this court previously decided had passed regulatory muster. Because the new ONA orders sufficiently resembled the previously approved orders, there was no violation of the APA.

The California petitions contended that the aspect of the FCC orders dealing with federal tariffing of certain BOC enhanced services violated the Communications Act because under 47 U.S.C. § 152(b)(1), the FCC does not have jurisdiction to regulate intrastate services. The court denied the petitions, holding that the orders established tariffs for potential interstate, not intrastate, services.
The court recognized the petitioners’ concern that since states’ rates for intrastate services helped to offset the costs of basic local telephone service, the rates for states will be higher than the federal tariffs, and thus enhanced service providers may elect to apply the federal tariffs not only to interstate communications but to intrastate services as well. The court emphasized that this potential problem in and of itself cannot deprive the FCC of jurisdiction over interstate communications, which the Act granted to the Commission under 47 U.S.C. § 152(a).

ICORE, Inc. v. FCC
985 F.2d 1075 (D.C. Cir. 1993)

Issue:

Review of the Federal Communications Commission’s (“FCC” or “Commission”) approval of the National Exchange Carrier Association’s (“NECA”) “flash cut” proposal—an immediate cut in revenues of average schedule telephone companies (i.e., small telcos which are permitted to average their costs of providing service in order to determine how much of their “fixed” cost they are permitted to recover under FCC regulations) handling more than 15.9 interstate messages per phone line per month.

Holding:

The D.C. Circuit held that (1) rational basis existed for the FCC’s decision, and (2) the Commission’s application of the rule during the remand period was not forbidden retroactive rulemaking.

Discussion:

The court found that because petitioner ICORE could not prove any methodological flaws in the FCC approval of a “surrogate” plan which NECA demonstrated via a detailed analysis that would adequately compensate the affected companies, a "substantial basis" existed for the FCC’s decision.

In contrast to Bowen, where a rule which had been struck down by a lower court was reapplied retroactively, in the present case, the rule was remanded to the FCC for want of adequate reasoning and explanation, but was not vacated (emphasis added). Furthermore, the court noted that the FCC provided the necessary support for the rule when the Commission applied it during the remand period.

The court ultimately held that because the “flash-cut” rule was never vacated, it does not fall under Bowen, and thus was not forbidden retroactive rulemaking.

Illinois Bell Tel. Co. v. FCC
988 F.2d 1254 (D.C. Cir. 1993)

Issue:

Whether the Federal Communications Commission’s (“FCC” or “Commission”) decision to use the historical discounted cash flow method (“DCF”) for estimating the appropriate rate of return of permissible revenue requirements of the Bell Operating Companies (“BOCs”) was arbitrary and capricious.

Holding:

The United States Court of Appeals for the District of Columbia Circuit held that the Commission’s decision to use the DCF method was not arbitrary and capricious.

Discussion:

The court determined that while Part 65 of the Commission’s regulations lists categories of data for the BOCs to submit, 47 C.F.R. § 65.102(a) provides that carriers “may include relevant evidence other than the data prescribed by part 65.” Nowhere does Part 65 state that the FCC cannot employ other methods that would lead to a full and fair record. Thus, the use of the DCF method and data constituted a reasonable interpretation of Part 65 regulations.

Moving Phones Partnership v. FCC
998 F.2d 1051 (D.C. Cir. 1993)

Issue:

Whether the Federal Communications Commission (“FCC” or “Commission”) had authority to dismiss the applications of cellular applicants selected by lottery upon discovery that each applicant proposed to operate its licensed radio common carrier facility with one or more general partners who were aliens in violation of 47 C.F.R. § 310(b)(3).

Holding:

The United States Court of Appeals for the Dis-
strict of Columbia Circuit held that because the FCC’s dismissal of the applications was reasonable and consistent with the FCC’s strict rules for processing cellular applications the policy was valid.

Discussion:

Section 310(b)(3) prohibits the grant of a radio license to any corporation in which an officer or director is an alien. The national security policy of this section has been applied to common carrier radio stations as well as partnership entities, and was adopted verbatim in the FCC’s rules governing cellular service, 47 C.F.R. § 22.4. FCC rules require “letter perfect” applications and only permit amendments to the applications for the correction of minor errors and omissions.

