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RADIO LAW IN THE MAKING

COLONEL THAD H. BROWN*

The advent of radio in American business and social life has demonstrated once more the conflicting mechanisms inherent in unregulated commerce. Science had given the world a new and marvelous invention for the dissemination of ideas, but it remained for law to follow and preserve its usefulness. It was at once apparent that National regulation alone could stabilize broadcasting and reconcile the many claims and controversies that precipitated themselves upon this inchoate industry. The Radio Act of 1927 was promulgated by the Congress to effect this much-needed regulation.

Since law is not a self-contained doctrine, but is subject to interpretation and construction, an immediate need arose in the Federal Radio Commission for a staff of legally trained personnel, to be concerned only with the legal aspects of radio regulation, its duties and functions to be: (1) aiding the Commission in the administration of radio communication under the Radio Act of 1927, as amended, by interpreting the Act for the Commission wherever any doubt arises as to its duties thereunder; (2) passing upon the many and varied legal questions arising in connection with applications made for the different classes of radio service; (3) evolving rules and regulations governing orderly procedure for conduct of hearings before the Commission; (4) assisting with the conduct of all hearings before the Commission; (5) conducting on behalf of the Commission all litigation in which it has an interest or is a party; (6) acting in the capacity of counsel for the individual Commissioners in any and all mandamus and/or contempt proceedings brought against them or any of them; and (7) last, but by no means least, endeavoring, wherever possible, to establish a sound radio jurisprudence.

For purposes of administration the Legal Division, under the immediate supervision and direction of the General Counsel, is divided into three sections as follows: 1. *Administrative*. (a) Application and Forms; (b) Complaint and Investigation. This section is responsible for the preparation and revision of all forms of application and authorization necessary under the Radio Act of 1927.

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It examines all applications for licenses and/or other authorizations to determine whether they present any legal questions. It receives all complaints of violation of the Radio Act or rules and regulations of the Commission. It cooperates with and advises the Chief Investigator of the Commission in respect to all matters requiring field investigation and refers to the Commission such cases as in its opinion merit revocation of license, denial of application, etc. It also keeps a record of all violations and presents them, together with its recommendations, to the Commission or Department of Justice as the case may warrant, for action. 2. *Hearing and Record.* One or more members of this section is present at all hearings of the Commission. The attorney so attending advises the Commission as to the status of the matter being heard, the rights of respondents and protestants, the admissibility of evidence and other legal questions. On behalf of the Commission he cross-examines witnesses, avoiding, however, the advocacy of the claims of any applicant, respondent or protestant. In proper cases, he also presents evidence for the Commission. He is also responsible for the correlation of all exhibits filed with the Commission in cases before it and the record on appeal from its decisions. 3. *Research and Drafting.* This section is responsible for the preparation of all court papers, briefs, etc., in any and all litigation in which the Commission may be a party or is interested. In the absence of legal precedents and codified radio laws, constant research work of a legal nature has been necessary. The problems of other administrative bodies have been studied in careful detail with a view to applying existing principles to situations confronting the Commission. This section drafts and correlates the opinions of the General Counsel and arranges for the publication thereof. Correspondence from the Radio Division of the Department of Commerce requesting legal opinions on various kinds of applications is referred to and answered by this section.

As a separate branch of the Legal Division the Commission authorized the appointment of a Chief Examiner and two Attorney-Examiners whose duties are to conduct hearings in such cases as the Commission directs, under and in accordance with its rules of practice and procedure.

