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# Federal Regulation of Radio Communication: Procedural Aspects

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# FEDERAL REGULATION OF RADIO COMMUNICATION: PROCEDURAL ASPECTS

PRIOR to 1934, telephone and telegraph communications were regulated by the Interstate Commerce Commission, and radio communications were under the control of the Federal Radio Commission. Because of the increasing importance of these fields and the difficulty of obtaining uniform regulations, Congress passed the Communications Act of 1934, placing all communications under one agency.[1] The Act abolished the Federal Radio Commission and created the Federal Communications Commission,[2] which was given control over telephone, telegraph, and radio communications.

The purpose of the Act, generally, was to regulate interstate and foreign commerce in communications so as to give all the people in the United States an efficient communications service with adequate facilities at reasonable rates.[3] The Federal Communications Commission was given jurisdiction over and, within the terms of the law, power to regulate interstate and foreign communications by wire and radio.[4] All communications by wire and radio which originate or are received in the United States and its territories are under the control of the Federal Communications Commission.[5]

The Commission has the power to supervise rates, license radio stations, and to establish and enforce rules and regulations that will aid in the fulfillment of the purposes of the act.[6] In making such rules, the Commission must conform to the Federal Administrative Procedure Act.[7] Subject to this limitation, it has wide dis-

[1] 48 STAT. 1064, 47 U. S. C. 1946 ed. § 151 *et seq.*

[2] Seven Commissioners, appointed by the President by and with the advice and consent of the Senate for a term of seven years, compose the Commission. The terms are staggered. No Commissioner may be connected in any way with any business engaged in buying or selling communications apparatus, and no more than four of the seven may be of the same political party.

[3] 47 U. S. C. 1946 ed. § 151.

[4] Sablowsky v. U. S., 101 F. 2d 183 (3rd Cir. 1938).

[5] 47 U. S. C. 1946 ed. § 152.

[6] F. C. C. ANNUAL REPORT (1950) 13.

[7] 5 U. S. C. 1946 ed. § 1001 *et seq.*

cretion in determining public and procedural policy, and in making appropriate rules.[8] The Commission has no right of censorship except as to indecent language.[9] A rule promulgated pursuant to the statutory authority has the force and effect of federal law.[10]

Hearings before the Commission may be either formal or informal. Informal hearings may be held on motion of the Commission or on petition by any person with sufficient interest.[11] All interested parties must be given reasonable notice of formal hearings. The notice must contain the time and place of the hearing, the nature of the hearing, a statement of the law and facts involved, and the authority under which the hearing is to be held.[12]

The Commission, or the presiding officer assigned by the Commission to the particular case, may hold a pre-hearing conference for simplifying issues, amending the pleadings, making admissions, determining the procedure to be followed at the hearing and considering offers of settlement.[13]

The presiding officer, appointed by the Commission,[14] may be a hearing examiner or one or more Commissioners.[15] The presiding officer is subject to challenge. If he denies a motion for disqualification, an exception may be taken to the ruling, and the question will be certified to the Commission for its determination.[16]

The presiding officer receives evidence and declares the hearing closed when all the evidence is taken.[17] Within twenty days thereafter each party is required to file with the presiding officer proposed findings of facts and conclusions of law. Failure to do so

[8] Ward v. F. C. C., 108 F. 2d 486 (D. C. Cir. 1939).

[9] 47 U. S. C. 1946 ed. § 326.

[10] Regents of N. M. A. & M. College v. Albuquerque Broadcasting Co., 158 F. 2d 900 (10th Cir. 1947).

[11] 47 C. F. R. § 1.801 (1949 ed.).

[12] *Id.* § 1.803.

[13] *Id.* § 1.814.

[14] *Id.* § 1.843(a).

[15] 5 U. S. C. 1946 ed. § 1006(a).

[16] 47 C. F. R. § 1.843(b) (1949 ed.).

