LAW

DEVELOPMENTS IN FEDERAL REGULATION OF BROADCASTING

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This is Louis Goldsborough Caldwell's fourth article in an annual series of reviews anent the federal regulation of broadcasting. In introducing it, the editors of the VARIETY RADIO DIRECTORY *believe that no comment is necessary, since the clarity of the writing speaks for itself. And it is similarly felt that it becomes redundant after four years to emphasize at length the author's ability to remain objective about a situation in which he himself, by the nature of his calling, played a role. That objectivity, too, has been (and is being) more than adequately displayed in the writing. The editors, however, would like to make public their satisfaction in being able to present, year after year, an analysis which, in their opinion, is unrivalled in quality by any other section of this book.*

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INTRODUCTION

Save for one factor, developments in federal regulation of radio in the year just closed* may be summarized with the statement that trends noted in the author's last article† have been, in the main, confirmed and carried forward.

On the credit side should be listed increasing efficiency, in the sense of prompt and incisive action, and the freedom from external evidence of bickering and dissension, which began during the closing two months of the previous year, and has continued during the year just closed. The commission's prestige has been correspondingly enhanced. Counterbalancing this (or as additional credits, depending on the viewpoint) must be placed (1) the persistent procedural trend toward decisions in quasi-judicial matters without hearing, toward avoiding or minimizing the rights of persons adversely affected to be heard either before the Commission or on appeal, and toward substitution of the "investigative technique" for due process of law in the traditional sense; (2) the equally persistent substantive trend toward so-called "value judgments" without statement of reasons or fixing of principles and with frequent disregard of principles or standards already an-

* From July 1, 1939 to July 1, 1940.

† VARIETY RADIO DIRECTORY, III, p. 896.

nounced, necessarily leading to lack of uniformity and unpredictability; and (3) a marked effort toward expansion of power, particularly in the direction of economic regulation of industries subject to the Act.

The one new factor is the crisis engendered by the war in Europe which at times bids fair to reverse the downward trend of censorship and to open up an all-too-tempting vista for further expansion of inquisitorial and burcaucratic control over broadcasting.

PART I

THE MACHINERY OF REGULATION

A. PERSONNEL AND INTERNAL ORGANIZATION OF THE COMMISSION

On July 25, 1939, Frank R. McNinch resigned as chairman of the Commission, effective September 1st. Because of illness he had been continuously absent for several months. He was thereafter retained in government service as a special communications expert to advice the Department of Justice. On July 27, 1939, James Lawrence Fly, general counsel of the Tennessee Valley Authority and earlier with the Department of Justice, was appointed to succeed McNinch for the unexpired portion of the term. Fly was immediately confirmed by the Senate and took up his duties as chairman of the Commission on September 1st.

On June 5, 1940, Thad H. Brown, whose term expired July 1st, was appointed by the President to succeed himself for a seven-year term. Brown had been a member of the Commission and of its predecessor, the Federal Radio Commission, since early in 1932. The appointment encountered difficulties in the Senate Committee on Interstate Commerce, which held hearings and, at the present writing, has not made its recommendations. Brown was subjected to an intense grilling, principally by Senator Tobey of New Hampshire, with regard to the delay in completion of the network-monopoly report by the committee of which he is chairman, and other matters.

On October 16, 1939, George O. Gillingham, Public Relations Director of the Tennessee Valley Authority, was engaged as Public Relations Director of the Commission. On April 25, 1940, William J. Dempsey, general counsel, and William C. Koplovitz, assistant general counsel, resigned, effective in May. They were succeeded in their respective offices by Telford Taylor and Joseph L. Rauh, Jr., who joined the Commission May 6th. At the time of their appointments, Taylor was special assistant to the Attorney General and Rauh was assistant general counsel of the Wage and Hour Administration.

On July 31, 1939, the Commission, in its Administrative Order No. 2, took the first of a series of steps designed gradually to transfer routine work from the Commission and its members to the staff. By this order important additional responsibilities were delegated to the secretary instead of to individual Commissioners. On November 8, 1939, by amendment of the order effective December 1st, the Commission created an Administrative Board comprising its general counsel, chief engineer, chief accountant and secretary. This same personnel has served since 1937 as a rules committee. The function of the board is to act as a junior commission, with power to dispose

of important classes of non-controverted and routine matters, previously assigned to individual commissioners on a month-to-month basis, and to make recommendations on other matters. The step has brought about a marked increase in efficiency.

During the fall of 1939 the Commission, through its chairman, advocated the establishment of a new unit of 12 to 15 investigators, to be called an Investigation Division, and sought funds from Congress for the purpose. The proposal must be viewed in connection with the principal tendencies manifest at the Commission during the past two years, noted in the introduction. Supporting the proposal in hearings before subcommittees of both the House and the Senate Committees on Appropriations and in public interviews, Chairman Fly emphasized the need for preliminary study of applicants, their financial responsibility, their real identity and their connections and backers. By this method, he stated, futile hearings could frequently be obviated. He also referred to the constantly increasing welter of work, with emphasis on the war situation. Congress declined, however, to approve appropriation of the necessary funds. During the year, thought was also given to the creation of a labor relations unit within the Commission to keep abreast of labor conditions in all aspects of communications, including broadcasting.

B. PROCEDURE

THE NEW HEARING PROCEDURE. On July 12, 1939, effective August 1, the Commission put into force another major change recommended by its Law Department, affecting primarily the rights of persons to intervene in opposition to applications. Prior to the change, the right to intervene had been made dependent solely on the disclosure of "a substantial interest in the subject-matter of the hearing." To a large extent, persons adversely affected had been automatically made parties and received notice of the hearing. Under the new rule, only the applicant is named as a party, and to obtain the right to participate other persons are required to file petitions to intervene. The granting of such petitions is made a matter of grace, dependent on a showing satisfactory to the Commission (1) as to the petitioner's grounds, (2) as to his position and interest in the proceeding, and (3) that "his intervention will be in the public interest." According to the rule, at least by implication, the Commission declines to recognize that a person adversely affected has "any legal or equitable right or interest in the proceeding."

The full import of this change, and particularly of the attempt to extend the substantive standard of "public interest," prescribed in the Act, to cover procedural rights, was not appreciated either by the bar or by some members of the Commission and its staff until October 2, 1939. On that date Commissioner Payne, presiding over the Motions Docket, released an opinion interpreting the new rule in such a manner as to make it necessary for a petitioner to indicate clearly that, by being permitted to intervene, he would be of assistance to the Commission in developing the issues, either through evidence providing information not otherwise available to the Commission through its staff or possibly by cross examination, provided the cross examination to be indulged in is *bona fide*.

Another and closely related innovation is that the issues specified in the notice of hearing are to be confined to those which appear to the Law Department to furnish clear and adequate grounds for denial of the application, leaving for later hearing (if necessary) other issues raised by the application. Provision is made in the rules for motions by interested parties to "enlarge the issues," but in the opinion rendered by Commissioner Payne on October 2nd so rigorous interpretation was given this provision as to make it of little value. The principal sufferers are licensees of existing stations located in the same community as the proposed new station, who would be affected economically through increased competition. Similarly affected are competing applicants for new stations in the same community.

Several rejected petitioners appealed their cases to the full Commission, but on October 10, 1939 the Commission, with two members absent, upheld Commissioner Payne's rulings, without, however, specifically adopting his opinion or reasons. The whole question has been complicated by extreme positions urged by the Commission's Law Department before the United States Court of Appeals for the District of Columbia and the Supreme Court of the United States, with varying degree of success, on both the substantive and the procedural aspects of the Act, as shown in Part IV of this article. Some of the major issues have not been judicially determined and court decisions on these and other issues are being ignored.

Actually, application of the rule has varied through the year, depending on the viewpoint of the particular Commissioner presiding over the Motions Docket in a given month, and on the varying interpretations given to the court decisions reviewed in Part IV. In later months there has been a notable tendency toward a more liberal policy, and petitions to intervene regularly denied in the earlier months are now more frequently granted.

The innovations just described are part and parcel of the pattern noted in the introduction to this article. They continue the attempt, which began with the elimination of the Examining Department in November, 1938,* to substitute the so-called investigative technique for the notice-and-hearing procedure up to the very limit (and, in the writer's opinion, beyond the limit) permitted by the Act and the decisions of reviewing courts, and to minimize the rights and opportunities of persons adversely affected to place obstacles in the way of its decisions.

For three years a continuing effort had been made by the Federal Communications Bar Association to bring about needed miscellaneous reforms in the rules, having to do largely with imperfections in the "red tape" category, some of which obstructed efficiency while others imposed unjustifiable hardship or expense on parties. A committee had cooperated with the Commission's Law Department in a series of almost weekly meetings. To a very satisfying extent, the Association's efforts were successful and several imperfections were remedied in the revision effective August 1, 1939.

THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE. Attention was focused on the Commission's new procedure by a study made public in February, 1940 by the Attorney

*VARIETY RADIO DIRECTORY, III, p. 901.

General's Committee on Administrative Procedure.* With minor exceptions, the study was highly laudatory of the innovations, including the new intervention rule, the abolition of the Examining Department, the substitution of presiding officers chosen from the Law Department to act in the dual capacity of examiner and trial attorney at hearings, and the substitution of "proposed decisions" of the Commission for examiners' reports. Among the few critical suggestions contained in the monograph was a statement that political lobbying at the Commission, notably by members of Congress, constituted a practice which should be discouraged. A reading of the document and of criticisms of its contents will be helpful to a more complete picture of the issues involved.†

QUESTIONNAIRES. The plethora of questionnaires which began in 1938, discussed in last year's article,** resulted in protracted negotiations between the Commission's Accounting Department and representatives of the National Association of Broadcasters. When the conversations began, a form of gargantuan dimensions was projected, but widespread protest, followed by negotiations, resulted in a radical reduction in bulk if not in scope.

On January 4, 1940, after months of delay, the Commission approved a revised form of financial report on station operations for 1939, returnable April 15th. It comprised 21 pages and was accompanied by instructions totaling 16 pages. Notwithstanding the abbreviations in length, it actually was more comprehensive than the questionnaires distributed in 1937 and 1938. It embraced a searching inquiry into the innermost phases of station operations. In addition to requiring a general balance sheet, it sought information on such matters as undistributed profits, distribution of revenues by corporations, proprietors, partners and officers, compensation paid proprietors, partners, employees, officers, musicians and other talent, and detailed income breakdowns as between network, non-network, and other sources of revenue.

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*Monograph No. 3, entitled "The Federal Communications Commission," submitted September, 1939, and revised January, 1940. The Committee had been created on February 24, 1939 by Former Attorney General Murphy at the request of the President (acting upon the earlier suggestion of former Attorney General Cummings), to "ascertain in a thorough and comprehensive manner" the extent to which "criticisms of the administrative procedure of federal agencies were well-founded" and "to suggest improvements, if any are found advisable." The creation of the Committee followed closely upon, and was probably the result of, the introduction of the Logan-Walter Bill in Congress in January, 1940, and the widespread support for its enactment.

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†The monograph has been printed as Part 3 of Sen. Doc. No. 186, 76th Cong., 3rd Sess. For criticism, see the writer's article entitled *Federal Communications Commission —Comments on the Report of the Staff of the Attorney General's Committee on Administrative Procedure*, 8 GEO. WASH. L. REV. 749 (Mar. 1940); also, *More About the Report of the Attorney General Committee's Staff on the Federal Communications Commission*, IV F. C. BAR JOURNAL 190, and Keller, *Report of the Attorney General Committee's Staff on the Federal Communications Commission*, *ibid*, p. 182.

**VARIETY RADIO DIRECTORY, III, p. 904.

APPLICATION FORMS. The tendency toward bulky, elaborate and intricate application forms, noted in last year's article,* continued. Space will not permit detailed discussion of this tendency. The principal development was the issuance, on April 1, 1940, of a new 42-page application† for a standard broadcast station construction permit or modification thereof. A few illustrations will suffice to show the penetrating character of the questions, in addition to those seeking detailed technical data regarding the proposed station.

Full information must be given as to all business employments or associations of the applicant for a period of five years, and, if the applicant is a corporation, the requirement extends to officers, directors, and principal stockholders.

Citizenship is the subject of minute inquiry. Where it is claimed by reason of naturalization, the application must state the date and place of birth, and, with respect to the final certificate, the date and place of issuance, the number, and court of issuance. Where it is claimed by reason of naturalization of a parent, additional information is required. Where a corporate applicant has less than 100 stockholders, the information must be given for each stockholder.**

Complete disclosure as to the applicant's encounters with the law, criminal and civil, is called for. He must reveal whether he has ever been found guilty of a felony or any other crime involving moral turpitude and, if he has, must supply a full description of the offense committed, the date, the court and reference to the official record. He must report any bankruptcy proceeding, voluntary or involuntary. If any other suit or proceeding of *any* character has ever been brought against him he must provide full information regarding it. Certified copies of any outstanding judgments or decrees must be attached to the application. If the applicant is other than an individual, the foregoing inquisition extends to any "partner, member, officer, director or principal stockholder." Thus there is little opportunity for a Jean Valjean to forget his past if he would engage in any form of radio communication.

The form delves deep into matters of corporate structure, direct or indirect control, proposed sale of stock, assets and financial responsibility, and any business or financial enterprise in which the applicant (including any partner, officer, member of the governing board, director or principal stockholder) has or has had a substantial interest (25% or greater).

The foregoing represents by no means all the information that is re-

*VARIETY RADIO DIRECTORY, III, p. 908.