Since the beginning of the Radio Commission in 1927, there have been 61 appeals taken to the Court of Appeals of the District of Columbia from decisions of the Commission under Section 16

of the Act. Of these, 24 are pending, 27 have been dismissed, and 10 have been decided.¹

There have been five cases in the Supreme Court of the District of Columbia, being in the nature of injunction proceedings, of which one was dismissed by that court,² two were dismissed by appellant,³ and two are pending.⁴

There have been five cases in the United States District Courts, one of which is pending,⁵ and three of which have been decided,⁶ and one dismissed by the court.^{6a}

Six cases have reached the Supreme Court of the United States, the first being the General Electric case,⁷ in which the matter of the jurisdiction of the Court of Appeals under Section 16 of the Radio Act of 1927 was determined to be administrative, hence its decision cannot be reviewed by the Supreme Court of the United States.⁸

1. *General Electric Company v. Federal Radio Commission*, 31 F. (2d) 630; *Richmond Development Corporation v. Federal Radio Commission*, 35 F. (2d) 883; *Technical Radio Laboratory v. Federal Radio Commission*, 36 F. (2d) 111; *C. L. Carrell v. Federal Radio Commission*, 36 F. (2d) 117; *City of New York v. Federal Radio Commission*, 36 F. (2d) 115; *Great Lakes Broadcasting Co. v. Federal Radio Commission*, *Wilbur Glenn Voliva v. Federal Radio Commission*, *Agricultural Broadcasting Co. v. Federal Radio Commission*, 36 F. (2d) 993; *Chicago Federation of Labor v. Federal Radio Commission*, 53 W. L. R. 402; *Universal Service Wireless, Inc., v. Federal Radio Commission*, 41 F. (2d) 113.

2. No. 49525, *National Radio Press v. Federal Radio Commission*.

3. No. 49,000, *San Angelo Broadcasting Co. v. Ira E. Robinson, et al.*, and No. 51,466, *Don Lee, Inc., v. Federal Radio Commission*.

4. No. 51,439, *The Baltimore Radio Show v. Federal Radio Commission*; No. 51,325, *Stromberg-Carlson Telephone Manufacturing Co. v. Federal Radio Commission*. In the *Stromberg* case a temporary injunction was granted by the Court and the Commission has appealed from the Order granting this temporary injunction to the Court of Appeals of the District of Columbia.

5. No. 9882, *Agricultural Broadcasting Co. v. Great Lakes Broadcasting Co. and C. McK. Saltzman et al. in the United States District Court for the District of Illinois, Eastern Division*.

6. *Clinton R. White v. George E. Q. Johnson and E. D. Hayes; Emil Denmark, Inc., a corporation, v. George E. Q. Johnson and E. D. Hayes*, 29 F. (2d) 113; *United States of America v. American Bond & Mortgage Co.*, 31 F. (2d) 448.

6a. No. 2064, *Bridgeport Broadcasting Station, Inc. v. Federal Radio Commission* in the United States District Court for the District of Connecticut.

7. *General Electric Co. v. F. R. C.* 74 L. Ed. (U. S.) 514, 281 U. S.

8. The amendment to Section 16 of the Radio Act of 1927, approved July 1, 1930, limits the scope of review by the Court of Appeals of the District of Columbia, by making the findings of the Commission conclusive unless arbitrary or capricious, omits the provision in the original section for the taking of additional evidence by that Court, and provides for a review of the decisions of the Court of Appeals by the Supreme Court of the United States.

Certiorari was denied in three cases⁹ and in two cases,¹⁰ arising in the United States District Courts, questions have been certified to the Supreme Court of the United States by the Circuit Court of Appeals for the Seventh Circuit.

Of the cases pending, their status and issues are as follows:

No. 4987—*Intercity Radio Telegraph Co. v. F. R. C.*

No. 4988—*Wireless Telegraph & Communications Co. v. F. R. C.*

No. 4990—*RCA Communications, Inc. v. F. R. C.*

No. 4991—*Mackay Radio & Telegraph Co. v. F. R. C.*

These appeals all relate to a controversy arising out of certain decisions of the Federal Radio Commission refusing to authorize the issuance of station licenses and construction permits for point-to-point communication within the United States. The principal issues involved in these appeals are: Whether the Court of Appeals of the District of Columbia can pass on rights of parties not before it; what consideration and weight (if any) ought to be given to priority of existing stations in the communication field carrying on—(a) the same service as that applied for by later applicants, or (b) a different service, and priority in the matter of the filing of applications; the application of the standard of "public interest, convenience, and necessity" to public point-to-point communication.