[17] *Id.* § 1.846.

constitutes waiver of the right to participate further in the preceeding.[18]

After considering the proposed findings of facts and conclusions of law, the presiding officer prepares and files with the Commission his initial or recommended decision. The decision of the presiding officer must contain findings of facts and conclusions of law on all material issues of fact, law, or discretion presented on the record, and the appropriate rule, sanction or relief for the case.[19] If the presiding officer submits only a recommended decision, the Commission itself will issue an initial decision.

Exceptions to the initial decision must be filed with the Commission within twenty days after public notice thereof is given.[20] A final decision will be rendered by the Commission after consideration of exceptions, and the final decision contains rulings on all material and relevant exceptions.[21]

An important procedural feature of the Federal Communications Commission is that a petition for rehearing must be filed with the Commission within twenty days after the final decision is rendered, as a condition precedent to judicial review. It is within the discretion of the Commission to grant a rehearing,[22] but the petition must be submitted and ruled upon before the party aggrieved can appeal to the courts.[23]

Two methods of judicial review of orders of the Commission are provided by the Act: review in federal district courts or in the United States Court of Appeals for the District of Columbia. An administrative order must have been rendered before resort is had to the courts,[24] and all administrative remedies must have been exhausted before appeal.[25] The administrative remedies must be

[18] *Id.* § 1.849.
[19] *Id.* § 1.851.
[20] *Id.* § 1.854.
[21] *Id.* § 1.856.
[22] *Id.* § 1.892.
[23] Red River Broadcasting Co. v. F. C. C., 98 F. 2d 282 (D. C. Cir. 1938).
[24] Black River Broadcasting Co. v. McNinch, 101 F. 2d 235 (D. C. Cir. 1938).
[25] Southland Industries v. F. C. C., 99 F 2d 117 (D. C. Cir. 1938).

pursued to their appropriate conclusion: it is not sufficient that they are merely instituted.[26]

In all proceedings, other than those involving an application for a construction permit, station license, or renewal or modification of a station license, the review is the same as that provided for review of orders of the Interstate Commerce Commission.[27] Suit may be brought in the appropriate federal district court to set aside, enjoin, annul or enforce the order of the Commission.[28] An injunction against enforcement of the order may be issued by a three-judge district court.[29] The jurisdiction of the federal district court is exclusive, and state courts have no jurisdiction to set aside the order of the Commission.[30] Only questions affecting constitutional power, statutory authority and basic prerequisites of proof can be raised, and if these are satisfied, the orders are uncontestable.[31] The courts may not substitute their judgment for that of the Commission, nor set aside the order unless it is made without substantial evidence to support it, involves errors of law, or is so manifestly arbitrary and unreasonable as to transcend the powers of the Commission.[32]

Exclusive jurisdiction is given to the United States Court of Appeals for the District of Columbia in proceedings on an application for a construction permit, station license, or renewal or modification of a station license.[33] Review is limited in this court as in the case of other orders reviewed in the district courts. The review is limited to questions of law, and findings of fact are held to be conclusive unless clearly arbitrary or capricious,[34] or not supported by substantial evidence.[35]

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[26] Aircraft & Diesel Equip. Co. v. Hirsch, 331 U. S. 752 (1947).
[27] 47 U. S. C. 1946 ed. § 402.
[28] 28 U. S. C. 1946 ed. § 2322.
[29] *Id.* § 2325.
[30] St. Louis Connecting Ry. Co. v. Blumberg, 325 Ill. 387, 156 N. E. 298 (1927).
[31] Waterway Transportation Co. v. U. S., 83 F. Supp. 588 (E. D. Mo. 1949).
[32] Carolina Scenic Coach Lines v. U. S., 56 F. Supp. 801 (W. D. N. C. 1944), *aff'd*, 323 U. S. 678 (1944).
[33] Black River Broadcasting Co. v. McNinch, 101 F. 2d 235 (D. C. Cir. 1938).
[34] 47 U. S. C. 1946 ed. § 402.
[35] Courier Post Publishing Co. v. F. C. C., 104 F. 2d 213 (D. C. Cir. 1938).

Important aspects of procedure before the Federal Comunications Commission have been called in question before the courts in recent cases. Among them are admissibility of evidence, the right to oral argument, the necessity of administrative fact findings, and the subpoena power of the Commission.

