University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, November to June, by the University of Pennsylvania Law School,
at 34th and Chestnut Streets, Philadelphia, Pa.

VOL. 79

DECEMBER, 1930

No. 2

PRINCIPLES GOVERNING THE LICENSING OF BROADCASTING STATIONS

LOUIS G. CALDWELL

I. INTRODUCTORY

The Federal Radio Commission, in exercising the functions reposed in it by the Radio Act of 1927,¹ is governed by the standard of "public interest, convenience or necessity."² This standard controls the Commission in the exercise both of its quasi-legislative functions, *i. e.*, in making rules and regulations, and of its quasi-judicial functions, *i. e.*, in acting upon applications for construction permits, licenses, and renewals or modifications of licenses. It constitutes the substantive law of federal regulation of radio communication.

In articles which have appeared elsewhere, I have endeavored to summarize the adjective law having to do with practice before the Commission³ and appeals from its decisions.⁴ In another

¹ 44 STAT. 1162 (1927), 47 U. S. C. § 81 (1928).

² The phrase appears in §§ 4, 9, 11, and 21 of the Act; 47 U. S. C. §§ 85, 89, 91, 101.

³ Caldwell, *Practice and Procedure before the Federal Radio Commission* (1930) 1 J. AIR LAW 144 (hereafter cited as *Radio Practice*). Since the appearance of the article the Commission has promulgated rules governing its procedure in part. They are available in pamphlet form.

⁴ Caldwell, *Appeals from Decisions of the Federal Radio Commission* (1930) 1 J. AIR LAW 274 (hereafter cited as *Radio Appeals*). On July 1, 1930 an amendment to the Radio Act, *supra* note 1, substituting a new §16, was approved (PUBLIC LAWS 494) which has both solved some of the difficulties raised by the original section and introduced some new ones.

article I have endeavored to interpret the standard of public interest, convenience or necessity as applied to the quasi-legislative functions of the Commission.⁵ The present article will be devoted to a study of the standard as applied to the quasi-judicial functions of the Commission, with reference solely to broadcasting stations.

Of the eight opinions so far delivered by the Court of Appeals of the District of Columbia on appeals from decisions of the Commission, seven have concerned broadcasting stations.⁶ Of the sixty-two cases in which appeals have been taken to that Court from decisions of the Commission (in which, except for a few which were dismissed at an early stage, the Commission has filed written statements of its grounds for decision), forty-eight have concerned broadcasting stations.⁷ In addition, there are miscellaneous other sources of information as to the Commission's interpretation of the standard, including its annual reports to Congress and releases published by it from time to time. Consequently there is no dearth of material for the present study.

The validity of the Radio Act of 1927 is in issue in two cases now pending before the Supreme Court of the United States on

⁵ Caldwell, *The Standard of Public Interest, Convenience or Necessity as used in the Radio Act of 1927* (1930) 1 AIR LAW REV. 295 (hereafter cited as *Standard of Pub. Int.*).

⁶ *General Electric Co. v. Commission*, 31 F. (2d) 630 (Ct. of App. D. C. 1929); *Richmond Development Corp. v. Commission*, 35 F. (2d) 883 (Ct. of App. D. C. 1929); *Technical Radio Laboratory v. Commission*, 36 F. (2d) 111 (Ct. of App. D. C. 1929); *City of New York v. Commission*, 36 F. (2d) 115 (Ct. of App. D. C. 1929); *Carrell v. Commission*, 36 F. (2d) 117 (Ct. of App. D. C. 1929); *Great Lakes Broadcasting Co. v. Commission*, 37 F. (2d) 993 (Ct. of App. D. C. 1930); *Chicago Federation of Labor v. Commission*, 41 F. (2d) 422 (Ct. of App. D. C. 1930). The other case involving short wave applications is *Universal Service Wireless, Inc. v. Commission*, 41 F. (2d) 113 (Ct. of App. D. C. 1930). In the one case which has reached the United States Supreme Court, *Commission v. Gen'l Elec. Co.*, 281 U. S. 461, 50 Sup. Ct. 389 (1930), the decision turned solely on the jurisdiction of that Court to review decisions of the District Court of Appeals on appeals under sec. 16 of the Radio Act of 1927.

⁷ See *Report of the Standing Committee on Radio Law* (1929) 54 A. B. A. REP. 461, and *Report of Standing Committee on Communications* (1930) 55 *ibid.* 92 (available at present only in pamphlet form) for a list of these cases and of appeals taken. (These reports will hereafter be cited as *1929 Radio Com. Rep.* and *1930 Communications Com. Rep.* respectively). Unfortunately the Commission's statements filed on appeals are not available as a whole. Portions of them will be found in its Second and Third Annual Reports and the issues of the U. S. Daily. Others may be obtained in mimeograph form from the Commission.

questions certified to it by the Seventh Circuit Court of Appeals.⁸ One of the grounds of attack is that the standard of public interest, convenience or necessity is too vague and indefinite and constitutes an unlawful delegation of legislative authority. In view of the pendency of these cases I shall not, of course, express any opinions on the issues involved in them, and shall assume that the standard meets all requirements of the Constitution.

I am unable to avoid a preliminary review of a few matters which really fall under the heading of the quasi-legislative functions of the Commission. For the purposes of this study the range of radio waves suitable for practical use may be assumed to extend from the frequency of 10 kc.⁹ (corresponding to a wave-length of 30,000 meters) to the frequency of 30,000 kc. (corresponding to a wave-length of 10 meters).¹⁰ Theoretically, before the Commission can safely exercise its quasi-judicial functions and grant or reject applications for licenses, it must divide this range of radio waves, sometimes referred to as the radio spectrum, into smaller "bands", each to be allocated to one or more types of radio communication. Broadcasting is but one of many types of radio communication, and important services, such as transoceanic (and domestic) wireless telegraphy, transoceanic wireless telephony, maritime and aviation stations, amateurs, experimenters and others, must be accommodated. The Commission must also subdivide each band of waves into channels, a channel being a narrow band of frequencies believed to be necessary and sufficient for the operation of a single station. Again, the Commission must determine what technical standards of apparatus and of operation

⁸ The opinions of the United States District Court in these two cases are reported as *White v. Federal Radio Commission*, 29 F. (2d) 113 (N. D. Ill. 1928) and *United States v. American Bond and Mortgage Co.*, 31 F. (2d) 448 (N. D. Ill. 1929). The constitutionality of the Radio Act of 1912 was questioned by the same Court because of the absence of any standard to guide the Secretary of Commerce as the licensing authority in *United States v. Zenith Radio Corp.*, 12 F. (2d) 614 (N. D. Ill. 1926).

⁹ Abbreviation for kilocycle. One kilocycle equals 1000 cycles. The speed of radio waves is 300,000 kilometers per second. The frequency of a radio wave, expressed in kilocycles, is approximately 300,000 divided by its wave-length.

¹⁰ For an explanation of the scientific facts and principles involved see 1929 *Radio Com. Rep.* 410. The Commission has issued experimental licenses for the use of frequencies as high as 400,000 kc.

thereof it will impose upon its licensees, for upon this determination will depend to a great extent how wide the channels must be and how many licensees can be accommodated in a given band. There are other important quasi-legislative functions,¹¹ but the foregoing are all that need be mentioned in this connection. It is obvious that these are not isolated functions; on the contrary, they are inextricably interwoven, both with each other and with the quasi-judicial functions of the Commission.

In the exercise of its quasi-legislative functions the Commission has set aside the band of frequencies from 550 kc. (545 meters) to 1500 kc. (200 meters) exclusively for broadcasting,¹² and has determined that within that band (usually referred to as the "broadcast band") there shall be 96 channels, each 10 kc. in width. The channels are usually designated by their mid-frequency, and, thus designated, begin with 550 kc., 560 kc., 570 kc. and so on up to and including 1500 kc. Under an informal understanding with Canada, six of the 96 channels are set aside for exclusive Canadian use, leaving a total of 90 available for use in the United States.¹³ By its General Order 40¹⁴ of August 30, 1928, the Commission classified these 90 channels with reference to the power which may be used by stations assigned to them, and the number of stations permitted to operate simultaneously upon each class of channel. Disregarding four channels which fall into a special class, we may describe the classifications of the remaining 86 channels as follows: (a) 40 cleared channels for use by stations with power of five kilowatts or more, only one such station being permitted to use such a channel at any time after sundown;¹⁵

¹¹ *Radio Practice* 147, 148; *Standard of Pub. Int.* 298.

¹² To be technically correct the broadcast band should have been described as extending from 545 kc. to 1505 kc.

¹³ Of these ninety, eleven are shared by the United States and Canada.

¹⁴ SECOND ANNUAL REPORT OF THE FEDERAL RADIO COMMISSION (1928) 48, 49 (cited hereafter as 2ND ANN. REP.). The Commission's general orders are to be found in its annual reports and in the *Radio Service Bulletin* published monthly by the Department of Commerce. They are issued in mimeograph form by the Commission.

¹⁵ Because of absorption of radio waves by sunlight, more stations can safely be permitted to operate simultaneously in the daytime than after sundown.

(b) 40 regional channels for use by stations with power ranging from 250 watts to one kilowatt, an average of four such stations being permitted to use each such channel after sundown; and (c) 6 local channels for use by stations with power not exceeding 100 watts, a fairly large number (30 or more) such stations being permitted to use each such channel.¹⁶

The foregoing exercises by the Commission of its quasi-legislative functions have not been free from attack. It has been urged that the broadcast band should be extended to include some of the low frequencies (which are used by broadcasting stations in Europe¹⁷), or some of the frequencies above 1500 kc.; that the band should be contracted so as to provide additional frequencies for aviation; that the channel separation should be reduced from 10 kc. to $7\frac{1}{2}$ kc. for regional and local stations; that more cleared channels should be provided; that more (and less) regional stations should be provided; that fewer cleared channels should be assigned to a regional channel, etc. Some of these contentions are in issue in cases now pending before the Court of Appeals of the District of Columbia. In this article I shall refrain from discussing them and shall assume that the Commission has correctly exercised its quasi-legislative functions with respect to broadcasting.

On one matter there is, apparently, universal agreement: there are far too many broadcasting stations (particularly those of the regional class) in simultaneous operation. At the present writing the total is 608; the total has been as high as 732 (the number which the Commission found in existence when it was established under the Radio Act of 1927). The decrease from

¹⁶ Provision was also made in General Order 40, *supra* note 14, for partial compliance with the Davis Amendment, having to do with equality in geographical distribution of broadcasting stations. This is taken up under a later heading.

