# LAW

## DEVELOPMENTS IN FEDERAL REGULATION OF BROADCASTING

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*Editor's Note: It is significant that Louis G. Caldwell's third article in this series is by all odds the most lengthy and detailed. Its mere length indicates—perhaps better than all the statistics, tables, and charts elsewhere in this book—the stage of historical development now reached by radio as an industry. That stage may be designated as the transition between late adolescence and maturity. Its hallmark is the inevitable government-industry preoccupation with socio-economic problems in place of the earlier, simpler attention to supervision of mechanical contrivances.*

*The ways of socio-economic regulation being complex, it is impossible to fashion a chronicle of them without at times waxing critical. The editors of the* DIRECTORY *frankly acknowledge that this is the most critical of the author's three articles, but do not know how any other mental attitude short of a pre-disposition to whitewashing, could have been adopted. They believe that, notwithstanding his participation in or close association with many of the developments which are discussed in the article, the author has succeeded in maintaining an objective attitude.*

*The reader wishing to pursue the study of the problems and procedures mentioned in this article further is advised to read the various government radio documents of the past year, as well as the several briefs filed by lawyers on behalf of their clients. The testimony at the allocation proceedings has been conveniently issued in transcript form by the National Association of Broadcasters. It comprises 360 pages of transcript and 458 pages of exhibits (charts, etc.). Copies of the Committee's Report resulting from these proceedings may be obtained from the Commission.*

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### INTRODUCTION

Had it not been for the past two months, the period covered by this article* would have achieved distinction as one of the most barren eras in the history of the Federal Communications Commission and (except for 1927) of its predecessor, the Federal Radio Commission. The past few weeks, however, have witnessed accomplishments which, in volume at least and perhaps also in merit, have gone far to redeem it and have converted an unpleasing spectacle of inaction accompanied by internal wrangling into one of productive activity, attended by a remarkable degree of harmony.

This is not to say that the twelve months prior to about May 1, 1939, were uneventful. On the contrary, they were crowded with incidents worth recording for the student of governmental regulatory machinery. In a sense, the Commission has been subjected to a process of vivisection by which its internal workings

* Roughly, from early in May, 1938, to July 1, 1939.

have been exposed to public view, and have provided valuable data on the influences and factors which have played a part in the results.

Both in organization and in the writing, this article has presented difficulties considerably greater than those encountered in the two DIRECTORY articles for preceding years. These difficulties have compelled departures in outline and in method of treatment. Such departures will be explained at appropriate junctures, but they should be prefaced by a brief attempt to provide a perspective—always hazardous when undertaken at a range so close to the event.

The twelve-months' period appears sterile in its production of formal law —that is, the adoption of policies, principles, and rules expressed in regulations or in decisions. It is nevertheless rich in something equally important to the *development* of the law, that is, in *tendencies* and *directions*. Like civilization itself, law is an ever-changing mixture of static and flux, never completely one or the other, but undergoing variations in composition between wide extremes. When flux predominates, precedents diminish in significance, and greater recourse must be had to events and facts if we would prophecy the law of the future.

To assert that either suddenly or unexpectedly the pendulum has swung from static to flux would be an overstatement. At no time in its brief history has the law of radio-communication been so fixed that the stream of events could safely be ignored. Yet the federal statute governing radio regulation has not been materially modified in its substantive features since its original enactment on February 23, 1927.* Following the reallocation of November 11, 1928, until a date which may be indefinitely placed at about 1936, regulation of broadcasting exhibited an outwardly gradual and unexciting evolution, with no very sensational change in the problems and issues at the forefront from year to year. Since about 1936, however, the symptoms have increasingly indicated a state of flux.

It is easier now than then to discuss yesterday's shadows of today's principal controversies. More recently, and particularly during the past year, they have advanced to the front of the stage. Among them may be cited the manifest tendency of so-called economic factors to crowd technical facts into the background, the tendency to place more emphasis on the content of broadcast programs than on the need for improved service in the physical sense through stronger signals, and the tendency to subject new uses of radio to more rigid restrictions than have been imposed on broadcasting. We have not time to inquire into all the causes and the implications of the phenomena we shall note. In part, they reflect social and economic philosophies which have been in the ascendancy of late and which are not peculiar to radio. In part, they are symptoms of the unrest which normally attends a rapid march forward by applied science and the rapid emergence of new discoveries from the laboratory into practical use. And in part, they are simply the expression of the particular commercial interests of groups within the industry.

## PART I

## THE MACHINERY OF REGULATION

More space and importance is assigned to this subject than in the earlier articles. Tested by actual effect on the development of the law, an express

* Title III of the Communications Act of 1934 is, with immaterial exceptions, a reenactment of the Radio Act of 1927.

statutory provision now on the books may play a role inferior to that played by new personnel in the regulatory agency because of human variations in philosophy, industry, capability and courage, or by a bill or a resolution pending in Congress, or by widespread criticism and threatened investigation, or by some prevalent technical or economic theory, whether sound or fallacious.

As Lord Beaconsfield said: "England is not governed by logic; she is governed by Parliament." To paraphrase a statement of the late Justice Holmes, on some legal questions a page of history is worth a whole volume of logic.

Such influences have been at work in the regulation of broadcasting during the past two or three years and will continue to be significant for some time to come. There has, for example, been a distinct procedural trend at the Commission toward what its friends call "efficiency" and its enemies call "administrative absolutism," visible principally in the activities and viewpoints of the Commission's Law Department, and resulting in dissension in the Commission. There has been an underlying issue between two schools of thought among the members of the Commission on economic regulation and on censorship. There has been the eternal human equation based on personalities and on different degrees of susceptibility to pressure from the outside. The developments of the past year cannot be understood, and those of next year cannot be prophesied, without a few pages of history giving a moving picture rather than a snapshot of the facts.

## A. PERSONNEL AND INTERNAL ORGANIZATION OF THE COMMISSION

During the past year further important changes have taken place in the personnel and the internal organization of the Commission.

Frank R. McNinch, appointed chairman in August, 1937, has continued in that office despite persistent rumors, still prevalent, that he would soon leave. At the time of his appointment he was chairman of the Federal Power Commission; technically, he continued a member of that body until June 22, 1939, when his term expired and a successor was appointed. The impression was given out that his connection with the Federal Communications Commission was in the nature of a temporary and short-term loan (originally said to be for three months), in order, by extensive remodelling of its internal organization and by correcting its alleged evils, to temper the increasing pressure for an investigation. More recently, his absence since April 29, 1939, because of ill health, has revived rumors of an early resignation.

During the winter, Eugene O. Sykes, an original member of the Federal Radio Commission, resigned, effective April 5, 1939, and was replaced by Frederick I. Thompson, an Alabama newspaper publisher, who had been a member of the United States Shipping Board, 1920-1925. Norman S. Case, whose term expired in July, 1938, was reappointed for a term of seven years, although his status was uncertain for months under a recess appointment, with a hiatus between the opening of Congress and his confirmation on February 6, 1939, and constant rumors during the interim that the hearing on his confirmation might be converted into the long-threatened Congressional investigation of the Commission. The next term to expire was that of Paul A. Walker, in July, 1939. His reappointment on June 26 was confirmed by the Senate four days later.

The first step in the heralded program of remodeling the internal organization occurred on November 15, 1937, and was noted briefly in last year's article.*

* VARIETY RADIO DIRECTORY, II, p. 525.

It consisted in the abolishment of the three-fold division of the Commission into Broadcast, Telegraph and Telephone Divisions and the automatic dismissal of the three directors of the divisions.* Thereafter, all business, including regulation of rates and other economic aspects of communications common carriers (such as telegraph, telephone, cable and wireless communication companies), as well as the technical regulation of all radio stations under the license system, was handled by the full Commission. In a published statement justifying the action, the Chairman declared that the division system tended away from cooperation and mutual understanding, vested an unnecessary load of responsibility and an undesirably large portion of the Commission's powers and functions in each division, and prevented a rounded development of each Commissioner's knowledge and experience, saying: "The aggregate wisdom and judgment of seven minds is surely greater than any two or three of the seven."†

No further steps were attempted until about a year later, in the fall of 1938. In the meantime turmoil and dissension developed within the Commission, attended by a marked decline in the morale of its staff and a recurrent vigorous demand in Congress for investigation. The latter was temporarily halted by the defeat of a resolution in the House of Representatives on June 14, 1938. A few days later, on June 25th, in a public address, the Chairman served notice of impending changes in staff and procedure and let it be known that his dissatisfaction was chiefly with the Law, the Examining and the Press Departments.

Suddenly, on September 23, 1938, by letter to the Civil Service Commission sent with the approval of three other members of the Commission, and without the knowledge of the remaining members, the Chairman sought to have six groups of employees removed from the protection of civil service and rendered subject to dismissal or change in status without hearing. About 60 employees were to be affected, including attorneys, trial examiners, and the director of press information. Two of the other Commissioners (the third being absent) communicated their vigorous disapproval to the Civil Service Commission by letter made public October 7th. Presumably because of opposition on the part of either the Civil Service Commission or the President, the Chairman's attempt was unsuccessful.

The following week, on October 13th, the Chairman, supported by the same three members, brought about the dismissal of Hampson Gary, general counsel of the Commission since 1935 and previously a member of the Commission, stating that the dismissal was based on "inefficiency and lack of administrative ability." In his place was appointed William J. Dempsey, theretofore legal adviser to the Chairman and special counsel in charge of the network investigation. Two Commissioners again dissented, a third being absent because of illness.

On November 9th, by a vote of four to three, the Examining Department was abolished, entailing the automatic dismissal of the chief examiner and the assistant chief examiner, and the remaining members of the Department were transferred to the Law Department. A new procedure was inaugurated which will be summarized under the next subheading.

*Sec. 5 of the Communications Act specifically authorizes the Commission to divide its members into not more than three divisions, each to consist of not less than three members, to distribute and delegate its powers and functions to the divisions, and to appoint a director for each division, but does not require it to do so. The purpose of Congress was expressed in the report of the Senate Committee on Interstate Commerce on the bill, quoted in VARIETY RADIO DIRECTORY, I, pp. 273-4. Accordingly, on July 17, 1934, immediately after its organization, the Commission established the three divisions.

†See also Fourth Annual Report, FCC, p. 3.

On the same day, by a vote of five to two, the Information Section was abolished, entailing the automatic dismissal of the chief of that section. The Chairman was authorized to borrow the director of information and research of the Rural Electrification Administration for a period of 90 days, to serve as special assistant to the chairman

> "to make a study of methods for the collection and dissemination of information for this Commission and assist and advise the Commission in connection with this and related matters and assist in the initial work of handling such matters."

The Chairman stated that the Information Section had been "wholly inadequate and ineffective" and that there had been no arrangement for collecting and disseminating the large amount of important information received by the Commission relating to developments in radio and wire communications. The Chairman further ordered that all matters released to the public clear through this newly-organized temporary information section. He then announced that, with these steps accomplished, the major portion of his reorganization program was completed and that any further personnel changes would be minor in character.

On December 8, 1938, the new general counsel reorganized the Commission's Law Department. The Department was divided into three major divisions, (1) Broadcasting, (2) Common Carrier, and (3) Litigation and Administration. The first was subdivided into five sections devoted respectively to new stations, changes in existing facilities, renewals, assignments of license, and transfers of control. The third division was subdivided into four sections devoted respectively to litigation, research, hearings, and legislation and rules and regulations. The arrangement was explained as enabling "the attorney or attorneys assigned to a matter to handle it from the time it reaches the Law Department until it is finally acted on by the Commission." In this connection it should be kept in mind that by this time the Law Department was, in effect, performing the functions of the Examining Department, and that the explanation was tantamount to saying that the same small section would have charge both of hearing a case and of doing all legal work in connection with it.

On March 6, 1939, the Commission extended the temporary information section until March 31. There was dissension over retention of the principal incumbent of the office (who had been borrowed from the REA). His employment was extended only to March 31, with the requirement that he submit a final recommendation for a permanent information section by March 15. On March 23, following submission of the report, the Commission voted to establish a permanent office of information to function directly under the Commission rather than the Chairman or the Secretary. Neither the interim or the final reports were ever made public. The principal changes inaugurated by the special assistant consisted of revised methods of releasing the various decisions and other pronouncements of the Commission, aimed chiefly at making such information available to the press at or before the time of furnishing such information to parties and their attorneys.

During this same period, as will be shown in later portions of this article, pressure in Congress for reorganization and investigation of the Commission was increasing; criticism was breaking out in the press and in magazines; the Commission's judicial machinery had bogged down because of its new procedure; the Commission was torn with dissension over ques-

tions of policy as well as procedure, and it was receiving severe reprimands from the reviewing court on appeals from its decisions. The situation was saved only by the unremitting industry of certain of the Commission's members and its staff which paved the way for the remarkable progress made by the Commission during the last two months.

Since April 29, in the absence of the Chairman on sick leave, members of the Commission (with the exception of one of the dissenters) have successively been designated by him as acting chairman for one-week periods.

## B. PROCEDURE

**REVISION OF RULES OF PRACTICE AND PROCEDURE.** On July 11, 1938, the Commission made public proposed new rules of practice and procedure which had been drawn up and presented to the Commission on the preceding February 9th by a Rules Committee consisting of members of its staff under the chairmanship of former general counsel Hampson Gary. As noted in last year's article*, revision of the rules had been under consideration for months before then. The Rules Committee was authorized to hold hearings and was directed to report to the Commission.

On November 28, effective January 1, 1939, the Commission adopted new rules of practice and procedure, following, in the main, the draft proposed by its Rules Committee (except for changes in procedure accompanying the abolition of the Examining Department).

The changes accompanying abolition of the Examining Department will be separately described below. Other important changes include (1) the establishment of a motions docket, which had been urged by practitioners before the Commission for several years to fill an obvious need for speedy and impartial disposition of routine motions and petitions not involving final disposition of cases, (2) relaxation of the "two-year rule," which had likewise been urged by practitioners through the Federal Communications Bar Association, (3) requirement of more complete information in applications, and (4) substitution of a new rule governing the filing of petitions for rehearing for the former rules governing rehearings and protests.

The revised rules were, however, in imperfect form, and maintained in force, or introduced a number of unnecessarily rigid prescriptions making for delay and expense and providing pitfalls for the unwary. Since their adoption, through cooperation between the general counsel of the Commission and representatives of the Association, gradual progress has been made toward remedying some of the defects.

**THE NEW HEARING PROCEDURE.** By far the most important change, however, was not the result of the revision proposed by the Commission's Rules Committee (which had advocated maintaining the examiner system) but came about with the abolition of the Examining Department on November 9, 1939. The working of the examiner system prior to that date has been described in an earlier article†. For present purposes, a brief summary will suffice. The Department, headed by a chief examiner and with a corps of trial examiners, was patterned after the system employed by a number of other important federal administrative agencies. It

* VARIETY RADIO DIRECTORY, II, p. 542.

†VARIETY RADIO DIRECTORY, I, pp. 295-9.

was directly responsible to the Commission, ranking with the Law Department, the Engineering Department, the Accounting, Statistical, and Tariff Departments, and the Secretary's Office. With rare exceptions, hearings were held before an examiner and were attended by a member of the Law Department representing the Commission as a party to the proceeding. In a sense, the examiner was a trial judge. After the hearing, he prepared and submitted a written report containing his findings from the evidence, his conclusions, and a recommendation. Parties dissatisfied with his report thereupon had the right to file exceptions and to present oral argument to the Commission, which thereafter issued a final decision, subject, of course, to petition for rehearing and appeal to the courts.

The system seemed to have a number of advantages making for the impartial and efficient administration of justice. To a fair degree it segregated the Commission's judicial function, represented by the Examining Department, from its prosecutor function, represented by its Law Department. The initial findings of fact were made by a judge present throughout the proceeding, hearing the witnesses and observing their demeanor; such judges, by constant practice, become experienced in presiding over hearings and in drafting findings and conclusions. By the time the case reached the Commission, the issues were narrowed to those that were substantial and were really in controversy, and members of the Commission were relieved of the burdensome detail of sorting the wheat from the chaff. The issues, thus narrowed and presented by the examiner's report, were squarely placed before the Commission for decision, and were difficult to side-step or ignore. While the system was not free of defects, they were remediable and it was fundamentally sound. In two decisions the Court of Appeals has admonished the Commission to pay more heed to the findings of its examiners*.

Under the new system adopted November 9, 1938, hearings are held before a member of the Law Department staff, designated from case to case by the Commission. Sometimes they are attended by another member of the Department's staff representing the Commission as party or prosecutor but more frequently the same lawyer acts as both judge and prosecutor. Ostensibly the lawyer-examiner's function is limited to forwarding the transcript of evidence to the Commission without findings, conclusions, or recommendation. Within 20 days the parties must file "proposed findings and conclusions" with the Commission. Thereafter, according to the new regulations, the Commission renders a "proposed decision" in the name of the Commission. Parties dissatisfied with the "proposed decision" may file exceptions and have oral argument before the Commission†. Finally, the Commission sits in review of its own "proposed decision" and renders a final decision.

Actually, the procedure works out somewhat differently. The "proposed decision," as a rule, is not prepared by the Commission or any member thereof, but by the Law Department and usually by the lawyer-examiner who heard the case. It may be prepared by any other lawyer in the

* Heitmeyer v. FCC, Dec. 27, 1937, 95 F (2d) 91; Courier-Post Publishing Co. v. FCC, May 6, 1939, not yet reported.

†The Law Department does not participate in the filing of exceptions or the oral argument.

Department (including the prosecuting representative) or any other employee of the Commission. The preparation is brought about after consultation with the Engineering Department and the Accounting Department, members of whose staffs have usually testified as witnesses in the case. The draft decision is assigned by the Chairman to a particular Commissioner who is expected to study it and report his recommendation to his colleagues. Either as submitted or as modified, it is then adopted as the "proposed decision."

The Commission's order justified the new procedure in a recital that it was "to provide for the more efficient discharge of the business of the Commission, particularly with respect to the handling of matters involving hearings." The Chairman stated that it would place responsibility more definitely upon Commissioners, would bring the Commission's practice into line with pronouncements of the Supreme Court*, would expedite the Commission's consideration of cases, making it "fuller and fairer to all parties," would cut overlapping and duplication to a minimum, would close the gap between the time applications are heard and decided, would prevent knowledge of the identity of the presiding officer until the hearing actually took place, would remedy past complaints arising out of reversals of recommendations of examiners by the Commission, and, inferentially, would reduce or eliminate the part supposedly played by "politics." None of these expectations has, as yet, been fulfilled.

The most immediate and noticeable consequence was the slowing down of proceedings with a log-jam of "proposed decisions" in the Commission's Law Department. The first "proposed decision" made its appearance January 31, 1939, in a case heard by an examiner prior to the adoption of the new system. Thereafter, no "proposed decisions" were forthcoming until the last week in March, when two more were announced. Two additional "proposed decisions" made their appearance in April. This was all until May 19. The net product of over six months of the new procedure was a total of five such documents (all uncontested or not vigorously contested and three of them resulting from hearings held prior to November 9, 1938), and in each such case the parties still had to face the filing of exceptions and oral argument before final decisions could be had. During the same period about 75 hearings had been held on approximately 110 separate applications, including a number involving important issues and calling for prompt action. In addition, some 60 cases were scheduled for hearing prior to July 15th, and a number of other cases had been designated for hearing with no dates set. Even petitions for rehearing on decisions previously rendered remained unacted on for months.

Increasing complaint, general among the legal profession, publicized in the trade journals, echoed in Congress and shared by certain members of the Commission and its staff, led to attempts to relieve the log-jam and to reduce the delays. In the spring of 1939, the Commission suddenly found it possible thenceforth to dispense with hearings in a large proportion of the assignment-of-license and transfer-of-control cases, which theretofore had been deemed to involve some of the most warmly controverted issues. Finding itself swamped with pending cases which had already gone to hearing, the Commission announced on May 6 that it would recess from July 15 to September 5, and during that period would hold only such hearings

* Presumably the Morgan cases, 298 U. S. 468 and 304 U. S. 1.

as might be specifically ordered, saying that the recess "can well be used in accelerating the disposition of pending cases." On May 23, it amended its rules so as to permit the immediate issuance of a final order (in lieu of a "proposed decision") in cases where the proposed findings filed by the parties present no substantial conflict and the Commission is in accord with the ultimate conclusions proposed. Every effort was made to bring about more rapid handling in the Law Department.

An immediate improvement was noted. Three "proposed decisions" were released on May 19, and by June 24 five more were made public, making a total of 13 since the system was established. In addition, a dozen or so cases were finally decided by order unaccompanied by findings, under the amendment of May 23. Of this total of 25 or so, however, five were in cases which were actually heard prior to the adoption of the new procedure in November, 1938, and there were still about 12 cases heard prior to that date which were awaiting final decision, and in some of them no "proposed decision" had yet been rendered. At present writing, "proposed decisions" and final orders without findings (mostly the latter) are appearing at a fairly rapid rate and it may be that, before summer recess, the delays will have been greatly mitigated. There are prospects, furthermore, that the hearings will be reduced in length and in expense by a practice inaugurated late in June, 1939, of confining the scope of hearings to those issues on which the applicant is deemed to have made an insufficient showing in his application.

Criticisms have not, however, been confined to the delay. The new procedure involves an extreme form of the prosecutor-judge combination, with the prosecution, the hearing, and the preparation of the "proposed decision" all largely under the control of the Law Department, which must ultimately defend the final decision on appeal. It calls for off-the-record consultation by the anonymous "judge" with other members of the Commission's staff who, if they have facts or opinions relevant to the issues, should testify to them in public hearing. If followed literally, and to achieve its announced purposes and advantages, the procedure imposes an impossible burden of detail on members of the Commission who do not have time to study the record and the proposed findings and who are deprived of the benefit of a narrowing of the issues. Actually, this burden is not met (except where individual Commissioners take it on themselves), with the result that responsibility for errors and partisanship may be concealed from the parties and the public, the side-stepping of important issues is facilitated, the development of rules and principles is hampered, and unnecessary labor, expense and exposure to pitfalls are imposed on the parties.

**QUESTIONNAIRES.** It seems appropriate in connection with procedure to discuss the plethora of questionnaires with which broadcasters have been deluged during the past 15 months. The phenomenon is of interest because of the conscious or unconscious tendency it exhibits in the direction of a common-carrier or public utility attitude toward the regulation of broadcast stations, notwithstanding the specific provision in the Communications Act that "a person engaged in radio broadcasting shall not . . . be deemed a common-carrier." The tendency was fostered by the abolition in November, 1937, of the three divisions of the Commission, which had largely segregated the regulation of communications common-carriers from the regulation of broadcasters, and, as believed in some quarters, by the fact that many of the Commission's employees, particularly in

its Accounting, Statistical and Tariff Department, have a background of experience and training with the Interstate Commerce Commission and other public utilities agencies.

At his first press conference on October 2, 1937, shortly after he took office, Chairman McNinch classed broadcasting as a "public utility" and asserted that it might be advisable for the Commission to recommend that Congress amend the law so as to confer rate-fixing authority, saying

> "I question the wisdom of a policy which would leave forever free from regulating control the charges made by any public utility."

Many months later, in June, 1938, he retracted this view and stated that such regulation was out of the question.

On January 24, 1938, there was made public a Report on Social and Economic Data, submitted to the Commission on July 1, 1937, by its Engineering Department as the result of an extended hearing on the subject of allocation improvements in the standard broadcast band held beginning October 5, 1936. One of the chief issues raised at that hearing (as it was also at the hearing of June 8, 1938) was the question whether the 50-kilowatt maximum power restriction on clear channel stations should be removed or at least increased to 500 kilowatts. The undisputed technical evidence having shown the desirability of the removal of the restriction for the sake of improved broadcast service over large areas now inadequately served, opponents urged that there were economic factors militating against the increased power. The Engineering Department recommended, in effect, that the Commission's regulations be amended so as to remove the restriction*, but that the Commission exercise caution in granting applications to the end that the broad social and economic effects might be taken into account.† It devoted a substantial section of the Report to the "need of additional social and economic data," stating:

> "It is the opinion of the Engineering Department that data is needed for intelligent planning and is essential before final conclusions can be made, and by reason of the lack of accumulated evidence bearing on the trends of broadcasting, the Engineering Department is impressed with the desirability, if not the necessity, of the Commission organizing better methods to secure statistical data of a social and economic character, and having available an expert to advise the interpretation of the data."

Among the methods suggested was the securing of "better factual data with reference to revenue, expenses and programs" through a questionnaire to be included in renewal applications. The Department clearly and expressly disavowed any thought of, or tendency toward, rate regulation.

Pursuant to this recommendation the Commission sent out elaborate questionnaires in March and April, 1938, the resulting information to be analyzed and summarized and to be employed in connection with the hear-

* See also its Preliminary Engineering Report of Jan. 11, 1937.

† The Engineering Department stated, in its report released Jan. 24, 1938, that it saw "no logical reason for an arbitrary defensive regulation which would prevent the future use of power in excess of 50 kw. in the event that evidence and data should show conclusively that such power in certain individual cases is in the interests of the public."

ing on the proposed rules and regulations governing standard broadcast stations, later held June 6-30, 1938. These questionnaires, having to do with the earnings and expenses of broadcast stations and networks for the year 1937, with employment and with programs, aroused a considerable degree of apprehension over possible rate-regulation. Some of the resulting information, and its effect on the issues of the June hearing, will be mentioned later in this article. The information was also used in connection with the network investigation which began November 14, 1938.

