

RECENT CASES

ADMINISTRATIVE LAW—FEDERAL COMMUNICATIONS COMMISSION—RESPONSIBLE REPRESENTATIVES OF THE LISTENING PUBLIC GRANTED STANDING TO INTERVENE AT FCC HEARINGS. *Office of Communications of the United Church of Christ v. FCC* (D.C. Cir. 1966).

Lamar Life Broadcasting Company, owners of television station WLBT in Jackson, Mississippi, filed an application for renewal of the station's broadcasting license with the Federal Communication Commission. Appellants¹ sought to have WLBT's renewal application denied by filing a petition and accompanying affidavits² raising substantial issues of fact as to whether a renewal would be within the public interest. The FCC's order dismissed appellant's petition for lack of standing as a "party in interest" to intervene at the hearing, and granted to Lamar Life Broadcasting a one year probationary license with strict requirements.³

¹ Appellants are (1) Office of Communications of the United Church of Christ, an instrumentality of the United Church of Christ, a national denomination with substantial membership within WLBT's prime service area; (2) Aron Henry and Robert L. T. Smith, residents of the state of Mississippi, television owners, and persons active in the leadership of civic and civil rights groups; and (3) United Church of Christ at Tougaloo, a congregation of the United Church of Christ.

² Communications Act Amendments, 1960, § 309, 74 Stat. 890, 47 U.S.C. § 309 (1964).

(d)(1) Any party in interest may file with the Commission a petition to deny any application . . . to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof.

³ *In re* Application of Lamar Life Broadcasting Co., 38 F.C.C. 1143 (1965). The allegations presented to the Commission and referred to by the circuit court showed a long history of programming misconduct dating back to 1955, when WLBT deliberately cut off a national television program in which a representative of the NAACP was speaking. In 1957, a program featuring Caucasian panelists discussing "the Little Rock crisis" was presented. The discussion advocated a segregationist policy, and Negroes were not allowed to participate. In 1958, WLBT's license was renewed only after a short delay, during which the Commissioner sought to determine the station's broadcasting policy. The station claimed that its policy was to avoid presenting programs that dealt with racial integration. Thereafter on several occasions, WLBT programming exhibited wholly segregationist views.

The station also had several weekly religious programs, but Negro churches were allowed to participate in only one. This program was exclusively Negro and was broadcast at 6:45 A.M. on Sunday for fifteen minutes. Negro colleges were allowed to participate to a limited extent in a program called "Our Colleges," but never for any discussion of matters of academic interest. In other aspects the Negro community was substantially ignored and abused by the station.

On appeal to the Court of Appeals for the District of Columbia, *held*, reversed: Appellants, or some of them, must be granted standing to intervene at the agency level; the previously followed determinants for standing to intervene are not exclusive. Furtherance of the public interest, convenience, and necessity may, in some instances, best be accomplished by allowing representatives of the listening audience standing to intervene as "parties in interest" at hearings where the renewal of a broadcasting license is contested. Furthermore, programming misconduct of the type and degree alleged in the petition is inconsistent with the public interest. The case was therefore remanded to the Commission for a hearing on the facts, with appellants, or some of them, participating. *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

The determinants for standing to appeal an FCC decision have historically been twofold. *FCC v. Sanders Brothers Radio Station*⁴ has been judicially interpreted as holding that one who will suffer "economic injury" due to an FCC order may have standing to appeal that order.⁵ *Sanders* points out that "economic injury" alone will not be a ground for standing, without a corresponding showing that competition might also be injurious to the "public convenience, interest, or necessity . . ."⁶ *National Broadcasting Co., Inc. v. FCC*,⁷ known as the *KOA* case, was the foundation for the second major determinant. *KOA* gave standing to appeal a Commission decision allowing to another broadcaster operational privileges which created "electrical interference" in the broadcast pattern of the appealing party. As a result of *Sanders* and *KOA*, a party who sought standing to appeal an FCC decision had to show either "economic injury" or "electrical interference."

Historically, standing to intervene at an agency hearing and standing to appeal from an agency decision have not been based entirely upon the same criteria.⁸ However, the FCC, which denotes an in-

Although the Commission apparently found misconduct, it granted a renewal in the apparent hope that WLBT would reform its practices. The renewal required the station to adhere to the established requirements of the *Fairness Doctrine*, *infra* note 28, and to meet with the petitioners to work out the problems alleged in the petition.