¹⁷ This is permitted to European countries only, by the International Radiotelegraph Convention of 1927, see ANNEXED REGULATIONS (1927) Art. 5, § 7. International complications, involving at least the nations on the North American continent, would arise in any extension or contraction of the broadcast band by the United States. Furthermore, both the informal character of our understanding with Canada and our lack of any understanding at all with Mexico with respect to the broadcast band, introduce decided elements of uncertainty as to the permanency of the present engineering structure in that band.

732 to 608 has been more apparent than real, since the eliminations have been largely of small stations of the local class which are not very troublesome factors in the problem, and there have been many increases of power among stations of the regional class, which cause the greatest difficulty. The history of events which led to this state of affairs, and the responsibility for it, are matters which fall outside the scope of this article.¹⁸ The fact itself of the excessive number of broadcasting stations is of great importance in the practical application of the standard of public interest, convenience or necessity. If the broadcast band were as yet entirely undisposed of, and if the Commission's task were simply to select, from a large number of applications, which ones should be granted and which localities in the United States should be favored with stations, its duty, while still not an easy one to perform, would be immeasurably simplified. Since, however, the broadcast band has been entirely disposed of and, in fact, is overpopulated with stations, and since the character of the licensees and the locations of stations under the Department of Commerce conformed to almost no standard, the problem is tremendously complicated with human and economic factors and with claims of acquired rights which, whatever their status under the Constitution, are difficult to ignore. The decisions of the Commission and of the Circuit Court of Appeals, interpreting the standard of public interest, convenience or necessity are inevitably influenced by such considerations.¹⁹

In a sense, therefore, so far as broadcasting stations are concerned, the standard has had to be applied retrospectively instead of prospectively, and to be enlisted in the process of reducing the number of stations and of opposing the establishment of new stations rather than in constructing an ideal allocation in the broadcast band.

¹⁸ See 1929 *Radio Com. Rep.* 439, 445; CODEL, RADIO AND ITS FUTURE (1930) 226-231.

¹⁹ In its statement in *Marquette University v. Commission*, No. 5253, the Commission said: "At the present time over-congestion exists in numerous communities and rather than increase this by allotting additional facilities, the Commission is duty bound to effect a reduction in the number of certain types and classes of stations."

II. GENERAL CONSIDERATIONS

a. Context in Radio Act of 1927

With reference to the statutory standard one judge has said:

"The words of the standard of public convenience or necessity must be read in connection with other portions of the act and interpreted in the light of its purpose."²⁰

There is not much to be found within the four corners of the Radio Act, however, which is helpful. Outside of the mandate as to geographical distribution of stations, and of some specific prohibitions against particular practices, there remain only a few general indications. As for the purpose of the Act, it is obvious that the Federal Radio Commission was not intended as a public utility commission, and that its primary function is technical regulation of traffic in the ether rather than economic regulation of the persons engaged in such traffic. As will be evident from what follows, however, a certain amount of economic regulation follows closely in the wake of technical regulation.

b. The Primary Test Is the Interest of the Listening Public

In the course of the Fourth National Radio Conference in 1925 a resolution was adopted to the effect "that public interest as represented by service to the listener shall be the basis for the broadcasting privilege."²¹ The Commission has repeatedly announced this same principle as the correct construction of public interest, convenience or necessity as applied to broadcasting stations, with respect both to its quasi-legislative and its quasi-judicial determinations.²²

c. The Standard Is Comparative, Not Absolute

In an interpretation of the standard published by the Commission on August 23, 1928, it was said:

²⁰ United States v. American Bond & Mortgage Co., *supra* note 8.

²¹ PROCEDURE OF THE FOURTH NATIONAL RADIO CONFERENCE (1926) 6 (available from the Government Printing Office, Washington, D. C., cited hereafter as PROC. OF FOURTH NAT. RADIO CONF.).

²² 2ND ANN. REP. 167, 169; Great Lakes Broadcasting Co. v. Commission, No. 4900.

"In conclusion, the commission desires to point out that the test—'public interest, convenience, or necessity'—becomes a matter of a comparative and not an absolute standard when applied to broadcasting stations. Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser." ²³

In one of its statements of grounds for decision, the Commission has stated:

"A different attitude must be taken in matters pending before the Commission than those before the courts. The very nature of the proceedings under the Radio Act makes them very difficult of proof since they are all a matter of comparative study and the Act itself sets up no definite procedure. In its ultimate analysis the proceeding is not between this individual station and that individual station; it is between the station licensee or applicant and the general public." ²⁴

d. Broadcasting Stations Are Not Common Carriers

Some have been led to assert that under the Radio Act broadcasters are common carriers and are under an obligation to permit

²³ 2ND ANN. REP. 169-170; see *General Electric Co. v. Commission*, No. 4870; *City of New York v. Commission*, No. 4898. See also *Chicago Federation of Labor v. Commission*, *supra* note 6, in which the Commission's procedure for determination of the comparative issue was approved. Cf. *General Electric Co. v. Commission*, *supra* note 6.

²⁴ *Missouri Broadcasting Corporation v. Commission*, No. 5204. It is rather difficult, however, to reconcile the above with other language in that decision and in the statement in *Ansley v. Commission*, No. 5149 as follows:

"As to the second fact, it must be remembered that this is not a proceeding to revoke the license of station KFYO or even to determine as between the present applicant and the present licensee of station KFYO, who is best able to meet the test of public interest, convenience and necessity in the use, control and operation of the facilities now allocated to Abilene and vicinity and now being used by station KFYO. This proceeding presents rather the question of whether or not the public interest would be served by granting the applicant authority to construct and ultimately to operate an entirely new station of the character specified in the application, in a broadcasting field obviously now containing far too many stations."

any and all persons in turn who have the price to make use of their stations.²⁵ This assertion has usually been based on the fact that the phrase "public interest, convenience or necessity" has a public utility background, on the tempting analogy between broadcasting stations and telegraph and telephone systems, and on the fact that broadcasting facilities are limited. It is possible, of course, that the last-mentioned consideration will lead Congress some day to impose on broadcasting stations the duty of non-discrimination between advertisers (just as Section 18 of the Act now imposes such a duty in affording facilities to rival candidates for public office), but no such construction of the present Radio Act would seem justified. In one of its statements, four members of the Commission held that broadcasting stations are not common carriers, saying, *inter alia*, the following:

"To pursue the analogy of telephone and telegraph public utilities is, therefore, to emphasize the right of the sender of messages to the detriment of the listening public. The commission believes that such an analogy is a mistaken one when applied to broadcasting stations; the emphasis should be on the receiving of service and the standard of public interest, convenience or necessity should be construed accordingly. This point of view does not take broadcasting stations out of the category of public utilities or relieve them of corresponding obligations; it simply assimilates them to a different group of public utilities, i. e., those engaged in purveying commodities to the general public, such, for example, as heat, water, light, and power companies, whose duties are to consumers, just as the duties of broadcasting stations are to listeners. The commodity may be intangible but so is electric light; the broadcast program has become a vital part of daily life. Just as heat, water, light, and power companies use franchises obtained from city or State to bring their commodities through pipes, conduits, or wires over public highways to the home, so a broadcasting station uses a franchise

²⁵ See testimony of Commissioner Robinson before the Senate Committee on Interstate Commerce, Hearings on Senate Bill 6, 71st Congress, 1st Session, at 190. Bills to declare broadcasting stations common carriers were introduced in the 70th Congress, and the original draft of the Couzens Bill (Senate Bill 6) was intended to accomplish the same end, 1929 *Radio Com. Rep.* 486, 490-491. The revised draft of the Couzens Bill, now pending in Congress, specifically declares that broadcasting stations are not common carriers. See 1930 *Communications Com. Rep.* 129.

from the Federal Government to bring its commodity over a channel through the ether to the home. The Government does not try to tell a public utility such as an electric-light company that it must obtain its materials such as coal or wire, from all-comers on equal terms; it is not interested so long as the service rendered in the form of light is good. Similarly, the commission believes that the Government is interested mainly in seeing to it that the program service of broadcasting stations is good, i. e., in accordance with the standard of public interest, convenience, or necessity." ²⁶

The same conclusion has been expressed by a member of the Interstate Commerce Commission.²⁷

If the test is the amount of regulation to which a business is subjected, then it may be conceded that broadcasting stations come within the general class of public utilities. It is in this sense, I believe, that early statements by the Secretary of Commerce and recommendations of the national radio conferences are to be construed.²⁸ The fact that both the Radio Act of 1927 and the International Radiotelegraph Convention of 1927, to which the United States is a party, specifically recognizes types of stations which cannot possibly be given a common carrier status (*e. g.*, amateurs, experimenters, etc.) demonstrates that the standard used in the Act cannot be interpreted as requiring all licensees to meet such a test.²⁹

²⁶ Great Lakes Broadcasting Co. v. Commission, No. 4900; see also 3RD ANN. REP., 32, 33.

²⁷ Commissioner Eastman, Hearings on Senate Bill 6, *supra* note 25, at 1565-1566.

²⁸ At the First National Radio Conference in 1922, a resolution was adopted to the effect "that radio communication is a public utility and as such should be regulated and controlled by the Federal Government in the public interest." Department of Commerce, No. 61. *Radio Service Bulletin* (May 1, 1922) 23; see also Mr. Hoover's opening address at the Third Conference in 1924 in RECOMMENDATIONS, ETC., ADOPTED BY THE THIRD NATIONAL RADIO CONFERENCE (1924) 2 (available from the Government Printing Office). At the Fourth Conference the report of the Committee on Legislation clearly negatives any intention that the words "public interest" should imply common carrier obligations. See PROC. OF FOURTH NAT. RADIO CONF. 34-35.

²⁹ See *Standard of Pub. Int.* 299, 303, 313-315.

III. PRIORITY

In an opinion rendered in a controversy between two broadcasting stations prior to the enactment of the Radio Act of 1927, it was held that "priority of time creates a superiority in right" as between the stations, in the absence of the exercise by Congress of its power under the Constitution to regulate such stations.³⁰

Under decisions with reference to state public utility statutes requiring certificates of public convenience and necessity, the rule is well established that ordinarily a second utility will not be permitted to enter a field occupied by a utility of the same character. A corollary of this rule which, although not quite so firmly established, is well supported by the decisions, is that when the choice of applicants for operation in a new field lies between a new utility and an existing utility occupying an adjacent field, the existing utility is entitled to preference. The exceptions recognized to the foregoing rule and corollary are (a) where the service carried on by the existing utility is unsatisfactory and inadequate and (b) where the new utility offers a new kind of service. Even where the service in an occupied area is unsatisfactory, in most states the commissions will afford the existing utility an opportunity to improve its service before granting permission to another to enter the same territory with virtually the same service.³¹ How far are these principles applicable to broadcasting stations?