In the fall of 1938 the Commission commenced a second series of questionnaires relating to the issues involved in the network investigation (which, as elsewhere pointed out, extended to phases of the industry other than network operation), four in all, the last being dispatched January 5, 1939. These questionnaires were sent to a total of about 2,300 persons or concerns, including station owners, holding companies, officers and stockholders, and others holding direct or indirect interests in stations. They sought data on the innermost phases of ownership, voting proxies, operations, policies, investments and even the antecedents of personnel. They revealed a probe for full information on multiple ownership, absentee ownership, character of ownership, other business affiliations, tendencies toward monopoly, unfair competition or restraint of trade. There were claims that the questions transcended the scope of the Commission's authority, particularly insofar as they related to businesses other than broadcasting. The smaller station owners encountered great difficulty in interpreting and executing them and again there were widespread protests which were echoed in Congress. To a considerable degree, summaries and analyses of the resulting information were introduced in evidence in the network investigation.

On February 15, 1939, a 29-page questionnaire was sent to all broadcast stations, covering financial, personnel, and program statistics for 1938, to be returned by March 15. Its financial portion contained important innovations over the questionnaire for 1937, including requirements that a balance sheet be submitted by each station and for more detailed information as to the source of income from the sale of time, including specific breakdowns on receipts from networks, whether national or regional, plus bulk sales. The reasons for the innovations were closely related to the outcome of the June, 1938, hearings. The Committee's Report resulting from the hearing recommended against removal or increase of the 50-kilowatt power restriction on clear channels. It premised its conclusion largely on alleged insufficiency of economic data on the revenue of stations from the several classes of advertising, particularly what is known as national spot advertising. At about the same time, it was learned that shortly thereafter the Commission planned to send out even more elaborate questionnaire forms, double in size or more, to be employed for 1939 data.

At this point a storm broke loose. The Board of Directors of the National Association of Broadcasters, at a special meeting on February 27-28, 1939, released a statement saying:

> "At present broadcasting stations are being overwhelmed by questionnaires, demands for information which obviously come from an atmosphere of common-carrier regulation. Our feeling is that the continuation of the practice is not only harrassing but also dangerous, in that it must inevitably lead to regulation of program content."

The Montana broadcasters petitioned their Congressional delegations to intercede. The Commission's conduct was denounced on the floor of the House. At the same time it was pointed out by critics that the Commission's power to keep the returns on the questionnaire secret was more than doubtful under the statute, although the Commission was taking pains to assure everyone that the resulting information would be treated as confidential.

As a result of the protest, the Commission indicated its willingness to alleviate the requirements, particularly for the smaller stations. A series of conferences have taken place between an Association committee and the Commission's accounting staff. As matters now appear, the questionnaires for 1939 will probably not be sent to stations until early next fall. There will be three grades, one for stations (about 125) having annual time sales less than $25,000, a second for stations (about 250) having time sales from $25,000 to $50,000, and a third for the remaining stations having time sales over $50,000. The questionnaires will probably be divided into two separate schedules, the financial schedule to fill about 20 pages, and the program-employment schedule about two pages. The Commission's aim is said to be the establishment of a progressive system of bookkeeping whereby a station's accountants can at any time, without undue difficulty, supply information requested by the Commission.

Notwithstanding the unquestioned good faith and laudable intentions which led to the questionnaires, no illusion may be entertained as to the outcome if the tendency is not kept within bounds.* The search for information by government agencies has, as its usual sequel, the paternalistic conviction that there are evils to be remedied and help to be given the industry (particularly the weaker units in the industry), by rules and decisions based on the information acquired, and that the agency's powers and jurisdiction should be enlarged for such purposes. The present momentum of events, when considered together with the preponderating role now being played at the Commission by economic and program factors over technical factors, is heading surely and directly toward economic regulation of broadcasting by the usual route of uniform cost accounting, inquisition of books and records, and eventually rate-regulation and perhaps also taxation of a regulatory character. Until recently it was also heading just as surely to-

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* DIRECTORY Editor's Note: Aside from their legal and similar implications, the statistics on revenue, etc., issued by the FCC are undoubtedly of considerable value to the radio industry. Without them, the radio industry would have only meager indices on its revenue as an advertising medium, especially since the National Association of Broadcasters no longer issues time-sale dollar-volume figures. The editors of the DIRECTORY, however, believe that the FCC's compilations—laudable and accurate as they are—can be improved in several respects, as follows: (1) the reports from year to year should follow the same formula, and employ the same categories or "breakdowns," so that comparisons may be made; (2) inasmuch as all media employ "gross revenue" as yardstick, the FCC (which issues "net" revenue figures) should provide a yardstick for converting the "net" into "gross"; (3) the industry balance sheet now issued by the FCC is strictly an accounting tool, and should be accompanied by a simplified breakdown useful to radio as an advertising medium; (4) some of the items included in the balance sheet are, without benefit of footnote, apt to be highly misleading when made public. For instance, a radio station owned directly by another firm—such as an insurance company or newspaper—must report that parent firm's revenue to the FCC, which makes the information public. However, if the station is owned by an insurance company or newspaper through an intervening subsidiary corporation, the information is not issued by the FCC. On the whole, however, the figures have many day-to-day industry uses, and are of utmost reliability.

ward program regulation. Call it what you will, the result is the equivalent of public utility regulation on the one hand and censorship on the other.

**APPLICATION FORMS.** When the simple two and four-page application forms originally prescribed by the Federal Radio Commission are recalled, the elaborate and intricate forms adopted in the early part of 1939 furnish a striking contrast. There has, of course, been a gradual growth in the dimensions, in the details and in the number of application forms during the intervening years. An application for the Commission's consent to the assignment of a construction permit or license totals 39 mimeographed pages, and must be accompanied by elaborate inventories, income statements and balance sheets on separate printed forms. An application for the Commission's consent to transfer of control of a licensee corporation totals 56 mimeographed pages and must be similarly accompanied by returns on the printed forms.

## C. CONGRESSIONAL PROPOSALS FOR INVESTIGATION AND REORGANIZATION

The preceding review of developments in the Commission's personnel, internal organization, and procedure, gives a helpful background for the course and fate (to date) of proposals in Congress to investigate and to reorganize the Commission. A further necessary part of the background is furnished by the Commission's policies (or lack thereof) on *substantive* matters in the regulation of broadcasting, and the dissension and vacillation within the Commission over the principles to be applied. The chief controversial issues, such as the use of high power by clear channel stations, newspaper ownership of stations, so-called trafficking in licenses, alleged tendencies toward monopoly in the industry, and censorship of broadcast programs, will be considered under the next heading.

As the account proceeds, it will be observed that controversy over some of these issues (for example, newspaper ownership and so-called trafficking in licenses) originated *outside* and not within the Commission, and that differences of opinion within the Commission were not the cause but the *consequence* of external attacks. It is true that, once controversy over such an issue was set in motion, it was attended by a state of reciprocal oscillation between developments within the Commission and demands for investigation. It is a regrettable but thoroughly understandable phenomenon of administrative regulation that criticism by persons occupying influential official positions elsewhere in the Government affects the regulatory agency's policies and decisions, sometimes at the expense of undisputed facts and of generally accepted expert opinion. On the side of the critics, it must be conceded that really important problems are all too frequently ignored by the regulators until they have become so acute as to be forced on public attention by the efforts of interested parties. An atmosphere in which the regulators are torn between a desire to vindicate their past conduct and at the same time to appease their critics is far from ideal for the formulation of sound conclusions in the public interest.

**INVESTIGATION OF THE COMMISSION.** At no time since the establishment of the Federal Radio Commission under the Radio Act of 1927 was either it or its successor free from criticism and demands for investigation in Congress. The same was true of the Secretary of Com-

merce, the licensing authority under the Radio Act of 1912. Broadcasting, as an agency of mass-communication, touches most of the public so intimately, is so little understood on its technical side by the layman, and furnishes so tempting a vehicle for publicity, that it has ever been the easy prey of plausible theories, claims, and alarms.

Because of differences of opinion as to the merits of radio regulation under the Radio Act of 1912 and distrust of the licensing authority on the part of certain Senators, enactment of an adequate statute was delayed two or three years beyond the date when it was imperatively needed. When, under the Radio Act of 1927, a five-man commission was appointed, the same differences and distrust led to confirmation by the Senate of only three of the five nominees and the failure by Congress to make any appropriations for the first year. Shortcomings on the part of the Commission in fulfilling the highly conflicting expectations of members of Congress led to virulent criticism on the floor of both Houses, severe inquisitions of members of the Commission by Congressional committees, and legislation in March, 1928, cutting the terms of the Commissioners to one year and prescribing a rigid and technically impossible standard for the geographical distribution of broadcast stations. The criticism, it must be conceded, was largely deserved since, during its first year, the Commission had done little more than temporize with pressing allocation problems and, in some respects, made matters worse rather than better. The onslaught was, however, repeated in March, 1929, when, after further severe inquisitions before Congressional committees and a filibuster which threatened to extinguish the Commission entirely, the terms of the members were cut to one year and the original jurisdiction of the Commission was limited to a 9-months' period expiring December 31, 1929.

Yet, it was during this stormy period, the real equivalent of which has not yet been witnessed by the present Commission, that the standard broadcast allocation of November 11, 1928, was prepared and adopted by a bare majority, largely through the courage, expert technical knowledge and tireless energy of former Commissioner O. H. Caldwell,* assisted by Acting Chief Engineer J. H. Dellinger. This allocation was sufficiently sound to stand unaltered in its essential features for over 10 years and is now being only slightly revised to become the basis for allocation for all of North America. It was also during this period that the present allocation of the high-frequency (short-wave) portion of the radio spectrum from 1500 kc. to 30,000 kc., then newly opened to practical use, was devised by the Commission's Assistant Chief Engineer, T. A. M. Craven, now a member of the Federal Communications Commission. It, too, has not had to be greatly changed and, in substance, has become the basis for allocation in the entire Western Hemisphere and, to a large extent, in the entire world. The action of Congress at the end of 1929, placing the Commission on a permanent basis, was due in no small measure to recognition of these accomplishments. They stand as enduring monuments long after the timorous apprehensions of the minority of the Commission, and the resounding criticisms against the majority by outsiders have sunk into oblivion.

During the next few years, further crucial situations developed from time to time but, until the past three years, did not rival the furor of the earlier

* Who had been confirmed by the Senate in 1928 by a vote of 35 to 34 and who never could have been confirmed in 1929, when he retired from the Commission, urging on Congress that the Commission be relieved of its original jurisdiction as the licensing authority.

period. Among the issues at the forefront were those created by the demands of particular groups, including labor and a group of educational institutions, for allocation of broadcast facilities (for example, a specified percentage of frequencies in the standard broadcast band). The repercussions were severe and, for a while, had a considerable effect on the decisions and policies of the Commission, but are now all but forgotten. At all times, including the present, it must be added, there has been an undercurrent of charges and suspicions that the Commission's decisions in individual cases have been too often the result of political pressure and other off-the-record considerations rather than of evidence received in open hearing, and that the Commission has not hesitated, for reasons best known to itself, to ignore its own rules and regulations to the advantage of certain favored applicants, or to rest decisions granting applications on substantially the same facts and arguments as those cited as reasons for denying other applications.

Beginning in about 1936, agitation against the Commission has revived and, by a succession of events, has been fanned into a flame which recently threatened to parallel that of 1928-9. In a general way, the agitation may be said to have begun with complaints stirred up in Congress against the network companies by a religious organization endeavoring to secure better facilities for its broadcast station in New York. This led to charges in Congress of undue favoritism to the networks on the Commission's part, of failure to exercise the power conferred on it by Congress to adopt regulations on chain broadcasting, of permitting the networks to acquire ownership or control of too many stations (specifically the high-power clear channel stations), and of tying up too large a proportion of the remaining stations by contracts with unduly restrictive provisions. The charges were aggravated by the Commission's approval, in the summer of 1936, of a sale of a 50-kilowatt clear channel station in Los Angeles to one of the networks at the price of $1,250,000 and subsequent attempts on the part of the same network to secure other stations by purchase or lease, leading to the claim that the Commission was sanctioning "trafficking in licenses" and the "sale of wave-lengths." Into the resulting melee was tossed the issue of newspaper ownership of stations. To all this was added a continuing indictment of the Commission for improper practices in the decision of cases. There were thus initiated a succession of violent attacks on the Commission in both Houses of Congress and of insistent demands for investigation both of it and of the industry.

A resolution introduced by Senator White calling for such an investigation by a sub-committee, with an appropriation of $25,000, was favorably reported by the Senate Committee on Interstate Commerce on August 11, 1937, and escaped adoption only by a narrow margin due to the strategy of Administration leaders. It was no secret that the President's appointment of Mr. McNinch as chairman of the Commission was for the purpose of bringing about sufficient remodeling of the Commission's policies and practices to deflect the pressure for investigation.

Senator White's resolution slumbered in the hands of the Senate Audit and Control Committee until the spring of 1938. In the meantime, the Senator, the original sponsor in the House of the Radio Act of 1927 and generally acknowledged the leading radio authority in Congress, was appointed Chairman of the American Delegation to the International Telecommunications Conference at Cairo and was absent from the country for

several months. Upon his return in April, pressure for enactment of the resolution was revived. On May 10, 1938 the Senate Audit and Control Committee reported the resolution without recommendation. Administration leaders in the Senate announced opposition to the proposed investigation, characterizing it as a political move and pointing out that the Commission was already engaged in investigating most of the important subjects enumerated in the resolution. The reference was to the Commission's Order No. 37, adopted March 18, 1938, calling for an investigation by a committee of the Commission of networks and alleged tendencies toward monopoly in the broadcasting industry, and on which hearings actually commenced some eight months later.

In May, 1938, pressure for adoption of similar resolutions in the House gained impetus and hearings were held before the House Rules Committee. At these hearings Chairman McNinch answered arguments for an investigation by explaining that the Commission was undertaking an inquiry of its own into the network-monopoly subject (referring to Order No. 37), telling of extensive work which had already been done, and stating that the Commission would be prepared to submit legislative recommendations to Congress at its next session. By a vote of seven to six, the House Committee reported one of the resolutions favorably. On June 14th, the resolution came before the House. There followed a tumultuous session characterized by impassioned speeches on both sides. Those supporting the resolution bitterly attacked what was described as the "radio lobby" for the "radio trust," charging wrong-doing by the Commission and comparing its internal strife with that of the Tennessee Valley Authority. Those opposing the resolution relied principally on the points made by Chairman McNinch and urged that he should be given a reasonable opportunity to carry out his program and to make definite legislative recommendations before subjecting the Commission to Congressional scrutiny. The issue was complicated by an unfavorable impression created by another member of the Commission, who had testified before the House Rules Committee and had been unable to substantiate charges he made against his colleagues. The resolution was voted down by an overwhelming majority of 234 to 101.

Congress adjourned on June 16, 1938 without enacting any of the resolutions. With the opening of the next Congress on January 3, 1939, it seemed almost certain there would be an investigation in view of continued dissatisfaction with the Commission, the widely-publicized reports of dissension within the Commission, the slowness of the Commission in moving forward with its network-monopoly hearing, and the great reduction in Administration forces due to the election. On January 25th, immediately after the President's proposal that the Commission be reorganized, separate resolutions for investigation were introduced by Representatives Wigglesworth and Connery in the House and, on March 6, 1939, by Senator White in the Senate. The White resolution enumerated the subjects to be investigated in 11 paragraphs, including, generally, the acts, practices and policies of the Commission; censorship; the term of licenses; newspaper ownership; network ownership and control; ownership of two or more stations; transfers of licenses and control of stations; financial and other aspects of network operations; duplication of programs; the use of high-power; competition; the Commission's questionnaires; possible license fees; and other matters. While the House resolutions contained considerably more detail, in the nature of specific charges of improper practice against the Commission, they did not differ sufficiently in scope to justify a separate sum-

mary. Senator White stated that he regarded the network-monopoly inquiry as one in which members of the Commission were passing on their own prior conduct, in other words, were studying conditions which they, themselves, had created. It is impossible, within reasonable limitations, to advert to the many speeches on the floors of both Houses, criticizing the Commission. It was obvious that Congressional dissatisfaction was greater than ever.

At present writing, none of the resolutions has been reported by the Committees to which they were referred. It is impossible to predict their fate with any confidence although it seems more likely than not that there will be no action on any of them at the present session, both because of a recent apparent relaxation in the pressure for their adoption, and because of the many other matters that urgently call for the attention of Congress prior to its adjournment this summer.

## PROPOSALS FOR REORGANIZATION OF THE COMMISSION.

In his statement explaining the actions of a majority of the Commission on November 9, 1938, abolishing the Examining Division and the Information Section, Chairman McNinch declared he had no plan whatever regarding the Commission itself and had made no recommendations to the President, but added that there had been discussions as to the size of boards. There were, however, persistent rumors of an impending legislative proposal for reorganization of the Commission. Early in December the *Washington Post* published a front-page story to the effect that a bill to substitute a three-man agency for the seven-man Commission was being drafted by Messrs. Corcoran and Cohen. On December 7, the Chairman asserted that the article was "utterly without foundation," as was also the statement that any such legislation had his approval. He charged that "this misinformation must have come from a source desirous of sabotaging the Commission's work."

On January 24, 1939, without advance warning, President Roosevelt sent letters to the chairman of the Senate and House Committees on Interstate Commerce reading, in part, as follows:

> "Although considerable progress has been made as a result of efforts to reorganize the work of the Federal Communications Commission under existing law, I am thoroughly dissatisfied with the present legal framework and administrative machinery of the Commission. I have come to the definite conclusion that the new legislation is necessary to effectuate a satisfactory reorganization of the Commission.
>
> "New legislation is also needed to lay down clearer congressional policies on the substantive side—so clear that the new administrative body will have no difficulty in interpreting or administering them."

The President expressed the hope that the committees "will consider the advisability of such new legislation" and stated that he had asked Chairman McNinch to discuss the problem with them and to give them his recommendations.

Immediately following the publication of the President's letter, Chairman McNinch issued a statement describing himself as "wholly sympathetic with the President's proposal" and adding that he had "recommended to the President some time ago that the Commission be reorganized."

While it appeared that on Sunday, January 22, and on the two preceding Sundays, Mr. McNinch had conferred with the President on the subject, the sudden move for reorganization was generally viewed as having been precipitated by an incident occurring January 18. On that date the Committee on the Proposed Rules and Regulations which had presided over the hearing in June, 1938, (described in Part II of this article) made public Part I of its Report on the hearing and, in so doing, did not comply with the Chairman's edict that all such matters clear through the newly organized temporary information section. This caused the sub-surface dissension to break out in open warfare.

It was then announced that a two-phase legislative program had been decided upon by the President, Senator Wheeler (Chairman of the Senate Committee), and Mr. McNinch: (1) the first part, to be executed as quickly as possible, would be restricted to reorganization of the Commission, and (2) the second part, to materialize within about two months, would embrace the formulation and prescribing of policies to guide the reorganized Commission. At a press conference January 24 the President stated that the principal difficulty with the existing law was its failure to prescribe policies on such matters as newspaper ownership, transfers of station licenses, limitations on power, liability of broadcasters for defamation, alleged network dominance and the like. So far as is known to the writer, no bill was ever drafted to carry the second part of the program into effect. and certainly none was introduced, presumably because of the intense opposition which completely thwarted endeavors to carry out the first part.

On February 9, a bill (S. 1268) was introduced to effect reorganization of the Commission, drafted by Senator Wheeler in collaboration with Mr. McNinch and with the Administration's approval and support. Its principal features were: (1) substitution of a new three-man commission for the present seven-man commission, (2) enlargement of the powers of the chairman, who would become "the principal executive officer of the Commission," (3) establishment of three "administrative assistants," under the "administrative supervision" of the chairman, for broadcasting, communications carriers, and international matters, respectively; (4) extension of scope within which the Commission might delegate its functions to an individual member or to one or more of its employees; (5) establishment of a new department of research and information, and (6) important extensions in the Commission's power to dismiss or reclassify employees. Senator Wheeler issued a statement in which, among other things, he declared that the bill was "intended to correct looseness and uncertainty as to functioning and diffused responsibility" and charged that in the Commission

> "such conditions have been aggravated because the Commission for years has been plagued by politics—not simple party politics alone but the politics of big business too."

The next day, February 10, Chairman McNinch delivered an address over a national network in which, to an unprecedented extent, he aired scathing charges against a minority of his colleagues who had disagreed with his views both on procedural and policy matters. He criticized them directly or by necessary implication for lack of cooperation, hostile tactics, public detraction of their fellow members, individual struggle for power, the seeking of personal prestige and advantage, inability to resist the urge for personal acclaim, inefficiency, lost motion, wasted time, injudicious

action, inaction, unjust action, a breakdown of regulation, playing into the hands of industry and leaving the public interest unprotected, and susceptibility to political influence. One of his most interesting statements, in view of his first step in the reformation of the Commission in 1937 (abolition of the three divisions and dismissal of their directors) was his justification for establishment of three "administrative assistants." He said that "approximately ninety per cent of the time and energy of the staff and the Commission are devoted to broadcasting," and that the effect had been "to cause measurable neglect of the regulation of the telephone and telegraph industries," which "should not longer go without aggressive, intelligent, fair regulation." He also bitterly attacked the author of an article in that week's *Saturday Evening Post,* which had charged the Commission with exercising censorship.

It was at first thought that the bill could be passed without hearings. Vigorous opposition, however, was manifested on Capitol Hill, based on objections that a three-man board would be too small in view of the diverse character of the Commission's jurisdiction, that its enactment would mean virtually a one-man dictatorship over each of the important fields of regulation, that the bill was really a device to "unpack" the Commission and eliminate the dissenting minority, that the President's appointments to the new commission might be of the rubber-stamp variety under the thumb of the Chairman, that injustice and spoils politics would be visited on the employees, that the proposed department of research and information was really an apparatus for program regulation and censorship (which was the subject of acute differences of opinion within the Commission at the time), and that no amendment of the Act was necessary to authorize the appointment of "administrative assistants" (i. e., directors) or to achieve the efficiency sought by the Chairman.

Senator White announced his opposition in a forceful statement, and, on February 22, introduced a bill (S. 1520) constructed on an entirely different model and dealing both with reorganization of the Commission and with substantive matters. It proposed that the Commission be increased from seven to 11 members: that it be divided into two autonomous divisions, each of five members, one of which would have jurisdiction principally over broadcasting and related services, and the other principally over communications common carriers and related services; that the chairman would be the chief executive officer but would not sit as a member of either division, and that the requirement of examiners' reports be reinstated.

The industry made it clear that it would oppose any restrictive legislation, that it was against the McNinch bill, and that it favored segregation of regulation of broadcasting from regulation of common carriers, because of the tendencies at the Commission already noted. During this same month of February, deep-seated differences of opinion within the Commission on the subject of censorship broke into the open and made the McNinch proposal seem all the more dangerous.

Thereafter the atmosphere on Capitol Hill became increasingly calm. The McNinch bill had also been introduced in the House, but Chairman Lea of the Interstate Commerce Committee stated repeatedly that his committee would not consider the legislation until the Senate had acted. Senator Wheeler's committee in the Senate was concentrating its attention on railroad legislation. For a while there were indications that Senators

Wheeler and White would work out a reorganization measure meeting with mutual approval, and that any bill would have to provide for at least five members on the Commission. It was generally agreed that the House would never assent to a three-man Commission. In the face of the opposition, enthusiasm for the McNinch measure, on the part of both the White House and the Chairman himself, appeared to dwindle to the vanishing point. Recently the Commission's standing with Congress has improved materially, considered with the industry and efficiency with which it has operated since early in May. At present writing it appears certain that there will be no reorganization legislation before Congress adjourns, and, subject to developments during the interim, there is not likely to be any great pressure for such legislation during the next session.

The story would not be complete without reference to legislative proposals of a more far-reaching character, affecting federal administrative agencies (including the Federal Communications Commission) generally. Since 1933 there has been a rising tide of reaction against such agencies, due in part to real or alleged misconduct, arbitrary action and ineffciency on the part of some of the agencies, in part to an increasing sentiment, chiefly among lawyers, that too broad a combination of legislative, executive and judicial powers has been reposed in many of the agencies with inadequate provision for judicial control of their decisions, and in part to opposition to the Government's invasion of certain fields of regulation. The Federal Communications Commission has been among the agencies most frequently cited as examples of the need for reform. This reaction has been expressed in a number of ways, including bills introduced in Congress.

Among the proposals has been one suggested early in 1937, in the Report of the President's Committee on Administrative Management, with particular reference to the so-called independent regulatory commissions, describing them as

> "a headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers."

The Report proposed that the staff of such commissions be absorbed into one or the other of the Executive Departments of the Government (e. g., the Department of Commerce in the case of the Federal Communications Commission and the Interstate Commerce Commission), and that the Commission itself become a board practically independent of the Department, to sit in review on all controverted cases of a judicial character. This would be somewhat on the model of the Board of Tax Appeals with reference to the Bureau of Internal Revenue in the Treasury Department, and would be not radically different from what was proposed in the Radio Act of 1927 as originally enacted.* Having become badly entangled in politics, the proposal of the President's Committee has made little or no progress in Congress. In the Reorganization Act adopted by Congress, approved April 3, 1939, however, there were indications (which did not materialize) that an attempt would be made to include the Federal Communications Commission among the agencies over which the President would have broad powers of remodeling.

Another important proposal has been incorporated in a bill sponsored

* Under the Act, after the end of one year, the Secretary of Commerce was to be the licensing authority, the Commission to hear controverted matters and to sit in review of the Secretary's decisions. Because of later legislation by Congress, this provision never became effective.

by the American Bar Association since 1937. Early in 1939 companion bills were introduced in the Senate and the House and for a while made remarkable progress, receiving a favorable report from the Senate Judiciary Committee and favorable action on the part of a subcommittee of the House Judiciary Committee. At present, its prospects for enactment are dim, due to an increasing appreciation by members of Congress of the need for further study before drastic or reckless reforms are imposed on the agencies generally, and to the appointment by the Attorney General of a committee of eminent persons to make this study.

