

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MM
FCC 85-578
36257

In the Matter of)
)
960 Radio, Inc., licensee of)
Station KJSN(FM),)
Klamath Falls, Oregon)
)
Petition for Declaratory Ruling)

MEMORANDUM OPINION AND DECLARATORY RULING

Adopted: October 29, 1985

Released: November 4, 1985

By the Commission:

1. The Commission has before it the April 26, 1985 "Petition for Declaratory Ruling," filed by 960 Radio, Inc. ("960"), requesting that "the Commission declare void a requirement contained in a Conditional Use Permit issued by a local zoning authority that an FM facility must protect TV translators from interference...."

2. In August of 1984, and in an effort to meet the Commission's requirements for FM facilities adopted in the omnibus Docket 80-90 proceedings, 960 filed an application to modify the facilities of station KJSN(FM), Klamath Falls, Oregon (BMPH-840806AT). 960 proposed to relocate its antenna to Stukel Mountain so that KJSN could achieve the minimum facilities required of Class C stations under Docket 80-90. In filing the application, 960 submitted that it would take steps to eliminate, if possible, any interference to pre-existing facilities on Stukel Mountain. BMPH-840806AT, exhibit V-5. The application was granted by the Mass Media Bureau pursuant to delegated authority on February 4, 1985.

3. Contemplating that the Commission would grant its modification application, 960 filed for a Conditional Use Permit with the local zoning board in Klamath County, Oregon. Upon receipt of evidence and testimony from the involved parties, Hearing Officer James R. Uerlings granted KJSN a Conditional Use Permit subject to the following pertinent restrictions:

"b) KJSN must not operate the new facility so as to produce electronic interference to existing facilities on Stukel Mountain; ¹

1 Six facilities are currently operated from atop Stukel Mountain, according to the Hearing Officer. KOTI-TV, licensed to Klamath Falls, and

c) KJSN must not operate its new facility so as to cause electronic interference to established translator sites on Stukel Mountain, and must aid KSYS(TV) and KSOR(FM) in retuning or recrystallizing their facilities;"²

Findings of Fact, Conclusions of Law and Decision of Klamath County, Oregon Hearing Officer, C.U.P. 26-84, released October 24, 1984. 960 posits that conditions "b" and "c" contained in the Conditional Use Permit are void and unenforceable because (i) the jurisdiction to control interference over the airwaves rests exclusively with the Federal Communications Commission; and (ii) the zoning authority's attempt to protect existing translator facilities conflicts with the Commission's rules and policies. Thus, the issue is whether or not the Communications Act has preempted the role of state and local governments in resolving specific interference disputes involving federally licensed broadcasting stations. For the reasons given below, we conclude that state and local governments are preempted in that area.

4. In general, state action may be preempted in the following circumstances:

[F]irst, when Congress, in enacting a federal statute, has expressed a clear intent to preempt state law...; second, when it is clear despite the absence of explicit pre-emptive language, that Congress has intended by legislating comprehensively to occupy an entire field of regulation and has thereby "left no room for the states to supplement" federal law...; and, finally, when compliance with both state and federal law is impossible...or when state law "stands as an obstacle to the accomplishment and execution of the full

KSYS-TV, licensed to Medford, Oregon, operate television translators on Channel 2 and 8 respectively; two two-way facilities are located on the mountain; KSOR-FM, licensed to Ashland, Oregon, operates an FM translator; and the FAA operates an aerial navigation facility on the mountain. KSYS and one of the two-way operators claimed that the grant of a permit to KJSN would result in harmful interference to their operations. See Motion for Declaratory Ruling at p. 2 n. 1.

2 Two other conditions required KJSN to comply with FCC and FAA regulations. Since the permittee has not objected to these conditions, they need not be discussed further. KSYS(TV) and KSOR(FM), as shown in footnote 1, supra, are the operators of the translator stations and are not the translator stations themselves.

purposes and objectives of Congress."