In its statement in *Great Lakes Broadcasting Co. v. Commission*,³² the Commission announced the principle that "as between two broadcasting stations with otherwise equal claims for privileges, the station which has the longest record of continuous service has the superior right", calling attention to the fact that the "principle is firmly established in public utility law." In answer to the possible contention that the principle was appropriate for application only to future stations and not to those already in existence, the Commission pointed out the necessity for reducing

³⁰ The Tribune Co. v. Oak Leaves Broadcasting Station, Inc., Circuit Court of Cook County, Ill., reported in 68 Congressional Record 266 ZOLLMAN, CASES ON AIR LAW (1930) 298.

³¹ See *Standard of Pub. Int.* 308-313 for cases in support of the above statement.

³² No. 4900.

the excessive number of stations in operation and for making a choice among them, saying that the:

"Commission sees no reason for the adoption of different principles in making that choice than those which are valid as to future stations . . . The late-comers cannot be heard to urge that by the simple act of invading the crowded field they succeeded in appropriating to themselves what was previously being enjoyed by others performing a good service."

The statement recognizes three cases where the principle of priority must give way:

1. "Where the junior applicant proceeds from a Zone or State, which is not getting the equal or the fair and equitable, share of broadcasting service to which it is entitled under the law."
2. "When the controversy is between stations of different classes with respect to power."
3. Where "there is a substantial disparity between the respective services."

In applying these principles (upon which all four Commissioners who took part in the decision agreed) to the stations involved in the controversy, the Commission divided evenly.

On appeal the Circuit Court of Appeals reversed the Commission, saying, *inter alia*:

"It is true that WLS began broadcasting some time earlier than WENR, and that it was the first to be assigned to the channel in question. These facts, however, are not controlling, for neither station has any fixed right in the frequency as against the reasonable regulatory power of the United States. Nor is this a case where a newcomer seeks to appropriate the existing privileges of an established station. The Commission found itself constrained by existing conditions to assign the two stations to the same channel, and the operating time should be divided justly between them."

The reasons for the Court's action in disregarding priority in that case were the popularity of the successful station, its financial responsibility, the character of its equipment and power capacity,

its expenditures in programs, etc.³³ So far as the Court's decision turns on the question of superior equipment, it would seem that the prevailing opinion of the Commission is founded on the better public utility law, as follows:

"It seems to us that WLS, the older station, which installed its 5000 watt transmitter at a time when that was the highest powered apparatus obtainable in the market, has the right to a reasonable opportunity for study of the needs of its listening public and, if it finds a need therefor, to ask for the right to replace its apparatus with a larger one. . . . As a matter of fact WLS now has pending before the Commission an application for a 100,000 watt transmitter filed prior to the decision rendered in this case."

The Commission, however, has adhered fairly uniformly to the principles announced in its statement in the *Great Lakes Broadcasting Co.* case. Without directly holding that a licensee who took advantage of the breakdown of radio regulation during the period between July, 1926, and February, 1927, to begin operation of a station occupied an inferior status, by its actions and by implication the Commission has several times acted on this assumption.³⁴

In denying an application to move a station from Lexington to Worcester, Mass., the Commission said:

"There is already sufficient broadcasting service in Worcester and the Commission believes that if any additional facilities are to be provided this Community, those existing stations, now and in the past serving that Community, and whose applications therefor are before the Commission, should be given consideration before a newcomer is allowed to enter the field, since the entire facilities available are so limited, and the granting of this application must necessarily preclude the granting of theirs."³⁵

In two instances the Commission has denied applications for the construction of additional stations in communities already served

³³ See (1930) 1 J. OF AIR LAW 349.

³⁴ Most of the 164 stations summoned in under General Order 32 came within this description. See also 2ND ANN. REP. 156; *Chicago Federation of Labor v. Commission*, No. 4972; *Ulrich v. Commission*, No. 5151.

³⁵ *Wheeler v. Commission*, No. 5245.

by a single station on the ground, among others, that the demand for broadcasting service for advertising and other economic uses which would produce revenue was not enough to support a second station.³⁶ Where deficiencies charged against a respondent station's equipment were shown to have been remedied at the time of the hearing, the Commission took cognizance of the fact.³⁷ And where an applicant for a new station or for increased privileges proposes a type of program service which is already being adequately rendered by other stations in the community, the application, in the absence of other considerations, will be rejected.³⁸

In one case the Commission granted an application for a new station in Buffalo because the four leading broadcasting stations in the city were controlled by one corporation with the result that "there exists a virtual monopoly of broadcasting facilities in the city", having for its consequences "a stifling of competition", "a disproportionate increase in advertising rates", "a lack of variety of program selection, to which the public in that section is reasonably entitled", "unnecessary friction between the Buffalo Broadcasting Corporation and parties desiring to use broadcasting facilities in the city of Buffalo", and others.³⁹ In another case the Commission granted an application by an existing station for the superior assignment of another station for miscellaneous reasons having to do with program service, financial responsibility, etc.⁴⁰

In a recent decision, the Court of Appeals recognized the right of established stations as against an applicant, having an inferior assignment, seeking their privileges, saying:

"It is not consistent with true public convenience, interest or necessity, that meritorious stations like WBBM and

³⁶ *Richmond Development Corp. v. Commission*, No. 4925 (a 2 to 2 decision *rev'd* in 35 F. (2d) 883 (Ct. of App. D. C. 1929)); *Ansley v. Commission*, No. 5149.

³⁷ *Missouri Broadcasting Corp. v. Commission*, No. 5204.

³⁸ See statements in *City of New York v. Commission*, No. 4808; *General Broadcasting System, Inc. v. Commission*, No. 5196; *Ansley v. Commission*, No. 5149; prevailing opinion in *Great Lakes Broadcasting Co. v. Commission*, No. 4900; 2ND ANN. REP. 154, 155, 168.

³⁹ See *WMAK Broadcasting System, Inc. v. Commission*, No. 5117; *The Onondaga Hotel Co. v. Commission*, No. 5125.

⁴⁰ *Northwest Broadcasting System, Inc. v. Commission*, No. 5112.

KFAB should be deprived of broadcasting privileges when once granted to them, which they have at great cost prepared themselves to exercise, unless clear and sound reasons of public policy demand such action. The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced, if the licenses of established stations should arbitrarily be withdrawn from them, and appropriated to the use of other stations. This statement does not imply any derogation of the controlling rule that all broadcasting privileges are held subject to the reasonable regulatory power of the United States, and that the public convenience, interest and necessity are the paramount considerations."

The effect of an assignment of license on priority was also dealt with by the Commission (but not by the Court of Appeals) in *Great Lakes Broadcasting Co. v. Commission*. Under the circumstances of the case the Commission held that the assignments of license which had occurred in the case of both stations WLS and WENR did not interrupt the rights of either station on the score of priority, and strongly intimated that the same rule would apply in any case of assignment, at least such as takes place under Section 12 of the Radio Act.

IV. GEOGRAPHICAL DISTRIBUTION OF BROADCASTING STATIONS

Even if the Radio Act of 1927 had been silent on the subject it would seem that a proper interpretation of the standard of public interest, convenience or necessity would have required a fair and equitable distribution of broadcasting facilities over the country. Section 9 of the Act, as originally enacted, however, gave a general direction to the Commission to "make such a distribution of licenses, bands of frequency of (or) wave lengths, periods of time for operation, and of power among the different States and communities as to give fair, efficient, and equitable radio service to each of the same." Because of dissatisfaction with the way that the Commission carried out this direction, Congress enacted the much-discussed Davis Amendment.⁴¹ This amendment required that the Commission "shall as nearly as possible make and

⁴¹ 45 STAT. 373 (1928), 47 U. S. C. § 85 n. (1929).

maintain an equal allocation of broadcasting licenses, of bands of frequency or wave-lengths, of periods of time for operation, and of station power, to each of said zones when and in so far as there are applications therefor." It also required "a fair and equitable allocation" of the same facilities "to each of the States . . . within each zone according to population." The defects of the Davis Amendment have been sufficiently discussed elsewhere.⁴² Its constitutionality is involved in cases now pending before the Supreme Court of the United States and before the Circuit Court of Appeals. For an account of the efforts of the Commission to carry its mandate into effect reference must be made to other sources.⁴³

The phrase "when and in so far as there are applications therefor" allowed virtually no leeway because there were already in licensed operation in each zone more stations than could be accommodated with due regard for sound scientific principles, while a multitude of applications for new stations were pending. The words "as nearly as possible", as construed by the Commission, provided no leeway whatsoever as between the zones. It is possible to effect an exact mathematical division of the specified facilities among the five zones if no account is taken of existing stations, of the best interests of the listening public or of other important considerations.⁴⁴ As between the states within any zone, however, there is desperate need for a liberal interpretation of the words "as nearly as possible" as well as of the words "fair and equitable."

Since equality between the zones is required under all four headings of (1) licenses, (2) frequencies, (3) hours of operation and (4) power, the equality can be obtained only by effecting a

⁴² 1929 *Radio Com. Rep.* 473-475; 1930 *Communication Com. Rep.* c. 4.

⁴³ 2ND ANN. REP. 11-18; 1929 *Radio Com. Rep.* 446-448; see also General Order 92 and accompanying statement.

⁴⁴ Another possible interpretation of the words takes into account the legal rights, if any, of existing stations. I am passing over this because a majority of the Commission has given the Amendment a rigid mathematical construction as between the zones. See Committee Report on H. R. 8825, 70th Congress, 1st Session. For cases which seem to support an elastic interpretation of the words, see *Finch v. Riverside & A. Ry. Co.*, 87 Cal. 597, 25 Pac. 765 (1891); *In re Hickey*, 223 N. Y. 92, 119 N. E. 235 (1918); *State v. Ide*, 35 Wash. 576, 77 Pac. 961 (1904); *Tekoa v. Reilly*, 47 Wash. 202, 91 Pac. 769 (1907).

station-to-station equality from those of the maximum power down to those of the lowest.⁴⁵ Scientific principles also necessitate this, if reception is not to be ruined by putting the amendment into effect.

With reference to the effect of the amendment on the standard of public interest, convenience or necessity the Commission has said:

"The Commission is of the opinion that Congress, in enacting the Davis amendment, did not intend to repeal or do away with this standard. While the primary purpose of the Davis amendment is to bring about equality as between the zones, it does not require the commission to grant any application which does not serve public interest, convenience, or necessity simply because the application happens to proceed from a zone or State that is under its quota. The equality is not to be brought about by sacrificing the standard. On the other hand, where a particular zone or State is over its quota, it is true that the commission may on occasions be forced to deny an application the granting of which might, in its opinion, serve public interest, convenience, or necessity. The Davis amendment may, therefore, be viewed as a partial limitation upon the power of the commission in applying the standard."⁴⁶

A practical application of this viewpoint is furnished by a case in which the Commission denied an application from a state admittedly under quota because of the interference which would result.⁴⁷ That the Commission is fully aware of the imperfections of the amendment is disclosed by several of its pronouncements, in one of which, for example, it stated that "the strict application of the Davis Amendment is not at all times consistent with its declared

⁴⁵ By this I do not mean that the Commission is not on sound ground if it balances all cleared channel stations against each other, whatever their power, as long as it will permit increases of power to the maximum in so far as there are applications therefor.

