LAW

REGULATION OF BROADCASTING BY THE FEDERAL GOVERNMENT

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Editor's note: In asking Mr. Caldwell to undertake a digest of Federal regulations as they affect broadcasting, his own words formed the basis of the VARIETY RADIO DIRECTORY *request: "the regulations now in effect are in printed form and cover the equivalent of some 200 pages or more."*

But it is assumed that the average station owner, despite his frequent appearances in Washington, would not wade through 200 pages of minute type. It is further assumed that if he did, the results would not be worth the effort from the standpoint of clarity.

This article thus digests what 200 pages of government text say in considerably more abstruse form. Not only that. The scope here takes in a terrain including not only the law, but the sources via which it is made. Superficially, this would appear to be inviting controversy. Actually, it results in a further understanding of subjects necessarily somewhat nebulous.

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Mr. Caldwell's previous writings in the field of radio law and related subjects are too well known to the industry to need further comment. Nor is it necessary to recall for the reader, more than in passing, his past associations and achievements: as first general counsel of the Federal Radio Commission, and as past chairman of the Standing Committee on Radio Law, Standing Committee on Communications, and Special Committee on Administrative Law of the American Bar Association.

The various forms of electrical communications, including radio, are regulated principally by an agency of the Federal Government at Washington known as the Federal Communications Commission, under a statute enacted by Congress, the Communications Act of 1934. I say "principally," because to some extent other branches of the Federal Government have a part in this regulation. In addition, important matters are covered by international agreements, binding on all countries that have signed them, and in the domestic field there are matters over which our Federal Government does not exercise control and which are left to our forty-eight states to regulate if they choose.

I. PLACE OF THE FEDERAL COMMUNICATIONS COMMISSION IN OUR FEDERAL GOVERNMENT

The Federal Communications Commission is one of an anomalous group of federal agencies established by Congress during the past half-century, known as the independent commissions. The first of these was the Interstate Commerce Commission, created in 1887; later examples include the Federal Trade Com-

mission, the Securities and Exchange Commission, the Federal Power Commission, the United States Tariff Commission, the Federal Reserve Board, and several others.

The place of these independent commissions in the structure of the United States Government is not easy to explain. They present a problem of government organization which has been the subject of concern to several Presidents of the United States, and of many studies and reports by committees of experts. The most recent of the latter is the Report of the President's Committee on Administrative Management, submitted in January of this year, in which the independent commissions were described as follows:

> "They are in reality miniature independent governments set up to deal with the railroad problem, the banking problem, or the radio problem."

Under our Constitution, the functions of the United States Government are in theory distributed among three separate and independent branches: the legislative, the executive and the judicial. In the Federal Communications Commission, however, the functions of all three branches are commingled and performed by one body—limited, of course, to the field of communications.

With exceptions that are not relevant to this discussion, the Federal Communications Commission is not under or responsible to Congress. Yet, the Communications Act confers upon it broad legislative power to make regulations which have all the force and effect of statutes, and violations of which entail severe penalties. The Federal Communications Commission is not part of the judicial branch of our Government and its decisions are subject only to a limited amount of review in the courts. Yet it holds hearings in controversies under the Communications Act and its own regulations, and makes decisions vitally affecting the business and means of livelihood of individuals. The Federal Communications Commission is not subordinate to the President or to any of the ten Executive Departments, and no representative of the Commission sits in the Cabinet. Yet it performs functions of an executive character in executing and enforcing the provisions of the Communications Act and of its own regulations; these functions closely resemble those performed by the Department of Justice in the execution and enforcement of penal laws.

Some idea of the scope of the Commission's powers in *all* branches is given by the following general provision in Title I of the Act:

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

Thus the Federal Communications Commission cannot be assigned to any one of the three branches of our Federal Government. It is, with qualifications, a miniature independent government set up to deal with radio and other forms of electrical communications. Indeed, when the *method* of regulation over radiocommunication (the license system) is taken into account, it must be regarded as one of the most powerful of such agencies in the scheme of our Government. No other federal regulatory agency has more boundless authority over any field of private activity.

II. SCOPE OF THE COMMISSION'S JURISDICTION

As stated in its opening clause, the Communications Act was enacted for the purpose of regulating interstate and foreign commerce in communication by wire and radio. The power of Congress to engage in such regulation, under the interstate commerce clause in the Constitution, is thoroughly established by court decisions. The validity of any of the basic provisions of the Communications Act,

by which Congress has delegated the greater portion of its power in this field to the Federal Communications Commission, is no longer open to any substantial doubt.

Radiocommunication is defined by the Act as the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds. Wire communication is defined as transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection. In recent years a new term, "telecommunication," has won increasing acceptance as a convenient method of denoting *all* forms of communications by electrical processes, whether by wire or by wireless. It is used in the general treaty, the International Telecommunications Convention, to which the United States and most of the other nations in the world are parties, and which deals with the international problems of communications.

Thus, the Commission has jurisdiction over wire communication as well as radiocommunication. It represents a merger of powers and duties which prior to 1934 were scattered among several federal agencies, the most important of which were the Interstate Commerce Commission and the Federal Radio Commission. It has, for example, the common carrier jurisdiction formerly exercised by the Interstate Commerce Commission over the rates and practices of public utilities engaged in communication, whether by wire or radio, such as the cable, telegraph and telephone companies. Because of the limitations imposed by the subject of this article, only the most incidental reference will be made to the chapter of the Communications Act (Title II) devoted to this common carrier jurisdiction.

Radiocommunication, in turn, embraces much more than broadcasting. It includes other important radio services, such as radiotelegraph and radiotelephone, carried on between stations at fixed points, or between stations one or both of which is in motion on land, on the sea, or in the air. The Commission's control over all forms of radiocommunication is exercised through the license system, and is covered largely by Title III of the Communications Act. This chapter is virtually a reproduction of the Radio Act of 1927, under which the Federal Radio Commission functioned from 1927 to 1934. Only such reference will be made to the Commission's regulation of other radio services as is necessary to provide a proper setting for this discussion of broadcasting.

Before leaving this general description of the Commission's jurisdiction, we must not omit to note that the onward march of civilization presents no more vital problem than the extent to which Government shall control the avenues of communication between human minds. One aspect of this problem is reflected in the First Amendment to our Constitution, forbidding Congress to make any law abridging the freedom of speech, or of the press. The principal avenues of communication in this modern era are dependent directly or indirectly on electrical processes. The globe is covered with a vast network of wires and cables over which facts and ideas, gathered by an army of newsgatherers from its four corners, are flashed to persons engaged in distributing information to the public, whether in printed form, or in broadcasts, or in newsreels, or on tickers. To this wire network has been added an invisible web of radio circuits for the instantaneous navigation of countless electrical messages, sometimes addressed directly to the public, as in broadcasting, sometimes relayed over great distances for ultimate dissemination to the public, and sometimes addressed by one individual to another. No federal regulatory agency rules over a more important portion of the fabric of our civilization than does the Federal Communications Commission. The responsibility of its members for a wise use

of their broad powers, and their opportunity for service in preventing inroads on the most valuable achievement of modern civilization, liberty of expression, are great indeed.

III. ORGANIZATION OF THE COMMISSION

The Federal Communications Commission is composed of seven commissioners, each appointed by the President for a seven-year term at an annual salary of $10,000. As in the case of cabinet officers, federal judges and many other government officials, the appointment must be submitted to the Senate which, by majority vote, may veto the appointment. The seven-year terms are staggered so that the term of only one commissioner expires in any one year. The President designates one of the commissioners as chairman and has done so for successive one-year periods.

Certain limitations are imposed by the Act on eligibility to membership on the Commission. Members must be citizens of the United States. Not more than four may belong to the same political party. There are strict prohibitions against financial interest on the part of any commissioner or employees of the Commission in businesses subject to its regulatory powers. The commissioners may not engage in any other business, vocation or employment. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. There is, however, no requirement of geographical representation on the Commission. The Radio Act of 1927 had divided the country into five zones and required that its five members be appointed one into each zone, but this requirement was not carried over into the Communications Act of 1934.

Unlike some of the other statutes establishing independent commissions, the Act makes no provision for removal of a commissioner from office. The Federal Trade Commission Act, for example, provides that "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office," and in a decision rendered in 1935 the Supreme Court held that the President has no power to remove a member of that Commission for any other cause. Consequently, the power of the President to remove a member of the Federal Communications Commission before the expiration of his term is, to say the least, doubtful. Undoubtedly Congress has such power in proper cases by following the procedure of impeachment provided in the Constitution.

The principal office of the Commission is in the District of Columbia (at present in the Post Office Building), where its general sessions must be held. It is permitted to hold special sessions in any part of the United States "whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby." Four members of the Commission constitute a quorum. No vacancy in the Commission impairs the right of the remaining commissioners to exercise all the powers of the Commission.

The Commission has an official seal. Its votes and official acts must be entered of record and its proceedings are public upon the request of any interested party, except where they contain secret information affecting the national defense. All its reports and investigations must be entered of record and copies thereof must be furnished interested parties. It is directed to provide for the publication of its reports and decisions "in such form and manner as may be best adapted for public information and use," and to make an annual report to Congress. It has broad authority to make such expenditures as may be necessary for the execution of its functions and as may be appropriated for by Congress.

For the fiscal year beginning July 1, 1937, Congress appropriated a total of $1,629,000 for the anticipated annual expenditures of the Commission (exclusive of sums appropriated for special investigations).

The Commission may appoint and prescribe the duties of its principal employees without regard to the civil service laws or the Classification Act of 1923 (which classifies government employees and fixes the range of salary for each classification). These employees include a secretary, a director for each of its three divisions, a chief engineer and three assistants, a general counsel and three assistants, and temporary counsel designated for the performance of special services. Likewise, each commissioner may appoint and prescribe the duties of a secretary. The Act fixes the maximum salaries that may be paid to each of these employees.

The Commission has authority to appoint such other officers, engineers, inspectors, attorneys, examiners and other employees as are necessary in the execution of its functions, but only subject to the civil service laws and the Classification Act. It has a total of 526 employees (exclusive of those employed in special investigations) of which 390 are in the Washington office and 136 in the field.

The Commission has distributed its employees among five subordinate bureaus, the Secretary's Office, the Examining Department, the Law Department, the Engineering Department, and the Accounting, Statistical and Tariff Department, each of them subdivided into sections or other lesser units. Limitations of space will not permit a description of the duties of these bureaus, and the reader is referred to the Commission's annual reports for information with respect to them. Two of them, however, both in the Engineering Department, should be noticed in any general description of the Commission's organization. One is the International Section, which carries on a work of coordination of international and interdepartment relations in connection with communications services. The other is the Field Section, which has important functions of inspection, observation and investigation, with 20 field district headquarters offices scattered over the United States and one in Hawaii, and two independent monitoring stations. The Commission also maintains a field office of accountants in New York City.