The court found that because the winning cellular applicants had certified compliance with sections 310(b) and 22.4(b), but in fact had proposed a general partnership with three alien general partners, the FCC properly denied the subsequent amendments and dismissed the applications as unacceptable for filing.

The court stated that “Supreme Court precedent instructs that classifications based on alienage in federal statutes are permissible so long as the statute is not a ‘wholly irrational’ means of effectuating a legitimate government purpose.” The court also noted that the national security policy of section 310(b)(3) satisfied the requirement that there be a “showing of some rational relationship between the interest sought to be protected and the limiting classification.” The court thus held that the FCC was well within its authority to dismiss the applications.

National Rural Telecom Ass’n v. FCC
988 F.2d 174 (D.C. Cir. 1993)

Issue:

Whether the Federal Communications Commission’s (“FCC” or “Commission”) orders implementing price cap rate regulation for the interstate services of local telephone exchange companies (“LECs”) were arbitrary and capricious.

Holding:

The United States Court of Appeals for the District of Columbia held that the Commission’s orders were neither arbitrary nor capricious because they were based on “informed prediction,” and thus the rules were deemed rational.

Discussion:

The FCC ordered that GTE and the Bell companies shift from rate-of-return rate regulation to price cap regulation. All other LECs were permitted, but not obligated, to make the change. Petitioners did not challenge the basic decision mandating price caps, but objected to certain elements of the general plan.

Specifically, the small local telephone companies charged that the ancillary conversion rules which were intended to maintain the effectiveness of price caps unduly restrained telephone company mergers and acquisitions. At issue were the “all or nothing rule” and the “permanent choice rule.” The former rule mandated that LECs which choose price cap regulation must shift all of their affiliates to price caps as well. The latter rule required LECs which choose price caps to remain under price cap regulation permanently.

The court rejected these claims and found the rules rational. Although the court conceded that the conversion rules could potentially impede mergers and acquisitions, the court pointed out that the FCC had previously considered the possibility of cost-shifting between rate-of-return and price cap entities of “hybrid” firms, which “all-or-nothing” was designed to cure.

The FCC had found that the aforementioned rules implied a “forced conversion rule” on mergers and acquisitions, which was codified at 47 C.F.R. § 61.41(c). This rule provided that when rate-of-return and price cap companies merge or acquire each other, the rate-of-return company must switch to price caps within one year.

The court found that the FCC had allowed enough flexibility to the small LECs by providing for waiver of the “forced conversion rule” when the efficiencies of a particular transaction outweighed the risk of a LEC beating the system by shifting costs between its differently regulated entities.

New York State Dept’l of Law v. FCC
984 F.2d 1209, (D.C. Cir. 1993)

Issue:

Whether the Federal Communications Commission (“FCC” or “Commission”) properly denied a petition for reconsideration which requested that the Commission repudiate a consent decree and reopen a show cause proceeding with respect to an enforcement action concerning certain regulated NYNEX affiliates overcharging nonregulated affiliates and passing these overcharges on to ratepayers.
**COURT DECISIONS**

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**Holding:**

The United States Court of Appeals for the District of Columbia Circuit held that the FCC's decision to enter into the consent decree was subject to the agency's nonreviewable discretion, and that the FCC's actions did not violate the Administrative Procedure Act ("APA") or the Commission's own rules prohibiting ex parte communications.

**Discussion:**

The FCC alleged that two regulated NYNEX affiliates, New England Telephone and Telegraph Company ("NET") and the New York Telephone Company ("NYT") violated the Commission's rules prohibiting cross-subsidization. The FCC, NET and NYT entered into a consent decree, without public notice, in which NET and NYT agreed to almost all the terms in the Commission's Order to Show Cause (e.g., NYNEX must reduce interstate revenue requirements by $35.5 million, and pay $1,419,000 in forfeitures to the U.S. Treasury) in return for the FCC's promise to terminate all current and new proceedings arising out of the order.