† FCC Form No. 301. This was followed by the adoption on June 28, 1940 of Form 319, to be used in applying for authority to construct a high-frequency (FM) broadcast station. It embodied substantially all the questions contained in Form 301, and added some. For example, the applicant must describe fully the "cultural, economic and other characteristics" of the community sought to be served. He must also demonstrate how he can compete effectively (in an economic sense) with FM stations operating in the same community.

** Otherwise, the information must be given for each stockholder owning or controlling more than 10% of the stock.

quired by the new form. It is striking evidence of the momentum in the direction of employing the investigative technique in lieu of hearings and toward expansion of the field of regulation.

C. CONGRESSIONAL PROPOSALS FOR INVESTIGATION, REORGANIZATION, AND PROCEDURAL REFORM

INVESTIGATION AND REORGANIZATION. Congress adjourned August 5, 1939, without having acted on any of the proposed legislation and resolutions to reorganize the Commission or the proposed resolutions to investigate it, summarized in last year's article.* With the opening of the new session on January 3, 1940, the sponsors of the Wheeler-McNinch Bill to substitute a three-man board for the Commission, with a substantial enlargement of the chairman's power, had virtually abandoned their proposal and it has remained shelved since then.

From time to time demands for an investigation of the Commission were revived but, with one exception, were not seriously pressed. The exception had to do with resolutions resulting from the Commission's action on March 23, 1940, suspending its new rule permitting limited commercial operation of television and setting the matter for hearing on April 8th. A resolution introduced in the Senate by Senator Lundeen, of Minnesota, resulted in a hearing before the Senate Committee on Interstate Commerce on April 10, 1940, but nothing further transpired.†

Otherwise, criticisms of the Commission in Congress found expression in occasional speeches on the floor of both Houses, and in questioning of Commission representatives at hearings held in December and January before subcommittees of the House and Senate Committees on Appropriations, and before the Senate Committee on Interstate Commerce in June in connection with Commissioner Brown's reappointment.

While the current session of Congress is, at present writing, still in progress, it appears almost certain that no legislative proposal for reorganization or investigation of the Commission will be passed.

THE LOGAN-WALTER BILL. The Logan-Walter Bill, introduced in January, 1939, and sponsored by the American Bar Association, sought to subject federal administrative agencies generally to drastic procedural requirements, accompanied by a broad scope of judicial review, with respect both to their rule-making functions and their quasi-judicial functions in the decision of controversies. Opinions differ as to the extent of application of the bill's provisions to the Federal Communications Commission, and the

* VARIETY RADIO DIRECTORY, III, pp. 908-12.

† S. Res. 251, 76th Cong., 3rd Sess. See also S. 3745, a bill introduced April 10th by Senator Barbour, of New Jersey, and a House Resolution, introduced April 10th in the House by Representative Connery, of Massachusetts. The former sought to amend the Communications Act to strip the Commission of power to regulate or control radio experimentation, research or development, or the manufacture or sale of transmitting and receiving radio apparatus, or the business policies of radio broadcasters. The latter sought a sweeping radio investigation.

merits or demerits of its provisions if thus applied.* The bill was unexpectedly passed by the Senate just prior to its adjournment in the summer of 1939, but was reconsidered and placed on the calendar on the assurance that it would be taken up at an early date during the next session. On April 18, 1940, the bill† was passed by the House (282 to 97). Vigorous efforts were made to have it acted on by the Senate but were unsuccessful, partly because of pleas by administration leaders that Congress should await the completion of the work of the Attorney General's Committee on Administrative Procedure before taking up the bill, and partly because of the exigencies of legislation having to do with national defense and related matters.

THE DITTER-BAILEY BILL. On February 16, 1940, Representative Ditter, of Pennsylvania, introduced a bill** designed to minimize the danger of arbitrary action on applications and the exploitation of procedural loopholes in the Act for the purpose of censorship. Among other things, it proposed that a minimum license period for broadcast stations be fixed at three years, with a maximum of five††; that persons who would be adversely affected by the granting of an application should be accorded a hearing; that revocation orders should be preceded, instead of followed, by hearings; and that no adverse action of any character should be taken against either applicants or licensees because of the character or contents of any program, unless such program contains matter expressly forbidden by the Act or by regulation of the Commission authorized by the Act, and then only after the licensee has been finally adjudged guilty by a federal court of one or more violations, and the offense is of so serious or repeated a nature as to show clearly that the licensee or applicant is not qualified in character to operate a radio station.

The bill also sought to place limitations on the extremely broad powers given the President by the Act, both in connection with the assignment of frequencies to Government stations and in time of war, threat of war, a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States. Beginning in the Fall of 1939, there was increasing sentiment to the effect that Congress should establish safeguards against abuse of such powers, and there was agitation for repeal of the pertinent provisions of Sec. 606 of the Act. The Ditter Bill sought to provide these safeguards by providing for hearings where the assignment of a frequency to a Government station would make impossible

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* See the author's analysis of the bill in the issues of the Congressional Record for April 18, 1940, p. 7225, and May 30, 1940, p. 10914.

† H. R. 6324.

** H. R. 8509, S. 3515, 76th Cong., 3rd Sess.

†† The Act now permits a maximum of three years and the Commission actually issues licenses on a one-year basis. The Senate bill provided a maximum license period of 10 years.

the further operation of, or cause objectionable interference to, any licensed station, and by limiting the application of Sec. 606 (c) of the Act to the closing down or taking over of the control of broadcast stations to imperative military need on the part of the armed forces of the United States, upon Presidential proclamation of the actual existence of war in which the United States is engaged, or a state of insurrection equivalent to war. The taking over of stations to permit the Government, or any department or agency thereof, to engage in or control broadcasting, was to be forbidden.

The bill immediately won general support among the broadcasting industry. Because, however, of the rapid sequence of international developments after its introduction, largely monopolizing the attention of Congress, it has not made any progress to date.

THE COMMISSION'S APPROPRIATION. As noted in last year's article,* after a stormy experience extending over months, the Commission finally secured a last-minute approval of an appropriation of $1,838,175 for the year 1939-40. During the past year the Commission sought a further large increase in appropriation. As passed by the House, the Independent Offices Bill accorded a total of $2,116,340, an increase of approximately $280,000, of which $150,000 was for modernization of monitoring equipment and $128,000 for personnel. On February 8th the Senate passed the bill, cutting the Commission's appropriation to $2,076,340.

Early in March charges were made in the House that the Department of the Interior was using the broadcast medium to further its own needs and even to promote certain favored legislation pending in Congress. The House Appropriations Committee refused to approve an item of $40,000 earmarked for the establishment of a permanent staff for radio activities in the Office of Education in the Department. The House also accepted an amendment proposed by Senator Gossett, of Texas, prohibiting the use of any part of the Department's appropriation

> "for the broadcast of radio programs designed for or calculated to influence the passage or defeat of any legislation pending before the Congress."

PART II

REGULATION OF STANDARD BROADCAST STATIONS

A. REGULATION OF BROADCAST ALLOCATION

TERM OF BROADCAST LICENSES. The Commission has adhered to the one-year period for broadcast licenses inaugurated by its action of June 23, 1939. To obviate procedural difficulties that might otherwise arise when the time comes to put the North American Regional Broadcasting Agreement into operation,† the Commission, by order issued February 20, 1940, modified outstanding licenses to make them expire uniformly on August 1, 1940. By further order on June 11, 1940, it extended all licenses to October 1, 1940.

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* VARIETY RADIO DIRECTORY, III, p. 916.

†See Part V.

As already noted in Part I of this article and in last year's article,* there has been continuous endeavor within the industry and in Congress to make a longer license period mandatory on the Commission, principally on the arguments that the short license period opens the door to indirect censorship through the threat of hearings on renewal applications, and that a longer period conduces toward greater stability in the industry. There is still reason to hope that, without legislation, the Commission will recognize the cogency of these arguments as soon as the present uncertainty over the effective date of the North American Regional Broadcasting Agreement is at an end.

CLASSIFICATION OF CHANNELS AND STATIONS. The classification of channels and stations specified in the revised rules adopted by the Commission June 23, 1930,† has been maintained in force without any formal modification. The new rules have not, however, proved immune from corrosive influences. Nor have the Standards of Good Engineering Practice, which accompany the rules and were adopted at the same time.

The clear channels, free of nighttime duplication, have not yet been invaded, but this has not been for want of attempts to establish additional full-time stations on these channels. Throughout the year their status has constantly been in danger on account of applications filed with the Commission and pressed on its attention, because of pressure from members of Congress to permit duplication in particular cases, and because of views of certain members of the Commission to the same effect. It is commonly reported that the Commission was divided three to three on the issue, with the chairman's views not yet known.

One evidence of the tendency has been the practice of certain of the Commissioners to grant and renew applications for special temporary authority to operate full-time to limited-time stations on clear channels. This practice was brought to an end by action of the Commission on July 31, 1939 adopting an amendment directing that such applications be handled in a manner "not inconsistent with the established policy of the Commission", and, after further repercussions, by a determination by the Commission on November 14, 1939 to adhere strictly to the policy of not granting such an application except for the purpose of permitting the broadcasting of a special program of a non-recurrent character and of outstanding public merit.

During the year, extensive hearings were held on two applications, one of which sought to introduce nighttime duplication at Boston on 830 kc., a clear channel occupied by KOA, Denver, and the other of which sought to introduce nighttime duplication at New York on 810 kc., a clear channel occupied by WCCO, Minneapolis, notwithstanding the fact that, under the clear phraseology and intent of the regulations, neither application could be granted. No action has been taken on either application. On June 10, 1940 an impairment of a minor character occurred when the Commission modified its regulations defining the "broadcast day" so as to authorize

*VARIETY RADIO DIRECTORY, III, p. 919.

†See VARIETY RADIO DIRECTORY, II, p. 530; *ibid*, III, p. 919.

daytime and limited-time stations to begin operation prior to sunrise, at 4 A. M., local standard time, for the sake of service to their respective rural populations. Technically, this involved a degree of interference to the much larger rural areas served by clear channel stations.

The most tangible threat to clear channel service, however, was presented by conclusions expressed by the Network-Monopoly Committee in its report to the Commission released June 12, 1940. The report was primarily devoted to the issues specified in the original notice of hearing, which the Committee was appointed to hear and determine.* Technical allocation questions, such as the necessity for high power and clear channels to afford service to rural and small towns, the extent and character of interference caused by duplication, the importance of preserving channels clear for future development through increased power, the effect of duplication under the North American Regional Broadcasting Agreement and kindred topics, had not been among the issues specified and consequently had not been the subject of evidence or argument in the network-monopoly hearings. These questions had been thoroughly canvassed in the hearings held in June, 1938 and in a report made by *another* committee, resulting in the adoption June 23, 1939 of the present regulations providing for 26 clear channels.

The conclusions of the Network-Monopoly Committee must, therefore, be regarded as *obiter dicta* not based on any evidence in the record, directly contrary to the evidence heard in the June, 1938 hearing, and simply reflecting the views of the three members. Nevertheless, they are an alarming portent. Reasoning principally from the fact that all but two of the high-power clear channel stations are on the Columbia and National networks, the Committee advances the conclusion that

> "* * competition in the radiobroadcast field can be further enhanced by a revaluation of the so-called clear-channel policy, whereby new stations are refused access to clear channels regardless of the service which the new station would be able to render and regardless of how small the interference to the clear channel station would be. * * The exclusive grant of a clear channel to a station which can only serve limited areas prevents people in other sections of the country from receiving service from stations which could otherwise operate on the clear channel frequency. In our opinion, the Commission should consider the wisdom and practicability of utilizing the clear channels so that people living in all sections of the United States can have the benefit of radio reception at present denied them."†

In the meantime, there have been encouraging signs of an increased understanding on the part of both members of Congress and the listening public of the necessity for high-powered stations operating on clear chan-

*The Committee's conclusions on these issues are summarized and discussed in Part II, B, of this article.

†The square conflict between these conclusions and the conclusions of the other Committee based on the actual technical facts, brought out and recognized at the June, 1938, hearing, will be apparent from a reading of a brief summary of the latter in VARIETY RADIO DIRECTORY, III, p. 921.

nels to furnish service to rural areas and small towns and cities having no stations of their own. On June 28, 1939, Representative Larrabee, of Indiana, introduced a resolution recommending that the Commission take steps

> "* * to provide an adequate method to obtain data to determine the social and economic effects of power in excess of 50 kilowatts."

In a speech on the floor of the House on July 6th, Larrabee pointed out that, with 40% of the area of the country receiving no satisfactory daytime signal and 60% receiving no satisfactory nighttime signal, power increases in excess of 50 kw. on clear channels appeared to be the only method of improving service. On October 26, 1939, Representative Sweeney of Ohio, placed in the Congressional Record the results of a postcard survey conducted throughout the rural areas of 14 states, showing the overwhelming percentage of listeners relying on clear channels and high power for service. He adverted to the fact that XERA, a Mexican border station, was reported to be using 800 kw., or 16 times as much as the maximum permitted by the Commission's regulations in the United States. This survey only served to confirm what had already been demonstrated by surveys conducted in previous years under the auspices of the Commission's Engineering Department, showing that about 80% of the country's rural listeners rely primarily on clear channel stations for nighttime service.

Another important factor has been the growing realization that duplication on any of the 26 channels entails a tremendous sacrifice of important rights of the United States under the North American Regional Broadcasting Agreement. Such channels, to be occupied by what are denominated Class I-A stations under the Agreement, may not be used by the other countries at nighttime at any place within 650 miles of the nearest boundary of the United States (which prevents their use in Canada, Cuba, and all but the southermost tip of Mexico), and, even at locations where they may be used, are subject to severe restrictions as to the strength of interfering signal, day or night, that may be delivered at the nearest boundary of the United States. The moment duplication is introduced on these channels in the United States these safeguards from foreign interference disappear and are replaced by very inferior degrees of protection.