The Act authorizes the Commission to divide its members into not more than three divisions, each with its own chairman, and to distribute its work among these divisions. Accordingly, on July 17, 1934, immediately after its organization, it established the Broadcast Division, the Telegraph Division and the Telephone Division, each with three members, consisting of the Chairman of the Commission and two other members, one of whom is chairman of the division. The Broadcast Division was given "jurisdiction over all matters related to or connected with broadcasting." Since this article is not concerned with the work of the other two divisions, it is unnecessary to describe their jurisdiction. The whole Commission retains jurisdiction over all matters not specifically allocated to a division, as well as over matters involving a conflict or overlapping among the divisions.

The purpose of Congress in authorizing these divisions was well stated in a Senate Committee report as follows:

> "One reason for this statutory division is a desire to achieve effective regulation of the telephone and telegraph business. Experience has shown that commercial broadcasting takes the attention of all of the members of the Radio Commission. Railroads and other transportation take most of the

attention of the Interstate Commerce Commission. Your committee believes that unless the law provides a clear division of powers, broadcasting problems being so numerous, the Commission would give most of its attention to radio and neglect the problems of telephone and telegraph regulation. The study and regulation of the telephone and telegraph business must be a fulltime task if it is to be effective."

Under the Act each division has, with respect to the functions assigned to it, all the jurisdiction, powers and duties conferred by the Act on the Commission, subject only to a rehearing before the full Commission if applied for by a party to a particular proceeding. The divisions act by majority vote. The Commission's secretary and seal are the secretary and seal of each division. The threefold division of the Commission is reflected in its subordinate bureaus, which are, to a certain extent, subdivided in a manner corresponding to the divisions. This is particularly true of the Engineering Department and the Law Department. The Act also provides another method for delegation of the Commission's work, to an individual commissioner or a board of one or more of its employees, but since this method has virtually not been used it need not detain us.

With this preliminary survey of the Commission's organization, we shall proceed to a study of its powers, to return later to consider more particularly that part of its machinery that is devoted to the holding of hearings and the making of decisions. Consistently with the outline suggested at the outset, we shall attempt to observe a classification of those powers into legislative and judicial, but the reader must be warned in advance that it is not always possible to follow out the distinction, since at times the powers shade into each other and the distinction is not clearly maintained either in the Act or by the Commission. It will not be worth while to attempt to give separate notice to the Commission's executive functions, since they will become more or less obvious as we proceed.

IV. THE COMMISSION'S LEGISLATIVE POWERS — RULES AND REGULATIONS

We have already noticed the general provision in Title I. of the Act authorizing the Commission to make such rules and regulations, not inconsistent with the Act, as may be necessary in the execution of its functions. Title III. contains a section in which the Commission's powers to make regulations in the field of radiocommunication are enumerated at length, together with a general power to "make such regulations as it may deem necessary . . . to carry out the provisions of this Act." There are other provisions scattered throughout Title III. conferring regulation-making power over particular subjects.

The Commission may revoke or refuse to renew a radio license for violation of any of its regulations. It may refuse to grant an application because it fails to comply with any of its regulations or because the applicant has previously been guilty of a violation. Violation of a regulation is also a criminal offense subject to a fine of not more than $500 for each day during which it occurs.

Thus, the Commission's regulations have all the force and effect of statutes enacted by Congress, with one qualification—a regulation not authorized by the Act may be held invalid by the courts. It is sufficient to say, however, that no regulation adopted by the Commission has yet been held invalid, and, in view of the broad delegations of legislative power by Congress to the Commission, it is unlikely that this will often occur.

Space will not permit a detailed examination into either the Commission's powers or the manner in which it has exercised them. The regulations now

in effect are in printed form and cover the equivalent of some 200 pages or more. It is possible, however, to make a general classification of them with respect to subject-matter, and it will be profitable to give particular attention to the principal class.

One class of regulations has to do with practice and procedure, the filing of applications and the conduct of hearings. These are more properly considered in connection with the Commission's judicial functions and are treated under a later heading. Other classes, actual or potential, have to do with the eligibility of persons for licenses, economic considerations which enter into the granting or denial of applications for licenses and other authorizations, and the character of programs (including advertising) which may be broadcast. None of these need detain us at this juncture. The Commission has legislated very little on these matters, and the few regulations that it has adopted may more conveniently be taken up under later headings, in connection with its actions on applications.

The principal class, which occupies the bulk of its printed volume of regulations, has to do with the *technical* aspects of radiocommunication. Without some appreciation of this class, it is hopeless to attempt to understand the work of the Commission. Directly or indirectly, it has to do with the prevention of interference and the rendering of good and efficient radio service. It includes the classification of radio stations, the assignment of bands of frequencies to the various classes of stations, the determination of the "width" of "channels" used by the various classes of stations, restrictions with respect to maximum and minimum power and hours of operation, restrictions with respect to the location of stations, and requirements with respect to the kind of apparatus used and its technical operation. Under the Act, the only standard prescribed by Congress to guide in making regulations of this character is "public convenience, interest, or necessity."

A survey of these regulations must begin with certain elementary scientific facts about radio, and particularly the meaning of such terms as frequency or wave-length, channel, bands of frequencies, and the radio spectrum. Radio waves, like light waves, to which they are akin, travel at the rate of approximately 186,000 miles, or to use a more convenient measure, 300,000 kilometers, a second. They are distinguished from each other by their *frequency* or *wave-length*. Imagine a radio transmitter put into operation at a given instant, propelling a series of radio waves out into space in all directions, just as when a pebble is dropped in a pool of still water. At the end of the second, the foremost of the series will have reached a point 300,000 kilometers away in any given direction and it will be followed, over the entire distance, by a procession of similar waves. The sequence stretching between the transmitter and the vanguard of the procession may be described in either of two ways. One is to *measure* the waves from crest to crest in meters; this is the "wave-length." The other is to *count* the crests in this series sent out in the period of one second, each wave from crest to crest being called a cycle, and a thousand a kilocycle (abbreviated "kc."); this is the "frequency." The wave-length expressed in meters multiplied by the frequency expressed in kilocycles will always equal 300,000. Thus, a wave-length of 300 meters is the same as a frequency of 1,000 kc. A wave-length of 10 meters is the same as a frequency of 30,000 kc. The long waves correspond to the low frequencies and the short waves to the high frequencies. Since wave-length is a very clumsy fashion of distinguishing between radio waves, frequency has become the all but universal method.

Radio waves may be said to extend over a range beginning at the low frequency of 10 kc. (10,000 cycles a second, each with a wave-length of 30,000 meters) to some very high frequency, perhaps as high as 2,000,000 kc. or even 10,000,000 kc. This range may be referred to as the "radio spectrum." It must, however, be subdivided since most of the higher portion of this spectrum (above about 500,000 kc.) has not yet been harnessed to use, and the middle portion (roughly from about 30,000 kc. to 500,000 kc.), while being used experimentally to a considerable extent, is only just emerging from the laboratory. Parenthetically, it should be noted that experimental television is being carried on in the middle portion (generally, between 40,000 kc. and 100,000 kc.) and seems likely temporarily or eventually to be assigned to this part of the radio spectrum.

The Commission's present regulations (which may soon be considerably revised) define the radio spectrum as extending from 10 kc. to 500,000 kc. (without, however, precluding its authority over frequencies outside these limits), and subdivides the spectrum into six major bands as follows:

a. Low frequency: 10 to 100 kc.
b. Medium frequency: 100 to 550 kc.
c. Broadcast: 550 to 1500 kc.
d. Medium high frequency: 1500 to 6000 kc.
e. High frequency: 6000 to 30,000 kc.
f. Very high frequency: Above 30,000 kc.

For the practical purposes of this article, we may consider the radio spectrum as extending from 10 kc. to some point very much above 30,000 kc.

The first legislative task to be performed with reference to the radio spectrum is to subdivide it into bands, and to assign each band to a particular class of station or kind of radiocommunication. To a considerable extent this task has already been performed for the Commission by international agreements to which the United States is a party. Annexed to the International Telecommunications Convention of 1932 is a whole volume devoted to International Radio Regulations, which were signed by the United States and are binding upon it. This convention was preceded by the International Radiotelegraph Convention of 1927, which was similarly accompanied by a volume of radio regulations signed by the United States. The Communications Act virtually incorporates these international regulations into our law, and makes violation of them a criminal offense.

The International Radio Regulations subdivide the radio spectrum into bands of frequencies, and assign these bands to a variety of radio services. Certain bands are assigned to broadcasting; others are assigned to what are called "fixed" services, such as radiotelegraph and radiotelephone between fixed points; still others are assigned to "mobile" services, which includes communications to, from, or between ships at sea and airplanes. Some bands are assigned to two or more services jointly. There are also the various government services (principally the military), amateurs, and others which need not be enumerated.

Under the General Radio Regulations the band from 550 to 1500 kc. is allocated to broadcasting the world over. Europe and a few other regions are allowed to use the band from 160 to 265 kc., which is especially desirable for broadcasting in non-tropical latitudes because of the great range over which a good signal can be transmitted day and night. There are special dispensations for specified countries (particularly Russia) to use other bands. The Convention also permits what are known as regional agreements, calling for departures from the prescribed scheme where interference will not be caused to other parts of the

world. So far as North America is concerned, the matter may be summarized by stating that the band of frequencies available for broadcasting is 550 to 1500 kc., plus the use of 540 kc. in Canada and a limited use of the band from 1500 to 1600 kc. arranged by regional agreement, for purposes which are at least partly experimental. The reason that the United States does not have as extensive bands of frequencies for broadcasting as the European nations is that the delegations of the United States at international conferences have been largely dominated by our Government Departments, chiefly the Navy and the Army, which have successfully prevented use of any frequencies below 550 kc. for broadcasting. For the purposes of this article, we shall consider the broadcast band as extending from 550 kc. to 1500 kc.

This subject must not be left, however, without mention of certain other bands of frequencies assigned to broadcasting by the International Radio Regulations. Broadcasting has no share of the *medium* high frequency band (1500 to 6000 kc.) but in the *high* frequency band (6000 to 30,000 kc.) it has seven allotments (6000-6150 kc., 9500-9600 kc., 11,700-11,900kc., 15,100-15,350 kc., 17,750-17,800 kc., 21,450-21,550 kc., and 25,600-26,600 kc.). These frequencies are, in general and with exceptions, capable of communication and of causing interference over tremendous distances, to such an extent that only one station anywhere in the world may operate on a given frequency at any one time. They are used, or rather supposed to be used, for international broadcasting, of the sort with which the owners of short-wave radio sets are familiar.