**THE COMMISSION'S APPROPRIATION.** Since 1934, the Commission's appropriation has been increased from year to year. For the fiscal year just closed, the appropriation was $1,700,000 for salaries and expenses (exclusive of printing and binding). In the fall of 1938 the Commission submitted an estimated budget of $2,385,000 for the fiscal year beginning July 1, 1939, basing its request on a need for additional personnel, including additional attorneys and engineers in the Washington headquarters, and proposed new branch offices of its Accounting Department in seven cities. The need for additional funds was stressed in the Commission's Annual Report to Congress. The sum actually submitted to Congress was $2,038,175.

Because of dissatisfaction with the Commission in Congress, and the unsettled state of affairs, hearings on the request which were scheduled to begin before a subcommittee of the House Committee on Appropriations in December were indefinitely postponed but were eventually held January 23, 1939, behind closed doors in what proved to be a very heated session, in the course of which the Chairman and others were subjected to vigorous examination of the Commission's actions and policies. This was on the same day that the President made public his letter calling for reorganization of the Commission. An unexpected result of this situation was that the House Appropriations Committee determined not to act on the appropriation until the reorganization matter was settled and, on February 8, the House passed the Independent Offices Supply Bill without any provision for funds for the Commission, and, on February 22, the Senate followed the example of the House and the bill became law.

From that time until well along in June all efforts to obtain an appropriation for the Commission were unavailing. Rumors were prevalent that the appropriation, if passed, would be greatly reduced or would be for only a limited period, or would be contingent on adoption of a resolution for investigation of the Commission, or might not be made at all. There was a substantial possibility that the experience of the Federal Radio Commission in 1927 would be repeated. With the improved standing of the Commission during the last two months, however, the way was paved for an about-face by Congress. Hearings were held before the House subcommittee on June 20, a deficiency bill carrying an appropriation of $1,838,175 for the Commission was passed by the House on June 23, and, by last-minute action, the bill was passed by the Senate and was approved by the President on June 30. The hearings before the subcommittee and the debate on the floor of the House were far from free of criticism of the Commission (particularly with respect to the recent rules governing international short-wave broadcasting), but, in comparison with earlier experiences, they were surprisingly mild.

## PART II

## REGULATION OF STANDARD BROADCAST STATIONS

For reasons based on the nature of the developments during the period covered by this article, the material has been organized with reference to *subject-matter* rather than *method* of regulation. In the two prior articles, a distinction was made between the exercise of the Commission's *legislative* functions, expressed in rules and regulations, and the exercise of its *judicial* functions, expressed in its actions and decisions in granting or denying applications. In this article its actions of whatever character will be summarized under three broad headings denoting the principal *fields* in which it regulates, or attempts to regulate, broadcasting.

The three fields, in general terms, are (1) allocation, (2) ownership and control of stations, and (3) program content. The first deals with the assignments of stations with respect to location, frequency, power and hours of operation and with measures taken to minimize interference, to produce efficient use of facilities, and to assure a maximum of broadcast service in the physical sense. At present, it appears to have two important subheadings. Originally it consisted almost entirely, if not entirely, of technical factors. In more recent years, according to the view taken by the Commission, there are also "economic and social factors," often more important than technical factors, to be considered and regulated.

The second heading has to do with the determination of what persons and corporations shall be permitted to acquire or retain control over broadcast stations, and the permissible limits of such control. The third has to do with regulation of what programs may be broadcast, including the limitations imposed on the Commission by the Constitutional guaranty of free speech and the prohibition against censorship in Section 326 of the Communications Act of 1934.

It is not difficult to demonstrate from the language of the statute, its legislative history, and the circumstances which led to its original enactment in 1927, that the principal functions which Congress intended to confide in the Commission were, first and foremost, regulation of the *technical* factors of allocation, including relief from the chaos of interference created in 1926, and a fair and equitable geographical distribution of stations; and, secondly, regulation of ownership and control in such manner as to preserve competition and prevent monopoly in radio communication. One purpose served by the arrangement followed below is to bring into bold relief the Commission's straying from the original concept of the law, to the point where so-called "economic factors" prevail over technical facts, and the forbidden field of program regulation and straw men have engrossed its attention frequently at the expense of problems urgently calling for study and constructive action. A by-product of the arrangement consists in the occasional glimpses it affords of the currents and cross-currents which have assisted to produce the results.

### A. REGULATION OF BROADCAST ALLOCATION

#### PROCEEDINGS LEADING TO REVISION OF REGULATIONS.

Of transcendent importance in the regulation of broadcasting was the adoption by the Commission on June 23, 1939 of a thorough-going revision of its rules governing standard broadcast stations. The revision deals principally, but not entirely, with allocation matters, and discussion of it will occupy most of this subheading.

The earlier proceedings were recounted in last year's article.* Beginning on June 6, 1938, an extended hearing was held on "Proposed Rules Governing Standard Broadcast Stations" and on "Proposed Standards of Good Engineering Practice Concerning Standard Broadcast Stations," as set forth in two bulky documents, before a committee of the Commission consisting of Commissioners Case, Chairman, Craven and Payne. The hearing, which was expeditiously and efficiently conducted, closed on June 30, with a record of nearly 2,200 pages and over 400 technical and statistical exhibits. The principal (although not the only) issues were (1) the number of channels to be preserved as clear channels, and (2) the maximum power of clear channel stations. On one side of these issues was the so-called Clear Channel Group, an informal organization consisting of 14 licensees of independently-owned clear channel stations. On the other side were the National Association of Regional Broadcast Stations, an organization of the owners of some 74 regional broadcast stations, and National Independent Broadcasters, an organization of the owners of some 105 local broadcast stations. There were, of course, other parties to the hearing.

Early in September, 1938, briefs were filed with the Committee by the principal parties. On January 18, 1939, the Committee released Part I† of its Report on the issues raised at the hearing and on April 7, 1939, Part II** of the Report. Part I of the Report comprised 35 single-spaced mimeographed pages and contained two sections, Section I being devoted to introductory matter and Section II, entitled "General Policy Considerations," covering a number of subjects, including the principal issues raised at the hearing together with newspaper ownership, economics, programs and other items. Part II of the Report added 149 such pages (accompanied by about 300 pages of appendices, including many elaborate charts and tabulations). It contained Section III entitled "Social Aspects" and Section IV entitled "Economic Aspects."

Dissatisfied parties were given an opportunity to file exceptions and briefs and, on June 1, 1939, a day was consumed in oral argument before the Commission. As already stated, final action on the proposed regulations and standards was taken June 23rd.

It is impossible, within reasonable limitations of space, to present an adequate picture of either the contents of the Committee's Report or the provisions of the revised regulations. Discussion will be limited to noting the outstanding features of the regulations and the disposition of the principal issues.

**TERM OF BROADCAST LICENSES.** Notwithstanding repeated attempts by the broadcasting industry for years to persuade the Commission to avail itself of the power given it by Congress to issue licenses for a period up to three years, the Commission had steadfastly shied away

* VARIETY RADIO DIRECTORY, II, pp. 526-532.

† It was the release of this document by the Committee without making use of the newly organized temporary Information Section of the Commission (and possibly also its contents) which, as pointed out in Part I-C of this article, was apparently the cause for the President's letter of January 23, 1939, and the move to force legislative reorganization of the Commission.

** In compliance with the Chairman's wishes, Part II was released through the Information Section but, to the consternation of parties and their attorneys, was distributed to the press three days before copies were available to them.

from any increase beyond the six-months' period which has obtained since April, 1931—until its action of June 23, 1939, in which a one-year period was inaugurated. This was pursuant to a recommendation made in Part I of the Committee's Report.

Back in May, 1938, just prior to the hearing on the proposed regulations, Chairman McNinch, in a letter to the president of the National Association of Broadcasters (which organization planned to participate in the hearing in behalf of the industry) had stated his personal belief that discussion of an increase in the six-months' license period "would not be opportune now or at any time soon." As late as January 23, 1939, in his appearance before the House Appropriations subcommittee, Mr. McNinch declared that in his opinion a majority of the Commission did not favor a longer license period, despite the recommendation of the Committee only five days before.

The change in attitude came about largely through a growing realization on the part both of certain members of the Commission and members of Congress that the short license period, combined with the procedure employed on renewal applications, was, in addition to being an unnecessary burden on the industry and on the Commission's staff, a constant threat of censorship. Senator White's bill, introduced on February 22, 1939, proposed a minimum period of one year and, on March 2, 1939, Representative McLeod introduced a bill to establish a minimum period of three years, with a maximum of five, and at the same time to eliminate the possibility of political reprisals against stations by the Commission.

With the adoption of the revision on June 23, it was stated at the Commission that, had it not been for the uncertainty with respect to Mexico's ratification of the North American Regional Broadcasting Agreement (see Part V—B), a three-year license period would have been approved.

**CLASSIFICATION OF CHANNELS AND STATIONS.** In last year's article*, the classification of channels and stations as originally proposed in the revision was set forth. It is necessary to point out only the modifications in the revision as finally adopted, which are few in number.

The subclassification of Class I stations into Class I-A and Class I-B was abandoned, but in name only, since the distinction applying to nighttime duplication) is preserved with respect to the frequencies on which they operate. All told, 44 frequencies are designated as "clear channels." On 26 of these frequencies, nighttime duplication is not to be permitted. The revision originally proposed that 25 be free of such duplication, the increase being due to the addition of 1170 kc (WCAU, Philadelphia) to the list. The remaining 18 are to be subject to nighttime duplication under restrictions designed to minimize interference.

The attempt to persuade the Commission to increase or remove the 50 kw. power limitation on the unduplicated clear channels was unsuccessful, and the dominant stations on those channels are subject to both a maximum and a minimum power limitation of 50 kw. The dominant stations on the remaining 18 clear channels have a maximum of 50 kw. and a minimum of 10 kw. A Class II, or secondary, station on a clear channel may have power ranging from 50 kw. down to 250 watts.

* VARIETY RADIO DIRECTORY, II, p. 530. In the preceding article, VARIETY RADIO DIRECTORY, I, p. 278, the situation heretofore existing was set forth.

The maximum nighttime power of Class III-A (regional) stations was increased from 1 kw. to 5 kw., and of Class IV (local) stations, from 100 watts to 250 watts, in both instances upon individual application and where engineeringly feasible.

For the first time, formal recognition of the "Standards of Good Engineering Practice" is given in the regulations, although there are qualifications which partly vitiate this welcome step. Heretofore, these standards, which have been developed over a period of some 10 years in an evolutionary manner by Assistant Chief Engineer Ring and his staff, have had only a semi-official status, representing merely recommendations of the Commission's Engineering Department.

Except for reallocation of frequencies to make room for assignments to Canada, Cuba and Mexico, the new rules, accompanied by the standards, give effect to virtually all the provisions of the North American Regional Broadcasting Agreement. It had been hoped that the Agreement and the regulations might go into effect simultaneously, but this has been prevented by Mexico's failure to ratify.

The revision of regulations and standards constitutes the first substantial change in the general reallocation of November 11, 1928. Taken in conjunction with the Agreement, it represents remarkable accomplishments in the practical solution of a number of baffling problems. If it is not free from defects it can be said only that, in view of the difficulties, it is surprising that the defects are not more numerous and more serious in their consequences.

**SPECIAL EXPERIMENTAL AUTHORIZATIONS.** No changes were made in the rules covering this type of authorization as summarized in last year's article*. They are of particular interest in view of the decisions of the Commission and of the Court of Appeals in the WLW case, as well as certain authorizations now outstanding. The applicant must sustain the burden of making a satisfactory showing of a program of research and experimentation and that the operation will be under the direct supervision of a qualified engineer with an adequate staff. In case the authorization permits additional hours of operation,

> "no licensee shall transmit any commercial or sponsored program or make any commercial announcement during such time of operation. In case of other, additional facilities, no additional charge shall be made by reason of transmission with such facilities."

The authorization will not be extended after the actual experimentation is concluded. A report must be filed with each application for an "extension."

**SHOWING TO BE MADE IN SUPPORT OF ALLOCATIONS.** The provision quoted in last year's article† having to do with the showing to be made on program service, and involving a serious issue of censorship, was omitted. Likewise were omitted the proposed requirement of a showing of adequate commercial support and that an applicant for a Class IV station be a resident in and familiar with the needs of the community to be served. A requirement that the transmitter

> "be so located that primary service is delivered to the city in which the main studio is located"

* VARIETY RADIO DIRECTORY, II, p. 531.

† VARIETY RADIO DIRECTORY, II, p. 531.

was retained, over the objection of a number of station-owners.

**THE WLW CASE.** On July 18, 1938, shortly after the hearing on the proposed new rules, the Committee entered on a ten-day hearing on the application of the Crosley Corporation for extension of its special experimental authorization to operate WLW, Cincinnati, with power of 500 kw. Except for a brief interruption in 1935, the authorization had regularly been renewed since it was first issued in the spring of 1934. Notwithstanding the fact that on the face of the record the issues were primarily technical, namely, the feasibility of the experimental operation and the question whether it should be continued, a large portion of the hearing was taken up with a minute inquiry into WLW's program service and its alleged shortcomings, and with the economic issue as to whether or not WLW's operation at 500 kw. had caused regional and local broadcast stations in other cities to lose advertising revenue.

On October 17, 1938 the Committee rendered its report recommending denial of the extension, relying both on the ground that the authorization was unnecessary from the technical experimental viewpoint and the ground of economic injury. In its decision February 8, 1939, rendered after exceptions had been filed and oral argument heard, the Commission followed the Committee's recommendation and denied the extension, effective at 3:00 A. M. March 1, but omitted reference to the economic issue as a ground for its decision. A petition for rehearing having been filed February 17th and denied February 20th, an appeal was taken to the United States Court of Appeals on the latter date. A motion for stay order was denied on February 28th, and the power of WLW was reduced to 50 kw. on March 1st. On June 26th the Court dismissed the appeal (see Part IV).

**NEED FOR IMPROVEMENT IN SERVICE.** The subject cannot be left with a bare recital of the results. Both at the October 5, 1936, and at the June 6, 1938 hearings, there were presented to the Commission the most thorough-going exploration into the problems of broadcast service, the nature and extent of the need for improvement, and the methods available to effect the improvement, that is to be found anywhere. As to the technical facts, there was no substantial dispute and, although in some of their most important aspects they were not accorded recognition in the outcome, it is necessary that they be kept constantly in mind in the hope that on a future and more auspicious occasion a suitable further revision of the regulations may be achieved.

As of 1930, the United States has a population slightly over 122,000,000 and a land area slightly under 3,000,000 square miles. During the daytime a population of over 16,000,000, residing in about 40% of the area, does not receive a satisfactory signal from a single broadcast station. At night, a population of over 50,000,000 people, residing in 82% of the area and mainly in rural regions and in small towns and cities having no stations of their own, is entirely dependent on clear channel stations for service. Out of these totals, a population of over 21,000,000 residing in about 60% of the country's area receives only *sky-wave* service from clear channel stations at night, subject to the well-known vagaries of fading and the wide variations in average signal strength from hour to hour, season to season, and year to year. The service received by this population of 21,000,000 residing in 60% of the area, measured merely on the minimum standards of satisfactory

daytime service, is nowhere sufficient to constitute adequate service, at the present power of clear channel stations. An additional 7,000,000 while receiving *ground-wave* service at night from clear channel stations, receives only signals of inadequate strength.

The above figures are based on *minimum* standards as to what constitutes satisfactory service, as recognized by the Commission's Engineering Department, and are based on reception from *only one station,* that is, they do not take a choice of at least two programs into account as a necessary element in good service. The inadequacy extends, in one form or another, into every State in the Union, from Maine to California.

The test of satisfactory service, in the physical sense, is a combination of two factors. The first factor is the *strength of the electric signal* at the point where it is received by the listener, expressed in terms of small fractions of a volt, millivolts (thousandths) and microvolts (millionths). The second factor (in the absence of interference from other stations) is the *strength of interfering electrical noise,* which may be due to natural static produced by thunderstorms and other atmospherics, or man-made static produced by innumerable kinds of electrical apparatus usually found in profusion in inhabited communities. As a rule, natural static predominates in rural communities and man-made static in towns and cities. The strength of the broadcast signal must be sufficiently strong to override the interfering electrical noise. According to the Standards of Good Engineering Practice, in city business or factory areas a broadcast signal of from 10 to 50 millivolts is necessary; in city residential areas, from 2 to 10 millivolts, and in rural areas, from 100 microvolts to 1 millivolt, depending on the season and the region (natural static being greater in the south). According to the same standards, although subject to wide variations in individual cases, a city of 10,000 population or more is regarded as requiring a signal of at least 10 millivolts; and a city of from 2,500 to 10,000, a signal of at least 2 millivolts.

By and large, and subject to minor exceptions that would not materially affect the result, the only method of effecting improvement in service from standard broadcast stations for these people and areas is by increasing the power of clear channel stations above the present maximum fixed by the rules of the Commission. At night, on any channel where simultaneous operation of two or more stations is permitted, no horizontal increase of the power of the stations, however large, will change the pattern of areas served and those not served, since the stations limit each other by mutual interference. The several hundred regional and local stations in the United States, taken all together, give interference-free service to only about 18% of its area. In the main, they are located in cities with the result that most of the urban population of the United States receives a broadcast service far superior to that enjoyed by most of the rural population. During the daytime, theoretically, improvement could be brought about by very large increases in the power of existing regional and local stations and by establishing a number of new daytime stations in the more sparsely settled parts of each state, but prohibitive economic obstacles stand in the way.

The benefits of the higher power have been thoroughly demonstrated through the operation of WLW at 500 kw. for a period of five years, and by the operation of high-power stations in other countries. In 1935 and again in 1937 extensive listener surveys were conducted by the Commission among the country's rural population. The first of these surveys revealed that WLW was first choice of the rural listeners in some 13 or 14 states

and second choice in six or seven more. The second showed that about 80% of the rural listeners relied primarily on service from clear channel stations at night and about 59% by day.

There are 72 broadcast stations in other countries operating with power in excess of 50 kw., most of them with 100 kw. or more, including 60 in Europe and 4 in Mexico. One of the Mexican stations, located on the border, has been authorized to use 850 kw. and appears actually to be using 500 kw.* Stations are operating with 500 kw. at Moscow and Warsaw. Germany, with a present area slightly less than that of Texas, has three 120 kw. stations, seven 100 kw. stations, and one 60 kw. station.

In the face of these facts, the Commission has decreed that the urban population, which least needs improved service, shall have the benefit resulting from substantial increases in the power of regional and local stations, whereas the rural and small-town population which now suffers most from inadequate service shall be denied any betterment. Fortunately, however, by leaving 26 channels really clear (i.e., unduplicated) it has left the door open for future remedy of the inadequacy.

**ECONOMIC FACTORS.** The Committee's recommendation against increasing or removing the power maximum is based on "possible disadvantages of an economic and social character." It is apprehensive of adverse economic effects upon smaller stations primarily serving the smaller metropolitan areas. It concedes that the claim that, in its five years of operation at 500 kw. WLW had not caused such injury, "was not successfully controverted in the testimony." The evidence showed that, at most, only a tiny handful of stations, located within the primary service areas of the clear channel stations, ran any hazard of losing revenue. It argues simply that there are "uncertainties" and that additional data are necessary, particularly with respect to what is known as national spot advertising.

Implicit in the Committee's reasoning, however, are conclusions based on the financial data compiled from the questionnaires (see Part I-B) sent to all broadcast stations and networks, covering the year 1937. According to these figures, the net income of the entire industry for 1937 (before federal income taxes) was $22,630,174,† of which $4,543,890 was earned from network operations and $18,086,284 from the 624 commercial stations, including 23 stations owned or managed by two of the national networks. The 33 stations having power of 50 kw. or more, including WLW, accounted for just half the total for the 624 stations. This, reasoned the Committee, is too large a proportion (overlooking the fact that almost the entire station revenue proceeds from not over 200 stations). These figures, however, proved to be misleading. When the revenue figures for the 23 stations are included in the network figures, the total for the networks becomes $9,828,932 and for the remaining 601 stations, $12,801,242, while the figure for the independently-owned 50 kw. clear channel stations undergoes a marked drop to a figure not out of line with the earnings of regional stations under similar circumstances. Further analysis shows that the Committee not only did not take earnings on investment into account but, in making its comparisons, placed undue emphasis on power and not sufficient emphasis

* Editor's Note: This station is XERA, Villa Acuna, Mexico, operating on 840 kc. with an allowable wattage of 850,000.

† Editor's Note: The net operating profit of the industry in 1937 was $18,883,935 (net excess of revenue over expenses after federal income taxes).

on such matters as desirability of frequency, population within the station's primary service area, and national network affiliation. One regional station, for example, actually showed larger net earnings than 13 out of 15 independently-owned clear channel stations.

These facts are recited, not to re-argue the case for higher power, but as further evidence of the significant *trend* of radio regulation referred to in Part I of this article. The significant thing is that, in the face of the undisputed facts showing a need for improved service for a large population over wide areas and the obvious remedy for the need, the Commission should give greater weight to a *possibility* of loss of income on the part of a few stations resulting from disturbing the *status quo* and to an implied sentiment that certain stations are taking too large a share of the industry's profits. This reasoning is in the direction of *economic* supervision of the industry, and, if not checked, leads inevitably to regulation of the public utility common carrier type. It is responsible for the questionnaires which have already flooded the industry and will be responsible for even more searching questionnaires in the future.

This is not an appropriate occasion for a legal discussion of the nature and extent of the Commission's power to take so-called economic factors into account in its regulation of broadcast stations. In passing, however, it may be noted that in 1927, when the standard of "public interest, convenience or necessity" was originally prescribed by Congress for the Commission's guidance, the standard could not have had any substantial economic aspect since the future of the industry's financial support was not generally appreciated or foreseen. Congress must have intended to place some limitation on the Commission's power with respect to economic factors when it declared in the Communications Act of 1934 that a broadcaster shall not "be deemed a common carrier" and did not subject him to the provisions of Title II of the Act which deal with economic regulation. Throughout its career, the Federal Radio Commission declined (almost consistently) to recognize any economic or competitive interest in licensees or applicants. Even now, the Federal Communications Commission does not accord complete recognition of such an interest and is resisting the assertion thereof before the Court of Appeals.

The present ascendancy of real and pseudo-economics had an innocent genesis, in practices participated in by applicants and their lawyers, and they are fully as responsible as the Commission for the result. The story is not unlike that which culminated in the present threat of censorship of broadcast programs. The seeds were sown when, early in the days of the Federal Radio Commission, the practice was initiated of making showings of proposed and past program service in support of applications, with the natural result that those who opposed the applications sought to expose the applicant's shortcomings in program service and the Commission eventually sought to prevent the evils and to subject them to discipline. Similarly, parties seeking to establish new stations or improved facilities for existing stations gradually acquired the habit of making elaborate showings of a "need" in the community to be served and of available commercial support. Their opponents countered with claims that there was no such need, that service from existing stations was adequate, that commercial support was not available except at the expense of existing stations, and that *ergo* the application could not be granted without causing economic injury to those stations and impairing their ability to serve

the public interest. From this point it was but a short and plausible step for the Commission to conclude, without any considerable dissent from the broadcasters, that part of its duty, in administering the standard of "public interest, convenience or necessity," is to protect existing stations from what it may choose to regard as excessive competition on the particular facts of each case and to think in terms of trade areas instead of broadcast service areas and listeners. This it has now done to the extent of giving effect to the philosophy in its regulations and of calling a halt on improvement in radio reception. If it is correct in its conclusion it may, with an equal show of logic, decide to take further steps to prevent threatened impairment of service, including the prevention of various forms of rate-cutting and unfair trade practices, or to assure that each class of station gets its fair share of the various types of advertising revenue. The underlying tendency, by whatever name it be called, is today the most portentous development in the regulation of broadcasting,* particularly since the tendency toward censorship now shows definite symptoms of being on the wane.

**OTHER FACTORS.** On June 13, 1938, in the very midst of the hearing on the proposed new rules, the Senate adopted a resolution reciting it to be the sense of the Senate that the Commission

> "should not adopt or promulgate rules to permit or otherwise allow any station operating on a frequency in the standard broadcast band (550 to 1600 kilocycles) to operate on a regular or other basis with power in excess of 50 kilowatts."

Passage of this resolution was the price paid for securing ratification of the North American Regional Broadcasting Agreement, two days later (see Part V-B). In addition, in the several resolutions introduced in Congress during the past two years seeking investigation of the Commission, "super-power" has usually been in the enumeration of proposed subjects of inquiry.

From almost the beginning of broadcasting, popular prejudices and fallacies have succeeded in attaching themselves to the phrases "clear channels" and "high power." Each proposed increase in power has been tagged as "super-power." In 1922, when WLW increased from 20 watts to 50 watts, its competitor station in Cincinnati raised this cry. In the fall of 1924, when there was a movement forward from 500 watts to 5 kilowatts, there was an alarm which has not been equalled until this past year. The Secretary of Commerce, then the licensing authority, received thousands of letters from men, women and children expressing fear of "a monopoly of the air," and "the blotting out of smaller competitors." At the Third National Radio Conference in October, 1924, debate on the issue reached dramatic heights, and a spokesman for the opposing groups, referring to 5 kilowatts as "super-power," stated

> "If the power is increased without any limitation of hours or season, it will result in less enjoyment to millions of people."

The principal spokesman against "super-power" of 500 kilowatts at the June 6, 1938, hearing, almost repeated the alarm voiced fourteen years before, when he declared that such power "would be a curtailment of service to millions" and that it would

* Contrast the present tendency with that exhibited in the Report of the Federal Radio Commission entitled "Commercial Radio Advertising," submitted to the Senate on June 9, 1932, in response to S. Res. 129.

"probably upset the whole present structure of the broadcast industry and its service to the public."

