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SUBJECTIVE JUDICIAL REVIEW OF THE FEDERAL COMMUNICATIONS COMMISSION

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"When I have before me a case on review from the Interstate Commerce Commission, almost instinctively I want to sustain their order. When I have before me a case to review of the Federal Trade Commission, almost instinctively I want to reverse it."[1]

THE basis for judicial review of administrative agencies in one form or another is the *Union Pacific* rule, originally developed to govern the relationship between the courts and the Interstate Commerce Commission.[2] Variations in the application of this judicial formula to different agencies[3] have been shaped for the most part by the character of the governmental power exercised and the nature of

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[1] Professor, now Justice, Frankfurter, "Summation of Cincinnati Conference on Administrative Tribunals," 24 A. B. A. J. 282 at 285 (1938), quoting Judge Hough of the United States Circuit Court of Appeals for the Second Circuit.

[2] Interstate Commerce Commission v. Union Pacific Railroad, 222 U. S. 541 at 547, 32 S. Ct. 108 (1912): "That the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) . . . to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly . . . contrary to the evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power." This rule was foreshadowed in Interstate Commerce Commission v. Illinois Cent. R. R., 215 U. S. 452 at 470, 30 S. Ct. 155 (1910). Cf. Rochester Telephone Corp. v. United States, 307 U. S. 125 at 140, 59 S. Ct. 754 (1939): "Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable."

[3] E.g., National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 57 S. Ct. 615 (1937); Electric Bond & Share Co. v. Securities & Exchange Comm., 303 U. S. 419, 58 S. Ct. 678 (1938); Federal Trade Comm. v. Curtis Publishing Co., 260 U. S. 568, 43 S. Ct. 210 (1923); Old Colony Trust Co. v. Commissioner of Internal Revenue, 279 U. S. 716, 49 S. Ct. 499 (1929); Lloyd Sabaudo Societa Anonima Per Azioni v. Elting, 287 U. S. 329, 53 S. Ct. 167 (1932). Compare Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285 (1932).

the subject matter under review.[4] For example, the judicial control exercised over taxing authorities is circumscribed by the sovereign demand for revenue essential to the maintenance of government.[5] The scope of judicial review has been extended in deportation cases because of a strong disposition to right the wrongs committed by a poorly-manned administrative agency employing an inadequate procedure.[6]

In some instances the flexible review may be ascribed to the expertness, or lack thereof, possessed by the agency; or it may be predicated on the "reputation of the agency for fairness and thoroughness."

> "If the extent of judicial review is being shaped, as I believe, by reference to an appreciation of the qualities of expertness for decision that the administrative may possess, important consequences follow. The constitution of the administrative and the procedure employed by it become of great importance. That these factors already in part mould the scope of judicial review is apparent from the decisions. Different agencies receive different treatment from the courts. A reputation for fairness and thoroughness that attaches to a particular agency seeps through to the judges and affects them in their treatment of its decisions. Fairness and thoroughness may also be apparent upon the record as it reaches the court, so as to lead the court to the conclusion that the evidence has received the attention that it deserved and that it would have received in the hands of one trained in legal techniques."[7]

[4] Albertsworth, "Judicial Review of Administrative Action by the Federal Supreme Court," 35 HARV. L. REV. 127 (1921); Davis, "To What Extent Should the Decisions of Administrative Bodies be Reviewable by the Courts?" 25 A. B. A. J. 770 at 777 (1939).

[5] Leigh v. Green, 193 U. S. 79, 24 S. Ct. 390 (1904); Loan Assn. v. Topeka, 20 Wall. (87 U. S.) 655 (1874); Powell, "Conclusiveness of Administrative Determinations in the Federal Government," 1 AM. POL. SCI. REV. 583 at 589 (1907); "Report of Committee on Federal Taxation," 62 A. B. A. REP. 679 at 685 (1937).

[6] Compare United States v. Ju Toy, 198 U. S. 253, 25 S. Ct. 644 (1908), characterized by LASKI, AUTHORITY IN THE MODERN STATE 99 (1919), as the origin of American administrative law, with Gonzales v. Williams, 192 U. S. 1, 24 S. Ct. 177 (1903); Ng Fung Ho v. White, 259 U. S. 276, 42 S. Ct. 492 (1922); VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS 27-32 (1932); Oppenheimer, "Recent Developments in the Deportation Process," 36 MICH. L. REV. 355 (1938).

[7] Landis, "Administrative Policies and the Courts," 47 YALE L. J. 519 at 531 (1938); Davis, "To What Extent Should the Decisions of Administrative Bodies be Reviewable by the Courts?" 25 A. B. A. J. 770 at 774 (1939):

"The custom of judicial decorum inhibiting frank discussion in formal opinions of calibre of individuals who man our various agencies, and the resulting habit of writing judicial opinions largely in terms of theoretical conceptions, are by no means proof that existing practices have not been molded largely by pragmatic considerations. Discerning judges will always strain to nullify unfairness caused by lack of administrative thorough-

The foregoing quotation exemplifies the subjective aspect of judicial review—in reality, an attitude or state of mind of the courts. Ordinarily, if any application of this "judicial attitude" be attempted, it refers to the Interstate Commerce Commission as an agency which has won a very high degree of both public and judicial respect.[8] The Federal Trade Commission has not fared as well. The commission's early procedure—the combination of prosecutor and judge, and failure to publish findings—resulted in a public and judicial distrust of its administrative process.[9]

It is the purpose of this paper to examine the leading decisions involving the Federal Communications Commission and its predecessor, the Federal Radio Commission, paralleled by an exposition of the administrative activities of the commission wherever the latter is deemed necessary. Has there been a change in the judicial attitude of the reviewing court towards the agency under observation? What are the factors which have caused this changed judicial attitude?

There are several factors which make this study of the Federal Communications Commission more interesting and edifying than a broad horizontal examination of what is here titled subjective judicial review. In the first place, we are working within the framework of a single statute, and variations in decisions need not be distinguished or reconciled on the basis of statutory differences in language. Secondly, there is available for study a substantial number of decisions, all from the same court, the United States Circuit Court of Appeals for the District of Columbia. The judges have become familiar with the statute and the subject matter, and, because of physical location, more readily

ness or competency. Neither the narrow scope of judicial review of Interstate Commerce Commission orders nor continual disregard of Federal Trade Commission findings can be explained by theories about supremacy of law, separation of powers, and the law-fact distinction."

At the Administrative Law Institute conducted by the George Washington University of Law in January, 1939, in Washington, D. C., Carl McFarland, a member of the panel, emphasized the importance of the "judicial attitude" in reviewing administrative determinations. Compare, MCFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION 33, 176-177 (1933).

[8] 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 423-424 (1931); Tollefson, "Judicial Review of the Decisions of the Interstate Commerce Commission," 5 GEO. WASH. L. REV. 503 (1937); Chief Justice Hughes, "Address before the American Law Institute," 24 A. B. A. J. 431 at 432 (1938): "Administrative agencies 'informed by experience,' and which have shown their capacity for dealing expertly with intricate problems, as, for example, in the case of the Interstate Commerce Commission, have won a very high degree of public respect."

[9] HENDERSON, THE FEDERAL TRADE COMMISSION, c. 2, 3 (1924); LANDIS, THE ADMINISTRATIVE PROCESS 105-106 (1938).

aware than would otherwise be possible of the administrative activities of the commission.[10]

THE PERIOD OF RESTRICTED REVIEW—1927-1937

The first general law on the subject of radio communication was the 1912 act, entitled "An Act to Regulate Radio Communication."[11] This statute, which vested jurisdiction over radio communication in the secretary of commerce, contained no provision for appellate review. The basic defect of the 1912 act, namely the failure of Congress to provide any discretionary standard for the secretary of commerce in the issuance of licenses, soon resulted in the application by the Supreme Court of the District of Columbia of the extraordinary legal writ of mandamus to require the secretary to grant licenses to all applicants.[12] The affirmance of this decision by the appellate court[13] paved the way for an opinion by the attorney general which in substance held that the 1912 act conferred no general authority on the secretary of commerce to fix hours of operation or limit power, and that it "preclude[d] the possibility of administrative discretion in [this] field."[14] This produced chaos in the radio broadcasting industry with the resultant breakdown of the law.[15]

The Radio Act of 1927[16] was enacted for the purpose of correcting the apparent deficiencies in the 1912 act. Popular demand for some sort of judicial review resulted in the inclusion of an appellate clause in the statute.[17]

[10] Both the United States Court of Appeals for the District of Columbia and the Federal Communications Commission are located in Washington, D.C. The United States Court of Appeals for the District of Columbia has exclusive jurisdiction over broadcast matters except in revocation proceedings, which may be brought in the federal district courts under the Urgent Deficiencies Act. 38 Stat. L. 219 (1913), incorporated in 48 Stat. L. 1093 (1934), 47 U. S. C. (1934), § 402(a).

[11] 37 Stat. L. 302 (1912). For a general discussion of the 1912 act, see DAVIS, THE LAW OF RADIO COMMUNICATION, c. 4 (1927).

[12] Intercity Radio Company v. Hoover, decided November 23, 1921, unreported. The Supreme Court of the District of Columbia is now the District Court of the United States for the District of Columbia.

[13] Hoover v. Intercity Radio Co., 52 App. D. C. 339, 286 F. 1003 (1923), error dismissed by stipulation, 266 U. S. 636, 45 S. Ct. 10 (1924); Donovan, "Origin and Development of Radio Law," 2 AIR L. REV. 107, 349, 468 (1931). Compare United States v. Zenith Radio Corp., (D. C. Ill. 1926) 12 F. (2d) 614, with Carmichael v. Anderson, (D. C. Mo. 1926) 14 F. (2d) 166.