The next International Telecommunications Conference is to be held at Cairo, Egypt, beginning February 1, 1938. It is already evident that a concerted attempt will be made to secure larger bands of frequencies throughout the spectrum for broadcasting in the rest of the world, and that this attempt will be strenuously resisted by the maritime interests, the aviation interests, the military and others. No forecast of the outcome is possible.

The second legislative task is to define radio "channels" and determine their "width." A radio transmission occupies more space in the ether than the exact frequency which the station is licensed to use; it must be protected up to certain limits on both sides of that frequency. This means that each station uses not merely a specified frequency, but a *band* of frequencies with the specified frequency in the center, i.e., a channel. For technical reasons which need not be recounted, the width of this channel varies with the type of radiocommunication being carried on. A radiotelegraph station requires a channel 2 kc. in width; a radiotelephone station a channel of 6 kc.; a broadcast station a channel of 10 kc., and a television station *a channel of about 6,000 kc.* The foregoing is by no means a complete picture, since other factors (including the vagaries of radio waves of different frequencies, the ground wave and the sky wave, limitations on the performance of radio receivers, instability of transmitters themselves and others) complicate the story, but it will serve for our present purposes.

A broadcast station assigned to a particular frequency, say 700 kc., must be protected from interference by other stations over a 10 kc. channel extending from 695 kc. to 705 kc. This is the channel width established by the Commission's regulations for broadcast stations in the United States. This means that in the broadcast band there are 96 channels, all stations being assigned to frequencies which are even multiples of 10, beginning with 550 kc., 560 kc., 570 kc., and so on up to 1500 kc. This channel width of 10 kc. is admittedly a compromise since it is wide enough, theoretically, to permit transmission and reception of musical notes up to only slightly above the highest note on the piano, whereas the average human ear can hear somewhat higher notes and overtones.

Europe has experimented with channel widths of less than 10 kc. for broadcasting with disastrous results by way of interference. A width of 10 kc. is the least that is consistent with any degree of fidelity of reproduction of sounds: a 15 kc. width would constitute a great improvement, particularly for the faithful rendering of music.

The third legislative task, with particular reference to broadcasting, is to classify channels as to number of stations permitted on each channel, restrictions on power used, and distance separations between stations on the same or adjacent channels. At this point, we must note that, by agreement with Canada, 6 of the 96 channels are allocated to exclusive use by Canada, leaving 90 which may be dealt with by the Commission. Some of the 90 are, by the same agreement, subject to *shared* use with Canada, but it would complicate this discussion unduly if we were to pause to consider these shared channels.

The Commission's regulations divide the 90 channels in the broadcast band into four major classes, as follows:

1. **CLEAR CHANNELS.** The Commission's regulations designate 40 of the 90 channels as clear channels. A clear channel is a channel on which only one station in the United States (and, in principle, in the entire continent of North America) operates at nighttime, such station to operate with substantial power. Two or more stations may operate on these channels in the daytime, if sufficiently separated, since the interference range of radio waves by day is much less than at night. The minimum power of clear channel stations, under the Commission's regulations, is 5 kilowatts (abbreviated "kw.") and the maximum is 50 kw. Clear channel stations operating with high power are, in a general way, the only method of assuring broadcast reception to rural and remote areas, that is, regions which are not within the immediate vicinity of a broadcast station. The moment two or more stations are permitted to operate on the same channel after sunset, each station severely limits the service rendered by the other, by interference.

2. **HIGH POWER REGIONAL CHANNELS.** The Commission's regulations designate 4 of the 90 channels as high power regional channels. Two or more stations may be licensed to operate simultaneously on these channels, with a power of not less than 5 kw. As the word "regional" suggests, these stations are designed to serve limited regions, each of them restricting the service areas of others on the same channel by interference, particularly at night.

3. **REGIONAL CHANNELS.** Of the 90 channels, 40 are designated as regional, with nighttime power ranging from 1 kilowatt down to 250 watts and with daytime power up to a maximum of 5 kw. On these channels several stations (from 3 to 6 or 7) are permitted to operate simultaneously at night, each of them being severely restricted by the others but still capable of rendering service over an area equivalent to a fairly large city and its immediate environs.

4. **LOCAL CHANNELS.** The remaining 6 channels are designated as local, with nighttime power not in excess of 100 watts and daytime power not in excess of 250 watts. A large number of such stations (about 50) are assigned to each such channel and, needless to say, each of them serves a comparatively small area, roughly corresponding to a smaller city or town.

All told, there are, at present writing, 704 broadcast stations authorized by the Commission, of which 100 are on clear channels, 9 on high power regional channels, 274 on regional channels, 317 on local channels, and 4 are called "special broadcast stations" in the band 1500-1600 kc. These totals are somewhat deceptive since in a number of instances two or more stations divide time

with each other, and there are quite a few stations which are required to close down at sunset or shortly thereafter. In the interest of brevity, we shall not attempt to describe the Commission's regulations as to the hours of operation of stations or its classification of stations with respect thereto.

The foregoing summary has not taken into account those cases in which the Commission has ignored its own regulations. There is, for example, one clear channel station which operates with 500 kw., or ten times the maximum permitted by its regulations. There are several regional stations which operate with 5 kw at night, whereas the prescribed maximum is 1 kw. There are several of the 40 clear channels on which two stations are permitted to operate simultaneously at night. Ordinarily these departures are covered by the word "experimental" written into the license, but for all practical purposes most of them are as regular as other licenses. The Commission has pending before it some sixteen applications of clear channel station licensees to increase their power to 500 kw. and a large number of applications of regional station licensees to increase their nighttime power to 5 kw. There is talk of an increase to 250 watts nighttime on local channels. Last fall a general hearing was held to determine whether changes should be made in its regulations so as to permit these increases but the issues debated at that hearing have not yet been decided.

Also, the summary has not taken into account a deplorable situation arising out of indiscriminate use of channels in the broadcast band by stations in Mexico and Cuba, causing ruinous interference. This is in large measure due to the fact that at the outset these nations made slower progress in establishing broadcast stations and in the meantime all the channels were occupied by stations in the United States and Canada. The problem is aggravated by the operation of several high power stations in Mexico, just across the Texas border, for the purpose of broadcasting to the population of this country and not to the Mexicans. Some of them were established by American citizens who had been deprived of broadcast licenses in the United States because of objectionable program service. These individuals are responsible for provisions in the Communications Act which forbid persons in this country to maintain a studio or other place or apparatus in this country from which programs are transmitted by wire or other means (including mechanical reproduction) to a broadcast station in another country, to be broadcast by that station, if that station has sufficient power or is so located geographically that its emissions may be received consistently in the United States, without first applying for and obtaining a permit from the Commission.

A North American Conference held in Mexico City in 1933 to consider allocation of channels among the North American nations and related problems broke up in disagreement. A preliminary meeting to discuss the problem again was held in Havana, in March of this year, to be followed by a formal conference of all the nations of North, South and Central America in the same city next November.

It will be noticed that so far nothing has been said with respect to distance-separations between stations. The Commission's regulations prescribe nothing in this respect, but its Engineering Department has devised standards and principles which are published from time to time and which to some extent serve the purpose of regulations. Under these standards, stations of given powers on the same channel should be separated by specified distances in miles by night and by day; a similar process is followed with respect to stations which are on adjacent channels separated by 10 kc. up to 40 kc. These standards are based on a large amount of experience, accumulated data and information. Frequent departures from them are permitted, however, due to possibilities (or claims)

of accomplishing equivalent results through various devices. The interested reader should consult the annual reports of the Commission and of its predecessor, the Federal Radio Commission, for the history, evolution and present nature of these standards.

The foregoing is only a bare introduction to the technical regulations of the Commission. There are elaborate and important requirements as to technical equipment and the operation thereof, designed to prevent interference by insuring that a station adheres closely to its assigned frequency and does not emit any superfluous electrical disturbances, and designed to insure good and efficient service to the extent permitted by the frequency and power assigned to the station. These must be passed over with bare mention.

Another subject which must be passed over rapidly is the Commission's regulation of radio operators. The Act requires that the actual operation of all transmitting apparatus in any radio station (with certain exceptions in the case of ships) must be carried on only by a person holding an operator's license. The Commission is given authority over the issuance of such licenses, having power to prescribe the qualifications of operators, to classify them, to fix the forms of such licenses, and to suspend any such license for a period up to two years for any of several causes enumerated in the Act.

With this framework of the Commission's legislation in mind, we are prepared to consider its judicial functions, that is, its actions in granting or denying applications having to do with radio stations.

V. THE COMMISSION'S JUDICIAL POWERS — THE LICENSE SYSTEM

The cornerstone of radio regulation in this country is the license system. Title III of the Communications Act, which deals particularly with radio, begins with the following declaration:

> "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."

It then provides that no person (other than the United States Government itself) shall operate any apparatus for radio transmission except under and in accordance with a license granted under the provisions of the Act. True, to require a license, the transmission must be across state or international boundaries, or must be such as to cause interference to transmission which has travelled across such boundaries but, for obvious reasons, these qualifications count for little or nothing with respect to the radio waves now in use. As one court has said, "radio communications are all interstate." Any person engaging in radiocommunication without a license, or not in accordance with his license, is subject to criminal prosecution in the federal courts and to punishment consisting of a fine of not more than $10,000 or imprisonment for not more than two years, or both. These penalties are, of course, a sufficient deterrent against unlicensed radio transmission in all but rare cases.

The necessary license can be obtained only from the Federal Communications Commission. The Commission is forbidden to grant a license until the applicant

> "shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

Every license granted by the Commission must contain a statement of certain conditions to which the license is subject, including the following:

> "The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein."

These, and related provisions in the Act, were intended to prevent the assertion or acquisition of any property right in the continued operation of a radio station. So far as such claims have been passed on by the courts, the intent seems to have been successfully carried out, and the right to a renewal of license is of a most fragile nature.

The maximum term for which a license may be granted is three years for a broadcasting station and five years for any other class of radio station. In actual practice, the Commission limits broadcast licenses to six months and other licenses to one year, although it is being constantly urged to issue licenses for longer periods and there appears to be no substantial reason against its doing so. A broadcast license must, therefore, be renewed every six months and the Commission's action with reference to granting renewal applications is "limited to and governed by the same considerations and practices which affect the granting of original applications."

The Act specifically authorizes the Commission to revoke licenses for any of the following causes: (1) false statements in the application or in statements filed in support of it; (2) conditions revealed by later statements of fact which would warrant the Commission in refusing to grant an original application; (3) failure to operate substantially as set forth in the license; and (4) violation of or failure to observe any of the restrictions and conditions of the Act, or of any regulation of the Commission authorized by the Act or by a treaty ratified by the United States. A definite procedure is provided, calling for notice stating the cause of revocation followed by hearing, before any revocation becomes effective. There is some doubt as to whether the Commission's power to *revoke* includes the power merely to *suspend* a license for a limited period. The Act being silent on this point, the Commission has taken the position that it does not have the lesser power and on several occasions has urged Congress to amend the Act accordingly.

