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A DISCUSSION OF THE AMENDMENT TO SECTION 16 OF THE RADIO ACT OF 1927

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There was approved on July 1, 1930, an amendment to Section 16 of the Radio Act of 1927. Substantial changes are made in the procedure to be followed where appeals are taken from certain decisions of the Federal Radio Commission. Interested parties, who had no standing under the former Act, except where leave was granted to appear as friends of the court, or as intervenors, are permitted under the new law to become parties to appeals from the Radio Commission. Drastic changes have been made in the scope of the appellate review and all appeals are taken to the Court of Appeals of the District of Columbia.

An effort will be made herein to point out the changes made by the Amendment, and to comment in a brief way on the effect of those changes. It is not the purpose of this article to consider the validity of any provisions found in the Amendment. It is quite probable that certain of them will be attacked as unconstitutional.¹

Under Section 16, as originally enacted, appeals could be taken only by an unsuccessful applicant for a construction permit, a station license, or for the renewal or modification of an existing station license. The Act also provided that any licensee whose license was revoked by the Commission, should have the right to appeal from such decision of revocation to the Court of Appeals of the District of Columbia or to the district court of the United States in which the apparatus licensed was operated.²

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1. Two cases are now pending in the Supreme Court of the United States on questions certified by the Seventh Circuit Court of Appeals. (*White v. Johnson, et al.*, 29 F. (2d) 113, and *U. S. v. American Bond and Mortgage Company* 31 F. (2d) 448.) These cases both raise questions touching the property right, if any, of a licensee in the use of his equipment and both cases attack the constitutionality of the Radio Act, in so far as it attempts to give to the Radio Commission the power to take away from a licensee, without just compensation, the right, in whole or in part, to the only possible use of his equipment. Obviously the Amendment to Section 16 is subject to the same attack.

2. For a complete and careful analysis of the subject of Radio Appeals, as practiced under the original enactment, see article by *Louis G. Caldwell*, former General Counsel of the Federal Radio Commission, "Appeals from Decisions of Federal Radio Commission," *JOURNAL OF AIR LAW*, Vol. 1, No. 3 (July 1930), p. 274.

No provision was made for appeals by any party other than the unsuccessful applicant. A party respondent to the hearings held by the Commission on an application, had no power to appeal from a decision granting that application. Nor could such a party respondent become a party respondent in the Court of Appeals, if after a denial of the application, the unsuccessful applicant appealed.

The Amendment provides that an appeal may be taken from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

"1. By any applicant for a station license, or for the renewal of a station license, or for the modification of an existing station license, whose application is refused by the Commission.

"2. By any licensee whose license is revoked, modified or suspended by the Commission.

"3. By any other person, firm, or corporation aggrieved, or whose interests are adversely affected by any decision of the Commission granting or refusing any such application or by any decision of the Commission revoking, modifying or suspending an existing station license."

It will be noted that the Amendment specifically permits an appeal to be taken not only where a license is revoked, but also when a license is suspended or modified. The failure of the original enactment to recognize the need of such appeals was one of its conspicuous weaknesses.

The appeals falling under Paragraph 3 of the Amendment, just quoted, also represents the filling of a distinct gap in the earlier legislation. It was apparently the intent of Congress to allow appeals from all decisions of the Commission which injured any other licensee, even though the latter was not a party to the proceedings before the Commission.

But what will be the situation where the Commission makes a change of its own initiative? May a station not directly affected by a modification or suspension of its own license appeal from the decision on the ground that it is aggrieved thereby? Paragraph 3 specifically contemplates only decisions rendered upon applications, or decisions revoking, modifying, or suspending a license. It would seem that in such an instance the injured licensee would be obliged to appeal under Paragraph 2, under the theory that while the Commission did not formally modify, suspend, or revoke its license, it did, in fact, modify the license, by granting to other licensees privileges which substantially changed the effect of the license originally granted to the aggrieved party.

Under amended Section 16, any interested party may intervene and participate in the proceedings had upon the appeal, by filing with the Court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement both upon the applicant and upon the Commission. The Amendment defines an interested party as "any person, firm or corporation who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission"

It is interesting to note that a person, firm, or corporation aggrieved by the Commission's decision, will, under the statute, seek its relief by becoming an appellant, whereas a person, firm, or corporation who would be aggrieved by a reversal or modification of the Commission's decision comes into the court as "an interested party" by filing a "Notice of Intention to Intervene."

