APPEALS COURT: NEW BACKER FOR FCC

Recent decisions show little inclination to tamper with FCC's judgment, but only to see that each applicant is given opportunity to present its case fairly.

CARTE BLANCHE for the FCC to choose among applicants for tv stations? Is that the meaning of recent U. S. Court of Appeals decisions which have bolstered the power of the FCC tremendously in recent months?

For the second time in as many weeks, the Supreme Court has been asked to review such a comparative television FCC decision. WTSP St. Petersburg, Fla. (*St. Petersburg Times*-Nelson Poynter) two weeks ago petitioned the high court for a writ of *certiorari* to accept review of a lower court ruling which affirmed the FCC's grant of Tampa-St. Petersburg to WFLA-*Tampa Tribune* [B•T, Jan. 23]. Three weeks ago, Southside Virginia Telecasting Corp. (WSSV Petersburg, Va.) asked the Supreme Court to review an appeals court decision which upheld the Commission in granting Petersburg's ch. 8 to what is now WXEX-TV Petersburg [B•T, Feb. 13].

The appellate court's basic attitude toward FCC decisions in comparative television cases (there have been six such opinions and only in one was the FCC reversed) is that the FCC was established to choose among several applicants for the same facility. In essence, the court has said:

"We aren't going to substitute our judgment for the Commission's. Our only function is to see that the proper procedures were followed in hearings and in the decision and that the Commission has considered fully the evidence in behalf of each contestant."

This was the heart of the court's decisions, involving three comparative tv cases, in the last five weeks. The cases were Tampa-St. Petersburg, Fla., chs. 8 and 13, and Sacramento, Calif., ch. 10 [B•T, Jan. 23, Feb. 13 and Jan. 30, respectively].

Even earlier the lower court seemed wedded to the philosophy that the Commission can properly pick any applicant it desires—so long as all applicants receive a fair hearing and the FCC's choice was based on a reasoned and considered judgment.

The appeals court has upheld the FCC in the Portland, Ore., ch. 12 grant to what is now KLOR (TV) that city, and in the Savannah, Ga., ch. 3 case to WSAV that city. In the Beaumont, Tex., ch. 6 grant to KFDM that city, the court reversed the FCC. This involved stock options held by W. P. Hobby (KPRC-AM-FM-TV-*Houston Post*) and the court felt that the Commission should have taken note of one of these taking place after the initial decision but prior to the final decision.

These Court of Appeals rulings have raised a small-scale furor within the communications legal fraternity—although many radio-tv lawyers privately admit that the court's decisions are what they expected right along.

However, so serious is this blanket authority considered in some circles that there is hope the U. S. Supreme Court will review the lower court's pronouncements and reverse them.

And, in fact, the refusal of the appeals court to reverse the commission's decision in the Sacramento ch. 10 case has been re-appealed by the unsuccessful applicant, McClatchy Broadcasting Co. McClatchy two weeks ago submitted a formal petition to the appeals court to rehear the case with a full court in attendance [B•T, Feb. 13]. The cases are usually heard by three-judge panels.

Among the FCC comparative tv decisions still in the Court of Appeals are those involving the following:

Shreveport, La., ch. 12, where KSLA-TV Shreveport was granted, and KRMD Shreveport and Southland Television Co. were denied; Shreveport, La., ch. 3, where KTBS Shreveport was granted and KWKH Shreveport was denied; Sacramento, Calif., ch. 3, where KCRA Sacramento was granted and KXOA Sacramento was denied; Flint, Mich., ch. 12, where WJR Detroit was granted and Butterfield Theatres Inc. was denied; Fort Wayne, Ind., ch. 69, where WANE Fort Wayne was granted and Anthony Wayne Broadcasting Co. was denied; Fresno, Calif., ch. 12, where KFRE Fresno was granted and KARM Fresno was denied; Knoxville, Tenn., ch. 10, where WBIR Knoxville was granted and Tennessee Television Inc. and WNOX Knoxville were denied, and Miami ch. 7, where Biscayne Television Corp. was granted and South Florida, East Coast and Sunbeam Tv Corps. (all) were denied.

There are a number of issues involved in these cases. Most significantly, many touch on such subjects as the Commission's diversification policy, newspaper ownership, past broadcast record, program effectuation, and integration of ownership and management.