At the time of the re-allocation of November 11, 1928, agitation in Congress against clear channels and "super-power" of 50 kilowatts so impressed the Federal Radio Commission that it omitted the word "clear" from its order and provided that the maximum power on such channels should be 25 kilowatts plus an additional 25 kilowatts "experimentally," and later, in 1930, restricted the number of 50 kilowatt stations to 20 in this entire country (a restriction which was removed without ceremony some three years later). Yet each advance in power has simply reflected the progress of science (which, it is hoped, will not be arrested by Government fiat) toward transmitting apparatus capable of giving better service over wider areas and thus taking advantage of radio's greatest asset and contribution as an agency of mass-communication, *radiation*. As stated by O. H. Caldwell, one of the original members of the Federal Radio Commission:

"Having laid the tracks for good reception, one can then decide what is going to be supplied on those tracks. *But the first thing is to get the tracks laid.*"

## B. REGULATION OF OWNERSHIP AND CONTROL OF STATIONS

**STATUTORY PRESCRIPTIONS.** Within the four corners of the Communications Act of 1934 are three specific indications by Congress of policies to be followed by the Commission in determining eligibility for license or renewal of license, (1) the barring of alien ownership or control, (2) the preservation of competition, and (3) by implication, satisfactory standards as to character and "financial, technical and other qualifications of the applicant." In the opinion of the writer, the broad standard "public interest, convenience or necessity" does not add anything to the foregoing, that is, it does not authorize the Commission to impose other and different tests of eligibility.

The barring of alien interests is covered by definite provisions in Section 310 (a) and need not detain us. The provisions are, in origin and purpose, closely associated with considerations of national defense, more likely to arise in the regulation of international communications, and, while they may conceivably assume importance for broadcasting in time of war, have not so far presented any substantial problem. To make these provisions effective, and to prevent tendencies toward monopoly were, historically, the principal reasons for giving the Commission control over assignments of license and transfers of control in Section 310 (b).

With respect to eligibility tests as to the character of an applicant, and his technical and other qualifications, there is so little to be said at present that a separate subheading is not justified. Very little attention has been, or need be, paid to an applicant's technical qualifications since ordinarily the applicant himself (or itself) will not claim to be qualified in this respect and must rely on the employment of engineers. Such broad terms as "character" and "other qualifications," if not reasonably construed, do, of course, open the door to a wide latitude of arbitrary and capricious conduct on the part of the licensing authority, including censorship, and, if they are to be used as reasons for rejecting applications, should be translated into intelligible standards and formal regulations.*

* The Commission's new regulations provide simply that the applicant must make a satisfactory showing that he is "legally qualified" and "is of good character and possesses other qualifications sufficient to provide a satisfactory public service."

The requirement of "financial qualifications" has occupied a large, and at times quite disproportionate, amount of time and attention in hearings and in the Commission's consideration of cases,* complicated as it has been with the seeming necessity for also making a showing of adequate commercial support. Its significance is, however, tending to diminish. The new regulations stipulate that the applicant must show that he "is financially qualified to construct and operate the proposed station," with a footnote referring to a portion of the Standards of Good Engineering Practice in which the sums required to construct and complete electrical tests of stations of different classes and powers are tabulated.

The policy of preservation of competition has proved the source of the principal real or apparent problems in regulating the ownership and control of broadcast stations, and, at bottom, is directly or indirectly (or allegedly) associated with nearly all the topics hereinafter discussed under this subheading.

The issue of monopoly has been raised, in one form or another, from the earliest days of radio communication, within a few years after Marconi first placed his invention in practical use. The issue was largely responsible for the first endeavor to negotiate a general international radio treaty at Berlin in 1903, successfully consummated at that city in 1906, and, in its earliest aspect, is still reflected in an article in the International Telecommunications Convention of 1932 and in Section 322 of the Communications Act of 1934. Section 322 requires land and ship stations open to public service to exchange communications "without distinction as to radio systems or instruments adopted by such stations."

In a somewhat different guise, the issue of monopoly developed shortly after the advent of broadcasting and led to an extensive investigation and report by the Federal Radio Commission in 1923, in response to a resolution adopted by the House of Representatives. It was largely a controversy over an alleged undue control of the manufacture of radio apparatus (and consequently of radio communication) through patents, and of international radio communication through traffic agreements. The apprehensions resulting from this controversy found expression in several provisions in the Radio Act of 1927, carried over into the Communications Act, such as Sections 311 and 313. By Section 311 the Commission is directed to refuse a license to any person finally adjudged guilty by a Federal court

> "of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition."

Section 315 extended the anti-trust laws of the United States to the manufacture and sale of, and trade in, radio apparatus.

A third phase came to a head only barely in time to be included in the Radio Act of 1927. When the bill passed the House on March 15, 1926, it contained no provision regarding chain broadcasting. In the Senate, a clause was inserted which, as described in the report of the Senate Committee, authorized the Commission "to control chain broadcasting." The bill passed the Senate on July 2, 1926. When it emerged from conference on January 27, 1927, in its present form, it was again debated and, on Feb-

* See VARIETY RADIO DIRECTORY, I, p. 285; II, pp. 536-7.

ruary 3, 1927, the Senator from Louisiana read a telegram from Mr. Henderson of Shreveport, one of broadcasting's most picturesque characters of that era, pointing out that the press had "this morning carried headlines of 35 stations to be chained together" and that "chain stations will monopolize and independent stations . . . are practically done for." The Senator asked how the bill covered the matter. Senator Dill, the sponsor of the bill in the Senate, replied with a statement which was, and remains, practically the only explanation of the legislative intent behind the provision contained in Section 303 (i) of the Communications Act of 1934, authorizing the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting." After referring to the fact that various radio organizations were building up chain stations "without let or hindrance and without any restrictions," he said, in part,

> "Unless this proposed legislation shall be enacted they will continue to do so, and they will be able by chain-broadcasting methods practically to obliterate the independent small broadcaster."*

As explained in last year's article, except for an abortive foray by the Federal Radio Commission in 1928, no regulations were ever promulgated under Section 303 (i).† The actual or prospective use of chain programs has, however, played a decisive role in determining the fate of many applications, sometimes one way and sometimes the other.

**THE NETWORK INVESTIGATION.** The antecedents of the current network investigation were reviewed in last year's article.** On July 6, 1938, the Commission appointed William J. Dempsey (later appointed general counsel) as special counsel for the proceedings. During the preceding month, Chairman McNinch had, in his appearance before the House Appropriations subcommittee, prophesied that the hearings would run from four to six weeks and that the Commission would be prepared to submit legislative recommendations to Congress for the next session.

On September 20, 1938, the Committee charged with the investigation, consisting of Chairman McNinch and Commissioners Brown, Sykes and Walker, announced that public hearings would begin October 24, and released the notice of hearing. The notice enumerated 20 items which each network organization was expected to cover in its presentation, extending into virtually every phase of network development, network ownership of stations, contractual relationships between networks and affiliated stations, advertising agencies and advertisers, extent of control exercised over affiliated stations, financial arrangements including basis for charges made by networks and affiliates, network policies on program standards and advertising continuity, agreements with wire companies, and other subjects. Nearly a score of networks, national and regional, were asked to supply data, along with more than 150 transcription and recording companies.

Later, the opening of the hearing was postponed to November 14, 1938. The subject-matter was divided under four general headings, to be heard in the following order: (1) network operations, (2) management contracts,

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* Congressional Record, Vol. 68, p. 2881.

†Variety Radio Directory, II, p. 533.

** Variety Radio Directory, II, pp. 533-4.

leases, etc., (3) nature and extent of common ownership of broadcast stations, and (4) transcription services.

The hearing opened on the date scheduled. Contrary to earlier estimates as to the time it would consume, it was three months before the presentation of the three major or national networks was concluded, and it was April 19, 1939, before the hearing adjourned, to resume for a brief three-day session on May 17-19, when it finally closed, with a record of nearly 9,000 pages and some 700 exhibits, many of them bulky. The time consumed was partly due to the fact that the Committee sat for only four days a week and in some weeks less, the daily hours of hearing were relatively short, and there were occasional interruptions.

By the time the hearing closed it seemed fairly clear that the principal issues raised, in the minds both of the Commission and the parties, had to do with the contractual relations between network companies and their affiliated stations. The chiefly controverted features of those contracts, exhibited either generally or in a large portion of the contracts, were (1) the exclusive feature which obligated the affiliate not to take programs from any other national network, (2) the option feature, by which, with respect to all its hours, or a large portion of its most desirable hours, the affiliate was obligated to give right-of-way to a commercial network program on 28 days' notice, and (3) the term of years covered by the contracts. Also, the question was raised whether one company should be permitted to operate two national networks.

Toward the end of the hearing a motion was filed in behalf of Mutual Broadcasting System asking the Committee to recommend to the Commission the adoption of a temporary regulation to prevent new contracts, or extensions or renewals of existing contracts, beyond a date to be fixed by the Commission, alleging among other things that, particularly in cities having less than four stations with comparable facilities, such contracts prevented Mutual's entry into those areas and handicapped it competitively, and that National Broadcasting Company and Columbia Broadcasting System were in the process of renewing or extending such contracts for a further period of five years after their present expiration dates. At present writing the motion has not been acted on by the Committee.

On June 7, 1939, the Committee planned its procedure for a report based on the investigation. S. King Funkhouser, an attorney of Roanoke, Va., who had been engaged in December, 1938, to assist in the investigation, was designated to assist in preparing the report, under the supervision of General Counsel Dempsey with Rosel H. Hyde, of the Commission's Law Department, as chief legal assistant. At present writing, it appears that a preliminary report will not be ready until September and that submission of a report by the Committee to the Commission is not likely until sometime later in the fall.

**MULTIPLE OWNERSHIP OF STATIONS.** The Commission has adhered to the principle, announced in a case mentioned in last year's article,* that acquisition of a second station in a city by the licensee of an existing station is ordinarily contrary to public interest. On May 27, 1938, it denied an application for its approval of a transfer of WREN, Lawrence, Kans., to the Kansas City Star, owner of WDAF at Kansas City, for a price of $295,000. It held that joint ownership of the two stations would create a competitive situation dangerous to another Kansas City station

* VARIETY RADIO DIRECTORY, II, p. 535.

and would "materially reduce competition in the area," citing its earlier decision. At the time, it appeared that the newspaper-ownership feature might also have been a factor in the Commission's decision.

On October 20, 1938, however, a majority of the Commission (including Chairman McNinch) approved the sale of WNAX, Yankton, S. D., to the South Dakota Broadcasting Corporation for $200,000. The principal stockholder of the assignee corporation was an Iowa newspaper publisher identified with the ownership of two of the three broadcast stations in Des Moines and of the only station at Cedar Rapids. The majority opinion stated:

> "The purchase price for a station may be so high that the conclusion is inescapable that a valuation has been placed on the station's operating assignment, or that burdening of the station in a financial way will result so that its inability to operate in the public interest may not be clear from the record,"

but concluded that such was not the case before it. Commissioner Craven, however, dissented, expressing himself in favor of "a diversification of licensees controlling regional broadcasting stations," and against "a concentration of such licensees in the same or allied interests," and recommended that the case be remanded for further hearing. From the majority decision, it would appear that the Commission does not intend to extend its principle of multiple ownership to stations in different cities, but it would be premature to venture a conclusion to this effect. Cases are pending before it, involving somewhat the same issue, and they have been designated for hearing.

There has still been no indication that the Commission intends to apply its restriction in multiple ownership in the same city retroactively.

The most significant development, at least in its potentialities, was the searching inquiry into ownership and control initiated by the questionnaires sent out in the fall of 1938 and the early winter of 1939, the compilations drawn from the returns by the Commission's Accounting Department, and the introduction of the compilations in the form of 117 exhibits at the network hearing on March 30, 1939, accompanied by elaborate indices. The exhibits were not all instances of multiple ownership since many of them dealt solely with situations where a substantial interest in a licensee corporation having a single station was held by another corporation. The exhibits tended to show that some 341 stations were affected by multiple ownership or control, although in some instances, the relationship was exceedingly tenuous.

**ABSENTEE OWNERSHIP.** In the proposed revision of its rules governing standard broadcast stations, as submitted for hearing in June, 1938, there was a requirement that an applicant for a Class IV (local) station must be "a resident in, and familiar with the needs of, the community to be served." This was eliminated in the rules as finally adopted on June 23, 1939.* In support of its recommendation that it be eliminated the Committee stated:

> "If, however, a local resident makes an application and makes a showing which is equal to that made by a concurrent non-resident applicant, the Committee of course would recommend that preference be given to the application of the local resident."

* See VARIETY RADIO DIRECTORY, II, pp. 522, 536.

**NEWSPAPER OWNERSHIP OF BROADCAST STATIONS.** On June 27, 1939, after a tumultuous experience of some three years, the issue of newspaper ownership of broadcast stations passed away, at least temporarily and certainly without fanfare. The demise was brought about by an action of the Commission, unanimous as to the six active members, reconsidering an earlier action setting for hearing a case involving assignments of license of two stations in Allentown, Pa., to a newspaper-controlled corporation, and granting the applications without hearing. The two stations shared time on 1440 kc. One of them, having slightly more than half the time, was owned by a company publishing the only morning and evening newspapers in the city. The transaction resulted in giving the newspaper publisher 65% control of the resulting full-time station, the only station in the city.

On March 13, 1939, a bare majority of the Commission (Commissioners Case and Craven dissenting and Brown not participating) had designated the applications for hearing

> "to determine whether the granting of the applications to consolidate the two existing stations would result in, or tend toward a monopoly in radio broadcasting in Allentown and its immediate environs, and to determine if the operation of the stations"

by the newspaper would be in the public interest. The majority action was not accompanied by any statement of reasons. In an able and vigorous dissenting opinion, which will probably be recorded as the final turning-point in the controversy, Commissioner Craven declared that the action meant that the majority had already adopted in their own minds, or contemplated adopting, a principle adverse to newspaper ownership (or, at least, a class thereof), and in enumerating his reasons for voting against such a policy, stated that the Commission had no power under the statute to exclude newspaper publishers; that, even on the assumption that it has the power, its exercise would be contrary to public interest, and that a hearing on the particular applications involving stations in a comparatively small city in one State

> "is not a proper or fair method of determining whether such a policy should be adopted."

He cited the fact that as of January 15, 1939, some 238 broadcast stations in the United States had newspaper publishers identified with their ownership and that the number had increased since that date. If the Commission were to adopt the policy in question

> "it must be prepared to extend it to all cases, existing and future. It must be prepared to refuse to renew the licenses of some 240 broadcast stations and to destroy or hand over to others the investments which their owners have in these stations."

The continuous record of some 18 years of newspaper ownership of a number of broadcast stations, he argued, refutes any implication that such stations as a class render less meritorious service or exhibit greater evils or dangers than stations under non-newspaper ownership. He directed attention to the fact that, by common knowledge, the newspaper extras of former days have almost disappeared, that broadcast stations are relied upon to a constantly increasing extent for news and comments upon news, and that they are both important customers of news services and creators of news agencies. Facsimile may ultimately mean that the newspaper of the future will be transmitted by radio into the home.

Chairman McNinch immediately released a statement commenting on the dissenting opinion, saying

> "What objection can there be to allowing the people directly affected by a proposed local monopoly of communications to say what they want in an open hearing?"

So far as is known, however, no one had protested against the proposed assignments of license.

On May 1, 1939, the Commission issued its notice of hearing in the case, specifying three issues, including the specific question of alleged monopoly, and the hearing was scheduled for June 6. On May 18 the applicants filed a motion to quash the hearing on the ground that the Commission had no power to consider the question. This motion was referred to the full Commission because of the "novelty of the issue," but was denied on June 6, Commissioner Craven dissenting. Suddenly and somewhat unexpectedly, the Commission reconsidered and granted the applications on June 27th.

Another indication of the more recent views of the Commission is found in the testimony of Commissioner Brown, then Acting Chairman, before the House Appropriations subcommittee on June 20, 1939. In response to a question he said:

> "Except through its decisions, the Commission had not arrived at any definite policy. In that connection, I would like to refer the Congressman to this language in a recent decision of the Court of Appeals of the District, in which the court stated, 'We know of no statute which would prohibit a newspaper from owning a broadcasting station.' That is our position."

The history of the question is both interesting and instructive. It is one of the principal examples of issues that originated and developed *outside* the Commission, finally to assume such proportions as to force itself on the Commission's attention and to persuade some of its members of its merits. There is nothing in the Radio Act of 1927 or the Communications Act of 1934 which even remotely suggests that Congress intended to make newspaper ownership a disqualification. On the contrary, in 1927 and even more so in 1934, a large number of the better-known broadcast stations were owned by newspaper publishers without substantial objection or complaint.

The birth and growth of the anti-newspaper school of thought has been ascribed to a number of factors and is probably due to a combination of several of them rather than to any one. In the first place, after 1934 there began a general movement of newspaper publishers to secure stations and in several instances, including the Hearst organization, a multiplicity of stations. In the second place the President, after his experience with opposition from the press, was known to look on newspaper ownership with askance, as were also other public officials and members of Congress. In the third place, several influential members of Congress had specific situations in mind which, in their opinion, presented dangers. Additional factors sometimes mentioned included a tendency on the part of certain representatives of national networks to exploit the issue as a red herring to deflect charges made against their organizations, the business practices of a few newspaper-station combinations, and possibly others. In any event, by the summer of 1937, as pointed out in an earlier article,* the

* VARIETY RADIO DIRECTORY, I, pp. 286-7.

school of thought had 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 to require a complete divorce of newspaper and broadcast station ownership.

With the appointment of Mr. McNinch as Chairman in 1937 there were unmistakeable indications that newspaper ownership would be considered a major issue. In his first press conference, he stated that he regarded it as "one of the important policy problems to be thought through and either determined by the Commission or presented to Congress with recommendations, if any, as the Commission may see fit to make." In the meantime, resolutions introduced in Congress in 1938, and again in 1939, for investigation of the Commission regularly specified newspaper ownership as a subject of inquiry. For a period of a year or more, while no application was denied solely and expressly because the applicant was identied with a newspaper, a number of applications by newspaper publishers met adverse decisions on other grounds.

By the end of March, 1938, as appears from last year's article,* it seemed that there had been sufficiently definite pronouncements by both the Commission and the Court of Appeals and that henceforth it was unlikely that newspaper publishers would be at a disadvantage. In addition, the Report on Social and Economic Data submitted to the Commission by its Engineering Department on July 1, 1937, and made public January 24, 1938, contained a sensible discussion of the subject, which was elaborated in Part I of the Report of the Committee on Proposed Rules, made public January 18, 1939.

The issue, however, still persisted into the year 1938-1939. In a report submitted early in November, 1938, an examiner recommended denial of an application involving transfer of control of a station to a newspaper concern already owning 49% of the licensee's stock, saying that a grant would give that concern

> "all the means of disseminating news or other information in the area and complete control of all advertising media available in the area. * * * In view of these facts, it appears that this would tend to restrict competition in the dissemination of news and information, and in advertising."

During oral argument on this case on May 11, 1939, Commissioner Thompson, newly appointed to the Commission in April, gave indications by his questions that he viewed the situation as a prospective monopoly. The matter of newspaper ownership was commonly regarded as one of the focal issues in the background of the President's move on January 23, 1939, for reorganization of the Commission and amendment of the Act, and was specifically mentioned by him at his press conference the next day. Nevertheless, in a number of cases, with Commissioners McNinch and Walker dissenting in certain of them, the Commission approved the acquisition of stations by publishers, frequently and to an increasing extent without hearing.

A curious twist to the newspaper question arose in Part II of the committee's report on rules and regulations, released June 7. In stating reasons for refusing to authorize power in excess of 50 kw., and in pointing to "certain policies" in the argument in behalf of the higher power, the

* VARIETY RADIO DIRECTORY, II, pp. 535-6.

committee stated that it cannot be concluded safely that if radio competition with other media should be "highly successful," the public interest would be served by permitting the "economic annihilation of these other media." The committee further states:

> "Consequently, it may be possible that influence might be exerted to stem an economic trend having adverse social effects. Such a movement has been attempted already but so far without success. However, since radio is an industry dependent upon governmental license to use the public domain, it cannot safely be argued that Congress will always permit radio licensees unlimited opportunity to secure all advertising business to the serious detriment of the economic structure of important and necessary services rendered to the public by unlicensed media. The latter have a far greater capital investment and affect the employment of many more thousands of people than radio. Labor displacement resulting from technological development is one of the social problems of the modern age and consequently this is a significant economic factor to be considered in the future of radio advertising business."

This was followed by press association stories interpreting the language as forecasting steps by the government to protect newspapers from unlimited radio competition. The interpretation was promptly denied at the Commission.

**SALE AND LEASE OF BROADCAST STATIONS.** Except for leases, management contracts and similar arrangements, the issue of "trafficking in licenses" and "sale of wave-lengths" has run a course closely parellel to the issue of "monopoly" based on newspaper ownership. Applications for the Commission's consent to an assignment of license or a transfer of control, which until a few months ago would regularly have been subjected to severe scrutiny, expensive hearing, and hazard of denial, are now granted without hearing almost as a matter of course. An important subdivision of such cases, involving the sale of a station to be moved from one city to another, was, by "proposed decisions" rendered June 21, 1939, and June 27, 1939, tentatively held to be not within the scope of Section 310 (b) of the Act requiring the Commission's consent to assignments of license and transfers of control. Thus, quietly and almost unnoticed, a dispute which at all times was more over words than ideas but which nevertheless gave provender for endless demagogy, has, after a meteoric career, all but burned itself out. It, too, was an issue which originated *outside* the Commission.

In view of the phraseology and legislative history of Section 310 (b), there is room for no great difference of opinion as to its meaning or the intent of Congress. It was originally inserted in the Radio Act of 1927 to fill a gap left by the Radio Act of 1912, so as to give the licensing authority control over changes in the ownership and control of stations and to subject the purchaser to the same tests of eligibility as were applied to applicants for new stations. The first consideration which Congress had in mind was to prevent stations from passing into the control of aliens. Another consideration which came to the forefront in the years immediately prior to 1927 was to prevent and control any tendency toward monopoly. Whether or not the price paid by the purchaser was too high was *not* regarded as a material consideration requiring regulation by the government. In fact, when the bill which became the Radio Act of 1927 came before the Senate

an amendment was added forbidding the Commission to approve any transfer where the price exceeded the physical assets, "to prevent the selling of wave-lengths for profit." This amendment, however, was stricken from the bill as it finally passed.

From 1927 to 1936 no substantial issue was raised. In a large number of cases, the Federal Radio Commission and, after 1934, the Federal Communications Commission, approved transfer after transfer, more often than not without hearing, although an increasing tendency to require data as to price and value of assets was exhibited. In 1934 the section was elaborated to extend to transfers of control in licensee corporations but otherwise no material change was made. A proposal to require a hearing in each case was rejected.

A milestone was erected by the Commission's approval, on August 18, 1936, after hearing, of the sale of KNX, a 50 kw. clear channel station in Los Angeles, to Columbia Broadcasting System for $1,250,000, whereas the original cost of the physical property was $177,982.15 and its depreciated value only $63,763.30. The Commission's decision passed on the reasonableness of the price and justified its conclusion by pointing out that, on the basis of the present and probable future earnings of KNX, a return of approximately 16% or 17% would be received on the consideration paid. This case was followed in the fall of 1936 by applications seeking Commission approval of the sale of WOAI, a 50 kw. clear channel station at San Antonio, Texas, to Columbia Broadcasting System, for a price of $825,000 on facts showing a larger proportion both of value of physical assets and of earnings to purchase price than in the KNX case. By this time, however, pandemonium had broken loose, in Congress and elsewhere, on the subject of "trafficking in licenses" and "sale of wave-lengths," and the examiner who heard the WOAI case turned in a scathing report in December, 1936, denouncing the transaction and recommending denial. Because of the expiration of the contract of purchase, the case was not passed on by the Commission. At about the same time, Commission approval was asked of an assignment of the license of KSFO, San Francisco, to the Columbia Broadcasting System, under a lease. The examiner who heard this case in December, 1936, later turned in a report recommending denial.

The furor over the "sale of wave-lengths" was really closely related to the then current agitation against the national networks on the score of monopoly, but curiously neither the Commission, its examiners, nor the complaining members of Congress seemed to realize that the question whether a network organization already had too many stations, or should be allowed to acquire another, was a separate issue, and might be passed on as such without reference to the price paid. In any event, in speeches on the floor of Congress, in hearings before Congressional committees, and in resolutions seeking investigation of the Commission, the charge of permitting "trafficking in licenses" became and remained one of the principal allegations against the Commission from 1937 to 1939. When Mr. McNinch became Chairman of the Commission, at his first press conference in October, 1937, he declared that, according to his understanding, a licensee has nothing to sell except the physical property, that there is no good will to pass on, and that, as applications came before the Commission for action, he would be interested to know "what is the actual, legitimate cost or value of the equipment that would follow with the transfer of license." The subject was one of those mentioned by the President on January 24, 1939, in

support of the statements in his letter on the previous day that "new legislation is also needed to lay down clearer Congressional policies on the substantive side."

During 1937 and for a considerable portion of 1938, matters remained at a standstill at the Commission, and applications, including a number that had been heard, were subjected to interminable delays while a flood of oral arguments and briefs were submitted, and members of the Commission debated and failed to agree. The pressure of need for action on normal business transactions became too great to be longer resisted, however, and the issue was compromised (and its solution avoided) by the simple device of issuing decisions approving transfers, in which the facts were recited and no reasons, principles or grounds were stated. This process, which began in April, 1938, was applied to a gradually increasing extent to other cases, some of them involving just as great a disparity (proportionately) between the value of physical assets and the purchase price as in the KNX case and several of them being the subject of adverse examiners' reports. With two exceptions to be noted below, virtually the only applications denied were in cases where other considerations intervened and predominated, such as multiple ownership.