The amended Section makes no provision for any appeal to the district court of the United States. The provision in the original Act which permitted a licensee whose license had been revoked by the Commission to file an appeal in the United States district court of the jurisdiction wherein the apparatus was located, was probably unconstitutional. It attempted to invest an administrative function in a constitutional court.

The Court of Appeals of the District of Columbia has a dual nature. It possesses the same jurisdiction as the United States Circuit Court of Appeals. In that sense it is a "constitutional" court. But under the plenary power of the Congress in its jurisdiction over the District of Columbia, it has the right to employ the Court of Appeals as a "legislative" court. It is in this latter capacity that the Court acted under Section 16 of the Radio Act of 1927.

In the General Electric case, decided by the Supreme Court of the United States on May 19, 1930, it was held that the appeal provided by the Radio Act was a "legislative" or "administrative" appeal, and that the Court of Appeals of the District of Columbia was not acting in its constitutional capacity in determining the appeal. For that reason, the appeal was not a "case for controversy" in the constitutional sense, and the Supreme Court held that it had no jurisdiction over that or any appeal taken under the Radio Act of 1927.

It is obviously the effort of the revised Section to make the appeal a judicial rather than an administrative proceeding. To

that end, the jurisdiction of the Court is limited to a review of the questions of law. The former possibility of a trial *de novo* is eliminated. Findings of fact by the Commission, if supported by substantial evidence, are to be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. It has been held, of course, by the Supreme Court of the United States that the question of whether a finding of fact is supported by substantial evidence is a question of law and not of fact.

The Amendment further provides "the court's judgment shall be final subject however to review by the Supreme Court of the United States upon the writ of certiorari on petition therefor under Section 347 of Title 28 of the Judicial Code by appellant, by the Commission, or by any interested party intervening in the appeal."³

It is doubtful if this provision adds anything to the effect of the Act. It is not within the power of Congress to add to or detract from the jurisdiction of the United States Supreme Court. If the appeal provided by the Amendment requires the Court of Appeals to act in its "constitutional" capacity, then the Supreme Court of the United States would have jurisdiction even if the last quoted provision were omitted from the Act. Conversely, if the Court of Appeals acts in a legislative or administrative capacity, the decision in the General Electric case will control, the Supreme Court will have no jurisdiction over the appeal, and the provision in the Amendment will not change the situation.

An odd situation is created by the enactment of this Amendment. Apparently through an oversight, no provision is made therein for an appeal by an applicant for a construction permit.⁴ Under the rules of the Commission, any person or firm desiring to operate a radio station must first apply for a construction permit. If that application is granted, an application for a license is filed, and that is usually granted as a matter of form. Under the Act as originally passed, an applicant for a construction permit was afforded the same opportunity for appellate review as an applicant for a station license or for the renewal of an existing license or for the modification of an existing license. There is every reason to

3. This citation is incorrect, as the reference should be to the U. S. Code, not to Judicial Code.

4. The omission is due to the fact that in a bill introduced in Congress during the last session designed to remedy a number of defects in the Radio Act of 1927 there was a provision repealing Section 21 of the act which provides for construction permits. The amended section 16 was taken verbatim out of this bill without reinserting reference to applications for construction permits.

believe that when Congress next convenes, a provision will be enacted giving to unsuccessful applicants for a construction permit the same opportunity to appeal as is accorded an unsuccessful applicant for a license.

In the meantime, an applicant for a construction permit whose application is denied by the Commission may probably obtain his relief by filing a petition for a writ of mandamus in the Supreme Court of the District of Columbia.

Those who have followed the progress of the legislative deliberations leading up to the enactment of the Amendment were surprised to find that no provision had been made for the taking of additional testimony. It was thought that the Court of Appeals would be empowered to remand the case to the Federal Radio Commission for the taking of additional evidence in instances where the Court of Appeals felt that it could not properly determine the questions of law in the absence of such evidence. It would seem that such a provision is highly desirable, particularly in view of the fact that an interested party may participate in an appeal in the Court of Appeals although that same party may have had no part in the making of a record before the Commission. There is also some reason to believe that Congress will enact such a provision when it next convenes.