[14] 35 OPS. ATTY. GEN. 126 at 129 (1926).

[15] DAVIS, LAW OF RADIO COMMUNICATION 54 (1927).

[16] Act of February 23, 1927, 44 Stat. L. 1162-1174.

[17] H. REP. 404, 69th Cong., 1st sess., p. 19 (1926): "During the consideration of legislation upon radio there has been a general demand that a right of appeal . . . should be accorded aggrieved parties; and the Secretary of Commerce and the Solicitor

Section 16 of the 1927 act provided in part:

"Any applicant for a construction permit, for a station license, or for the renewal or modification of an existing license whose application is refused by the licensing authority shall have the right to appeal from said decision to the Court of Appeals of the District of Columbia. . . .

"At the earliest convenient time, the court shall hear, review and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as to it may seem just. The revision by the court shall be confined to the points set forth in the reasons of appeal."

The judicial interpretation and scope of appellate jurisdiction under this provision were first raised in *Federal Radio Commission v. General Electric Co.*[18] Since 1923, WGY, owned by the General Electric Company, had been assigned to the 790-kilocycle frequency, sharing time with station WHAZ. On October 12, 1928, the commission authorized a revision of the allocation of all broadcasting stations, effective on November 11, 1928. By the terms of this revision, WGY was assigned its same frequency of 790 kilocycles with a power of 50,000 watts subject to limitation that the station was to share the frequency with station KGO, Oakland, California, and was not to operate after sunset at the latter station. The effect of the commission's action was to deprive WGY of variable evening hours of operation. WGY appealed and the court reversed and remanded the case to the commission with instructions that WGY be authorized to operate in the evening without any time limitations.[19] The commission applied for certiorari.[20] The Supreme Court declined to take jurisdiction, holding that the "provision for appeals to the Court of Appeals does no more than make that court a superior and revising agency in the same field,"[21] and that

of the Department of Commerce likewise took the position that such appeal should be granted." This report accompanied H. R. 9108, later merged into H. R. 9971, which ultimately became the Radio Act of 1927.

[18] 281 U. S. 464, 50 S. Ct. 389 (1930).

[19] General Electric Co. v. Federal Radio Comm., 58 App. D. C. 386, 31 F. (2d) 630 (1929).

[20] The commission, contemporaneous with its application for certiorari, filed an original application for leave to file a petition for a writ of mandamus and/or prohibition. The latter was consolidated and set down for hearing with the petition for writ of certiorari. The opinion of the Supreme Court in 281 U. S. 464, 50 S. Ct. 389, does not mention the petitions for mandamus and/or prohibition. In all probability the latter were dismissed.

[21] Federal Radio Comm. v. General Electric Co., 281 U. S. 464 at 467, 50 S. Ct. 389 (1930).

the court of appeals was a part of the machinery of the Radio Commission for administrative purposes. The Supreme Court was precluded from exercising its jurisdiction on decisions which call for the exercise of essentially legislative or administrative functions.

The judicial interpretation given to section 16 of the Radio Act of 1927 made the court of appeals the final reviewing tribunal. In view of the broad language contained in section 16, the court was at liberty to exercise its independent judgment on the law and the facts, revise any decision, or substitute its own judgment for that of the commission. The court, for the most part, exercised a restricted judicial supervision and held that it "should sustain the Commission's findings unless they are shown by the record to be manifestly against the evidence."[22] It was soon established that any order of the commission changing a station's frequency without notice or opportunity for hearing was void,[23] and that an ex parte proceeding resulting in findings and conclusions, formulated in the absence of the applicant and based on undisclosed evidence, was error of law.[24] It was likewise held that the commission could depart from the strict jury-trial rules of evidence which are applicable in court proceedings.[25]

The court of appeals exercised its appellate jurisdiction in thirteen cases[26] under section 16 of the 1927 act. The commission was reversed in six cases. Three of the reversals were caused by the failure of the commission to accord appellants notice and hearing where changes in frequencies were involved.[27] The reversal in the *Richmond Development Corporation* case can be attributed to an erroneous interpretation by the commission of section 21 of the act.[28] In the *Great Lakes Broad-*

[22] Technical Radio Laboratory v. Federal Radio Comm., 59 App. D. C. 125 at 128, 36 F. (2d) 111 (1929); Havens & Martin, Inc. v. Federal Radio Comm., 59 App. D. C. 393, 45 F. (2d) 295 (1930); Ansley v. Federal Radio Comm., 60 App. D. C. 19, 46 F. (2d) 600 (1930); Marquette University v. Federal Radio Comm., 60 App. D. C. 44, 47 F. (2d) 406 (1931); Reading Broadcasting Co. v. Federal Radio Comm., 60 App. D. C. 89, 48 F. (2d) 458 (1931).

[23] Saltzman v. Stromberg-Carlson Telephone Mfg. Co., 60 App. D. C. 31, 46 F. (2d) 612 (1931); Courier-Journal Co. v. Federal Radio Comm., 60 App. D. C. 33, 46 F. (2d) 614 (1931); Westinghouse Electric & Mfg. Co. v. Federal Radio Comm., 60 App. D. C. 53, 47 F. (2d) 415 (1931).

[24] Saltzman v. Stromberg-Carlson Telephone Mfg. Co., 60 App. D. C. 31, 46 F. (2d) 612 (1931).

[25] Technical Radio Laboratory v. Federal Radio Comm., 59 App. D. C. 125, 36 F. (2d) 111 (1929).

[26] Throughout this article, cases have reference to written opinions. In several instances, one written opinion may consider two or more appeals.

[27] Cases cited in note 23, supra.

[28] Richmond Development Corp. v. Federal Radio Comm., 59 App. D. C. 113,

casting Company case,[29] the court, as in the *General Electric* case, revised the judgment of the commission. The latter two cases are the only instances wherein the court substituted its judgment for the commission's. In those cases where the commission was sustained,[30] the court recognized the commission's expertness and competence in handling a highly technical problem.[31]

The desire to insure judicial review of the commission's activities by the Supreme Court[32] provoked the 1930 amendment to the Radio Act, which supplanted in toto the former provision for review. Section 16 was amended to provide that:

> "(a) An appeal may be taken . . . from decisions of the commission to the Court of Appeals of the District of Columbia in any of the following cases:
>
> "(1) By any applicant for a station license, or for renewal of an existing station license, or for modification of an existing station license, whose application is refused by the commission.
>
> "(2) By any licensee whose license is revoked, modified, or suspended by the commission.

35 F. (2d) 883 (1929). Section 21 provides in part that before a license shall be issued for the operation of a station, the construction of which is begun or continued after the act takes effect, an applicant must secure a permit for its construction from the commission. The permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the licensing authority may allow, unless prevented by causes not under the control of the grantee. Appellant had been authorized to construct a new station on May 2, 1928. Appellant requested several extensions of time, the last one on September 15, 1928, to expire October 31, 1928, in order to complete the construction of the station. The uncontradicted evidence is to the effect that during this time appellant was making diligent effort to complete the station within the specified time, but owing to delays caused by contractors, by engineering difficulties and by weather conditions, construction was not completed by September. The Commission denied appellant's last petition for extension of time, which had the effect of revoking the construction permit. The court ruled that "the evidence without substantial contradiction, discloses that the applicant had acted, not only in good faith, but also with diligence, in its efforts to construct the station within the time allowed by the permit, and that the completion thereof was prevented by causes not under its control." 59 App. D. C. at 114.

[29] Great Lakes Broadcasting Co. v. Federal Radio Comm., 59 App. D. C. 197, 37 F. (2d) 993 (1930).

[30] In addition to the five cases cited in note 22, supra, the commission was sustained in the City of New York v. Federal Radio Comm., 59 App. D. C. 129, 36 F. (2d) 115 (1929), and Carrell v. Federal Radio Comm., 59 App. D. C. 131, 36 F. (2d) 117 (1929).

[31] E.g., Ansley v. Federal Radio Comm., 60 App. D. C. 19 at 20, 46 F. (2d) 600 (1930); Havens & Martin, Inc. v. Federal Radio Comm., 59 App. D. C. 393, 45 F. (2d) 295 (1930).

[32] See S. REP. 1105, 71st Cong., 2d sess. (1930), which accompanied H. R. 12599; 72 Cong. Rec. 11882 (1930). See note 144, infra.

"(3) By any other person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission granting or refusing any such application or by any decision of the commission revoking, modifying or suspending an existing station license. . . .

"(d) At the earliest convenient time, the court shall hear and determine the appeal upon the record before it, and shall have the power, upon such record, to enter a judgment affirming or reversing the decision of the commission, and, in the event the court shall render a decision and enter an order reversing the decision of the commission, it shall remand the case to the commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that the findings of fact by the commsision, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious."[33]

The foregoing provision was carried over, almost verbatim, into section 402 of the Communications Act of 1934.[34]

The validity of the 1930 amendment to the Radio Act of 1927 was upheld by the Supreme Court in *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Company.*[35] It is a curious anomaly that although one of the avowed purposes of the 1930 amendment was to give jurisdiction to the Supreme Court, the latter has been extremely reluctant to grant applications for certiorari.[36]

In the *Nelson Brothers Bond & Mortgage Company* case, the Supreme Court pointed out that the amendment to section 16 limited review to "questions of law" and that this "limitation manifestly demands judicial, as distinguished from administrative, review."[37] The extent of judicial review is thereby patterned after the rule of review laid down in the *Union Pacific* case.

"Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal

[33] Act of July 1, 1930, 46 Stat. L. 844.

[34] Act of June 19, 1934, 48 Stat. L. 1064 at 1093, 47 U. S. C. (1934), § 402.

[35] 289 U. S. 266, 53 S. Ct. 627 (1933).

[36] From 1933 to the fall of 1939, the Supreme Court refused all applications for certiorari filed by licensees of broadcast stations. At the present time the Supreme Court has granted three applications for certiorari filed by the Commission.

[37] 289 U. S. 266 at 276.

> requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. . . . Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action."[38]

For six years, from 1931 to December 1937, when the *Heitmeyer* case[39] was decided, the court of appeals exercised a minimum of judicial supervision over the commission's activities. In this six year period, the court rendered thirty-nine written opinions; the commission was reversed in only three cases. In the *Journal Company*[40] case the commission was reversed because its action in granting additional power to two stations operating on the 620-kilocycle frequency was taken without notice to the appellant, an existing licensee operating on the same frequency, with the result that appellant suffered "intolerable interference" from the commission's grant. Although the decision can be explained on procedural grounds, the case has several significant aspects. The court held that an existing licensee who would suffer objectionable electrical interference by the commission's grant, was a "person, firm, or corporation aggrieved or whose interests are adversely affected by any decision of the commission." The court likewise declared that "No station that has been operated in good faith should be subjected to a change of frequency or power or to a reduction of its normal and established service area, except for compelling reasons," and that the commission's finding that appellant would not receive intolerable interference was "manifestly against the evidence."[41] This was the only

[38] Ibid., 289 U. S. 266 at 276, 277. See also Missouri Broadcasting Corp. v. Federal Communications Comm., 68 App. D. C. 154 at 156, 94 F. (2d) 623 (1937), cert. denied 303 U. S. 655, 58 S. Ct. 759 (1938): "The review to this court is limited by the act to questions of law, and it is provided that 'findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious.' [48 Stat. L. 1093 (1934), 47 U. S. C. (1934), § 402 (e).] This quoted language of the act provides substantially the same rule applied in cases of appeal from most, if not all, of the important federal administrative boards and commissions. The language implies that there shall be a public hearing, that evidence shall be taken and preserved, that the facts shall be found by the commission, and that this court shall have jurisdiction to deny effect to an order made without any supporting evidence or contrary to the indisputable character of the evidence, or wherever the hearing or the decision is inadequate, unfair, or arbitrary." The court cited Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285 (1932).

[39] Heitmeyer v. Federal Communications Comm., 68 App. D. C. 180, 95 F. (2d) 91 (1937).

[40] Journal Co. v. Federal Radio Comm., 60 App. D. C. 92, 48 F. (2d) 461 (1931).

[41] Ibid., at 93, 94.

case in the six-year period wherein the court challenged the validity of the commission's findings. It is interesting to note that the court was reluctant to direct the particular form of relief, and ordered the commission to work out an equitable solution of the problem.

The court reversed the commission in the *Symons* case[42] because the commission had granted a construction permit to an applicant without giving a competing applicant for the same facilities an opportunity to be heard. The commission in this case had made a temporary grant of a construction permit for 900-kilocycles to the intervener, licensee of KSEI, without a hearing. Paragraph 45[43] of the commission's rules provided that where an application is granted in whole or in part without a hearing, any person or corporation aggrieved and whose interests are adversely affected by such a temporary grant may obtain a hearing before the commission by filing a protest within twenty days. Appellant filed its protest within the prescribed period. The commission ignored the protest and refused to grant a hearing and this "was arbitrary and in violation of its rules."[44] The reversal in the *Symons* case can be attributed to the commission's failure to grant appellant the procedural rights of a hearing which had been guaranteed by the commission's rules and regulations and on general principles of due process of law. The court in its opinion enunciated the following dictum, namely that where there is a controversy between two radio broadcasting stations, the commission's action should not be based "on the mere question of priority of application as between the two stations but rather on the basic standard which Congress [has] directed shall apply, namely, the public interest and convenience."[44a] The foregoing statement is highly significant. In so far as each case must be decided on its individual merits, the dictum suggests the negative inference that the commission need not crystallize policies nor standards in its administrative interpretation of the Radio Act.

The third case in which the commission was reversed was *Unity School of Christianity v. Federal Radio Commission.*[45] The Radio Act

[42] Symons Broadcasting Co. v. Federal Radio Comm., 62 App. D. C. 46, 64 F. (2d) 381 (1933).

[43] The new rules of practice and procedure adopted by the Federal Communications Commission on July 12, 1939, effective August 1, 1939, contain no applicable provision which authorizes the filing of protests by applicants. 4 FED. REG. 3341-3355 (July 19, 1939).

[44] Symons Broadcasting Co. v. Federal Radio Comm., 62 App. D. C. 46 at 47, 64 F. (2d) 381 (1933).

[44a] Ibid., 62 App. D. C. at 46.

[45] 62 App. D. C. 52, 64 F. (2d) 550 (1933).

of 1927 contained no statutory provision which gave an applicant the right of oral argument before the commission. In the *Nelson Brothers Bond & Mortgage* case, the Supreme Court held that the absence of oral argument on an examiner's report before the commission did not invalidate an order when no request had been made for oral argument.[46] The court of appeals expanded this principle and ruled that the commission in its discretion may properly refuse oral argument to an applicant who had been served with an examiner's report and had had opportunity to file exceptions thereto.[47] This principle was modified in the *Unity* case. It was there held that where oral argument is accorded to a respondent, it was the commission's duty before decision to notify appellant and afford the latter an opportunity to be heard. The Communications Act of 1934 removes the uncertainty attendant oral argument in the Radio Act of 1927 by specifically providing that in all cases heard by an examiner the commission shall hear oral argument on request of either party.[48]

These three reversals illustrate that the court of appeals restricted its judicial supervision to the constitutional minimum of notice and hearing; correspondingly, the commission exercised an extremely broad administrative discretion in its interpretation of the act. This is confirmed by the cases wherein the court affirmed the commission. In 1928 Congress enacted the so-called Davis amendment, which was to provide a more equitable distribution of radio broadcasting facilities among zones and among the several states according to population.[49] Pursuant to this statutory mandate, the commission established a quota system whereby the assignable radio broadcasting facilities were classified in numerical units according to power, frequency, and hours of operation.

[46] Compare Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906 (1936), 304 U. S. 1, 58 S. Ct. 773, 999 (1938).

[47] Sproul v. Federal Radio Comm., 60 App. D. C. 333, 54 F. (2d) 444 (1931); Woodmen of the World Life Ins. Assn. v. Federal Radio Comm., 62 App. D. C. 138, 65 F. (2d) 484 (1933).

[48] 48 Stat. L. 1096, 47 U. S. C. (1934), § 409 (a).

[49] Act of March 28, 1928, 45 Stat. L. 373. The Davis amendment was carried over into the Communications Act of 1934, 48 Stat. L. 1084, 47 U. S. C. (1934), § 307 (b). It was repealed by the act of June 5, 1936, 49 Stat. L. 1475. Section 307 (b) now provides: "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is a demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of same." 49 Stat. L. 1475, 47 U. S. C. (Supp. 1938), § 307 (b).

Quotas of facilities were established for the several states.[50] The regulation which established the quota system provided that where a zone or state had its pro-rata or over-quota share of facilities, the commission would not allocate any further radio facilities to that zone or state. It was further provided that the commission could allow a slight departure, "plus or minus" in the allocation of broadcast facilities pursuant to its quota system.[51] The validity of the quota system was soon established and the commission's administrative interpretation of the Davis amendment was upheld in every case. The court held that the commission's finding under the quota system "is presumed to be correct."[52]

In the thirty-six written opinions handed down in this six-year period, the court of appeals on innumerable occasions stated that the findings of fact made by the commission, if supported by substantial evidence, are conclusive unless it shall clearly appear that the findings are arbitrary or capricious.[53] Substantial evidence was any evidence in the record which tended to support the commission's findings and conclusions.[54]

[50] General Order No. 92 of the Federal Radio Commission, promulgated June 17, 1930, 4 F. R. C. ANNUAL REPORT 4 (1930).

[51] General Order No. 102 of the Federal Radio Commission, promulgated January 8, 1931, 5 F. R. C. ANNUAL REPORT 91-92 (1931).

[52] Ansley v. Federal Radio Comm., 60 App. D. C. 19 at 21, 46 F. (2d) 600 (1930). Accord: Durham Life Ins. Co. v. Federal Radio Comm., 60 App. D. C. 375, 55 F. (2d) 537 (1931); Pacific Development Radio Co. v. Federal Radio Comm., 60 App. D. C. 378, 55 F. (2d) 540 (1931); Strawbridge & Clothier v. Federal Radio Comm., 61 App. D. C. 68, 57 F. (2d) 434 (1932); WHB Broadcasting Co. v. Federal Radio Comm., 61 App. D. C. 14, 56 F (2d) 311 (1932); Magnolia Petroleum Co. v. Federal Communications Comm., 64 App. D. C. 189, 76 F. (2d) 439 (1935); Radio Service Corp. v. Federal Communications Comm., 64 App. D. C. 323, 78 F. (2d) 207 (1935); Eastland Co. v. Federal Communications Comm., 67 App. D. C. 316, 92 F. (2d) 467 (1937).