All parties to these appeals have filed briefs and appellants have filed reply briefs. Oral argument will be presented to the Court of Appeals of the District of Columbia early in the Fall term.

No. 5095—*The Journal Company, a corporation v. F. R. C. (Station WTMJ).*

This is an appeal from an order of the Commission granting a license to the applicant but by him claimed not to be in accordance with the terms of his applications, because licenses were granted *other applicants* whose operation cut down appellant's "service area." The primary questions are whether the Act permits an appeal from a decision of the Commission in so far as said decision reduced the service area of appellant's broadcasting station, and whether a hearing is necessary when the Commission puts other stations on the same frequency as existing stations. Briefs have been filed by both parties and oral argument thereon was, by the Court, postponed until the second Journal Co. case, No. 5163, is heard.

No. 5104—*Westinghouse Electric and Manufacturing Co. v. F. R. C.*

9. *City of New York v. F. R. C.*; *Great Lakes Broadcasting Company v. F. R. C.*, and *Wilbur Glenn Voliva v. F. R. C.*

10. *Clinton R. White, George E. Q. Johnson, et al. and American Bond and Mortgage Company v. United States of America*, *supra*.

No. 5105—*Westinghouse Electric and Manufacturing Co. v. F. R. C.*

No. 5150—*Westinghouse Electric and Manufacturing Co. v. F. R. C.*

These appeals grew out of certain action of the Commission relating to applications of appellant for renewal of licenses for its broadcasting stations KYW, KFKX, and KYA, located at Chicago, Ill. The renewal licenses contained language to the effect that they were issued with the specific understanding that the cleared channel of frequency of 1020 kilocycles had been allocated for use by stations in the Second Zone created by Section 2 of the Radio Act of 1927, and they were issued for a temporary period of 90 days and would not be renewed provided application therefor was made for the use of 1020 kilocycles by a proper applicant within the Second Zone. It is contended by appellant that this provision in the licenses constitutes a denial of its applications. The Commission moved to dismiss on the ground that there was no denial of appellant's applications and the use of 1020 kilocycles by it originally was temporary and known to be so by appellant. The principal issue presented is whether the decisions of the Commission are ones from which an appeal may be taken under Section 16 of the Act. Briefs are due by both parties early in the Fall and these appeals will probably be argued orally before the Court of Appeals at the next term of Court.

No. 5141—*Havens and Martin v. F. R. C.*

This is an appeal from an order of the Commission denying an application for a construction permit seeking an increase in power with a regional frequency assignment for Station WGBM at Richmond, Va. The issues include an interpretation of "public interest, convenience and necessity" as used in the Radio Act of 1927, and the Davis Amendment to the Radio Act of 1927, approved March 28, 1928. The record in this appeal has been filed and briefs will be forthcoming by both parties in the early Fall. Oral argument may be reached the next term of Court.

No. 5149—*W. O. Ansley, Jr. v. F. R. C.*

This is an appeal from an order of the Commission denying an application for a construction permit to build a station in the City of Abilene, Texas. The questions raised by this appeal are mostly questions of fact relating to the service Texas is getting and probable interference if the application of appellant were granted. The quota figures promulgated by the Commission under the provisions of the Amendatory Act of March 28, 1928, are challenged in this appeal as well as certain procedure of the Commission. The record has been printed and appellant's brief is due shortly.

No. 5163—*The Journal Co. v. F. R. C.*

This is an appeal from an order of the Commission denying appellant's application for modification of station license (WTMJ). This station is at Milwaukee, Wisconsin, and had been operating on the frequency of 620 kilocycles with a power output of 1 kilowatt and an additional 1½ kilowatts for experimental purposes. Its application, the denial of which gave rise to these proceedings, requested an increase in power to 5000 watts. The Journal Company attacked General Order No. 40 of the Commission by their appeal and propose in place of the 10 kilocycles separation of stations adhered to by that order, a plan for 50 clear channels or frequencies with a 10-kilo-

cycle separation and a 7½-kilocycle separation for all others. The record has been printed and appellant's brief is due in the near future.