There have been developments worth noting in connection with the other classes of stations. So far as is possible, the provisions of the Agreement have been given effect and station shifts have been made accordingly. This has been particularly true with respect to the 18 channels which, while technically classed as "clear channels," are open to a certain amount of duplication by what are known as Class I-B and Class II stations under the Agreement.

With respect to regional and local stations and, to some extent, Class II stations, the Commission, in addition to numerous increases in power to the new maximum limits under the revised regulations, has pursued a course of attempting to fill every niche and cranny in the broadcast spectrum with new stations. It has made assignments in violation of the Commission's Standards of Good Engineering Practice, assignments subject to what formerly was regarded as excessively objectionable interference, and assignments dependent on extreme forms of directive antennas to avoid disastrous interference to existing stations. Little regard has been paid to

the preservation of latitude for future improvement of service, or to the working out of an allocation plan scientifically designed to achieve "a fair, efficient, and equitable distribution of radio service" over the country, or to solution of the serious problem now presented by the present inadequacy of service in about 40% of the country's area by day and in about 60% of its area by night. Instead, there is an increasing tendency to return to the chaos of interference in all but urban areas which the rural listening public experienced during the period from July 9, 1926, when federal regulation under the Radio Act of 1912 broke down, to November 11, 1928, when the Federal Radio Commission placed in effect a reallocation providing for 40 clear channels and imposing at least partial safeguards against undue loading of the 44 regional channels. This was followed by carefully considered empirical standards evolved over the years by the Commission's Engineering Department and designed to assure a maximum of service and a minimum of objectionable interference on all classes of channels. Although, on hitherto generally accepted engineering principles, the standard broadcast band is filled to overflowing,* the Commission authorized 52 new stations in 1938, 54 in 1939, about 25 to July 1, 1940, bringing the present total to about 840. True, for the most part, the new stations have been given local or daytime assignments, but a number have raised serious questions of interference and have been in clear violation of the Standards of Good Engineering Practice. Usually, during the past year, the grants have been made without hearing, even in cases where substantial interference to existing stations was involved.

ECONOMIC FACTORS. Any attempt to piece together the Commission's pronouncements on the relevancy and the significance of economic factors in the allocation of standard broadcast stations leads to bewilderment. When last year's article was written, the prevailing tendency of the Commission itself was to regard economic factors as of paramount importance in the interpretation and application of the statutory standard "public interest, convenience or necessity" in both its rule-making and its licensing functions. During the same period its Law Department was urging an inconsistent and almost contrary thesis in the reviewing courts.†

By its action of June 23, 1939, following the report and recommendation of its Committee, the Commission refused to amend its regulations to permit power in excess of 50 kw. on clear channels. This determination had no technical justification (the uncontroverted evidence favoring the removal of the power restriction in the interest of improved service) and was based almost entirely on so-called economic factors, consisting of apprehended adverse competitive effects on smaller stations which, it was feared, would lose audience and revenue. In its actions on applications for new stations of any class, the Commission had for several years given

* When the Federal Radio Commission was established in 1927 there were 733 licensed broadcast stations. One of the principal purposes for establishing the Commission was the bringing of order out of the then-existing bedlam of interference, by reduction in the number of stations in simultaneous operation and other methods. By successive actions in 1928 the Commission succeeded in reducing the total number to about 600, and the number in simultaneous nighttime operation to a much lower figure.

† VARIETY RADIO DIRECTORY, III, pp. 923, 967, 973.

almost automatic recognition to the rights of licensees of existing stations in the same community to be protected against economic injury resulting from excessive competition to a degree sufficient to prevent the existing licensees from carrying on in the public service. Applications for new stations were denied on this ground, and in almost all cases the issue was raised, was the subject of evidence, and was determined.

The *volte-face* has come in several stages and has more than one facet. It began with the Law Department's contention in the United States Court of Appeals and later in the Supreme Court that economic damage through loss of revenue, even though substantial, does not confer the right of appeal because such damage, in legal phraseology, is "without injury." It was furthered through the new intervention rule, effective August 1, 1939, and the rigorous interpretation given it on October 2, 1939, under which petitions to intervene by persons apprehending economic injury and motions to enlarge the issues to include economic factors were regularly denied. It was revealed in a tendency to visit retribution on those who ventured to raise the economic issue in proceedings pending before the Commission.* It was given substantive expression in a series of decisions, usually without hearing, on particular applications beginning in January, 1940, in which the right of existing licensees to be protected against excessive competition, no matter how injurious, has been categorically denied.† Small towns which, under the Commission's earlier views, would

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* On October 10, 1939, the Commission, without hearing, granted an increase of facilities to a station at New Albany, Indiana. On October 30th, the Kentucky Broadcasting Corporation, which had previously been granted a construction permit for a new station of the same class across the river at Louisville, Ky., petitioned for reconsideration of the New Albany grant, alleging it would result in such severe loss of revenue as to impair petitioner's service and would destroy its ability to render proper service in the public interest. On November 20th the Commission not only denied the petition but issued an order to the Kentucky Broadcasting Corporation to show cause why its construction permit should not be recalled because of doubts raised by its petition as to its financial qualifications. Months later, on May 8, 1940, the order was rescinded.

† On January 9, 1940, the Commission, in denying a petition by an existing licensee for reconsideration of a grant of a new station made without hearing in Spartanburg, S. C., said:

> "In the radiobroadcast field public interest, convenience and necessity is served *not* by the establishment and protection of monopolies, but by the widest possible utilization of broadcast facilities. Competition between stations in the same community inures to the public good because only by attracting and holding listeners can a broadcast station successfully compete for advertisers. Competition for advertisers which means competition for listeners necessarily results in rivalry between stations to broadcast programs calculated to attract and hold listeners, which necessarily results in the improvement of the quality of their program service. This is the essence of the American system of broadcasting.
>
> "Experience has shown that the addition of a competitive station in a community does not bring about disastrous results sometimes predicted by the licensee of an existing station in the community. More often the protests of the existing station to the establishment of a new station spring not from a desire to insure its continued operation in the public interest, but rather from the purely private interest of seeking a monopoly in a field in which the interests of the public are best served by competitive operation."

Notwithstanding this momentous announcement of principle, on April 22, 1940, the existing station was sold to the successful applicant for the new station, and the sale was thereafter approved by the Commission on May 21, 1940.

have been held of doubtful ability to support even one station, have been granted two stations without hearing.*

The *volte-face* has not, however, been complete. This is apparently due in part to the principles announced in the Supreme Court's opinion in the *Sanders Bros. Radio Station* case, discussed in Part IV, and in part to a reservation in the Commission's own views. With respect to the latter, in presenting the matter in the reviewing courts, the Commission's Law Department, while strenuously opposing the right of an existing licensee to appeal, declared as follows:

> "We do not wish to minimize the importance of a consideration by the Commission of the effect of competition between a proposed new station and existing stations before the Commission grants a license for the proposed new station. Unquestionably, the Commission should, in determining whether the 'public interest, convenience and necessity' will be served by the licensing of a new station in a community, give careful and painstaking consideration to the question of whether the effect of granting the new license will be to defeat the ability of the holder of any one or more outstanding licenses to carry on in the public interest. The Commission is entirely in accord with the view that if the effect of granting a new license would be to defeat the ability of the holder of an outstanding license to carry on in the public interest, the application for the new station should be denied unless there are 'overweening' reasons of a public nature for granting it. And the Commission also believes that it is obviously a stronger case where neither licensee will be financially able to render adequate service. It is the Commission's endeavor to determine in every case whether service to the public will be benefited or adversely affected by its action on an application."†

The net result of the foregoing would seem to be that the Commission entertains the view that it may consider and determine the issue but that persons adversely affected have little or no standing, either before the Commission or in the reviewing courts, to participate in the proceedings or to complain of an erroneous determination. This position, as will hereafter appear, was in large measure rejected by the Supreme Court. In fact, notwithstanding the Commission's more recent views, its earlier views are occasionally given effect and, from time to time, the factor of adequate economic support and, conversely, the factor of competitive effect on existing stations, directly or indirectly enters into the Commission's decisions. In the present state of affairs it is extremely difficult to state with any confidence what, in actual practice, is the law on the subject.

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* Instances of this are the grants in the spring of 1940 of two stations in Salisbury, Md., having a 1930 population of 10,997, and two stations in Las Vegas, Nev., with a 1930 population of 5,165.

† Petition of Federal Communications Commission for rehearing in United States Court of Appeals for the District of Columbia in Sanders Bros. Radio Station V. F.C.C., 106 F. (2d) 321.

B. REGULATION OF OWNERSHIP AND CONTROL OF STATIONS

THE NETWORK-MONOPOLY INVESTIGATION. On June 11, 1940, there was submitted to the Commission the long-awaited "Report of the Committee Appointed by the Commission to Supervise the Investigation of Chain Broadcasting," commonly referred to as the Network-Monopoly Investigation. The report was made public the following day. The proceeding, the earlier history of which has been traced in preceding articles,* began with the Commission's Order No. 37 on March 18, 1938, underwent an extended hearing from November 14, 1938 to May 19, 1939, and since then has been in the hands of the Commission's staff and the Committee for the preparation of the Report. The Report does not recommend or suggest the procedure to be followed by the Commission in considering and giving effect to its conclusions. At present writing, the Commission has not made any determination in this respect. It may be assumed, however, that, following the pattern usually adhered to in its quasi-legislative proceedings, the Commission will eventually accord opportunity to dissatisfied parties to file exceptions and to present briefs and oral argument, although such opportunity may be preceded by the formulation of tentative regulations on the subject-matter.

The document is of encyclopaedic dimensions, totaling some 1,300 pages, comprising a text of 138 pages and bulky appendices. Pursuant to the original specification of issues, it covers a few matters not exclusively related to network operations, such as a study of ownership and control of broadcast stations generally. These will be adverted to in later subheadings. It also covers at least one matter already discussed in this article and not included in the specified issues, namely, the issue as to preservation of clear channels. Otherwise, its contents and conclusions relate exclusively or primarily to networks. These conclusions can be covered only in bare outline in this article.

According to the Report, "the heart of the abuses of chain broadcasting is the network-outlet contract." Examples of "arbitrary and inequitable practices" due to these contracts are (1) the exclusive provision preventing the affiliate station from accepting programs from a competing network; (2) the provision requiring the affiliate station to subject all or a major portion of its time to network utilization at the network's option, regardless of whether such time is actually used; (3) the provision that non-network rates for national advertising cannot be less than those for network commercial programs; (4) the provisions concerning the free use of the first hours, combined with low initial compensating rates for the next hours; and (5) the long periods of time covered by the contracts. In the case of National Broadcasting Company, the additional feature is pointed out that it "has two distinct networks with separate service to two stations in each of many cities," and that the manner in which they are operated is evidence of the "complete domination" of the affiliated stations and is "one of the most inequitable by-products of these contracts."

The Committee finds that the interests of the outlet stations "have been subordinated to the interests of the network owned and controlled station"; that "the predominance of network organization is evidenced by

* VARIETY RADIO DIRECTORY, II, p. 533; *ibid*, III, p. 928.

their disproportionate share of the income of the radio broadcasting industry"*; and that the contract arrangements are reflected in the program policies of the networks and the lack of independence on the part of outlet stations.

Citing Sec. 303 (i) of the Communications Act, authorizing the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting," together with other provisions in the Act, the Committee concludes that it has authority to deal with the contracts, and that "public interest, convenience or necessity are adversely affected by inclusion in the network-outlet contracts of many of the contractual provisions discussed." It expressed the belief that

> "* * the Commission should proceed at once to deal with these problems to the extent that Congress has given it authority in the Communications Act of 1934."

Other matters covered by the Report include the so-called management contracts (covered in a later subheading), the policies of Columbia and National of placing a large number of the best-known artists under exclusive contract, the dominant part played by National in the field of electrical transcriptions, the dominant position occupied by stations owned or directly controlled by networks, the charge that two-thirds of the nation's standard broadcast stations are operated as incidental to other businesses (covered in a later subheading), the charge that networks have passed on to advertising agencies the right of selection and production of programs, and the charge that, while networks have gone voluntarily into the better markets, they have neglected the less profitable ones and, as a result, about 320 stations remain without major network connections and many listeners are deprived of the advantages of chain broadcasting service. The Committee specifically directs the Commission's attention to the following problems suggested by the Report: (1) the necessity and advisability of requiring networks to be licensed by the Commission; (2) the ownership of stations by networks; (3) the ownership of more than one station by an individual or corporation; (4) the control of talent by networks; (5) the dominant position of National in the transcription field; and (6) the difficulties involved in supervising the transfer of control of corporate licensees because of their stock being listed on stock exchanges, adding

> "The actual administrative experience which the Commission will obtain under its new licensing policy will enable it to suggest to the Congress the enactment of amendatory legislation to deal with these problems if such is later found to be necessary."

The public appearance of the Report on June 12, 1940 had been preceded by a rising tide of criticism and complaint at the delay, particularly in Congress. Arrangements made by the Committee shortly after the conclusion of the hearings on May 19, 1939, seemed to assure completion of the Report at an early date, and statements to that effect were freely made by members of the Commission both publicly and to congressional committees as early as June, 1939. On August 3, 1939, Commissioner Walker, then acting chairman of the Committee, ordered the newly-created special

* The Report points out that, out of $18,854,784 net operating income of all the stations and networks for 1938, $9,277,352 went to National and Columbia.

staff to proceed at full speed, devoting full time to the task, and to complete it for the Committee's consideration within two months. By September, 1939, it was common knowledge that at least a preliminary draft had been completed, and the substance of its contents and conclusions even found their way into the trade press. In fact, as then published, they differed little from those contained in the Report when it finally appeared.

