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COMMENT ON PROCEDURAL RULES AND REGULATIONS OF THE FEDERAL RADIO COMMISSION

PHILIP G. LOUCKS*

Rules and regulations governing practice and procedure before the Federal Radio Commission are provided by General Order No. 93, adopted by the Commission on June 25, 1930. The order became effective on September 1, 1930. By express terms all inconsistent rules and regulations in force on that date were repealed.

The necessity for an orderly procedure at hearings before the Commission has been recognized since its creation three years ago. Not infrequently has there been just criticism for the Commission's failure to provide an adequate procedural system for the conduct of hearings provided by the Radio Act of 1927.

General Order No. 93 contains thirty-eight sections, divided into seven subtitles, each dealing with a particular phase of procedure. It inaugurates many drastic changes in the practice which previously had been followed by the Commission.

On the whole the rules and regulations are an excellent piece of draftmanship and effect many needed reforms in the Commission's practice. They are not free from criticism, however, and it is to be expected that numerous alterations and additions will be found necessary as problems arise at hearings.

In all cases where the Commission is unable to determine without a hearing on the merits (a) that the granting of an application in whole or in part would serve the public interest; or, (b) that the granting would not aggrieve or adversely affect the interest of any person, firm, company, or corporation holding a permit, license or other instrument of authorization from the Commission, or having an application therefor pending before it, the application must be designated for hearing.

After an application is designated for hearing, the applicant is served with a written notice of such fact containing the reasons why the Commission believes the application cannot be granted and naming a time and place for the hearing together with a list of other parties notified. Within 20 days from the mailing of such

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written notice, the applicant is required to file a written appearance and a statement in writing of the facts he intends to prove at the hearing, accompanying such statement with an affidavit showing that copies of the statement have been served upon other parties notified of the hearing. If no appearance or statement is filed within the prescribed time, the application is defaulted. After the statement is filed, the application is entered upon the hearing docket. Should the applicant fail to appear at the hearing, the application is denied. After a hearing has been held, the Commission may grant the application, deny it, or grant it in part, or deny it in part. A partial denial of any application, after hearing, shall be considered as a denial of the application under Section 7 of Subtitle B.

Undoubtedly for the purpose of throttling the steady stream of applications flowing into the Commission, the new rules provide that upon denial after hearing, the applicant will not be heard upon a second application for substantially the same privileges for a period of one year (in some cases six months) unless there has been a material change in the facilities available for designation to the particular service sought.

The procedure governing revocation proceedings is contained in Section 1 of Subtitle B and follows substantially the provisions of the Radio Act of 1927. The steps to be taken prior to hearing are very similar to those in other cases except that in all revocation proceedings the burden of proof is upon the Commission.

Persons permitted to be heard in support of applications are referred to as "applicants" under the terms of Section 1, Subtitle D. All other persons permitted to be heard in opposition to any application or licensees against whom revocation proceedings are instituted are referred to as "respondents." The Commission is considered a party to all hearings and will be represented by the general counsel or one of his assistants. Any governmental department or officer, any person, firm, company or corporation, or any State or political subdivision thereof, may intervene in any hearing provided a petition disclosing a substantial interest in the subject matter is filed at least ten days before the date of hearing.

The procedure followed at hearings resembles that of the Interstate Commerce Commission. Testimony may be taken before the entire Commission, a quorum of the Commission or before an examiner. In the event the Commission hears the testimony oral argument may be heard, briefs filed, or both, at the discretion of the Commission. Where, however, the testimony is taken before less than a quorum of the Commission or an examiner, the testi-

mony must be reported back to the Commission in a written report setting forth findings of fact and recommendations for decision. Copies of this report must be mailed to each party participating in the hearing and each shall have the right, if exercised within 15 days, to file exceptions to the report. The Commission may, in its discretion, request argument upon such exceptions before entering a final decision.

Rules of evidence governing civil proceedings in the courts of the United States are adopted by Section 8 of Subtitle D, the Commission reserving the right to relax such rules where, in its judgment, the ends of justice would be better served. Certain official documents, such as lists of stations, pending applications, the Commission's rules, regulations and orders are considered parts of each record. Copies of governmental departments or agencies, such as supervisors' reports, may be admitted in the form of a properly authenticated copy. With certain qualifications, portions of documents may also be received in evidence, but the rules require that the original must be tendered. The Commission reserves the right to limit the number of witnesses that may be heard on any issue.

Perhaps the most noteworthy change in the procedure is the rule governing the admissibility of affidavits. As in the past, any party may present his case in whole or in part by affidavit. Such affidavits, however, must be limited to material facts personally known to affiants and must not contain expressions of opinion, argument, or conclusions. Only affidavits of parties and their respective agents and employees will be received. Copies of all affidavits must be served upon or mailed to the Commission and parties notified of the hearing not less than 15 days before the date of hearing and an affidavit must be filed showing that this requirement has been met. Counteraffidavits may be filed, denying or explaining the matter set forth in the affidavits previously mailed.

Provision is made for the holding of informal hearings by the Commission upon its own motion and authority is given to summon witnesses and require production of testimony at such hearings.

The time allotted for the taking of various steps leading to hearings may prove inadequate. For example, under the regulations, a Fifth Zone applicant has five days' grace and an applicant residing in Texas is held strictly to the general-time limitations.

Some clarification should be made of the rules governing intervening parties. In a few cases applicants are attempting to dodge the restriction on affidavits by setting up facts in support

of their applications in documents filed by intervenors. It is not unlikely that the rule governing the admissibility of affidavits by employees of a party will be abused in the near future.

Parties notified of hearings are not required to file statements of the facts they intend to prove in opposition to the granting of the application. Thus, for the first time, at the hearing, the applicant is apprised of facts which he may not be prepared to disprove. If parties notified intend to present affirmative testimony, they should be required to file statements similar to those required from applicants.

The burden of proof is upon the applicant in each case, except in revocation proceedings. There is some doubt, however, whether or not the Commission should not have the burden of going forward in hearings upon renewal applications. Also where the Commission initiates some change in assignments, it would seem fair, and it is not without some authority, that the Commission should have the burden of proving that the change is in the public interest.

Minor defects in the rules could be detailed at length, but space will not permit. However, the rules are not offered as a perfect piece of work. No one not familiar with the legal and technical complexities of radio could appreciate the task in assembling procedural rules to govern this peculiar type of practice. Radio hearings are an anomaly in the whole field of adjective law.

