

ORIGINAL
ADMINISTRATIVE LAW FINAL EXAM

FALL SEMESTER, 1995

PROFESSOR JOHNSON

INSTRUCTIONS

1. The exam consists of two questions. You have a total of 3 1/2 hours in which to complete the exam. The suggested time limits are:

Question I: 135 minutes
Question II: 45 minutes
2. Questions will be graded on your ability to focus on the pertinent legal issues and discuss them in a knowledgeable and convincing fashion. Organization and coherence of your answer will count, so invest some time thinking about the question and organizing your answer before you begin writing.
3. It is probably useful, but not mandatory, to read through the entire exam before beginning any question in order to get a sense for which questions may require more or less than the suggested time.
4. This is an OPEN BOOK exam. Any materials, including non-commercial outlines prepared by you, are permitted in the examination room.
5. If you believe that unintended ambiguities are present in any question, the safest approach is to present arguments based on alternative interpretations of the question. Alternatively, make the most reasonable assumption that you can, and state the assumption in your answer.

Traditional television broadcasters, like WMAZ-TV Channel 13 in Macon, broadcast their television programs to our homes by transmitting electromagnetic waves (signals) through the air at a specific frequency between 30 Mhz and 3000 Mhz. Traditional televisions receive those signals through an antenna and then convert those signals into pictures and sound. Today, cable television companies receive those signals through the air and retransmit them directly to subscribers' homes through a system of cables.

Due to the immutable laws of nature, the number of electromagnetic frequencies that can be used for broadcasting television signals is limited. If two or more broadcasters attempt to transmit their signals at the same electromagnetic frequency at the same time in the same geographic area, the signals will interfere with, and destroy each other. In light of the fact that there were not, and are not, enough electromagnetic frequencies that can be used for broadcasting television signals for all of the companies that wish to broadcast television signals, Congress, in the 1950's, passed legislation (the Communications statute) that regulates the use of electromagnetic frequencies for television broadcasting. Assume, for purposes of this question that the statute provides:

Section 1. The Federal Communication Commission may issue a license to a person that allows the person to broadcast television signals at a defined electromagnetic frequency if the FCC determines that public interest, convenience and necessity would be served by issuance of the license.

- a. The FCC may, by order after a hearing, revoke, suspend or modify a license issued under this Section whenever it determines that public interest, convenience or necessity would be served by revocation, suspension or modification of the license.

Section 2. Any interested person may challenge any final action taken by the FCC under this statute in the United States district court for the district in which the person resides or transacts business. Challenges brought under this section against final actions taken by the FCC must be brought within 60 days of the FCC's action. The Court may grant such injunctive and declaratory relief as it deems necessary to achieve the purposes of this statute.

Although the FCC has issued thousands of licenses under the statute, the FCC has also reserved several thousand electromagnetic frequencies for future use. For purposes of this hypothetical, those frequencies will be referred to as "the advanced television (ATV) electromagnetic spectrum." Many of those frequencies are being reserved so that they can be used in the future to transmit "high-definition television (HDTV)" signals. HDTVs rely on digital technology to offer much sharper, clearer pictures than "standard definition televisions (SDTV)" (the current television industry standard). However, HDTVs will be much more expensive than SDTVs. For instance, a traditional SDTV that may cost \$400 to \$500 might cost as much as \$2000 to \$3000 in HDTV format.

Assume, for purposes of this hypothetical, that the Communications statute described above

includes two provisions that address the question of how the FCC should make the ATV electromagnetic frequencies available to broadcasters for broadcasting HDTV signals. Specifically, the statute provides:

Section 3. The FCC shall, after hearing, develop a strategy that defines the manner in which the Commission will allocate frequencies in the ATV spectrum, and the manner in which those frequencies may be used. The FCC shall ensure that the frequencies are allocated and used in a manner that serves the public interest, necessity and convenience.

- a. In developing this strategy, the FCC shall afford interested persons an opportunity to provide oral testimony on the strategy, and the FCC shall compile a written docket that contains all of the testimony and comments that were submitted to the FCC regarding the strategy.

Section 4. The FCC may auction the right to broadcast television signals on electromagnetic frequencies in the ATV spectrum if the frequencies will be used to provide pay-per-view television services or other subscriber-based television services.

In 1973, the FCC issued WALK-TV a license under Section 1 of the statute that authorizes WALK-TV to broadcast its standard definition television signal at 45 Mhz. WALK-TV is a privately-owned, for-profit television station, which does not offer pay-per-view or subscriber-based television services.