Time went on, however, and, as the Report failed to materialize, a maze of conflicting rumors circulated as to the reasons for the delay. Stories persisted that high administration officials, including even the White House, had intervened and, either for that or other reasons, the Report was being purposely delayed or suppressed. Yet in the meantime repeated assurances were given by the Commission of an early conclusion of its labors.* Insistent prodding developed on the part of Senator Tobey of New Hampshire, who wrote each member of the Commission on May 3, 1940, reviewed the earlier assurances given by Commission representatives, describing them as "nothing but a mockery," and on May 15th read his letter and the replies received into the Congressional Record. The delay in completion of the Report was, as already noted, the principal topic of the grilling to which Commissioner Brown (who had become chairman of the Committee) was subjected at the hearing before the Senate Committee on Interstate Commerce on his reappointment, June 12, 1940, the day on which the Report was released to the public.

MULTIPLE OWNERSHIP. To judge from the Commission's actions on applications without hearing during the past year, the issue of multiple ownership of broadcast stations, that is, the ownership of two or more stations either in the same or in different communities, has passed into oblivion. Applications raising the issue have been granted speedily, usually without hearing, and without dissent.

That the question is not entirely forgotten, however, is indicated by the Network-Monopoly Report. A substantial portion of the Report is devoted to "Multiple Ownership of Radiobroadcast Stations." It states:

> "The control of the business of broadcasting has progressively fallen into fewer and fewer hands. * * *
>
> "The problem with respect to the ownership of two or more stations by the same person or group of persons is not unlike that

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* By December 1, 1939 the Committee was reported by the trade press to be still engrossed in drafting its report, with a majority of its members favoring the conclusions which had already been made public. On December 13, 1939 a Commission representative, testifying before a House Appropriations subcommittee, asserted that a second part of the Report was being formulated and probably would be in the Committee's hands in two weeks, probably to be followed by submission to the full Commission by the middle of January. On January 30, 1940 another Commission representative, testifying before a Senate Appropriations subcommittee, predicted that the Report would be available "easily within a month". By February 15th, it became known that there would be a further delay of two weeks and perhaps a month, before the Report reached the full Commission. This was followed by a published rumor that the Commission *en banc*, rather than the Committee, would draft the Report and that its conclusions would be less stringent than those previously indicated. Early in May it was stated at the Commission that action would probably come by about the middle of May, and the delay was explained by the fact that the draft had been returned to the Law Department for further revision but was now back in the Committee's hands. On May 27, 1940 the Committee met in an effort to put "finishing touches" on the Report but again the draft was referred to the staff for revision.

of network ownership of stations. The record evidences a definite trend toward concentration of ownership of radio stations. * * To the extent that the ownership and control of radiobroadcast stations falls into fewer and fewer hands, whether they be network organizations or other private interests, the free dissemination of ideas and information, upon which our democracy depends, is threatened."

The Report points out that, as of the end of 1939, there were 660 commercial standard broadcast stations, of which 283 were owned by 87 multiple-owners and 377 were owned by single-owners; that the 87 multiple-owners received 58% of the total business with average net time sales of $487,773, and the 377 single-owners received the remaining 42%, with average net time sales of only $82,669. These figures are further broken down into various categories, by degrees of multiple ownership and geographical subdivisions, but their significance is complicated by other important factors such as network ownership and size of market.

As earlier stated, "the ownership of more than one station by an individual or corporation" is one of the problems to which the Committee specifically directs the Commission's attention, and there is a clear implication that the problem should be dealt with under the Commission's "new licensing policy."

NEWSPAPER OWNERSHIP OF BROADCAST STATIONS—LOCAL MONOPOLY. During the past year the matter of newspaper ownership of broadcast stations continued to be theoretically important but, with one exception, remained practically a dead issue. As of July 1, 1939, 246 broadcast stations were owned in whole or in part by publishers.* By January 15, 1940, the number had increased to 269 and, as of July 1, 1940, it stands at almost 300. The increases have been due in part to the granting of applications for new stations by newspaper interests, and in part to Commission approval of sales of existing stations and transfers of their licenses of control to such interests. In both cases the Commission has not deemed a hearing necessary in most instances, and in many instances the actions have been taken with record-breaking speed.

The exception above-noted revolves about the situation where Commission action would result in ownership of the sole newspaper and of the sole broadcast station by a single individual or company in a given community. There are many communities scattered over the country where this situation already obtains, due to past actions of the Commission. The issue was raised in the Allentown case, reviewed in last year's article,† in which, after considerable vacillation between opposing theories, the Commission gave its approval to the unified ownership without hearing. During the spring of 1940 the issue bobbed up again. On April 15, 1940, a majority of the Commission granted an application for a new station by a

* This figure represents an increase of somewhat over 100 during the life of the Federal Communications Commission, beginning July 11, 1934. On January 1, 1938, the number was 211, and, on January 1, 1939, it was 239.

† VARIETY RADIO DIRECTORY, III, p. 931.

newspaper publishing company in Martinsville, Va., although the company was owned by non-residents, and rejected a competing application by resident interests in the community. Chairman Fly entered a dissenting opinion, pointing out that the action of the majority was in direct contradiction to an action of the Commission involving a similar situation in Port Huron, Mich.* Commissioner Case concurred in the dissent and Commissioner Walker concurred in part. Shortly afterwards the Commission, by a vote of 4 to 1 (Commissioner Craven dissenting) abruptly and without hearing denied an application of Brush-Moore Newspapers, Inc., owner of a chain of daily papers in Ohio, for Commission approval of its acquisition of control of WPAY, Portsmouth, Ohio, in which the company already held a 50% interest. It was said that the Commission desired to see a test of "the issue of local monopoly." Since then, the Commission has decided to hold a hearing on the application.

During the same period, the issue of newspaper ownership has not been allowed to die entirely in Congress. It has been the subject of questioning at the several hearings before the subcommittees of the House and Senate Committees on Appropriations. To a limited extent the matter is adverted to in the Network-Monopoly Report, which contains statements such as the following:

> "Unlike other big business enterprises, however, broadcasting is not the chief activity of its owners, but is operated principally as a 'side line' to the main business. * * More and more of the applications filed with the Commission for authority to become the owners of stations show the applicants to be persons of other large business interests, consisting of such activities as manufacturing, banking, publishing, natural resources development, public utility, and many other types.
>
> "Two-thirds of the nation's standard broadcast stations are operated as incidental to other businesses. In many cases, the actual owners of the stations do not personally operate them.
>
> "In addition to the operation of approximately 300 stations by newspapers, 125 other stations are operated by businesses of various kinds."

The foregoing seems to imply disapproval of such ownership, but the Committee does not make any recommendation or enumerate it as one of the problems to be resolved.

SALE AND LEASE OF BROADCAST STATIONS—CONTROL BY NON-LICENSEES. The past year has served to confirm the conclusion advanced in last year's article that the issue as to "sale of wavelengths" has "all but burned itself out."† The granting of applications for Commission approval of transfers of license or of control became and remained a matter of routine, in most cases without hearing, regardless of

* 5 F.C.C. Rep. 177.

† VARIETY RADIO DIRECTORY, III, p. 934.

the price paid by the purchaser or the excess of such price over the value of the tangible assets comprising the station purchased. Included in the transfers approved were many purchases by newspaper publishers, purchases by persons or corporations already having one or more stations, and purchases by absentee owners. In several instances very large amounts were paid. In certain of these instances all records for speed were broken.* The issue, however, continued to be the subject of interest in hearings before Congressional committees. In response to a question at such a hearing, the Commission chairman stated:

> "The Commission has no jurisdiction over the price paid for equipment used by broadcast stations as such."

By way of contrast, there has been a vigorous onslaught in instances where, in the Commission's judgment, broadcast stations were actually controlled by persons other than their licensees. The Network-Monopoly Report covers the matter extensively, including contracts whereby the licensee appoints a chain as sole agent for the purpose of supplying programs (such as those heretofore existing between National and General Electric and Westinghouse) and miscellaneous examples of management and agency contracts. The Report, referring to Sec. 310 (b) requiring Commission approval of transfers, expresses the conclusion:

> "The various types of contracts just reviewed raise serious questions under this Section of the Act. The problem is particularly acute where management is transferred to a network whose interest to serve the public might be secondary to its interest as a network organization."

Most of the situations described in the Report were the subject of proceedings of one sort or another during the year prior to publication of the Report. Action by the Commission on January 30, 1940, setting the renewal applications of eight stations for hearing, announcing an inquiry into management contracts, and stating that about a dozen additional renewal applications would be similarly treated when they became due (including the Westinghouse and General Electric stations), was followed by a long delay due to the Commission's failure to send out notices of hearing or to specify the issues in which it was interested. In the meantime, the situations were to a large extent corrected voluntarily. The Westinghouse stations, for example, were shifted from National to Westinghouse management, effective July 1, 1940.

Where the alleged unauthorized transfer of control was coupled with misrepresentations to the Commission, however, no such lenience was exhibited. In several instances, all having to do with small stations, licenses have been revoked, and the revocations have either become final after hearing or are still pending before the Commission. On January 25, 1940, the Commission made final its revocation of the license of KUMA, Yuma, Ariz., for alleged false statements as to control and operation. Similar action was taken on March 29th against WSAL, Salisbury, Md., where alleged control by a non-licensee was coupled with a charge of misrepresentation as to the

* In one case, involving one of the largest purchase prices, newspaper ownership, multiple ownership of stations both in the same and in different communities, and absentee ownership, the application for approval was filed December 8, 1939, announced three days later, and granted on the fourth day.

applicant's financial responsibility. On February 8, 1940, the Commission issued revocation orders against five local stations in Texas, and another such order followed a few days later, all based on an undisclosed interest by two individuals coupled with misrepresentations. In May and June, 1940, after extended hearings in Texas, the Commission adopted proposed decisions making the revocation orders final, but the decisions have not yet become final. Still other proceedings are pending. It is interesting to note, however, that as a rule the communities where the stations are located have not suffered a loss of service through the revocations. In Yuma, Ariz., for example, the Commission authorized another company to construct a new station on August 8, 1939, over five months prior to the revocation. In Salisbury, Md., the Commission authorized two new stations without hearing on April 13, 1940.

ABSENTEE OWNERSHIP. During the past year there have been no significant developments on the issue of absentee ownership of broadcast stations that have not been sufficiently covered in connection with multiple and newspaper ownership. The basic philosophy of the Network-Monopoly Report is obviously in the direction of favoring local operation and control.

ALIEN OWNERSHIP. In past years the matter of alien interests in the ownership and control of broadcast stations has not presented any substantial problem. With the outbreak of war on September 1, 1939 the situation changed somewhat, and there has been an increasing tendency to exercise vigilance. Immediately there were indications that the Federal Bureau of Investigation would collaborate with the Commission in checking the nationality and antecedents of licensees. Later evidence of the tendency is found in the meticulous inquiry into citizenship in the new application forms, and in the Commission's announced intention on June 10, 1940 of insisting upon actual proof of citizenship in connection with applications for all classes of stations and operators.

On June 18, 1940 the proof-of-citizenship quest took a turn bordering on the spectacular when the Commission issued regulations requiring fingerprinting and proof of citizenship of all licensed operators, both commercial and amateur, totaling considerably more than 100,000. The required proof of citizenship extended to information about the citizenship or nationality of the operator's immediate family, and about his service with the American army or navy or with any foreign government. It is said that the same requirements with respect to fingerprinting and proof of citizenship will shortly be extended to all applicants and licensees and, in the case of corporations, to all officers, directors, stockholders and employees. The same will extend to officers, directors and stockholders of holding corporations. If this proves true, bureaucracy will have scored an impressive triumph.

In the Senate, it was said, legislation might be introduced soon to forbid foreign holdings in any corporate licensee. The present law permits a limited extent of foreign interest, *e.g.*, the owning of one-fifth of the capital stock in the licensing corporation.

C. REGULATION OF PROGRAM CONTENT

STATUTORY PRESCRIPTIONS. The Commission still adheres to the viewpoint that, notwithstanding the express prohibition against censor-

ship in Sec. 326 of the Act, it has power to refuse to renew a broadcast license because of alleged program offenses, not merely where the programs (*e.g.*, lotteries and obscene, indecent or profane language) are specifically forbidden by the Act, but also where, in the Commission's opinion, they fail to meet the vague test of "public interest, convenience or necessity."

As an illustration of the viewpoint may be cited an address by Commissioner Walker in San Francisco on March 1, 1940. Urging that the Commission establish program standards, he declared that a station must provide worthwhile service to justify its continued existence; that stations violating the law *or public interest* by "promoting lotteries, or fraudulent advertising, or vulgar programs, hardly would be expected to be in a favorable position for license renewal"; and that, although the Commission does not have the right to censor, it has important functions to perform in the public interest and its duties should be so exercised as to encourage and eventually bring about a higher standard of broadcast programs, responsive not only to the entertainment but to the educational, religious and cultural needs of our people and of the nation at large. This philosophy has frequently been buttressed by the proverb "By their fruits shall ye know them," first cited in this connection by the reviewing court in the famous and overworked *Brinkley* case.*

Claiming this power of indirect censorship, and having on occasion successfully exercised it, the Commission is enabled to regulate program content effectively through public and private statements of members of the Commission and notices to stations by the Law Department, with the implied threat of designating renewal applications for hearing, the accompanying harmful publicity, and the possibility of deletion of the station. Under these circumstances the number of cases actually reaching the designation-for-hearing stage is relatively unimportant. The extent of censorship really exercised must be determined in the first instance from the extent and the effect of the Commission's activities prior to this stage. It was to strip the Commission of this power that the Ditter-Bailey Bill, reviewed in Part I-C of this article, was principally designed.