Unless the Supreme Court commands the lower court to reverse itself, it seems that the FCC has the power to pick and choose among the applicants on whatever basis it feels significant in a particular docket. Similarly, the Supreme Court's refusal to accept review in the two appeals now before it will leave as law the existing appeals court decisions giving the Commission these broad powers of choice.

UHF-VHF SESSIONS RESUME WEDNESDAY

THE Senate Commerce Committee will hold hearings Wednesday through Friday in its investigation of tv networks and uhf-vhf troubles with 13 witnesses scheduled. The networks are scheduled to testify on allocations problems March 26-28.

Committee Chairman Warren G. Magnuson (D-Wash.) said that with testimony this week by 13 witnesses he hopes to wind up one phase of the probe, except for network testimony. He said other phases of the tv inquiry will be explored at hearings in mid-April.

The list of network witnesses has not been compiled yet, Sen. Magnuson said.

Scheduled witnesses this week:

Wednesday—John Engelbrecht, WTSK-TV Knoxville (ch. 26) and WIKY-AM-FM Evansville, Ind.; Stephen A. Cisler, KEAR San Francisco; Benito Gaguine, Washington attorney representing WKOW-TV Madison, Wis. (ch. 27); John H. DeWitt Jr., WSM-TV Nashville (ch. 4); Paul W. Morency, WTIC-AM-TV Hartford, favored by an FCC initial decision for ch. 3 there, and Elmer W. Engstrom, RCA senior executive vice president.

Thursday—Paul Bartlett, KFRE Fresno, Calif., grantee of ch. 12 there; Arthur W. Scharfeld, Washington attorney representing Radio Wisconsin Inc., grantee for ch. 3 at Madison; Clifford F. Rothery, president, National Assn. of Broadcast Employes & Technicians (NABET); John J. Gunther, Americans for Democratic Action (ADA); Irving Ferman, American Civil Liberties Union (ACLU), and Andrew J. Biemiller, AFL-CIO.

Friday—H. Leslie Hoffman, president of RETMA and of Hoffman Electronics Corp., Los Angeles, set producer.

JUSTICE ACCEPTS 16 MM FILM EDICT

THE Dept. of Justice will not appeal a federal court judge's ruling throwing out its antitrust suit against 12 motion picture companies for conspiracy to withhold their films from television.

The government's suit—against such Hollywood majors as RKO, 20th Century-Fox, Columbia, Warner Bros., Universal, Republic—was brought in 1952. It charged that the producers had illegally conspired to restrain distribution of 16mm feature films to television and other outlets.

Last December, Los Angeles Federal Judge Leon R. Yankwich ruled that the government had failed to prove its case of conspiracy [B•T, Dec. 12, 1955]. He held that although the companies may have kept films off tv for economic reasons, no proof had been offered that they had conspired together in violation of the Sherman antitrust law.

Attorney General Herbert Brownell Jr. pointed out that in recent weeks many of those named in the suit have licensed or sold over 1,800 features and westerns to tv. In addition, he said, there have been reports that the remaining defendants are negotiating to release some of their features to tv.

One of the principal objectives of the suit, Mr. Brownell said, was to make feature movies available to tv. Since a "substantial" flow of feature films from major studios has started, he said, continuation of the litigation would serve no practical purpose.

House Bill Would Define Areas for Antitrust Action

A BILL to give the Attorney General authority to take antitrust action against industries under regulation by federal agencies, including the FCC, was introduced last week by Rep. Emanuel Celler (D-N. Y.), chairman of the House Judiciary Committee and of its Antitrust Subcommittee.

Rep. Celler said his bill (HR 9762) would make it plain Congress intended federal regulatory agencies "to supplement and not supersede" the free enterprise system. The Celler measure, introduced as a statement of congressional policy, provides that no antitrust action instituted by the U. S. "shall be barred or stayed for the reason that any official, agency, board, or commission has jurisdiction or is exercising jurisdiction over some or all of the activities included in the alleged antitrust violation."

In recent testimony before congressional committees [B•T, March 5], Stanley N. Barnes, assistant attorney general in charge of the Justice Dept.'s Antitrust Div., said the Justice Dept. has been left in doubt by one court decision about its jurisdiction in certain areas of FCC activity. He declined to comment at that time on whether he thought Congress should establish primary and secondary jurisdiction between the FCC and the Justice Dept. in enforcing antitrust laws.

In introducing his bill, Rep. Celler cited