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Practice and Procedure before the Federal Radio Commission

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I. INTRODUCTORY

The powers and duties delegated to the Federal Radio Commission by the Radio Act of 1927, as amended, may, for the purpose of studying its practice and procedure, be classified under two headings: (1) quasi-legislative, and (2) quasi-judicial. The use of these terms is not free from just criticism for failing to take into account the great amount of routine work of a purely administrative nature which devolves upon the Commission. The nature of this work and the procedure governing it will, however, be pointed out under the second of the two headings.

The term “quasi-legislative” is used in this article to characterize the functions of the Commission with reference to the making of rules and regulations. In this respect the Commission has powers and duties of greater breadth, and which are more nearly truly legislative in character, than perhaps any other federal commission. These powers and duties are contained largely in Section 4 of the Act (which section, however, is not confined to matters coming within this description) but are partly scattered among other sections. They may be classified as follows:

1. *Divisions of the radio spectrum into bands and allocation of these bands to particular services.* Except as it is restricted by international conventions and agreements to which the United States is a party, by the needs of Government stations, and by the rights

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1. Approved Feb. 23, 1927, 44 Stat. 1162. Under the Act the Commission was to be the licensing authority for only one year after its first meeting and thereafter to be an appellate tribunal reviewing actions of the Secretary of Commerce. By successive amendments approved March 28, 1928, March 4, 1929, and Dec. 19, 1929, the Commission has been continued as the licensing authority and is henceforth to continue as such “until otherwise provided by law.”


3. Sec. 6 of the Radio Act of 1927 gives the President power to assign frequencies to Government stations.
of existing stations under the Radio Act of 1927, the Commission has been given the power of disposing of the entire radio spectrum (the range of radio waves from 10 kc. to 60,000 kc. and as much higher as the progress of science permits). Its first duty (theoretically, if not altogether actually) has been to partition this radio spectrum into "bands," i.e., smaller ranges of radio waves, to be allocated each to one or more types of service, or kinds of radio communication. For example, the band from 550 kc. to 1,500 kc. has been allocated exclusively to broadcasting stations and is popularly called the broadcast band. Other bands have to be carved out of the low frequency band (10 kc. to 550 kc.) and out of the high frequency band (1,500 kc. to 60,000 kc. or higher) and allocated to maritime communication, aircraft communication, point-to-point wireless telegraphy, telephony and facsimile, amateurs, experimenters and various other services. In making such allocations the Commission is exercising functions expressly conferred by Section 4 of the Act, but must conform to the standard of "public interest, convenience or necessity." While no attempt will be made in this article to define this phrase with reference to the exercise of these functions, it is obvious that it involves a determination of the comparative needs of the several services and of their relative public importance.

2. Channeling system. Except as restricted as aforesaid, the Commission has, by Section 4, been given the power and duty of dividing each band into "channels," a channel being a narrow band of frequencies believed to be necessary and sufficient for the operation of a single station. Thus in the broadcast band there are 96 channels each 10 kc. in width; the frequency in the middle of each channel is the one assigned to a station and is commonly referred

4. Under Sec. 11 of the Act a licensee is entitled to hearing before a renewal may be refused; the license must be renewed if "public interest, convenience or necessity" would be served thereby.

5. The International Convention specifically covered 10 kc. to 60,000 kc. Frequencies as high as 75,000 kc. have been licensed by the Commission. For a statement of the scientific facts and principles underlying radio law see Report of the Standing Committee on Radio Law, Reports of the American Bar Association, 1929, Vol. 54, pp. 410-436.


to in designating a particular channel. These broadcasting channels, thus designated, begin with 550 kc., 560 kc., 570 kc., etc., and proceed up to and including 1,500 kc. Channels within a particular band may be further classified and restricted, e. g., with reference to the power which any one station may use on such a channel, the number of stations which may operate simultaneously on such a channel, and the geographical separation which must exist between such stations (if more than one), or the type of apparatus which may be used. For example, of the 96 channels in the broadcast band, six have been reserved for exclusive use by Canadian stations. Of the remaining 90, 40 have been designated as “cleared” channels (to be used by only one station at a time in the evening and that of substantial power of 5,000 watts or more); 40 have been designated as “regional” channels (to be used by from two to about five stations at a time in the evening, with power not to exceed 1,000 watts); four have been designated as “high power regional” channels (to be used by two or more stations at a time in the evening, with power not to exceed 5,000 watts); and six have been designated as “local” channels (to be used by a large number of stations at a time in the evening, with power not to exceed 100 watts). Due to the requirements of such laws as the Davis Amendment or of international obligations such as the North American Agreement of March 1, 1929, the channels must sometimes be further classified and restricted as to the geographical region in which they may be used. Thus, the 40 cleared channels in the broadcast band were allocated eight to each of the five zones into which the country was divided by Section 2 of the Act, the share of each zone being specified by an enumeration of its eight channels by frequency. Subject to the Davis Amendment and the international obligations of the United States, the Commission must, in exercising its functions

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9. This is due to an informal “gentleman’s agreement” with Canada arrived at between the Secretary of Commerce and the Canadian authorities prior to Feb. 23, 1927. Under this agreement 11 additional channels are designated for shared use between the two countries. See G. O. 40, 2nd Ann. Rep., p. 48.

10. As a matter of fact, the Commission has exceeded this power limitation: e. g., KSTP at St. Paul and WJSV at Mt. Vernon, Va.

11. Act of Congress approved March 28, 1928, Sec. 5, requiring equal allocation of broadcasting facilities equally among the five zones and equitably among the states according to population. G. O. 40 was an attempt to give effect to this provision.

12. See Paragraphs 1 and 5 of that Agreement.
under this heading, conform to the standard of public interest, convenience or necessity.

3. Regulations to prevent interference and to make possible the maximum use of the radio spectrum. This subject is inextricably intertwined with the two just enumerated. All radio regulation is primarily based on the fact that at best the total of radio facilities is limited, and that the little there is would be useless if interference be not prevented both by suitable limitations on the total number of stations in operation and by requiring those which are in operation to conform to high technical standards. Regulations under this heading cover the type and efficiency of apparatus, the qualifications of operators, the use of precision equipment to avoid frequency deviation, the suppression of parasitic radiation such as harmonics, the use of a high percentage of modulation (e.g., in broadcasting), the keeping of necessary records and the making of periodical reports, etc. Here again the Commission's powers are largely derived from Section 4 and are governed by the standard of public interest, convenience or necessity.

4. Regulations with respect to contents of communications, etc. By Section 29 it is provided:

"Nothing in this act shall be understood or construed to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications."

The power of the Commission to make regulations with respect to the program service of broadcasting stations and similar matters is, therefore, very restricted. The Commission is, however, given express authority by Section 18 to make rules and regulations to carry into effect the requirement of nondiscrimination between candidates for public office, by Section 4(b) "to make special regulations applicable to radio stations engaged in chain broadcasting," and by Section 4(i) "to make general rules and regulations requiring stations to keep such records of programs . . . as it may deem desirable." Whether further powers are given by implica-

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13. This is regulated by the Secretary of Commerce under Sec. 5 of the Act.
14. General Order 43, September 8, 1928, was an attempt to restrict duplication of programs on cleared channels. Because of vigorous protests and because of evidence of the drastic scope and effect of the order, the Commission postponed its effect date from time to time and finally repealed it in December, 1929. U. S. Daily, Dec. 21, 1929.
15. No such rules and regulations have been adopted.
tion by these and other provisions in the Act, would be beyond the scope of this article to inquire. Under the same heading may be considered the restrictions placed on other types of communications. Amateurs may not ordinarily engage in commercial correspondence. Neither may experimenters. Broadcasters may not engage in point-to-point telephony. There are restrictions on rebroadcasting.