*Admissibility of Evidence.* Under the Federal Administrative Procedure Act any oral or documentary evidence may be received by an administrative agency other than irrelevant, immaterial or unduly repetitious evidence; provided, however, that no sanction may be imposed or rule or order issued except as supported and in accordance with reliable, probative, and substantial evidence.[36] Supplementing the general language of the Administrative Procedure Act, the Federal Communications Commission has provided that the ordinary rules of evidence for non-jury civil cases in federal courts shall prevail in hearings before the Commission, except where justice will be "better served" by relaxing the same.[37] The question has arisen whether, under these liberal provisions, decisions of the Commission may be vacated as having been based upon incompetent evidence.

The case of *Tri-State Broadcasting Co. v. F. C. C.*[38] involved incompetent evidence. In that case an applicant for a radio station was permitted to testify before the presiding officer as to conversations he had had with other parties who had stated to him that El Paso needed another radio station. On review, the court held that such testimony was hearsay and incompetent. It was contended that the applicant was an expert and could testify as such concerning the need for additional radio facilities. The court held that the applicant had not been properly qualified as an expert. The court said:

> "... While the Commission under familiar principles is not, as an administrative body, limited by the strict rules as to the admissibility of evidence which prevail in courts, nevertheless, '... the more liberal

[36] 5 U. S. C. 1946 ed. § 1001 *et seq.*
[37] 47 C. F. R. § 1.871 (1949 ed.).
[38] 96 F. 2d 564 (D. C. Cir. 1938).

the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. . . .' "[39]

The court set aside the order of the Commission granting the application on the ground that the Commission did not make proper fact findings. The court declined to decide whether there was sufficient competent evidence to support the order of the Commission until adequate findings of fact were made.

Although incompetent evidence will not support an order of the Commission, receiving incompetent evidence does not of itself constitute such error as will warrant the court's setting aside the order. Common law exclusionary rules of evidence are not based on constitutional interdiction, and are not applicable to administrative proceedings, unless observance of them is required by statute. While the agency should exclude irrelevant, immaterial or unduly repetitious evidence, the receipt of such evidence, even hearsay, over objection, is not grounds for vacating the order of the agency.[40]

*Right to Argument.* In the recent case of *F. C. C. v. WJR, The Goodwill Station,*[41] the Supreme Court of the United States considered at length the problem of when a party is entitled to oral argument before the Commission. The Coastal Broadcasting Company applied for and was granted a permit to build a radio station. The applicable statute[42] requires that the holder of an outstanding license be given notice of the application for a station on the same frequency and an opportunity to show cause why the application for the license should not be issued. Such notice was not given to WJR, but after the application had been passed upon by the Commission, WJR filed a petition for consideration and rehearing. The Commission denied the petition without giving WJR opportunity for oral argument. The United States Court of Appeals

[39] *Id.* at 566.

[40] Willapoint Oysters v. Ewing, 174 F. 2d 676 (9th Cir. 1949).

[41] 337 U. S. 265 (1949).

[42] 47 U. S. C. 1946 ed. § 312b.

ruled that procedural due process under the Fifth Amendment of the Constitution requires an opportunity for oral argument to be given on all questions of law raised before a judicial or quasi-judicial tribunal, except questions of law involved in interlocutory orders. This ruling was reversed by the United States Supreme Court. Such a decision, said the Court, would require oral argument on every legal question whether substantial or insubstantial, and the Court held that due process under the Fifth Amendment has not cast so rigid a rule.