The past year has been one of conflicting movements in the field of program control but, on the whole, it is believed that the trend noted in last year's article is still predominant, namely, toward a reduction in the extent and character of the Commission's endeavor to censor programs. The trend has been far from a simple curve downward, however, and has recently been badly complicated by influences arising out of the threat of war. Earlier, comfort was derived from the attitude of the President who, in an address by his Secretary, Stephen T. Early, delivered at the annual convention of the National Association of Broadcasters July 11, 1939, was quoted as follows:

> "But now in our time, there has come into being another great institution for the general diffusion of knowledge—the radio. Still in its infancy, it already rivals in importance the schools and the press. The government, as the people's agent, has had and has now a still different relation to radio from that toward the school

* KFKB Broadcasting Ass'n v. Federal Radio Commission, 1931, 47 F. (2d) 670.

and the press. It has encouraged and aided its development on the one hand, and, on the other, it has set up such controls of its operation as are necessary to prevent complete confusion on the air. In all other respects the radio is as free as the press."

It may not be amiss in this connection to note that, in its struggle to achieve parity with the press as a medium for the dissemination of news, radio scored a success in the formal opening on July 20, 1939, of the Radio Galleries in Congress.

In its convention at Philadelphia, the Republican Party adopted the following plank on June 19, 1940:

> "The principles of a free press and free speech, as established by the Constitution, should apply to the radio. Federal regulation of radio is necessary in view of the natural limitations of wave lengths, but this gives no excuse for censorship. We oppose the use of licensing to establish arbitrary controls. Licenses should be revocable only when, after public hearings, due cause for cancellation is shown."

It is expected that a similar plank will be contained in the Democratic platform.

PROGRAM COMPLAINTS—PROCEDURE. For a while during the summer of 1939 it appeared that the Commission was reviving its earlier program complaint procedure which had long been under attack as back-door censorship. Apprehension was caused by the Law Department's practice of sending out requests to stations for their program continuities of "questionable" programs. In several instances the inquiries also were addressed to individuals whose testimonials were broadcast. The earlier practice of issuing temporary licenses as the result of complaints was not, however, followed. Late in August, 1939, to quiet the apprehension, the Commission indicated that it would take pains to verify the validity of program complaints before sending notices to stations.

Throughout the year the Commission showed an inclination to employ the revocation procedure, rather than the renewal application procedure, for disciplinary purposes, although there were notable exceptions to this. Also, when a program complaint involved an alleged violation of a specific provision in the Act entailing criminal penalties, such as Sec. 316 relating to lotteries, the Commission usually referred the matter to the Department of Justice rather than to initiate proceedings before itself.

PROGRAM COMPLAINTS-SUBSTANCE. The wide variety of program complaints received and considered by the Commission, noted in earlier articles, continued during the past year.

In testimony presented to a subcommittee of the House Committee on Appropriations December 13, 1939, data were given showing that the complaints covered refusals to broadcast particular programs (coupled with charges of censorship and denials of the right of free speech): failures to provide time for political broadcasts and criticisms of such broadcasts; false, fraudulent or misleading statements; religious programs; medical programs; lotteries; solicitation of funds; editorial policies of stations; news broadcasts: alleged propaganda, including foreign-language programs; defamatory material; program contests; obscene, indecent or profane lan-

guage; horse racing and gambling; fortune-telling and astrological programs; excessive advertising; excessive use of recordings; piracy of program ideas; inferior program service; and many unclassified items. The overwhelming proportion of these complaints, it was said, had been deemed frivolous, unsubstantiated or otherwise not warranting investigation. It was not made clear what test was applied in determining, first, whether a complaint warrants investigation and, second, whether it thereafter warrants disciplinary proceedings.

In the flurry in the summer of 1939, when it appeared that the Commission was reviving its old procedure, the requests for program continuities sent out by the Law Department had to do with a variety of programs ranging from prize contests and testimonials to foreign-language scripts. In the fall of 1939 a renewal application was reportedly set for hearing for, among other reasons, excessive use of phonograph records. On February 6, 1940, the Commission directed its Law Department to investigate complaints as to race-track gambling broadcasts carried by a station. During the early winter of 1940, the Commission gave evidence of an intention to "crack down" on a large number of alleged lottery and gift enterprise programs, and by the end of February, the industry was deeply concerned over what appeared to be a new siege of program regulation through hearings on renewal applications.

The species of program drawing the greatest fire was the lottery or near-lottery type. Under a long line of federal and state court decisions, the language of the several lottery statutes* had been construed to require the presence of two elements before an enterprise could be deemed to fall under the ban, (1) chance, and (2) the payment of a consideration. The cases had stretched the conception of what constitutes "consideration" to a far point, but had not dispensed with the requirement. Various ingenious program schemes were devised (usually by advertising agencies), designed to have somewhat the same popular appeal as does a lottery but falling outside the legal definition for want of one or the other of the two requirements. Some schemes, while having an element of consideration, depended on various types of alleged "skill" to elude the element of chance. Others, frankly involving the element of chance, relied on the absence of consideration. Both types enjoyed tremendous success with the listening public, to the detriment of other programs and even of other media of entertainment.

The matter came to a climax with the "Pot o' Gold" program carried over one of the National Broadcasting Company networks. As everyone knows, the selection of the prize winner depended entirely on chance in the choice of a telephone number, but, it was contended, no consideration flowed from the telephone subscriber in order to be eligible. The program led to the registering of over 100 complaints with the Commission proceeding from theatre owners, religious groups, members of Congress, and other organizations and individuals. It resulted in the institution of various schemes by theatre owners to hold their audiences during the evening when the program was broadcast. Members of the Commission were reported to be stating that they considered the program, and others like it, as contrary to public interest.

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* Sec. 316 of the Communications Act, in its phraseology defining the offense, is virtually a replica of the federal statute governing use of the mails for lottery information.

Submission of the program to the Post Office Department, to the Commission's Law Department and to the Law Department of the Federal Trade Commission was followed, it is understood, by opinions in each case that the scheme was not a lottery within the meaning of the statutory phraseology. Finally, on February 8, 1940, the Commission announced that it had transmitted the facts concerning the "Pot o' Gold" program to the Department of Justice which, however, did not receive formal notice of the transmittal until 13 days later. In the meantime, both out of concern for the eventual ruling and because of disapproval of the program itself, a few stations ceased broadcasting it. On April 12, 1940, in a letter to the Commission, the Department of Justice gave the programs a favorable ruling, and, what was even more significant, did likewise with another program submitted to it which involved elements approaching even closer to forbidden territory. This was followed by a similar ruling by the Department in May on a batch of five other prize-contest programs, including "Musico", which had been submitted by the Commission on March 29th.* At present writing, the issue seems to be temporarily quiescent but, in the writer's opinion, cannot be regarded as permanently closed. Such programs, if persisted in, are bound sooner or later to incite agitation for repressive measures. There is no assurance that, if a scheme such as that in the "Pot o' Gold" prize contest should come before the Supreme Court as presently constituted, the element of consideration will be held to be necessary to constitute a lottery or gift enterprise, or, even if it is held to be indispensable, that the definition of the element will not be enlarged to cover the scheme.

There remain to be discussed a few miscellaneous developments related at least in part to the subject of program complaints.

During November, 1939 there were hints from former Attorney General Murphy that legislation might be sought to outlaw minute-to-minute racing results from all communications media, including radio. The Johnson bill†, prohibiting the advertising of alcoholic beverages, including beer, by radio showed signs of activity for a while but was passed over and now seems unlikely of enactment.

Sec. 315 of the Act, requiring that stations accord equal opportunities to political candidates, continues to serve as a starting point for an attempt to extend its underlying principle to the discussion of all controversial issues. For example, the State Restaurant Liquor Dealers' Association of New York complained to the Commission that a station at Rochester had improperly denied it time to present the liquor industry's side of the local option prohibition issue to the voters of upstate New York. In his reply on September 25, 1939, Chairman Fly proceeded on the theory that it was the station's duty to accord both sides an opportunity if either side were given time on the air, saying:

> "However, it is the duty of the Commission to require that such licensees shall utilize their facilities to serve the public in-

* In November, 1939, a federal district court had held that "Musico" did not violate the lottery statute.

†S. 517.

terest and insofar as such facilities are used to discuss controversial political issues, it is the responsibility of the licensees to provide a well-rounded as distinguished from a one-sided presentation of such subjects."

He stated that the Commission has no power to compel a station to permit a particular individual to use station facilities except insofar as required by Sec. 315 in the case of political candidates, but suggested that the complainant furnish additional facts showing how the station's facilities had been used for discussion of the issue.*

On August 16, 1939, the age-old Bellingham, Wash., cases came on for further hearing, involving the renewal application of the existing station in that city and the competing application of a newcomer for the same local facilities. Among the matters aired were allegations against the existing station of political activity and "a definite editorial policy," misplacement and disappearance of funds secured through public subscription, favoritism in allotting time for political broadcasts, and incitement of labor troubles. Some of the foregoing charges, notably the editorializing, were similarly made against an existing station in Boston during a three-week hearing in November, 1939, in a proceeding involving its renewal application and a competing application by a new-comer. The fact that such issues can be raised and that evidence is received on them is another continuous potential source of censorship. Neither proceeding has as yet been concluded.

The weight to be given to an applicant's plans with respect to network affiliation has been the subject of attention. In a decision rendered by a divided Commission, authorization for a new local station in Denver was granted November 16, 1939. The majority premised its conclusion on the circumstance that all existing stations in Denver were network outlets and that a purely local station, without chain connections, was desirable. The decision further stated, somewhat cryptically, that nothing in the Act or in the Commission's rules or policies requires a finding of a "definite need to support the granting of an application."† Any attempt to deduce an intelligible set of principles from the Commission's decisions mentioning chain affiliations as a factor is foredoomed to failure. What is a virtue in some cases, justifying the granting of an application, is a fatal vice in others, leading to a denial. Instances can be cited from the records of the past few years where an applicant was successful wholly or partly because of the sworn representation that he planned a purely local service, free of network affiliation, only to enter into such an affiliation before the ink was

* On Nov. 7, 1939, the Commission notified the United Rubber Workers of America in Akron, O., that it would not concern itself with a station's refusal to accept commercial broadcasts on controversial issues unless there are "extenuating circumstances." It pointed out that under the Act broadcasters are not common carriers, and station licensees may "legally refuse to sell time to any particular individual or organization."

On Oct. 31, 1939, a New York Supreme Court Justice denied an application for temporary injunction against a station owner by a Communist candidate for the New York City Council, ruling that the station was within its rights in cancelling broadcasts by Communists whose names had been removed from the ballot.

† The decision is difficult to reconcile with other decisions during the same period to the effect that, because of inadequate coverage, purely local stations should not be authorized in metropolitan areas of substantial size.

dry on the decision. In one case during the past year, however (in which there may have been extenuating circumstances, whereas there were none in others that could be cited), a licensee in Richmond who secured improved facilities on such a representation was hailed before the Commission on disciplinary proceedings in the form of a rehearing scheduled in May, 1940, but later indefinitely postponed.

Two of the Commission's revised rules deserve mention. One rule, which has been the subject of widespread protest because of undue hardship, particularly on the smaller stations, has required the maintenance of an operating log with entries showing detailed information describing each program broadcast and its character (including records and transcriptions), the time of beginning and the end of each program, the character and time of the various kinds of required announcements, and data as to speeches by political candidates. On September 12, 1939, at the urging of the National Association of Broadcasters, the rigors of the rule were somewhat alleviated for the sake of the smaller stations.

Another rule causing protest was that having to do with the requirement of announcements of mechanical reproduction, particularly phonograph records and transcriptions. On January 4, 1940, the Commission amended the rule so as to permit announcements at 30-minute rather than 15-minute intervals. Further mitigation was sought to permit variation in the phrasing of the announcements and to avoid monotonous repetition of the same words and phrases (the rule required differentiation between phonograph records and transcriptions), but, aside from an inconsequential revision, the Commission refused early in March to make the desired changes.

NEUTRALITY AND THE THREAT OF WAR. The Communications Act of 1934 (like the Radio Act of 1927) confers almost unlimited power over radio on the President in time of war and even under conditions short of war. Under sec. 606 (c), upon proclamation

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

the President may suspend or amend, for such time as he sees fit, the Commission's rules and regulations applicable to any and all stations; he may close down any station and remove its apparatus; or he may authorize the use or control of any station or its apparatus by any Government department, under such regulations as he may prescribe, upon just compensation to the owners.

Until the cataclysmic onrush of events beginning September 1, 1939. few were heard to point out the almost dictatorial power conferred by this section over one of the principal means of mass-communication.* The outbreak of war led to sober reflection on the statute's potentialities and to a demand for repeal or modification of the statute, later reflected in provisions in the Ditter-Bailey bill summarized in Part I-C of this article.

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* See the author's article *Freedom of Speech and Radio Broadcasting*, 177 ANN. AMER. ACAD. POL. & SOC. SCIENCE 179, 194 (1935).

On September 8, 1939, the President declared a state of "limited national emergency." His action led to speculation whether the proclamation brought Sec. 606 (c) into operation and whether, if it did, responsibility would be placed with the military authorities or with the Commission. This had been preceded by a statement by Secretary Early two days before, in which he declared that the President had no desire to censor either press or radio unless and until the country is faced with war; that there was no censorship plan "at present"; that broadcasting is a "rookie" which has yet to prove its ability to keep within proper limitations during a national emergency; and that if radio could prove itself a "good child" and well-mannered in the handling of news during the critical period it would be left to its own resources, but otherwise the Government's disposition would be "to teach it manners." While this was followed by a second statement six days later in which Early specifically disclaimed any Governmental intention of censorship, it was clear that the subject was under consideration. At the Commission there was talk of a flexible interpretation of "public interest, convenience or necessity" to meet emergency conditions, and Chairman Fly declared that the Commission might or might not decide upon the promulgation of "guides" for the avoidance of unneutral acts by the industry.