The subject of revocation need not, however, detain us. The Commission has virtually never employed this procedure. Nor did its predecessor, the Federal Radio Commission. At an early date in the administration of the Radio Act of 1927, it became apparent that, with the short-term license period, action on renewal applications was a much more convenient and effective weapon for the discipline of licensees. In revocation cases the burden of alleging and proving specific misconduct is on the Commission. In renewal-of-license cases, the *applicant* has the burden (if the Commission chooses to place it on him) of proving his right to renewal, practically to the same extent as if he were an applicant for a new station, and the Commission is comparatively free, by conducting an *ex post facto* inquisition at the hearing, to develop some reason for denying the application either because of some failure on the part of the applicant to make a complete showing or because of some misconduct (including programs or advertising deemed to be objectionable) which is uncovered in the course of the hearing. In fairness to the Commission, it should be said that its procedure has increasingly provided notice of the detailed issues with which applicants will be faced at hearings of this sort, and the tendency has been in the direction of fair play. Yet no precautions will obviate the possibility of unfairness in view of the vague standard which Congress has given the Com-

mission to guide its decisions, coupled with the fact that the burden is on the applicant to prove that he has complied with that standard.

This standard is "public interest, convenience or necessity." The Act instructs the Commission to grant an application for license, or for renewal or modification of license, if public interest, convenience or necessity would be served thereby. If it is not satisfied that the standard would be served, then it must notify the applicant and give him an opportunity to be heard. After the hearing, it grants or denies the application according to its decision on the issue whether the test has been met.

The Commission assumes, probably correctly, that it may refuse to renew a license for any cause for which it might have revoked it, and, in addition, for failure on the part of the licensee to operate his station in accordance with "public interest, convenience or necessity" during one or more preceding license periods. The meaning of the standard "public interest, convenience or necessity" must be reserved for separate treatment under the next heading. The practice and procedure followed by the Commission in the exercise of its judicial functions will be treated under a further separate heading.

A very candid statement of the Commission's position is to be found in the following excerpt from a recent letter from the Commission to the Chairman of the House Committee on Interstate Commerce in response to the latter's request for the Commission's opinion on a bill providing a five-year license for broadcast stations:

> "At the present time the Commission has no authority to suspend licenses or impose penalties for violations of its rules. The only punitive action available is revocation, deletion through denial of a renewal of license or recourse to criminal proceeding. These measures have been found to be too severe in most instances of delinquency. The Commission, however, has been able to exercise a degree of control through consideration of application for renewal of license every six months. *There is thus constantly present a means of checking the technical operation and program service of stations.*" (Italics supplied.)

It may be noted that the Communications Act specifically provides the very sort of punitive action which the Commission seems to believe lacking, namely, small or moderate penalties for violations of its rules.

The license system is not peculiar to radio regulation. According to a calculation made by a committee of the American Bar Association there were, as of January 1, 1935, 149 instances in the federal statutes where a license, permit or equivalent authorization is made a prerequisite for carrying on a business or engaging in some activity, and in approximately 54 of these instances power is given to a federal administrative agency to revoke or suspend the authorization for specified causes. Some of the instances are exceedingly important, including the licensing of securities exchanges, of commodities exchanges, of commission brokers, and of the use of second class mail. The recent tendency to extend the license system to all or nearly all businesses is instanced by provisions which were in the National Industrial Recovery Act and the Agricultural Adjustment Act, and by bills which have been introduced to require the federal chartering of corporations engaged in interstate commerce. So far as I know, however, the Communications Act is the only statute under which proceedings on renewal-of-license applications (as distinguished from revocation proceedings) are employed to put licensees out of business.

The far-reaching change wrought by the license system in the relations between the individual and his Government is best understood by comparing

the situation of a person dependent on the business of broadcasting for his livelihood and of a person similarly dependent on some trade such as the grocery business. The latter is protected by both his State and Federal Constitutions in the right to engage in his trade and to remain in it, as well as in the use of his property required in the business. He need ask no one's permission to start a grocery or to keep it going. He cannot be subjected to loss of his property or his business except as the result of criminal or civil proceedings in court, in which his opponents have the burden of alleging and proving definite charges and he has the protection of many safeguards, including more or less definite rules of law and procedure, jury trial, and appeal to higher courts. With the broadcaster under the license system, nearly the entire procedure is thrown into reverse gear.

VI. PUBLIC INTEREST, CONVENIENCE OR NECESSITY

As we have noted, Congress has prescribed the standard of "public convenience, interest or necessity" as virtually the only limitation on the Commission in exercising its exceedingly broad legislative powers over radiocommunication, and has prescribed the same standard, with an unimportant interchange of words ("public interest, convenience or necessity"), as virtually the only limitation on the Commission in exercising its judicial powers in the same field. The occasion is now appropriate for a brief exploration into the meaning of the standard.

A volume might be written speculating on its meaning. The phrase, or its equivalent, has been common in State legislation regulating public utilities, and is found in other important federal statutes. Its history and evolution can be traced in the legislative history of the Communications Act, beginning with the national radio conferences held from 1922 to 1925 under the auspices of Mr. Hoover when Secretary of Commerce and with a series of bills introduced in 1923 and the following years. These resulted in the Radio Act of 1927, from which the language was taken over into the Communications Act. The many written decisions of the Federal Radio Commission and of the Federal Communications Commission, their annual reports, and their recorded actions and other public pronouncements, may be minutely scrutinized and analyzed for indications of the meaning of the phrase. The same process may be followed with reference to court decisions on appeals from the Commission's decisions. All this is obviously not practicable within the limitations of this article.

In general it may be said that, while there is considerable academic interest and some legal value in such a study, the total reward is not very great. After over ten years of administration of radio regulation under the standard of "public interest, convenience or necessity," since the enactment of the Radio Act of 1927, there is virtually nothing in the court decisions giving body or content to the standard and surprisingly little in the Commission's decisions.

The precise meaning of the standard is, after all, not very important in the exercise of the Commission's *legislative* powers. Here the important thing is that the Commission legislate only on the subjects over which it has been given power, and that the regulations themselves be clearly intelligible and reasonable. There has been no substantial ground for complaint on these scores. The Commission's Engineering Department has done remarkably good work in translating the statutory phrase into definite and reasonable regulations and engineering standards in the technical field.

It is in the exercise of the Commission's *judicial* functions that the vague and unpredictable nature of the standard becomes of serious import. With definite

regulations before them, applicants and licensees know, or can easily learn, their exact rights and duties, and may act accordingly. Where, however, in a hearing on an applicaton for a new station or for renewal of license of an existng station, they must demonstrate by evidence that granting the application will serve "public interest, convenience or necessity," and where, outside of the technical aspects of the case, they have virtually nothing definite to guide them, the situation is very different. They are faced with the hazard of what may prove to be an insufficient or defective showing, of which they are first apprised when the Commission makes its decision. They must continuously choose between either running that hazard or incurring great expense to cover all conceivable matters by evidence, including matters in which the Commission may take no interest or which it may take for granted. It is unfortunate that the Commission has not gone further to do in other fields what it has done in the technical field, namely, to translate "public interest, convenience or necessity" into definite regulations or, where that is not possible, into definite principles, policies, and rules announced in decisions or other formal pronouncements or to formulate or give recognition to factors by which the standard may be tested and applied.

The result of the situation which has existed has been the building up of a complicated, formless and unnecessarily expensive set of nebulous formulas as to the showing which should be made by evidence at a hearing on an application. These formulas have grown up haphazard, sometimes with no real reason other than that a particular practice was followed in a previous case and, starting as accidents, have become traditions. The Commission has not been consistent in the effect it has given to this or that kind of showing, or to this or that method of making proof.

A superficial attempt will be made in what follows to indicate some of these formulas. At the same time, in order to avoid unnecessary repetition, reference will also be made to certain positive requirements or prohibitions in the Communications Act which have to do with related subjects. Whatever be the true meaning of "public interest, convenience or necessity," it must, of course, be construed consistently with the provisions of the Act.

Opinions will differ as to the proper way in which to subdivide discussion of "public interest, convenience, or necessity," and related provisions in the Act. The following subdivision will, however, suit our present purposes.

ELIGIBILITY FOR LICENSE

The Act forbids the granting of a license to (1) any alien or representative of an alien, (2) any foreign government or representative thereof, (3) any corporation organized under the laws of any foreign government, (4) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, or (5) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens or of which more than one-fourth of the capital stock is owned of record or voted by aliens, etc. "if the Commission finds that the public interest will be served by the refusal or the revocation of such license."

The Commission is also directed to refuse a license or permit to any person (or to any person directly or indirectly controlled by such person) whose license

has been revoked by a court under Section 313 of the Act. Section 313 gives the courts power, in the case of an anti-trust prosecution against a radio licensee, to revoke the license. The Commission is also authorized to refuse a license or permit to any person (or to any person directly or indirectly controlled by such person) who has been finally adjudged guilty by a Federal court of violation of the anti-trust laws in radiocommunication or of using unfair methods of competition.

Other than the foregoing, the Commission is free to determine the eligibility of applicants under the standard of "public interest, convenience or necessity." An indication of legitimate fields of inquiry is given by the requirement in the Act that applications for construction permits or licenses should set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station.

The practice has grown up of taking the depositions of a large number of witnesses in the city or town where the proposed station is located, consisting of public officials, officers of civic, philanthropic, religious and educational institutions and organizations, and other prominent persons. These depositions are taken before the hearing, pursuant to certain formalities covered by the regulations, and must be on file with the Commission not later than 5 days before the hearing begins. Regularly the number of such depositions is 30 or more, and frequently it runs as high as 50 or 60, even in cases involving small 100-watt stations. Among the subjects covered by the testimony of these witnesses is the character, standing and past record of the applicant or, if the applicant is a corporation, of its principal officers and stockholders. Other subjects more properly fall under later subheadings, such as the need for the proposed station, and for the sort of program service it proposes, the talent and other program material available in the community, the support that may be expected from various organizations both with respect to furnishing programs, the advertising support, possible defects or insufficiencies in the service now being received in the community from existing stations with respect to programs, willingness to meet local needs, and sufficiency of signal, and so on. Frequently, parties who oppose the application also secure a large number of depositions to counteract such testimony, and not infrequently a town finds itself divided into two camps in a war of depositions. All such testimony could, of course, be reserved for the hearings, but the expense of bringing witnesses to Washington would be prohibitive in the ordinary case. In some cases, Senators, Congressmen and other public officials at Washington are produced at hearings as witnesses to the good character of the applicant or the need for the proposed station.