> "... [T]he right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances.... Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised....
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> "It follows also that we should not undertake in this case to generalize more broadly than the particular circumstances require upon when and under what circumstances procedural due process may require oral argument.... It is rather one for case-to-case determination, through which alone account may be taken of differences in the particular interests affected, circumstances involved, and procedures prescribed by Congress for dealing with them."[43]

Section 4j of the Federal Communications Act[44] allows the Commission to conduct its proceedings in such manner as will best conduce to proper dispatch of business and to the ends of justice. This and Section 312b[45] left to the reasonable discretion of the Commission when it would permit oral argument. The Act does not expressly require it, and there was no denial of due process in refusing oral argument. This decision may constitute a departure from the rule of *Londoner v. Denver*,[46] in which the Court stated that a "hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argu-

[43] 337 U. S. at 276, 277.
[44] 47 U. S. C. 1946 ed. § 154j.
[45] 47 U. S. C. 1946 ed. § 312b.
[46] 210 U. S. 373, 386 (1908).

ment however brief" and in which the failure of a board of equalization to accord a hearing with oral argument rendered the decision void.

In its decision in the *WJR* case the court seemed not to regard as of particular importance the very real difference between oral argument and written argument. Written argument, submitted with points and authorities, may not be given careful consideration by the hearing officer or the agency. But, in making an oral argument, the party is at least assured that his points have been explained and heard, and he has the further opportunity of answering questions and explaining matters which may not have been fully understood. The power of persuasion is more effective in oral than in written form.[47]

*Necessity of Fact Findings.* When an order is entered denying an application for a radio station permit, the Commission is required to file a full statement of facts and the grounds for its decision.[48] The party appealing must state expressly wherein the decision is wrong, and a statement of facts found is necessary to enable him to do so. Therefore, the Commission is under a duty to make such findings.[49] In the case of *Saginaw Broadcasting Co. v. F. C. C.*[50] the court held that this requirement is a means to assure that the case is decided according to the law and evidence. It is not a mere technicality. If there are no findings of fact, the court cannot decide whether the decision follows as a matter of law from the facts, or is supported by substantial evidence. The court will not consider whether there is substantial evidence to support the decision unless there are adequate findings of fact.[51] In the *Saginaw Broadcasting Co.* case, the court held that findings in broad terms of public convenience, interest or necessity are not sufficient. The findings must include basic facts from which the ultimate facts

[47] Tri-State Broadcasting Co. (Station KSTM) v. F. C. C., 107 F. 2d 956 (D. C. Cir. 1939).

[48] 47 U. S. C. 1946 ed. § 402(c).

[49] Missouri Broadcasting Co. v. F. C. C., 94 F. 2d 623 (D. C. Cir. 1937).

[50] 96 F. 2d 554 (D. C. Cir. 1938).

[51] Tri-State Broadcasting Co. v. F. C. C., 96 F. 2d 564 (D. C. Cir. 1938).

are inferred. The court will not search the record for the facts. In the absence of findings on essential basic facts, the order cannot be sustained.

*Scope of Subpoena Power of the Commission.* Can the Communications Commission subpoena witnesses to testify at an inquiry that is directed solely at obtaining information which will aid in the determination of future rules and public policy? The Court of Appeals for the District of Columbia answered this question in *Stahlman v. F. C. C.*[52] The Commission was conducting an inquiry, on its own motion, to determine what statement of policy or rules, if any, it should issue concerning applications for high frequency (FM) broadcasting stations by applicants associated with publication of newspapers. The appellant was subpoenaed to appear at the hearing in Washington, D. C. He refused to appear on the ground that the hearing was not authorized by the Act. A district court order was issued commanding him to appear. The court of appeals affirmed this order. Section 403 of the Act[53] gives full power to the Commission, with or without complaint, to institute an inquiry concerning questions arising under the provisions of the Act or relating to its enforcement. The court concluded that this included authority to obtain the information necessary to discharge its proper functions, including an investigation directed at the prevention or disclosure of practices contrary to public policy. The power to grant licenses and to make rules and regulations necessary to the carrying out of the provisions of the Act implies the grant of all means necessary or appropriate to the discharge of the power expressly granted. The information sought in the *Stahlman* case pertained to subjects within the power of the Commission, and the order was upheld, subject however, to the following warning:

> "... [W]e do not mean to hold or to suggest that the Commission is authorized to require appellant or other witnesses whom it may

[52] 126 F. 2d 124 (D. C. Cir. 1942).
[53] 47 U. S. C. 1946 ed. § 403.