⁴ 309 U.S. 470 (1940).

⁵ See Communication Act of 1934, § 402(b)(2), 48 Stat. 1093. (This section granted the right to appeal an FCC decision to one "aggrieved or whose interests are adversely affected.")

⁶ 309 U.S. at 473.

⁷ 132 F.2d 545 (D.C. Cir. 1942), *aff'd*, 319 U.S. 239 (1943).

⁸ 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 8.11, 564 (1958).

The problem of right to intervene in administrative proceedings is closely

tervening party a "party in interest" and an appealing party an "aggrieved party," has held the same two criteria to be determinative of standing for both procedures.⁹ The new determinant set forth in *Office of Communications* allows standing to intervene at the hearing level to ". . . a limited number of responsible representatives of the listening public when such representatives seek participation."¹⁰

To recognize the right of the general public to intervene in FCC proceedings is not a completely new concept. However, the idea apparently has not been exploited to date, although in several instances certain members of the public have been allowed standing to appeal the orders or decisions of various other administrative bodies.¹¹ It seems logical to proceed one step further and grant standing to intervene at the hearing level to representatives of the television viewing public.¹²

Apparently at no time has a determination of "parties in interest" been limited solely to a finding that one suffered "economic injury" or "electrical interference." As noted in *Office of Communications*,¹³ *Sanders* did not make "economic injury" a sole criterion for determining who is a "party in interest."¹⁴ Nor did *KOA* attempt to make

related to and in some measure governed by the elaborate body of law concerning standing to challenge and to enforce administrative action. But intervention and standing to challenge are not the same and are not governed by the same considerations. . . . Furthermore, the consequences of intervention are different from the consequences of allowing a party to obtain review. Intervention depends not only upon the directness and importance of the effects of the proceedings upon the interest of the party seeking to intervene, but it also depends upon the effect upon the proceedings of allowing intervention.

⁹ *Metropolitan Television Co. v. United States*, 221 F.2d 879, 880 (D.C. Cir. 1955) ("A 'party in interest' is one who is 'aggrieved or whose interests are adversely affected'. § 402(b)."); cf. *Seaboard & Western Airlines v. CAB*, 181 F.2d 515 (D.C. Cir. 1950), *cert. denied*, 339 U.S. 963 (1950) ("It is not disputed that one who may appeal may intervene."). For a full development of the history of standing at FCC procedures, see Comment, *Standing to Sue Before the FCC*, 55 COLUM. L. REV. 209, (1955).

¹⁰ *Office of Communications of the United Church of Christ v. FCC*, 359 F.2d 994, 1005 (D.C. Cir. 1966).

¹¹ *Henderson v. United States*, 339 U.S. 816 (1950) (granted railroad passenger right to appeal order of ICC); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (granted standing to appeal an order of the Federal Power Commission to a conservation group); *Bebchick v. Public Util. Comm'n of D.C.*, 287 F.2d 337 (D.C. Cir. 1961) (granted standing to consumer to appeal order of the Commission); *Reade v. Ewing*, 205 F.2d 630 (2d Cir. 1953) (granted standing to appeal order of Federal Securities Administrator).

¹² See *Metropolitan Television Company v. United States*, 221 F.2d 879, 880 (D.C. Cir. 1955); *Seaboard & Western Airlines v. CAB*, 181 F.2d 515 (1950), *cert. denied*, 339 U.S. 963 (D.C. Cir. 1950).

¹³ 359 F.2d at 1001.