5. Regulations with respect to procedure. By Section 11 (covering hearings on applications), and by the third-to-the-last paragraph of Section 5 (covering hearings de novo on appeals taken from decisions of the Secretary of Commerce), the Commission is given power to make rules and regulations to govern hearings. Within certain limits it may prescribe the form and contents of applications. This subject is mentioned at this juncture only for the sake of completeness, since it is incidental to the exercise of the quasi-judicial functions of the Commission.

The term “quasi-judicial” is used in this article to characterize generally an aggregate of powers and duties conferred by the Act on the Commission in connection with the granting and revocation of licenses. The term “licensing function” would, perhaps, be more accurate. Not all, by far, of the work of the Commission to be discussed under this heading, is really quasi-judicial in character. Much of it is of the purest administrative type. Yet that which is quasi-judicial in character presents some of the most baffling procedural difficulties and elusive problems which have arisen in any branch of jurisprudence.

It must be remembered that while the Radio Act of 1927 forbids radio communication without a license, under penalty of a fine of not more than $5,000 or by imprisonment for not more than five years, the Department of Justice and not the Commission is charged with the enforcement of the penal provisions. The Commission is a licensing authority. It determines, within the limits permitted by international treaty, by statute, and by its own regulations, who shall and who shall not have licenses, what shall be the terms of such licenses, and when they shall be revoked. Its sole guide in the granting of licenses is again public interest, convenience

15d. Secs. 32 and 33.
Under certain circumstances it must hold hearings on applications and from certain of its decisions appeals may be taken. When it is considered that frequently it must choose a few out of a great many applicants for a particular type of privilege, that more often than not the granting of the privilege applied for will adversely affect many other licensees and applicants, that in any such proceeding the validity of one or more of its regulations may be at stake, that there is no definite rule or precedent to guide it in determining who are entitled to be considered interested parties or how to give such parties adequate notice and opportunity to be heard, not to mention many other problems, it will readily be seen that the way to a satisfactory practice and procedure is not strewn with roses.

In discussing the quasi-judicial functions of the Commission, this article will describe the entire procedure to be followed, from the filing of the several kinds of applications through to the ultimate action of the Commission thereon, with an attempt to state the rights of interested parties at each stage and to point out such questions as are as yet undecided or uncertain.

Notwithstanding the fact that Section 5 of the Act has not been allowed to take its course, the Secretary of Commerce still has important powers and duties in the regulation of radio communication. They are as follows:

1. To prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such persons as he finds qualified.
2. To suspend the license of any operator for causes defined in the Act.
3. To inspect all transmitting apparatus.
4. To report violations of the Act or of regulations to the Commission.
5. To designate call letters of all stations.
6. To cause the publication of call letters and other data.
7. To receive applications for license which are filed.
8. To act as the licensing authority when the Commission is not in session.17

Appeals from "any decision, determination or regulation of the Secretary of Commerce" may be taken to the Commission by "any person, firm, company, or corporation, any State or political division thereof aggrieved or whose interests are adversely affected" thereby,

16. Secs. 9, 11 and 21. This, of course, is subject to the Davis Amendment, which amended Sec. 9 and to certain specific statutory provisions, such as in Secs. 12, 13, 14, 17, 18, 19, 27, 28, 29, etc.
17. Secs. 5, 10 and 11.
upon conditions prescribed in Section 5. The Commission hears such appeals *de novo*. No such appeal has yet been taken, and no rules or regulations have been adopted with reference thereto. It will not be worth while to attempt to analyze or discuss the present powers and duties of the Secretary of Commerce since no serious legal questions are involved.\(^1\)

II. Procedure Followed in Exercise of Quasi-Legislative Functions

The Commission has not, as yet, adopted any formal rules and regulations in the usual sense of the word. Instead, it has pursued the practice of issuing from time to time "general orders," numbered consecutively, which, at the date of writing, have reached a total of 84.\(^1\) These orders cover a variety of matters. A great many of them are extensions of all licenses of a given class, e. g., extensions of all broadcasting licenses (which have a common expiration date) for 30, 60 or even 90 days.\(^2\) Others are authorizations to the individual commissioners to travel into their respective zones for the purpose of making investigations, etc.\(^3\) A considerable number of them, however, partake genuinely of the character of rules and regulations, and among them will be found examples of each of the five classes enumerated under the preceding heading.\(^4\)

The general orders, by their very nature, are piecemeal, and unsatisfactory as a source of information as to the law of the Commission. No one subject of any substantial scope is yet thoroughly covered. Nor are the rules and regulations which are actually followed by the Commission in practice all to be found in these orders. Some are to be found by implication from international conventions.

\(^{18}\) In case the Secretary of Commerce should become the licensing authority, there are serious defects in Sec. 5 when read together with Secs. 11 and 16. See 1929 Report of Standing Committee on Radio Law, p. 476.

\(^1\) General Orders 1-16 are contained in the Commission's 1st Annual Report, pp. 12-16; G. O. 17-49 in the 2nd Annual Report, pp. 41-55; G. O. 50-74 in the 3rd Annual Report, pp. 55-67. Later General Orders may be obtained in mimeographed form on application to the Secretary of the Commission.

\(^2\) E. g., G. O. 1, 3, 5, 18, 21, 22, 23, 25, 26, 27, 33, 34, 35, 36, 38, 39, 44, 47, 54, 58, 60, 69, 72, 73, 80, 83.

\(^3\) E. g., G. O. 17, 20, 65.

and agreements; some appear in the form of published statements of the Commission; and still others are a sort of unwritten law which has gradually developed. The time has arrived, however, when a formal set of rules and regulations is not only desirable but imperatively necessary.

In the first year or two, while somewhat more could have been accomplished along this line than actually was, it was impossible to evolve a complete set of rules and regulations, even of a tentative character. In the broadcast band the Commission was, at the outset in 1927, met with a chaotic condition resulting from the crowding of 732 stations on and between the limited number of channels, although half that number would have been excessive. The opening and development of the high frequency band which the next two years were to witness were hardly suspected. No allocation of the radio spectrum to services, and little in the way of a channeling system were possible (outside the broadcast band) until after the Washington Conference in the fall of 1927. What is sometimes called the domestic high frequency band (1,500 kc. to 6,000 kc.) could not be allocated except on a tentative basis until after the conclusion of the North American Agreement of March 1, 1929.