[53] Cases cited supra, note 52; also Beebe v. Federal Radio Comm., 61 App. D. C. 273, 61 F. (2d) 914 (1932); Brahy v. Federal Radio Comm., 61 App. D. C. 204, 59 F. (2d) 879 (1932); Davidson v. Federal Radio Comm., 61 App. D. C. 249, 61 F. (2d) 401 (1932); Radio Inv. Co. v. Federal Radio Comm., 61 App. D. C. 296, 62 F. (2d) 381 (1932); Woodmen of the World Life Ins. Assn. v. Federal Radio Comm., 61 App. D. C. 54, 57 F. (2d) 420 (1932); City of New York v. Federal Radio Comm., 62 App. D. C. 81, 64 F. (2d) 719 (1933); Woodmen of the World Life Ins. Assn. v. Federal Radio Comm., 62 App. D. C. 138, 65 F. (2d) 484 (1933); WREC v. Federal Radio Comm., 62 App. D. C. 312, 67 F. (2d) 578 (1933); Unity School of Christianity v. Federal Radio Comm., 63 App. D. C. 84, 69 F. (2d) 570 (1934); Don Lee Broadcasting System v. Federal Communications Comm., 64 App. D. C. 228, 76 F. (2d) 998 (1935); Head-of-the-Lakes Broadcasting Co. v. Federal Communications Comm., 66 App. D. C. 19, 84 F. (2d) 396 (1936).

[54] Woodmen of the World Life Ins. Assn. v. Federal Radio Comm., 62 App. D. C. 138 at 139, 65 F. (2d) 484 (1933): "While the evidence is conflicting, that introduced in behalf of the applicant station certainly tended to support the conclu-

During this six-year period, the commission's refusal to renew the licenses of six stations was upheld by the court. The judicial tribunal attached the same conclusiveness to the commission's findings in renewal cases, which involved the deletion of existing stations, as it did to appeals by applicants who requested construction permits or improvements in existing facilities. In four of the cases the court affirmed the commission's findings of faulty and inefficient technical operation and equipment.[55] In the other two cases, the court affirmed the commission's factual determinations in deleting two stations whose program standards were inimical to the public interest. In both cases the commission considered the character and quality of the program service; the court held that administrative scrutiny of programs was not censorship and that it did not violate the First Amendment to the Constitution.[56] Courts have always exercised a broader judicial supervision where ethical or moral questions are involved. For example, in reviewing the determinations of the Federal Trade Commission, the courts extended the scope of judicial review because of the moral or ethical implications attached to "unfair competition."[57] The ethical problems are as great or perhaps greater when the commission deletes a station because the latter's programs violate the accepted standards of good taste. Nevertheless the court has applied a uniform standard of finality to ethical as compared to technical determinations.

The foregoing cases wherein stations have been deleted because of improprieties in technical operation or program standards must be

sions reached by the examiner and the Commission. In other words, there was substantial evidence to support those findings and, hence, they are conclusive." See also Eastland Co. v. Federal Communications Comm., 67 App. D. C. 316, 92 F. (2d) 467 (1937).

[55] Riker v. Federal Radio Comm., 60 App. D. C. 373, 55 F. (2d) 535 (1931); Brahy v. Federal Radio Comm., 61 App. D. C. 204, 59 F (2d) 879 (1932); Beebe v. Federal Radio Comm., 61 App. D. C. 273, 61 F. (2d) 914 (1932). In Boston Broadcasting Co. v. Federal Radio Comm., 62 App. D. C. 299, 67 F. (2d) 505 (1933), the primary ground for the commission's refusal to renew the license was the insolvency of the applicant. A secondary finding by the commission was appellant's failure to operate the technical equipment in conformity with the terms of the license.

[56] KFKB Broadcasting Assn. Inc. v. Federal Radio Comm., 60 App. D. C. 79, 47 F. (2d) 670 (1931); Trinity Methodist Church, South v. Federal Radio Comm., 61 App. D. C. 311, 62 F. (2d) 850 (1932), cert. denied 288 U. S. 599, 53 S. Ct. 317 (1933). Cf. Kadin, "Administrative Censorship: A Study of the Mails, Motion Pictures, and Radio Broadcasting," 19 BOST. UNIV. L. REV. 533 at 561 (1939).

[57] Federal Trade Comm. v. Gratz, 253 U. S. 421 at 427, 40 S. Ct. 572 (1920); MCFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION 17, 181 (1933). See Hankin, "Conclusiveness of the Federal Trade Commission's Findings as to Facts," 23 MICH. L. REV. 233 (1925). Cf. Federal Trade Comm. v. Keppel & Bro., 291 U. S. 304, 54 S. Ct. 423 (1934).

distinguished from those decisions wherein an applicant requests the facilities of an existing licensee. In the former instance the action of the commission in charging an existing licensee with violations of the statute and the regulations is a controversy between the commission and the licensee. In the second case it is an adversary proceeding between the applicant requesting the facilities of an existing licensee and that existing licensee, with the commission as judge in the interest of the public. The applicant who requests the facilities of an existing licensee must make a comparative showing and has the burden of proof to show that he is better qualified and will render a superior public service. The foregoing distinction has not been fully developed by the court; it is reflected to some extent in the commission's administrative process.[58] However, several judicial opinions recognize the equities of existing licensees, particularly the large financial outlays which have been invested. "The cause of independent broadcasting in general would be seriously endangered and public interests correspondingly prejudiced, if the licenses of established stations should arbitrarily be withdrawn from them, and appropriated to the use of other stations."[59]

One of the most fascinating chapters in the administration of radio broadcasting has been the commission's attitude toward economic factors in the allocation and distribution of broadcasting facilities. The question whether or not the commission must consider the competitive aspects of broadcasting and whether economic injury is a sufficient basis for an appeal merits individual treatment in another article. We shall set forth the high lights of this question only as it relates to the activities of the court.

In the *WGN* case,[60] appellant, licensee of radio broadcasting station WGN, located in Chicago, Illinois, contended that the grant of addi-

[58] Re Wilburn, 1 F. C. C. 146 (1934); Re Walker & Downing Radio Corp., 1 F. C. C. 183 (1934); Re Parmer, 2 F. C. C. 172 (1935); Re Walker, 2 F. C. C. 489 (1936); Re Berks Broadcasting Co., 3 F. C. C. 54 (1936); Re Kindig, 3 F. C. C. 313 (1936); Re Wimpy, 4 F. C. C. 178 (1937).

[59] Chicago Federation of Labor v. Federal Radio Comm., 59 App. D. C. 333 at 334, 41 F. (2d) 422 (1930). Accord: Woodmen of the World Life Ins. Assn. v. Federal Radio Comm., 61 App. D. C. 54, 57 F. (2d) 420 (1932); Journal Co. v. Federal Radio Comm., 60 App. D. C. 92, 48 F. (2d) 461 (1931); Don Lee Broadcasting System v. Federal Communications Comm., 64 App. D. C. 228, 76 F. (2d) 998 (1935). Cf. Federal Radio Comm. v. Nelson Brothers Bond & Mortgage Co., 289 U. S. 266, 53 S. Ct. 627 (1933). But compare Radio Investment Co. v. Federal Radio Comm., 61 App. D. C. 296, 62 F. (2d) 381 (1932), and Unity School of Christianity v. Federal Radio Comm., 63 App. D. C. 84, 69 F. (2d) 570 (1934).

[60] WGN, Inc. v. Federal Radio Comm., 62 App. D. C. 385, 68 F. (2d) 432 (1933).

tional facilities to the same community would increase competition among broadcast stations in Chicago and thereby inflict a pecuniary loss on WGN. The court ruled that the "complaint . . . is so vague, problematical, and conjectural, as not to furnish a present substantial objection to the Commission's decision."[61]

This statement caused a great deal of confusion in the administration of the Radio Act of 1927 and the Communications Act of 1934; the commission was of the opinion that it need not consider economic factors in the allocation of broadcast facilities.[62] In 1935, after the Federal Communications Commission had been created, Station WREN, located in the metropolitan area of Kansas City, Missouri, petitioned the commission to intervene in the application of WHB Broadcasting Company, which had requested evening hours of operation.[63] WREN claimed that the operation of WHB at night would result in active competition with the former as to distribution of audience listeners, advertising revenue, and available talent material. The commission denied WREN's petition for intervention.[64] Appellant thereupon sought to enjoin the hearing on WHB's application until it was afforded an opportunity to participate therein. The district court denied the preliminary injunction and the commission's motion to dismiss. The commission appealed, alleging, first, that an economic interest was not such an interest as entitled an existing licensee to intervene, and second, that WREN had a plain, speedy, and adequate rem-

[61] Ibid., 62 App. D. C. at 386.

[62] Magnolia Petroleum Co. v. Federal Communications Comm., 64 App. D. C. 189, 76 F. (2d) 439 (1935); Head-of-the-Lakes Broadcasting Co. v. Federal Communications Comm., 66 App. D. C. 19, 84 F. (2d) 396 (1936). Commissioner Thad H. Brown in an address entitled "The Federal Communications Law," delivered at the School of Law, Western Reserve University, Cleveland, Ohio, on May 11, 1937 (Press Release 21207, p. 31) expressed the opinion that the commission does not consider the competitive aspects of radio broadcasting.

[63] Sykes v. Jenny Wren Co., 64 App. D. C. 379, 78 F. (2d) 729 (1935), cert. denied 296 U. S. 624, 56 S. Ct. 147 (1935).