Much emphasis is regularly placed on the applicant's financial ability. While no definite yardstick has been laid down, the practice is to present definite evidence of the cost of construction of the proposed station and of its operation for the first year, and to show that the applicant has sufficient ready funds to cover these costs. There is a tendency to disapprove the raising of these funds by sale of stock, especially if done on a widespread scale, accompanied by solicitation or advertising. Apparently the Commission does not consider an applicant financially qualified if he must borrow money to construct the station, especially if the funds are to be raised after the issue of the permit. If the applicant is a corporation, a complete showing should be made as to its capital structure and corporate power, including the power to engage in broadcasting.

It is customary also to make as elaborate showing as possible as to staff

which will be employed to operate the station, particularly with respect to program service and technical operation, accompanied by charts showing the organization, the names and qualfications of the principal employees where known (these are often tentatively engaged in advance), the salaries that will be paid, and the like. Not infrequently an applicant will employ a man who has had experience in operating a station to superintend the preparation of his case before the Commission, for a period of several months before the hearing.

There remain two matters which relate to the subject of eligibility and which have taken on substantial importance in recent months. One has to do with the acquisition of stations by persons already having one or more existing stations; the other has to do with the acquisition of stations by newspaper publishers. There have been no definite decisions or other pronouncements by the Commission on either matter; no statement of principles which will serve as a guide to a prospective applicant is available. There is, nevertheless, an undercurrent of discussion, debate and criticism, partly in the halls of Congress, partly within the Commission and its staff, and partly elsewhere, which must be taken into account. Unconsciously, perhaps, and without direct expression, this undercurrent is now having an effect upon the issues raised at hearings and on the Commission's decisions, and seems likely to have an increasing effect, at least in the immediate future.

Neither matter can be discussed at length in this article. The question as to the propriety of ownership of two or more stations is heard most frequently with reference to the acquisition of stations by the principal national networks. A closely related question has to do with the relation between these networks and their affiliated stations, under contracts which, it is claimed, unduly restrict the independent operation of the affiliate stations and bring about an unnecessary duplication of network programs over the country, and a disregard of local needs in the community. The question has also been raised with respect to others than networks, for example, in cases where there is an attempt to acquire ownership of an unduly large share of the stations in a particular region or in a particular city, or too many stations in different cities. The Communications Act, it is argued, is based on the theory of preserving competition between radio stations and this theory is nullified if one individual or group acquires an excessive number of stations either nationally or locally. Incidentally, the Act specifically gives the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting," but so far no such regulations have been made.

Not unrelated to the matter of multiple ownership is the tendency manifested at times by the Commission to require the applicant to be a resident of the locality in which a proposed station is to be established, in other words, to frown on absentee ownership. The decisions in which this requirement has been given effect (mostly the smaller stations) are not easy to reconcile with decisions in which the acquisition of large holdings of broadcast stations in different cities has been permitted.

Of the 704 broadcast stations in operation or authorized in the United States, somewhat over 200 are owned or controlled by newspaper interests. Some of them were acquired in the infancy of broadcasting, but many of them were acquired during the past two years during which there has been a virtual stampede on the part of the press to secure stations. As might be expected, these stations present a variety of situations. One situation is the case where the only newspaper (or newspapers) and the only station (or stations) in a given community are owned by the same person or corporation. Another is

the case where a newspaper publisher owns a number of stations but in different cities. A third is where the newspaper-owned station is only one of a number of competing stations in the city, the others owned either by competing newspaper publishers or by other interests. No one rule, whether based on competition or on some other principle, will cover these different situations. There is a school of thought which believes that since both newspapers and broadcast stations are competing agencies of mass communication to the public as well as competitors for the advertiser's dollar, they should be kept in separate hands. Another school of thought answers by saying that newspaper publishers are unusually well equipped to render good broadcast service, and that they are largely responsible for preserving such independence and competition as now exist in broadcasting. In any event, some of the thoughts of those that oppose newspaper ownership have found expression in a minority opinion by one member of the Commission, in speeches and statements by prominent members of Congress, and in a bill introduced in Congress during the current session, which would require a complete divorce of newspaper and broadcast station ownership.

GEOGRAPHICAL DISTRIBUTION OF STATIONS. The Act requires that in considering applications "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."

Even if this direction had not been in the statute, it is believed that the same principle would have been followed sooner or later under the standard of public interest, convenience or necessity.

A fair distribution of stations over the country, as between the larger regions or areas, follows almost automatically from the observance of sound engineering principles. The Commission has, at present, no specific rules for achieving or maintaining a "fair distribution," but its decisions are frequently motivated by the reasoning that a particular community has either too little or too much broadcasting service. There is no yardstick, however, based on population, economic considerations or other factors, with the result that the Commission's decisions have been far from consistent, even with respect to a given city.

From 1928 to 1936, there was in force a statute called the Davis Amendment, by which Congress directed the Commission, as nearly as possible, to make and maintain an equal allocation of broadcast facilities between five zones into which the country was divided, and a fair and equitable allocation between the States within each zone, according to population. This statute gave rise to a set of Commission regulations setting up a complicated quota system for determining the shares of the zones and the states. For both technical and practical reasons the statute proved impossible of execution, was never rigidly observed, and was finally repealed.

TECHNICAL REQUIREMENTS. It is an obvious corollary of public interest, convenience or necessity that a maximum efficient use be made of the limited number of radio channels. Interference should be reduced to a minimum, and licensees should be required to choose locations, to install apparatus and to operate their stations in such a way as to provide the service over the largest area, with the utmost of clarity and fidelity of reproduction, that is practicable within the limitations imposed by their licenses.

Such matters are largely covered by the Commission's regulations and the technical standards recommended by its Engineering Department. A showing of actual or intended compliance with these regulations and standards (or of justification for not doing so) is an exceedingly important part of the case of an

applicant for a new station, or for modification of the license of an existing station in any substantial respect. It is the usual practice for such an applicant to engage a recognized consulting radio engineer well in advance of the hearing, to prepare this portion of the case. The preparation frequently involves extensive tests, measurements and observations, either in the vicinity of the proposed station or at points where there may be claims of interference with existing stations. These are reduced to elaborate exhibits, fortified with calculations based on United States census reports and maps as to the population that will be benefited by new or improved service or injured by interference. Questions of international interference (e.g., to or from stations in Canada, Mexico and Cuba) must be taken into account.

It is customary to show that arrangements have been made for the transmitter site and for studio quarters, or, at least, that they are available with reasonable certainty. Frequently an option is secured on the transmitter site and a tentative lease or equivalent arrangement with respect to studios. Photographs of the site and of the building which is to house the studios are often introduced and of the transmitter building, the antenna towers and the interior of the studios where they are already in existence. The equipment to be installed is described in detail, and its estimated cost is carefully itemized, as is also the estimated monthly cost of operation.

ECONOMIC CONSIDERATIONS. The Act is silent on the economic factors, if any, which may be taken into account by the Commission in acting on applications having to do with broadcast stations. This is in marked contrast with the portion of the Act having to do with the Commission's common carrier jurisdiction over public utilities engaged in wire or radio communication. While hesitant to do so at the start, the Commission is, to an increasing extent, reading economic factors into the standard of public interest, convenience, or necessity, and, while there is still considerable doubt as to what weight it will give some of these factors in a particular case, they cannot be ignored.

These factors group themselves into two sets which overlap somewhat. The first set has to do with whether the proposed station will have sufficient means of support, i.e., adequate revenue from the sale of time, principally to advertisers. The second set has to do with possible adverse effects of the new station on the revenue of existing stations. The same questions are present, of course, when, instead of a new station, an increase of power or other improvement in an existing station's assignment is involved; or where an existing station in City A desires to move to City B. A number of instances of the latter sort have occurred, with the Commission's approval, where a station has moved from a smaller community, leaving it without a station, to a larger community already having several stations, for the sake principally of the greater advertising revenue.

The temptation is great at this juncture to digress into a discussion of the tremendous effect which the economic basis for broadcasting in this country has had on the allocation of assignments to stations, their location, and their service. The inevitable tendency, unless controlled by the Government, leads to the concentration of stations in large cities and thickly inhabited centers, at the expense of smaller communities and rural or sparsely settled areas. The chief executive of one of the large broadcast stations stated at a recent hearing:

> "The principal danger in our system is not that which you most often hear charged against it, namely, excessive or undesirable advertising. Such missteps as may have been made in this direction were, I am convinced, merely

the growing pains of a young industry, accentuated by the depression. The real danger in the economics of broadcasting is that the interest of the advertiser in reaching large masses of listeners, and the profit that is to be made in accommodating him, will result in laying down too many tracks of good reception to thickly inhabited centres and too few, or none at all, to sparsely settled areas, which are not such attractive markets . . ."

To demonstrate that there is sufficient economic support for a proposed station, resort has been had to a variety of devices by applicants and their attorneys. One device very much in vogue at present is to secure written assurances from business houses in the community that, if the application is granted, they will expend stated sums for advertising over the new station, on the basis of a rate card which the applicant has prepared and proposes to adhere to. Sometimes these assurances take the form of binding contracts; sometimes they are merely expressions of intention without binding legal force. The endeavor is usually to get such assurances to a total sum equal to, or greater than, the estimated cost of operating the station during the first year.

In addition, a heterogeneous mass of other data and information is customarily introduced into the record in the form of elaborate exhibits, or through the mouths of witnesses, usually taken from Government publications, State or Federal, or compiled by civic organizations such as chambers of commerce. These include statistics on wholesale establishments, retail establishments, service establishments, manufacturing industries, agricultural production, amusements, hotels, radio receiving sets, revenue paid for taxes, and what not, all designed to show the wealth and economic importance of the community. So far no one has found a way to prove how much money is spent for advertising through *all* media in a given locality (at least in the larger centres), let alone how much money is available or open to enticement for that purpose.

That these statistics have some effect is obvious from a reading of examiners' reports and Commission's decisions. Yet the query naturally suggests itself whether all the expense of time and money which this involves for the applicant, his opponents and the Government, could not be obviated by the formulation of principles based directly on population served, and a calculation of the number of competing broadcasting services of various sorts which can be supported by a given population.

The converse proposition, the economic effect of granting an application on existing stations in the same locality, need not be analyzed, since the nature of the usual proof may be readily deduced from what has already been stated. The Commission has not been consistent in its rulings as to whether the licensees of such other stations are entitled to notice or to intervene in the hearing; neither has the Court of Appeals in reviewing the Commission's decisions. So far, a newspaper publisher, not having a station, has not been recognized as having the right to intervene and oppose an application to establish a station in his community. The issue of adverse economic interest on the part of existing stations threatens to take a new and more vigorous turn in the near future, as applications for substantial increases of power on the part of a number of clear channel and regional stations come on for hearing and decision. The indications are that some of these applications will be strenuously opposed by the licensees of certain smaller stations which, if the power increases are granted, might find their restricted service areas within the orbits of good service rendered by the higher-powered stations, and the Commission will have to balance the possible economic injury to these smaller stations against the large rural and sparsely settled areas which will receive new or improved service from the increased power.