As a result, hearings held by the Commission often assumed a hybrid character, particularly those which concerned disposition of facilities in the high frequency band. The Commission had pending before it hundreds upon hundreds of applications for authorization to construct and operate new stations on these frequencies, for a wide variety of purposes and services and from many kinds of businesses and individuals. These applications asked for facilities many times the total available. In a sense, hearings were made to serve both (1) the requirement of the Radio Act of 1927 for opportunity for hearing on particular applications and (2) the purpose of giving the Commission the information necessary to determine upon proper rules and regulations as to allocation between services, channeling, etc. Classes of applicants were heard in turn as to the needs of their particular businesses; as to the defects in claims made by other classes of applicants; as to the proper width of channel for various types of service, etc. Thus the Commission was assisted in formulating the very rules by which the applications were later to be granted or denied. By June, 1929, substantially the entire portion of the high frequency band suitable for practical use had been allocated to services, channeled, and parceled out to applicants. It had been

an anomalous situation not likely to occur again on so large a scale. While there may and undoubtedly will be important changes, they will more and more take the form of amendments to existing rules and regulations, as set forth in general orders or, it is to be hoped, in a formal printed pamphlet such as that issued by other federal commissions.

An applicant now finds that he must either make his application accord with the existing law of the Commission or, if he desires something inconsistent with that law, must find some way to cause its repeal or its annulment. For example, a prospective broadcaster may desire a frequency outside the broadcast band, e.g., in adjacent bands now allocated to and used for maritime wireless telegraphy. In other words, he desires that the broadcast band be extended at the expense of bands devoted to other services. Or a concern desiring to engage in point-to-point wireless telegraphy may feel that channels in the high frequency band are separated by too wide a margin and that there is room between them to permit it to operate its proposed stations. Examples might be multiplied but the foregoing will serve as illustrations.

Three methods of raising such a question suggest themselves.

The first is that usually followed by the Commission in such cases when there are important issues involved, that of informal conference with all licensees and applicants interested. The development of shore-to-ship telephony since General Order No. 55 of December 22, 1928, and General Order No. 74 of October 11, 1929, is a case in point. It obviously had to be accommodated. For this purpose the Commission held a general open conference, under the auspices of its Engineering Division, on January 14, 1930, to determine what amendments to the general orders then in force were necessary or desirable. Although the conference lasted several days and there were many vigorous controversies among the interested parties present, the result will undoubtedly be one satisfactory to all of them and no formal hearings or legal proceedings will result. A similar method has been followed in ascertaining the radio needs of aviation. There is now pending before the Commission a formal motion to amend General Order 40 (covering the broadcast band) so as to increase the number of cleared channels from 40 to 50 at the expense of the regional and local channels;

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this motion was filed by a group of several broadcasting stations. General Order 40 itself was the result of several important open hearings, participated in by the leading radio engineers of the country and by representatives of all important branches of the industry. That the Commission has power to proceed in this manner is clear from Section 4(k) of the Act.

Nevertheless, such hearings as have been described have no formal, legal status. There is no way of compelling the Commission to hold them. There are no rules or regulations governing them when held. The Commission is not bound by anything agreed upon at such a conference, and no appeal may be taken from a regulation, as such, adopted by the Commission as a result thereof. The situation is not such as it would have been if the original Section 5 of the Radio Act of 1927 had been allowed to take its course and, at the end of the first year, the Secretary of Commerce had become the licensing authority and the Commission had become an appellate tribunal. That section provided for appeals from "any decision, determination or regulation of the Secretary of Commerce" to the Commission.

A second method is by filing and insisting on a hearing upon an application which is inconsistent with the rules or regulations attached, and thereby raising the question as to whether such rules or regulations are not invalid, or unreasonable, or deserving of repeal. To some extent the same question arises when the Commission undertakes to revoke a license for infraction of a regulation which the licensee attacks as invalid. This seems a legitimate manner of raising such a question, although the Commission has not yet adopted a definite policy as to the extent to which it will permit a hearing and evidence upon such an issue. This matter is again discussed under an appropriate subheading in Part III of this article. In any event, if the Commission denies the application, whether with or without hearing, an appeal may be taken under Section 16 to the Court of Appeals of the District of Columbia (if the application falls within the four classes of application therein described) and the validity of the rule or regulation attacked may be argued and determined in that court. The same is true in cases of revocation of license, at least when the appeal is taken to the Court of Appeals as distinguished from the district courts of the United States. In view of the broad administrative power which that court seems to have on such appeals, it apparently can pass even on

the desirability or wisdom of a regulation and repeal or disregard it as it deems best. An example of this is found in *Carrell v. Federal Radio Commission*. In that case an applicant for renewal of license with respect to each of three portable broadcasting stations, appealed from a decision of the Commission denying the applications (after hearing). Prior to the hearing the Commission had adopted its General Order 30 of May 10, 1928, in which it directed that after July 1, 1928, “all portable broadcasting stations will cease operations.” This regulation was attacked, passed upon, and upheld in the Court of Appeals. Another example, but much less clear, is found in *General Electric Co. v. Federal Radio Commission*. In this case, the applicant had filed with the Commission an application for renewal of its license to operate Station WGY at Schenectady, N. Y., which had been operating during the previous license period on 790 kc., full-time, with 50 KW power. On August 30, 1928, prior to taking any action on the application for renewal, the Commission adopted its General Order 40 which designated 790 kc. as a cleared channel and assigned it to the Fifth Zone (the Rocky Mountain and Pacific Coast States) for exclusive evening use. On September 11, 1928, the Commission adopted a tentative, and on October 12, 1928, a definite new allocation of the approximately 620 existing broadcasting stations to the channels as defined and restricted by General Order 40, the allocation to go into effect on November 11, 1928 (the first date of the next succeeding license period). KGO, a station also owned by the General Electric Company and located at Oakland, California, was assigned to full-time use of 790 kc., while WGY was given what is known as a “limited-time” assignment on the channel. The Commission adopted and announced on September 11th a procedure whereby any station dissatisfied with its assignment might apply for a modification thereof and be heard thereon prior to November 11th; it required, however, that such a station specify the assignment desired (so that stations tentatively assigned thereto might be notified and given an oppor-

15. A “limited time” assignment is defined by G. O. 48, 2nd Ann. Rep., p. 54. In the instant case, under an arrangement approved by the Commission WGY could have operated until 10:00 P. M. every evening (and during three months slightly later) on condition that KGO refrain from operating between sunset at Oakland, Cal., and 7:00 P. M. in those months when sunset occurred prior to 7:00 P. M.
The General Electric Company refused to apply for any of the eight cleared channels allocated by General Order 40 to the First Zone (in which WGY was located) and, instead, filed an application asking for full-time operation on 790 kc. with 150 K. W. (an amount of power 100 KW in excess of the maximum permitted by General Order 42 of the Commission). Thus the application was one which could not be granted if General Orders 40 and 42 were valid and effective. On October 12th the Commission denied the application without hearing because of its inconsistency with General Order 40. On the same day it acted upon all pending applications for renewal, including that of WGY, which it "granted," but only in accordance with the terms set forth in the allocation. On October 17th, pursuant to this action, the Commission issued a license to WGY covering the next license period beginning November 11, 1928, for "limited-time" operation on 790 kc. with 50 KW power, which did not reach the General Electric until October 29th. On November 9th and again on November 30th the General Electric Company appealed from the Commission's action denying its application for renewal of license. The Court, without passing upon General Order 40 or modifying it except by necessary implication, reversed the Commission and entered judgment directing the Commission to issue to the General Electric Company a license to operate WGY full-time on 790 kc. with 50 KW. Thus 790 kc. ceased to be a cleared channel and the equality between the zones with respect to cleared channels was pro tanto disturbed. Yet in all later decisions the court has assumed General Order 40 to be a valid regulation and it has been approved indirectly in a district court of the United States. Cases now pending before the Court of Appeals involve similar situations. In Westinghouse Electric & Manufacturing Co. v. Federal Radio Commission, involved a question as to whether General Order 40 was in part amended by a later action of the Commission and, if it was not, whether the order (as well as the Davis Amendment, pursuant to which the order was adopted so far as equalization among zones was concerned) is valid. In InterCity Radio Telegraph Co. v. Federal Radio Com-