[64] Paragraph 59 of the Federal Radio Commission's and Federal Communication Commission's Rules and Regulations, which were in effect until December 18, 1935, provided: "Any governmental department or officer, any person, firm, company or corporation, or any State or political subdivision thereof may, at any time, more than ten days prior to the date of any hearing, file with the Commission a petition to intervene therein in support of or in opposition to any application designated for hearing. If the petition discloses a substantial interest in the subject matter of the hearing the Commission will grant the same and permit the petitioner to be heard at such hearing subject to regulations hereinafter imposed." Compare paragraph 1.102 on intervention of the present Rules of Practice and Procedure, effective August 1, 1939, 4 FED. REG. 3344 (1939).

edy at law under the appeals provision of the act. The court ruled that the statutory remedy was exclusive and dismissed the bill. In a subsequent proceeding[65] it was held that despite the provision in the act which recites that: "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies,"[66] a bill in equity was not available to test the legality of the commission's action and that the proper remedy was by way of section 402.

Two judges dissented in the *"Jenny Wren"* case and contended that financial loss inflicted on an existing licensee to the extent that it would destroy the ability of the station to operate in the public interest was sufficient ground for invoking equitable jurisdiction.[67] In the *Great Western Broadcasting Company* case,[68] the minority view of the *"Jenny Wren"* case was adopted obiter dictum.

A group of cases which express the judicial philosophy toward the construction to be given the appellate provision merits discussion. In the first stage of its supervisory jurisdiction, the court of appeals adopted a strict construction of the appeals provision. Only those applicants or licensees who came within the express provisions of section 16, as originally enacted and as amended, could invoke appellate jurisdiction.[69] Thus it was held that an applicant which had failed to pursue the commission's formalized procedure, although it had participated in the administrative proceedings, lacked an appealable interest to contest

[65] Monocacy Broadcasting Co. v. Prall, 67 App. D. C. 176, 90 F. (2d) 421 (1937).

[66] 48 Stat. L. 1099 (1934), 47 U. S. C. (1934), § 414.

[67] Justice Groner, with Justice Hitz concurring, Sykes v. Jenny Wren Co., 64 App. D. C. 379 at 382, 78 F. (2d) 729 (1935).

[68] Great Western Broadcasting Assn. Inc. v. Federal Communications Comm., 68 App. D. C. 119 at 123, 94 F. (2d) 244 (1937): "we think it [consideration of economic factors] is a necessary part of the problem submitted to the commission in the application for broadcasting facilities. In any case where it is shown that the effect of granting a new license will be to defeat the ability of the holder of the old license to carry on in the public interest, the application should be denied unless there are overweening reasons of a public nature for granting it."

[69] The philosophy of strict statutory interpretation was first applied in Universal Service Wireless, Inc. v. Federal Radio Comm., 59 App. D. C. 319 at 321, 41 F. (2d) 113 (1930), wherein it was stated: "The right of appeal being a statutory one, the court cannot dispense with its express provisions, even to the extent of doing equity." Appellants in this case were public service point-to-point stations engaged in the transmission of press communications as distinguished from regular broadcast licensees. The foregoing quotation was cited with approval in broadcast cases. See infra, notes 70 and 71.

the validity of the commission's action.[70] Similarly in the *Pote* case[71] an order of the commission refusing a transfer or assignment of broadcasting facilities was declared not appealable.[72] Justice Groner concurred in the result of the majority, but was of the opinion that an application to transfer a previously existent license is an application within the purview of section 16 and was therefore appealable. It is believed that the court will reverse the *Pote* case and hold that an application to transfer a station license is a modification of license,[73]

[70] Telegraph Herald Co. v. Federal Radio Comm., 62 App. D. C. 240 at 242, 66 F. (2d) 220 (1933). Appellant addressed a letter to the commission indicating a desire to apply for a local broadcast station. This letter "did not amount to a legal application, nor was appellant an applicant for the removal or modification of an existing station license. . . . And in contemplation of law appellant was not a corporation aggrieved or whose interests were adversely affected by the decision of the Commission. . . ." The commission had authorized another station to move to the community where appellant was located.

[71] Pote v. Federal Radio Commission, 62 App. D. C. 303, 67 F. (2d) 509 (1933), cert. denied 290 U. S. 680, 54 S. Ct. 103 (1933).

[72] Section 12 of the Radio Act of 1927, 44 Stat. L. 1162 at 1167, provided that "The station license required hereby, the frequencies or wave lengths authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner, either voluntarily or involuntarily, disposed of to any person, firm, company, or corporation without the consent in writing of the licensing authority." Section 310 (b) of the Communications Act of 1934, 48 Stat. L. 1086, 47 U. S. C. (1934), § 310 (b), is an almost verbatim reproduction of section 12 of the Radio Act of 1927.

[73] When a person requests a construction permit, he makes application for a new broadcast station or an improvement in an existing facility. In both instances, he must show that he possesses the legal and technical qualifications, that there is available economic support, and most important, that there is a *need* for the facilities requested. In a transfer case, the transferee must likewise show that he is legally and technically qualified, but there is no requirement that he show that there is a need for broadcasting facilities. The latter has been established by the commission's original grant to the transferor. Since a transfer of license involves the substitution of one licensee for another, it might properly be regarded as a modification of the license, rather than a construction permit.

On November 29, 1939, the court of appeals handed down its decision in Associated Broadcasters Inc. v. Federal Communications Comm., (App. D. C. 1939) 108 F. (2d) 737, wherein Associated Broadcasters Inc. appealed from the action of the commission, which had refused to consent to the assignment of license from appellant to the Columbia Broadcasting System. The commission moved to dismiss the appeal. The court held that it had jurisdiction to entertain the appeal under section 402(b)(1) of the Communications Act of 1934. Justice Stephens dissented, relying on the Pote case. The majority held that, since the transferee, Columbia, could have filed for the facilities of Associated Broadcasters, and the denial of that application would have brought the applicant within the purview of section 402(b)(1) (see cases cited supra, note 58), Columbia should not be deprived of the right of judicial review in an assignment or transfer case. An assignment of license is for all practical purposes the same as an outright request for the facilities of an existing license. The court also relied on the change

and hence appealable under section 402(b)(1) of the Communications Act of 1934. But the philosophy of the court as expressed in the *Pote* case must be compared with the *Durham*[74] decision. Section 16(a)(1)

in the language of section 310(b) which provides in part that "The station license . . . shall not be transferred, assigned . . . *unless the Commission shall, after securing full information, decide that said transfer is in the public interest,* and shall give its consent in writing." The italicized part of the above quotation is the new language which was added to section 310(b). This section of the Communications Act, "as now phrased, contemplates an application, a hearing, if necessary and a decision upon the basis of public interest, just as much in the case of an application for the transfer of an outstanding license as in the case of an application for a proposed new station license."

It is believed that the legislative history of several provisions of the Radio Act of 1927 throws some light on whether or not Congress intended that transfers or assignments should be appealable. S. 1 and S. 1754, 69th Cong., 1st session (1926), was one of the forerunners of the Radio Act of 1927. Section 10 of S. 1754 contains language which is similar, for all practical purposes, to section 16 of the Radio Act of 1927. Section 10 contained the following paragraph, which was not incorporated in the Radio Act of 1927: "All other decisions of the Secretary of Commerce, or of the radio commission hereinafter established, shall be subject to the right of appeal by the party aggrieved to the district court of the United States for the district in which the appellant resides upon the same terms of procedure as hereinbefore provided for an appeal to the Court of Appeals for the District of Columbia."

Extended hearings were held before the Committee on Interstate Commerce. S. HEARINGS ON S. 1 AND S. 1754, 69th Cong., 1st sess. (1926). The following conversation is reported in ibid., part. 2, pp. 114-116 (Feb. 26, 1926). Mr. Stephen B. Davis, Jr., solicitor of the department of commerce, in commenting on that portion of section 10 quoted above suggested that it be stricken.

"Senator Dill [who sponsored the Radio Act of 1927 in the Senate]: There are matters, of course, that come up, my idea is, other than the granting of a license or the revocation of a license, and it might be that such action should be in the court where the station exists. That was my idea. I did not intend to cover by this mere discretionary matters that you have mentioned, but matters of a different sort. I did not intend to cover matters which were merely local in which there was a ruling by the Secretary of Commerce, and it seemed to me there should be action in the district court where the matter occurred, rather than bringing them to Washington. . . .

"Senator Wheeler: What I was getting at was what was meant by the 'decisions.' That decisions could be meant other than the right to grant license or take it away?

"Senator Dill: For instance, the matter of transferring a license is one that might come up, in which the Secretary might rule that they had no right to transfer a license.

"Senator Wheeler: That would not come up. There is no question a man can transfer anything he has. The question is whether the man to whom the transfers go can get a permit.

"Senator Dill: Under the terms of this bill his right to transfer is controlled; it must be subject to the approval of the Secretary of Commerce. That is one of the things I had in mind."

The conclusion is warranted that Congress intended that persons should have the right of appeal in transfer cases in the Radio Act of 1927. Whether Congress in clear terms provided for this right of appeal in the Radio Act of 1927 is another story.

[74] Durham Life Ins. Co. v. Federal Radio Comm., 60 App. D. C. 375, 55 F. (2d) 537 (1931). See also Pacific Development Radio Co. v. Federal Radio Comm., 60 App. D. C. 378, 55 F. (2d) 540 (1931).

of the 1930 amendment contained no phraseology which would permit a person who had been refused a construction permit to appeal. The court ruled that an application for increased power by an existing station, "when properly considered is not for a construction permit, but for a modification of license." The court by authorizing applicants for construction permits to invoke appellate jurisdiction applied a broad construction to the appeals provision. The latter represents the only instance wherein the court veered from its policy of strict construction.