Certain changes are made in the procedure to be followed in taking an appeal. The earlier Act, in an odd provision, required that the licensing authority, that is, the Federal Radio Commission, be notified of said appeal by service upon it *prior to the filing thereof* of a certified copy of the said appeal and the reasons therefor. At the same time it was necessary to file in the Court a notice of appeal and reasons therefor which had been served upon the Federal Radio Commission. The Amendment provides that a true copy of the notice and statement of reasons for appeal shall be served upon the Commission, and that the notice and statement with proof of that service shall be filed with the Court within twenty days after the decision complained of is effective.

In the Act as originally passed, and in the Amendment, the effective date of the Commission's decision is important as it determines the time during which the appeal may be filed. In several appeals taken under the earlier enactment the effective date of the Commission's decision was a controverted issue. There was no obligation on the Commission to announce its decision on the effective date. In some instances, the aggrieved party did not learn

of the decision until several days after the effective date. This situation cannot exist under the Amendment, since it is provided that "unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the City of Washington."

An entirely new provision requires the Commission within five days from the date of service upon it of a notice of appeal to mail or otherwise deliver a copy of the notice of appeal to each person, firm, or corporation shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of the amended Section 16. In this manner, the interests of all licensees are protected. In the past it has been difficult for the holder of a license to know when applications inimical to his interests had been filed with the Commission. A similar difficulty existed with respect to appeals filed in the Court of Appeals.

In its recently adopted rules of practice and procedure the Commission has provided that all interested parties shall be notified of the date of hearings and an applicant must send to all such interested parties a statement of the facts which the applicant expects to prove at the hearing. (Practice and Procedure Before the Federal Radio Commission, Subtitle B, Sections 6 and 7.)

The record on appeal, therefore, would show the identity of the interested parties, and the provision in Section 16 rounds out the scheme of protection for all licensees who might be affected by the action one way or the other on any application, or on an appeal from decisions of the Commission.

The Commission shall have thirty days after the filing of the appeal within which to file with the Court the record in the case, and shall within thirty days thereafter file a "full statement in writing of the facts and grounds for its decision, as found and given by it and a list of all interested persons, firms, or corporations to whom it has mailed or otherwise delivered a copy of said notice of appeal."

It is interesting to speculate on what is meant by the phrase "as found and given by it" as used in the above paragraph. In the past, the "Statement of Facts and Grounds for Decision" had not been prepared until after the appellant had filed his notice of appeal and reasons therefor. The Commission decided that the Radio

Act did not require it to render written opinions or statement of grounds for its decision, *except* where appeals were taken from its decisions. Frequently the Commission's statement has taken the form of a brief in reply to the appeal. In view of the implications of the amended Section 16, the Commission may decide to render written opinions, explaining its reasons for its decisions. It would seem that appeals could be greatly simplified if unsuccessful applicants were furnished with a simple statement of the reasons for the Commission's action.

Another consideration is that future hearings will be held before examiners rather than before members of the Commission. The new rules of practice and procedure provide that the examiner shall make a written report to the Commission containing recommendations as to the decision to be made, and the facts and grounds upon which such recommendations are made. A copy of the report is to be mailed to all parties who participated in the hearing, and provision is made for the filing of exceptions.

This new practice will in itself be another reason for expecting the Commission to "find and give" the reasons for decisions rendered by it.

At the time of writing this paper, September, 1930, there are pending in the Court of Appeals of the District of Columbia approximately twenty-two appeals from decisions of the Federal Radio Commission, all of which were filed prior to July 1, 1930, the date of the Amendment. These cases will be argued and decided under the prior statute, since the Amendment specifically provides that appeals filed prior to the enactment of the amendatory legislation should not be affected thereby.

In conclusion, it should be said that although this Amendment still leaves much to be desired in the method of providing a procedure of full appellate review of Federal Radio Commission decisions, it does represent a vast improvement over the original Section 16. If it is true that the entire body of the law is constantly changing, it is ever truer that the law of radio, like any new-born babe, is still in its swaddling clothes, and is undergoing a marked change almost from day to day.