16. The first appeal did not specify what decision was complained of, but described it as one rendered October 17, 1928, effective October 17, 1928. The State of New York also appealed from the Commission's decision.


mission and Wireless Telegraph & Communications Co. v. Federal Radio Commission, the court has before it appellants all of whose applications contemplating the establishment of additional stations for domestic point-to-point wireless telegraphy were denied. Out of a great number of channels specified in the applications in both the low frequency and the high frequency bands, most are, for one reason or another, unavailable. Some are in bands assigned to other services, such as maritime mobile service; some are in the transoceanic high frequency band primarily reserved for international transoceanic communication; some have, by international agreement, been reserved for exclusive use in other countries or are in use by stations in other countries which probably have a valid legal claim thereto by reason of priority; some have long since been reserved for and assigned to stations of American companies either in operation or under course of construction. Yet the Court of Appeals, on motion of appellants, granted a stay order in these cases on December 7, 1929, which, under the interpretation given it by the Commission, restrains the Commission from issuing any new construction permits or licenses contemplating the use of any channels in either the domestic or the transoceanic high frequency bands, even in the case where stations have been built under construction permits granted six months before the appeals were taken and which are now ready for licenses to operate. On February 25, 1930, the court entered a further stay order on the motion of the Mackay Radio & Telegraph Company. It appears, therefore, inter alia that the Court of Appeals believes it has power to repeal, modify, or disregard the Commission's General Orders 55 and 74 allocating the domestic high frequency band among the various services.

A third possible method is that of direct attack, by suit for injunction restraining the Commission from enforcing a given rule or regulation, or by other extraordinary remedy. This offers an interesting field for study but is beyond the scope of this article. Obviously much depends on the validity of, and construction given to, Section 16 of the Act, governing appeals. As an example of

20. Nos. 4987, 4988.
22. The Court of Appeals hinted that such a suit might lie in Technical Radio Laboratories v. Commission, 36 F. (2d) 111. The decision of the Supreme Court of the United States in the General Electric Co. case would seem to indicate that the Court of Appeals sits as a super-Radio Commission. In as much as the court also passes on purely legal questions as well as administrative questions the situation is anomalous.
what may occur may be cited the rumor that a suit for injunction
was to have been filed to restrain the Commission's General Order
43 (since repealed), which attempted to limit the duplication of
chain programs by stations on cleared channels.²⁸

Another fruitful field for discussion is the construction of
Section 4(f) of the Act, which reads as follows:

“(f) Make such regulations not inconsistent with law as it may
deeh necessary to prevent interference between stations and to carry
out the provisions of this Act: Provided, however, That changes in
the wave lengths, authorized power, in the character of emitted signals,
or in the times of operation of any station, shall not be made without
the consent of the station licensee unless, in the judgment of the Com-
mission, such changes will promote public convenience or interest or
will serve public necessity or the provisions of this Act will be more
fully complied with;”

This has been thought by the Commission to give it power at the end
of a license period to make changes in the frequency, power and/or
hours of operation of a broadcasting station without notice or hear-
ing upon a mere recital of a finding that public interest, convenience,
or necessity will be served thereby.²⁴ It would seem, however, from
the language of the opening clause that the section was intended
to apply only to changes made necessary by regulations of general
application, and even then the holding of the Court of Appeals in
the General Electric Company case seems to make a hearing pre-
requisite to such changes.

III. Procedure Followed in Exercising Quasi-Judicial
Functions

Let us now assume that the entire radio spectrum has been al-
located as between services and channeled by appropriate regula-
tions of the Commission and that there also are regulations which
make certain specific requirements as to the standards which must
be met by the apparatus to be used in operating a proposed station,
etc. As has already been pointed out, these assumptions are war-
ranted only in part, but sufficiently so that it is unlikely that in the

²³. The stay orders issued by the Court of Appeals in such broad terms
as to affect parties not before it are likely to lead to suits for mandamus or
injunction against the Commission in the Supreme Court of the District of
Columbia on the theory that the Court of Appeals has exceeded its jurisdiction
under the Act and the Commission is not bound by such orders.

²⁴. This has been the theory on which most of the general reallocations
in the broadcast band have been based. The Commission did, however, pro-
vide opportunity for hearing on the reallocation of Nov. 11, 1928.
future hearings on individual applications will, to any great extent, also have the character of investigations to determine what regulations shall be adopted whereby the applications will be granted or denied. We may now examine the procedure by which applications are brought to the Commission, examined, heard, and acted upon, and by which licenses are brought to an end by revocation or refusal to renew.¹

**Kinds of Applications.** The four major classes of application recognized by the Act are:

1. **Applications for construction permit.** Section 21 provides:

   "No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the licensing authority upon written application therefor . . . A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft."

   It will be noticed that the foregoing does not forbid the construction of a radio station; it achieves the same end by an indirect route. The constitutionality of the requirement has been challenged as an invasion of the powers reserved to the states by the Federal Constitution.¹α Many troublesome questions of construction arise in connection with Section 21. For example, if A has lawfully constructed an amateur station without a permit and has a license for its use, may he thereafter apply directly for a license to use the station for a fixed point-to-point wireless telegraphy public service; or must he first apply for a construction permit to build a station which is already lawfully in existence? What constitutes the construction of a new station so as to require a permit; suppose that important parts of an existing licensed apparatus are replaced with new or more efficient apparatus, that the studio of a broadcasting station is remodeled or moved, or that the building housing the transmitter is torn down and rebuilt? To what extent does the application for construction permit serve as a substitute for an application for license under Section 10? Some of these questions will recur in the discussion below.

2. **Applications for License.** These will obviously fall into two major groups: (a) cases where a construction permit is a necessary prerequisite to a license and (b) cases where it is not. In addition, there are a variety of subclassifications as to kind of station, type of service, etc. (which is also the case in applications for construction permits).

¹ A brief but excellent outline of the Commission's practice and procedure, prepared by Mr. Paul M. Segal, formerly first assistant general counsel of the Commission, is contained in the Commission's Third Annual Report, pp. 53-55.

¹α This has been done by Members of Congress in the course of hearings and debates on radio legislation pending in 1928 and 1929. See Hearings on S. 6 before Senate Committee on Interstate Commerce, May 10, 1929, p. 107.
3. Applications for modification of license. It is not clear from the language of the Act exactly what was originally intended by this type of application. It is possible that Congress intended to refer to applications for the Commission's written consent to assignment of license under the second paragraph to Section 12, and only to such applications. The Commission has sensibly given this kind of application a very broad interpretation to cover requests for changes in frequency, power,\(^2\) hours of operation, and other essential terms and conditions of a license.