No. 5190—*The Courier-Journal Co. and The Louisville-Times Co. v. F. R. C.*

This appeal arises by virtue of a change in the frequency assignment of Station WHAS pursuant to a clear channel shift undertaken by the Commission's General Order No. 87, to alleviate cross-talk interference, promulgated by virtue of Section 4 (f) of the Radio Act of 1927, as amended. It is contended by appellant that General Order No. 87 is not a reasonable exercise of the powers of the Commission, and that the action of the Commission taken pursuant thereto affecting a change of the frequency on which Station WHAS was licensed to operate, constitutes an appealable decision of the Commission. The Commission contends that General Order No. 87 is a valid exercise of its regulatory powers affecting all stations of a particular class so that its action taken pursuant thereto changing the frequency assignment of Station WHAS does not constitute an appealable decision of the Commission under Section 16 of the Radio Act of 1927, as amended. The record in this case has been printed and briefs are due in the early fall.

No. 5192—*Westinghouse Electric & Manufacturing Co. v. F. R. C.*

This appeal, unlike the other three former Westinghouse appeals, grew out of the clear channel shift made by the Commission pursuant to General Order No. 87. It raises the same question as those in the Courier-Journal Company and The Louisville-Times Company appeal. The printed record has been received and briefs are due in the early fall.

No. 5196—*General Broadcasting Co. v. F. R. C.*

This appeal is taken from an order of the Commission denying appellant's application for renewal of station license (WGBS) for the use of the frequency of 600 kilocycles, power output 500 watts (day), 250 watts (night); limited time. The station had been given the use of this frequency temporarily and experimentally because it was only 30 kilocycles away from another station operating in the same geographical area of metropolitan New York, this being less than the separation generally accepted by the leading engineers of the country for satisfactory service. The principal issue is one of fact, viz., whether interference resulted by reason of the operation of Station WGBS only, on 600 kilocycles only 30 kilocycles away from Stations WMCA and WNYC, all in New York City. The application of the Amendatory Act, approved March 28, 1928, is also in question. The record has not yet been printed in this case, but is due early in the fall.

No. 5204—*Missouri Broadcasting Corp. and C. W. Benson v. F. R. C.*

This is an appeal from an order of the Commission denying the application of the Missouri Broadcasting station for a construction permit seeking the use of the frequency of 1350 kilocycles for Station WIL with a power output of 1000 watts. Besides the issue of fact, viz., whether the evidence of comparative showing of public interest of the stations involved in this appeal supports the Commission's decision, there is this question of law: Is proof of improper use of facilities by a licensee sufficient to entitle any

other applicant to the use thereof, without further proof of its serving public interest, convenience, and necessity? The record in this case has not yet been printed.

No. 5208—*J. E. Bennett Music Company v. F. R. C.*

This is an appeal from an order of the Commission denying a construction permit to erect a station at Cordell, Oklahoma, for the use of 1360 kilocycles with a power output of 100 watts. No question of law is involved in this appeal. The only questions of fact arising herein relate to interference and whether the Commission's finding that public interest would not be served by the granting of the appellant's application is supported by the evidence. The record has not yet been printed.

No. 5227—*Shortwave and Television Laboratory, Inc. v. F. R. C.*

This appeal arose as a result of the Commission's denial of appellant's application for a construction permit to build a station at Boston, Mass., for the use of the frequency of 1370 kilocycles with a power output of 100 watts (night) and 250 watts (day). The principal issue is one of fact, viz., whether the evidence supports the Commission's finding that public interest would not be served by granting the application applied for. Commission procedure is questioned by this appeal also. The record has not yet been printed.

No. 5228—*William B. Schaeffer (doing business as Schaeffer Radio Company) v. F. R. C.*

The Commission denied the application of appellant for renewal of its station (KVEP) license to operate at Portland, Oregon, on the frequency 1490 kilocycles, unlimited time of operation with a power output of 15 watts. This appeal raises squarely these questions: What is obscene and indecent language as contemplated by the Act, and can the Commission indirectly censor station programs for "indecent and obscene" language? The record in this case is not yet printed.