The first exception was a proposed transfer of license of WTIC, a 50 kw. station at Hartford, Connecticut. The license was held by a subsidiary corporation of the Travelers Insurance Company and the application was for approval of an assignment to another newly-organized subsidiary corporation. The motive for the transaction was more efficient bookkeeping and operation through combining ownership of the station property and equipment (which had theretofore been owned by the parent corporation and leased to the subsidiary) and operation of the station in one corporation. Losses of nearly $2,000,000 had been incurred in the operation of WTIC over a period of years, and the subsidiary had given the parent corporation a note for $1,500,000, payable as to both principal and interest only out of profits. Under the proposed transfer the new subsidiary would take over this note. The application, filed in the spring of 1937, had been heard before an examiner in October of that year. The examiner (the same one that had turned in the report in the WOAI case and a number of others in which a similar philosophy was given effect) recommended denial in a document fulminating against the transaction which he characterized, in substance, as the sale of a wave-length for $1,500,000. The case was argued orally before the Commission in May, 1938, and on November 1, 1938, a bare majority of the Commission (Commissioners Brown and Craven dissenting and Case not participating) rendered a decision denying the application without, however, placing it squarely on the question of price. In a courageous dissenting opinion, which must now be regarded as a landmark in the history of this issue, Commissioner Craven reviewed the subject at length, including reference to the legislative history of Section 310 (b) and stated that he knew of no law, philosophy or regulation making it good public policy to deprive a pioneer of the opportunity to regain moneys expended for development when the development has resulted in benefit to the public. He expressed himself strongly against the "bare bones" policy in transfer cases, and pointed out that if this policy were the law it was just as illegal to pay $25,000 more than the value of the assets as it is to pay $1,500,000 more. He further pointed out the hardships, injustices and difficulties that would be corollary to such a policy, as well as of other poli-

cies that had been suggested. On November 28, 1938, a petition for rehearing was filed. It slumbered in the Commission's Law Department for over six months. Finally, on June 20, 1939, the Commission reopened the case for further oral argument on July 13.

The second exception has to do with transfers of license under a lease by which the assignee pays the assignor a rental over a period of years and is obligated to re-assign the license to the assignor at the expiration of the lease. As pointed out in last year's article,* the Commission's position on this question was forecast in a negative action having to do with WMAL, Washington, D. C., on April 20, 1938. The position crystallized in a decision rendered October 20, 1938, in which an application (filed and heard in 1936) for approval of assignment of the license for KSFO, San Francisco, to Columbia Broadcasting System was denied.† The majority opinion stated that to recognize a right in the assignor to recapture the license upon expiration of the lease "would be tantamount to the recognition of an outsider to the use of a frequency for a future time" and that the arrangement "is misleading to the public generally and particularly misleading to the investing public." Referring to previous actions in earlier years, in which consent had been given to similar transactions, it stated that if any of them might be considered as approval of such lease provisions, "then to that extent such actions are hereby overruled." The case was appealed and is now pending before the Court of Appeals (see Part IV).

On May 16, 1939, the Commission adhered to this position in denying an application involving an assignment of the license of WAPI, Birmingham, Ala., to a new corporation, of which Columbia Broadcasting System held 45% of the stock. The Commission labelled the arrangement as "subversive of the general public interest," stating that it would have a tendency toward

> "domination and control of radio broadcast facilities by persons or corporations to whom licenses therefore are once issued by the Commission, and who, therefore, although not operating the stations themselves, exact tribute in the form of rental from those actually using the facilities to serve the public,"

and that the Commission did not

> "consider it in the public interest to permit a practice to continue which has the effect of permitting existing broadcasting licensees who disassociate themselves from the operation of their stations for a period of years to be in the same position as those who continue to operate their stations."

On June 2, 1939, a petition for rehearing was filed and is still pending.**

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* VARIETY RADIO DIRECTORY, II, p. 542.

† Commissioner Brown concurred in the result but not in the reasons.

** A further example of the same principle is furnished by a decision of the Commission in December, 1938, in which the Commission made its approval of a transfer conditional upon modification of the sales contract to preclude recapture by the assignor should the assignee fail to comply with its terms.

It is possible that the principle thus applied to leases of stations may be extended to lesser arrangements whereby control of the station passes in part (or is alleged to do so), such as in the so-called "management contracts" under which, for a 10-year term, National Broadcasting Company manages four broadcast stations owned by and licensed to the Westinghouse company. On June 1, 1938, the Commission ordered a hearing on these contracts, and the inquiry was later conducted as part of the network investigation. During the investigation it was alleged, furthermore, that the prevalent contracts between networks and their affiliated stations constituted *pro tanto* assignments of licenses.

Following the adoption of the elaborate new application forms in the early part of 1939 (see Part I-B), the Commission adopted the policy of dispensing with any hearing at all in assignment cases where only a sale was involved, and thereafter granted such applications without hearing, apparently without any regard for or consideration of the purchase price. Since no decisions or findings are made or published under such circumstances, it is impossible to state dogmatically what principles (if any) have been agreed on or are being followed by the Commission, but it seems fair to say that the "bare bones policy" has been completely discarded. This is all the more remarkable in that, as late as January 23, 1939, in his appearance before the House Appropriations subcommittee, Chairman McNinch disclosed that the Commission had been unable to agree upon any formula or yardstick to be applied to transfer cases.

It remained for the closing days in June, 1939, to provide a fitting anticlimax to the shadow-boxing. On June 27, the Commission announced its "proposed decision" in what the parties and all persons following the proceedings had treated and regarded as a transfer case but which, according to the Commission, was no such thing. The Greater New York Broadcasting Corporation (controlled by Arde Bulova), the owner of two part-time stations in New York City (WBIL, having one-fourth time on 1100 kc., and WOV, operating daytime only on 1130 kc.), entered into an arrangement to purchase WPG, Atlantic City (having the remaining three-fourths time on 1100 kc.) for $275,000.* The net result of the proposed transaction was that the owner of the two stations in New York would end up with one full-time station in that city on 1100 kc., and Atlantic City would lose its station. Following the procedure which has been regularly followed and prescribed for years, an application was filed asking the Commission's consent to assignment of the license for WPG to the New York corporation, accompanied by the usual application for a construction permit. The hearing was one of the most hotly contested in recent years, the principal issue being over the alleged sale of a wave-length.†

The Commission's proposed decision gives effect to the transaction but holds that, in essence, the application was for the establishment of a full-time station in New York on 1100 kc., that it "does not involve a transfer of license now held by the City of Atlantic City," and that this contract "in so far as it deals with the purchase of the facilities of Station WPG

* Bulova had already paid large sums for the acquisition of WBIL and WOV and it is said that his total outlay for acquisition of the three stations was close to $900,000.

† The case has a long history, WBIL having formerly been owned by the Paulist Fathers, a religious organization which played an important role in stirring up agitation against the networks in 1936.

is a matter of private concern between the City of Atlantic City and the Greater New York Broadcasting Corporation and does not require Commission consent or approval."

On June 21, 1939, the same reasoning had been applied to a proposed purchase of a station in Los Angeles, to be moved to San Diego but, since the procedure did not square with the new theory (although it had been expressly approved in previous decisions of the Commission), the "proposed decision" denied the application—to the discomfiture of the attorneys for the parties. It is interesting (but futile) to speculate how the Commission will henceforth dispose of transfers involving a change of site, frequency, power or hours of operation in the same city.

## C. REGULATION OF PROGRAM CONTENT

**STATUTORY PRESCRIPTIONS.** If there is any one thing clearer than another in the Radio Act of 1927 and in the Communications Act of 1934, it is that Congress intended that the Commission should *not* have the power to regulate the contents of broadcast programs. Section 326 of the Communications Act, which cannot be too frequently repeated, provides in part:

"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."

If it be necessary to demonstrate that this language was intended to mean what it says, and that it should be construed in accordance with its intent, reference may be had to its legislative history and to the experience of the Federal Radio Commission and of the Federal Communications Commission in deviating from its mandate.*

There are, it is true, certain express prohibitions in the Act. Section 326 forbids the utterance of "any obscene, indecent, or profane language by means of radio communication." Broadcasters must afford equal opportunity to legally qualified candidates for public office. The broadcasting of any lottery matter is forbidden. Announcements must be made of sponsored programs. Unauthorized rebroadcasting is prohibited.

Violation of any of these provisions is made a criminal offense, punishable by heavy fine and imprisonment. A person charged with such a violation is entitled to a jury trial and to numerous other procedural guarantees and safeguards which are lacking in a proceeding on an application for renewal of license or a revocation-of-license proceeding before an administrative agency such as the Commission. Logic would seem to require that, before the Commission may take such an offense into account (if it is to do so at all), there should first be a conviction by a court of competent jurisdiction. Some doubt, however, is bred by Section 312(a) of the Act which authorizes the Commission to revoke a license "for violation of or failure to observe any of the restrictions and conditions of this Act," and, until the courts pass on the question, it remains uncertain whether the Commission itself is to determine the violation from the facts or whether it must await a conviction by a court. During the past year its

* See VARIETY RADIO DIRECTORY, I, pp. 290-293; *ibid.*, II, 539-541; also articles by the writer *Freedom of Speech and Radio Broadcasting* (1935), 177 Annals of Amer. Acad. of Pol. & Soc. Sci. 179, and *Comments on the Procedure of Federal Administrative Tribunals* (1939), Geo. Wash. Law Rev., April, 1939.

power to determine the violation itself was directly challenged with reference to alleged lotteries and, while the Commission has not obligated itself, it has implied that henceforth it will refer reported violations of the Act over to the Department of Justice.

**PROGRAM STANDARDS.** From the outset until the past year the Commission has consistently taken the position that it has no power under the Act to prescribe standards of program service, or even of advertising, by formal rule or regulation, although strongly urged to do so at times by interested groups and by members of the Commission itself. The promulgation of such standards, it has said, would be censorship in violation of Section 326. Its attitude was expressed in the following excerpt from a report which the Federal Radio Commission made to the Senate in 1932:

> "Any plan to reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain per cent of the total time utilized by the station must have its inception in new and additional legislation which either fixes and prescribes such limitations or specifically authorizes the Commission to do so under a general standard prescribed by that legislation. While the Commission may under the existing law refuse to renew a license to broadcast or revoke such license because the character of program material does not comply with the statutory standard of public interest, convenience, and necessity, there is at present no other limitation upon the use of radio facilities for commercial advertising."*

The experience of the Commission during the period covered by this article has confirmed the wisdom of its earlier view. Under the proposed revision of regulations presented as the basis for the hearing of June 6, 1938, an applicant for a new station or for an increase in facilities of an existing station would be required to make a satisfactory showing among other things:

> "(1) That the proposed programs are of such standard as to provide a meritorious service, *including such cultural programs as may be required,* to the listening public; that there is a need for such service; and that the necessary program material is available to provide such service." (Italics supplied.)

This proposal raised a storm of protest, voiced at the hearing by representatives of the industry and others. In Part I of the Committee's Report, released January 18, 1939, it recommended that the proposed rule be deleted from the revision, and the Commission followed this recommendation on June 23, 1939. The Committee also, however, discussed at some length "rules governing program service" and "standards of public service," making a distinction between the two. It rejected the idea of rules

> "because it has the danger of requiring the Commission to exercise a regimented control of program service which would result in the imposition of its judgment upon the American people"

and because of "the specific prohibition against censorship."

The Committee showed a more receptive attitude toward the promulgation of "standards of public service." It stated that "it is the duty of the Commission to see to it that the radio service is not debased and that it shall be operated in the public interest," and that the Commission shares

* Report on Commercial Radio Advertising, in response to S. Res. 129, Doc. No. 137, 72d Cong., 1st Sess.

in the responsibility that each station licensee "offer programs which will fully satisfy the public needs in the particular area served." It concludes that some standards "might not be unreasonable," but

> "that such standards should be minimum standards and that they should be utilized solely as guides and subject to variation in accordance with changed conditions and even then should not be requirements of the Commission."

It then proceeds, in 13 paragraphs, to enumerate such standards, preceded by the statement,

> "For example—subject to exceptions to the rule—a station licensee might be considered to have earned the right of expectancy of renewal of license if he had adhered to the following practices in the operation of a broadcasting station:"

Following the enumeration, the Committee expresses the opinion that

> "the Commission should not prescribe such standards at this time. However, this matter might be the subject of a future hearing of a legislative character in which may be considered not only the feasibility of adopting standards but also the procedure for making them effective."

These 13 paragraphs of standards are most illuminating. With respect to programs, they would ban

> "programs in which there is obscenity, profanity, salaciousness, immorality, vulgarity, viciousness, malicious libel, maligning of character, sedition, and malicious incitement to riot or to racial or religious animosities so as to contrive the ruin and destruction of peace, safety, and order of the public,"

and would require that

> "all programs should be formulated for broadcasting to the home, so that no listener would be compelled to tune out the station because of doubtful effect on youth."

A station must at all times maintain "a liberal reaction to public opinion and demands with respect to the service rendered by the broadcasting station"; must be "fair and equitable when making its broadcasting facilities available to citizens and organizations of the community . . . regardless of race, creed, or social and economic status"; must render "a balanced program of service of diversified interest to all the public"; must exercise "care to insure that the listening public has an opportunity to hear opposing schools of thought on controversial subjects of public interest"; and must avoid "making the station's facilities available for editorial utterances which reflect solely the opinion of the licensee or the management of the station."

With respect to advertising, the station must avoid

> "the broadcasting of lottery information, false, fraudulent or misleading advertising, and programs containing uninteresting and lengthy advertising continuity."

In the advertising of medical services or products, the station must require that

> "the representations made be strictly truthful and decorous,"

and must use

> "as a basis for determining the truth of such advertising the findings

of the United States Food and Drug Administration, the Post Office Department, the Federal Trade Commission, the local medical authorities and the expression of the Federal Communications Commission as found in its decisions."

The station must exercise

"care in making its facilities available on an equitable basis to all if to any advertisers in the community."

In Part II of the Committee's Report, released April 7, 1939, some 52 pages are devoted to "Program Service," (as compared with less than 22 pages devoted to the technical facts showing need for improved service) with a succession of tabulations and analyses of program data resulting from the questionnaires sent out in the spring of 1938, in an attempt to determine the apparent effect and influence of various factors such as (1) class of station, (2) time designation of station, (3) power classification of station, (4) size of community, (5) network affiliation of station, (6) revenue classification of station according to net sales, (7) geographic regions, and (8) media of rendition. The Committee found the data inadequate as a basis for final conclusions and stated there was a

"need for additional data thoroughly analyzed and presented both as to listener preference for a pattern of program service as provided by the broadcasters."

To obtain the desired data a revised and more complete questionnaire form was recommended, the Committee saying,

"This procedure would tend to lead toward a general and satisfactory standardization in classification of programs and make possible for comparative purposes a more ready evaluation of the program service of broadcast stations."

The distinction made by the Committee between a "rule" forbidding a certain type of program and a "standard" under which the Commission may refuse to renew a license for broadcasting the same type of program, is too subtle for the writer. In practical operation, it is to be feared that the only difference would be that the "standard," qualified vaguely by "exceptions," would simply serve as a device for permitting discrimination between two licensees guilty of the same offense, a situation which has arisen altogether too frequently in the past. Notwithstanding the Committee's protestations to the contrary, the inevitable tendency of its reasoning, its conclusions and its recommendations is toward formal regulation of program content to the point of regimentation and censorship. All that can be said in its favor is that, if this is to be the tendency, it is better that it be done openly in the form of published standards of which licensees may have advance knowledge than that it be done purely *ex post facto* in decisions denying applications for renewal of license.

In its action of June 23, 1939, adopting the revised regulations, the Commission took no action on the Committee's proposal with respect to standards, and, it may be predicted, it is not likely to take such action in the near future. In the interim, the tendency toward censorship was overtaken and, it is believed, turned back by a succession of events, the principal of which will be mentioned below, including the Mae West, the "Beyond the Horizon" and "War of the Worlds" incidents, the release on February 27, 1939, of a report of the Committee on Program Complaints, accompanied

by a robust dissent by Commissioner Craven, and the Commission's adoption on May 23, 1939, of its rules relating to international broadcasting (discussed in Part III-C), each action followed by a country-wide flood of complaint, criticism and charge of censorship.

**PROGRAM COMPLAINTS—PROCEDURE.** On March 9, 1938, the Commission set up a "Committee on Informal Complaints," consisting of Commissioners Payne, chairman, McNinch and Sykes. Mr. McNinch asked to be relieved and, two weeks later, Mr. Craven was appointed in his stead. The occasion for the Committee was the extensive criticism then prevalent of the Commission's procedure in handling complaints of all kinds against stations, including program complaints. The Commission's practice, instituted several months before, was to notify stations of all complaints received against them, no matter from what source or with how little foundation. Without any investigation worthy of the name, licensees would be given only "temporary" renewals of license, instead of regular renewals, and the fact of their uncertain status would be made public, to their great damage and to the advantage of competitors. After investigation, if the charges proved unjustified, the "temporary" licenses would be replaced by regular licenses; otherwise, the renewal applications would be set for hearing. The price of securing a regular license and of escaping hearing was frequently the discontinuance or modification of the program objected to, to meet the demands of the Commission (or, more frequently, its Law Department).

The Committee held a meeting in April, 1938, at which it asked the Law Department for certain information, which was supplied late in July. The Committee then asked the Law Department to submit a plan of organization and procedure, defining the manner in which complaints should be handled and routed through the Commission's staff.

In the meantime, in May, it became known that the Commission's Secretary, presumably upon direction of the Commission, was sending out a new form letter stating that thereafter it would not be the practice to supply any person with copies of complaints against stations, and that, in following up each complaint which on its face appeared meritorious, the Commission would request the station to supply certain information. It then developed that the Commission was asking stations for verbatim copies of continuity of the program in question, although neither the law nor the regulations required the keeping of transcripts of all words uttered and such a requirement entailed a tremendous and expensive burden for many stations. On July 6, 1938, a letter from the Secretary in response to an inquiry was construed as indicating that the Commission expected stations to maintain complete transcripts of all programs broadcast. Reports from the field indicated that inspectors were becoming more active in monitoring and investigating stations, particularly with respect to programs.

By the middle of August, while the Commission was in the midst of a summer slump of partial inactivity, the industry was in a state amounting almost to an uproar. About 24 stations had had their renewal applications set for hearing, most of them because of program complaints, and an additional 15 stations held "temporary" licenses pending investigation of similar complaints. On September 27th, the Commission set the renewal applications of some 10 more stations for hearing because of the broadcast of "Beyond the Horizon" and issued "temporary" licenses to them. Com-

missioner Craven had expressed disagreement with the Commission's action. At this point, because of the brisk and unanimous public reaction to this incident, there was a noticeable abating of the tide. On October 25th, on the initiative of Commissioners Sykes and Craven, the Commission rescinded its action with respect to the 10 stations, and gave them regular license renewals (although at the same meeting it set another renewal application for hearing and issued a "temporary" license to the station). It also instructed its Law Department to make a study of the whole subject of program jurisdiction, especially as to lottery information and profanity,* it being understood that this study was not to supplant the work of the Committee on Program Complaints. The general counsel was instructed to confer with the Department of Justice, which he did, and thereafter submitted a memorandum to the Committee. It was understood that the Department had offered its services on program violations falling within the penal clauses of the Act, which would permit the Commission in such cases simply to notify the Department of the results of its investigations and to let the Department take the responsibility thereafter.

By December it became known that there was disagreement within the Committee, which had been asked to submit its report by December 15th. The disagreement persisted and was later reflected in the release, on February 27, 1939, of a majority report by Commissioners Payne and Sykes, and a minority report by Commissioner Craven. The majority report was adopted on that day by the other six members of the Commission. It was intended to deal primarily with the procedure to be followed in handling complaints. Without distinguishing between complaints as to kind or seriousness, it directed the Law Department to investigate all complaints "of an informative character . . . in such manner as may appear warranted," and provided:

> ". . . Thereafter and upon the completion of the investigation the Law Department should report its findings with appropriate recommendation either upon the renewal of license application or with a memorandum on the subject of revocation of license, as the case may appear to warrant. As to revocation few single complaint matters will warrant such action. In addition, such proceedings may or may not appear warranted in cases of specific violations of the Act, orders or rules and regulations of the Commission where the complaint matter is being *contemporaneously* reported to the Department of Justice for possible criminal action."

Naively enough, the report included "a summary of the usual complaint matters handled," under two headings. The first heading embraced violation of the statute and of the Commission's regulations. The second heading was "Programs contrary to public interest," over the following enumeration:

1. Fortune telling.
2. Astrology.
3. Solicitation of funds.
4. False, fraudulent and misleading advertising.

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* In pleadings filed in August, 1938, the Commission's jurisdiction over program offenses subject to criminal proceedings and penalties under the Act had been challenged by the owners of two stations.

5. Defamatory statements.
6. Refusal to give equal opportunity for discussion on controversial subjects.
7. Suggestive programs bordering on obscenity or indecency.
8. Programs offending the religious sensibilities of listeners.
9. Programs in which the station takes sides on political, religious or racial questions.
10. Children's programs.
11. Liquor and cigarette advertising.
12. Programs in which a concert or music is interrupted for the interpolation of advertising announcements.
13. Programs containing too much advertising.
14. Too many recorded programs.

Naturally, the enumeration was widely construed as a code of forbidden programs.

In his minority report, Commissioner Craven, for the first time in the Commission's history, expressed the view that the procedure theretofore followed was tantamount to censorship. He strongly recommended that

> "the Commission abolish entirely its past and present procedure of handling complaints, as well as the practice of designating applications for renewal of license for hearing for isolated instances of infractions of the Act or the Commission's Rules and Regulations, or of conduct of the station contrary to the standard of public interest."

He stated:

> "Everyone will agree that there is nothing more vital to our form of government than the preservation of liberty of expression. Broadcasting has largely replaced the public platform of former days as the forum for discussion of issues of public interest, and, if the Constitutional guarantee of free speech is to have any real meaning, it must extend to utterances before the microphone,"

and suggested that the Commission impose four restrictions on itself designed to restrict discipline of stations for program offenses within a narrow compass.

The publication of the majority and minority reports was followed by country-wide reverberations. On March 1, Chairman McNinch issued a blast about what he termed the "gratuitous, alarmist statements by Commissioner T. A. M. Craven in a one-man minority report," using such expressions as "grandstand play," "stump speech" and "flag-waving." Commissioner Craven did not reply.

During the winter and spring of 1939, however, one by one nearly all the pending proceedings against stations on program complaints were dropped and regular renewal licenses were granted. For months, there have been no new instances of "temporary" licenses or the holding up of renewal applications for this cause. There has also been at least one indication of a change in procedure. On February 20, 1939, for the first time in its history, the Commission employed the revocation procedure to terminate a license, because of false statements by the licensee with respect to control of the station. There have also been indications that advantage is being taken of the offer of the Department of Justice.

**PROGRAM COMPLAINTS—SUBSTANCE.** The complete story has yet to be written—and probably never will be—as to the kinds and varieties of programs which the Commission and its Law Department have deemed serious enough to justify it in initiating disciplinary proceedings. A large proportion of them have never seen the light of day because of steps immediately taken by the station's owner to correct the alleged evil and thus avoid the issuance of a temporary license and eventually an expensive and hazardous hearing on a renewal application.

The more sensational cases have been the Mae West, the "Beyond the Horizon" and the "War of the Worlds" incidents. The first of these was recounted in last year's article.* Chairman McNinch's letter to the network executive on January 14, 1938, had flatly stated that

> "upon application for renewal of the licenses of the stations carrying this broadcast, the Commission will take under consideration this incident along with all other evidence tending to show whether or not a particular licensee has conducted his station in the public interest."

A few months later, however, he testified before the House Appropriations subcommittee that the Commission had agreed the broadcast was "legally not a violation of the statute."

On July 28, 1938, WTCN, Minneapolis, together with some nine other stations affiliated with NBC, broadcast Eugene O'Neill's play, "Beyond the Horizon." The play had won the Pulitzer prize some years before and another federal agency, The Federal Theatre, had three times presented the same play, uncensored. The program was broadcast as a sustaining (non-commercial) program over a network, and the affiliated stations, such as WTCN, had no control over what was in the broadcast. During August, on the single complaint from a man and his wife in Minnesota, and, so far as is known, without verifying the authenticity of the complaint, the Commission asked the station to supply a certified verbatim transcript. The station having no copy, it requested NBC to supply it, which was done.

On September 27 the Commission set WTCN's renewal application for hearing because of allegations of "numerous expressions of profane language." At various junctures in the continuity were the words "God" and "damn." The citation led to a peak (up to that time) of press and public criticism of the Commission and, as already pointed out, the action was rescinded less than a month later.

On October 30, 1938, occurred the now-famous "War of the Worlds" (Men from Mars) broadcast of Orson Welles over CBS, resulting in a furor more in the press than in actual fact, since the listener reaction was apparently greatly exaggerated. By this time, however, the Commission had learned to exercise more caution and, in a statement issued by Chairman McNinch the following day, he said, in part,

> "I withhold final judgment until later, but any broadcast that creates such general panic and fear as this one is reported to have done is, to say the least, regrettable."

He invited the heads of three national network organizations to a conference in Washington. There was a strict injunction of secrecy on the discussion, but it was known that program standards constituted the principal topic. After the conference he issued a statement saying that the three network heads saw no reason to alter the present bulletin practice

* VARIETY RADIO DIRECTORY, II, p. 539.

but that it was agreed that such terms as "flash" should be used with discretion in the dramatization of fictional events to avoid possible general alarm. In an announcement a few days later, Mr. McNinch expressed the belief that program standards, general in character, might well get a start after the Law Department had completed its initial study on lotteries and profanity.