4. Applications for renewal of license. The important question arising in connection with this kind of application is as to what constitutes a granting or a denying of such an application so as to require a hearing. Analogous questions arise in connection with the three previously mentioned kinds of application. All four will be discussed from this viewpoint below.

There are other kinds of applications recognized by the Act which, from the viewpoint of the procedural rights of the parties, may be grouped under one or the other of the foregoing classes. Applications for the Commission's written consent to assignment of license, as required by Section 12, may be considered to be an application for modification of license. Applications for the Commission's approval of assignment of a construction permit, as required by Section 21, and applications for extension of date of completion may probably be grouped under applications for a construction permit in view of the decision of the Court of Appeals in Richmond Development Corporation v. Federal Radio Commission. In that case, an application for extension of time when the station should be completed and ready for operation (which is required to be specified in construction permits) was treated as an application for a construction permit and a denial of the application was regarded as an appealable decision of the Commission under Section 16, although there had been two previous extensions and the last extension had expired 15 days before the application in question was made.

The Commission has still further forms of application which have proved necessary in the administration of the Act and which probably also fall within one or the other of the four major classes, at least if the Court of Appeals is to adhere to the broad principle of construction which it followed in the Richmond Development Corporation case. Among these may be mentioned applications for modification of construction permit, applications for authorization

\(^2\) When the increase necessitates a new transmitter, an application for construction permit is necessary.

\(^3\) U. S. Daily, Nov. 7, 1929 (not yet reported).
to install automatic frequency control, applications for special authorization to engage in television and picture broadcasting, and others which are listed in the Commission's Third Annual Report.4

One constant source of confusion in construing the procedural provisions of the Radio Act of 1927 is the uncertainty as to the scope and status of construction permits. Section 21 was tacked on the Act at a late date because of the large number of broadcasting stations which were being constructed and were crowding their way into the congested broadcast band just prior to the enactment of the Act. Care was not taken to make other sections of the Act conform to the added requirement, with the result that in many places no mention is made of construction permits where logic requires that they be mentioned along with licenses and modifications and renewals of license. Examples of this are Section 5, (A) and (B), Section 9, Section 11, Section 12, Section 14, and Section 15.5 On the other hand, construction permits were not overlooked in Section 13. It is not improbable that the word license will, in certain of these sections, be construed to mean both license and construction permit.

**Form and Contents of Applications.** The Act is specific as to the contents of applications for licenses (Section 10) and applications for construction permits (Section 21). The language of the two sections is almost identical, a consideration which lends weight to the theory that a construction permit is sort of a preliminary or tentative license to be completed by the issuance of a formal license when the terms of the permit have been complied with. Both applications for license and applications for construction permit must be signed by the applicant under oath or affirmation. The Act makes no specific requirements as to the form, contents, or execution of applications for renewal or for modification. The Commission, however, has provided printed forms for both classes, and requires them to be signed by the applicant under oath or affirmation. Section 5 stipulates:

"No station license shall be granted by the Commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wavelength or of the ether as against the regulatory power of the United

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5. It has been recommended that the requirement of construction permits be abandoned. 1929 Report of Standing Committee on Radio Law, p. 478.
6. Under Sec. 9 renewal licenses may not be granted more than thirty days prior to the expiration of the preceding license. This is a burdensome provision to the Commission from an administrative point of view.
States because of the previous use of the same, whether by license or otherwise."

The Commission requires a similar waiver in applications for construction permit, for renewal or for modification, for assignment, and certain other classes of application.

**Filing of Applications.** Section 10 requires that applications for license be filed with the Secretary of Commerce. No such requirement is made by the Act with respect to any other class of application, but the Commission makes such a requirement with respect to all of them. This is necessary for the sake of uniformity of records and for the proper functioning of the investigation and inspection services carried on by the Department of Commerce. The filing actually is done with subordinate officers of the Radio Division of the Department of Commerce, called radio supervisors, of which there are nine, one in each of nine districts into which the country is divided for administrative purposes. The supervisors forward the applications to the Radio Division's headquarters at Washington which, after making records of them, delivers them to the Commission. Under the present system there is obviously an unfortunate duplication of work and records and a division of responsibility between the Radio Division and the Commission.

**Recording and Publication of Applications.** Because of the variety of classes and subclasses of applications, it has been necessary to evolve a system of file numbers which will show the zone from which the application proceeds, the class of application, the type of station, and the order in which it has been received. The file number 5-P-B-210 indicates an application for construction of a broadcasting station in the Fifth Zone, No. 210; 3-R-C-70 indicates a third zone application for renewal of license to operate a fixed point-to-point station, No. 70, etc., etc. The applicant is notified of receipt of the application and of the file number. Lists of all applications received (except such as proceed from amateurs and a few other classes in which the public is not interested) are made public at frequent intervals and usually are published in the United States Daily. It is to be desired that such publication be required

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7. These headquarters are adjacent to those of the Commission in the Interior Building in Washington.
10. The list shows the names of applicants and a brief statement of the privileges applied for.
by law so that all persons interested against the granting of the application may have some measure of notice.\textsuperscript{11}

\textit{Preliminary Examination of Applications.} The applications are examined successively by the licensing, engineering, and legal divisions of the Commission. To some extent an attempt is made by correspondence to cure irregularities and, in proper cases, to encourage withdrawal or alteration in applications such as request privileges inconsistent with the Commission's regulations, or such as cannot possibly be granted. The engineering and legal divisions make written recommendations to the Commission, and, if the recommendation is to the effect that the application be not granted but set for hearing, the Secretary advises the applicant of the reasons for the recommendation.\textsuperscript{12} The Secretary submits applications, accompanied by recommendations and correspondence, to the Commission for consideration.

\textit{Meetings and Decisions of the Commission.} In the great majority of cases, action on applications is taken by the Commission at closed meetings, regularly held on Mondays and occasionally on other days of the week. At times, however, action is taken by passing a memorandum among the individual commissioners for the approval of at least three of them. Actions of the Commission (other than orders entered in the hearing docket files) are noted in the minutes of its regular meetings, the minutes being mimeographed and, in an abbreviated form, are made public and usually published in the United States Daily. At present there are frequently unavoidable but nevertheless unfortunate delays in making public the Commission's decisions of a certain date; this becomes important in calculating the twenty-day period for appeals and an applicant is frequently badly prejudiced by delay in being advised of the Commission's decision.

In its first action upon an application the Commission may dispose of it in either of the following ways: (a) by granting it; (b) by denying it, or (c) by designating it for hearing.\textsuperscript{13} If an application is granted in part and denied in part, it may (from the point of view of the necessity for a hearing under Section 11 and of the privilege of appeal under Section 16) be regarded as a denial of the application, under the interpretation of the law adopted by the Court

\textsuperscript{11} See 1929 Report of Standing Committee on Radio Law, p. 476.
\textsuperscript{12} See 3rd Ann. Rep., p. 54.
\textsuperscript{13} Each of these actions comports the proper finding as to public interest, convenience or necessity, under action taken by the Commission on Oct. 31, 1929, and shown in its minutes of that date.
of Appeals. Before considering what applications must be designated for hearing, it will be well to review briefly the cases in which applications may be granted without hearing, and the cases (if any) in which applications may be denied without hearing.