There is one phase of economics which does not enter into any interpretation of public interest, convenience or necessity as applied to broadcasting. That is rate regulation. The Communications Act confers no power upon the Commission to regulate the rates of broadcast stations, and the intent of Congress was that it should not have such power. In some of the early drafts of proposed statutes to regulate communications, broadcast stations were included within the definition of common carriers, and from time to time bills have been introduced to give the Commission this power of rate-regulation. So far such proposals have all been rejected. Indications are not wanting, however, that eventually there may be legislation of this sort.

The task that such legislation will impose is not enviable. It seems obvious that rate regulation cannot be predicated on valuation of physical assets without fantastic results and without making advertising by radio so cheap that all other media will be unattractive. On the other hand, the "circulation" (whether in terms of population or area covered) of broadcast stations varies between wide extremes and cannot easily be related to any one or more definitely ascertainable factors. Power is a factor but its benefits may be largely nullified by undesirable frequency, poor conductivity of the soil in the area in which the station is located and interference from other stations. A 100 watt station in parts of Texas and the Dakotas may have a larger daytime coverage than a 50 kw. station in New England. Then, too, there is the very intangible element of "popularity" depending on the public fancy and the station's program service.

PROGRAM SERVICE. The Communications Act contains several provisions which are related directly or indirectly to what may be broadcast. These provisions will be rapidly surveyed in the order in which they appear in the Act, before passing to a study of the Commission's activities in this field.

In their treatment of candidates for public office, broadcasters are under a sort of public utility obligation to treat competing candidates impartially. A broadcaster is under no obligation to allow the use of his station by any candidate. If, however, he permits a person who is a legally qualified candidate for any public office to use his station, he must afford equal opportunities to all other such candidates for that office in the use of his station. The Commission is directed to make rules and regulations to carry this provision into effect, but has not done so since none has proved necessary. Broadcasters generally have scrupulously adhered to the requirements of the statute. Some situations have raised interesting questions as to the proper interpretation of the statute, as in the case where the party of a candidate for president is not recognized in the State where a station is located. A really difficult problem is presented by the proviso "that such licensee shall have no power of censorship over the material broadcast under the provisions of this section." The Supreme Court of Nebraska has held that, notwithstanding this provision against censorship, the broadcaster is liable for damages to a person who may be defamed in the course of a speech by a candidate broadcast under the section! If this decision is followed elsewhere, it subjects the broadcaster to a perplexing dilemma from which he should be relieved (from which he has been relieved by statute in a few states).

The Act forbids the broadcasting of any obscene, indecent, or profane language. It also forbids the broadcasting of any advertisement of, or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.

All matter broadcast which is directly or indirectly paid for must, at the

time it is broadcast, be announced as paid for or furnished, as the case may be, by the person paying for it. No broadcast station may rebroadcast the program or any part thereof of another broadcast station without the express authority of the originating station. There are also provisions in the Act having to do with distress signals, and unauthorized publication of communications which need not be summarized.

This brings us to a consideration of the Commission's power to legislate or adjudicate on the program service of broadcast stations under the standard of public interest, convenience or necessity. There is no more interesting or elusive problem raised by the Act than this.

We may begin with a prohibition contained in the Act which, because of its importance, will be quoted *verbatim*.

> "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

Chiefly, if not entirely, as a result of this prohibition against censorship, the Commission has not *legislated* on the subject of the program service of broadcast stations. Save for exceptions which may readily be distinguished, its regulations contain nothing of this sort. The exceptions have to do with such matters as the required keeping of program logs (specifically authorized by the Act), periodical announcements of the call letters and location of the station, and announcements to be made in connection with broadcasting of phonograph records, electrical transcriptions and other mechanical reproductions and rebroadcasts. The Commission's self-restraint has extended to advertising as well as programs; its regulations contain nothing by way of limitation on the amount or character of advertising. It and its predecessor commission have repeatedly held that because of the statutory prohibition against censorship, it does not have the power to make any such regulations.

Paradoxically, the Commission has taken the position that it may take such matters into account in the exercise of its *judicial* powers, that is, in granting or denying applications under the standard of public interest, convenience or necessity. When it is remembered that the same phrase governs both its legislative and its judicial powers, its position is difficult to justify. From the point of view of the applicant (and of the public, as well), it would seem preferable that, if the Commission is to exercise such control, it do so by regulations which would at least afford a measure of certainty as to the rules with which the applicant is expected to comply.

The legislative history of the prohibition against censorship seems to show that it was enacted by Congress with the distinct understanding that the Act gave the Commission no authority to censor *programs* in any way, either by regulations, or by Government scrutiny prior to release, or by *ex post facto* judgment; and that the phrase "public interest, convenience or necessity" did not carry with it any such power of censorship. In my opinion, this statement cannot be made with the same degree of confidence with regard to the Commission's power to make regulations with regard to the permissible amount or character of *advertising;* it may be that it has such power (although it denies that it has), but the question need not be debated here. In any event, the Commission's position that it may regulate *both* program service and advertising through the *ex post facto* process of decisions on applications has been upheld by

the United States Court of Appeals for the District of Columbia, but the question has not yet been passed on by the Supreme Court of the United States.

The situations in which the question usually arises are roughly of two sorts: (1) on applications for the establishment of new stations, and (2) on applications for renewal of license or related situations where a loss or impairment of the licensee's privilege may be imposed for failure to meet the test of public interest, convenience or necessity in the program service of his station. An applicant for increased power or some other improvement in assignment may be unsuccessful because of failure to meet the test. Or, deficiency in the service rendered by an existing station may be cited as a reason for granting an application for a new station which will cause either economic injury through competition or physical injury through interference.

The showing that is customarily made in support of an application for a new station includes elaborate testimony and exhibits in which are set forth the program service which the applicant intends to render. This includes sample programs by quarter hours covering a given period (usually a week), an analysis of those programs into various classifications (entertainment, news, religion, education, agriculture, civic, etc.), showing of talent and other program service that is available in the community and arrangements made for the use of such talent, the licensee's plans with respect to use of chain programs (sometimes an advantage and sometimes a handicap in almost identical situations), lists of educational, civic and religious organizations in the community which would use the station and testimony of representatives of those organizations that they would make such use, and that the station is needed, proposed standards of advertising admittance, etc. If there are existing stations in the same community, the showing may, and frequently does include evidence as to defects and insufficiencies in their program service, sometimes supported by actual phonograph recordings or stenographic transcripts of their programs, accompanied by analyses. If the applicant is a newspaper publisher, his opponents may endeavor to show that his standards of advertising admittance have not been of the best, or that his editorials have been intemperate. The foregoing is by no means a complete description of the issues which may be faced by the applicant for a new station.

The practice of subjecting a new applicant to a rigorous scrutiny at a hearing does have its advantages from the point of view of the public, particularly in the community or region where the station is to be located, and of impressing the applicant with the importance of the trust that is being reposed in him, even though the methods now in use are crude and involve a great waste of time and money. The chief dangers are, of course, that form will be taken for substance or that the applicant will be favorably or unfavorably treated depending on unimportant or irrelevant considerations (including his views on political, social and economic questions). It would be interesting and instructive, furthermore, if the elaborate program plans and positive assurances which have been so glibly brought forth at hearings during the past few years were compared with the later performance of the applicants after they became licensees.

There is cause for more serious reflection in the exercise of this same power over applications for renewal of license when the object or the possible outcome is discipline of the licensee through loss of his license or an impairment of his privileges. This subject cannot be even superficially summarized in an article such as this. A painstaking search of the Commission's decisions, reports and pronouncements will develop a multitude of minutiæ as to what will

be viewed unfavorably, but unfortunately the rulings are far from uniform or consistent.

From time to time since 1927 there have been indications that fortune telling, false, deceptive, or exaggerated advertising, advertising of proprietary remedies, "programs which contain matter which would be commonly regarded as offensive to persons of recognized types of political, social, and religious belief," liquor advertising, programs not "meeting a standard of refinement fitting our day and generation," use of stations as "mere personal organs," repeated defamation of public officials, excessive use of chain programs, excessive use of phonograph records, excessive sales talk, piracy of programs from another station (e.g., on play-by-play accounts of a baseball game), and a variety of other kinds of broadcasts might fall under the ban, sometimes lightly, sometimes heavily. Broadcasters have had to be particularly on the lookout for advertising and advertisers which have fallen or may fall afoul of the Federal Trade Commission, or the Bureau of Food and Drugs in the Department of Agriculture, or the Post Office Department. Moreover, it is not difficult to demonstrate from certain decisions of the Federal Radio Commission and of the reviewing courts that a broadcasting station can be put out of existence and its owner deprived of his means of livelihood for the oral dissemination of language which, if printed in a newspaper, is protected by the First Amendment to the Constitution against exactly the same sort of repression.

We have noted the provision in the Act requiring the giving of equal opportunities for use of the station to candidates for public office. The Act makes no further requirement of this sort with respect to other persons or with respect to matters of public interest, although from time to time bills have been introduced in Congress to this end. Yet the tendency on the part of broadcasters themselves has been voluntarily to comply with a high standard of fairness and neutrality on political, social, economic, religious and other issues, and to attempt to accord equal opportunities for expression of each of the two or more points of view on such issues. Lapses from this standard frequently result in vehement protests lodged with the Commission, or published in the press, and on occasions have been cited against applicants at hearing. It seems not unlikely that this principle of fairness and neutrality on issues of public interest will be read into the standard of public interest, convenience or necessity. Likewise, there is evidence of recognition of an implied obligation on the part of broadcasters to devote a certain portion of their hours to education, religion, matters of civic importance and the like. These implied obligations are, as yet, of the most nebulous character.

Two conceptions of the proper function of a broadcast station are possible. Under one conception, the broadcast station would, like a newspaper, have an editorial policy and might, if it chose, be the medium for expression of a violent partisanship. Under the other conception, the station, while not a public utility in a technical sense, would, on the whole, pursue a public utility policy toward all substantial groups and points of view in the community it serves. Without compulsion and by a gradual policy of evolution, broadcasters (including newspaper publishers owning stations) themselves have chosen the latter and their choice, sooner or later, seems destined to be reflected in the legal interpretation of the standard.

SALE OF BROADCAST STATIONS. Because of the importance of this subject, the pertinent provision in the Act is quoted in full:

"The station license required hereby, the frequencies authorized to be used by the license, and the rights therein granted shall not be transferred,

assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

Among the conditions that must be expressly stated in any license granted by the Commission is one that

"neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act."

The section having to do with construction permits contains the following:

"The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission."

These provisions, or their equivalent, have been law for over ten years, having been originally in the Radio Act of 1927 and, with certain revisions, having been carried over into the Communications Act. Yet, today it is impossible to know or to ascertain in advance on what basis the sale of a broadcast station may be consummated in order to obtain the approval of the Commission, and there are conflicting schools of thought within the Commission itself.