Petitioners filed a petition for reconsideration with the Commission, demanding that the consent decree be repudiated and alleging that the Commission: (1) acted arbitrarily and capriciously by abandoning its show cause proceedings without notice; (2) failed to follow its own rules concerning overcharges; (3) violated its own policy against ex parte communications; and (4) violated the APA's notice-and-comment provisions by entering into the agreement.

The court held that as a general matter, the FCC is best positioned to weigh the costs and benefits of pursuing a given enforcement method. Under Heckler v. Chaney, 470 U.S. 821 (1985), the Supreme Court held that except in limited circumstances, courts should not second guess agency enforcement decisions. Hence, the Commission's decision was not arbitrary and capricious.

The D.C. Circuit extended the Chaney rule to agency settlement decisions. The court stated that, according to Chaney, barring any violation of the Commission's statutory responsibilities, the FCC's decision to enter into a consent decree is presumed to be nonreviewable. The court noted, inter alia, that 47 U.S.C. § 504(b) gave the FCC discretion as to the decision to collect and/or the amount of forfeitures "that it has adjudicated under such regulations and methods of ascertaining of facts as it may deem advisable."

The court refuted the alleged ex parte violation argument by concluding that the settlement negotiations fell within an FCC rule exception, 47 C.F.R. § 1.1204(b)(7), which permits ex parte communications initiated by the Commission for the resolution of issues in a proceeding that has not been designated for a hearing. The court noted that 47 C.F.R. § 1.93(b) "leaves open the question of when to designate an enforcement action for a hearing." The FCC had not designated this issue for hearing.

Finally, the court determined that the FCC's decision to conduct the settlement negotiations in private was fully consistent with the discretion granted to agencies under the APA. The court stated that although 5 U.S.C. § 554(c) provides that all interested parties be given the opportunity to consider, e.g., offers of settlement, 5 U.S.C. § 554(a) provides that section 554(c) only applies to "adjudications required by statute to be determined on the record after opportunity for agency hearing . . . ."

Because the FCC's decision to enter into a consent decree was nonreviewable, and the Commission did not violate the APA or its own ex parte rules, the court denied the petition for review.

**Southwestern Bell Tel. Co. v. FCC**

10 F.3d 892 (D.C. Cir. 1993)

**Issue:**

Whether a Federal Communications Commission ("FCC" or "Commission") price cap order provided sufficient notice to Southwestern Bell ("SWB") that the company's mid-course corrections to its tariff filings would be barred outright because of failure to comply with the mandated price cap mechanisms.

**Holding:**

The United States Court of Appeals for the District of Columbia Circuit held that adequate notice was given and thus denied SWB's petition for review.

**Discussion:**

The court reiterated the principle articulated in McElroy Electronics Corp. v. FCC, 990 F.2d 1351 (D.C. Cir. 1993). McElroy held that adequate agency notice requires not the clearest possible articulation, but based on a fair reading of the language of the order, the petitioners should have known what an agency expected of them.

Under this rule, the court held that while the price cap order was not a "beacon of clarity," it did
provide the petitioners with adequate notice that increases to price caps were to be accomplished only by the mechanisms set forth in the order. Thus, the court denied the petitioner's petition for review.

**United States v. Western Electric Co.**
993 F.2d 1572 (D.C. Cir. 1993)

**Issue:**

Whether the district court erred in upholding the U.S. Department of Justice's ("DOJ" or "Department") conclusion that the ban established in the Modified Final Judgement ("MFJ") prohibiting the Bell Operating Companies ("BOCs") from providing information services was unreasonable.

**Holding:**

The United States Court of Appeals for the District of Columbia Circuit affirmed the judgment removing the information services line of business restrictions.

**Discussion:**

Stressing that the court's role was simply to determine whether the DOJ's position had substantial factual support and was grounded in reasonable analysis, the D.C. Circuit pointed to the Department's expert testimony to support its conclusion that dropping the line of business restrictions would serve the public interest. The evidence showed that the DOJ's expert witnesses (which included two Nobel laureate economists) testified that the BOCs' entry into information services would actually increase competition, which would lead to lower prices and increased output of various information services.