Applications Granted Without Hearing. The first paragraph of Section 9 of the Act reads as follows:

"The licensing authority, if public convenience, interest, or necessity will be served thereby subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act."

The first paragraph of Section 11 of the Act reads as follows:

"If upon examination of any application for a station license or for the renewal or modification of a station license the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the licensing authority upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe."

Section 21, governing construction permits, contains the following:

"The licensing authority may grant such permit if public convenience, interest, or necessity will be served by the construction of the station."

The reason for the apparent repetition in Sections 9 and 11 and for the separate mention of construction permits in Section 21 is undoubtedly the hurried throwing-together of the compromise bill which became the Radio Act of 1927. From the foregoing it is clear that, except in so far as it is restricted by the Davis Amendment and a few other specific provisions in the Act, the Commission's sole guide in acting upon applications is the test of public interest, convenience, or necessity. No attempt will be made in this article to interpret the phrase with reference to the Commission's actions upon applications.

Congress plainly contemplated that there would be occasions when the Commission might properly act favorably on certain ap-
lications without hearing. In what cases may the Commission properly do this?

The obvious cases are applications concerning ship stations, amateur stations, perhaps also in the near future aircraft stations, and similar cases where, once a band of frequencies has been set aside for a given service, there is no necessity or reason for excluding any applicants who are eligible under the law. In other words, there is no necessity for choosing a lesser out of a greater number of applicants. All ships above a certain minimum size are required by law to be equipped with wireless, and the same requirement will shortly be made of aircraft engaged in interstate flying. About seventeen thousand amateurs are permitted to use the amateur bands without being confined to specific frequencies in those bands, and their applications are granted as a matter of course.\(^1\)

The moment, however, that the necessity arises for choosing between applicants, or for dislodging or harming one licensee in order to grant an application of another, or for making impossible the granting of one application by the granting of another, then justice requires a hearing as a condition precedent to action affecting the various applicants and/or licensees. Unfortunately the Commission has not consistently acted upon this principle.

Perhaps the clearest illustration is in the broadcast band where, with certain exceptions, the 90 available channels are already taxed to, and in many cases beyond, their capacity. The Commission has not adopted any rules as to the minimum geographical distance it will permit between stations of a given power on either regional or local channels, or between a station of a given power on a cleared channel and a station of a given power assigned to daytime operation on that channel.\(^2\) All too frequently, it has assigned new stations to such channels at grossly insufficient geographical distances from existing stations without notice or opportunity for hearing to the latter.\(^3\) The latter may have, and all too many of them have had, their service areas badly cut down by such actions. Sometimes this is done on formal application by the favored station; sometimes such a station is favored without making formal application for what


it receives. The same thing may occur by the establishment of nearby stations on adjacent channels. On the other hand, it is still possible in certain parts of the country (e.g., the sparsely settled Rocky Mountain regions, to permit the operation of additional 100-watt stations on the six local channels without any serious violation of sound engineering principles. Still, cases are comparatively few where this is true, and even in such cases there is something to be said in favor of giving the public notice of the pendency of the application and an opportunity to be heard with regard to it. The operation of a new station in a particular locality may, by unavoidable blanketing of adjacent channels, prevent the listening public from tuning in on a favorite station located elsewhere. The applicant may, for some reason not appearing on the face of the application, be a person not fit to be entrusted with a license to broadcast. There may be other and better qualified persons in the same region who are about to make application.

Take, as a second illustration, the situation in the domestic high frequency band as it was when the Commission began to hold hearings on applications for fixed point-to-point service. Only a small portion of the total number of channels available for this purpose were in use; nearly all were open to disposal by the Commission. Yet the applications were for the use of a number of channels many times greater than the total available. In a sense, therefore, each applicant had as his opponents all other applicants. Justice, as well as the desirability of an adequate record on appeal, required that each applicant submit to hearing and to scrutiny of his claims both by the Commission and by all other applicants.

As a third illustration, suppose that the Commission, by general regulation, should decrease the frequency separation, and consequently the channel width, in a portion of the high frequency band so as to create a new channel between each pair of existing channels and throw them open to application. There must be some way for existing stations to attack the regulation by one of the methods suggested in Part II of this article, and, where necessary, to insist upon a suitable regulation governing geographical separation of stations on the same or adjacent channels. There seems also to be the same necessity for requiring a hearing so far as other applicants are concerned, as was pointed out in the second illustration. On the other hand, the same might not hold true on regional and local channels in the broadcast band, were there general regulations pre-

19. This is the basis for appeal in The Journal Co. (WTMJ) v. Commission, No. 5095.
scribing minimum geographical distances between stations of a given power on the same or on adjacent channels, where applications are for the establishment of stations at localities not coming within the areas prohibited by such regulations. Still, the writer believes that the public should have an opportunity to be heard even in such cases.

Applicants Denied Without Hearing. May the Commission deny an application without hearing? The answer to this question depends upon which of two opposing constructions of Section 11 is correct: (1) that a hearing is required only in those cases where the application is in proper form, and is in compliance and consistent with the law and the Commission's regulations, in other words, where the only question to be determined is whether the granting of the application would serve public interest, convenience or necessity; (2) that a hearing is required on all applications described in Section 11. With certain exceptions hereinbelow noted, it is submitted that the first is the correct construction but it must be conceded that the decision of the Court of Appeals in the General Electric Company case leaves the question in a state of considerable uncertainty.

There are three major examples which will serve to illustrate the opposing points of view:

(a) An application may be formally defective on its face by reason of noncompliance with requirements either of the law or of valid regulations of the Commission. It may not be sworn to as required by Section 10; it may omit the waiver required by Section 5; it may not supply information which the Commission is empowered to require, etc., etc. Such a document, it would seem, is not an "application," within the meaning of Section 11, and the Commission would be warranted in disregarding it or, if it chooses, in denying it.

(b) An application may show on its face that because of the provisions of the law or of international treaty, the Commission may not grant it. A clear example is where an application reveals that an applicant is an alien or is otherwise within the prohibitions of Section 12, or that an applicant has been finally adjudged guilty of attempting to monopolize radio communication under Section 13. Another example (which is not free from complications arising from possible issues of fact) is where an application seeks privileges to carry on a particular type of radio service in a band of frequencies

20. See note 17.
allocated exclusively by international treaty (where international interference is involved) to other types of radio service, or where the application seeks to use a frequency already in use by a foreign station and the United States is bound not to permit any station in the United States to use that frequency if interference would be caused. Where no issue of fact is involved, a hearing would be a useless ceremony and should not be necessary; the applicant is free to attack the validity of the particular provision of the law (if he does not attack the validity of the entire Act) if he chooses by appeal. Where an issue of fact is involved, such as whether the proposed station will interfere with an existing foreign station protected by international treaty, it may be that a hearing should be held on this issue alone (with right of appeal confined as set forth in the previous paragraph), but the Commission should protect itself by appropriate regulations and by adequate records so that the danger of a decision by the Court of Appeals violative of the international obligations of the United States will be minimized.