No. 5240—*KFKB Broadcasting Association, Inc. v. F. R. C.*

Like the foregoing appeal, this arose out of a denial of an application to renew the station's license. This appeal raises the question: How far can the Commission go in its indirect censorship of programs, determining what is or is not in the public interest? The record has not yet been printed.

No. 5253—*Marquette University, a corporation (Station WHAD) v. F. R. C.*

This is an appeal from an order of the Commission denying appellant's application for modification of its station license. The issues involved in this appeal include the application of the Davis Amendment to the Radio Act of 1927, approved March 28, 1928, and the legislative standard of public interest. The Commission's statement and record have not yet been filed.

No. 5264—*Horace D. Good, trading as the Avenue Radio and Electric Shop v. F. R. C.*

The Commission denied the appellant's application for a construction permit and from this order an appeal was taken. Appellant attacks certain procedure of the Commission in his appeal, but the principal issue is one of

fact, viz., whether the granting of the application would serve public interest. The record in this appeal has not been designated yet.

No. 5268—*The Journal Company v. F. R. C.*

This is an appeal under the amendment to the Radio Act approved July 1, 1930, from an Order of the Commission granting a renewal of license to the Clearwater Chamber of Commerce and St. Petersburg Chamber of Commerce for the operation of a station known as WFLA-WSUN located at Clearwater, Florida, with authorized power of 1 kilowatt in the evening and 2½ kilowatts daytime operation on the frequency of 620 kilocycles. Appellant contends that it is aggrieved and that its interests are affected by reason of interference caused by the operation of the aforesaid station with programs from its station, WTMJ, on the same frequency.

This appeal attacks the procedure of the Commission as well as its findings.

A Motion to Dismiss has been filed by the Commission in this, and Cause No. 5269—*The Journal Co. v. F. R. C.*, being a similar protest against the Commission's Order granting a renewal license to the Maine Broadcasting Corporation Station WLBZ on 620 kilocycles.

No. 51439—*The Baltimore Radio Show, Inc., a corporation, et al. v. F. R. C. (in the Supreme Court of the District of Columbia).*

This is a suit for an injunction against the Commission to enjoin it from allowing the Baltimore Broadcasting Company to operate its station WCBN upon a frequency 60 kilocycles away from that upon which appellant operates its station WFBR. Plaintiff's contention is that the operation of station WFBR located geographically so close to Station WCBN, 60 kilocycles apart, will cause a reduction of its service area. It raises a question of fact first as to whether the action complained of does effect a reduction of plaintiff's station's service area, and, second, a question of law: does a license to operate a station on a given frequency with a given power output entitle the station to a "service area" to the limit of such facilities?

No. 51325—*Stromberg-Carlson Telephone Mfg. Co., a corporation v. F. R. C.*

This is a suit for an injunction growing out of the Commission's General Order No. 87 and subsequent amendments, to enjoin the Commission from changing the frequency assignment of the plaintiff's radio broadcasting station WHAM and to restrain and enjoin the Commission from assigning any other radio station to the frequency used or to be used by plaintiff's radio station WHAM.

The Supreme Court of the District of Columbia granted plaintiff's motion for preliminary injunction and the Commission appealed from this order granting the same on the ground that the Court's Order placed the burden of proof in showing why the changes made by the Commission's General Order No. 87 should not be made, on the Commission, contrary to the provisions of the Radio Act of 1927.

The validity of the Commission's General Order No. 87 and amendments thereto is in issue as well as certain other Commission procedure.

The Commission's application to the Court of Appeals of the District of Columbia for a special appeal has been granted and the record will be printed in a short time.

No. 9882—*Agricultural Broadcasting Co. v. Great Lakes Broadcasting Co. and Charles McK. Saltzman et al. (in the United States District Court for the Northern District of Illinois).*

The Agricultural Broadcasting Company has filed a suit for injunction against the individual Commissioners as the Federal Radio Commission and the Great Lakes Broadcasting Company to restrain the Commission from enforcing as against it the Order of the Court of Appeals reducing the time of operation of its station WLC from 5/7 to 1/2.