Although opposing positions were taken by other distinguished economists, the court held that its job was not to determine whether "removal of the information services ban is an optimizing move," but rather to determine whether there existed ample factual foundation for the DOJ's conclusion. Here, the court determined that the quality of the DOJ's "array of prominent economists'" presentations was sufficient to establish the factual foundation necessary for the Department to make a reasonable conclusion.

**Virgin Islands Tel. Corp. v. FCC**
989 F.2d 1231 (D.C. Cir. 1993)

**Issue:**

Whether the Federal Communications Commission's ("FCC" or "Commission") reliance on a six-month evaluation period to determine the reasonableness of the Virgin Islands Telephone Corporation's ("Vitelco") interim rates was justified, given the Commission's previous indications that the interim rates would be evaluated over the standard two-year rate monitoring period.

**Holding:**

The United States Court of Appeals for the District of Columbia Circuit held that the FCC arbitrarily deviated from standard practice in employing a six-month monitoring period. The court held that the Commission did not evaluate Vitelco's interim rates in light of their impact on the company's earnings as per the standard theory of rate of return regulation, which is consistent with prior Commission practice.

**Discussion:**

This controversy centered around Vitelco's request to increase access service charges for the first six months of 1990, where Vitelco anticipated a dramatic decrease in demand for interstate access service due to the devastation of Hurricane Hugo. The FCC granted Vitelco's request—subject to a reasonable rate investigation—to protect Vitelco's income stream and financial integrity, which was especially significant in this case because a prohibition on retroactive ratemaking would prevent Vitelco from recouping actual losses at a later date.

When demand was actually higher than anticipated, Vitelco's annual earnings for interstate access service turned out to be three times greater than its authorized rate of return. "Annualizing" Vitelco's earnings during the six month period, the FCC found the rates to be unjust and unreasonable and ordered Vitelco to issue a refund.

The Commission's established practice is to monitor earnings over a two-year period to account for changes in marketing conditions. Throughout the investigation of Vitelco's rates, the FCC indicated that the first six months of 1990 would be factored into the standard two-year monitoring process. The court found that Vitelco was justified in assuming that the FCC would evaluate earnings over the relevant "authorized return" monitoring period. The court found that the FCC's decision ordering Vitelco to refund "overearnings" was arbitrary and capricious, where the FCC narrowly focused on the six month period without calculating in underearnings during 1989,
and where the FCC disregarded its past practices regarding interim rates.

COPYRIGHT ISSUES

Atlantic Business and Community Dev. Corp. v. Thomas J. Subranni
994 F.2d 1069 (3d Cir. 1993)

Issue:

Whether a broadcast license granted by the Federal Communications Commission ("FCC" or "Commission") qualifies as property or an interest in property to which a tax lien could attach under the Internal Revenue Code, 26 U.S.C.A. § 6321, given a longstanding FCC prohibition against treating such licenses as property, coupled with legal authority denying private creditors from obtaining an interest in the licenses.

Holding:

The United States Court of Appeals for the Third Circuit held that a broadcast license was property for the purposes of section 6321, and that a section 6321 lien does attach to the proceeds of a Chapter 7 bankruptcy sale. The court also held that the FCC's policy refusing to recognize liens obtained by private creditors against a broadcaster's license is not applicable to the IRS's assertion of a secured claim against the proceeds of a bankruptcy sale. The holding reversed the district court's decision denying the IRS a lien against the proceeds of the bankruptcy sale of the broadcast license.

Discussion:

Atlantic Business and Community Development Corporation ("Atlantic") owned and operated an AM radio station in Atlantic City, New Jersey. Atlantic filed a petition for bankruptcy in 1986. In this proceeding, the IRS had a secured claim for unpaid employment taxes due to federal tax liens that were perfected before the bankruptcy petition was filed. When the Chapter 11 reorganization plan failed and the case was converted into a Chapter 7 proceeding, the bankruptcy trustee sold the AM broadcast station and all its assets.