A summary of the court's activities during this six-year period discloses that the court exercised a minimum of judicial supervision over the activities of the commission, and correspondingly the commission had a wide latitude in its administrative interpretation of the act. This limited judicial scrutiny may be attributed to several factors.

The demand for federal control of radio broadcasting came from the industry. Broadcasters recognized that some federal agency must police the airways in order to prevent intolerable interference and chaos such as occurred in the breakdown of 1926. Undoubtedly, this demand by the industry for some federal regulatory agency prompted the court to give a wide leeway to the Radio Commission in its administration of communications.

Secondly, the Radio Commission was "notable for the direct connection and wide experience that many of its commissioners had had in the industry they were called upon to regulate."[75] The personnel of the first commission of five included two members who had had direct experience in broadcasting,[76] two members who had been active in the communications branches of the Army and Navy,[77] and one member who was a former justice of a state supreme court.[78] Their successors included men who were connected with the industry, attorneys, a lawyer-engineer, and a business-executive.[79] As Herring states, the first nine appointees to the commission showed,

[75] HERRING, FEDERAL COMMISSIONERS 121 (1936).

[76] Ibid., 120-123, 130-131. H. A. Bellows, before his appointment to the Radio Commission, was manager of the Gold Medal Radio Corporation. O. H. Caldwell was an electrical engineer, and an associate editor of Electrical World, an important electrical engineering journal.

[77] Ibid., 121. Lieutenant Colonel Dillon was one of the first federal radio inspectors in the bureau of investigation; Rear Admiral Bullard, the first chairman, organized the department of electrical engineering at the United States Naval Academy and was superintendent of the United States Naval Radio Service.

[78] Ibid., 122. E. O. Sykes was justice on the Mississippi Supreme Court from 1916 to 1925.

[79] Ibid., 120-122. W. D. L. Starbuck was an engineer and patent attorney, confirmed by the Senate on May 2, 1929. FEDERAL RADIO COMMISSION, THIRD ANNUAL

"a direct knowledge of one or more aspects of radio. The technical qualifications of these commissioners were good. They brought to their official duties experience in either the engineering, broadcasting or manufacturing phases of radio communications." [80]

The public confidence in the commission undoubtedly was reflected in the court's attitude to the agency.

Lastly, radio broadcasting is a highly technical subject matter calling for specialized knowledge and training in scientific engineering principles. The court was reluctant to disturb the allocation plan of the commission, or become embroiled in engineering issues of interference. The judicial tribunal lacked the technical skill and competence which is so necessary for the proper administration of radio communication. The court thus confined its judicial activities to the procedural requisites of notice and hearing.

CHANGED ATTITUDE AFTER 1937

Since the fall of 1937 the court of appeals has manifested a new interest in radio broadcasting [80a] and has exercised a broader judicial supervision over the activities of the commission. This "new judicial attitude" must ultimately be attributed to a lack of both public and judicial confidence in the administrative process of the Federal Communications Commission. Several factors have contributed to this "changed judicial attitude."

First, several of the recent decisions, such as the *Heitmeyer* [81] and *Saginaw* [82] cases show a lack of thoroughness which is "apparent upon

REPORT I (1929). Sam Pickard organized the first "college of the air" at Kansas Agricultural College, was chief of the radio division in the department of agriculture and was the first secretary of the commission. I. E. Robinson, the second chairman of the commission, was formerly chief justice of the Supreme Court of Appeals of West Virginia. H. A. Lafount, at the time of his appointment to the commission, was "an important figure in the religious, civic, and business life of Utah . . . and at the time of his appointment was active head of the Great Western Radio Corporation." HERRING, FEDERAL COMMISSIONERS 122 (1936).

[80] HERRING, FEDERAL COMMISSIONERS 121 (1936).

[80a] Justice Miller, "A Judge Looks at Judicial Review of Administrative Determinations," 26 A. B. A. J. 5, 64 at 65 (1940), states that the Federal Communications Commission is "one of the most frequent litigants in the United States Court of Appeals."

[81] Heitmeyer v. Federal Communications Comm., 68 App. D. C. 180, 95 F. (2d) 91 (1937).

[82] Saginaw Broadcasting Co. v. Federal Communications Comm., 68 App. D. C. 282 at 291-292, 96 F. (2d) 554 (1938), cert. denied 305 U. S. 613, 59 S. Ct. 72 (1938): "Even though the inaccuracies alluded to may have been caused solely by inadvertence rather than by arbitrary or capricious action, they nevertheless show that the Commission's decision was not based upon that careful consideration of the evidence

the record as it reaches the court, so as to lead the court to the conclusion that the evidence has [not] received the attention that it deserved and that it would have received in the hands of one trained in legal techniques."[83] It will be subsequently shown that the commission has propounded a philosophy which seeks to immunize the agency from judicial review[84] and to free the commission from judicial supervision.[85] Undoubtedly this has prompted the court to view the commission's activities with suspicion.

Secondly, the administrative has been subject to a barrage of adverse criticism by the executive,[86] and legislative[87] branches of government. This adverse criticism is reflected in the newspapers,[88] trade

which is properly to be expected from an unbiased body of experts discharging a function so important from the standpoint of both the parties and the public." See, Courier Post Publishing Co. v. Federal Communications Comm., (App. D. C. 1939) 104 F. (2d) 213; Sanders Brothers Radio Station v. Federal Communications Comm., 70 App. D. C. 265, 106 F. (2d) 321 (1939), cert. granted (U. S. 1939) 60 S. Ct. 294.

[83] Landis, "Administrative Policies and the Courts," 47 YALE L. J. 519 at 531 (1938).

[84] Yankee Network, Inc. v. Federal Communications Comm., (App. D. C. 1939) 107 F. (2d) 212.

[85] Pottsville Broadcasting Co. v. Federal Communications Comm., 105 F. (2d) 36 (1939), reversed (U. S. 1940) 60 S. Ct. 437; McNinch v. Heitmeyer, 105 F. (2d) 41 (1939), reversed sub nom. Fly v. Heitmeyer, (U. S. 1940) 60 S. Ct. 443; per curiam opinion in Courier Post Publishing Co. v. Federal Communications Comm., dated June 30, 1939, and order dated August 2, 1939.

[86] Letter of President Roosevelt to Senator Wheeler and Representative Lea on January 24, 1939: "I am thoroughly dissatisfied with the present legal framework and administrative machinery of the [Communications] Commission." Quoted in 16 Broadcasting, No. 3, p. 11 (February 1, 1939).

[87] Senator White, "Regulation of Radio Communication," 81 CONG. REC. 2332 ff. (1937); S. Res. 94 introduced by Senator White to investigate the commission on March 6, 1939. 84 CONG. REC., No. 45, p. 3213. See S. 1268, introduced by Senator Wheeler to reorganize the Federal Communications Commission. 84 CONG. REC., No. 28, p. 1805 (1939). Remarks of Representative Connery for a Congressional Investigation of Radio Monopoly, 83 CONG. REC. 5284, 9315-9316 (1938). There is complete discussion of the various congressional proposals for investigation and reorganization in VARIETY RADIO DIRECTORY 908 ff. (1939-1940).

[88] Editorial in the WASHINGTON HERALD, October 13, 1939; WASHINGTON DAILY NEWS, October 17, 1939; General Hugh S. Johnson in WASHINGTON DAILY NEWS, October 17, 1939; 32 TIME, No. 17, p. 44 (Oct. 24, 1938); article by Pearson and Allen in WASHINGTON HERALD, November 3, 1938; article by Jerry Kluttz in WASHINGTON DAILY NEWS, November 28, 1938; article by Pearson and Allen in WASHINGTON HERALD, December 24, 1938; article by Thomas L. Stokes, WASHINGTON DAILY NEWS, January 26, 1939; article by Doris Fleeson in WASHINGTON HERALD, March 2, 1939; article by Richard Wilson in DES MOINES REGISTER AND TRIBUNE, March 30, 1939; column by Hugh S. Johnson in WASHINGTON DAILY NEWS, June 10, 1939.

journals,[89] and current literature.[90] The latter has contributed to a lack of public confidence in the commission.

Thirdly, and in all probability the most important, there has been an almost complete change in the personnel of the court since 1937.[91] The new appointees to the bench have been disposed to make a vigorous inquiry into the activities and administrative policies of the commission. The foregoing factors have "instinctively" prompted the new court to scrutinize the administrative process with greater care.

This "changed judicial attitude" has caused an almost complete overhauling and clarification of the appeals proviso. This was presaged by the *Missouri Broadcasting Corporation* case,[92] which clarified a long-controverted provision of the statute.[93] Section 402(c), which sets forth the mechanics for taking an appeal, provides in substance that within thirty days after the filing of an appeal,

> "the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application involved, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a

[89] RADIO DAILY, November 12, 1937, June 3, 1938, June 13, 1938, June 24, 1938, July 10, 1938, March 27, 1939; VARIETY, November 30, 1937, March 22, 1938, June 8, 1938, June 15, 1938, June 14, 1939; Werne, "Radio Censorship and Federal Regulation," 72 EDITOR AND PUBLISHER, No. 27, § 1, p. 16 (July 8, 1939); 16 BROADCASTING, No. 5, p. 1 (March 1, 1939); 16 ibid., No. 11, p. 13 (June 1, 1939); 16 ibid., No. 6, p. 13 (March 15, 1939); 16 ibid., No. 12, p. 12 (June 15, (1939).