The validity of the Order of the Court of Appeals of the District of Columbia is in question and also whether or not there is a property right in a license as between two individual stations which may be protected by injunction.

The Commission has moved to dismiss on the grounds of lack of jurisdiction over any of the Commissioners.

Amerian Bond & Mortgage Co. v. Federal Radio Commission (in the Supreme Court of the United States).

This appeal was taken to the circuit court of appeals from a decree entered by the District Court for the Northern District of Illinois, perpetually enjoining the American Bond & Mortgage Company from operating its broadcasting station WMBB-WOK in Chicago on a frequency of 1190 kilocycles with a power output of 5000 watts.

The following questions are certified to the Supreme Court:

Question 1. Did a corporation which, prior to the enactment of the Radio Act of 1927, applied for and obtained successive licenses from the Secretary of Commerce authorizing such corporation to broadcast with a specified transmitter, and which acquired and owned the necessary apparatus, the building in which the apparatus was housed and the land whereon the same was located, and continuously broadcast therewith to an audience interested in its radio programs, have or acquire thereby a property right within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States.

(a) In the continuance of broadcasting by such corporation as a business or occupation?

(b) In the continued use of such apparatus, building and land for similar broadcasting purposes?

Question 2. Does a corporation, which, subsequent to the enactment of the Radio Act of 1927, expended substantial sums in replacing old apparatus with new after obtaining a construction permit from the Federal Radio Commission and thereafter used the new apparatus under licenses issued by the Federal Radio Commission and continuously broadcast therewith to an audience interested in its radio programs, have or acquire thereby a property right within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States.

(a) In the continuance of such broadcasting as a business or occupation?

(b) In the continued use of such apparatus, building and land for similar broadcasting purposes?

Question 3. If by virtue of the answers to questions 1 and/or 2, it appears that such a corporation had or acquired such property rights, is such a corporation deprived of property without due process of law or without just compensation contrary to the provisions of the Fifth Amendment to

the Constitution of the United States by virtue of the waiver required by the joint resolution of Congress of Dec. 8, 1926, or the waiver referred to in the last paragraph of Section 5, or the condition required to be contained in all licenses by subparagraph (a) of Section 11 of the Radio Act of 1927, as amended?

Question 4. If by virtue of the answers to questions 1 and/or 2, it appears that after Feb. 23, 1927, such a corporation had or acquired such a property right, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license by said person, to deprive such person of such property without due process of law, in that the only standards provided by the act for the guidance of the Commission in acting upon such applications are that of "public interest, convenience or necessity" and that set forth in Section 5 of the amendatory act of Mar. 28, 1928, and in that the act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the granting of such application would not serve public interest, convenience or necessity, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

Question 5. If by virtue of the answers to questions 1 and/or 2, it appeared that after Feb. 23, 1927, such a corporation had or acquired such a property right, is the act of Mar. 28, 1928, amending the Radio Act of 1927 (commonly known as the Davis Amendment) valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license to deprive such person of such property without due process of law or to take private property for public use without just compensation, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

Question 6. If by virtue of the answers to questions 1 and/or 2, it appears that after Feb. 23, 1927, such a corporation had or acquired such a property right, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission in its action on an application for renewal of license by a person such as is described in question 2 to take property for public use without just compensation, by denying such application, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

The case of *Clinton R. White v. George E. Q. Johnson* which was filed in the United States District Court for the Northern District of Illinois arose by reason of the attempt of Clinton R. White, the owner of radio station WCRW at Chicago, to compel the Commission to renew his license to operate on 1340 kilocycles, with 500 watts power. An interlocutory injunction was sought to enjoin the Commission from enforcing the penal provisions of sections 32 and 33 of the Radio Act of 1927 against Mr. White, either for violation of the provisions of the Act or for violation of the Order of the Commission. The Court denied the application for injunction, and upon appeal to the Circuit Court of Appeals for the Seventh Circuit, the following questions were certified to the Supreme Court of the United States:

1. Did a person who, prior to the enactment of the Radio Act of 1927, applied for and was granted successive licenses by the Secretary of Commerce for the operation of a broadcasting station, and who owned and continuously operated such broadcasting station, whereby it developed a following of listeners and advertisers which constituted a going business, have or acquire thereby property in the continued operation of such station, with power appropriate to continue the operation of said business, within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States?