¹⁴ 309 U.S. at 477.

the determinants "economic injury" and "electrical interference" exclusive.¹⁵

Congress has evidently had mixed feelings as to the desirability of allowing further determinants in classifying one as a "party in interest." In 1951, under an apparent apprehension that a "host of parties" would descend upon the FCC, the Senate defined "party in interest" by the determinants set forth in *Sanders* and *KOA*.¹⁶ However, no mention was made with respect to the exclusion of other determinants, and the Senate, in a later report, broadened its views concerning "party in interest."¹⁷ Thus, it is apparent that the *Office of Communications* court was not taking an unprecedented step by allowing responsible members of the listening public standing to intervene in an FCC hearing. In fact, the determinant established by *Office of Communications* should help to alleviate the problem of protests "based on grounds which have little or no relationship to the public interest."¹⁸

The new determinant for standing to intervene, as set forth in the instant case, will apply only to applications for renewal of licenses. In the granting of a new license, it is difficult to imagine, and should not be recognized, that the listening public would have any grounds for complaint. For those who fear¹⁹ that the new determinant may lead some parties to attempt intervention merely to delay the renewal of licenses, or to injure the licensee, it is noteworthy that Congress has provided an extension of the license during the renewal proceedings.²⁰

Even though the new determinant will not encourage dilatory practices, it is possible that by the very nature of the new determinant

¹⁵ 132 F.2d at 547 ("It does not follow that others, who may be affected adversely though not financially, will be neither willing nor able to appeal.").

¹⁶ S. REP. NO. 44, 82d Cong., 1st Sess. 8 (1951).

¹⁷ S. REP. NO. 1231, 84th Cong., 1st Sess. 2 (1955) ("The committee also wishes to call attention to the fact that the term 'party in interest' encompasses a wide variety of persons, all of whom have standing to protest . . .").

¹⁸ H. R. REP. NO. 1051, 84th Cong., 1st Sess. 3 (1955).

¹⁹ This fear has been expressed by Congress in one of its reports; it was there pointed out that the main difficulty in determining a "party in interest" was the fact that persons with no legitimate interest to intervene attempted to do so merely to delay the licensing procedure. S. REP. NO. 44, 82d Cong., 1st Sess. 8 (1951).

²⁰ Administrative Procedure Act § 9, 60 Stat. 243 (1946), 5 U.S.C. § 1008(b) (1965).

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In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

some "clogging" of the hearing process may take place. This possibility exists because participation in an FCC hearing is somewhat unique. While other administrative agencies have the power to limit participation by parties,²¹ the FCC must allow full participation by any "party in interest."²² Hence the FCC, by its rule making power,²³ must carefully define who are "responsible representatives of the listening public" as a means of insuring that the public interest will be served. The *Office of Communications* court, although recognizing the need for defining "responsible representatives," did not set out any useful guide lines for this definition.

In promulgating the rules under which "responsible representatives of the listening public" will be defined, the following proffered guide lines may prove helpful. "Listening public" should initially be defined as any group showing a substantial number of members within the total listening audience. Following such a showing, the group should be allowed representation upon its allegations of the applicant's broadcasting misconduct which has injured the group.²⁴

²¹ 1 DAVIS, *op. cit. supra* note, at 545 ("Although rules of practice of regulatory agencies characteristically leave specific problems for agency discretion, the rules usually recognize that intervention need not be completely granted or completely denied but that limited participation may be permitted.").

²² Communications Act Amendments, 1960, § 309, 74 Stat. 891, 47 U.S.C. § 309 (1964).

If in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. . . .

The meaning of full hearing ". . . under § 309 means that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956). This hearing might well be equated to a full trial, and since the FCC does not have the facilities to function as a court, its docket must be effectively limited.

The Commission must have a hearing when there are allegations of misconduct of the degree made in *Office of Communications*. See material cited note 3 *supra*. The circuit court in the instant case held that if the allegation were proven, then, as a matter of law, there could be no finding that the public interest would be served, and the license should not be renewed. 359 F.2d at 1007.

²³ Communications Act of 1934, § 4, 48 Stat. 1068, 47 U.S.C. § 154 (1964).

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

²⁴ Communications Act Amendments, 1960, § 309, 74 Stat. 889 (1960), 47 U.S.C. § 309 (1964).

(a) Subject to the provisions of this section, the Commission shall determine . . . whether the public interest, convenience, and necessity will be served by the granting of such application

In order that a "party in interest" be granted a hearing, that party must, in its peti-

The next step involves a definition of an *injured group*. A general guide line for defining *injured group* may be found in the policy set out by the FCC concerning the responsibility of the broadcaster to the needs of the listening public.²⁵ The policy requires that the "tastes, needs and desires of the public he is licensed to serve . . ." must not be neglected by the broadcaster.²⁶ Upon an allegation of policy neglect, *injured group* status should be granted.