⁴⁶ 2ND ANN. REP. 166. See also *Great Lakes Broadcasting Co. v. Commission*, No. 4900.

⁴⁷ *Statement, Good v. Commission*, No. 5264, in which the Commission said that it had "determined that the interference which would result on the 620-kilocycle and the 670-kilocycle channels would be more detrimental to the listening public of Pennsylvania than the existing lack of this State's full quota of regional assignments."

purpose or with the most advantageous use that can be made of a band of frequencies assigned to broadcasting from the point of view of the country's radio listeners." ⁴⁸

The Commission, by its general orders and published statements, has construed the amendment as requiring mathematical equality as between the zones,⁴⁹ though it has not carried out this construction consistently. The Court of Appeals, without expressly so holding, has acted on the assumption that mathematical equality is not required as between the zones.⁵⁰

The Commission has construed the words "fair and equitable" as permitting some latitude as between the states within any zone. In one case it stated:

"The use of the words 'fair and equitable' in the Davis Amendment precludes any argument that the distribution of facilities between States must attain an absolute numerical ideal based on population. The commission here have a discretionary authority." ⁵¹

In estimating the quota of any state, an excess over quota of any of the three classes of stations (cleared, regional and local) may be balanced against a deficiency in others.⁵²

The fact that an application proceeds from an over-quota zone has been considered sufficient ground to deny it, although the particular state is under-quota.⁵³ Where an application proceeds from an over-quota state, or from an over-quota state in an over-

⁴⁸ Statement, Marquette University v. Commission, No. 5253.

⁴⁹ See General Orders 40, 42, 87, 92, and statements accompanying General Orders 40 and 92. Also statement in General Electric Co. v. Commission, No. 4870. On this theory the Commission deleted several "stations" which were in reality only second sets of call-letters for single stations. See 2ND ANN. REP. 162.

⁵⁰ General Electric Co. v. Commission, *supra* note 6. See, however, United States v. American Bond & Mortgage Co., *supra* note 8.

⁵¹ Statements in Head of the Lakes Broadcasting Co. v. Commission, No. 4976 (3RD ANN. REP. 36); Havens & Martin, Inc. v. Commission, No. 5141; Short Wave & Television Laboratory, Inc. v. Commission, No. 5227.

⁵² Statements in City of New York v. Commission, No. 4898; Bennett v. Commission, No. 5208; Stewart v. Commission, No. 5158; Shortwave & Television Laboratory, Inc. v. Commission, No. 5227; Marquette University v. Commission, No. 5253; Havens & Martin, Inc. v. Commission, No. 5141.

⁵³ Statement, Marquette University v. Commission, No. 5253. There were other grounds for denial enumerated in this decision.

quota zone, it has usually been denied.⁵⁴ This is particularly true when granting the application would have the effect of depleting the facilities of a state already under-quota,⁵⁵ even if only by way of additional interference.⁵⁶ In a controversy between stations in two states, each of which is over-quota, the one that is least over-quota will be favored.⁵⁷

In several cases the Commission has held that the requirement of fair and equitable distribution "was intended for the communities within a State as well as for the States within a zone",⁵⁸ and on this theory has denied an application from an under-quota state because the proposed station was located in a portion of the state already well served.

The curious provision in the Davis Amendment that "allocations shall be charged to the State . . . wherein the studio of the station is located and not where the transmitter is located" has been in issue in only one case, where, because of the facts of the case, the Commission held the issue irrelevant.⁵⁹

V. PROGRAM SERVICE

A. How the Question Arises

While Section 29 of the Radio Act of 1927 negatives any intention by Congress to give the Commission the power of censorship over the communications transmitted by a station and forbids the promulgation of any regulation or condition interfering with the right of free speech by radio, nevertheless, the Commission indirectly exercises a most effective form of censorship. It does this by taking the program service of stations into consideration in acting upon applications. This usually happens only in

⁵⁴ Statements in *General Electric Co. v. Commission*, No. 4870; *Chicago Federation of Labor v. Commission*, No. 4972; *Ansley v. Commission*, No. 5149; *Baker v. Commission*, No. 5004; *Westinghouse Elec. & Mfg. Co. v. Commission*, Nos. 5104, 5105, 5150, 5192.

⁵⁵ Statement, *Chicago Federation of Labor v. Commission*, No. 4972.

⁵⁶ Statement, *Havens & Martin, Inc. v. Commission*, No. 5141.

⁵⁷ Statement, *General Broadcasting System, Inc. v. Commission*, No. 5196.

⁵⁸ Statement, *Havens & Martin, Inc. v. Commission*, No. 5141; *Shortwave & Television Laboratory, Inc. v. Commission*, No. 5227; *Wheeler v. Commission*, No. 5245. The weight to be given to the fact that reception conditions are not good in particular communities is discussed in *Ansley v. Commission*, No. 5149; *Bennett v. Commission*, No. 5208; 2ND ANN. REP. 160.

⁵⁹ Statement, *Havens & Martin, Inc. v. Commission*, No. 5141.

cases involving existing stations, although the program service to be rendered by a proposed new station may, in a general way, raise the same question. Most of the cases can be classified into two groups: (1) where station *A* applies for a superior assignment now enjoyed by station *B* (or where, without such an application, the Commission seeks justification for effecting an exchange of the assignments between the two stations), and (2) where the Commission, in endeavoring to reduce the excessive number of stations in a zone, state or community, sets the renewal applications of one or more stations for hearing with the intention of denying them if sufficient grounds appear.

Space will not permit mention of the baffling procedural difficulties involved. It is obvious that in both groups of cases comparative issues are involved;⁶⁰ in the first group, between stations *A* and *B*, and in the second group, between the stations whose renewal applications are designated for hearing and all other stations in the zone, state or community in which the reduction is to be attempted. Program service is only one of the issues that are thus raised in a comparative manner. It may be appraised on the basis of specific practices which, because of provisions of the law or of the Commission's regulations, or because of principles adopted by it in its decisions, have fallen under the ban, or simply on the basis of general character and quality of the program. The Commission has not been entirely consistent in the views it has taken as to the right of an applicant to show deficiencies in the program service or operation of a respondent's station.⁶¹

B. Regularity of Schedule

In its statement published on August 23, 1928, the Commission said:

⁶⁰ See cases cited and quoted in Part II, A, *supra* 119 *et seq.* What is a better or a worse assignment is not always an easy question. See statement, Onondaga Hotel Co. v. Commission, No. 5125. The fact that to grant an application would necessitate a shift of several stations was taken into consideration in Missouri Broadcasting System, Inc. v. Commission, No. 5204.

⁶¹ See particularly statements in Missouri Broadcasting Corporation v. Commission, No. 5204, and Ansley v. Commission, No. 5149, and facts involved in Southwestern Sales Corp. v. Commission, No. 5003 (in which Henderson's station at Shreveport, La., was respondent). See U. S. Daily, Feb. 20, 1930, for miscellaneous charges made against respondent station in No. 5204.

"A station which does not operate on a regular schedule made known to the public through announcements in the press or otherwise is not rendering a service which meets the test of the law. If the radio listener does not know whether or not a particular station is broadcasting, or what its program will be, but must rely on the whim of the broadcaster and on chance in tuning his dial at the proper time, the service is not such as justify the commission in licensing such a broadcaster as against one who will give a regular service of which the public is properly advised."⁶²

This viewpoint, which is amply justified by the corresponding rule recognized in state public utility decisions,⁶³ has been applied or reaffirmed by the Commission several times,⁶⁴ and has been approved by the Court of Appeals.⁶⁵ Similarly, where a respondent station is not using all the time allotted to it, this fact will be considered in favor of the applicant.⁶⁶ The fact that a station has disregarded the time limitation imposed upon it by its license will, of course, be considered against it.⁶⁷

C. General Character of Program Service

The Commission's position with regard to the general character of program service expected of a broadcasting station is expressed in the following excerpt from its statement in *Great Lakes Broadcasting Co. v. Commission*:⁶⁸

"The *entire* listening public within the service area of a station, or of a group of stations in one community, is entitled to service from that station or stations. If, therefore, all the

⁶² 2ND ANN. REP. 169; see also *ibid.* 157, 158-159.

⁶³ See *Standard of Pub. Int.* 313, and cases cited therein.

⁶⁴ Statements, Technical Radio Laboratory v. Commission, No. 4835; Carrell v. Commission, No. 4899; Great Lakes Broadcasting Co. v. Commission, No. 4900; Marquette University v. Commission, No. 5253.

⁶⁵ Technical Radio Laboratory v. Commission; Carrell v. Commission, both *supra* note 6.

⁶⁶ Richmond Development Corporation v. Commission, *supra* note 6. The Commission has pursued an analogous viewpoint when an applicant or respondent station is asking for, or using, more time than it can or does devote to high class programs. See statements in City of New York v. Commission, No. 4898 (*aff'd*, 36 F. (2d) 115) and WMAK Broadcasting System, Inc. v. Commission, No. 5117.

⁶⁷ Statement, Schaeffer v. Commission, No. 5228.

⁶⁸ No. 4900, reprinted in part in 3RD ANN. REP. 32-35.

programs transmitted are intended for, and interesting or valuable to, only a small portion of that public, the rest of the listeners are being discriminated against. This does not mean that every individual is entitled to his exact preference in program items. It does mean, in the opinion of the Commission, that the tastes, needs and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussion of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place. . . .

"In such a scheme there is no room for the operation of broadcasting stations exclusively by, or in the private interests of, individuals or groups so far as the nature of the programs is concerned. There is not room in the broadcast band for every school of thought, religious, political, social and economic, each to have its separate broadcasting station, its mouthpiece in the ether. If franchises are extended to some, it gives them an unfair advantage over others and results in a corresponding cutting down of general public service stations. It favors the interests and desires of a portion of the listening public at the expense of the rest."