These three incidents, while they did much to crystallize public sentiment against censorship by the Commission, do not by any means represent all, or even the most important instances of the tendency during the same period. Most of the others have occurred without attracting publicity and have been buried in a procedural labyrinth. From about May 1, 1938, to about December 1, 1938, renewal applications were set for hearing, or "temporary" licenses were issued, because of complaints as to such programs as the following: discussion of the processing tax in South Dakota, an attack on a medical school and anti-vivisection, discussion of pension plans in California, CIO talks, talks sponsored by the "League for Civic and Political Decency," anti-Catholic broadcasts, depiction of a white-slave situation, an Italian verse in which Woodrow Wilson was referred to as "potzo" (crazy), and pro-Fascist broadcasts. One of the most interesting involved WAAB and WNAC, two Boston stations owned by the Yankee Network. Their renewal applications were designated for hearing on such issues as whether the licensee or any of its officers, directors or employees had used the stations

> "to promote or oppose the interest of any candidate in the 1937 mayoralty election"

in Boston, or

> "at other times to promote or oppose the interest of any candidate for public office or has used the station to promote the viewpoint of the licensee or persons in control thereof, on public questions in general, particularly during any program identified as 'editorial' or release of the Colonial Network News Service Broadcast during certain periods from 1937 to 1938."

On November 1, 1938, an indefinite postponement of the hearings was ordered, and some months later the stations were granted renewal applications without hearing.

During the same period, similar action was taken with reference to alleged objectionable advertising in a number of instances. Most of the continuities involved fortune-telling or astrology, lotteries and various kinds of contests (including a radio version of Bingo), and medical and patent medicine advertising. In one case, on June 20, 1938, the Commission, in its release justifying its designating a renewal application for hearing, said that its investigation of the programs

> "did not disclose that the advertising was in accord with stipulations entered into by the manufacturers with the Federal Trade Commission and Food and Drug Administration, Department of Agriculture, following proceedings had and cease and desist orders entered by those agencies."

The continuities in question were commercial announcements for Cystex, an internal remedy, and Kolor-bak, a hair preparation. A large number of other stations had been carrying the same announcements. The action was later rescinded.

Almost the only ray of hope during this period was the announcement on October 27, 1938, that a protest by the president of the Bach Society of New Jersey against the broadcasting of music "swinging" the classics and asking that offending stations be penalized by suspension or revocation of license, had been rejected by the Commission on the ground that it had no jurisdiction over the matter.

The last occasion on which the Commission actually denied a renewal application for any such cause was on May 27, 1938. On that date it announced decisions which deleted three stations. In two of the cases the offenses were violations of technical regulations. In the third, the grounds were that the station had been used "to broadcast information relating to a lottery" and that it had "failed to exercise proper control over the broadcasting of foreign commercial announcements." In a decision on January 16, 1939, granting a renewal of license, the Commission made it clear that it intended to hold stations strictly accountable for commercial programs making fraudulent claims "concerning the treatment of human disease and misery." The license was renewed because the station's management had changed and the programs had long since been discontinued. The announcements found objectionable were of the Basic Science Institute, a chiropractic organization, and the Samaritan Institute, which advertised a 48-hour treatment for alcoholism.

The question of selling time for religious or quasi-religious broadcasts was brought to the front late in November, 1938, following the widely-publicized addresses of Father Charles E. Coughlin, speaking over an independent hook-up of some 50 stations. Three stations declined to carry the broadcast when he failed to submit his manuscript in advance, and certain New York stations were thereupon subjected to picketing and near-rioting, and there was a deluge of literature urging listeners and advertisers to boycott them. In an address on November 19, Chairman McNinch stated that if any attempt were made to debase radio as an instrument of racial or religious persecution in this country, the Commission would employ every resource at its disposal "to prevent any such shocking offense." Later, in an address on January 26, 1939, he expressed himself strongly against censorship but also said that broadcasting cannot

> "become a propaganda medium serving the interests of any administration, Democratic or Republican, or any political, religious or economic organization, or any individual, however rich or powerful, to the exclusion of others."

An important factor in steering public sentiment against censorship in addition to editorials and columns in the press, was a series of magazine articles. In an article appearing in *Fortune* in the spring of 1938 there had been a warning against meddling with broadcast programs. Articles entitled "Radio Gets the Jitters" in the March, 1939, issue of the *American Magazine* and "Freedom, Radio, and the FCC" in the May, 1939, issue of *Harper's Magazine* also contributed. The principal and most effective presentation, however, was the essay "Not So Free Air," by Stanley High, in the February 11, 1939, issue of the *Saturday Evening Post*. Its charges against the Commission on the score of censorship so stirred Chairman McNinch that in his radio address February 10 he paid his respects to the author of the article. Organizations such as the Federal Council of Churches and the National Council on Freedom from Censorship also evidenced deep interest in the issue of censorship.

**THE ADOPTION OF PROGRAM STANDARDS BY THE INDUSTRY.** At the beginning of the network hearing on November 14, 1938, Sarnoff, president of RCA, proposed self-regulation of broadcasting through a voluntary code embodying program standards. The suggestion was promptly acted upon by the Executive Committee of the National Association of Broadcasters, and a representative committee was appointed to draft a plan. On June 10, 1939, after extended studies and meetings, the committee submitted its proposed "Code and Standards of Practice of the NAB." The code is subject to revision and action by the Association at its annual convention to be held at Atlantic City beginning July 10th. Considerable controversy over its provisions, and over the proper method of enforcing them, has already been manifested and its adoption is a matter of uncertainty.

**REGULATION OF ADVERTISING CONTINUITY BY THE FEDERAL TRADE COMMISSION.** On October 18, 1938, the Federal Trade Commission set up a new bureau, known as the Radio and Periodical Division, displacing the special board which had reviewed advertising continuities and copy since 1929. Under the Wheeler-Lea Amendment to the Federal Trade Commission Act, the Commission's jurisdiction extends to any case involving false or misleading practices in advertising, with no requirement that unfair practice resulting in injury to a competitor be shown.

The division scans advertising matter for possible violations of the statute. In its systematic review of broadcast advertising copy, calls are issued to individual stations about four times yearly for commercial script covering specified 15-day periods. National and regional networks report on a continuous weekly basis. Producers of electrical transcription recordings submit monthly returns of the commercial portions of all recordings produced by them for broadcasts. The material is supplemented by periodic reports from individual stations listing the programs of recordings, transcriptions and other essential data.

**MISCELLANEOUS.** For years it has been the practice for applicants, both in their applications and in their evidence produced at hearings, to make extensive and attractive showings as to their proposed program services. To a considerable extent the Commission's decisions have relied in whole or in part on such showings as grounds for granting or denying the applications, and this has not infrequently been the case when it has had to choose between two or more competing applications. To those who have watched the process and have observed that in a substantial proportion of such cases the successful applicant has later paid little or no attention to the optimistic picture he presented to the Commission, it has only been a question of time before the Commission's attention would be invited to the fact by a defeated applicant. Such a case is now pending before the Commission.

Under Section 325 of the Communications Act, a permit from the Commission is necessary in order to transmit programs to a station in a foreign country so located that it may be received consistently in the United States. An interesting case arose out of a protest by a Detroit station which resulted in the Commission's setting for hearing an application of Mutual Broadcasting System for renewal of its authority to transmit programs to

Canadian stations, particularly CKLW, at Windsor, which serves an audience in Detroit as well as in Canada. As part of its case, the Detroit licensee urged alleged program deficiencies and unfair advertising practices on the part of CKLW with respect to that station's own programs (it being conceded that there was no complaint against Mutual programs). On June 27, 1939, the Commission issued its proposed decision in which it would grant Mutual's application and, as one of its conclusions, recited:

> "This record does not disclose sufficient facts to justify Station WJBK's claim that it has been impaired by unfair practices. Therefore, at this time, consideration of the maintenance of a free interchange of programs with stations licensed by the Government of Canada outweighs the present suggestion of possible adverse effect upon the service rendered by the American station."

**COMMENTS.** From what has been set forth under this subheading, it must not be concluded that the Commission, or any of its members, has intentionally or consciously determined to exercise censorship in contravention of Section 326 of the Act. Each of the Commissioners, if asked, would say (as several of them have said repeatedly in public utterances) that he is opposed to censorship, that the Commission has never been guilty of it, and that it has no intention of exercising it. It must be recognized that men (and courts) differ in their conceptions of what constitutes an unlawful restraint on liberty of expression. Much of what the Commission has done is actually based on, and well within, principles announced in decisions of the United States Court of Appeals for the District of Columbia back in 1931 and 1932,* and the issue, so far as broadcasting is concerned, has yet to reach the Supreme Court. There have been times when influential and vocal members of Congress have taken the Commission to task just as strongly for its failure to discipline alleged program offenses, as they now criticize it for doing so. Bills are introduced every year (including the current session) which, if enacted, would constitute or lead to one form or another of suppression of broadcast programs or advertising. Even the National Council on Freedom from Censorship has sponsored bills that tend in this direction, and one of the militant organizations of educational institutions, the National Committee on Education by Radio, has strongly urged that the Commission develop and enforce program standards. Consequently, it is hardly a cause for wonder that the Commission has had differences of opinion within its own ranks, or that it has taken actions that have led to criticism.

The writer ventures the opinion that, unless war or other national emergency or hysteria develops, the tendency toward censorship of broadcasting is now definitely checked and that it is no longer the serious danger that it appeared to be a year ago.

## PART III
## REGULATION OF RADIO SERVICES RELATED TO BROADCASTING

The achievements of science in opening vast new portions of the radio spectrum to immediate or potential practical use, and in developing new

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* *KFKB Broadcasting Ass'n v. Federal Radio Commission*, 47 F (2d) 670; *Trinity Methodist Church, South v. Federal Radio Commission*, 62 F (2d) 850.

forms of public service for radio, have gone forward at an accelerated pace, so much so as at times to threaten to outdistance the Commission in its efforts to make its regulations keep pace with and conform to technical progress. What has come to be known as the "ultra-high frequency" portion of the spectrum, extending from about 25 mc. or 30 mc. to 300 mc.* and higher, and impressive forward steps in television, facsimile, and a new system of transmission known as frequency modulation, have provided a series of remarkable and frequently sensational events.

The year just ended, and particularly its closing months, have witnessed extensive efforts on the part of the Commission to translate these events into appropriate rules. The subjects covered exhibit such variety and overlapping that they are not easily organized into satisfactory sub-headings. There are, furthermore, miscellaneous developments which must be noted but which, strictly speaking, have no necessary relation to the above title.

It is appropriate to note, by way of preface, that on May 16, 1939, the Commission announced that, effective June 15th, a codification of its rules and regulations had been adopted, constituting a framework into which all specific rules would be fitted. For simplified reference, the codification is arranged in five parts, including procedural, technical, administrative and related phases of radio regulation. In itself, the codification involved no basic change in policy.†

## A. RULES GOVERNING BROADCAST SERVICES OTHER THAN STANDARD BROADCAST

On April 17, 1939, effective the same day, the Commission adopted its "Rules Governing Broadcast Services other than Standard Broadcast," in a 42-page mimeographed document. The contents were subdivided into seven parts which, after a part containing general provisions, were devoted to relay broadcast stations, international broadcast stations, visual broadcast service (television and facsimile broadcast stations), high frequency broadcast stations, non-commercial educational broadcast stations, and developmental broadcast stations. The part devoted to international broadcast stations was, however, omitted, with the explanation that such rules would be promulgated at a later date. They were published on May 23, 1939.

It is impracticable to attempt more than a superficial summary of the new rules. On the other hand, such a summary, even in detail, would not reflect important developments with respect to certain of the services. It seems advisable, therefore, to confine this sub-heading to a word about the general provisions, and to a general account of the Commission's allocation of the ultra-high frequencies to the several services, and to deal with specific services under separate sub-headings.

The general provisions in the first part of the revised rules deal with a number of subjects, some of them highly technical, such as frequency tolerance, frequency monitors, station's records, equipment charges, emission authorized, and the like. The normal license period is specified as one

* For convenience, the term megacycle (abbreviated "mc.") will be used in referring to the high and ultra-high frequencies. A megacycle is 1,000 kilocycles (kc.), a kilocycle being 1,000 cycles.

†Only mimeographed copies are now available, but the Commission plans to issue the codification in printed form as soon as funds are available.

year, with dates of expiration staggered for the several classes of stations. Various limitations and restrictions are imposed to insure that stations licensed experimentally will be actually conducted experimentally. Specific and rigid rules are prescribed to govern rebroadcasting by international and non-commercial educational broadcast stations, as well as by the other classes.

The frequencies allocated to the broadcast services covered by the rules cover a wide range from 1,600 kc. to 300 mc. and above. They may be summarized as follows:

**Relay Broadcast Stations: 12 frequencies in the band 1,600-3,000 kc.,** 12 frequencies in the band 30-40 mc., 8 frequencies in the band 130-140 mc., and any four frequencies above 300 mc.

**International Broadcast Stations:** 58 frequencies in the bands provided by the International General Radio Regulations, as revised at Cairo in 1938, in the bands 6,000-6,200 kc., 9,500-9,700 kc., 11,700-11,900 kc., 15,100-15,350 kc., 17,750-17,850 kc., 21,450-21,750 kc., and 25,600-27,000 kc.

**Television Broadcast Stations:** A total of 19 channels, each of 6,000 kc., of which seven channels are in the range 44-108 mc., and 12 are in the range 156-294 mc., and, in addition, any 6,000 kc. channel above 300 mc.

**Facsimile Broadcast Stations:** 10 frequencies in the 25 mc. band, 11 frequencies in the 43 mc. band, four frequencies in the 116 mc. band, and any frequency above 300 mc.*

**High Frequency Broadcast Stations (amplitude modulation):** 24 channels of 25 kc. each in the 25 mc. and 26 mc. bands, 12 channels of 40 kc. each in the 42 mc. band, five channels of 120 kc. each in the 116 mc. band, and any frequency above 300 mc.

**High Frequency Broadcast Stations (frequency modulation):** Four-200 kc. channels in the 26 mc. band, five-200 kc. channels in the 42 mc. and 43 mc. bands, four-240 kc. channels in the 117 mc. band, and any frequency above 300 mc.

**Non-Commercial Educational Broadcast Stations:** 25 channels, each of 40 kc., in the 41 mc. band.

**Developmental Broadcast Stations:** A number of frequencies, also available for assignment to all other stations in the experimental service, ranging from 1614 kc. to above 300 mc.

Assignments above 300 mc. are all subject to an exception for the band 400-401 mc.

The foregoing allocations, particularly in so far as they involve the ultra-high frequency portion of the radio spectrum, were preceded by intensive study and investigation, and a moderate amount of controversy between the interests affected, dating back to the extensive hearing held by the Commission in June, 1936, on the initiative of Commissioner Craven, then chief engineer. By its Order No. 18, promulgated in October, 1937, the Commission adopted an allocation of the ultra-high frequencies to the various services, to go into effect a year later.

* Other broadcast or experimental frequencies may be authorized on condition that a need be shown and that there will not be interference.

A number of protests having been filed, a hearing was held June 20-23, 1938, before a special committee of the Commission. There was little objection to the allocations in the lower portions in the band and the hearing was confined principally to the range from 60 mc. to 300 mc. It was contended, among other things, that too large a portion of this band had been marked off for government and other specified services, and that too little had been left open for research and experimentation without restriction as to type of service. On August 2, 1938, the Commission extended the effective date of its Order No. 18 to April 13, 1939. Provision was made, however, for putting allocations below 60 mc. into immediate operation, including two television channels.

On March 13, 1939, the Commission finally adopted an allocation, effective April 13th. Relatively few changes were made in Order No. 18 as originally promulgated.

## B. RELAY BROADCAST STATIONS

A "relay broadcast station" is a station licensed to transmit, from points where wire facilities are not available, programs to be broadcast by one or more regular broadcast stations. The new regulations limit the issuance of such licenses, in general, to licensees of standard broadcast stations, although suitable exceptions are provided. The programs transmitted may be commercial or sustaining, or orders concerning such programs, and they may be broadcast by several stations simultaneously or furnished to the network with which the licensee is regularly affiliated.

## C. INTERNATIONAL BROADCAST STATIONS

No action of the Commission during the period covered by this article had led to more criticism and unfavorable comment (and, it may well be added, misunderstanding) than its adoption on May 23, 1939, of revised rules dealing with international broadcast stations.

This type of station is defined as "licensed for the transmission of broadcast programs for international public reception." The frequencies allocated for this purpose are, as already pointed out, in the range from 6,000 kc. to 26,600 kc., the allocations being governed primarily by the General Radio Regulations annexed to the International Telecommunications Convention. Except for the bands in the upper portion of this range, the frequencies are capable of regularly spanning tremendous distances day and night because of their sky-wave propagation characteristics. On the other hand, their ground-wave service areas are small and there are intervening zones in which, depending on the hour, the season, and the year, there is a skip-distance effect resulting in an absence of an intelligible or satisfactory signal. Their interference range being so great, each such frequency must be used exclusively by a single station over the entire world, subject to exceptions due to conditions which need not be enumerated, or to special precautions.

In the light of the events of recent years, the importance of this class of station looms large. The use of these frequencies by other countries to reach large areas outside their own boundaries, sometimes for alleged propaganda purposes, has been brought to the attention of the public in a wealth of literature, varying in tone from moderate to lurid. Several such stations, the so-called short-wave stations, have been in operation in the United States for years, but until fairly recently have largely confined

themselves to broadcasting the same programs as those disseminated by standard broadcast stations operated by their owners.

The principal controversial issue raised by the new regulations is one of censorship. Discussion of it will be preceded by a brief review of some of the other provisions.

An applicant for a license must make a satisfactory showing that there is a need for the international broadcast service proposed to be rendered, that the necessary program sources are available to the applicant to render an effective international service, that the technical facilities are available without causing interference, that directive antennas and other technical facilities will be employed to deliver maximum signals to the country or countries for which the service is designed, that the station will be conducted by qualified persons, and certain other general matters.

Heretofore, this class of station has not been permitted to be conducted on a commercial basis. Within limitations this restriction has been liberalized, although not sufficiently to be free from objection by existing licensees of such stations. Commercial program continuities are limited to the name of the sponsor and the name and general characteristics of the commodity, utility or service, or attraction advertised. The commodity must be regularly sold or promoted for sale in the open market in the foreign country or countries to which the program is directed. There are further restrictions. The station may transmit the program of a standard broadcast station or network system, provided restrictions with respect to commercial continuities are observed and, when station identifications are made, only the call-letter designation of the international station is given. In the case of chain broadcasting, the program may not be carried simultaneously by another international station, directing service to the same foreign countries, except another station owned by the same licensee operating on a different frequency to obtain continuity of service.

No international broadcast station will be authorized to install equipment or be licensed for operation with a power less than 50 kw.* As applied to existing stations this provision becomes effective July 1, 1940. Directive antennas must be so designed and operated that the station's signal toward the countries served shall be 3.16 times normal.

The provision giving rise to the criticism above referred to reads as follows:

> "A licensee of an international broadcast station shall render only an international broadcast service which will reflect the culture of this country and which will promote international goodwill, understanding and cooperation. Any program solely intended for, and directed to an audience in the continental United States does not meet the requirements for this service."

At the time the regulations were adopted, Commissioner Craven objected to this phraseology, on the ground of censorship. The charge that the language constitutes censorship, in violation of the First Amendment to the Constitution and Section 326 of the Communications Act, was voiced from one end of the country to the other immediately after the rule was made public. It has furnished material for countless newspaper editorials

* This requirement stands in curious contrast with the Commission's action of June 23, 1939, limiting its domestic broadcast stations to a maximum of 50 kw.

and dissertations by columnists, for thundering reverberations in Congress including an attempt to annul the regulations by a rider to the Commission's appropriation, for a vigorous protest filed with the Commission on June 3, 1939, by the President of the National Association of Broadcasters, and for a petition filed by the American Civil Liberties Union on June 9, 1939.

In fairness to the Commission, it must be said that the language was innocuous in origin and in intent. It was designed as a gesture of international goodwill based on, or drawn from, language originally used in the convention resulting from the Pan American Conference at Montevideo in 1933 with reference to the allocation of five frequencies for use in furthering the good-neighbor policy between nations in the Western Hemisphere. The language, as interpreted by members of the Commission, was for descriptive and not regulatory purposes. Following the outcry, the Commission granted a hearing on the petition of the American Civil Liberties Union, ignoring the protest filed in behalf of the National Association of Broadcasters, but providing an opportunity for it and any other interested organization or person to participate. The hearing, originally scheduled for July 12, was postponed to July 14. The National Association of Broadcasters and certain of the licensees of international broadcast stations are objecting not only to the above-quoted provision but also to some of the commercial and other restrictions imposed by the new regulations.

As a helpful background, references to proposed legislation in Congress during the past two years will not be amiss. Early in 1938 bills were introduced in both Houses proposing the establishment of a government-owned short-wave broadcast station at San Diego, California, to promote "good will" among the American nations. Similar bills were introduced for the establishment of such stations in Florida, Texas and the Canal Zone. Hearings were held before subcommittees in both Houses, at which the bills were strongly opposed by representatives of the broadcasting industry on the ground that they would serve as the entering wedge for general government operation of broadcast stations and for censorship. Support for the bills faded away quickly and Congress adjourned without further developments.

In the 1939 session the bills were re-introduced in slightly different form. A bill introduced by Representative Celler proposed government construction of a "superpower short-wave station" for transmission of programs to "all parts of the United States and from this country to other countries in the western hemisphere," to be located in Panama. The Secretary of the Navy would be authorized to construct the station. Its policies and programs would be determined by an advisory council headed by the Secretary of State. Senator Chavez introduced a somewhat similar bill. Both bills have remained pigeon-holed in committee and neither has any present prospect of enactment.

An inter-departmental committee, which had been appointed by the President late in 1937 or early in 1938, under the chairmanship of Mr. McNinch, to deal with the subject of international broadcasting and to consider the most effective means of combating alleged propaganda broadcast to the Latin-American nations primarily by stations in Germany, Great Britain and Italy, was expected to submit a report to the President but, so far as is known to the writer, no report has been forthcoming. In

an oral statement on January 27, 1939, Mr. McNinch declared himself opposed to government ownership or operation of broadcast stations "except possibly in the international field."

On November 29, 1938, an inter-departmental committee on cooperation with the American republics, headed by Sumner Welles (also a member of the committee on international broadcasting), submitted a report to the President enumerating three projects for expansion of broadcasting and communications as part of a broad program of cooperation. The fact that none of the projects envisaged expenditure by the government encouraged the belief that the idea of a government short-wave broadcast station had been abandoned.

## D. VISUAL BROADCAST SERVICE

The term "visual broadcast service," as used in the regulations, means a service rendered by stations broadcasting images for general public reception. It comprises two classes of broadcast stations, television and facsimile. A television broadcast station is licensed

> "for the transmission of transient visual images or moving or fixed objects for simultaneous reception and reproduction by the general public."

The transmission of the synchronized sound is considered an essential phase, and both the visual and the aural broadcast will be authorized in a single license. A facsimile broadcast station is licensed

> "to transmit images of still objects for record reception by the general public."

An applicant for a television license must sustain the burden of making a satisfactory showing

> "That the applicant has a program of research and experimentation which indicates reasonable promise of substantial contribution to the development of the television broadcast art"

and that the program will be conducted by a qualified engineer. An applicant for a facsimile license must sustain a burden expressed in the same language except that the words "facsimile broadcast *service*" are substituted for "television broadcast *art*," and except for the additional condition

> "That sufficient facsimile recorders will be distributed to accomplish the experimental program proposed."

These apparently simple differences in phraseology have significant differences in implication with respect to eligibility for license and the scope of privileges conferred thereby.

The licensees of both classes of stations are prohibited from making any charge, directly or indirectly, for the transmission of programs. The aural program of a television broadcast station may be broadcast by a standard broadcast station subject to restrictions as to announcements and call-letter designations. Limitations are placed on the power of both classes of stations, and both are required to file supplemental reports with each renewal application, showing the number of hours of operation, the research and experimentation conducted, the conclusions and program for further development, all developments and major changes in equipment, and any other pertinent developments.

Progress in the manufacture of television transmitting and receiving apparatus, the satisfactory public demonstrations of experimental operation

of television broadcast stations, and the resulting pressure for a liberalization of the Commission's regulations on the subject, have led to important developments not yet reflected in regulations, resulting in a report submitted to the Commission on May 22, 1939, by a committee of its members, consisting of Commissioners Craven, chairman, Brown and Case. This document, constituting Part I of a complete report on the subject, was adopted by the Commission June 27th. The remaining portion of the report, Part II, is to be completed at an early date but probably will not be acted on by the Commission until September.

For over a decade television licenses have restricted their holders to purely experimental operation. In addition to the prohibition against commercial features, the regulations have required each licensee to contribute to the technical advancement of the art by conducting regular laboratory experiments and by submitting periodical reports. The sort of experimentation which would consist in carrying on operations to gauge public reaction and to mold program technique would require a change in the regulations.

By way of contrast, television was introduced to the public in Great Britain some three years ago by the British Broadcasting Corporation operating in London. From the point of view of geographical location and distribution of population, the London station is operated under extremely favorable conditions, since there are approximately 14,000,000 persons within range of the station. While technically the results seemed satisfactory (the British system being practically the same as the American), the public reaction, as expressed in the purchase of receiving sets, has not been overly encouraging. Recent estimates, referred to in the Committee's report, indicate that not more than 14,000 sets have been sold.

As of November 1, 1938, there were 19 authorizations in effect for experimental television transmission in the United States, some of them, however, representing licenses issued to the same licensee to operate on more than one channel. In reality, there were 10 concerns actually in the television field, with two more holding construction permits. The Radio Corporation of America (RCA) and its subsidiary, National Broadcasting Company (NBC), have been operating an experimental station on top of the Empire State Building in New York for some time. Columbia Broadcasting System has recently purchased a transmitter, which, with other equipment, represents an outlay of $650,000, which it expects to place in operation on top of the Chrysler Building in New York. Early in the fall of 1938, RCA announced a plan to open the television field to others through sale of standard 1 kw. transmitters along with experimental receivers.

