

Fairness in Rulemaking

Administrative Law

Penn State Dickinson Law

March 3, 2026



The Big Question:

Why was TV so bad in the 1970s?

1977

	7:00	7:30	8:00	8:30	9:00	9:30	10:00	10:30
SAT	ABC	Local	Fish	Operation Petticoat	Starsky & Hutch		The Love Boat	
	CBS	Local	Bob Newhart	We've Got Each Other	The Jeffersons	Tony Randall	Carol Burnett Show	
	NBC	Local	The Bionic Woman		NBC Saturday Night at the Movies			
SUN	ABC	Hardy Boys/Nancy Drew Mysteries		The Six Million Dollar Man		The ABC Sunday Night Movie		
	CBS	60 Minutes	Rhoda	On Our Own	All in the Family	Alice	Kojak	
	NBC	The Wonderful World of Disney			The Big Event			
MON	ABC	Local	The San Pedro Beach Bums		ABC Monday Night Football			
	CBS	Local	Young Dan'l Boone		Betty White Show	Maude	Rafferty	
	NBC	Local	Little House on the Prairie		NBC Monday Night at the Movies			
TUE	ABC	Local	Happy Days	Laverne & Shirley	Three's Company	Soap	Family	
	CBS	Local	The Fitzpatricks		M*A*S*H	One Day at a Time	Lou Grant	
	NBC	Local	Richard Pryor Show		Mulligan's Stew		Police Woman	
WED	ABC	Local	Eight Is Enough		Charlie's Angels		Baretta	
	CBS	Local	Good Times	Busting Loose	The CBS Wednesday Night Movie			
	NBC	Local	The Life and Times of Grizzly Adams		The Oregon Trail		Big Hawaii	
	ABC	Local	Welcome Back, Kotter	What's Happenin'!!	Barney Miller	Carter Country	Redd Foxx	

State



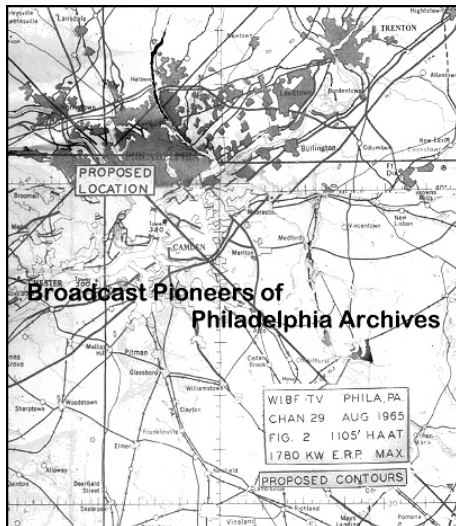
One culprit

limited bandwidth



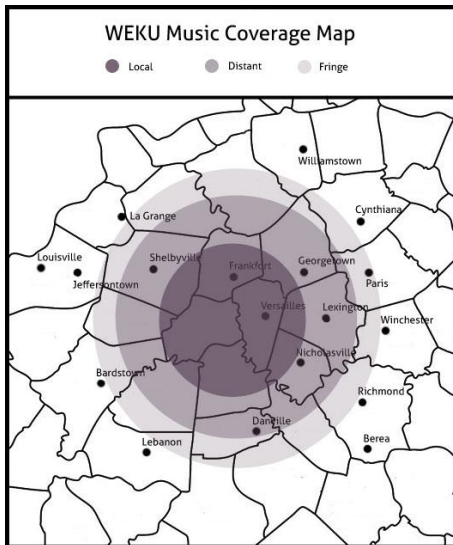
Another culprit

excessive localism in license allocation



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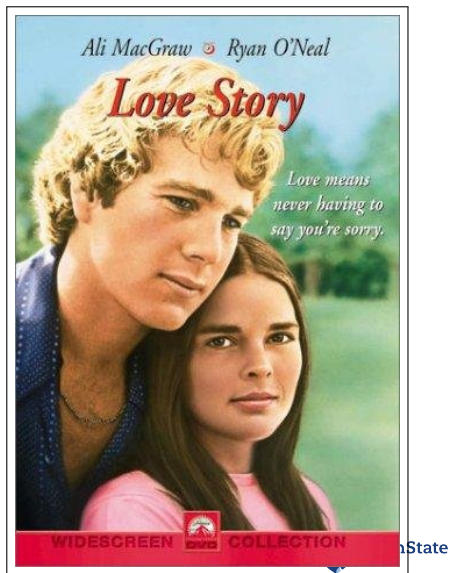
excessive localism in license allocation