The principles announced in the foregoing were applied in that case to Voliva's station, WCBD, at Zion City, Ill., and in this respect the Commission's decision was affirmed by the Court of Appeals, which impliedly approved the principles.⁶⁹ They were shortly thereafter applied to the station of the Chicago Federation of Labor, WCFL, at Chicago,⁷⁰ and again impliedly approved by the Court of Appeals.⁷¹ Since then they have been relied upon as grounds for refusing an application for a station to be used in interests of colored listeners⁷² and an application by a university for a better assignment in order to give a service to its alumni.⁷³ The Commission has, however, held that the mere fact

⁶⁹ Great Lakes Broadcasting Co. v. Commission, *supra* note 6.

⁷⁰ Statement, Chicago Federation of Labor v. Commission, No. 4972.

⁷¹ Chicago Federation of Labor v. Commission, *supra* note 6.

⁷² United States Daily, Feb. 17, 1930.

⁷³ Statement, Marquette University v. Commission, No. 5253. See also Ulrich v. Commission, No. 5151.

that an application discloses that the applicant is a public utility (or controlled by a group of affiliated public utilities) and that it states that "the policy of this station is to furnish to the public a service which will foster and promote the cordial relations with the public, which the station already as public utilities, now enjoys" does not bring the applicant's station within the class of "propaganda stations", in the absence of any evidence showing a use of the station for propaganda purposes, and with evidence showing a positive intention of the licensee not to use it for such purposes.⁷⁴

The Commission has indicated that its interpretation of the requirements of public interest, convenience or necessity cannot be as rigorously enforced against regional and local stations as against cleared channel stations, "because of the smaller area served, the smaller capital available for programs, and the extensive time divisions", saying:

"Furthermore, program service of general or national interest appropriate to stations serving large areas will be replaced in part by program service of regional or local interest appropriate to stations serving lesser areas."⁷⁵

The unwritten rule⁷⁶ of the Commission against using a broadcasting station for point-to-point communication may be considered as falling under this heading. By "point-to-point communication" in this connection is usually understood correspondence between two persons such as would ordinarily be carried on

⁷⁴ Statement, *Great Lakes Broadcasting Co. v. Commission*, No. 4900.

⁷⁵ *Ibid.*

⁷⁶ At the First National Radio Conference the following recommendation was adopted:

"In view of the demand for broadcast service by the general public, it is not desirable to disseminate information over wide areas for purposes of point-to-point communication except where that communication can not be effectively maintained by other means."

Radio Service Bulletin, *supra* note 28, at 26. At the Second Conference the following recommendation was adopted:

"That reading of telegrams or letters by broadcasting stations be not construed as point-to-point communication so long as the signer is not addressed in person and so long as the text matter is of general interest."

Ibid. April 2, 1923, No. 72, at 12. The Department of Commerce had previously adopted regulations forbidding both communication between stations and the transmission of acknowledgments to individuals relating to the receipt of letters, telegrams, and telephone calls, as "direct communications" and not authorized. *Ibid.* Jan. 2, 1923, No. 69; *ibid.* May 1, 1923, No. 73.

over the telephone. Such two-way communication can, of course, be carried on between two broadcasting stations, or between a broadcasting station and a commercial, amateur, or experimental station equipped for radiotelephony, and, in fact, was indulged in in the early days of broadcasting. At present, however, the rule is more likely to be applied to what is really one-way communication (so far as radio is concerned) by a broadcasting station to addressed individuals, who may or may not communicate to the station by letter, telegraph or telephone. The rule is fundamentally sound since, with the limited facilities available for broadcasting (which, under the International Radiotelegraph Convention of 1927, is defined as "a service carrying on the dissemination of radiotelephone communications intended to be received by the public, directly or by the intermediary of relay stations"),⁷⁷ the receiving public should not be deprived of service for the sake of private messages. The rule has to be applied sensibly, however, for there are many communications which, while in form addressed to particular individuals, are of general interest to listeners. Among these may be mentioned acknowledgment by station announcers of letters or telegrams from distant listeners, or children's programs in which birthdays are announced, or children are permitted to step before the microphone and say "hello" to their relatives or friends. The Commission has, on the basis of recent informal opinions of its general counsel, held that such practices are proper. Again, there are many cases of emergency, such as in the location of lost persons or criminals, information as to death or illness to relatives whose exact location is unknown, and the like. In only one of its decisions has the Commission expressed formal disapproval of a practice falling under this heading; namely, *KFKB Broadcasting Assn, Inc. v. Commission*.⁷⁸ In that case the licensee, a physician owning a hospital and financially interested in a chain of pharmacies, made a practice of soliciting letters in which the writers set forth their ailments, and of broadcasting, in answer to such letters, prescriptions which

⁷⁷ TREATY SERIES No. 767, Art. I, ANNEXED REGULATIONS, 21-22.

⁷⁸ No. 5240.

could be filled only at the pharmacies in which he was interested. The Commission said:

"The practice of Station KFKB in permitting the use of its station by Dr. Brinkley for the purpose of answering letters in the so-called medical question box constitutes the use of a broadcasting station license for point-to-point communication, and is contrary to the International Radiotelegraph Convention of 1927, and is of itself a sufficient abuse of Station KFKB's license to broadcast to warrant refusal to renew that license."

The view that the practice violates the Convention is, in my opinion, of doubtful correctness; the definitions of broadcasting and of broadcasting stations contained in the regulations annexed to the Convention are not intended to draw so fine a line, and the control over details as to what communications shall or shall not be permitted to a broadcasting station has, I believe, been left with the respective countries.

A not dissimilar practice was, however, the subject of adverse comment in the Commission's statement in *City of New York v. Commission*,⁷⁹ as follows:

"The use of Station WNYC for the purpose of establishing an intradepartmental communication system for the Fire and Police Department of the City of New York, is not material in this proceeding. Communications of this nature are not public communications in the sense that they are of general interest to the public. They do not, therefore, constitute a broadcasting service. Channels other than those devoted to broadcasting are allocated for services of this nature."

Another group of cases which may be treated under this heading is that in which the Commission has commented unfavorably upon the broadcasting of private disputes, personal vilification, and the like. In this connection the Commission stated:

⁷⁹ No. 4898.

"A word of warning must be given to those broadcasting (of which there have been all too many) who consume much of the valuable time allotted to them under their licenses in matters of a distinctly private nature, which are not only uninteresting but also distasteful to the listening public. Such is the case where two rival broadcasters in the same community spend their time in abusing each other over the air."⁸⁰

In a recent decision the Commission has refused to renew a license on the ground that the licensee knowingly permitted the station to be used by a defeated candidate in a very bitter political campaign "for a program of vilification denouncing in most violent terms those whom he believed responsible for his defeat."⁸¹ This was done about "two hours daily, and under the guise of a political speech the character of reputable citizens was defamed and maligned, not only by innuendo but by the direct use of indecent language". It is further stated that "the nature of these talks was provocative of serious public disturbance inasmuch as people of the community had expressed considerable antagonism to such broadcasts". The language actually used does not appear in the statement, and it is therefore impossible to determine whether it came within the description of "obscene, indecent, or profane language" forbidden by Section 29. The case is now pending before the Court of Appeals and involves very interesting questions on the Commission's power of censorship, and the responsibility of a licensee for matter broadcast by third persons over his station. The Commission placed KWKH of Shreveport under probation for the use of profane language but at the same time stated that it was not because of the licensee's attacks on chain stores.⁸²

In addition to all the foregoing there have been some general expressions by the Commission, the exact significance of which is difficult to determine. For example:

⁸⁰ 2ND ANN. REP. 169; see also *ibid.* 159-161. In another case, while the evidence showed a practice, it was not deemed serious enough to warrant discipline: statement, Missouri Broadcasting Corporation v. Commission, No. 5204.

⁸¹ Statement, Schaeffer v. Commission, No. 5228. See also 2ND ANN. REP. 152-153. See also complaint filed against KGEF (Rev. "Bob" Schuler), Los Angeles, U. S. Daily, Aug. 5, 1930.

⁸² U. S. Daily, Jan. 25, 1930. Since the above was written the appeal in Schaeffer v. Commission has been dismissed.

"A broadcasting station is public in purpose and character and any use of it as a private or individual affair is repugnant both to policy and legislation." ⁸³

and:

"The testimony in this case shows conclusively that the operation of Station KFKB is conducted only in the personal interest of Dr. John R. Brinkley (controlling stockholder of licensee corporation). While it is to be expected that a licensee of a radio broadcasting station will receive some remuneration for serving the public with radio programs, at the same time the interest of the listening public is paramount, and may not be subordinated to the interests of the station licensee." ⁸⁴

Without intending to question the application of such principles to the two particular cases in which the expressions were used, I feel that their generality may be open to question. Virtually all broadcasting stations are, in a sense, conducted in the personal interests of their owners. ⁸⁵

D. Advertising

The subject just discussed is closely related to the amount and character of advertising which will be permitted to a broadcasting station. In its statement of August 23, 1928, the Commission said:

"While it is true that broadcasting stations in this country are for the most part supported or partially supported by

⁸³ Statement, Schaeffer v. Commission, No. 5228.

⁸⁴ Statement, KFKB Broadcasting Ass'n, Inc., v. Commission, No. 5240.

⁸⁵ See statement, Shortwave & Television Laboratory, Inc. v. Commission, No. 5227, in which the Commission said:

"One of the primary reasons for this application was admitted by appellant to be an effort to secure a medium for the direct promotion of the sale of television receivers manufactured by appellant. The Commission did not regard this as a ground for denial of the application, yet the Commission felt that this fact alone, or taken in connection with the other facts here involved did not constitute a sufficient showing that public interest, convenience or necessity would be served by the granting of appellant's application."

In another case, decided under General Order 32, (KFWF, St. Louis Truth Center, St. Louis, Mo.), the Commission reduced the power of a station largely because of evidence tending to show that the licensee had solicited contributions for religious and charitable purposes and had used the money thus received for his own enrichment. By implication the Commission has expressed disfavor of use of a station to further a boycott.

advertisers, broadcasting stations are not given these great privileges by the United States Government for the primary benefit of advertisers. Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public.

"The same question arises in another connection. Where the station is used for the broadcasting of a considerable amount of what is called 'direct advertising', including the quoting of merchandise prices, the advertising is usually offensive to the listening public. Advertising should be only incidental to some real service rendered to the public, and not the main object of a program. The commission realizes that in some communities, particularly in the State of Iowa, there seems to exist a strong sentiment in favor of such advertising on the part of the listening public. At least the broadcasters in that community have succeeded in making an impressive demonstration before the commission on each occasion when the matter has come up for discussion. The commission is not fully convinced that it has heard both sides of the matter, but is willing to concede that in some localities the quoting of direct merchandise prices may serve as a sort of local market, and in that community a service may thus be rendered. That such is not the case generally, however, the commission knows from thousands and thousands of letters which it has had from all over the country complaining of such practices."⁸⁶

In at least two of its decisions at that time, refusing renewal applications, the Commission relied in part upon "direct advertising".⁸⁷ In its statement in *Great Lakes Broadcasting Co. v. Commission*,⁸⁸ the Commission said:

"The Commission must, however, recognize that, without advertising, broadcasting would not exist, and must confine itself to limiting this advertising in amount and in character so as to preserve the largest possible amount of service for the public. The advertising must, of course, be presented as such and not under the guise of other forms on the same principle that the newspaper must not present advertising as news. It will be recognized and accepted for what it is on such a basis, whereas propaganda is difficult to recognize. If

⁸⁶ 2ND ANN. REP. 168-169.