Assume that by February, 1997, 2-3% of the U.S. population own HDTVs. Although HDTVs will be able to receive SDTV signals, the picture quality that they will offer when broadcasting SDTV signals will not be superior to SDTVs. HDTVs will only be able to offer a sharper, clearer picture than SDTVs when they are broadcasting an HDTV signal. Therefore, in February, 1997, WALK-TV applies to the FCC for a modification of its license that would allow the station to continue to broadcast its SDTV signal at 45 Mhz and to begin broadcasting an HDTV signal at an electromagnetic frequency in the ATV electromagnetic spectrum. The FCC modifies WALK-TV's license to allow the station to broadcast its SDTV signal at 45 Mhz and to broadcast an HDTV signal at 270 Mhz. In its decision, the Commission states that "authorizing persons that currently hold a license under Section 1 to transmit their signal in HDTV format on an additional frequency in the ATV spectrum serves the public interest because it will encourage a gradual transition among consumers from SDTV to HDTV. Since HDTVs are significantly more expensive than SDTVs, consumers will not purchase HDTVs unless there is sufficient programming that is offered in HDTV format to justify the purchase of the HDTV. If currently licensed television stations offer programming in both SDTV format and HDTV format for a transition period, more people will purchase HDTVs, and the price of HDTVs will be reduced, thus making them available to even more consumers. At the same time, persons who cannot initially afford the HDTVs will not be penalized during the transition period."

In May, 1997, after the FCC modified WALK-TV's license, WALK-TV discovered that it was technologically possible to use the ATV frequency to broadcast up to four separate signals of SDTV instead of one HDTV signal. The station could, therefore, simultaneously broadcast up to

four channels worth of programming. WALK-TV did not seek a modification of its license that would allow it to broadcast SDTV on the HDTV frequency. Instead, on May 10, the station began broadcasting four SDTV signals over its ATV frequency, instead of an HDTV signal.

In June, 1997, the FCC published a notice of proposed rulemaking in the Federal Register under the authority of Section 3 of the Communications statute. The proposed rulemaking provided: "All persons that currently hold television broadcasting licenses under Section 1 of the Communications statute will be authorized to transmit their signal in HDTV format on an frequency in the ATV spectrum (in addition to broadcasting their SDTV signal on their currently approved frequency) if they apply to the Commission for a license modification. The signal that broadcasters transmit on the ATV frequency must, however, be an HDTV signal. After the Commission modifies the licenses of currently licensed broadcasters, the Commission will accept applications from interested persons for licenses to broadcast over the remaining ATV frequencies. The Commission will not, however, issue licenses that authorize the transmission of pay-per-view or subscriber-based television services over ATV frequencies." The Commission allowed interested persons to submit written (but not oral) comments on the proposal for a 90 day period after the notice of proposed rulemaking was filed in the Federal Register. The Commission did not hold any public hearings on the proposal.

In July, 1997, the Pay-Per-View Television Association submitted the following comment to the agency: "The FCC cannot refuse to issue licenses that authorize the transmission of pay-per-view or subscriber-based television services over ATV frequencies. Section 4 of the Communications statute clearly contemplates that some of the frequencies in the ATV spectrum may be used for the transmission of pay-per-view or subscriber-based television programming."

In August, 1997, several representatives of the Corporation for Public Broadcasting (CPB) met with the FCC to discuss the allocation of ATV frequencies. In that meeting, the CPB representatives suggested that public broadcasters should be allowed to use the additional ATV frequency to broadcast several SDTV signals in order to enhance the financial viability of public broadcasters. If the FCC adopted the CPB's suggestion, the CPB argued, public broadcasters could broadcast their own programming on one of the signals, and sell the right to transmit other signals over their frequency to other broadcasters. The representatives of the CPB informed the FCC that WALK-TV was already transmitting multiple SDTV signals over its ATV frequency. The CPB representatives argued, however, that the FCC should not allow private broadcasters to broadcast several SDTV signals on ATV frequencies. If the FCC allowed all broadcasters to broadcast several SDTV signals on ATV frequencies, the CPB reasoned, the CPB would not be able to make as much money selling the right to broadcast over its ATV frequencies as it would if only public television broadcasters were allowed to broadcast multiple SDTV signals over the ATV frequencies. Although the FCC maintained a docket of all of the written testimony and comments that were offered on the rule, the FCC did not include the meeting with CPB representatives in the docket.