There are really two issues involved which should be kept entirely distinct. One of them presents no difficulty in itself. The legislative history of the above-quoted provisions shows that the intent of Congress was to require the purchaser of a station to be treated as a new applicant and to be subjected to the same test as to his eligibility to become a licensee. It would seem that, in this connection, the words "public interest" have the same meaning as "public interest, convenience or necessity."

The trouble has arisen over the second issue which, simply stated, has to do with the *price* for which the licensee may sell the station. To avoid unnecessary complications, the several methods by which the sale may be effected (direct assignment of license accompanied by a transfer of the physical assets or sale of a controlling interest in the stock of a licensee corporation) will be treated as involving the same question, and separate consideration will not be given to the matter of leasing a station.

On the one hand, it is contended that the Commission has no power to pass on the price which is paid or received for a station or that, if it has such power, it may safely approve a price based on a fair capitalization of annual earnings (e.g., six to ten times earnings). The latter theory was followed by the Commission in a decision rendered in August, 1936, when it approved a sale of a large clear channel station in Los Angeles to a network company for the largest price on record, $1,250,000. The Chairman of the Commission, in testifying later before a Senate Committee, seemed to agree with the view that price was of no concern to the Commission.

Other members of the Commission, however, have recently expressed the view that the matter of price is of great concern, and that under the law the Commission must disapprove any price in excess of a certain standard bearing some relation to the value of the physical assets constituting the station. As to what that relation should be, there is no evidence of agreement. One member of the Commission has inclined to the belief that the price should not exceed the value of the physical assets. Others seem to favor a basis somewhere between that value and the value based on capitalization of earnings.

Such points of view are usually based on provisions in the Act quoted under a previous heading, which negative any ownership of a channel in a

licensee and stipulate that no license shall be construed to create any right beyond the terms, conditions and period of the license. It is said that when the price is substantially larger than the value of the physical assets, then there is an attempted sale of the "channel," a "trafficking in wave-lengths;" that since the license is only for a brief period and there is no assurance of renewal, there is no justification for capitalization on earnings such as would be perfectly proper in fixing the value of any other business; and that no allowance can be made for "good will" or "going value" since both are directly dependent on use of the channel and future renewals of license.

This is not the proper place to debate the question as to the correct interpretation of the law. In any event, the matter has received considerable attention from members of Congress during the current session. At present there is no ascertainable principle or standard to guide those who wish to sell or to buy stations. The reader will readily appreciate the unfortunate effects of the uncertainty, with its bearing on estate and inheritance taxes and on the value of stock in corporations which hold licenses, in a business so important to its owners and to the public as is broadcasting.

VII. THE COMMISSION'S PRACTICE AND PROCEDURE—APPLICATIONS AND HEARINGS

As is already apparent, what we have called the judicial powers of the Commission are exercised almost entirely (so far as broadcasting stations are concerned) in connection with its decisions granting or denying various sorts of applications. These applications fall within five principal classes: (1) application for a construction permit; (2) application for a license; (3) application for renewal of license; (4) application for modification of license, and (5) application for the Commission's consent to an assignment of license or permit, or to the transfer of control of a corporation holding a license or permit. There are various sorts of special, experimental and temporary authorizations, authorizations connected with services which are auxiliary to broadcasting (for testing and for relay or pick-up purposes), applications involving permits to transmit programs across international boundaries, and others which need not occupy our attention separately.

The first step toward obtaining a license to operate a broadcast station (or, with certain exceptions, any other kind of radio station) is to apply to the Commission for a construction permit which, in effect, is a preliminary license covering construction of the proposed station. The application is made on a printed form furnished by the Commission, setting forth such facts as the Commission prescribes as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the proposed station, together with considerable detail regarding the nature, purpose and technical equipment of the station. It must be sworn to.

This application is first routed through the Secretary's office, the Engineering Department and the Law Department of the Commission. If the application is defective on its face, or is obviously in conflict with the requirements of the Act, or of the Commission's regulations, the normal practice is to return it without further ado, although there have been frequent departures from this practice.

The application is then reported back to the proper division of the Commission, in this case the Broadcast Division, for initial action. Under the Act, if the Broadcast Division finds that "public interest, convenience or necessity" will be served by granting the application, then the application may be

granted immediately. If this is done, the Commission's regulations give other parties who may be affected a 30-day period in which to file protests and force the application to hearing. Only in rare instances, however, is an application for a new broadcast station or an application involving any substantial change in the status of an existing broadcast station granted without hearing. Because of the crowded condition of the 90 channels used by broadcast stations and the fact that someone else is almost certain to be adversely affected, because also of convincing considerations of public policy, such applications are usually subjected to hearing. Thus, the first action of the Broadcast Division is to designate the application for hearing.

This hearing is usually before an examiner who makes a report and recommendation to the Broadcast Division, whereupon the application comes before the Division for the second time and is either granted, or granted in part and denied in part, or denied. At this stage, subject to the right of rehearing and the right to appeal to the courts, the action becomes final.

Let us assume that the application for a construction permit is granted. The permit specifies the dates before which construction must be begun and completed, but these dates are subject to extension upon application. Upon completion of the station and

> "upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstances arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station."

To make the showing required by the foregoing, and to obtain the license, an application for license is filed with the Commission. Normally, such an application is granted by the Broadcast Division without hearing and as a routine matter, provided none of the contingencies has arisen mentioned in the above-quoted excerpt from the statute. The construction permit itself carries with it authority to engage in operation of the station to a limited extent after construction is completed for the purpose of "program tests" pending action on the application for license.

Applications for renewal of license may not, under the Act, be granted more than 30 days prior to the expiration of the existing license. Under the Commission's regulations, the renewal application must be filed at least 60 days prior to the expiration date. Normally, renewal applications are granted as a matter of course, without hearing. When, however, the Broadcast Division has reason to believe that there is cause for disciplining a licensee, whether for violation of some provision in the Act or in the Commission's regulations, or for some failure to operate his station in accordance with the standard of "public interest, convenience, or necessity," it designates the renewal application for hearing and issues a temporary license to cover the interim pending the hearing and decision. The same procedure is followed where someone else files an application the granting of which would make the continued operation of the existing station impossible, e.g., an application for a new station on the same frequency in the same city.

Applications for modification of license are another very important group which are handled practically in the same manner as applications for construction permits. In fact, it is sometimes necessary to couple them with applications for construction permits, in cases where new transmitting equipment must be

installed. In some instances, applications for modification of license are for minor changes in the station or its equipment, or in order to install improvements required by the Commission's regulations; such applications are usually treated as routine matters and granted without hearing. Others are for important changes in the status of the station, such as increased power, a different frequency, different hours of operation, or a substantially different location (e.g., a different city). Such applications are, at present, rarely granted without hearing.

There remains a fifth class of application, applications for the Commission's consent to assignment of license or construction permit, or to transfer of control of any corporation holding a license or construction permit. In the past many, in fact most, such applications have been granted without hearing but, because of a changed point of view toward them which has recently developed, they are now more frequently subjected to hearing than not. In such hearings, the transfer and the transferee are normally the only parties, other than the Commission itself.

Of considerable importance are the various methods of holding hearings. The Act provides that "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." A hearing on a particular matter, for example on an application for a construction permit for a broadcast station, may occur in any one of three ways in the Commission, depending on the will of the Commission. It may take place before the full Commission itself; this occurs rarely and only in cases deemed to be of unusual importance. Or it may take place directly before the division which has jurisdiction over that class of proceeding, which, in the case assumed, would be the Broadcast Division; this occurs infrequently, likewise in cases deemed to be of unusual importance. The normal method is to hold the hearing before an employe of the Commission called an examiner who, under the Act, "may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Commission." This is also true of the division directors, but they have not been used for this purpose.

Examiners may not be authorized to hold hearings with respect to a matter involving a change of policy by the Commission, the revocation of a station license, new devices or developments in radio, or a new kind of use of frequencies. In fact, however, they are regularly hearing some matters which would seem to come within these categories.

Space will not permit detailed discussion of the practice and procedure followed at hearings. The Act contains lengthy provisions dealing with the Commission's power to compel the attendance and testimony of witnesses and the production of books and documents relating to any matter under investigation; with the taking of depositions; with protection of witnesses against self-incrimination, and with the punishment of recalcitrant witnesses. The Commission has adopted extensive regulations governing its practice and procedure, contained in printed form; these should be consulted by the interested reader. Nevertheless, a few words dealing with the principal features of the hearing procedure will not be out of place, with particular reference to hearings before examiners.

Hearings are conducted very much after the pattern of trials before a court without a jury. Interested parties may, if they have complied with the Commission's regulations, appear and be heard in person or by attorney. The Commission requires that an attorney be first formally admitted to practice before

the Commission, except that an attorney from outside the District of Columbia may be admitted for a particular case. Witnesses are heard and cross-examined and documentary evidence is introduced very much as in court.

Prior to the hearing, the Commission notifies other parties likely to be affected by a granting of the application and makes liberal provision for all interested parties to intervene and participate. The parties most likely to be affected are those who have existing stations to which interference might be caused, those having pending applications which directly or indirectly conflict with the application being heard, and those who might be affected economically, such as the licensees of existing stations serving the same community. The Commission has not been entirely consistent in its recognition of economic interest, but for present purposes such interest may be assumed to be sufficient ground for participation in the hearing. Representatives of the Commission's Law and Engineering Departments also participate, and the engineer usually testifies and is available for cross-examination by the parties.

Some time after the conclusion of the hearing the examiner makes a written report to the proper division of the Commission, reciting the facts and conclusions which in his judgment are justified by the evidence, accompanied by a recommendation as to the decision to be made on the application. The law and engineering departments make confidential reports and recommendations. The parties to the hearing are given a specified period of time in which to file exceptions, that is, to point out alleged errors and omissions in the examiner's report. The Act requires that "in all cases heard by an examiner, the Commission shall hear oral arguments on request of either party." These oral arguments are usually before the proper division, and are ordinarily made by the attorneys. No new evidence is heard. The division then makes a decision granting or denying the application, effective at some specified date in the future. Thereafter it has its law department prepare a statement of grounds for its decision based on the evidence. This statement is mimeographed and made available to the public. These decisions are published from time to time in bound volumes.

Elaborate provision is made for rehearing. A decision of the Broadcast Division, for example, is subject to rehearing before the full Commission, but ordinarily the petition for rehearing is heard and determined on the petition and opposing documents filed with the Commission and is not followed by further hearing of evidence or oral argument. Sometimes, however, a new or further hearing is ordered, either by remanding the case to the examiner, or before the division, or before the Commission itself. When the decision has become final it is subject to a restricted right of review in the courts on appeal. This will be covered under the next heading.