[90] Article by Frost in KEN MAGAZINE, December 15, 1938; Patten, "Radio Gets the Jitters," 127 AMERICAN MAGAZINE, No. 3, p. 42 (March, 1939); "Federal Communications Commission" 17 FORTUNE, No. 5, p. 60 (May, 1938); SUMMERS, RADIO CENSORSHIP (1939). See ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, Monograph No. 3, FEDERAL COMMUNICATIONS COMMISSION, vol. 2, c. 7, "Congressional Lobbying" (1940) (Dept. of Justice, mimeographed).

[91] From 1930 to 1935, Chief Justice Martin and Associate Justices Robb, Van Orsdel, Hitz and Groner were members of the Circuit Court of Appeals for the District of Columbia. On July 24, 1939, Justice Stephens succeeded Justice Hitz, Justice Groner was appointed Chief Justice on December 7, 1937, and Associate Justices Miller, Edgerton, and Vinson were appointed in 1937 and 1938. 65 App. D. C. iii (1936) and 68 App. D. C. iii (1938). Justice Rutledge was appointed on May 2, 1939. See concurring opinion of Justice Frankfurter in Graves v. People of State of New York ex rel. O'Keefe, 306 U. S. 466 at 487, 59 S. Ct. 595 (1939).

[92] Missouri Broadcasting Corp. v. Federal Communications Comm., 68 App. D. C. 154, 94 F. (2d) 623 (1937), cert. denied 303 U. S. 655, 58 S. Ct. 759 (1938).

[93] Ibid., at 156: "The question here presented is not new." It was first raised in Ansley v. Federal Radio Comm., 60 App. D. C. 19, 46 F. (2d) 600 (1930), and in particular appellant's brief at page 39.

> list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal." [94]

The administrative interpretation of this provision had resulted in the practice of issuing an order either granting or denying an application, and at a subsequent date—two to four weeks later—publishing a statement of facts and grounds for decision. The Missouri Broadcasting Corporation contended that the commission was without statutory or constitutional authority to enter post factum findings. The commission answered this contention by stating that the rendition of findings subsequent to the order complained of was valid, and that it could file its written decision after an appeal had been noted in court.[95] Justice Groner stated that if the commission's construction of this section prevailed, an appellant would be in the anomalous and undesirable position of attempting to assign errors of appeal without knowing the grounds or reasons of the commission's order.

> "an even greater injustice might result (and we have the commission's assurance that such procedure would be proper) if the commission seized the opportunity to write its statement of facts and grounds for decision as an answer to appellant's reason for appeal. We think reflection upon the bare statement of this possibility is convincing that no such procedure can be allowed." [96]

The court ruled that the language of the statute which required "a full statement in writing of the facts and grounds for decision as found and given by it," meant that the commission should issue a brief factual statement and the reasons for its action contemporaneous with its order. In the event that an appeal should be filed, the commission may make more complete and detailed findings of fact. In the *Heitmeyer*[97] case the court went one step further and held that the findings of fact which the commission is required to file within sixty days after an appeal

[94] 48 Stat. L. 1093, 47 U. S. C. (1934), § 402(c).

[95] The commission, in its brief in the Missouri Broadcasting Corporation case, pp. 8-9, advanced the argument that "the only finding" the Commission is required to make under the Communications Act of 1934 is that of "public interest, convenience and necessity. . . ." The evidence upon which the finding is made need not be incorporated in the order. The court disposed of this contention in a single sentence by referring to the provisions of the statute which require a full statement in writing of the facts and grounds for its decision.

[96] Missouri Broadcasting Corp. v. Federal Communications Comm., 8 App. D. C. 154 at 157, 94 F. (2d) 623 (1937).

[97] Heitmeyer v. Federal Communications Comm., 68 App. D. C. 180 at 182, 95 F. (2d) 91 (1937).

is taken must be complete and adequate and "of the same general form and character as findings of fact well known to trial courts."

The *Heitmeyer* case merits extended discussion since it illustrates the necessity and value of judicial review. This decision, written by Justice Miller, carefully analyzes the administrative decision, sentence by sentence, to determine whether or not there was substantial evidence to support the findings of fact. The commission had declared that the applicant was not financially qualified to own and operate a broadcasting station. This conclusion was based on an agreement whereby one Glasman, the publisher of a newspaper, placed a deposit of $20,000 to the credit of Heitmeyer. Under the terms of this agreement Heitmeyer was to form a corporation and apply to the commission to assign the license of the station to the corporation. The applicant was to pay six per cent interest on the principal and repay the loan within five years. In the event the loan was not paid within this period of time, Heitmeyer would assign forty-nine per cent of the stock of the proposed licensee corporation to Glasman. The commission concluded that since the loan was not covered by sufficient collateral or other security to insure against the lien, foreclosure, and seizure of the physical equipment of the station, in case the loan was not repaid within five years, Heitmeyer was not financially qualified. A subsidiary ground for denying the application was the fact that the loan was conditioned on an application for assignment of license which was not before the commission. This would require the commission to prejudge an application which was not properly before it at that time.

The court as a matter of law declared that the commission's policy of refusing to grant a construction permit to an individual because the applicant contemplates the formation of a corporation to which the license will be assigned

> "verge[s] closely upon arbitrary and capricious action. It would seem to be a rather idle and expensive gesture to require the formation of a corporation for such a purpose before the securing of a construction permit, when a refusal to grant the permit would automatically abort the whole occasion and purpose of the corporation. It would seem on its face to be a rather severe restriction upon business enterprise and an unnecessary limitation upon the availability of radio service in a particular community." [98]

Justice Miller, in analyzing that part of the commission's reasoning which disapproved of the plan of financing the station with borrowed

[98] Ibid., at 186-187.

money, suggested that "the public is entitled to have the statute implemented by a regulation setting out clearly and concisely just what the Commission regards as a minimum standard of financial ability." The commission's conclusion that the borrowed money was unsupported by collateral and that the station equipment might be subject to lien, foreclosure, or sale at the termination of the five year period was regarded as an arbitrary and capricious standard of financial responsibility and "would seem to constitute much more than the average of business security. If the standard of financial responsibility required by the Commission in this case were imposed upon the country generally, business would cease." The commission was forewarned that it must exercise its discretion in conformity with the standard of public interest, that it must carefully observe the procedure established by Congress, and that "convenience of administration cannot be permitted to justify noncompliance with the law, or the substitution of fiat for adjudication."[99]

The *Heitmeyer* case illustrates the value of judicial review, and in particular the competency of the court to evaluate the policies and principles of the commission in relationship to accepted standards of business conduct. There can be no doubt that the commission's policy of penalizing applicants because they proposed at a later date to form a corporation represented a too literal, and thus a distorted, interpretation of the Communications Act. Similarly the measure of financial responsibility imposed on new applicants was narrow and constrained and ignored the ordinary standards of business safety. It would appear that the administrative interpretation of financial responsibility was severely canalized by the technical and specialized aspects of radio broadcasting, whereas the judicial process viewed this standard in relationship to the entire field of business enterprise.[100]

The *Saginaw*[101] and *Tri-State*[102] cases amplified the principle enunciated in the *Heitmeyer* case and ruled that findings of fact to support an order must include basic or underlying facts from which the ultimate

[99] Ibid., at 187, 189.

[100] Dickinson, "Judicial Control of Official Discretion," 22 AM. POL. SCI. REV. 275 at 279 (1928): "A technical agency dealing constantly with a highly specialized class of problems is always in danger of losing its sense of proportion at the points where its narrow field impinges on wider problems." Cf. MCFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION 17 (1933).

[101] Saginaw Broadcasting Co. v. Federal Communications Comm., 68 App. D. C. 282, 96 F. (2d) 554 (1938).

[102] Tri-State Broadcasting Co. v. Federal Communications Comm., 68 App. D. C. 292, 96 F. (2d) 564 (1938).

facts or conclusions in the terms of the statutory criterion are inferred. Justice Stephens spelled out a fact-finding standard "which a commission properly follows in reaching a decision."[103] The latter was undoubtedly prompted by several inaccuracies in the commission's decision. The *Tri-State* case elaborated on the *Saginaw* decision by requiring that there be a "rational or coherent relationship between the basic and the ultimate facts, that the latter shall flow logically from the former."[104] Thus the court applies a general test of reasonableness to the administrative activities of the commission and demands a reasonable exercise of administrative discretion having a logical relationshp to the facts.[105] Finally in the *Sanders Brothers* case,[106] the failure of the commission to make adequate findings of fact on the issue of economic injury resulted in a reversal of the commission's decision and the judicial ruling that the statement of facts and grounds for decision must contain basic and ultimate facts on all clearly defined issues. There was sufficient evidence in the record to prepare appropriate findings of fact on this issue since they had been incorporated into the commission's brief. But the court ruled that, "it is not sufficient that they be marshalled and presented in the brief on appeal. They must be prepared as findings of fact, upon which the decision of the Commission may be rested."[107]

[103] Saginaw case, 68 App. D. C. at 287: "In discussing the necessary content of findings of fact, it will be helpful to spell out the process which a commission properly follows in reaching a decision. The process necessarily includes four parts: (1) evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred or not, as the case may be; (4) from this finding the decision will follow by the application of the statutory criterion."

[104] Tri-State case, 68 App. D. C. at 295.

[105] DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 143-144 (1927); Levitt, "The Judicial Review of Executive Acts," 23 MICH. L. REV. 588 at 600 (1925). In Courier Post Publishing Co. v. Federal Communications Commission, (App. D. C. 1939) 104 F. (2d) 213 at 217 it was said: "The Supreme Court has declared substantial evidence to be 'more than a mere scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' " Quoting National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292 at 300, 59 S. Ct. 501 (1939), which in turn quoted Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 at 229, 59 S. Ct. 206 (1938).