The bankruptcy court held, and the district court affirmed, that the FCC license did not qualify as property to which a tax lien could be attached under section 6321. Thus, the IRS had no lien on any funds received by the estate attributable to the sale of the license.

On appeal, the Third Circuit court broadly interpreted section 6321 to find that Congress meant to reach every interest in property a taxpayer might have. The court pointed out that it is well settled that federal tax liens reach interests that are immune from attachment by private creditors. The court considered factors such as alienability and value to determine whether the interest could be classified as property or an interest in property.

The court found that the Communications Act itself seems to imply the existence of a limited property right in a broadcast license. For example, the court noted that the FCC had established procedural safeguards against arbitrary revocations of licenses, permitted licenses to be transferred, and implied that these licenses have value.

FIRST AMENDMENT ISSUES

Turner Broadcasting System, Inc. v. FCC
113 S. Ct. 1806 (1993)

Issue:

Whether enforcement of sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1471-1481 ("Cable Act"), requiring cable operators to reserve a portion of their channel capacity for carrying local commercial and noncommercial educational broadcasting stations violates the First Amendment.

Holding:

The Supreme Court denied the petitioner's request for an injunction, holding that all acts of Congress were presumptively constitutional and should remain in effect pending a final decision on the merits by the Court.

Discussion:

The Court pointed out that the applicants were not merely seeking a stay of a lower court's order, but an injunction against the enforcement of a presumptively valid act of Congress. The Court emphasized that an injunction is appropriate only in very limited circumstances, when they meet jurisdictional limitations and when the legal rights at issue are "indisputably clear." The Court reasoned that it was not indisputably clear that the petitioners had a First
Amendment right to be free from government regulation.

**Turner Broadcasting System, Inc. v. FCC**

**Issue:**

**Holding:**
The United States District Court for the District of Columbia held that the government need not demonstrate that it has used the least restrictive means to accomplish economic regulation of the cable industry. The court concluded that the must-carry provisions passed constitutional muster because they furthered the significant government interest of economic regulation of the cable industry.

**Discussion:**
The plaintiffs contended that the must-carry provisions of the Cable Act limited the freedom of cable operators to refuse to carry the signals of local broadcast stations and therefore violated the First Amendment's right to freedom of speech. As such, plaintiffs contended that the must-carry provisions should be viewed under strict First Amendment scrutiny.

The court declined to apply strict scrutiny, reasoning that the must-carry provisions did not compel cable operators to carry any particular messages, nor did they impose a burden on programmers or broadcasters regarding messages they proposed to transmit. In other words, strict scrutiny should be applied only if governmental regulation is overtly content-based or presents an opportunity for official censorship. The must-carry rules are only minimally content-based, if at all, and as such are not properly the subject of strict scrutiny.

The court determined that the correct inquiry was whether the must-carry provisions further a significant government interest. The court stated that the significant government interest at issue was an economic one. The court mentioned that the First Amendment should not unduly inhibit Congress in what clearly appeared on its face to be an effort to level the economic playing field in the television industry. In the absence of such regulation, local broadcast stations would be unable to compete. As a result, they would lose advertising revenue and eventually lose their audiences. Therefore, the court stated that regulation in this arena was necessary in order to preserve the vitality of a free source of over the air programming.

**MASS MEDIA ISSUES**

**Action for Children's Television v. FCC**
999 F.2d 19 (1st Cir. 1993)

**Issue:**
Whether the Federal Communications Commission ("FCC" or "Commission") can be required to take action to combat "hidden television commercials" which promote smoking.

**Holding:**
The United States Court of Appeals for the First Circuit denied Action for Children's Television's ("ACT") petition for review of the FCC's decision denying ACT's request that the FCC take action to combat hidden commercials on television that promote smoking.

**Discussion:**
In 1990, ACT petitioned the FCC to issue a declaratory ruling requiring licensees to air anti-smoking messages to offset the harm caused by "hidden commercials"—cigarette company sponsorship of sporting events during which cigarette brand names or logos are displayed on signs or banners, which are broadcast during televised coverage of these events. The FCC denied the petition, finding that this issue had previously been raised and resolved.