The crux of the warning was, of course, the avoidance of the use of broadcast and other radio stations for "propaganda." There was a tendency to urge that the rebroadcasting of war "news" programs from foreign stations be curbed, that stations transmitting programs in foreign languages be carefully supervised, and that international broadcast stations be kept in check to avoid provocation abroad. It was said that the Federal Bureau of Investigation, in charge of investigating espionage, would collaborate with the Commission in efforts to suppress propaganda and generally it was expected that broadcasting would be subjected to close surveillance by governmental agencies. In support of its plea to Congress for a larger appropriation the Commission alleged its greater burden of work of investigation and monitoring because of the national emergency precipitated by the pending war, and reiterated the allegation in its annual report. Tentative executive orders were drafted. For a while there was talk of legislation but on October 12, 1939, Senator Thomas, of Oklahoma, asserted he had abanoned his plans for an amendment to the then-pending Neutrality Act to provide for governmental suspension of radio, press and the cinema.

Except for one disciplinary proceeding before the Commission,* nothing tangible or of particular importance occurred until, with the resurgence of military activity in Europe in the spring of 1940, apprehension was revived. In the meantime, the various pronouncements of the Commission

* On Sept. 12, 1939, the Commission issued an order to WMCA, New York City, to show cause on a revocation proceeding on a charge of interception of secret radio communications sent by the Governments of Germany and Great Britain, and the broadcasting thereof, without the authority of the senders, in violation of Sec. 605 of the Act. At the hearing held September 25, 1939, it appeared that the station's offense was rather in the nature of exaggerated and misleading advertising of supposed scoops rather than any serious infraction of Sec. 605. In the Commission's decision a month later, the station was sharply rebuked, and it was stated that grave doubts had been cast upon the licensee's qualifications to operate a station in a manner consistent with public interest, but no revocation order was entered.

and other governmental agencies undoubtedly had considerable effect on the industry's policies.

By late in May the increased tension began to be reflected first in rumors as to Government plans and later in tangible actions of the Commission. On June 5, 1940, the Commission banned amateur radio communication with foreign stations and on June 7th placed a similar ban on amateur portable and mobile units (except for frequencies above 56 mc.).* On June 8th, the Commission warned ship radio operators that superfluous, unnecessary or unidentified communications from ship stations would not be tolerated and on June 14th a similar warning was sent to all commercial operators. On June 18th the Commission issued regulations requiring the fingerprinting and proof of citizenship for all licensed radio operators, affecting more than 100,000 persons, noted under a previous heading.

On June 25, 1940, the President, from his lump sum for defense purposes, allocated a fund of $1,600,000 for an expansion of the Commission's monitoring activities, motivated by considerations of national defense and neutrality and attended by alarm at reports of unlicensed radio signals and the danger of subversive communications. With this sum the Commission proposes to establish a far-flung radio surveillance network, increasing its present field force of less than 200 by the hiring of an additional staff of 500 or more radio inspectors, the setting up of 10 primary long-range direction finders to determine the bearings of unauthorized or suspicious radio signals, and the ultimate establishment of some 100 "detector" stations in the United States and its possessions. The surveillance would be over broadcast, as well as other classes of, stations. There was mention of the making of recordings of all foreign-language broadcasts, both over standard broadcast stations and over foreign shortwave stations received in the United States.

Symptomatic of the almost hysterical extent of the alarm were statements at the Commission and elsewhere that diathermy and other high-frequency apparatus would be checked to guard against their conversion into subversive transmitters; that records would be kept of transmitters in stock and in storerooms; that thought was being given to requiring manufacturers of transmitters to register with the Government the serial numbers of all transmitters sold; that control of reception of broadcasts from foreign stations is a "serious problem" (page Hitler); that the control of local stations, and perhaps the placing of a supervisor in each of them, was being discussed; and that another serious problem is presented by international broadcast stations in the United States which may have to be required by the Government to transmit programs designed to counteract foreign propaganda.

Rumors became current that Administration plans included the taking over of commercial broadcasting in the war crisis. On May 28, 1940, Chairman Fly denied this, saying that cooperation with the industry would constitute the basis of approach but that this did not mean that all communications would be free from Government scrutiny and possible action. Among the possibilities mentioned were restrictions on foreign-language programs,

* This latter restriction was alleviated on June 11, 1940, to provide for *bona fide* communications emergencies and for testing.

on international broadcasting, and on coastal broadcast stations, particularly those operating on the lower frequencies useful for coastal and harbor military purposes. There were indications that arrangements might have to be made for the temporary closing down of stations, particularly clear channel stations, upon warning of approaching enemy aircraft, to avoid use of the station signals as beacons.

Toward the end of June, 1940, it became known that the President was considering the creation of a Defense Communications Committee, to be composed of representatives of the Commission, the Departments of State, War and Navy, and the Coast Guard; and that Chairman Fly had, on June 25th, submitted to the President a draft executive order for the purpose. The Committee would name subcommittees, including one for broadcasting, with the advice and counsel of the industries affected.

While speedy approval of the executive order had been expected, it has not, to date, been issued. Rumor has it that there is difference of opinion over the question of the military or civilian character of the chairman.

The entire spectacle is a sad commentary on democracy. Sugar-coated though it is, the underlying program is unadulterated censorship, not merely for the purpose of safeguarding military information but for the purpose of permitting the public to hear only such facts and propaganda as those in power deem good for listeners, i.e., to "maintain morale." Plans are seductively put forth on the basis of "collaboration with the industry" but it is too clear for words that if "collaboration" is not satisfactory to the officials it will be replaced by rigid program supervision by Government agents. Of what avail is liberty of expression if it is denied on the very issues most important to the citizen?

THE ADOPTION OF PROGRAM STANDARDS BY THE INDUSTRY. At its annual convention held July 10-13, 1939, at Atlantic City, the National Association of Broadcasters adopted a voluntary code embracing program standards. By later action of its Board of Directors, the code was made effective October 1, 1939.

A nationwide controversy was provoked by the provision:

> "Time for the presentation of controversial issues shall not be sold, except for political broadcasts"

largely, although not entirely, because Father Coughlin fell under the ban. The majority of Coughlin's contracts were to expire October 29th. A number of station-owners announced they intended to ignore the code and threatened resignation from the Association. Criticism against the provision was launched by a number of newspapers editorially and by several columnists, although, curiously enough, the provision was supported by the American Civil Liberties Union. On October 26, 1939, in a network radio address, Chairman Fly endorsed the code and urged that it be given a "fair opportunity to work," implying that if it did not governmental regulation might eventually be necessary. Fortunately, however, the controversy subsided, with only a handful of resignations and without the necessity of the Association's invoking summary action against any of its members. Incidentally, Father Coughlin's network dwindled to very small dimensions.

The outbreak of war on September 1, 1939, led networks and stations to establish and thereafter to observe self-imposed standards designed to

minimize unneutral broadcasting. On October 9, 1939, Chairman Fly praised the industry's handling of the matter as "an excellent example of industrial self-regulation."

The revival of alarm over the crisis in the spring of 1940 was reflected in a resolution adopted by the Association's Board on June 22, 1940 with reference to foreign-language programs. Stations were urged

> " * * to exercise extreme precautions against the use of their facilities wittingly or unwittingly to promote propaganda inimical to the interests of the United States. Scripts should be carefully scrutinized in advance by station managers and appropriate measures should be taken to guard against deviation from approved scripts."

This was followed by a statement by the Association's president interpreting the Board's action as recommending that all stations carrying foreign-language programs should carefully read and appraise them in the light of American national defense, should employ linguists to supervise actual presentation on the air to prevent insertions or deviations from the scripts, and should keep a complete file of the scripts. On June 27th the Association began a survey of the use of such programs through questionnaires.

PART III

REGULATION OF RADIO SERVICES RELATED TO BROADCASTING

A. INTERNATIONAL BROADCAST STATIONS

Beginning July 14, 1939, the Commission held the hearing forecast in last year's article* on the widely criticized provision in its proposed regulations governing international broadcast stations, 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 intended for, and directed to an audience in the continental United States does not meet the requirements for this service."

In its announcement, the Commission stated that an open hearing was desirable "particularly in view of the fact that the application of the rules has been misunderstood in some quarters."

At the opening of the hearing the Commission announced that the rule in question would be suspended pending the proceeding and read a statement explaining its intention and disclaiming any censorship purpose, containing the following:

> "The Commission intended by this rule to require international broadcast stations, which are licensed for the purpose of rendering a program service intended for general public reception in foreign countries, to render a program service designed for reception by the people of such countries as distinguished from a program service intended only for reception in this country. It was

*VARIETY RADIO DIRECTORY, III, p. 954.

further intended to define the primary purpose and objectives of international broadcast stations for reasons provided in international agreements to which the United States is a party."

The hearing was marked by considerable feeling and frequent outbursts, on the part of both members of the Commission and counsel. There were continued repercussions in Congress.*

No action resulted, however, and by resolution adopted September 27, 1939, the Commission further suspended the rule, stating that the outbreak of the European War had injected various additional significant factors and that on September 6, 1939, it had appointed a committee to study various phases of communications problems in relation to current war conditions, including international broadcasting. Nothing has been heard of the matter since then.

On April 13, 1940, the Commission adopted new rules authorizing standard and non-commercial educational broadcast stations to pick up and rebroadcast programs of international broadcast stations, restricting the privilege, however, to non-profit purposes. The action resulted from a petition by WNYC, the municipally-owned broadcast station at New York City, strongly supported by Mayor LaGuardia. Commissioner Craven questioned the Commission's right to impose the non-profit restriction.

B. VISUAL BROADCAST SERVICE

As noted in last year's article† the Commission's Television Committee submitted Part I of its Report on May 22, 1937, and it was adopted on June 27, 1939. At that time it was thought that the second phase of the Committee's operations would be the formulation of a definite licensing policy and consideration of pending applications.

Under an amended rule announced August 3, 1939, the Commission commenced the practice of identifying television channels by group and number rather than by frequency. The channels were divided into 3 groups, A, B, and C. Group A comprised the 7 channels in the range 44-108 mc., numbered in the order of frequency band, channel No. 1 being 44-50 mc. Group B comprised the 12 channels in the range 156-294 mc., and Group C comprised unspecified channels above 300 mc.

On November 15, 1939, the Television Committee made its second report, accompanied by a recommended set of revised regulations. The principal new features of the proposed regulations revolved about the setting up of two types of television broadcast stations, Class I, to be known as "Experimental Research Stations" and, Class II, to be known as "Experimental Program Stations." The latter class was to be permitted to engage in what became known as "limited commercialization," that is, the program facilities and funds contributed by sponsors were limited to use

* An unsuccessful attempt was made to attach a rider to the Commission's appropriations preventing use of the funds for enforcement of the rules. A bill to invalidate the rule was introduced in the House July 13, 1939, by Representative Corcoran of Missouri, and on the preceding day Representative McLeod of Michigan made an address vigorously attacking it.

† VARIETY RADIO DIRECTORY, III, pp. 957, 959.

primarily for experimental development of television program service. Class II stations were further to be required to maintain a minimum scheduled program service of 5 hours a week. It was further to be required that Class II stations should operate "in accordance with the television transmission standards * * which the Commission recognizes for this class of station." The Commission would

> "* * recognize a modification of these standards upon a showing by the applicant proposing the changes that it will be in the public interest to require all Class II stations to adopt the proposed changes."

While no standards were specified in the proposed regulations, the Report itself stated:

> "While the future may require changes in the RMA * standards by reason of improved and proved technical progress, the Committee recognizes that for the time being these standards must be used for scheduled program service, and recommends that similar action be taken by the Commission."

The proposed regulations further provided that, of the 7 channels in Group A,† not more than three should be assigned to cities having a population exceeding 1,000,000; not more than two to cities having a population from 500,000 to 1,000,000; and not more than one to smaller cities. An allocation of channel assignments to cities was attached and the Committee recommended that "it be utilized as a guide for allocating television stations" of the Class II type.

On December 22, 1939, the Commission ordered a hearing to be held January 15, 1940, on the proposed new rules. There were immediate indications of opposition within the industry to certain of the provisions, particularly the authorization of limited commercialization and the fixing of the RMA standards. Controversies also arose out of the proposed allocation of channels to cities. That the allocation of Channel No. 1 (44-50 mc.) to television would be challenged was foreshadowed at a meeting of the proponents of frequency modulation held on January 5, 1940.

The television hearing lasted from January 15th to 23rd. In opposition to limited commercialization it was urged that the widespread sale of television receiving apparatus would automatically have the effect of freezing standards at the level of the RMA standards, shutting the door to improved service which appeared near at hand with respect to number of lines per picture and frames per second, polarization, synchronization systems, and other matters. For the same reason, it was urged that the RMA standards be not made compulsory. Proponents of the rules as recommended vigorously urged the contrary.

On February 29, 1940, the Commission promulgated revised television rules and accompanied them with a report containing a statement of reasons. It adopted the classification of stations into two classes but deferred

* Radio Manufacturers Association. See VARIETY RADIO DIRECTORY, III, p. 958.

† In the present state of the art, only these seven channels are susceptible of practical use, and even the upper two or three are none too desirable.

the "limited commercialization" privilege for Class II stations until September 1, 1940. It eliminated any requirement of adherence to standards. The regulations made the following announcement compulsory:

"This is a special television broadcast made by authority of the Federal Communications Commission for experimental purposes."