(c) An application may show on its face that because of inconsistency with rules and regulations of the Commission it cannot be granted. The outstanding example of such an application is that which the Court of Appeals required the Commission to grant in the General Electric Company case without passing upon the validity of the regulation involved, and without expressly modifying it. The Commission's action had been taken without hearing and therefore no evidence was or could be submitted to the Court upon appeal except the applicant's self-serving statements contained in the application. Yet the court entered judgment upon the merits. In such a case, an applicant should have an opportunity, by hearing limited to such issue, to test the validity of a regulation such as General Order 40 on appeal, but it would seem sound that the court should, on appeal, likewise confine itself to that issue and not attempt, on an ex parte record, to determine whether public interest, convenience or necessity would be served by granting the application.

21. The Court of Appeals, although it sits in an administrative capacity, takes the position that it may pass on such purely judicial questions as the constitutionality of the provisions of the Radio Act of 1927. In the General Electric Co. case, where the validity of the entire Act was attacked, the court disregarded the point made by the Commission that a person making an application under the Act and appealing under Sec. 16 of the Act could not be heard to question the constitutionality of the Act.

22. A motion by the Commission to strike certain evidentiary matter attached to the notice of appeal in the form of an affidavit was ignored. Neither party applied for leave to take additional evidence.

23. I. e., it ordered the Commission to grant the license applied for instead of sending the case back to the Commission for hearing.
Largely because of the decision in the General Electric Company case the Commission has virtually abandoned any attempt to deny applications without hearing, no matter how defective the application may be on its face and no matter how vitally it conflicts with the law or with the Commission's regulations. In such cases, however, the Commission attempts to persuade the applicant to withdraw or alter his application so as to avoid useless hearings. Nevertheless, a substantial number of such useless hearings have been and are being held.

**Applications Designated for Hearing.** Except as the Commission may have the power to deny applications without hearing in the cases just discussed, it may not deny any application without hearing. Under its present practice, any application not granted is, by formal notation in the minutes, "designated for hearing." By general action taken on October 31, 1928, such an entry is in each case to be construed as meaning that the Commission is not satisfied that public interest, convenience or necessity would be served by granting the application. The applicant is thereupon notified to this effect by the Secretary of the Commission and is at the same time advised of a date on which the hearing is to be held.24 Unless otherwise specifically provided the place for hearing is at the Commission's offices at Washington, D. C. The time may not be set earlier than the first Tuesday falling after the lapse of a period of twenty days from the date on which the Secretary mails the notice.25 The applicant, in order to be heard, must, ten days or more prior to the date set, send to the Commission written notice26 of his desire to be heard, together with a statement of the approximate time which, in his opinion, the presentation of his case will require. Failure to respond by the applicant results in a default and a denial of the application. Hearings are held usually on any week day other than Monday.27 Provision has been made for the obtaining of continuances,28 and for subpoenas for the attendance of witnesses and the production of documents.29

**Procedure at Hearings.** When an applicant has indicated his desire to be heard, the case is then for the first time entered on the Commission's hearing docket (which is maintained under the supervision of the Legal Division) and is given a docket number. Notice

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25. Ibid.
26. Ibid.
27. Ibid.
28. Ibid.
is sent of the nature of the application and of the time and place set for hearing, to other persons which the Commission considers interested. Who are interested parties is discussed below. Some measure of notice is also given the public through public announcement through the Commission's Press Bureau. There is no certain means whereby an applicant can ascertain prior to hearing what persons, if any, will appear to oppose the application. Pending applications and the docket records are, as a general rule, open to public inspection, although other matters such as correspondence and recommendations of the legal and engineering divisions are not, without authorization from the Commission.

The hearing may, in a proper case, be held at a place elsewhere than Washington but there are no formal regulations covering the occasions when this will be permitted or the steps necessary to obtain the proper permission.30

The tendency is increasingly for a single Commissioner to conduct hearings, although other Commissioners will usually participate if particularly requested. Under the present organization of the Commission, at least one Commissioner is continuously designated for this purpose. The Commission has power, of course, to employ examiners to conduct hearings but has not yet done so. Where a hearing takes place before less than a quorum (i.e., three), the applicant (and presumably also other parties) is entitled to present argument in support of his application before a quorum of the Commission. It is not necessary under the law that all the Commissioners attend the hearing.31

Parties may appear with or without attorneys, and may be represented by persons other than attorneys, such as radio engineers. Senators and Congressmen have frequently acted in the capacity of attorneys at hearings. There are no rules governing the qualifications of attorneys or others practicing before the Commission.

If the applicant does not appear at the time and place set for hearing, a default is entered and the application is thereafter denied.

The testimony is taken down and transcribed by a firm of court reporters under contract with the Commission, and parties (and any others) may obtain copies of the testimony directly from the reporters by paying for it. Parties are not ordinarily permitted to have their own stenographers.

Rules as to the admission of evidence are not yet very definitely settled but, in a general way, are the same as those followed by other administrative tribunals. The Court of Appeals has indicated that the strict rules followed in proceedings before courts of law need not be adhered to. A party is permitted to file affidavits both at the hearing, and by mail prior to the hearing. Evidence introduced at any previous hearing held by the Commission (no matter who may be the parties) may be introduced from the transcripts contained in the Commission's files. Unsworn evidence, such as letters, petitions, and the like, is usually rejected, as is also hearsay. The Commission looks with some degree of disfavor upon the all-too-frequent practice of stations to comb their listening publics for affidavits, etc. Employes of the Commission and of the Radio Division of the Department of Commerce may be required to testify upon reasonable notice so as to permit their attendance. Curiously, members of the Commission are also willing to testify if called by a party, although this seems unsound in the ordinary case; a Commission is usually presumed to speak only through its records.

The Commission has been very liberal in permitting the amendment of applications even after hearing has commenced but does not, as a rule, do so where the rights of parties not notified might be affected.

An applicant is heard first (the burden of proof is upon him). He is followed by the several respondents, after which the applicant may, if he desires, offer evidence in rebuttal. No very strict rule is adhered to on this score, however. A wide range of cross-examination is permitted. An attorney for the Commission participates in the examination of all witnesses, as do also the attending members of the Commission. At the close of the case, argument is permitted in behalf of each of the parties. Ordinarily briefs are not filed, though there have been instances where parties have obtained leave thereafter to file briefs within a period of time fixed by the Commission.

RADIO PRACTICE AND PROCEDURE

The transcript of evidence is circulated among the members of the Commission for study. Thereafter a decision is made (usually at a regular meeting of the Commission) and an order pursuant to the decision, signed by the Chairman, is entered in the proper hearing docket file. This order, which recites a finding as to whether public interest, convenience or necessity would be served by granting the application, is one either granting or denying the application, or granting it in part and denying it in part. Where a decision is divided, two to two, the application is considered denied. Sometimes the order specifies an effective date later than the date on which it is entered; sometimes it does not and in such cases the effective date would logically be the date of entry. Since, however, the parties may not learn of the order for several days thereafter (because of delay in preparing minutes, etc.), an unfair situation frequently arises in connection with appeals, which must be taken within twenty days of the effective date. For the purposes of appeal the order entered in the hearing docket file is ordinarily considered the decision appealed from, although, where appeal is taken from a decision made without hearing, reference must be had to entries in the Commission’s minutes of its meetings, kept by the secretary.