On November 1, 1997, the FCC issued a final rule that provided that all persons that currently hold licenses under Section 1 of the Communications statute would be authorized to transmit their signal in HDTV format on an additional frequency in the ATV spectrum if they applied to the Commission for a license modification. The final rule allowed public broadcasters to transmit several SDTV signals on the ATV frequency, but required all other broadcasters to

transmit their signals on the ATV frequencies in HDTV format. In fact, the rule prohibited the transmission of multiple SDTV signals on ATV frequencies on or after July 1, 1997, and suspended, for six months, the licenses of WALK-TV and any other broadcasters that transmitted multiple SDTV signals on ATV frequencies on or after July 1, 1997. In the notice that accompanied the final rule, the FCC stated, "As we previously noted in our February 1, 1997 order modifying WALK-TV's broadcast license, it is in the public interest to require most broadcasters to broadcast an HDTV signal on the ATV frequency in order to encourage a gradual transition among consumers from SDTV to HDTV. Although, in the course of individual license proceedings prior to this rulemaking, we have authorized several private broadcasters to transmit HDTV signals on an ATV frequency in addition to transmitting SDTV signals on their SDTV frequency, several broadcasters have attempted to gain an unfair competitive advantage over the rest of the broadcast industry, and have begun broadcasting several SDTV signals over the ATV frequencies. Since the Commission never authorized any licensee to transmit SDTV signals over the ATV frequencies, the agency is, by this order, suspending, for six months, the licenses of WALK-TV and all broadcasters that transmitted SDTV signals over the ATV frequencies." The notice did not mention the CPB meeting, and did not explain why the Commission concluded that it was in the public interest to allow public broadcasters to broadcast several SDTV signals on their ATV frequency and to prohibit private broadcasters from doing so.

The final rule also authorizes the FCC to auction the right to broadcast television signals on 100 electromagnetic frequencies in the ATV spectrum, but provides that those frequencies may not be used to provide pay-per-view television services. The regulation does, however, require persons who broadcast on those frequencies to scramble their signal and to require persons who wish to receive the signal to pay the broadcaster a monthly fee for a converter box that unscrambles the signal. The agency did not mention the Pay-Per-View Television Association's comment in the notice that accompanied the final rulemaking. In the notice that supported the final rule, the agency defended the auction provision as follows: "Unlike the programs that are shown on other subscriber-based television services like HBO, many of the programs that are shown on a pay-per-view basis have no redeeming social, cultural or artistic value. The Commission has determined that it would not be in the public interest to provide pay-per-view television providers with an additional outlet for their programs. Therefore, the final rule prohibits persons from using the ATV frequencies that will be auctioned under the rule to provide pay-per-view television services."

In a press conference that was held shortly after the regulations were promulgated, representatives of WALK-TV criticized the auction provision as follows: "Through the auction rules in today's regulation, the FCC has begun charging private businesses for the right to broadcast television signals over the electromagnetic spectrum. It is only a matter of time before the agency will be charging all licensees for this right, and this will signal an end to the era of free television. The agency has taken the action today without providing any warning that it would do so."

I.

As of December 1, 1997, WALK-TV continues to broadcast several SDTV signals on its ATV frequency and has retained you to file a lawsuit for a declaratory judgment that the regulations (including the license suspension) are invalid, and an injunction to prevent the FCC from enforcing the regulations against anyone.

- A. Assuming that the Communications statute authorizes courts to impose civil and criminal penalties on persons who broadcast television signals in violation of the statute or any regulations promulgated under the statute, and assuming that WALK-TV does not challenge any of the factual determinations made by the FCC, on what basis might WALK-TV challenge the regulations, including the license suspension? With what success? (100 minutes).
- B. Making the same assumptions as in the last question and assuming, for purposes of this question only, that WALK-TV does not want to challenge the license suspension, can WALK-TV bring a lawsuit to raise its other challenges to the regulations at this time and obtain the declaratory and injunctive relief that it is seeking? If so, in what court? (Justify your response fully in your answer, but DO NOT address standing.) Would your answer be any different if WALK-TV brought its lawsuit on February 1, 1997 and sought money damages from the FCC, in addition to declaratory and injunctive relief? (35 minutes)

II.

On December 1, 1997, the Pay-Per-View Television Association retains you to file a lawsuit for a declaration that the FCC's regulations are invalid. The Pay-Per-View Television Association is an association of pay-per-view television broadcasters that was formed to encourage the growth of the Pay-Per-View television industry. The Association believes that the agency's decision regarding the auction of ATV frequencies shuts pay-per-view broadcasters out of a lucrative market which is available to other subscriber-based television providers (like HBO) and places Association members at a competitive disadvantage with regard to those providers. Once subscriber-based television providers obtain the right to broadcast a scrambled signal over the ATV frequency, they will be able to deliver their programs to homes that do not have cable television or satellites. Pay-per-view providers will not be able to offer that service. Representatives of the Pay-Per-View Association argue that the only difference between pay-per-view providers and subscriber-based service providers (that the regulations allow to bid on the ATV frequencies) is that the subscriber-based service providers charge subscribers on a monthly basis, while pay-per-view providers charge subscribers on a per-view basis.

- A. Assuming that the Pay-Per-View Television Association does not challenge any of the factual determinations made by the FCC, on what grounds might it challenge the agency's regulations? (25 minutes).
- B. What allegations would the Pay-Per-View Television Association have to make in its complaint (and prove at trial) in order to demonstrate that it has standing to bring its lawsuit? (20 minutes)