The high stakes of HBO v. FCC

“In the circumstance posited by ABC, slightly more than 1.5 million homes would pay \$2.25 each for a particular program making available slightly more than \$1.2 million dollars to the pay cable industry for the purchase of the program in question. This, ABC suggests, compares with the \$1.5 million dollars a network might pay for two showings of a blockbuster feature film like Love Story during a five year period, and with the \$1 million dollars that might be paid for a movie of somewhat less appeal.

From this demonstration[ABC] would draw the conclusion that ‘pay cable operations . . . will inevitably purchase much of the best programming now broadcast on free television and leave free television only with what is left over.’ ”



HBO v. FCC

Ex parte contacts in informal rulemakings (Take 1)

- **before NPRM:** Contacts OK. No docketing required, unless forms basis for agency action.
- **after NPRM:** agency officials involved in RM should refuse contacts about rule.
- **if meetings happen anyway:** agency must docket.



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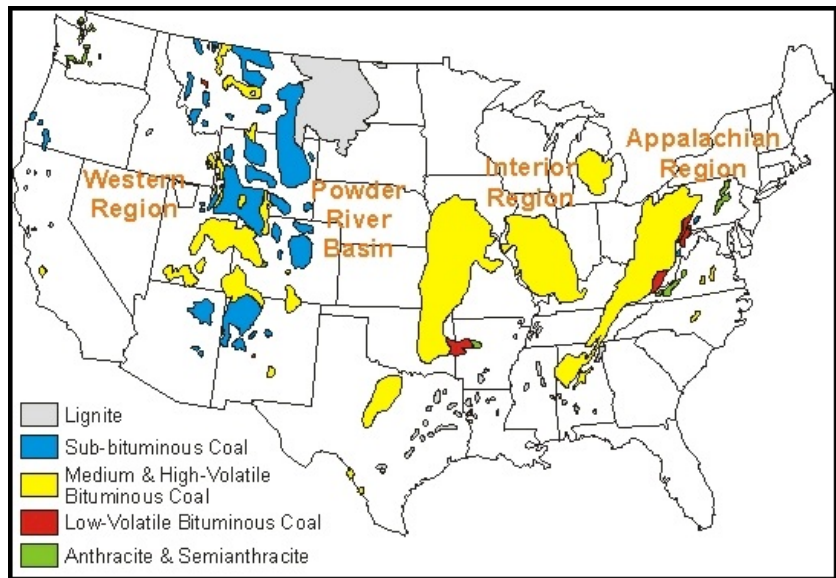


Sierra Club v. Costle: Coal



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Sierra Club v. Costle: Coal



Sierra Club v. Costle: A scrubber



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Penn State's West Campus Steam Plant



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Sierra Club v. Costle

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- **late written comments:** EPA can add to docket. Problem if EPA adds “documents of central importance” too late for “meaningful public comment.”
- **post-comment period meetings with outside parties:** EPA must docket meetings of “central relevance” to rulemaking.
- **intra-executive branch meetings:** must be docketed if necessary to ensure due process (e.g., if concern outcome of quasi-adjudicatory proceeding); not otherwise.
- **meetings with members of Congress:** OK so long as focused on substance of proposed rule.



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Impartiality in Agency Decisionmaking

Administrative Law

Penn State Dickinson Law

March 17, 2026



Administrative law in the wild



<https://www.ecfr.gov/current/title-36/chapter-I/part-1/section-1.536> C.F.R. 1.5(a)(1)



5 U.S.C. §557(b)

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. **On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.**



Cinderella Career and Finishing Schools: ???

“[W]e are charged with the responsibility of making certain that the image of the administrative process is not transformed from a Rubens to a Modigliani.”



PennState

Ass'n of Nat'l Advertisers

What's at Stake



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<http://www.youtube.com/watch?v=JasUMhzX6kA>: advertising to children