2. If the answer to question 1 is in the affirmative, is the joint resolution of Congress of Dec. 8, 1926, valid as against the claim that, by virtue

of the waiver it requires, it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

3. If the answer to question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that by virtue of the waiver required in the last paragraph of section 5 and by virtue of the condition required to be contained in all licenses by subparagraph (a) of section 11, it works a deprivation of such property without due process of law or a taking of private property for public use without just compensation?

4. If the answer to question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in its action on an application for renewal of license by a person such as is described in question 1, to take private property for public use without just compensation, either by denying such application or granting it on such terms as virtually to destroy a going broadcasting business of such person?

5. If the answer to question 1 is in the affirmative, is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license by said person, to deprive such person of such property without due process of law, in that the only standards provided by the act for the guidance of the Commission is acting upon such applications are that of "public interest convenience or necessity" and that set forth in section 5 of the amendatory act of Mar. 28, 1928, and in that the act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the granting of such application would not serve public interest, convenience or necessity?

While the decisions rendered by the courts in cases wherein the Commission was a party were not numerous, certain of these are destined to have a more or less permanent effect on the law of radio. The following is a summary of these cases:

THE WGY CASES

The first and probably best known decision of the Court of Appeals is that rendered in the case of *General Electric Company and the People of the State of New York v. Federal Radio Commission*, usually called the WGY case.¹¹ In this case the Commission had failed to renew the license of WGY in all particulars and an appeal was taken on the theory that an application which was granted WGY in part constituted a refusal of which the Court might take cognizance under Section 16 of the Radio Act of 1927. The Court of Appeals upheld this contention by reviewing and revising the decision of the Commission in an administrative rather than a judicial capacity. It refrained, however, from passing on any question of property rights, although the power of Congress to deal with the subject matter by appropriate legislation was specifically recognized.

A petition for a writ of certiorari was thereupon filed in the Supreme Court and was granted on October 14, 1929. However, at the time of oral argument in January, 1930, the Supreme Court indicated from the bench that it had no jurisdiction over the cause inasmuch as the Court of Appeals was the final authority under the then existing appellate provision. The Court on May 19, 1930, rendered a written opinion in which it was clearly

11. 31 F. (2d) 630.

enunciated that the Court of Appeals, under the Radio Act of 1927, is an administrative tribunal and the Supreme Court has no appellate jurisdiction to review its determination on writ of certiorari.

THE TECHNICAL RADIO LABORATORY CASE

In the next case decided by the Court of Appeals, *Technical Radio Laboratory v. Federal Radio Commission*,¹² the question of property rights in the use of the ether was squarely presented to the Court and it was held that "the authority of Congress to regulate radio communication as a species of interstate commerce necessarily implies the right of reasonable regulation to control in the public interest the number, location, and activities of the broadcasting stations of the country as an integral system, and such control must necessarily at times involve the right of reasonable restriction and pro tanto prohibition." On the question of the weight to be attached to the Commission's decision the Court declared that "the burden is upon appellant and this Court should sustain the Commission's findings of fact unless they are shown by the record to be manifestly against the evidence."

THE CARRELL CASE

The legislative power of the Commission to make rules of general application, entailing limitation of private property rights was sustained in the case of *Carrell v. Federal Radio Commission*.¹³ The order from which the appeal was taken put an end to the licensing of all portable broadcasting stations. By declaring for its validity the Court defined, within the broad limits, the regulatory authority of the Commission.