For more specific guide lines, the Commission should consider the criteria used by the court in the instant case.²⁷ A group prejudiced by a violation of the *Fairness Doctrine*, as defined by the FCC,²⁸ might well be designated an *injured group*. Because the duty imposed on the broadcaster under the *Fairness Doctrine* is unmistakable with respect to his relations with the public, violations thereof should allow the *injured group* standing to intervene. A group alleging discrimination should also be termed an *injured group*. Thus in the present case, where a broadcaster discriminated against a group consisting of 45% of the listening public, standing to intervene should be allowed.

tion to deny the application, allege, and support by affidavit, facts sufficient to show that a granting of the license would be inconsistent with the public interest, convenience, and necessity. See Communications Act Amendments, 1960, § 309, 74 Stat. 890, 74 U.S.C. § 309 (1964), note 2 *supra*.

²⁵ Network Programming Inquiry-Report and Statement of Policy (FCC 60-970) 25 Fed. Reg. 7291, 7295 (1960).

In the fulfillment of his obligation the broadcaster should consider the tastes, needs and desires of the public he is licensed to serve in developing his programming and should exercise conscientious efforts not only to ascertain them but also to carry them out as well as he reasonably can.

²⁶ *Ibid.*

²⁷ 359 F.2d at 998-99.

²⁸ *In re* Editorializing By Broadcast Licensees, 13 F.C.C. 1246, 1257-58 (1949).

[T]he Commission believes that under the American system of broadcasting the individual licensees of radio stations have the responsibility for determining the specific program material to be broadcast over their stations. This choice, however, must be exercised in a manner consistent with the basic policy of the Congress that radio be maintained as a medium of free speech for the general public as a whole rather than as an outlet for the purely personal or private interests of the licensee. This requires that licensees devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community. . . . Such presentation may include the identified expression of the licensee's personal viewpoint as part of the more general presentation of views or comments on the various issues, but the opportunity of licensees to present such views as they may have on matters of controversy may not be utilized to achieve a partisan or one-sided presentation of issues. Licensee editorialization is but one aspect of freedom of expression by means of radio. Only insofar as it is exercised in conformity with the paramount right of the public to hear a reasonably balanced presentation of all responsible viewpoints on particular issues can such editorialization be considered to be consistent with the licensee's duty to operate in the public interest. For the licensee is a trustee impressed with the duty of preserving for the public generally radio as a medium of free expression and fair presentation.

Obviously, the entire *injured group* will not be designated a "party in interest;" upon meeting certain requirements, one representative should be recognized from each *injured group*.²⁹ The accepted requirement for "party in interest," as set forth in *Sanders* and *KOA*, and formalized with the definition of the term "Private Attorney General,"³⁰ is that the person be allowed standing only to vindicate the public interest.

In determining who will vindicate the public interest, it should be required that the "responsible representative" show that he has some special interest in the injured group's welfare which separates him from other members of the *injured group*. Where the *injured group* is organized, an officer thereof might meet this requirement. Where the group is unorganized, the person attempting to represent it should be required to show that he is familiar with the problems of the group, and that he is considered a distinguished member by the group.

The *Office of Communications* court has taken a broad step to insure adherence to the Congressional mandate that the public interest be adequately represented in FCC hearings. However, the court has left with the FCC the problem of determining who are "parties in interest" under the new determinant. The guide lines herein discussed are not exclusive, for it is possible that representation of the public interest may come from a different quarter than has been suggested. The decision should serve as a warning to broadcasters that they must exercise their license privileges in such manner as will be beneficial to the listening public generally, and non-discriminatory to any segment thereof.

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²⁹ Since it is contemplated that every participating party will do so "fully," as defined in note 22 *supra*, to allow more than one representative per group would lead to wasteful duplication of effort and material presented. Another consideration in allowing only one representative per group is that there may be more than one *injured group* participating. To allow more than one representative from each group would contribute little, and might tend to "clog" the proceedings.

³⁰ *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943). The court, in discussing whether a consumer may be involved in administrative actions, formalized the theory of private Attorney General.

Congress can constitutionally enact a statute conferring on any non-official person . . . authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.