On January 27, 1938, began what was described as "television's first road show" at Washington, D. C., consisting of a seven-day public demonstration by RCA and NBC. On April 30, with the opening of the New York World's Fair, the public was afforded a large-scale demonstration of high-definition television broadcasting by stations located in New York. The Crosley Corporation, which had filed an application in March, announced that it had leased the 48th floor of the tallest building in Cincinnati for television studios. During April the Don Lee Broadcasting System announced plans to erect a television station on one of the highest peaks overlooking Hollywood. During this period, broadcasters throughout the country manifested increased interest in the subject and a desire to engage in

experimental transmission, more, however, from the point of view of determining public reaction than to carry on purely technical experiments.

In the meantime, the public was not permitted to become over-optimistic on the early advent of television on a regular basis. The principal obstacles, repeatedly emphasized in public pronouncements by the representatives of reputable concerns, are economic and, among other things, have to do with the expense of program production and with network distribution of programs.

The initial outlay for a television transmitter need not in itself be prohibitive. It has been estimated that the cost of a 1 kw. unit, accompanied by certain necessary equipment, will run about $60,000,* although large additional sums would have to be expended for a complete studio outlay. For wire transmission of programs from one city to another, however, a very expensive type of cable, known as a coaxial cable, is necessary, and the only such cable now existing links New York and Philadelphia. It is believed, however, that this obstacle will be overcome by automatic booster stations on ultra-high frequencies placed at frequent intervals between cities, involving a cost of only about $500 each, and not requiring the attendance of operators. Recent experiments have also indicated reasonable success in transmitting television pictures over an ordinary telephone line especially adapted for the purpose by appropriate accessories.

Program production is another matter. It has been said that motion pictures range in cost from about $3,000 to $25,000 a minute, and that television must find some way of cutting this cost to about $50 a minute before it can safely consider commercial operation. In February, the president of NBC conjectured that it would be five years before television could ask for advertising support, and that to maintain a program of five hours a week would require an expenditure of approximately $1,000,000 annually.

The progress in technical development, combined with realization of economic obstacles, has brought the Commission face to face with serious problems. One problem is whether (and to what extent) standards should be adopted so as to facilitate the public use and acceptance of television. It would obviously be unfortunate if television transmitters and receivers should be developed on different systems so that a particular type of receiver would not be able to reproduce the programs of some of the stations. On the other hand, it would be unfortunate if by specifying standards the Commission should hamper or discourage technical improvements. The equipment used and sold by RCA and by some of the others is based on the cathode ray and is constructed for 441 lines, framed at the rate of 30 per second, interlaced to provide 60 exposures per second. The demonstrations at Washington in January were on receivers giving images 9 inches by 7½ inches.

The RCA announcement started a movement for standardized equipment. On October 20, 1938, the Radio Manufacturers' Association released a statement recognizing that experimental television service to the public was at hand and submitted to the Commission proposed standards for television transmission and reception. At the same time, other manufacturers and experimenters expressed opposition to promulgation of such standards.

*Editor's Note: A booklet issued by RCA ("Television," p. 12) states: "At the present time, the minimum cost of a 1 kw. RCA Television Transmitter is approximately $100,000, including studio equipment, but not including installation."

A second problem was created by the filing of applications by broadcasters not equipped to do the purely experimental or laboratory type of research, but desiring to gauge public reaction and to experiment with program production. The first such application was one filed by The Milwaukee Journal in the fall of 1938, after contracting for the purchase of an RCA transmitter. This application was followed by others, including the Crosley Corporation at Cincinnati and Earle C. Anthony, Inc., in Los Angeles.

In its annual report transmitted to Congress in December, 1938, the Commission stated that while technical phases of television were progressing satisfactorily, it was not ready for standardized or commercial use. On January 3, 1939, the Commission appointed the committee, above referred to, to study the whole subject and to prepare recommendations, including the matter of proposed standards and the policy to be followed with reference to applications.

The committee held informal sessions immediately. For a while, it seemed likely there would be an immediate general hearing, but the committee later determined that this would not be advisable. On April 11, the committee, accompanied by members of its engineering and legal staff, visited the principal laboratories during a five-day fact-finding expedition. By May 15, it had completed its conferences with manufacturers.

On May 22, 1939, the committee submitted Part I of its report, dealing principally with the proposed standards. It recommended, among other things, that the Commission neither approve nor disapprove the standards proposed by the Radio Manufacturers' Association, explaining that this was not to be understood as a holding that the standards were objectionable, but rather because it appeared undesirable to take action which might discourage private enterprise or decrease the incentive to research to effect further improvements. It recommended that future applicants proposing external transmitter performance on standards other than those in general use be required to demonstrate not only at least equal quality but also public interest; and that the Commission adopt a policy of cooperation with the industry, enabling it to keep abreast of technical developments to acquaint the industry with the resulting problems. While the belief was expressed that constructive results could not be obtained by a public hearing at this time, it suggested that such a hearing might be opportune after experimentation had made it possible to gauge public reaction more accurately.

According to the report, while television is now emerging from the technical research stage, practical television service on a nation-wide scale is not to be expected for some time. Facilities for network distribution of programs have not been developed, and much has yet to be learned concerning program production and the financing thereof. Only the larger metropolitan centers will receive television service in the immediate future, and the smaller centers must wait several years. Because of the high cost of operation, cities of less than 100,000 population may have difficulty in supporting a single television station, and cities of less than 1,000,000 population may not support two stations, on the basis of income from advertising. Further, according to the committee, the proposed standards do not at this time appear to be suitable for the 12 undeveloped ultra-high frequency channels above 150 mc. The patent situation is chaotic, and no accurate conclusion can be reached as to the ultimate holder of any patent

essential to a complete television system. Reference was also made to the problem created by electrical interference from devices such as X-ray, automobile ignition and similar apparatus, which may have the effect of blurring or blotting out images.

Somewhat less spectacular but nevertheless of great potential importance has been the advance in facsimile. As stated in last year's article, provision was made for the use of facsimile by standard broadcast stations by order of the Commission in September, 1937. With this step, facsimile may be said to have left the technical research stage (in which the Commission's regulations have so far left television), and a number of broadcasters were authorized to use the early morning hours, when their stations are normally silent, for this purpose.

In January, 1939, the Crosley Corporation announced that it was placing a facsimile receiver on the market, at a retail price of $79.50, reproducing pictures and printed matter in black on a grey paper two columns wide. A group of three clear channel stations, WGN, WLW and WOR, disclosed a plan for an experimental network of television programs. In March, 1939, plans for a chain of facsimile newspapers were announced by Transradio Press Service. Facsimile, like television, is receiving a large-scale demonstration at the New York World's Fair, with an exhibit called "The Newspaper of Tomorrow." Some idea of the technical progress already made is afforded by the announcement in June, 1939, by Finch Telecommunications Laboratories, Inc., in New York, of the development of a facsimile transmitter with recording equipment, producing a five-column copy of tabloid size at a speed of 20 square inches a minute or eight full pages an hour. It was described as capable of transmitting and receiving printed matter, drawings, photographs, advertisements and, in sum, all the usual features of a modern newspaper.

Television is already the subject of legislative attention. Early in 1939 a bill was introduced in the Senate by Senator Barbour to eliminate the existing statutory provision which would prohibit the televising of prize-fights across State lines. Passage of the bill was urged before a subcommittee of the Senate Committee on Interstate Commerce by the president of the National Association of Broadcasters on May 25, 1939, who pointed out that programming will be one of television's major problems and that the existing ban on prize-fights will deprive television broadcasters of valuable program material.

## E. HIGH FREQUENCY BROADCAST STATIONS

A "high frequency broadcast station" is

> "a station licensed on frequencies above 25,000 kilocycles for transmission of aural programs for general public reception."

The applicant is required to make a satisfactory showing that he has a program of research and experimentation indicating reasonable promise of substantial contribution to the development of high frequency broadcasting; that substantial data will be taken on propagation characteristics, on noise level, on the field intensity necessary to render good broadcast service, on antenna design and characteristics, and on allied phases of broadcast coverage; and that the research and experimentation will be conducted by qualified engineers. No charge may be made, directly or indirectly, but the programs of a standard broadcast station or network, including com-

mercial programs, may be transmitted under certain restrictions. Supplemental reports are required to be filed with renewal applications.

As has been shown under sub-heading "A" above, the frequencies allocated to this class of station are, in terms of band-width, about equally divided between two types of transmission, known respectively as "amplitude modulation" and "frequency modulation." Beneath the somewhat forbidding technical exterior of these terms lies what may prove to be a startling revolution in broadcasting service, rendering obsolete all or a large portion of existing transmitters and of the 35,000,000 receiving sets now in use by the public. The system now used by all standard and international broadcast stations, and nearly all other classes of broadcast stations, is amplitude modulation, requiring a minimum channel 10 kc. in width and increasing somewhat in width in the higher frequencies because of the limitations on precision apparatus and other considerations. The new system of frequency modulation, on the other hand, requires a channel of 200 kc. in width and is, therefore, feasible only in the ultra-high frequency spectrum.

The advantages of the new system were persuasively demonstrated by its inventor, Major E. H. Armstrong, at the general hearing held in June, 1936. Since then it has made impressive advances. In the Commission's Annual Report submitted to Congress in December, 1938, its Engineering Department expressed itself as foreseeing bright prospects for the system, declaring that available data indicate a material gain in effectiveness of reception through static, both natural and man-made, and, since the required signal-to-noise ratio is less, good reception at greater distances and a correspondingly larger service area may be had for the same amount of power.

It is claimed that, whereas under the system of amplitude modulation interference of 5% or less can be extremely annoying, the interference factor must be at least 50% to be objectionable under the system of frequency modulation. Stations on the same 200 kc. channel may be located as close as at New York and Philadelphia. There are indications that both the initial cost and the cost of operation are less. Among other things, the need for a studio engineer to "edit" musical programs is done away with. It permits broadcasting of multiple signals within the band or channel, for example, the simultaneous transmission of facsimile copy and sound from a single station.

A few stations employing the new system have been in experimental operation for some time, principally in New York. Early in June, the operation of such a station was commenced in New England, on the top of a hill about 1,400 feet above sea-level. With a power of only 2 kw. (which is to be later increased to 50 kw.), on a frequency in the 43 mc. band, its owner expects it to serve all of southern New England with static-free reception equivalent to that available from any local station. Other New England broadcasters have applications pending for the same sort of station.

In its new regulations, the Commission has given practical recognition to the new system not merely for high frequency broadcast stations but also, subject to limitations, for relay broadcast stations and non-commercial educational broadcast stations.

Earlier notions that the ultra-high frequencies are limited in range to

the horizon are being badly disturbed by evidence that, under the new system, clear coverage over a primary area with a radius of 100 miles or more may be had.

## F. NON-COMMERCIAL EDUCATIONAL BROADCAST STATIONS

A non-commercial educational broadcast station is licensed

> "to an organized non-profit educational agency for the advancement of its educational work and for the transmission of educational and entertainment programs to the general public."

The advancement of the agency's program is to be "particularly with regard to use in an educational system consisting of several units." Each station

> "may transmit programs directed to specific schools in the system for use in connection with the regular courses as well as routine and administrative material pertaining to the school system and may transmit educational and entertainment programs to the general public."

They are not required to operate on any definite schedule or minimum hours.

The broadcast service furnished shall be "non-profit and non-commercial."

> "No sponsored or commercial program shall be transmitted nor shall commercial announcements of any character be made. A station shall not transmit the programs of other classes of broadcast stations unless all commercial announcements and commercial references in the continuity are eliminated."

This class of station is largely the product of the issue raised by a group of educational institutions some years ago, demanding the allocation of a substantial portion of the standard broadcast band to such institutions.

## G. DEVELOPMENTAL BROADCAST STATIONS

In the new regulations the term "developmental broadcast stations" appears for the first time, to replace the term "experimental broadcast stations" and thus to avoid confusion with other stations operating on an experimental basis. The term means a station

> "licensed to carry on development and research for the advancement of broadcast services along lines other than those prescribed by other broadcast rules or a combination of closely related developments that can be better carried on under one license."

It is unnecessary to summarize the requirements with respect to the showing to be made by applicants, the limitations on program service and on commercial use, the reports to be filed, and other provisions.

## H. MISCELLANEOUS

**LOW-POWER RADIO FREQUENCY DEVICES AND DIATHERMY APPARATUS.** On August 30, 1938, the Commission ordered an informal conference to be held September 19 to consider proposed rules to govern use of low-power radio frequency devices which probably do not radiate more than one-billionth of a watt but which nevertheless have interference implications if not properly controlled. This was brought about by the sudden influx of radio-controlled devices, such as phonograph record players, so-called "mystery control" attachments for radio receivers, garage door openers, remote floodlight switches, and burglar alarms. These de-

vices throw signals only from 20 to 50 feet. Later in the fall, such regulations were adopted.

On January 9, 1939, a meeting was held at Columbia University, New York, attended by approximately 100 representatives of the broadcasting industry, the medical profession, and firms manufacturing diathermy and other electrical medical apparatus, to discuss the problem of interference. The result of the meeting was the adoption of a resolution requesting the Physical Therapy Council of the American Medical Association and the Commission to cooperate in organizing a committee to study the problem and suggest a solution.

On May 24, 1938, Senator Wheeler introduced a bill (S. 4074) to enable the Commission to check interference to radio reception caused by diathermy apparatus. This was pursuant to a recommendation from the Commission.

The amendment would authorize the Commission to make such rules and regulations and prescribe such restrictions and conditions as it might deem necessary to prevent interference from such sources. Diathermy machines have interfered primarily with high-frequency transmission and might become an important factor in the event of development of television. No action was taken on the bill.

**REGULATIONS GOVERNING EXPERIMENTAL STATIONS.** On May 23, 1939, the Commission promulgated new regulations governing experimental stations generally. Experimenters are grouped under three general classifications:

1. Stations licensed for general or specific research and experimentation for advancement of the radio art along lines not specifically directed to any proposed or established radio service.

2. Stations licensed for research and experimentation directed toward the development of a proposed or established radio service, with several sub-classes, such as police, broadcast television, high-frequency broadcasting, etc.

3. Stations licensed to a citizen interested in radio technique solely with a personal aim to conduct experiments on his own behalf, requiring the use of radio facilities for a limited time.

The rules cover a variety of details.

**OPERATOR RULES.** Hearings were held July 11-12, 1938, regarding proposed changes in radio operator rules. The main exceptions to the proposed changes had to do with the "physical, mental and moral" standards as eligibility requirements, the provision that applicants for license renewals be required to pass examinations as for original licenses, and the requirement that operators point out all defects and imperfections in the radio equipment they operate. The first of the foregoing was described as an attempt to exercise "bedroom powers" by the Commission. Hearings were recessed, to resume September 14.

Revised rules were adopted December 19, to become effective May 1, 1939. They will affect between 3,000 and 4,000 commercial operators and apply to about 40,000 operators altogether. The rules as adopted made allowance for the major objections voiced at the hearing. The proposal to set up definite "physical, mental and moral standards" was deleted along with the rule which would have made the operator responsible for reporting deficiencies in the equipment he is operating. The proposal to issue

renewal licenses upon re-examination only was modified to provide renewal based in large measure on experience and service. The license term was extended from three to five years.

## PART IV

## APPEALS FROM THE COMMISSION'S DECISIONS

During a period of almost 14 months,* 13† opinions have been handed down by the United States Court of Appeals for the District of Columbia in cases involving appeals from decisions of the Federal Communications Commission on broadcast station applications. In its total of decisions affirmed (including appeals dismissed), the Commission fared considerably better than in the previous year, but it was occasionally treated to pointed criticism by the reviewing court.

**APPEALABLE INTEREST.** In one case,** three appeals were dismissed by the Court on the ground that none of the appellants had an appealable interest. Two appellants were the licensees of existing regional stations who had applications pending to increase nighttime power from 1 kw. to 5 kw., and whose interest arose from the fact that, if the proposed application were granted, it would create a situation which, because of considerations of interference, might operate as a bar to the granting of their applications. The Court said:

> "This is a matter so wholly of policy under the provisions of the Act and so peculiarly within the special and expert knowledge of the Commission that to undertake to control it judicially would be clearly an impingement upon the jurisdiction of the Commission."

The present regulations of the Commission have, since 1928, limited the nighttime power of regional stations to 1 kw., but a proposal to amend the regulations to increase the maximum to 5 kw. has been pending for several years, has been virtually certain of adoption for over two years, and, in fact, was adopted June 23, 1939, effective August 1, 1939. In the meantime, several regional stations have been authorized by "special experimental authorization" to use the higher power and have done so for two years or more, on a regular commercial basis. The applications of others for a similar increase have actually (although not always openly) been taken into account by the Commission in precisely similar situations. Whatever may be the correct view on the question presented to the Court, the result has been highly discriminatory.

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* From May 9, 1938, to July 1, 1939.

† Pittsburgh Radio Supply House v. F.C.C., May 23, 1938, 98 F. (2d) 303; Southland Industries, Inc. v. F.C.C., June 15, 1938, 99 F. (2d) 117; Woodmen of the World v. F.C.C., June 15, 1938, 99 F. (2d) 122; Sanders Bros. Radio Station v. F.C.C., January 23, 1939; Courier-Post Publishing Co. v. F.C.C., March 6, 1939; Pottsville Broadcasting Co. v. F.C.C., April 3, 1939; McNinch et al v. Heitmeyer, April 3, 1939; Woodmen of the World v. F.C.C., April 17 1939; Colonial Broadcasters, Inc. v. F.C.C., June 12, 1939; W. P. Stuart v. F.C.C., June 12, 1939; Evangelical Lutheran Synod v. F.C.C., June 26, 1939; The Crosley Corporation v. F.C.C, June 26, 1939, and Courier-Post Publishing Co. v. F.C.C., June 30, 1939.

** Pittsburgh Radio Supply House v. F.C.C., May 23, 1938, 98 F. (2d) 303.

In another case,* now a *cause celebre,* a similar question involving a more fundamental issue was presented, and, on motion of the Commission, the appeal was dismissed for want of jurisdiction. It involved the "extension" of the "special experimental authorization" of WLW, Cincinnati, to operate with power of 500 kw. instead of with power of 50 kw. as authorized in its regular license. The earlier proceedings in this case before the Commission have already been reviewed and need not be repeated. The Commission's regulations limit the power of clear channel stations to 50 kw. and, while a proposal to increase the maximum to 500 kw. has been pending for some three years, it was finally rejected by the Commission on June 23, 1939. WLW was first authorized to use 500 kw. in April, 1934, and extensions of its authority have been granted from time to time since then, always subject to

> "the express condition that it may be terminated by the Commission at any time without advance notice or hearing if in its discretion the need for such action arises."

After hearing by a committee and report to the Commission, the Commission on February 8, 1939, denied an application for further extension, effective 3:00 A. M., March 1, 1939. The station's owner appealed and petitioned the Court to stay the effective date of the order. The Court, without opinion, denied the petition in the early evening of February 28, 1939.†

When the case came before the Court for argument, it was urged in behalf of WLW that the "special experimental authorization" was in reality a license and that the Commission could not, by calling a license by another name, deprive the licensee of the rights to notice, hearing, and appeal which are specifically conferred by the statute. This contention seems unassailable. In unambiguous and unqualified terms the statute (Section 301) provides, in substance, that

> "no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act."

Violation of this prohibition entails a fine of $10,000 and imprisonment for two years. Section 309(a) makes notice and hearing prerequisite to any denial of an application for renewal or modification of license. Section 402 (b) gives the right of appeal to any person whose application for renewal or modification is refused.

The Court's answer to the contention is both surprising and uncon-

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* The Crosley Corporation v. F.C.C., June 26, 1939.

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†Among the arguments urged by the Commission in opposition to the petition for stay order was that the Court could not grant it without, in effect, substituting itself for the Commission as the licensing authority. In view of the Court's final decision, as well as the procedural situation before the Commission, it seems unlikely that the Court gave effect to this argument. If it did, it disrobed itself of a power which it had regularly exercised, in its discretion, ever since its first decision on an appeal from the Federal Radio Commission. General Electric Co. v. Federal Radio Commission (1929), 31 F. (2d) 630; Nelson Bros. Bond & Mfg. Co. v. Federal Radio Commission (1932), 62 F. (2d) 854.

vincing. It states that it is unnecessary to decide whether or not the "special experimental authorization" is a "license" (although, if it was not a license, the operation of WLW was a criminal offense and it is clear that neither the Commission nor the owner of WLW intended that the operation should be anything but lawful). The Court seems to say that either (1) the license was not the sort of license which Congress authorized the Commission to issue under Section 309 and authorized the Court to review, or (2) if it was anything more than for purely experimental purposes and subject to termination at the will of the Commission, it "would have been beyond the power of the Commission to grant under its own rules and regulations." The Court said:

> "At the time the grant was made the Commission was required to limit licenses for standard stations issued under Sec. 309 of the Act to the power of 50 kw. When it gave appellant more than this manifestly it was assuming to act under Sec. 303(g),* which authorized it to endeavor by trial and experiment to determine how and in what manner larger results might be obtained in the use of frequencies."

As pointed out in a concurring opinion by Justice Stephens, the opinion

> "implies that the Commission has power to issue and terminate special experimental authorizations without conformance to the provisions of the statute for notice, hearing and review, and that the Commission can by contract with a licensee render ineffective or inapplicable those provisions."

It seems unfortunate that the appeal was dismissed on this point of jurisdiction (as distinguished from affirming the Commission's decision on the merits), both for the reason suggested by Justice Stephens and because of the opening it gives the Commission by this device to inflict injury on existing stations by way of interference without possibility of recourse to the Court. The same device of "special experimental authorization" has been used for years to cover up departures from regulations so as to permit duplication on certain of the clear channels, power in excess of the maximum permitted on regional channels and other special privileges which have been continuously enjoyed on a regular commercial basis.

Another question of appealable interest of vital importance to the future development of rate regulation is now pending before the Court for decision. It involves principally the matter of so-called "economic injury" inflicted on existing broadcast stations in a given community when the Commission authorizes the establishment of a new station in that community, or an improvement in facilities of one of the existing stations. The subject is closely related to matters already discussed in connection with the plethora of questionnaires and the allocation regulations in Parts I and II of this article.

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* Sec. 303 of the Communications Act of 1934 enumerates what may be described generally as the legislative or regulation-making powers of the Commission. Clause (g) authorizes it 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."

This clause, which was not contained in the Radio Act of 1927, had never previously (so far as known to the writer) been understood or used to justify the issue of a new species of license not subject to the procedural requirements of the Act. The legislative history does not justify the interpretation given it by the Court.

As already pointed out, the Commission was slow to give formal recognition to interests based on economic injury, although it frequently gave effect to such interests in actual practice. For several years now, however, it has become axiomatic that such interests are entitled to recognition, and persons asserting them have been given the right to notice and participation in hearings. This is still the case, although by a change put into effect during the last few days it is said that such parties will not automatically be given notice, but on petition may intervene.

In the main, the Court has followed and upheld the Commission's viewpoint in its various stages of evolution. In its first pronouncement on the subject* the Court held the complaint of economic injury to be "so vague, problematical and conjectural as not to furnish a person substantial objection to the Commission's decision." Four years later, by way of dictum the Court did an about-face, saying:

> ". . . we are by no means in agreement with the contention frequently urged upon us that evidence showing economic injury to an existing station through the establishment of an additional station is too vague and uncertain a subject to furnish proper grounds of contest. On the contrary, we think it is a necessary part of the problem submitted to the Commission in the application for broadcasting facilities. In any case where it is shown that the effect of granting a new license will be to defeat the ability of the holder of the old license to carry on in the public interest, the application should be denied unless there are overweening reasons of a public nature for granting it. And it is obviously a stronger case where neither licensee will be financially able to render adequate service. . . ."†

Carrying this same reasoning to its logical conclusion, the Court, in a case decided during the past year,** reversed a decision of the Commission because of the Commission's failure to make appropriate findings of fact one way or the other on the economic issue. In this case the owner of an existing station appealed from a grant of a new station in the same city on the ground of economic injury.

At this point there developed a sudden change in philosophy on the part of the Commission's Law Department. A petition for rehearing was filed in the case just described, and motions were made, briefs filed, and arguments presented in other cases pending before the Court,*** disclosing a five-point program of contentions somewhat as follows:

(1) Economic damage through loss of advertising, even though substantial, does not confer the right of appeal because such damage, in legal phraseology, is "without injury."

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* WGN, Inc., v. Federal Radio Commission, December 11, 1933, 66 F. (2d) 432.

† Great Western Broadcasting Association, Inc. v. F.C.C., December 6, 1937, 94 F. (2d) 244.

** Sanders Bros. Radio Station v. F.C.C., January 23, 1939, not yet reported.

*** One of these cases involved the appeal of KTSM, El Paso, Texas, from a decision authorizing a new station in that city. The other case involved three appeals from a decision authorizing a large increase of power and improvement in assignment of WMEX, Boston; two of the appellants raising the economic issue and the third raising the question of interference.

(2) Similarly, loss of listening audience, talent, or program material resulting from the grant of a new station does not confer the right of appeal.

(3) Injury from interference does not confer the right of appeal if the interference occurs outside the "normally protected" contour of the complaining station.*

(4) That the Commission is not required to render a written decision reciting findings of fact when it *grants* new facilities, and that the requirement extends only to cases where it *denies* an application.

(5) That an applicant for new or additional facilities may not appeal from the grant of the same facilities to another applicant until such time as the Commission renders its decision on the former's case.