There are no rules covering rehearings but there have been a few cases in which rehearings have been granted after an unusually strong showing that, through no fault of the party, important evidence was not presented at the original hearing.

The Commission does not, as a rule, “stay” or otherwise attempt to preserve matters in statu quo pending appeal. This has frequently been done by the Court of Appeals, however. In a few cases the Commission has authorized a party adversely affected by a decision to enjoy certain privileges temporarily until the successful party is ready to make use of such privileges. Also, when application has been made to the Court of Appeals for a stay order, the Commission has, pending action by the court on the application, refrained from issuing permits or licenses which it might be restrained from issuing by such a stay order if and when issued.

35. This was the case in Great Lakes Broadcasting Co. v. Commission, U. S. Daily, Jan. 7, 13, 1930 (not yet reported); Richmond Development Corporation v. Commission, U. S. Daily, Nov. 7, 1929 (not yet reported).

36. A rehearing had been granted by the Commission in Richmond Development Corporation v. Commission, supra. See also the Commission’s revision of its shifts of Florida stations, U. S. Daily, Oct. 17, 1929, Oct. 25, 1929.


38. This was the case pending the applications for stay order in Inter-city Radio Telegraph Co. v. Commission, Wireless Telegraph and Communi-
When Must Applications Be Designated for Hearing. Some aspects of this question have already been pointed out in a previous subheading, in considering what applications ought to be designated for hearing before being granted. There remain some troublesome questions as to what is to be considered a granting of the application. When an application is followed by a permit or license which varies in a greater or less degree from the terms, conditions or privileges specified in the application, is the action of the Commission to be considered as pro tanto a denial of the application so as to require a hearing under Section 11 and so as to constitute the basis for an appeal under Section 16?

The nature of the questions likely to arise will be clarified by an analysis of the more important features expressly or impliedly incorporated in a license. These features may be classified into two groups, one having to do with the transmitting apparatus itself and the other having to do with the operation of the apparatus as a station. The two groups overlap somewhat.

I. Features related to the transmitting apparatus.
   a. Description of transmitting apparatus (which necessarily includes, to a varying degree, the type of service for which it is suitable, the type of emission which it is capable of transmitting, the maximum and minimum power capacity, the frequency range over which it will transmit satisfactorily, its frequency stability, etc.).
   b. Location of transmitter.

II. Features related to the operation of the station.
   a. Frequency or frequencies authorized to be used.
   b. Power authorized to be used.
   c. Hours of operation authorized.
   d. Points, stations or persons with which station is authorized to communicate.
   e. Location of principal studio (important only because of the Davis Amendment).
   f. Service area of the station—meaning the area satisfactorily served by the station free from interference from other stations on the same or adjacent channels. This is a function chiefly of the frequency, power, location and hours of operation of such other stations, if we assume that they are efficiently constructed and operated.
   g. Type of service.
   h. Type of emission.
   i. Call letters (designated by the Secretary of Commerce).
   j. Period of license.

RADIO PRACTICE AND PROCEDURE

It will facilitate discussion of the question to consider first the most simple case, that of an application for renewal of license, and thereafter the other kinds of application.

**When Must Applications for Renewal of License Be Designated for Hearing.** The Commission has taken the position that it has power, at the end of a license period, to make changes in the frequency, authorized power, and hours of operation of a broadcasting station without notice or hearing on that station’s application for renewal, and that a new license incorporating the changes constitutes a renewal of the previous license and therefore a granting, not a denial, of the application. It therefore considers that in such cases it is not obliged to accord notice and hearing under Section 11 and that its action is not appealable under Section 16. The Commission bases its position on Section 4(f) of the Act of 1927 and on the intention of Congress as manifested by the circumstances under which the Act was enacted and by the limitations placed by Congress on the maximum licensing period both by Section 9 of the Act and by the successive amendments thereto. The same reasoning would, of course, extend to stations other than broadcasting and would include also the other features above enumerated. The Commission has persisted in this position since and despite the decision of the Court of Appeals in *General Electric Company v. Federal Radio Commission.*

The Commission has not contended, and undoubtedly would not contend, that, if a licensee authorized to engage in broadcasting should, as the result of an application for renewal, receive a license to engage in point-to-point wireless communication in the domestic high frequency band with Mexico City or a license to operate a station on an airplane, the Commission’s action would constitute a granting of the application. In fact, the Commission has not attempted to draw any line between the features of a license which may be considered as essential and those which are not. Its position has been taken almost entirely with reference to the frequency, authorized power and hours of operation of broadcasting stations.

Even in such cases it has not been consistent. In the great majority of cases, where an application is before it which requests authority for the establishment of a new broadcasting station, the Commission designates the applicant for hearing, notifies all other broadcasting stations which would be adversely affected by granting the application with respect to frequency, power and hours of operation and permits them to participate in the hearing as respondents. Also, in the great majority of cases, where a licensee of a broadcasting station (or any other kind of station) desires a change in the terms of his license with respect to any of the above-listed features, he must make formal application on forms provided by the Commission, the Commission takes formal action on the application (either with or without hearing, depending on the case), and, if it grants the application, the Commission issues a formal document known as a modification of license (or a modified license) which expressly alters the terms of the license modified. Occasionally, however, and usually as the result of the insistence of a particular station for a better assignment, widespread changes in the assignments of a dozen or more stations are made without notice or hearing to any of them. 39a

These changes are put in effect at the end of the license period (which is common to all broadcasting stations under existing practice). The broadcast band is so congested with an excess of stations that (with minor exceptions in the case of low power stations) no new or increased facilities can be given to any applicant without curtailing and perhaps even destroying the privileges enjoyed by at least one and usually many more existing stations. 39b

It would seem that the General Electric Company case is decisive against the correctness of the position taken by the Commission. In that case, the application for renewal of license asked for full-time operation on 790 kc. with 50 KW. power. The Commission acted upon the application by "granting" it with a license authorizing limited-time operation on 790 kc. with 50 KW. power. The Court of Appeals held that this constituted a denial of the application (but disregarded the fact that the Commission had given the applicant an opportunity for hearing which the applicant repeatedly rejected). In White v. Johnson, 39c it was clearly intimated that the Commission's action after hearing upon an application for

39b. The station for which one of the widespread shifts was made (WCFL) was asking to be restored to its former assignment within 30 days, U. S. Daily, Dec. 19, 1929.
39c. 29 F. (2d) 113.
his deputies, charged with the investigation of any and all air fatalities. A group of technically trained pilots living in various sections of the county are my assistants. We have the usual police powers relative to fast driving, et cetera, when on duty. Orders have been issued to all police in the County to allow no one to touch any aircraft wreckage or dead bodies until we have arrived and completed our investigation. We have authority to send any or all parts of a wrecked aircraft to laboratories for scientific tests, to employ experts, et cetera, to learn all we can about accidents, their cause and prevention. The press has co-operated very generously, and we feel that many of our population now know something about the difference between licensed and unlicensed—safe and unsafe—flying.

That is the story of one out of 102 counties comprising the State of Illinois. It illustrates some of the problems present everywhere. In the effort to keep Illinois completely abreast of the situation, the legislature has created our Aerial Navigation Commission. Through Mr. Knotts, our Secretary, we are in touch with the problems in every state—in every flying center, and we have the complete co-operation of Governor Emmerson.