Capital Cities Cable, Inc. v. Crisp, ___ U.S. ___, 104 S.Ct. 2694, 2700 (1984) (citations omitted). Under this third test, federal regulations have the same preemptive effect as federal statutes. See Fidelity Savings and Loan Association v. de la Cuesta, 458 U.S. 141, 153 (1983). The second and third tests are relevant to the preemption question before us. Because the Communications Act comprehensively regulates interference, Congress undoubtedly intended federal regulation to completely occupy that field to the exclusion of local and state governments. Additionally, even assuming state and local regulation is permitted, such regulation is preempted when, as in this instance, it conflicts with federal regulation. Under these circumstances, preemption is warranted.

5. We observe that exclusive jurisdiction to resolve questions involving interference has been assigned to the FCC. See, e.g., 47 U.S.C. §§ 152(a) 301, 303(c), (d), (e) and especially (f). While it has never been held that federal legislation in the field of broadcasting excludes every possible application of state law to radio stations³, the Supreme Court has stated that the FCC's jurisdiction "over technical matters" associated with the transmission of broadcast signals "is clearly exclusive." Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424, 430 n.6 (1963), See also National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943) (the Commission has "comprehensive powers to promote and realize the vast potentialities of radio"); and Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940) (the Commission is to design a "unified and comprehensive regulatory system for the industry").⁴ Moreover, assuming there was any doubt regarding our jurisdiction to regulate interference, Congress certainly removed such doubts when, in amending the Communications Act in 1982, it stated:

The Conference Substitute is further intended to clarify the reservation of exclusive jurisdiction to the Federal Communications Commission over matters involving RFI [radio

3 See, e.g., Raul Santiago Roman, 4 RR 2d 175 (1965) (state court may enjoin construction of broadcast facility based on enforceable covenant not to compete; federal regulation of interstate communication is not exclusive).

4 Though these latter two pronouncements are not conclusive regarding the issue of preemption, they do provide some indication of the Supreme Court's perception of the plenary jurisdiction of the Commission over matters relating to broadcasting.

frequency interference]. Such matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation as part of any effort to resolve an RFI complaint [T]he Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission.

H.R. Report No. 765, 97th Cong., 2d Sess. 33 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 2277, quoted in Blackburn v. Doubleday Broadcasting Co., 353 N.W. 2d 550, 556 (Minn. 1984). In Blackburn, the Minnesota Supreme Court affirmed the dismissal of a private nuisance complaint brought against five Minneapolis radio stations, holding that the FCC has exclusive jurisdiction to regulate interference between radio stations. In short, the House Report language indicates that the proposed federal regulatory scheme is so pervasive that it is reasonable to assume that Congress did not intend to permit states to supplement it. See Fidelity Federal Savings & Loan Association v. de la Cuesta, supra at 153 (1983).

6. In this same vein, the Commission itself has long recognized the breadth of its jurisdiction over cases involving interference:

The delegation [in Section 303(f) of the Communications Act] is broad and leaves within the Commission's discretion, subject to the criterion of the public interest, convenience and necessity, not only the determination of what degree of interference between stations shall be considered excessive but also the methods by which such excessive interference shall be avoided.

Roy Hofheinz, 9 RR 784c, 788 (1953).

7. Accordingly, we find that federal power in the area of radio frequency interference is exclusive; to the extent that any state or local government attempts to regulate in this area, their regulations are preempted. Additionally, a second basis exists for preempting in part the actions of Klamath County. The conditions in the Klamath County zoning authority's Conditional Use Permit concerning the translator station are inconsistent with federal policy. Conditions "b" and "c" of the Conditional Use Permit conflict with established federal policy and rules governing radio frequency interference between broadcasting services.