⁸⁷ *Ibid.* 152, 156.

⁸⁸ No. 4900.

a rule against advertising were enforced the public would be deprived of millions of dollars worth of programs which are being given out entirely by concerns simply for the resultant good will which is believed to accrue to the broadcaster or the advertiser by the announcement of his name and business in connection with programs. Advertising must be accepted for the present as the sole means of support for broadcasting, and regulation must be relied upon to prevent the abuse and over use of the privilege."

In another case, among the factors in an adverse decision by the Commission against an existing station were "a disproportionate increase in advertising rates" and "the introduction of a vast amount of direct advertising and the consequent lowering of the quality of local programs".⁸⁹ Prior to 1927 the national radio conferences expressed disapproval of direct advertising,⁹⁰ as did also Mr. Hoover, as Secretary of Commerce.⁹¹ By implication, although not expressly, direct advertising was forbidden to Class B stations.⁹²

No satisfactory definition has yet been achieved of what constitutes "direct", as distinguished from "indirect" advertising. At the Fourth National Radio Conference, a committee report, which was adopted by the conference, classified advertising into direct, mixed, and indirect, and found both direct and mixed advertising to be objectionable to the listening public, and that "indirect advertising could be made detrimental to the interests of both the public and the broadcasting station". The only semblance of a definition, however, appears as part of a resolution adopted, deprecating "the use of radio broadcasting for direct sales effort, and any form of special pleading for the broadcaster or his products, which forms are entirely appropriate when printed or through direct advertising mediums", as distinguishable from "good will" advertising.⁹³ In the present state of affairs, I believe, the *pro-*

⁸⁹ Statement, WMAK Broadcasting System, Inc. v. Commission, No. 5117.

⁹⁰ *Radio Service Bulletin*, Dept. of Com., May 1, 1922, No. 61, at 26, 28; PROC. OF FOURTH NAT. RADIO CONF. 18.

⁹¹ RECOMMENDATIONS, ETC., ADOPTED BY THE THIRD NAT. RADIO CONF. 4; PROC. OF FOURTH NAT. RADIO CONF. 5.

⁹² See *Radio Service Bulletin*, Dept. of Com., May 1, 1922, No. 73, at 11.

⁹³ PROC. OF FOURTH NAT. RADIO CONF. 18.

portion of time consumed in advertising is a more important consideration than attempting to draw too fine a distinction between direct and indirect advertising.⁹⁴

Particular kinds of advertising have been disapproved by the Commission, including "advertising medicine of questionable value",⁹⁵ and "the practice of a physician's prescribing treatment for a patient whom he has never seen", where he "bases his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him".⁹⁶ In the latter case, the practice was found to be "inimical to the public health and safety, and for that reason is not in the public interest". The form of advertising which was originally indulged in in behalf of Lucky Strike cigarettes over one of the large networks, against which it was objected both that it was improper to be admitted into the home and that it was unfair advertising against a legitimate industry (the manufacture of candy, etc.), was considered in an opinion by the general counsel of the Commission, who expressed the opinion that it might be considered by the Commission in determining whether it would or would not renew a license.⁹⁷ In other words, every one of the forty or fifty stations which put on the Lucky Strike program on Saturday nights was open to the danger of a black mark against it in any hearing in which it might become involved. The matter was settled "out of court", however, by a voluntary modification of the form of advertising announcement used in the program.

Section 19 of the Radio Act requires that all matter broadcast for which a valuable consideration is directly or indirectly paid by any person "shall, at the time the same is so broadcast, be announced as paid for or furnished" by such person. The failure of one station, in advertising securities, to mention the name of

⁹⁴ This is the theory upon which a proposed radio bill now pending before the French Parliament is drawn. It limits advertising to a percentage of the time per hour. See the standards adopted by certain New England stations, U. S. Daily, Oct. 21, 1929; and Code of Ethics of National Ass'n of Broadcasters, Hearings on Senate Bill No. 6, 71st Congress, 2d Session 1735.

⁹⁵ Statement, Chicago Federation of Labor v. Commission, No. 4972.

⁹⁶ Statement, KFKB Broadcasting Ass'n, Inc. v. Commission, No. 5240.

⁹⁷ Petition of Adrian Kelly, U. S. Daily, April 23, 1929. See, however, U. S. Daily, Nov. 28, 1929, Jan. 25, 1930, in which the Commission virtually declined to consider protest of chain store systems against attacks by Station KWKH, Shreveport, La.

the advertiser, was considered against it in a decision by the Commission denying an application for a better assignment.⁹⁸

It may be assumed, I think, that advertising of the sort which, if sent through the mails, would constitute a scheme to defraud, or would violate the federal lottery statute, would be considered against a station, if knowingly sponsored or permitted by the station. Yet with respect to third parties advertising over the station a station should not be held to any greater degree of care or responsibility than a newspaper or a magazine, if as much. A publisher has an opportunity in all cases to pass upon advertising matter which is necessarily submitted in written form before it is printed. A broadcasting station, no matter what precautions it may take in advance, cannot always foresee what will actually be said before the microphone. In many cases, if it insists too vigorously on a previous submission of a matter in writing for approval, the station runs the danger of criticism and public clamor against it for violating an unwritten rule against censorship. Where the advertising is of the sort that would be held to be an unfair method of competition within the meaning of the Federal Trade Commission Act, and the advertising is by the person owning or controlling the station, it is possible but not certain that it may be considered by the Federal Radio Commission. Where, however, such advertising is by or in behalf of third persons, it is doubtful (at least, except in extreme cases where the interest of the listening public, as distinguished from the interested competitor, is involved) whether the Federal Radio Commission has any jurisdiction. Probably, it would seem, the broadcaster could not be haled before the Federal Trade Commission, since, like a newspaper or magazine, his station serves merely as the medium through which the advertiser expresses himself.

Very complicated issues arise when the advertising is alleged to be in violation of state laws in which the station's program is received. A particular form of advertising may be perfectly proper in the state in which the station is located and illegal in a neighboring (or a distant) state. Conversely, the advertising may

⁹⁸ Statement, Chicago Federation of Labor v. Commission, No. 4972.

be illegal in the state in which the station is located and legal elsewhere, and yet may be intended for persons only in other states. In both cases a conflict between federal and state jurisdiction arises which involves too many factors to be within the scope of this article. May the Federal Radio Commission consider such advertising in acting upon applications of the broadcaster who sponsors or permits it? I suspect that it may, although the question is undecided, if it appears that the interest of the listening public is really and substantially involved. Yet I doubt whether such a power would extend to the laws of distant states where reception, though occasionally bad, is only freakish and irregular. The sort of advertising which has already threatened several times to bring the matter to a head is the sale of insurance⁹⁹ or of securities¹⁰⁰ as against state laws which require prerequisite qualifications. Miscellaneous other state laws may raise similar questions, such as real estate broker acts, medical practice acts, trading-stamp acts, etc.

E. Duplication of Program Service Already Available

This subject overlaps what has already been said under the heading of "Priority".¹⁰¹ As was there stated, when an applicant for a new station or for increased privileges proposes a type of program service which is already being adequately rendered by other stations in the community, the application (in the absence of other considerations) will be rejected. The Commission has said:

"The commission also believes that public interest, convenience, or necessity will be best served by avoiding too much duplication of programs and types of programs. Where one community is underserved and another community is receiving duplication of the same order of programs, the second community should be restricted in order to benefit the first. Where one type of service is being rendered by several stations in the same region, consideration should be given to

⁹⁹ See U. S. Daily, Dec. 10, 1929; *ibid.* Feb. 19, 1930.

¹⁰⁰ See *ibid.* Jan. 24, 1930.

¹⁰¹ See Part III, *supra* pages.

a station which renders a type of service which is not such a duplication." ¹⁰²

In one way or another this principle has been applied in a number of the Commission's decisions.¹⁰³

The Commission's viewpoint with respect to use of commercial phonograph records by a broadcasting station falls under the same heading. It is expressed in the following excerpt from one of its statements:

"In view of the paucity of channels, the commission is of the opinion that the limited facilities for broadcasting should not be shared with stations which give the sort of service which is readily available to the public in another form. For example, the public in large cities can easily purchase and use phonograph records of the ordinary commercial type. A station which devotes the main portion of its hours of operation to broadcasting such phonograph records is not giving the public anything which it can not readily have without such a station. If, in addition to this, the station is located in a city where there are large resources in program material, the continued operation of the station means that some other station is being kept out of existence which might put to use such original program material. The commission realizes that the situation is not the same in some of the smaller towns and farming communities, where such program resources are not available. Without placing the stamp of approval on the use of phonograph records under such circumstances, the commission will not go so far at present as to state that the practice is at all times and under all conditions a violation of the test provided by the statute. It may be also that the development of special phonograph records will take such a form that the result can be made available by broadcasting only and not available to the public commercially, and if such proves to be the case the commission will take the fact into consideration. The commission can not close its eyes to the fact that the real purpose of the use of phonograph records in most communities is to provide a

¹⁰² 2ND ANN. REP. 168; see also 154, 155.

¹⁰³ Statements, *City of New York v. Commission*, No. 4898; *Chicago Federation of Labor v. Commission*, No. 4972; *Northwest Broadcasting System, Inc. v. Commission*, No. 5112; *The Onondaga Hotel Company v. Commission*, No. 5125; *Ansley v. Commission*, No. 5149; *General Broadcasting System, Inc. v. Commission*, No. 5196; *Wheeler v. Commission*, No. 5245.

cheaper method of advertising for advertisers who are thereby saved the expense of providing an original program." ¹⁰⁴

The Commission has relied on the excessive use of phonograph records as justification (at least, in connection with other circumstances) for unfavorable action on applications.¹⁰⁵ So also has the Court of Appeals.¹⁰⁶ Prior to 1927, the Department of Commerce regulations forbade the use of phonograph records by Class B stations.¹⁰⁷ The Commission has stringent regulations requiring that phonograph records be announced as such.¹⁰⁸

Another related subject is so-called duplication of service by stations connected with one or the other of the national networks. It is a very rare occurrence (and usually only in the case of events of great public interest) that two or more stations broadcast exactly the same performance in the same community. In rural areas, however, located midway between two or more large cities, it frequently happens (particularly on evenings when reception conditions are good) that the listener will find the same program at two or more points on the dial of his receiving set. In cities, where the electric noise level is relatively high, and only reception from local stations is sufficient to overcome the interference, listeners will not ordinarily get satisfactory continuous reception from stations located in other cities and there is no complaint of duplication. So far as there has been any complaint from rural areas it has been from very limited regions and has usually proceeded on a misconception of the actual facts. The fact that some rural listeners can get the same program from two or more stations does not seem any justification for depriving the many listeners located in or near large cities from hearing the program. For a while the Commission came close to attempting to forbid duplication (except to a limited extent) between stations located within

¹⁰⁴ 2ND ANN. REP. 168; see also 155, 156, 161.