This superficial review of the Commission's procedure has had to do with what we have called its *judicial* functions. There are also hearings incidental to what we have called its *executive* functions and its *legislative* functions. As we have already seen, its powers in these respects are exceedingly broad. It has

> "full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing . . . concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act."

It may, for example, and frequently does hold general hearings or conferences with reference to proposed new regulations or revision of existing regulations, or with reference to the position to be taken by the United States at international

communications conferences. The procedure at such hearings or conferences is usually informal, not covered by specific regulations, and not resulting in formal written decisions or open to appeal to the courts.

Space does not permit a description of the Commission method of handling the many complaints it receives. These are handled by the law department which ordinarily follows a routine of correspondence, first with the complaining party and, if justified, then with the broadcaster, in the course of which most complaints are informally disposed of. Comparatively few of them (at present 21) reach the stage of serious consideration by the Commission.

VIII. APPEALS FROM THE COMMISSION'S DECISIONS

Probably no commission in Washington is subject to so many kinds of review by the courts as the Federal Communications Commission. This is due chiefly to the several kinds of jurisdiction which have been united in this one agency. So far as court review of the Commission's actions on radio applications is concerned, however, the method is fairly simple—with three major and some minor exceptions. The major exceptions have to do with decisions (a) on applications for the Commission's consent to an assignment of a license or permit or to the transfer of control of a corporation holding such license or permit, (b) on applications for a permit to transmit programs to a foreign station which may be consistently received in the United States, and (c) on revocation proceedings. These exceptions will be discussed later on.

With respect to the remaining four classes of applications (for construction permit, for license, for renewal of license and for modification of license), an appeal may be taken to the United States Court of Appeals for the District of Columbia by (a) an applicant whose application has been refused by the Commission, or (b) by any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application. Persons who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the Commission's decisions are given the right to intervene and participate in the proceedings. In proper cases a stay order may be obtained from the court, which operates to suspend the effect of the Commission's decision pending determination of the appeal. In many cases, however, the mere taking of the appeal has all the effect of a stay order since the Commission will not issue the permit or other authorization applied for until the appeal is decided. The time within which such an appeal must be taken, and the procedure which must be followed by the appellant, the Commission, and interveners, are set forth in detail in the Act. The rules of the Court should also be consulted.

The Act provides that:

"At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari

on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal."

The significance of the proviso is considerable. Stated in its simplest terms, it means that the Court may reverse the Commission's decision if the Commission has erred in construing the *law,* but not if the Commission has made an erroneous finding on any issue of *fact* in the case unless there is virtually no evidence in the record supporting the finding of fact. Most cases before the Commission, like most cases before the courts, turn on issues of fact and not on questions of law. The proviso means, therefore, that there is really no right of appeal from the overwhelming majority of the Commission's decisions.

Since the enactment of the Radio Act of 1927 there have been 50 cases in which decisions of the Federal Radio Commission and of this Commission have come before the Court of Appeals for review. Eight of these were prior to July 1, 1930, when the appeal statute was revised into substantially its present form and the review was first limited to questions of law. Since then the Commission has never been reversed by the Court on any question except such as would be classified as procedural, that is, having to do with matters such as whether interested parties were entitled to or given proper notice and opportunity to be heard. At no time since 1930 (with one exception, and in this case the Court of Appeals was reversed by the Supreme Court) has the Court reversed the Commission on any question as to the proper interpretation of "public interest, convenience, or necessity"; indeed, in hardly any decision has it thrown any real light on the meaning of the standard. It should be added, furthermore, that these appeals are very expensive. The record of evidence at the hearing and of proceedings before the Commission must be printed at an average of over $2 a page; these records, for reasons which must be already apparent, run into an enormous size even in ordinary cases.

The right of review by the Supreme Court is very rarely granted. It has been granted in only one case since July 1, 1930, and then at the request of the Government.

At the outset three major exceptions were noted. The reasons for their being excluded from the method of appeal just described differ. The exclusion of the assignment-of-license cases results from a decision of the Court of Appeals itself which held (erroneously, in my opinion) that applications of this sort do not come within the description of applications for modification of license. The exclusion of border-permit cases and the revocation-of-license cases seems to be either accidental or due to a desire on the part of Congress to see to it that review of decisions of this sort occurs in the district where the licensee resides.

Whatever may have been the reasons, the result is apparently the same. Decisions of the Commission in these three classes of cases seem to be subject to another provision in the Act whereby court review is obtainable in the District Courts of the United States throughout the country, in the district where the parties reside or do business. If and to the extent that this provision proves inapplicable, the aggrieved parties must resort to what are known as proceedings for extraordinary writs (mandamus and injunction) in the United States District Courts for the District of Columbia.

IX. EXPERIMENTAL AND MISCELLANEOUS CLASSES OF BROADCAST STATIONS

Of great and constantly increasing importance in the service of broadcasting are several classes of stations which perform auxiliary or closely related services.

They are relay broadcast, international broadcast, television broadcast, facsimile broadcast, high frequency broadcast, and experimental broadcast stations. They are extensively covered in the Commission's regulations, and considerable space might profitably be devoted to a summary of definitions of these stations, allocations of frequency bands to them, restrictions on their use and operation, programs of research and experimentation that are required in connection with some of them, the practice and procedure that is specially applicable to them, and the problems, international and domestic, that are peculiar to them. It is not unlikely that a development of some of these services will take on proportions fully as interesting and important as the class of stations now occupying the broadcast band, and the day may not be far off when other portions of the radio spectrum (possibly the very high frequencies used by sound and visual broadcast stations) will be as much the object of attention on the part of the radio public. Within the past two or three years the sale of so-called all-wave receivers is evidence enough that listeners are not limiting themselves to stations in the band from 550 to 1500 kc.; millions are listening to high frequency broadcast programs from all over the world.

These classes of stations must, however, be passed over if this article is to be kept within reasonable bounds. With the exception of certain strictly auxiliary services, the Commission's regulations still clothe these classes with a more or less experimental status, excluding direct commercial use and sale of time. In fact, with respect to some of them to which the word "experimental" no longer applies in its scientific sense, the restriction is nevertheless maintained for various purposes although there are indications that it may soon be modified or done away with in such cases.

The Communications Act directs the Commission, subject to the standard of public interest, convenience or necessity, to

> "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."

As pioneering in the very high frequency portions of the radio spectrum gives more and more promise of successful achievement, it may be assumed that the future will provide ample work for the Commission to do under this clause. The reader who is interested in Federal regulation of broadcasting cannot, therefore, safely confine his study to the class of broadcast station now most in evidence.

X. RADIO REGULATION IN TIME OF WAR OR OTHER EMERGENCY

Whatever may be the breadth of the Commission's powers over radio stations in times of peace, they are as nothing when compared to the power of the President in time of war or other emergency.

> "Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other public emergency, or in order to preserve the neutrality of the United States"

the President is given extraordinary authority. He may suspend or amend, for such time as he may see fit, the rules or regulations applicable to any or all stations. He may cause the closing of any station and the removal therefrom of its apparatus and equipment. He may authorize the use and control of any such station, its apparatus and equipment by any department of the Government

under such regulations as he may prescribe, upon just compensation to the owners. A method for ascertaining what is just compensation is provided in the statute.

The language of the statute justifies us in concluding that, under the circumstances which it specifies, there is virtually no right in a licensee as against the President even during the period of the license.

XI. INTERNATIONAL RADIO REGULATION

At several points in this article mention has been made of international agreements having to do with radiocommunication, together with some reference to matters covered by these agreements. Let us now make a rapid survey of the nature of these agreements and of such international organization as has been established under them for the regulation of radio.

The principal agreement now in force is the International Telecommunications Convention, signed at Madrid, Spain, on December 9, 1932, after a protracted conference of over three months. Some 73 nations signed this Convention, including the United States. This Convention represented a merger of two treaties, very much as the Communications Act of 1934 represented a merger of the functions of the Federal Radio Commission and certain functions of the Interstate Commerce Commission. Since 1875 there had been in force an International Telegraph Convention to which the United States had never been a party, largely because the Convention contained provisions based on government ownership of telegraph and telephone systems or on a degree of government control over them which our Federal Government did not have. Since 1906 (preceded by a preliminary agreement in 1903), there had been in force a series of International Radiotelegraph Conventions (Berlin, 1906; London, 1912, and Washington, 1927) to which the United States had been a party. These two Conventions were combined into one International Telecommunication Convention at Madrid.

To the Convention are annexed three bulky sets of Regulations, and some other documents which need not concern us. These are the Radio Regulations, the Telegraph Regulations and the Telephone Regulations. The Convention contains provisions only of a rather general nature; the details are in these three sets of Regulations. The Convention provides that a nation which signed it need sign only one of these sets. The United States signed only the Radio Regulations.

The next major international conference takes place beginning February 1, 1938, at Cairo, Egypt. The Convention will not be revised at this conference; the three sets of regulations will undoubtedly be considerably amended. For the first time, the United States is seriously considering signing the Telegraph Regulations if they are satisfactorily revised. Some of the issues that will occupy the attention of the delegates, so far as radio is concerned, have already been mentioned. The chief issue is, as at past conferences, the allocation of bands of frequencies in the radio spectrum to the various kinds of radiocommunication.

The administrative work under the Convention is performed by a bureau at Berne, Switzerland, known as the International Telecommunications Bureau. It publishes a monthly journal in French.

During the interim between the major international conferences, there are minor conferences designed largely for the discussion and solution of technical problems. These are under organizations set up by the Convention, one under each set of Regulations. In radio, this organization is known as the Inter-

national Radio Consulting Committee. It held its most recent meeting at Bucharest, Rumania, in May, 1937, attended by a delegation from the United States.

The Convention permits the making of regional agreements, for example, between the countries of a given continent, on matters of regional interest, so long as such agreements do not conflict with the Convention and the annexed Regulations. The United States has a regional agreement with Canada, and, at a conference held in Havana in March, 1937, and another to be held beginning November 1, 1937, is attempting to reach a regional agreement between the countries of North America, as well as of Central and South America. The chief problem at these conferences is usually the allocation of channels for broadcasting. Europe and certain regions adjacent to it also have regional agreements which (not very successfully) have attempted to regulate this allocation problem. An important factor in Europe and indeed at all international conferences, is the International Broadcasting Union, composed principally of European broadcasting organizations and companies, but also having members elsewhere in the world, including several in the United States.

XII. CONCLUSION

The reader will recognize that in this article an attempt has been made to embrace what might well be the subject of a lengthy legal treatise. Of necessity, the treatment has been superficial and subject to legitimate criticism for its omissions as well as perhaps an undue emphasis on certain features of the Communications Act of 1934. It is offered with the hope that the reader will be sufficiently interested to pursue his study further with a reading of the Act itself and an examination of authoritative sources of information as to its interpretation and administration.