In its report the Commission warned against the freezing of standards by industry agreement and excessive commercial activity.

As a result of an intensive merchandizing and sales campaign by RCA to sell television receiving apparatus to the public, the Commission suddenly acted on March 23, 1940 (Commissioner Craven dissenting) to suspend its rule permitting limited commercialization as of September 1, 1940, and ordered a further hearing on April 8th. Its action was followed by a barrage of criticism in the press and in Congress, with the charge that the Commission was exceeding its powers and attempting to regulate the manufacture and sale of receiving apparatus. On April 10th, while the hearing was in progress, the Senate Interstate Commerce Committee held a hearing on a resolution introduced by Senator Lundeen of Minnesota calling for an investigation. The resolution was never reported out. On April 12th the matter achieved the dignity of comment by the President at a press conference.

On May 27, 1940, by unanimous vote, the Commission adopted a 29-page report in which it eliminated the Class II type and did away with the rule permitting "limited commercial operation." In substance, the action returned television to an experimental basis, although there were intimations that the Commission would cooperate with the industry in working out standards and that when this was accomplished, commercialization privileges (perhaps full instead of limited) would be authorized. Afterwards, on June 18, 1940, the new rules were released and the Commission announced tentative approval of 23 applications for television stations, of which 18 were authorized to furnish television programs to the public and five were restricted to research. A number of other applications was held pending the making of a satisfactory showing. It stipulated that in the seven Group A channels no person should operate or control more than three public programming television stations, or more than one in the same service area.

In the meantime, as explained under the next subheading, the Commission had deprived television of former Channel No. 1 (44-50 mc.), assigning it to frequency modulation, so that the band 50-56 mc. became Channel No. 1. The band 60-66 mc. was yielded by Government services to become Channel No. 2. Channel 8 in Group B was also sacrificed, in order to make way for Government demands.

C. HIGH FREQUENCY BROADCAST STATIONS—FREQUENCY MODULATION

The progress made by wide-band frequency modulation (FM) during the past year resembles little short of a blitzkrieg.

The advantages claimed for the new system, invented by Major E. H. Armstrong, were briefly reviewed in last year's article.* By the summer

* VARIETY RADIO DIRECTORY, III, p. 960.

of 1939, two FM stations were in operation and a third was expected to commence in the early fall. Applications commenced to multiply, and it became apparent that a serious allocation problem was in the offing.

Under the regulations then in force, a total of 13 channels, each 200 kc. in width, had been provided, four in the 25 mc. band, five in the 42-43 mc. band, and four in the 117 mc. band. Of the three bands, however, the only one considered desirable was 42.5-43.5 mc., and all applications were directed at it. On December 19, 1939, the Commission ordered a hearing for February 28, 1940, to consider the use of ultra-high frequencies for regular broadcasting service, with particular reference to allocation. On January 5, 1940, a large group of FM broadcasters and persons having FM applications pending before the Commission met and organized for the purpose of a unified presentation at the hearing and generally for furthering the interests of the new system. Through extremely effective publicity and demonstrations, this organization, cooperating with Major Armstrong, aroused a country-wide interest, with a favorable press and formidable support in Congress.

The hearing was postponed to March 18, 1940, and lasted 10 days. The organization urged a large increase in the channels in the 40-50 mc. band and immediate full commercialization privileges. On the latter point there was no controversy but the need for the large number of additional channels claimed was earnestly disputed. Opposing contentions were based, among other things, on conflicting technical evidence as to the desirable channel width, one school advocating 200 kc. (wide-band) and the other (principally RCA) asserting that 100 mc. or less is sufficient.

On May 20, 1940, the Commission issued its report, accompanied by its Order No. 67, announcing that it was making available the entire band 42-50 mc. for frequency modulation on a 200 kc. channel basis, thus providing 40 channels, of which 35 would be allocated to regular commercial broadcast stations and five (in the band 42-43 mc.) to non-commercial educational broadcast stations. It declared that FM broadcasting on a commercial basis is desirable in the public interest, that the new allocations would become effective immediately on a limited basis, and that after January 1, 1941, unlimited operation may be authorized.

The allocation entailed the sacrifice of former television channel No. 1 (44-50 mc.) and, indirectly, of television channel No. 8 (156-162 mc.), although the loss was in part compensated as explained under the previous subheading. The former FM allocations in the 26 mc. and 117 mc. bands were discontinued. The wide-band channel was approved because it "makes possible a reduction of noise to a greater extent than attained with narrow-band standard broadcast" and because "the narrower band width would jeopardize use of facsimile transmission on the same channel."

The Commission stated that there was unanimous agreement at the hearing that FM is superior to amplitude modulation for broadcasting on frequencies above 25 mc., with respect to fidelity and freedom from interference. It declared that FM "is highly developed" and that "it is ready to move forward on a broad scale and on a full commercial basis." On the other hand, it stated that the new service would not supplant the service

of standard broadcast stations generally, certainly for a number of years.*

By the time the Report was published nearly 200 applications for new FM stations were on file with the Commission. These were returned, pending the issuance of new regulations and the adoption of a new application form.

On June 22, 1940, the Commission promulgated new rules and allocations governing the new service, followed by the publication of engineering standards. It appeared that the maximum number of such stations that could be accommodated in any single major market area was 11. The 35 channels were divided into three categories: six channels for towns of less than 25,000, with a coverage radius of about 12.5 miles; 22 channels for cities over 25,000, with a coverage radius of about 31 miles; and seven channels for large coverage embracing two or more large cities with a surrounding rural area or, in exceptional cases, one large city and a sizeable rural area in the environs, with a probable radius of from 70 to 100 miles. A power range from 50 watts with an antenna height of 100 feet to 50 kw. with an antenna height as much as 1,000 feet or more is indicated by the engineering standards.

FM stations will be required to broadcast programs not duplicated in the same area and having high fidelity characteristics at least one hour each day and night. No person is to be allowed to own or control more than one FM station serving a given area, and ownership or control of more than six stations is to be considered "inconsistent with public interest." Facsimile, multiplexed on the same channel, is authorized on a commercial basis.

On June 28, 1940, the new application form was approved (Form 319). It contained, in substance, all the questions, previously summarized, in the standard broadcast application form, together with new subjects of inquiry. Among the innovations is a direction to "describe fully the cultural, economic, and other characteristics common to the area to be served, and which establish it as a logical service area." Another, noteworthy in view of the Commission's recent viewpoint on the economic factor in connection with standard broadcast stations, is the following:

> "If application is for a new high frequency broadcast station to serve wholly or substantially an area already served by an existing or contemplated high frequency broadcast station, state fully the facts upon which reliance is placed to show applicant can compete effectively with such existing or contemplated station."

PART IV

APPEALS FROM THE COMMISSION'S DECISIONS

SUMMARY. During the past year, for the first time since *Federal Radio*

* The evidence at the hearing disclosed rather convincingly that, because of its somewhat restricted range and coverage, it was doubtful whether FM could ever perform the service now rendered by clear channel stations to the wide rural and sparsely settled areas.

Commission v. *Nelson Bros. Bond & Mortgage Co.*,* decided in the spring of 1933, the Supreme Court has consented to review decisions of the United States Court of Appeals for the District of Columbia arising on appeal from the Commission. During the year it has rendered three decisions in such cases, and it has recently granted a petition for certiorari in a fourth.† In all four, review was accorded at the Government's request. In fact, although frequent attempts have been made over the years, the Supreme Court has never granted certiorari to a private party in a case arising on appeal from a decision of the Commission.

During the year the United States Court of Appeals has rendered nine final or interlocutory decisions accompanied by opinions.‡ Due to the peculiar turn taken in the Court of Appeals toward deciding questions on the merits in passing on motions to dismiss, five of the cases were disposed of by orders dismissing the appeals.** In two cases motions to dismiss filed by the Commission were denied.†† In one case, both a motion to dismiss by the Commission and a motion for a stay order by appellant were denied.‡‡ In only one case was the Commission's decision affirmed.*** In 10 additional cases the court dismissed appeals without opinion, seven on the motion of appellant.

In one case†††arising in the United States District Court for the Dis-

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* 289 U. S. 266.

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†The three decisions already rendered are F.C.C. v. Pottsville Broadcasting Co., 309 U. S. 134 (decided January 29, 1940); Fly v. Heitmeyer, 309 U. S. 146 (decided the same day); and F.C.C. v. Sanders Bros. Radio Station, 309 U. S. 470 (decided March 25, 1940), opinion amended 309 U. S. 642. The case pending on writ of certiorari is F.C.C. v. Associated Broadcasters, Inc., certiorari granted May 6, 1940.

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‡ Yankee Network, Inc. v. F.C.C 107 F. (2nd) 212 (August 14, 1939); Massachusetts Broadcasting Corp. v. F.C.C. 107 F. (2d) 1007 (a per curiam opinion, October 23, 1939); The Greater Kampeska Radio Corp. v. F.C.C., 108 F. (2d) 5 (October 16, 1939); Ward v. F.C.C., 108 F. (2d) 486 (November 13, 1939); Tri-State Broadcasting Co., Inc. v. F.C.C., 107 F. (2d) 956 (November 13, 1939); The Associated Broadcasters, Inc. v. F.C.C., 108 F. (2d) 737 (November 29, 1939); WOKO, Inc. v. F.C.C., 109 F. (2d) 665 (December 11, 1939); Florida Broadcasting Co. v. F.C.C., 109 F. (2d) 668 (December 11, 1939); Evans v. F.C.C., not yet reported (April 29, 1940).

** The Yankee Network, Massachusetts Broadcasting, Ward, Tri-State Broadcasting, and WOKO, Inc., cases.

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†† Associated Broadcasters, Inc. and Florida Broadcasting Co. The ruling in the former was immediately and directly made the subject of a petition for certiorari which was granted by the Supreme Court.

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‡‡ The Evans case.

*** The Greater Kampeska Radio Corp. case.

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††† Sunshine Broadcasting Co. v. Fly et al., Civil Action No. 4638, District Court of the United States for the District of Columbia (June 15, 1940).

trict of Columbia, an opinion rendered in connection with the dismissal of a complaint involved an issue so closely related to those hereafter discussed (the issue of economic injury) that it is cited in passing.

COMMISSION PROCEDURE FOLLOWING REVERSAL BY THE COURT OF APPEALS. In last year's article, the tangled and complex situation arising out of the Commission's procedure in three cases where the decisions denying applications had been reversed by the Court of Appeals was reviewed.* In two of the cases the Commission sought and was granted a review in the Supreme Court, and was successful in both cases.

In one of the cases, the Pottsville Broadcasting Company's application for a new station in Pottsville, Pa., had been denied by the Commission and, on appeal, the Commission had been reversed for an error of law in the reasons it gave for the denial. Thereafter, instead of granting the application as desired by the applicant, the Commission set it for argument along with two rival applications for the same facilities. The latter applications had been filed subsequently but were undisposed of when the Pottsville case was returned to the Commission.

In the other case, under somewhat similar circumstances, involving a new station in Cheyenne, Wyoming, after reversal by the Court, the Commission proposed not only to reconsider Heitmeyer's application or oral argument with subsequently filed rival applications but to reopen the record and take new evidence on the comparative ability of the several applicants to meet the test of "public interest, convenience or necessity." An interesting additional factor in the Heitmeyer case was that by the time the case went back to court the only competing application asked for a different frequency assignment in Cheyenne, so that no interference question or other technical factor was involved and the only basis for placing the two applications in competition lay in economic considerations such as the ability of Cheyenne to support more than one station and the possible injurious competitive effect of two stations in the city. In both cases, on further recourse to the Court of Appeals by the original applicants, the Court had taken the Commission to task for failure to conform to its mandates.

In both cases the Supreme Court sustained the Commission's contentions and reversed the Court of Appeals. The result was not unexpected and, in the writer's opinion,† was correct. The language of the Supreme Court's opinion in the Pottsville case, however, written by Mr. Justice Frankfurter, contained very significant implications (as well as a few obviously incorrect statements apparently due to carelessness) favoring a broad view of the Commission's discretion and a narrow view of the extent of judicial control on appeal.

In a case decided since then, on April 29, 1940, the Court of Appeals has had occasion to apply the Supreme Court's reasoning in the Pottsville case

* VARIETY RADIO DIRECTORY, III, p. 971. The three cases were Courier-Post Pub. Co. v. F.C.C., 104 F. (2d) 213; Pottsville Broadcasting Corp. v. F.C.C., 105 F. (2d) 36; McNinch v. Heitmeyer, 105 F. (2d) 41.

† VARIETY RADIO DIRECTORY, III, p. 973.

to a motion for a stay order.* The appellant was the owner and licensee of an existing station at Spartanburg, S. C. He appealed from a Commission decision granting an application for a new station in the same city. Three days before the appeal was taken, the permittee of the new station filed an application for modification of its construction permit, requesting changes in frequency, power and other features of the permit. Appellant filed with the Court a motion for an order directing the Commission to stay all further proceedings in connection with the modification application or any application of the permittee for authority to construct or operate a new station in the city. The motion was denied.