¹⁰⁵ *Statements, Technical Radio Laboratory v. Commission*, No. 4835; *WMAC Broadcasting System, Inc. v. Commission*, No. 5117.

¹⁰⁶ *Technical Radio Laboratory v. Commission*, *supra* note 6.

¹⁰⁷ See regulations as contained in *Radio Service Bulletin*, Dept. of Com., No. 65, September 1, 1922; *ibid.* No. 66, October 2, 1922, 8; *ibid.* No. 73, 12.

¹⁰⁸ See General Orders 16, 49, 52, 78.

300 miles of each other, but the enforcement of its general order to that effect was postponed from time to time and it was finally rescinded.¹⁰⁹

F. Excellence of Programs

No more nebulous issue is faced by the Commission than when it attempts, as it has in the past, to pass on the comparative excellence of the programs of stations which are parties to a controversy before it. The difficulties may best be stated in excerpts from the Commission's statement in the case of *Great Lakes Broadcasting Co. v. Commission*:¹¹⁰

"Where the contest is between two general public service stations, equal in all respects other than program service what principles apply to their evaluation in comparison with each other? For the present, the Commission can say only that these principles must be worked out by the gradual process of judicial determination and the creation of precedents. One helpful element is the popularity of a station to the extent that it can accurately be ascertained from a real cross-section of the public.

"Evidence such as is frequently offered to the Commission as to comparative popularity of broadcasting stations is exceedingly untrustworthy. No matter how ironclad the safeguards claimed to have been thrown around the taking of the so-called polls of the listeners, the result is usually that the station for whose benefit the poll is taken is shown to be the most popular station. Such popularity at best is fleeting and transient. A particular entertainer or a particular bit of advertising may be responsible for one station's temporary ascendancy in the minds of a public momentarily forgetful of the more serious and important service being continuously rendered by another station. The mere fact that a controversy such as the present one exists, and that one station has used its broadcasting facilities to stir up the public into indig-

¹⁰⁹ See General Orders 43 and 81. See the accounts of the four national radio conferences for evidence of the encouragement given to network programs by the Department of Commerce. The subject of chain programs has received only incidental mention in the Commission's statements. See *General Electric Company v. Commission*, No. 4870, and *Missouri Broadcasting Corporation v. Commission*, No. 5204. In the latter case the fact that a respondent station was connected with a network was recited in its favor.

¹¹⁰ No. 4900.

nation over an alleged wrong, will, of course, be reflected in a vote of protest which is ignorant of the identity of the other party to the controversy and of the claims of stations not parties to the controversy. It has become a regrettable practice for stations appearing before the Commission to comb their listening public for affidavits, signers of petitions, letters and telegrams to support their claims. In the opinion of the Commission this is in most cases resulting only in an encumbrance of the record without any particular significance. Even a comparatively unimportant and unpopular station can, by announcements from the station and by recourse to friends of the licensee, make a formidable showing which is usually more probative of the diligence of the broadcaster than of the popularity of his station."

And also in the separate opinion filed by Commissioners O. H. Caldwell and Lafount in that case:

"It is true, of course, that a Commission sitting in Washington is in a poor position to compare the programs of two stations when all it has before it is the testimony of a few witnesses and a collection of itemized programs. Names of artists without evidence of their standing and titles of musical numbers without a description of their rendering are not particularly helpful. For this reason we must go back to such evidence and attempt to discover more significant indications of the character of the service. One such indication will be found, we believe, in the amount of money paid out by a station for its programs over a given period. This will not be conclusive but it is very persuasive evidence. Another such indication will be found, we believe, in the popularity of a station with the listening public, although, as was pointed out in the general statement of principles by the Commission, there are manifest infirmities in the kinds of evidence usually adduced by stations on this score."

The Court of Appeals, which upheld the position of these two Commissioners, said, *inter alia*:

"We base this opinion upon a consideration of the excellent service heretofore rendered to the public by WENR, and its capacity for increased service; also its large expenditures for meritorious programs for public instruction and entertainment, and the popularity of the station; also its ability by

means of its 50,000 watt transmitter to cover a large area; and the assured financial responsibility behind it." ¹¹¹

The Commission has frequently reiterated the slight probative value of popularity polls, expressions from listeners, etc. ¹¹²

Of the various considerations that have been offered in the effort to prove excellence of programs, the only one that, in my opinion, rests on a sound foundation is the amount of money spent on programs. This may not be conclusive but it is eloquent evidence of the merit of the service actually rendered by the station.

G. Miscellaneous

Violations of specific provisions of the Radio Act and of the Commission's regulations with respect to program service, have, of course, been viewed as legitimate grounds for adverse action against the station. ¹¹³ Among these may be mentioned the broadcasting of "obscene, indecent, or profane language" in violation of Section 29; ¹¹⁴ failure to announce the name of a person sponsoring a program in violation of Section 19; ¹¹⁵ rebroadcasting in violation of Section 28; ¹¹⁶ failure to give equal opportunities to opposing political candidates, in violation of Section 18; failure to announce phonograph records in accordance with the Commission's regulations; ¹¹⁷ failure to announce call letters every fifteen minutes, ¹¹⁸ etc. Repeated slander and vilification has also been deemed a ground, ¹¹⁹ even though by a person merely speaking over

¹¹¹ Great Lakes Broadcasting Co. v. Commission, *supra* note 6, at 995.

¹¹² Statements, City of New York v. Commission, No. 4898; Chicago Federation of Labor v. Commission, No. 4972; Baker v. Commission, No. 5004; Stewart v. Commission, No. 5158; Missouri Broadcasting Corporation v. Commission, No. 5204. See, however, statement in Northwest Broadcasting System, Inc. v. Commission, No. 5112, in which a comparison of publicity received by the opposing stations in the press was apparently given substantial weight.

¹¹³ The testimony of former employees against a station is to be taken with caution, statement, Missouri Broadcasting System, Inc. v. Commission, No. 5204.

¹¹⁴ 2ND ANN. REP. 153; Schaeffer v. Commission, No. 5228; and U. S. Daily, Jan. 23, 1930.

¹¹⁵ Statement, Chicago Federation of Labor v. Commission, No. 4972.

¹¹⁶ 2ND ANN. REP. 153.

¹¹⁷ Statement, Chicago Federation of Labor v. Commission, No. 4972.

¹¹⁸ See General Order No. 8.

¹¹⁹ 2ND ANN. REP. 153.

the station.¹²⁰ As for violations of state laws, the same remarks are in order as are above made in connection with advertising.

H. Censorship

Sufficient has already been said to indicate that the meaning and scope of Section 29, forbidding censorship by the Commission, is necessarily involved both in particular decisions of the Commission and in its general viewpoint with respect to program service. Two cases now pending before the Court of Appeals present the issue.¹²¹ The Commission has both in its statements filed in those two cases and elsewhere, expressed its position. In one of its early pronouncements in August, 1928, it said:

"Through the course of the hearings a great deal has been said on the subject of freedom of speech, and it is consequently intimated that in making its decisions the commission has been usurping the power of a censor. It will not be out of place at this time to give expression to a few general observations on the subject of freedom of speech as applied to broadcasting.

"It is self-evident that the constitutional guaranty of freedom of speech applies to the expression of political and religious opinions, to discussions, fair comments, and criticisms on matters of general public interest, of candidates, of men holding public office, and of political, social, and economical issues. At no time has the commission considered that it had any right to chastise a station for its conduct in handling such matters if the station has observed the requirement of the law that it give rival candidates equal opportunities to use its microphone.

"Does this same constitutional guaranty apply to the airing of personal disputes and private matters? It seems to the commission that it does not. The history of the guaranty shows that it was the outgrowth of a long struggle for the right of free expression on matters of public interest. Two neighbors may indulge in any verbal dispute they please in their own back yards where no one is within hearing distance. Let them try to conduct the same dispute in a public place, such as on a busy street or in a theatre, and they soon find that they are not protected by the Constitution. Even if

¹²⁰ Statement, *Schaeffer v. Commission*, No. 5228.

¹²¹ *Ibid.*; *KFKB Broadcasting Ass'n, Inc. v. Commission*, No. 5240.

they conduct the controversy on premises owned by them, if it is so noisy as to disturb people in the vicinity it will soon be terminated as a nuisance. The rights of the public to be free from disturbances of this sort are superior to those of the individual. Even on a subject of public importance a man is not permitted to get up in a public place such as on a street or in a public park in many cities and speak to the public without a permit.

"With these limitations already imposed by the law on unrestrained utterance, is the commission powerless to protect the great public of radio listeners from disturbances and nuisances of this kind? Should a man who is forbidden to perpetrate such a nuisance in a public street or in such a manner as to disturb people living in the vicinity be allowed to invade the homes of radio listeners over a vast area in something so disagreeable and annoying? Listeners have no protection unless it is given to them by this commission, for they are powerless to prevent the ether waves carrying the unwelcome messages from entering the walls of their houses. Their only alternative, which is not to tune in on the station, is not satisfactory, particularly when in a city such as Erie only the local stations can be received during a large part of the year. When a station is misused for such a private purpose the entire listening public is deprived of the use of a station for a service in the public interest.

"The commission is unable to see that the guaranty of freedom of speech has anything to do with entertainment programs as such. Since there are only a limited number of channels and since an excessive number of stations desire to broadcast over these channels, the commission believes it is entitled to consider the program service rendered by the various applicants, to compare them, and to favor those which render the best service. If one station is broadcasting commercial phonograph records in a large city where original programs are available and another station is broadcasting original programs, for which it is making a great financial outlay, the commission believes that the second station should be favored and that the question of freedom of speech is not involved. This is only one example of many that might be cited. Entertainment such as music is not 'speech' in the sense in which it is used in the first amendment to the Federal Constitution.