8. The Commission has consistently held that FM and television translator stations (as well as booster stations and Low Power Television Stations) are licensed on a secondary basis and are not protected against interference from regular broadcast stations. See FM Channel Assignments (Claremore and Tulsa, Oklahoma), 55 RR 2d 1203, 1204 (Mass Media Bureau, 1984); FM Channel Assignment (Houghton, Michigan), MM Docket No. 84-461, Mimeo No. 2766, (Mass Media Bureau, 1985). In Low Power Television Service, 51 RR 2d

476 (1982), reconsideration granted on other grounds, FCC 83-129, 53 RR 2d 1267 (1983), the Commission stated its intention to "continue our present policy to protect full service reception from impairment of the signal by translators...[because] translators...are secondary to full power stations." 51 RR 2d at 493-4. See also Western Slope Communications, Ltd., Mimeo No. 4431 (Chief, Mass Media Bureau, May 31, 1983). Further, in Springfield Television of Utah v. FCC, 710 F.2d 620, 627-8 (10th Cir. 1983), the Court acknowledged the Commission's policy that translators provide a secondary service and are required to accept the consequences of harmful interference from primary users of spectrum space. In effect, the allocation of an FM or TV broadcast channel to a community "reserves" that channel for a full-service station; any broadcaster who constructs or relocates a translator (or other secondary service) to within interference distance of that reserved channel does so at its own risk.⁵

5 We are fully cognizant that this policy can create significant dislocations and in appropriate circumstances have fashioned measured relief. See, e.g., Third Report and Order in Docket 20735, FCC 84-515, released October 26, 1984, at fn. 17. However, Commission policy provides that broadcasters second in time are first in responsibility to resolve interference problems due to proximity of transmitters. Midnight Sun Broadcasting Co., 11 FCC 1119 (1947). See also Sudbrink Broadcasting of Georgia, 65 FCC 2d 691 (1977). While this "first in time" doctrine is generally inapplicable in situations involving translator stations due to the secondary nature of translator service, the Commission has accommodated the interests of existing translators in a few situations by conditioning the grant of a new full-service construction permit on the protection of existing translator stations. In Letter to George M. Skinner, (Chief, Audio Services Division, June 27, 1984), the Chief, Audio Services Division, modified the construction permit of an FM non-commercial educational station in Alamosa, Colorado to require "implementation of effective measures to rectify interference caused to other services," which included several existing television translator stations. Beyond the fact that this was a Commission, not a local government, action, Skinner is distinguishable in at least two ways. First, the specific request by the licensee of the translators, i.e., that the Commission issue an order to show cause why the construction permit of the FM station should not be rescinded or modified, was denied for a variety of procedural and substantive reasons. Second, the FM permittee in Skinner affirmatively indicated that it was "prepared to install equipment to eliminate any problems" and thus would readily accept the condition. Additionally, in Western Slope Communications, supra, at paragraph 15, the Commission conditioned the grant of a television permittee's application for modification of construction permit on the elimination of harmful interference to the modulators of existing UHF translators located in close proximity to the permittee's antenna site. In so doing, the Chief, Mass

9. As the above discussion indicates, the Commission considers translator stations, whether FM-based or TV-based, to be secondary services which must provide protection to full-service broadcast facilities. Thus, the decision by the Klamath County zoning board to condition KJSN's use of the Stukel Mountain site on its protection of existing translators directly contravenes established federal policy in the area of radio frequency interference between broadcast services.

10. In sum, 960 is correct that state or local regulation of interference by or to translator stations has been preempted by the Federal Communications Commission and that Commission policy does not mandate full-service FM stations to protect the signals of pre-existing FM or TV translators. Under the circumstances presented here, the Commission will not require KJSN(FM) to protect any of the existing translator stations located at the Stukel Mountain Site, and state and local governing authorities are preempted from imposing such a requirement.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO
SECRETARY

Media Bureau opined that "[w]hile translators are secondary in spectrum allocation, we believe that incidental radiation to them caused by the grant of a new facility at a nearby site does raise public interest concerns" when the new facility also seeks a waiver of the Commission's spacing rules for television facilities, 47 CFR § 610. Thus, the protection granted therein appears directly related to the public interest dimension created by the Commission decision to waive its short-spacing rules to accommodate the permittee. Review of these cases leads to the conclusion that both these departures from the general policy here appear to support the wisdom of the federal supremacy principle in that they involve very specialized and technical issues best resolved using the expertise of the agency specifically charged with making such determinations. Local jurisdictions have neither the technical expertise nor the appropriate background to make those decisions which have profound impact on the national public interest policies mandated by the Federal Communications Act and implemented by this Commission.