These surprising contentions, which would overturn principles recognized by the Commission and the Court for years, were argued at length orally before the Court early in March. With an exception not material to this discussion,† no decision has as yet been rendered by the Court, and the long interval since the date of oral argument, during which other cases have been both argued and decided, gives ground for apprehension that the Court is having difficulty in arriving at conclusions.

**EFFECT OF PENDING PETITION FOR REHEARING.** In two decisions the Court held that it lacked jurisdiction to review a Commission decision if, at the time the appeal was taken, a petition for rehearing was pending before the Commission.** By this holding the Court completely removed the ambiguity, part of which had been removed in a decision three months earlier.†† In one of the two cases*** the Court said:

"We have heretofore suggested that rehearings should be availed of by aggrieved persons both for their own protection, and in order to afford opportunity to the Commission to correct errors or to hear

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* By "normally protected" is meant the contours which, under the Engineering Department's Standards of Good Engineering Practice, should be protected from anything greater than a certain degree of interference. These Standards have never been given the status of regulations by the Commission and on the whole have been more honored in the breach than in the observance. Even under the new regulations adopted June 23, 1939, they are not controlling and may be disregarded by the Commission.

† Colonial Broadcasters, Inc., v. F.C.C., June 12, 1939, not yet reported. Departing from its practice in previous years, the Court will continue to issue decisions during the summer, and it is not unlikely that these cases will be determined in the near future.

** Southland Industries, Inc. v. F.C.C., June 15, 1938, 99 F. (2d) 117; Woodmen of the World v. F.C.C. June 15, 1938, 99 F. (2d) 122.

†† Saginaw Broadcasting Co. v. F.C.C., March 16, 1938, 96 F. (2d) 554, in which the Court had held that the filing of a petition for rehearing automatically suspended the running of the 20-day period during which an appeal must be taken under the statute.

*** Southland Industries, Inc. v. F.C.C. *supra*.

newly discovered evidence before appeal. This is not and should not be an arbitrary requirement. Whether a petition for rehearing should be filed in a particular case must be decided on the merits as each case arises. However, in our view, its use as an administrative remedy should not be discouraged, but instead should be encouraged—'not to supplant, but to supplement' appellate review. For that reason, in our opinion, the purpose of the law is defeated if the Commission declines to act upon such petitions when they are filed, or dismisses them without consideration, as was done in the present case. Its action, therefore, was arbitrary and capricious and constituted an improvident exercise of power. Until the Commission has considered and acted upon such a petition, the administrative remedy of the aggrieved person cannot properly be said to have been exhausted, and resort to this court in such cases is, therefore, premature."

**FINDINGS OF FACT BY THE COMMISSION.** As above noted, the Court reversed a decision of the Commission because of its failure to make appropriate findings of fact one way or the other on the issue of economic injury. Answering the contention that the record contained insufficient evidence of facts to support findings, the Court said:

". . . it is not sufficient that they be marshalled and presented in the brief on appeal. They must be prepared as findings of fact, upon which the decision of the Commission may be rested." *

Presumably this holding is still at least partly in suspense because of the petition for rehearing and the recent contentions of the Commission's Law Department.

Another decision of the Court is difficult to classify, but may properly be considered in this connection.† The Court reversed a decision of the Commission denying an application for a new station at Hannibal, Mo. Contrary to the findings of the Commission, the Court found there was a public need shown for the station, as well as a demand by the merchants at Hannibal for the service. The language of the opinion, written by a member of the Court who had not previously written opinions in radio cases, is difficult to reconcile with those written by other members of the Court. In defining what constitutes "substantial evidence," the Court cites a decision holding that it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Court suggests that the Commission might have profited from a more careful consideration of the examiner's report.** In meeting appellant's contention that the Commission had failed to apply standards which it followed in other cases, the Court said:

* Sanders Bros. Radio Station v. F.C.C., *supra*.

†Courier-Post Publishing Co. v. F.C.C., March 6, 1939.

** This was not the first occasion on which the Court admonished the Commission to pay more heed to the reports of its examiners. In Heitmeyer v. F.C.C., 95 F. (2d) 91, the Court said: "While the Commission is not bound by the findings of the Examiner it is itself charged with the responsibility of making findings. . . . In this case it would have profited from a more careful consideration of those which the Examiner prepared."

"In administering the law, the Commission must consider each case upon its individual grounds. The permit should be granted if it meets the statutory criterion of public convenience, interest or necessity, if not, it should be denied."

This is hardly consistent with the Court's tendency, exhibited in several pronouncements during the past two years, to require the Commission to formulate and adhere to more definite standards.

Another decision* in which the Court affirmed the Commission's findings deserves mention because of the facts brought to the Court's attention. The application had been originally filed June 26, 1934, and was not finally acted upon until June, 1938. In the interim it had been granted three times, had been subjected to a bewildering succession of reconsiderations, examiner's reports, oral arguments, and petitions for rehearing.

An even more striking instance of delay, with ultimate hardship upon all parties involved, was exhibited by another appeal which was dismissed October 13, 1938, without opinion.† The case involved renewal applications which had been pending before the Commission since 1932, principally on charges of misconduct in program service. After an interminable controversy, in the course of which there were two hearings and a multiplicity of other proceedings, the Commission denied the renewal applications and the owners of the stations appealed. The cost of printing the record alone was $6,118, paid by appellants. After appellants' brief was filed and before the case was argued, the Commission filed a motion with the Court conceding that its findings were inadequate and asking the Court to remand the case for the purpose of making further findings. The Court had no alternative but to grant the motion, but at a conference of interested attorneys the Chief Justice stated that it was "unconscionable" that the Commission should stipulate so expensive a record.**

Three other decisions of the Court may be passed over briefly. In all three the Court affirmed the Commission's decisions, either wholly or partly, because the Commission's findings were deemed to be supported by the evidence. In one of them†† the Court also emphasized the necessity for designation of particular errors in an appellant's statement of reasons for appeal. In the second, the Court upheld the Commission's rule, pursuant to which it refused to postpone a hearing scheduled on an application until another application, filed subsequently to the date on which the first application was designated for hearing, was itself ready for hearing.*** In the third case the Court, in rejecting a contention that public interest

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* Woodmen of the World v. F.C.C., April 17, 1939, not yet reported.

† Voice of Brooklyn, Inc. v. F.C.C.

** The court has prepared and has under consideration revised rules governing appeals from the Commission's decisions, in which a commendable effort is made to reduce the expense.

†† W. P. Stuart v. F.C.C., June 12, 1939, not yet reported.

*** Colonial Broadcasters v. F.C.C., June 12, 1939, not yet reported.

requires "an equal division of time between respectable stations which operate on one frequency in one locality," stated:

> "The public interest requires, on the contrary, that existing arrangements be not disturbed without reason."*

**USE OF CONFIDENTIAL MEMORANDA.** The question raised by the Commission's use of confidential memoranda submitted by its staff *dehors* the record in arriving at its decisions was again raised.† The Commission having again specifically and formally denied the allegation, the Court applied the presumption of regulatory or official conduct but condemned any "Star Chamber procedures to deprive a citizen of a fair hearing."

**COMMISSION PROCEDURE FOLLOWING REVERSAL BY THE COURT.** A tangled and complex situation which has arrayed the Commission in open conflict with the Court has arisen in cases where Commission decisions denying applications for new stations have been reversed by the Court. In three such cases** the Commission's procedure following the decisions has been such as to take the parties back into court.

The procedure followed in all three cases was substantially the same. After a decision denying an application had been reversed, the Commission refused to reconsider and grant the application, but, instead, ordered a new hearing, in which other applications for the same or competing facilities, filed subsequently to the original application, were also to be heard. In the language of one of its orders, the Commission announced that it would hear the several applications

> "individually on a comparative basis, the application which in the judgment of the Commission will best serve public interest to be granted."

To prevent the carrying out of such an order, one applicant applied to the Court of Appeals for writs of prohibition and mandamus. The Court rendered an opinion severely condemning the Commission's conduct, declaring:

> ". . . In saying this much, we do not wish to be understood as implying that the Commission may not, upon a showing of newly discovered evidence or upon a showing of supervening facts which go to the very right of the applicant to have a license, remake the record in those respects without the necessity of a bill of review or other like technical methods of bringing into the record new and previously undiscovered facts, but there should be some control of the exercise of this right, and we think control is of necessity lodged in this court. But we think it is obvious that the particular objections of the Commission to a reconsideration on the record—to which we have referred—are mere

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* Evangelical Lutheran Synod v. F.C.C., June 26, 1939, not yet reported, citing *Chicago Federation of Labor* v. *Federal Radio Commission*, 41 F. (2d) 422, and *Journal Co. v. Federal Radio Commission*, 48 F (2d) 461.

† Sanders Bros. Radio Station v. F.C.C., *supra*.

** Heitmeyer v. F.C.C., December 27, 1937, 95 F. (2d) 91; Pottsville Broadcasting Co. v. F.C.C., May 9, 1938, 98 F. (2d) 288; and Courier-Post Publishing Co. v. F.C.C., March 6, 1939, not yet reported.

makeweights, and that the real bone of contention is the insistence by the Commission upon absolute authority to decide the rights of applicants for permits without regard to previous findings or decisions made by it or by this court. . . .

". . . In such a case petitioner ought not now to be put in any worse position than it occupied on the original hearing, and therefore ought not to be required any more now than originally to be put in hodgepodge with later applicants whose records were not made at the time of the previous hearing. On this state of facts, we are of opinion the Commission should rehear the application on the record and in the light of our opinion. We believe that this expression of our views on the subject will obviate the necessity of issuing the writ. If it becomes necessary for the protection of petitioner's rights, counsel may submit a proposed form of order within 30 days. Otherwise an order will be entered denying the petition for prohibition and mandamus."*

In another case, while the procedure followed by the applicant was somewhat different, the result was the same.†

Notwithstanding the Court's pronouncements, the Commission has insisted on its right to consider other applications in its later proceedings. It finally became necessary for the Court to issue a writ of mandamus in one of the cases on May 24th.**

In a second case, the Court issued a writ of mandamus on June 30, 1939.†† At present writing the matter is likely to be presented to the Supreme Court by petitions for certiorari by the Commission.***

**ASSIGNMENT-OF-LICENSE CASES.** There is now pending before the court a case††† involving the right of appeal under Section 402 (b) from

* Pottsville Broadcasting Co. v. F.C.C., April 3, 1939, not yet reported.

† McNinch et al. v. Heitmeyer, April 3, 1939, not yet reported. By reason of these and other decisions of the Court of Appeals, cited in the foregoing, it is now clear that the remedy by appeal under Section 402 (b) of the Act to the United States Court of Appeals for the District of Columbia is exclusive, and that proceedings for injunction or mandamus against the Commission in the lower Court may not be maintained in matters embraced within the section.

** The Heitmeyer case, Part IV-p. 13. On motion of the Commission, the Court, on June 20th, suspended the writ for 10 days to permit the Commission to file a statement of grounds for opposition.

†† Courier-Post Publishing Co. v. F.C.C., not yet reported. In this case the application had been originally heard in competition with another application for the same facilities in the same town. The Commission had denied both applications. The other applicant had not appealed, so the decision of the Commission became final as to it, and being a corporation, it was subsequently dissolved by surrender of its charter. Nevertheless, after the Court's decision the Commission set the successful appellant's application for hearing in a consolidated proceeding and on a comparative basis with the other applicant.

*** Petitions for certiorari to the Supreme Court have frequently been filed by parties defeated in the Court of Appeals. No petition, however, has ever been granted in a radio case by the Court except in two early instances, where petitions were filed by the Commission, and in one of these the petition was later dismissed. General Electric Co. v. Federal Radio Commission, 281 U. S. 464; Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266.

††† Associated Broadcasters, Inc. v. F.C.C. See Part II, B.

a Commission decision refusing its consent to a transfer of license and, on the merits, the Commission's power to approve or disapprove such a transfer. The Commission moved to dismiss the appeal, principally on the ground that the Act omits to provide for such an appeal in these cases, relying on a decision rendered by a majority of the Court several years ago.* The case was argued orally early in March, and the long interval since then seems to indicate that the Court is having difficulty in deciding the issues. If it holds that such matters are not appealable, the only recourse open to a defeated applicant is to the statutory three-judge court in the district, where the applicant resides or does business, under Section 402 (a). That such recourse is open would seem to be indicated by a recent decision of the Supreme Court.†

**COMMENTS.** On the whole, for reasons sufficiently indicated in the foregoing review, progress in clarification of the law through decisions of the reviewing court has not been as satisfactory during the past, as during the preceding, year. This conclusion is based not at all upon the count of decisions affirmed or reversed. In the writer's opinion, the Court's errors, if they be such, have been just as frequently at the expense of the Commission as in its favor. In one direction there has been a tendency too closely to restrict the Commission's discretion and its continuing power of supervision and regulation.** In another direction unnecessary loopholes have been provided for arbitrary and capricious rulings.††

One phenomenon is so important that it cannot be ignored, and that is, the attitude of and the growing authority exercised by the Commission's Law Department. No matter what the case or the issue, the Department is relentlessly urging a point of view that would limit the scope of the Court's review, and would, in certain classes of cases, free the Commission from any judicial control whatsoever. In a word, its position is that of "administrative absolutism". At the same time, the Law Department is urging principles, such as on the question of economic injury, which are at least partly inconsistent with the position of the Commission itself, evidenced by its practice and its decisions over a period of years.

## PART V

## INTERNATIONAL RADIO REGULATION

Developments in international radio regulation, so far as it affects broadcasting, have been few in number.

### A. THE INTERNATIONAL TELECOMMUNICATIONS CONVENTION

As pointed out in last year's article,*** the International Telecommuni-

* Pote v. Federal Radio Commission, 67 F. (2d) 509, *Justice Groner (now Chief Justice) dissenting.*

† *Rochester Telephone Corporation* v. *United States of America*, April 17, 1939.

** For example, in the second decisions in the Heitmeyer, Pottsville and Courier-Post cases. Reference is had to decisions of the Supreme Court and other courts, in which the continuing right of supervision by administrative agencies is recognized, and the doctrine of "final decision" (in the sense in which the term is used as to court decisions) is rejected.

†† For example, in The Crosley Corporation and the first Courier-Post decisions.

*** VARIETY RADIO DIRECTORY, II, p. 546.

cations Convention, signed at Madrid in 1932, and later ratified by the United States, was not subject to revision at the Conference held at Cairo beginning February 1, 1938. The General Radio Regulations, annexed to the Convention, were revised in a number of respects (effective January 1, 1939), including a very moderate increase in the bands of frequencies above 6,000 kc. allocated to broadcasting. The congestion of stations in these bands continues, however, because of the widespread use of these frequencies for long-distance or international broadcasting, together with their use in tropical regions to avoid static. It may safely be predicted that they will continue to constitute one of the principal problems of international radio regulation and that they will be one of the most controversial topics of debate at the next Conference to be held in Rome, probably early in 1943.

## B. THE NORTH AMERICAN REGIONAL BROADCASTING AGREEMENT

The North American Regional Broadcasting Agreement, negotiated at a six weeks' conference in Havana beginning November 1, 1937, and described in last year's article, was ratified by the United States following action by the Senate on June 15, 1938. Because of a sedulously circulated misinterpretation of the provisions of the Agreement, the Senate's action was not taken until after adoption of a resolution on June 13th, advising the Federal Communications Commissions that it was the sense of the Senate that power in excess of 50 kw. is against public interest and that its regulations should not be amended to permit higher power. The Agreement did not, however, call for or require the use of power in excess of 50 kw. on clear channels, but simply *permitted* the higher power, leaving each country free to adopt its own policy.

Unfortunately, the Agreement has encountered obstacles which may prevent it from becoming effective. According to its provisions, ratification by Canada, Cuba, Mexico and the United States is prerequisite to its validity (although if three of these countries ratify and the fourth evidences readiness to ratify, there is provision for its becoming valid by administrative arrangement). It does not become effective until one year after ratification by the fourth of these governments. Shortly after the Agreement was signed, Cuba ratified. On November 28, 1938, Canada ratified. Mexico, however, has so far proved a stumbling-block.

It was understood at the time of the Havana Conference that, under Mexico's Constitution, that country could not ratify earlier than December, 1938. On October 26, 1938, newspapers in Mexico City published stories to the effect that the Mexican Senate had approved the other treaties and agreements negotiated at Havana but, in secret session, had declined to ratify the Broadcasting Agreement on the ground that it

> "imposed limitations upon Mexico without affording any benefits in return."

While the action was not necessarily final, it naturally created apprehension. It soon became known that the owners of the so-called border stations, who had been successful in frustrating efforts to reach agreement at a conference held in Mexico City in 1933, and whose stations (with one exception) would be eliminated, re-located, or reduced in power under the terms of the Havana Agreement, had again been politically active, and were largely responsible for the situation.

Overtures were made to the Mexican Government to clear up the mis-

understanding. A collateral agreement, covering use of some of the clear channels, was considered as a temporary expedient. An effort was made to persuade the Mexican Post Office Department and the Ministry of Communications to take advantage of the Agreement's provision for an administrative arrangement in lieu of ratification. On January 11, 1939, the State Department was notified that the Mexican Government had this proposal under consideration, and the prospects for a successful outcome seemed bright. On January 23rd, the sudden resignation of the Mexican Minister of Communications took place, and on the following day a successor was appointed. While this incident disrupted negotiations, it was hoped that the disruption would be only temporary. On February 22nd, the Mexican Postmaster General, a personal friend of Commissioner Craven (who had headed the United States Delegation at Havana), paid an unofficial visit to Washington, and left the impression that his government would sanction the Agreement in the early future, probably not later than March 22nd. It was reported that the Mexican Cabinet had the matter under consideration, and that formal word of approval had been delayed only by the illness of the new Minister of Communications. Word was received that President Cardenas had signed the administrative arrangement on April 14th, and that formal ratification by the Mexican Senate would be had at a special session to be convoked late in April or early in May. Later it developed, however, that the administrative approval was subject to reservations on the subject of re-location of the border stations and that probably the intention was to attach similar reservations to the formal ratification. The latter would be objectionable to the United States.

At present the matter is at an impasse, and Mexican ratification appears not to be close at hand. During the last few days it is reported that the Mexican Senate has again rejected the Agreement without a provision that would permit use of Mexico's exclusive clear channels by the border stations. If this proves to be the case, it is a tragedy from the standpoint of the listening public not only in the United States but in the other North American countries. The Havana Agreement was a brilliant diplomatic and technical achievement over what appeared to be insuperable obstacles. Its provisions are unquestionably fair to all the participating countries, almost to the point of generosity in the case of Mexico. That the interests of a few border stations, largely owned and operated by citizens of the United States who have been deprived of licenses to operate stations in this country because of misconduct, and designed to serve an audience in this country and not in Mexico, should have so far prevailed over truly Mexican stations and the Mexican listening public, is regrettable.

## C. THE INTERNATIONAL RADIO CONSULTING COMMITTEE

The Fifth Meeting of the International Radio Consulting Committee (the C.C.I.R.) will be held at Stockholm, Sweden, in 1940. The earlier meetings have been held at The Hague in 1929, at Copenhagen in 1931, at Lisbon in 1934, and at Bucharest in 1937.

Provision is made for "international consulting committees" in Article 16 of the International Telecommunications Convention of 1932, the number, composition, duties and functioning of these committees to be defined in the several sets of Regulations annexed to the Convention. The General Radio Regulations, as revised at Cairo in 1938, provide for the International

Radio Consulting Committee in Article 33. It is

> "charged with the study of technical radio questions and operating questions the solution of which depends principally upon considerations of a technical character."

It is formed principally "of experts of the contracting administrations and of private operating enterprises or groups of private operating enterprises recognized by the respective contracting governments." In principle, its meetings take place every three years.

The results of agreements reached at these meetings are expressed in "opinions." They have a very considerable practical importance both in saving time and unnecessary controversy at the general international telecommunications conferences, and in laying an interim basis for formal and binding agreements expressed later in revisions of the Regulations.

Preparation for the Stockholm Meeting has been in process for several weeks under the auspices of the Division of International Communications, Department of State, at a series of conferences to which all interested organizations and groups are admitted. The questions, including a few directly affecting broadcasting, are of a highly technical character and no attempt will be made to summarize them in this article.

# FEDERAL COMMUNICATIONS COMMISSION COMMISSIONERS

**McNINCH, FRANK R.** Nominated chairman of the FCC (to fill the unexpired term of the late Anning S. Prall) August 17, 1937. **Political party:** Democrat. **Length of appointment:** To July 1, 1942. **Previously:** Lawyer; member, North Carolina House of Representatives, 1905; mayor and commissioner of finance of Charlotte, N. C., 1917 to 1921; member, Federal Power Commission, 1930 to 1933; chairman, Federal Power Commission, 1933 to 1937. **Born:** April 27, 1873, in Charlotte, N. C.

**CASE, NORMAN STANLEY.** Appointed to the FCC in July, 1934. **Political party:** Republican. **Length of appointment:** To July 1, 1945. **Previously:** Lawyer; Providence, R. I., City Council member, 1914 to 1918; General Staff Officer during World War; member of the Soldiers Bonus Board of Rhode Island, 1920 to 1922; U. S. Attorney for the District of Rhode Island, 1921 to 1926; elected lieutenant governor of Rhode Island in 1926, succeeding to the governorship in 1928 on the death of Governor Pothier; elected governor in 1928, and again in 1930. **Born:** Oct. 11, 1888, in Providence, R. I.

**CRAVEN, COMMANDER T. A. M.** Became member of the FCC in August, 1937. **Political party:** Democrat. **Length of appointment:** To July 1, 1944. **Previously:** Radio officer on USS Delaware, 1913 to 1915; fleet radio officer, U. S. Asiatic Fleet, 1915 to 1917; in charge U. S. Naval Coastal and Transoceanic Operations, 1917 to 1920; battleship force radio officer, 1921; fleet radio officer, U. S. Atlantic fleet, 1921 to 1922; fleet radio officer, United States fleet, 1922 to 1923; in charge of radio research and design section, Bureau of Engineering, 1923 to 1926; private consulting radio engineer, 1930 to 1935; appointed chief engineer to the FCC on Nov. 20, 1935. **Born:** Jan. 31, 1893, in Philadelphia, Pa.

**PAYNE, GEORGE HENRY.** Became FCC member July 11, 1934. **Political party:** Republican. **Length of appointment:** To July 1, 1943. **Previously:** Exchange editor and editorial writer, *Commercial Advertiser*, 1895 to 1896; associate editor, *Criterion Magazine*, 1896 to 1899; music and dramatic critic, New York *Evening Telegram*, 1903 to 1907; member, New York County Republican Committee, 1906 to 1907; candidate for Assembly, 1908; political writer, New York *Evening Post*, 1909 to 1912; manager literary bureau for Henry L. Stimson, Republican candidate for governor, 1910; one of the New York campaign managers during presidential campaign of Theodore Roosevelt, 1912; manager, campaign for George McAneny, president Board of Aldermen, 1913; lecturer on history and development of American journalism, Cooper Union, 1915; delegate, Republican National Convention (floor manager for General Wood) in Chicago, 1920; candidate for U. S. Senator, 1920; one-time tax commissioner, New York City; one-time president Bronx National Bank; author, playwright. **Born:** Aug. 13, 1876, in New York City.

**THOMPSON, FREDERICK INGATE.** Became FCC member on April 13, 1939, to fill the vacancy caused by the resignation of Commissioner Eugene O. Sykes. **Political party:** Democrat. **Length of appointment:** To July 1, 1941. **Previously:** Newspaper executive; became editor of the Aberdeen (Miss.) *Weekly* in 1892; member, Democratic National Convention, 1912, 1924 and 1928; chief owner and publisher of the Mobile, Ala., *Daily* and *Sunday Register*, 1909 to 1932; chief owner and publisher of the Mobile *News-Item*, 1916 to 1932; appointed Commissioner of the U. S. Shipping Board by President Wilson in 1920, and re-appointed by Presidents Harding and Coolidge in 1921 and 1923 (resigned from the Board in November, 1925); chief owner and publisher of the Birmingham, Ala., *Daily* and *Sunday Age-Herald*, 1922 to 1927; owner and publisher of the Montgomery, Ala., *Journal* since 1922; director of the Associated Press for 10 years; appointed by President Roosevelt to the Advisory Board of Public Works in 1933; member of the Alabama State Docks Commission since 1935. **Born:** Sept. 29, 1875, in Aberdeen, Miss.

**BROWN, COLONEL THAD H.** Became member of the Federal Radio Commis-

sion March 28, 1932. **Political party:** Republican. **Length of appointment:** To July 1, 1940. **Previously:** School teacher; admitted to law practice, 1912; served in the World War as Captain and later Major; appointed member of State Civil Service Commission of Ohio in 1920; Secretary of State of Ohio, 1923 to 1927; President Cleveland Radio Broadcasting Corp. (manager, WJAY), 1927 to 1928; chief counsel, Federal Power Commission, 1929; general counsel, Federal Radio Commission, 1929 to 1932; became Federal Radio Commission member in 1932 and vice-chairman in April, 1933; active in the American Legion in Ohio. **Born:** Jan. 10, 1887, in Lincoln Township, Morrow County, Ohio.

**WALKER, PAUL ATLEE.** Appointed to the FCC July 11, 1934. **Political party:** Democrat. **Length of appointment:** To July 1, 1939. **Previously:** Lawyer; one time high school principal, Shawnee, Okla.; one time instructor, University of Oklahoma; counsel and commissioner of the State Corporation Commission of Oklahoma for 15 years; referee for the Supreme Court of Oklahoma, 1919 to 1921; chairman, Committee on Cooperation with the Interstate Commerce Commission in the National Association of Railroad Utilities Commissioners, 1925 to 1934. **Born:** Jan. 11, 1881, in Washington, Pa.

# F. C. C. EXECUTIVE PERSONNEL

**SECRETARY**
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