The court held that given the FCC's broad discretion as to how to deploy its limited resources, it was reasonable for the FCC to deny ACT's request. The court concluded that Congress provided a general ban on television cigarette advertising as part of a "comprehensive" federal program. Hence, if the ban was being violated at its perimeters, the courts, and not the FCC, would be the proper venue for review.

**In The Matter of Tak Communications, Inc.**
985 F.2d 916 (7th Cir. 1993)

**Issue:**
Whether Federal Communications Commission ("FCC" or "Commission") policy precludes creditors from holding security interests in broadcast licenses.

**Holding:**

The United States Court of Appeals for the Seventh Circuit noted that the FCC has consistently refused to recognize creditors' interests in broadcast licenses. This policy is based on statutes which prohibit assignment of broadcast licenses without prior FCC approval. The court held that the decision as to whether or not to allow creditors to hold security interests in broadcast licenses should be the domain of the Commission.

**Discussion:**

Tak Communications, Inc.'s ("Tak") secured creditors sought to have their liens on Tak's broadcast licenses declared valid when Tak filed a voluntary bankruptcy petition. The bankruptcy court and the district court agreed that the liens were invalid because FCC policy precluded creditors from holding security interests in FCC licenses. In affirming this decision, the Seventh Circuit acknowledged that broadcast licenses indeed constitute property of a debtor's estate.

The court noted that the bankruptcy court in *In re Ridgely Communications, Inc.*, 139 Bankr. 374 (Bankr. D. Md. 1992), held that a creditor may perfect a security interest in a debtor's broadcast license. This right is limited to the extent of the proceeds received by the licensee from a private buyer.

The court in the present case held that it does not necessarily follow from *Ridgely* (as Tak's creditors argued) that a creditor may hold a security interest in that license *per se*. To support this holding, the court noted the FCC's consistent refusal to recognize such security interests.

**Weyburn Broadcasting v. FCC**  
984 F.2d 1220 (D.C. Cir. 1993)

**Issue:**

Whether the Federal Communications Commission's ("FCC" or "Commission") treatment of various issues in the comparative hearing process violated the standard of reasoned decisionmaking set forth in the Administrative Procedure Act ("APA").

**Holding:**

The United States Court of Appeals for the District of Columbia Circuit held that, although reviewing courts grant a high level of deference to administrative decisionmaking, the FCC did not adhere to the APA's standard of reasoned decisionmaking in that it did not deal adequately with the financial qualification, misrepresentation and real party-in-interest issues raised in this matter.

**Discussion:**

Appellants were competing applicants for a new FM station in Richmond, Virginia. They challenged the application of James River Communications Corporation on several issues, including financial qualifications, real party-in-interest and misrepresentation. The FCC resolved the financial qualifications issue in favor of James River, and declined to designate the other issues for hearing.

The D.C. Circuit, while acknowledging the high level of deference due the Commission, found that the FCC failed to act reasonably in resolving the financial qualifications issue. The Commission argued that its rules authorized granting a summary decision in favor of James River, because there was no genuine issue as to any material fact.

The court held that the FCC was wrong, notwithstanding the Commission's substantial discretion, because there were significant questions of material fact regarding James River's financial qualifications. In particular, the court was troubled by the fact that James River's written financial plan excluded substantial legal and engineering costs. The court noted the fact that the FCC has historically disqualified applicants lacking clear and complete financial plans. The court also noted that the administrative law judge put restraints on discovery that ensured the impossibility of adequately addressing the financial qualifications issue.

Regarding the misrepresentation issue, the FCC argued that such matters are solely within its discretion, and that the courts should not interfere. However, the court held that the Commission failed to acknowledge the materiality of the misrepresentation involved here. Because the misrepresentation was related to James River's financial qualifications, the court reasoned that it was particularly important. The court concluded that the misrepresentation issue should have been designated for hearing.

Finally, the court concluded that the real party-in-interest issue should also have been designated for hearing. The court saw the Commission's failure to
do so as a sharp departure from precedent. The court further reasoned that this issue was closely tied to the misrepresentation and financial qualifications issues and for that reason a full hearing was necessary.