"Nevertheless, on all matters that seem near the border line the commission will proceed very cautiously, and where

it feels that it may reasonably be contended that freedom of speech is involved, although the commission may not entirely agree with the contention, it will give the station the benefit of the doubt, as has been done in the cases which have come before it."¹²²

The meaning and scope of Section 29 are among the most interesting and the most difficult questions raised by the Radio Act of 1927. They must be reserved for a separate study.

VI. QUALIFICATIONS OF APPLICANTS

The Radio Act of 1927 makes certain specific requirements on the subject of eligibility of applicants for licenses. Section 12 forbids the issuance of licenses to aliens or to corporations having alien directors or officers or alien stockholdings in excess of 20%.¹²³ Section 13 forbids the issuance of permits or licenses to persons finally adjudged guilty by a federal court of certain infractions of the anti-trust laws. Under Sections 10 and 21 of the Act the Commission is expected to take into consideration the "character, and financial,¹²⁴ technical,¹²⁵ and other qualifications of the applicant to operate the station".

It is impossible, of course, to draw a hard and fast line between the subject matter of this heading and that of other portions

¹²² 2ND ANN. REP. 160. See also statement, *Great Lakes Broadcasting Co. v. Commission*, No. 4900.

¹²³ In view of the silence of the statute on the subject of common law trusts, unincorporated associations, etc., interesting questions may be raised as to the extent to which analogous requirements should be made of them, or of persons acting for their benefit. Through an oversight sec. 12 omits all reference to construction permits.

¹²⁴ Financial responsibility was treated as an important consideration in *Great Lakes Broadcasting Co. v. Commission*, *supra* note 6, at 995, and in the Commission's statements in 2ND ANN. REP. 169; *Northwest Broadcasting System, Inc. v. Commission*, No. 5112. In *Schaeffer v. Commission*, No. 5228, the Commission, in its adverse action on a renewal application, curiously relied in part upon the fact that the station "was not a profitable enterprise until the licensee entered into" the contract with the person whose utterances were found objectionable, and says "where it is shown . . . that the public had failed to lend its aid for the station's support there is some indication that the legislative standard is not being met". This, I believe, is unsound. Over half the existing number of broadcasting stations, including many of the very finest, are still losing money. The Commission's viewpoint, as expressed in the foregoing, is an undesirable incentive to a station to accept advertising (*e. g.*, direct advertising) which it now refuses to take.

¹²⁵ Experience in operating stations was recited as an important consideration in the statement in *Northwest Broadcasting System, Inc. v. Commission*, No. 5112.

of this article. To some extent, the subject is academic in view of the already overcrowded condition of the broadcast band, and of the lack of standards which has prevailed in the past; it cannot be approached with quite the same freedom as if the entire broadcast band were now for the first time thrown open for disposition. Except for the specific directions given by the Radio Act, this subject, like the others, must be treated on a comparative basis. The principles may, however, have some application in effecting reductions in the number of stations as well as with respect to applications for new stations.

To some extent the character of an applicant is involved in a showing that in the past he has been a persistent violator of the provisions of the Radio Act, or of the Commission's regulations. To what extent, under the heading of "character", the Commission may consider violations of federal or state laws having no direct bearing on radio communication is a subject to which I have given no study. The fact that an applicant was part of a virtual monopoly of broadcasting in a large city (Buffalo) was considered adversely in one case by the Commission.¹²⁶

Some weight, it would seem, should be given to the business in which the applicant is engaged, other than broadcasting itself. This would be particularly important if the question of who should be licensed to broadcast were free from any complications arising from the present existence of stations. Obviously persons carrying on businesses which most nearly resemble broadcasting, and who thus have had experience with the needs and desires of the public as well as program resources, should be preferred over businesses which are totally unlike broadcasting. The analogies most frequently drawn are between the broadcasting business and (1) the press and (2) the entertainment or "show" business. Newspapers and broadcasting stations have the same economic basis, *i. e.*, advertising; both have the same need for consulting the needs and desires of the public; both, in varying proportions, publish news, information and entertainment; a large amount of duplication of expense can be obviated by newspaper operation of a broadcasting station. The large number of stations now owned or con-

¹²⁶ Statement, WMAK Broadcasting System, Inc. v. Commission, No. 5117.

trolled by newspapers is evidence of a natural economic tendency. Similar considerations, with a different emphasis, may be mentioned in comparing broadcasting stations and theatres. A third analogy is the university, with the emphasis on educational information, but most educational institutions lack financial resources for such purposes, and are handicapped in any endeavor to get support by advertising.

In any given community experience demonstrates that the public will be far better served, and injustice will more largely be avoided, if the stations are owned by persons in competing businesses rather than by persons in businesses which have no relation to each other. In a city where one station is owned by a department store, another by a newspaper, another by an insurance company, etc., the other department stores, newspapers and insurance companies are placed at a disadvantage. If the stations are all owned by department stores, then there is no injustice as between them, or as between competitors in other businesses which have no stations at all, while the public gets the benefit of an intensified competition. The large number of communities in which stations have entirely or almost entirely drifted into the hands of business competitors, and the complaints which have arisen from communities where this is not so, are some evidence of the economic soundness of the conclusion above expressed.

Another subject which, while not perhaps technically falling under this heading but still closely enough related to it to permit mention at this juncture, is the type and character of the apparatus with which the applicant is equipped or proposes to use. For the most part, this subject ought to be covered and is gradually being covered by regulations. Most of the considerations raised by character of apparatus have to do with interference and fall under the next heading. There are other considerations, however, which bear directly on the quality and extent of service of which the apparatus is capable.

It is obvious, of course, that, other things being equal, a 50-kilowatt transmitter will cover a wider area with better service than a 5-kilowatt transmitter. If the situation were not complicated by existing stations, as between two applicants for an assign-

ment to a cleared channel, the one proposing the higher power should be preferred. As I have already suggested, however, as between a new applicant and an existing station, the latter should first be given an opportunity to increase its power.¹²⁷ The same reasoning is involved in decisions of the Commission in granting applications to establish 100-watt stations on regional channels where the maximum power permitted under its regulations is 1000 watts but no minimum power has been prescribed.¹²⁸

The same principles may be applied as between competing applicants with respect to the amount of modulation, which has a direct bearing on the effectiveness to which the use of an assignment is put as well as other matters which involve the technical excellence and fidelity of transmission.¹²⁹

VII. INTERFERENCE

This matter should eventually be almost entirely covered by regulations and should not be involved in the exercise of the quasi-judicial functions of the Commission except where violations of the regulations are involved. While the Commission's regulations cover some of these matters, they do not yet cover such important considerations as the maximum number of stations which will be permitted to operate simultaneously on local channels, the minimum geographical separation which will be permitted between two stations of given powers operating on the same channel, the minimum geographical separation which will be permitted between stations of given power on adjacent channels, the

¹²⁷ As has already been pointed out, the Court of Appeals adopted in part a contrary view in *Great Lakes Broadcasting Co. v. Commission*, *supra* note 6.

¹²⁸ *Statements*, *Bennett v. Commission*, No. 5208; *Stewart v. Commission*, No. 5158.

For cases in which deficiencies in apparatus were factors in Commission decisions, see *statements in Technical Radio Laboratory v. Commission*, No. 4835; *Good v. Commission*, No. 5264. See also decision of the Court of Appeals in *Technical Radio Laboratory v. Commission*, *supra* note 6.

¹²⁹ See *statements in Technical Radio Laboratory v. Commission*, No. 4835; *City of New York v. Commission*, No. 4898; *The Head of the Lakes Broadcasting Co. v. Commission*, No. 4976; *Havens & Martin, Inc. v. Commission*, No. 5141; *Ansley v. Commission*, No. 5149; *Courier-Journal, etc. v. Commission*, No. 5190; *Westinghouse Electric & Mfg. Co. v. Commission*, No. 5192; *General Broadcasting System, Inc. v. Commission*, No. 5196; *Bennett v. Commission*, No. 5208; *Shortwave & Television Laboratory, Inc. v. Commission*, No. 5227; *Marquette University v. Commission*, No. 5253; *Good v. Commission*, No. 5264.

minimum frequency separations which will be permitted between stations in the same community or larger area, and the like. As a result, such questions have been frequently passed on as quasi-judicial matters with an unfortunate lack of uniformity in the Commission's decisions.¹³⁰

The location of a transmitter with respect to inhabited communities is important. A transmitter of comparatively low power (*e. g.*, 500 watts) located in a thickly inhabited community will cause many times the interference (in numbers of listeners interfered with) that will be caused by a high-powered transmitter (*e. g.*, 50 kilowatt) located only a few miles out in the country.¹³¹ In a general way it is possible by regulation to prescribe the minimum distance at which a transmitter of a given power should be separated from residential districts but it has not yet been done by the Commission. In the absence of regulations on the subject, it has been necessary to hold several hearings in which the proposed location of high-powered stations has been opposed by representatives of the residents in the community which would be affected.¹³²

By regulation the Commission has prescribed the maximum deviation from frequency assignment which it will permit as 500 cycles.¹³³ This tolerance is five or ten times greater than is necessary in view of the efficiency of modern apparatus, with automatic crystal control. The Commission is taking this fact into consideration in acting upon all applications for new stations. Needless to say, it is also considering frequency deviation by a station in excess of the tolerance permitted as grounds for unfavorable action on applications.

The foregoing is not an exhaustive or complete review of the instances in which questions of interference have influenced decisions of the Commission. Enough has been said, however, to indicate in a general way the character of such questions.

¹³⁰ See 1929 *Radio Com. Rep.* 430-431.

¹³¹ See *Radio Practice*, 178. See also statement, *Carrell v. Commission*, No. 4899, *aff'd* by Court of Appeals, *supra* note 6.

¹³² General Order No. 7, April 28, 1927.

¹³³ Statement, *Schaeffer v. Commission*, No. 5228; 2ND ANN. REP. 169.

CONCLUSION

The fact must not be overlooked that broadcasting is a business, dependent like all other businesses on stability of conditions, a reasonable assurance of continued operation to attract investors, and to permit plans and contracts looking to the future, and freedom from unnecessary Government interference. Argument is unnecessary to show that the interest of the listening public is in the same direction. While an unsettled period of uncertainty and of drastic changes was necessitated by the condition of affairs which faced the Commission when it was first established, the time has come when, after the lapse of over three years of constant shifts in assignments, the business of broadcasting should be allowed to settle down. This does not mean that stations should not be eliminated for cause, or that general regulations which will effect substantial improvement in reception conditions should not be adopted, for the contrary is true. If the best interest of the listening public is kept at all times in the foreground and due regard is had to the experience of state public utility commissions, which have everywhere been required by the courts to respect the rights of existing businesses in the interest of the consuming public, no station which conforms to the Commission's regulations and gives a good service to its listeners need fear a sudden loss of privileges from changes necessitated by the advancing progress of science.