THE WNYC CASE

Constitutional questions, involving property rights and the due process clause, were again raised and determined in the Commission's favor in the case of *City of New York v. Federal Radio Commission*.¹⁴ The Court further held that in operating a municipal station the City of New York is acting in its governmental capacity, but in its corporate proprietary capacity, and, irrespective of whether its activity is governmental or merely corporate, it is subject to regulation by the Commission. A petition for a writ of certiorari was filed with the Supreme Court and this was denied on the same theory as the Court had already determined in the WGY case.¹⁵

THE CHICAGO CASES (WLS-WENR and WCBA)

The Commission's practice under General Order No. 40 was very seriously contested in a group of cases decided together by the Court of Appeals, namely, *Great Lakes Broadcasting Company v. Federal Radio Commission*, *Wilbur Glenn Voliva v. Federal Radio Commission*, *Agricultural Broadcasting Company v. Federal Radio Commission*.¹⁶ In none of the cases did the Court examine into the procedural difficulties, but proceeded simply to con-

12. 36 F. (2d) 111.

13. 36 F. (2d) 117.

14. 36 F. (2d) 115.

15. *Supra*.

16. 37 F. (2d) 993.

sider, in its administrative capacity, the relative merits of the three stations involved. The result of the decision was to give one of the stations, Great Lakes Broadcasting Company, a little more operating time at the expense of Station WLS, owned by the Agricultural Broadcasting Company. The Commission's decision was otherwise upheld with respect to the other stations. The importance of this decision is further enhanced by the fact that it sustained the general reallocation of broadcasting stations effected November 11, 1928.

Shortly after the rendition of the Court's opinion in the above case, Station WLS applied to the Supreme Court for a writ of certiorari to review the action of the Court of Appeals, but this was denied by the Court in a memorandum decision. The same station thereupon filed a bill of complaint in the United States Court for the Northern District of Illinois, Eastern Division, seeking to restrain the Great Lakes Broadcasting Company and the Federal Radio Commission from interfering with its operation on the theory that the validity of the order of the Court of Appeals may be collaterally attacked in a constitutional court exercising judicial functions. A motion to dismiss the case as to the defendant members of the Radio Commission, because of the Court's lack of jurisdiction and failure to serve process upon the Commissioners, has been filed and it is expected that the cause will proceed, if at all, only as to the Great Lakes Broadcasting Company.

THE RICHMOND DEVELOPMENT CASE

In the case of *Richmond Development Corporation v. Federal Radio Commission*,¹⁷ the Court reversed the Commission's decision denying an application for extension of a construction permit. The applicant had expended a substantial sum on construction of its station in reliance on the Commission's action, and this to the Court seemed to justify granting the application.

THE CHICAGO FEDERATION OF LABOR CASE

In the case of *Chicago Federation of Labor v. Federal Radio Commission*,¹⁸ the Court declared that meritorious stations should not be deprived of privileges merely to make room for another station inasmuch as such an attitude would greatly impair the cause of independent broadcasting. The additional question of the propriety of the Commission's procedure in requiring an applicant to designate in its application a single frequency upon which it may be heard was determined in the Commission's favor.

THE UNIVERSAL SERVICE WIRELESS CASE

In *Universal Service Wireless Company v. Federal Radio Commission*¹⁹ an appeal was taken from a decision of the Commission denying an application for point-to-point press communication facilities on the ground that the frequencies set aside for press service had already been assigned to one public utility corporation to serve all the press agencies. The Court was not called upon to determine this question in its decision, but rather decided the

17. 35 F. (2d) 883.

18. *Supra*.

19. 41 F. (2d) 113.

case on the procedural ground that the appeal did not come within the appellate provisions of Section 16 of the Radio Act and therefore it could not assume jurisdiction.

These decisions of the Court of Appeals all disclose a well-advised caution in treading slowly through uncharted fields. Regardless of the individual viewpoint toward any particular decision, it must be acknowledged that the Court has materially assisted the progress of a sound body of radio law despite many defects in the Act itself.²⁰

20. I wish to express appreciation to Miss Fanny Neyman, an attorney in the Research Section of the Legal Division of the Commission, for the preparation of much detailed information set forth in the foregoing article.