ECONOMIC FACTORS. The earlier history of the attitude both of the Commission and the Court of Appeals toward recognition of economic factors was reviewed in last year's article.† As there pointed out, in the early months of 1939 the Commission's Law Department announced a change of philosophy, inconsistent with the principles then and for several months later applied by the Commission itself. It contended that Sec. 402 (b) (2) of the Act, which confers the right of appeal on

> " * * any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application"

does not confer the right of appeal on the licensee of an existing station in a given community from a Commission decision granting an application for a new station in that community, on the ground of economic damage through loss of advertising, even though substantial, or through loss of audience, talent or program material.‡ The Law Department sought to make the contention effective by filing a motion for rehearing in one case which the Court of Appeals had already decided,** and in briefs and arguments in support of motions to dismiss appeals in other cases then pending. The petition for rehearing was denied on August 2, 1939, but in one of the pending cases, *Yankee Network, Inc.* v. *F.C.C.*,†† the Court on August 14th rendered a lengthy opinion, written by Mr. Justice Miller, in which the contentions were carefully reviewed and rejected. It found, however, that in that particular case the Commission's findings were sufficient to support its determination, and dismissed the appeal on the ground that appellant had failed in fact to show destructive economic competition. Because the result

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* The Evans case.

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† VARIETY RADIO DIRECTORY, III, pp. 923, 967.

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‡ The Law Department at the same time took a similar position with respect to injury caused by interference occurring outside the "normally protected" contour of an existing station, and with respect to an applicant for new or additional facilities where the Commission grants those facilities to another applicant.

** Sanders Bros. Radio Station v. F.C.C., 106 F. (2d) 321, decided January 23, 1939. A portion of the petition for rehearsing is quoted in Part II, A.

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†† 107 F. (2d) 212.

was favorable to the Commission, although the principles announced in the opinion were against the Law Department's contentions, the Commission was unable to seek review in the Supreme Court. Instead, it sought a writ of certiorari in the Sanders Bros. Radio Station case, in which the contention had been made for the first time on petition for rehearing. The Supreme Court granted the petition on December 11, 1939.

Before undertaking to summarize the Supreme Court's decision in the Sanders case, it will be helpful to note further decisions of the Court of Appeals on the same issue. It continued to pass on the question on motions to dismiss, confusing what would appear to be two separate and distinct questions: (1) whether the appellant has the right to appeal because of apprehended economic injury, and (2) whether the establishment of the proposed new station will have so serious an economic effect both on existing stations and on its own operations as to destroy or impair service in the public interest. Once the right to appeal is recognized, logic requires that the appellant be permitted to raise any question, economic or otherwise, which the Commission has erroneously decided and the Court has power to review. In a succession of cases, however, the Court held that to confer the right to appeal the appellant's apprehended economic injury must result in such severe loss of operating revenue as to destroy or seriously impair the licensee's ability to render service in the public interest, and that lack of a showing to this effect entails a dismissal of the appeal.* In giving effect to this view the Court even examined into the record to determine whether there was evidence supporting Commission findings that no such degree of injury was present, and, where such evidence was present, dismissed the appeal and refused to consider other alleged errors specified by the appellant. In another case,† however, the Court held a statement of reasons for appeal sufficient which stated the point briefly.

On March 25, 1940, the Supreme Court rendered its decision in the Sanders Bros. Radio Station case, again reversing the Court of Appeals. In an opinion written by Mr. Justice Roberts, the Supreme Court properly distinguished between the two questions which had been confused by the Court of Appeals and, rejecting the contention that the licensee of an existing station had no right to appeal because of economic injury, said that the licensee "had the requisite standing to appeal and to raise, in the court below, any relevant question of law in respect of the order of the Commission." To have the right to appeal, therefore, it is not necessary that the apprehended economic injury be destructive of service in the public interest. On the merits, however, the Court found in favor of the Commission, saying, in general, that its findings were sufficient. The opinion contained important pronouncements which can hardly be viewed as a victory for the Commission, including the following:

> "But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the

* This view was first expressed in the Yankee Network case and was followed in the Massachusetts Broadcasting Corp., Tri-State Broadcasting Company, and WOKO, Inc., cases.

† Florida Broadcasting Co.

programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

* * * *

"Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

"This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. These matters, however, are distinct from the consideration that, if a license be granted, competition between the licensee and any other existing station may cause economic loss to the latter * * "

In substance, therefore, the Supreme Court has held that the test which the Court of Appeals had been applying to the right to appeal is a perfectly valid test of the correctness or incorrectness of the Commission's decision. Other questions were directly or indirectly passed on and will be noted in other connections below.

In a decision rendered April 29, 1940,* the Court of Appeals had occasion to apply the principles announced by the Supreme Court and denied a Commission motion to dismiss an appeal.

PROCEDURAL RIGHTS OF PERSONS ADVERSELY AFFECTED. Sec. 405 of the Act, having to do with petitions for rehearing, contains substantially the same phraseology as the appeal section just discussed:

> "Such application may be made by any party or any person aggrieved or whose interests are adversely affected"

by a decision of the Commission. It may be assumed, therefore, that the holding of the Supreme Court in the Sanders case applies with equal force to the right of rehearing.

The Commission's Law Department has, during the period under discussion, contended that under Sec. 309 (a) of the Act, having to do with applications for license, or for renewal or modification of license, the Commission (1) may grant any such application without hearing, no matter how

* The Evans case.

seriously its grant may injure another licensee or another applicant, whether economically or by interference or through making the grant of the other application impossible; (2) need hold a hearing only as a condition precedent to a denial of an application; (3) may, after hearing, grant an application without regard to the rights of any person adversely affected and without making or publishing any findings at least for a period of 60 days after an appeal is taken. These contentions were, in large measure, based on the somewhat peculiar phraseology of the section, but underlying them was an inarticulate premise that the Commission is a purely executive agency and is immune from the requirements of due process of law. *A fortiori,* the Law Department made equivalent or broader contentions as to the proper construction of Sec. 319, having to do with applications for construction permit, and Sec. 310(b), having to do with applications for the Commission's consent to assignments and transfers.

These contentions were presented to the Supreme Court in the Sanders case and, it would seem from the language of the opinion, were rejected by clear implication.

ASSIGNMENT-OF-LICENSE CASES. On November 29, 1939, the Court of Appeals, overruling an earlier decision,* held that an applicant for Commission approval of a transfer of license to the applicant is to be considered an applicant for a radio station license under Sec. 402(b)(1) of the Act and has the right to appeal from a Commission decision denying the application.† The Court said that it was unnecessary to determine whether the assignor of the license also is an applicant within the same clause, since in any event the assignor would come within the description of a person aggrieved or whose interests are adversely affected under Sec. 402(b)(2). The Court denied the Commission's motion to dismiss the appeal, whereupon the Commission sought, and, on May 16, 1940, was granted a writ of certiorari bringing the case before the Supreme Court, where it is now pending.

USE OF CONFIDENTIAL MEMORANDA. In the Sanders case the Supreme Court declined to disturb the conclusion reached by the Court of Appeals in the matter of the Commission's alleged use of confidential memoranda *dehors* the record in arriving at its decisions.

MISCELLANEOUS. In the one case‡ in which the Court of Appeals affirmed a Commission decision during the year, the Commission had refused to grant a renewal of license because of charges, supported by evidence at a hearing, of several violations of the Commission's rules governing the technical operation of stations and of an unauthorized transfer of

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* Pote v. Federal Radio Commission, 67 F. (2d) 509, *cert. denied* 290 U. S. 680, likewise by a divided court. Justice Groner, who dissented in the earlier case, was with the majority in the later case.

† Associated Broadcasters, Inc. Mr. Justice Stephens dissented.

‡ The Greater Kampeska Radio Corp. case.

control of the licensee corporation. The Court held that the record fully justified the Commission's action, and rejected contentions based on the alleged inconsequential character of the violations and on the fact that the delinquencies had occurred prior to the previous granting of a renewal by the Commission.

In another case* the Court of Appeals held that injury by way of electrical interference from a proposed station to an existing station confers the right of appeal; and that a licensee who has an application pending which may be affected by the grant of another application has no standing to appeal from the grant of the latter if he fails to request a joint hearing.

The foregoing review does not completely cover all the points directly or indirectly passed on by the Court of Appeals during the year, but the few omitted have to do with relatively technical procedural matters.

NEW RULES GOVERNING APPEALS. On August 16, 1939, effective September 1st, the Court of Appeals promulgated new rules governing appeals from decisions of the Commission, designed to expedite the handling of cases and to reduce the expense of appeals by reduction in the size of records. The new rules followed informal conferences between the Court, the Commission's Law Department and officers of the Federal Communications Bar Association. A further revision is now under consideration.

PART V

INTERNATIONAL RADIO REGULATION

A. THE INTERNATIONAL TELECOMMUNICATIONS CONVENTION

On July 21, 1939, the Senate approved the revision of the General Radio Regulations negotiated at the International Telecommunications Conference held at Cairo early in 1938. The Regulations constitute an annex to the International Telecommunications Convention, Madrid, 1932, to which the United States is a party.

In view of the international situation it is, of course, problematical whether the next Conference, scheduled for Rome in 1943, will be held. In principle these Conferences are held every five years.

B. THE NORTH AMERICAN REGIONAL BROADCASTING AGREEMENT

The North American Regional Broadcasting Agreement became an accomplished fact March 29, 1940, with the formal deposit of Mexico's unconditional ratification with the Cuban Government. Under the terms of the Agreement its validity depended on ratification by the four principal countries, the United States, Canada, Cuba and Mexico, and its provisions were to become effective one year thereafter. The first three countries gave their assent rather promptly but delays encountered in Mexico caused widespread apprehension that the labors and the remarkable achievements

* The Ward case.

of the Havana Conference in the latter part of 1937 would go for naught.

As explained in last year's article, the obstacles to Mexican ratification proceeded from political pressure engendered by the so-called border stations. Because of their activities, the Mexican Senate twice refused to give its assent and, even after it had acted favorably (in the latter part of December, 1939), there were heart-breaking delays in completing the further requisite formalities, including signature of the Agreement by President Cardenas (January 25, 1940), publication in the *Dairo Official* (in February) and deposit of the ratification at Havana.

At first, it appears, Mexico insisted, as a condition to its ratification, that the Agreement be modified to permit use of its clear channel assignments by border stations. Since then, it is believed, an unwritten gentlemen's agreement has been entered into whereby the United States has agreed not to license any full-time stations on four of Mexico's six Class I-A channels and to license not more than one station (each at a specified location, in New York and Detroit) on each of the other two such channels. In the absence of such an understanding the Agreement permits the United States to assign stations to these channels at distances greater than 650 miles from the Mexican border, provided their interfering signals in the direction of Mexico are suppressed to very low prescribed levels. The manifest purpose of such an understanding would be to insure coverage in the United States for the Mexican stations on those channels. Further proposals by Mexico to be incorporated in the understanding, contemplating a change in the location of certain of Mexico's Class I-A stations to points closer to the boundary of the United States than contemplated by the Agreement, have, it is said, been rejected. One of these proposed the use of 800 kc. at Rosarita, Southern California, rather than in the province of Sonora (presumably at Hermisillo). The other proposed the use of 1220 kc. at Mexico City instead of in Yucatan. Whatever be the terms of the understanding, it is said that Canada and Cuba will follow the lead of the United States.

In any event, the ratification of the Agreement is the successful culmination of a brilliant diplomatic and technical achievement by the United States Delegation to the Havana Conference in 1937, headed by Commissioner Craven. If placed in effect, it will bring about a remarkably sound and scientific allocation of broadcast facilities throughout North America, with scrupulous regard to the rights of each country and a minimum of disturbance of the existing allocation in the United States, a welcome reduction in the ruinous interference now experienced on most of the standard broadcast channels in the rural areas over the entire continent, a marked improvement in service in each of the countries with latitude for future improvement, and international recognition of the standards of good engineering practice which have been developed since 1928 by the Commission's Engineering Department. There remains the arduous task of placing the Agreement in effective operation, for which a period of one year from March 29, 1940 is provided but which it is hoped can be accomplished in a somewhat shorter time, perhaps early in 1941. It is to facilitate the necessary shift in frequency assignments that the Commission has modified all outstanding licenses to expire on a common date, at first fixed at August 1, 1940 and since extended to October 1, 1940.

C. MISCELLANEOUS

On July 21, 1939, the United States Senate gave its assent to the regional radio convention between the United States and the countries of Central America, covering the allocation of medium high-frequency channels for broadcasting among the seven nations involved, together with technical and other standards governing the use of the channels. The convention had been negotiated and signed at Guatemala, December 8, 1938.

The second Inter-American Radio Conference was held at Santiago, Chile, January 18-26, 1940 (the first having been held at Havana in 1937). Representatives of 19 out of 22 American countries were represented at the meeting. Revisions were made in the Inter-American Radiocommunications Arrangements (signed at Havana in 1937) with respect to allocation and other matters relating to high frequency, amateur, police and aeronautical facilities. The band 550-1600 kc. was recognized as exclusively for standard broadcast service in the Western Hemisphere but broadcast service as such did not enter the deliberations. The Conference declared continued approval of the other two principal accomplishments of the Havana Conference, the Inter-American Radio Convention and the North American Regional Broadcasting Agreement, notwithstanding efforts by a minority at the outset to bring about changes.

FEDERAL COMMUNICATIONS COMMISSION COMMISSIONERS

FLY, JAMES LAWRENCE. Nominated chairman of the FCC to succeed Frank R. McNinch (resigned) July 28, 1939. **Political party:** Democrat. **Length of appointment:** To July 1, 1942. **Previously:** In the U. S. Navy to 1923 (graduate, U. S. Naval Academy); law clerk with Burlingham, Veeder, Masten, and Feary (New York City); associated with White and Case (New York City); appointed special assistant to the attorney-general, 1929; in 1934 he became general solicitor of the Tennessee Valley Authority, general counsel to the Electric Home and Farm Authority, and counsel for the Tennessee Valley Associated Cooperatives. **Born:** Feb. 22, 1898, in Seagoville, Texas.

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 Commission 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, 1946. **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.

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