[106] Sanders Brothers Radio Station v. Federal Communications Comm., 70 App. D. C. 265, 106 F. (2d) 321 (1939), cert. granted (U. S. 1939) 60 S. Ct. 294.

[107] Ibid., 106 F. (2d) at 326.

An unreported decision, the so-called *Brooklyn* cases,[108] decided in the fall of 1938, was reversed on the commission's admission of error that there were no findings of basic facts to support the order. The *Brooklyn* cases are significant because of the size and expense of the printed record.[109] This decision contributed to the new rules enacted by the court on September 1, 1939, which were specifically designed to shorten the record and cut down appellate costs.[110]

Four decisions have been rendered since the fall of 1937 which confirm an established principle of administrative law—that applicants must exhaust all prescribed applicable administrative remedies before invoking appellate jurisdiction. Section 405[111] of the Communications Act provides that any party aggrieved or whose interests are adversely affected by any decision, order, or requirement of the commission may petition for rehearing within twenty days after the effective date thereof. The first case established two propositions: that the foregoing administrative remedy "is not to supplant, but to supplement, that of appellate review," and that the filing of a petition for rehearing suspends the running of time within which an appeal may be taken, hence a litigant has twenty days from final action on a petition for rehearing within which to note an appeal.[112] This opinion contained dictum to the effect that "it is doubtful, moreover, whether this court would have jurisdiction to entertain an appeal while such petition was pending before the Commission." This dictum became a controlling principle in two subsequent cases, wherein petitions for rehearing were recognized as statutory rights which the commission was without power to refuse to entertain.[113]

The *Red River* case[114] went one step further by requiring an ap-

[108] Voice of Brooklyn, Inc. v. Federal Communications Comm., No. 7044 (1938); United States Broadcasting Corporation v. Federal Communications Comm., No. 7045.

[109] The record in this case totaled 1572 pages and cost $3,768.96. In 2 FED. COM. B. J., No. 7, pp. 2-4 (1938), there is tabulated the costs of taking appeals from decisions of the Federal Radio Commission and the Federal Communications Commission to the United States Court of Appeals for the District of Columbia.

[110] Rule No. 32 of the United States Court of Appeals for the District of Columbia, 11 DIGEST OF THE UNITED STATES SUPREME COURT REPORTS, SUPP. No. 1, COURT RULES 8 (1940).

[111] 48 Stat. L. 1095, 47 U. S. C. (1934), § 405.

[112] Saginaw Broadcasting Co. v. Federal Communications Comm., 68 App. D. C. 282 at 286, 96 F. (2d) 554 (1938).

[113] Southland Industries Inc. v. Federal Communications Comm., 69 App. D. C. 82, 99 F. (2d) 117 (1938); Woodmen of the World Life Ins. Assn. v. Federal Communications Comm., 69 App. D. C. 87, 99 F. (2d) 122 (1938).

[114] Red River Broadcasting Co., Inc. v. Federal Communications Comm., 69 App. D. C. 1, 98 F. (2d) 282 (1938), cert. denied 305 U. S. 625, 59 S. Ct. 86 (1938).

pellant to exhaust all prescribed and applicable remedies before resorting to the court. Appellant was the licensee of an existing broadcasting station which had neither been made a party to, nor intervened in a hearing on, the application of one Baxter for a new radio broadcasting facility in the same community wherein appellant was located. The commission granted the Baxter application. Red River Broadcasting Company appealed pursuant to section 402(b)(2) of the act, claiming that the grant of the Baxter application had been made without notice to or hearing accorded appellant and that the application had been granted without consideration of its probable deleterious economic effect upon appellant. Baxter intervened in the appeal and moved to dismiss the same because appellant had failed to exhaust all administrative remedies before invoking the jurisdiction of the appellate tribunal. The Communications Act and the rules and regulations then in effect offered four methods to an existing licensee to participate in a hearing. Appellant could petition to intervene in the proceedings,[115] petition for a continuance[116] or extension of time, request an informal hearing,[117] or apply for rehearing under section 405 of the act. Red River, in its brief, contended that petitions to invoke the foregoing administrative remedies, particularly intervention, would be a futile gesture because it was the announced rule and policy of the commission to deny permission to existing licensees to participate in hearings when the latter alleged a possible deterioration of service through economic competition. The court held that appellant had actual notice of the Baxter application before the last of the four administrative remedies became unavailable. Red River could have applied for a petition for rehearing in lieu of taking an appeal, since the time allowed to invoke section 405 is identical with the time allowed to file an appeal. "It is inconceivable that appellant could have had sufficient notice to take an appeal and not have had sufficient notice to seek at least one administrative remedy." The principle of law was reaffirmed that appellant was not entitled to judicial relief because it had failed to exhaust section 405, the applicable administrative remedy. The court suggested that "its [appellant's] duty was to seek the first administrative remedy

[115] Paragraph 105.20 of the Commission's Rules and Regulations (1935): "Any party may, at any time, more than ten days prior to the date of any hearing, file with the Commission a petition to intervene. If the petition discloses a substantial interest in the subject matter of the hearing, the Commission may grant the same and permit the petitioner to be heard at such hearing." See also paragraphs 102.6, 102.1, and 102.7. The foregoing regulations have been superseded by the new Rules of Practice and Procedure effective August 1, 1939, 4 FED. REG. 3341-3355 (1939).

[116] Rule 106.5.

[117] Rule 106.2.

available to it before the Commission." Appellant's contention that its attempt to invoke administrative remedies would have been denied, was answered by the statement that this was an assumption and that appellant "cannot be heard to complain in this court that there was any danger of refusal when it made no effort to do so."[118]

The *Red River* decision has been criticized by several commentators.[119] As a general rule the courts have not demanded application for administrative rehearing as preliminary to judicial relief unless the statute specifically required such an application.[120] The *Red River* case represents a departure from the general rule, since the omission to apply for rehearing under a permissive statute constituted a failure to exhaust the administrative remedy. The opinion of the court suggests that whether or not an application for administrative rehearing must be made rests within the judicial discretion of the court.[121] Applications for rehearing should be availed of by aggrieved parties to correct erroneous findings of fact or to hear newly discovered evidence, but where a question of law is presented, viz., whether or not the commission must consider economic factors in its administration of the act, it would appear that the court with its competence in dealing with questions of law could have dispensed with the permissive administrative remedy.[122]

Several decisions have been rendered which describe the allegations necessary for a statement of reasons for appeal. The court has applied the same standard which governs a plaintiff who seeks to invoke the equitable jurisdiction of a district court by a bill in equity.[123] Thus

[118] Red River Broadcasting Co. v. Federal Communications Comm., 69 App. D. C. 1 at 5, 6-7, 98 F. (2d) 282 (1938).

[119] Berger, "Exhaustion of Administrative Remedies," 48 YALE L. J. 981 (1939); 27 GEORGETOWN L. J. 783 (1939).

[120] 51 HARV. L. REV. 1251 at 1262 (1938): "Usually the courts do not require application to the commission for a rehearing before suit may be maintained." Prendergast v. New York Telephone Co., 262 U. S. 43, 43 S. Ct. 466 (1923); United States v. Abilene & Southern Ry., 265 U. S. 274, 44 S. Ct. 565 (1924). The Federal Power Commission Act expressly requires a petition for rehearing before appellate jurisdiction can be invoked, 49 Stat. L. 860 (1935), 16 U. S. C. (Supp. 1938), § 825 l. The court in the Red River case relied on Goldsmith v. United States Board of Tax Appeals, 270 U. S. 117, 46 S. Ct. 215 (1926), to substantiate its position. It is submitted that the reasoning in the latter case is not particularly convincing. See also Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 58 S. Ct. 459 (1938).

[121] Southland Industries Inc. v. Federal Communications Comm., 69 App. D. C. 82, 99 F. (2d) 117 (1938).

[122] See citations in note 119, supra. But compare Justice Miller, "A Judge Looks at Judicial Review of Administrative Determinations," 26 A. B. A. J. 5 at 6-7 (1940).

[123] "When this court acts upon an appeal from the Commission the proceeding is similar in nature to an equitable proceeding to restrain the enforcement of an

general and vague assignments of error which fail to set forth in particularity how the financial or economic interests of an existing licensee will be affected will be dismissed.[124] Similarly the assignment of argumentative and abstract propositions of law as reasons for appeal lack the jurisdictional requisites necessary to invoke judicial action.[125]

A perplexing problem before the court is the formalization of appealable interest to determine who may invoke appellate jurisdiction. Section 402(b)(1), which provides that an appeal may be taken by an applicant for a construction permit, license, renewal of license, or modification of license whose application has been refused, would appear to be free from ambiguity since it specifies the classes of applicants entitled to judicial relief. But in the *Crosley* case[126] the question before the court was whether a "temporary experimental authorization" to operate with increased power was a license which was subject to judicial review. The maximum power for clear channel stations is fifty kilowatts.[127] In August 1934, the commission authorized the Crosley

invalid administrative order." Red River Broadcasting Co., Inc. v. Federal Communications Comm., 69 App. D. C. 1 at 3, note 2, 98 F. (2d) 282 (1938). See also Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U. S. 266 at 277, 53 S. Ct. 627 (1933); Great Western Broadcasting Assn., Inc. v. Federal Communications Comm., 68 App. D. C. 119 at 123, 94 F. (2d) 244 (1937); Yankee Network, Inc. v. Communications Comm., (App. D. C. 1939) 107 F. (2d) 212.

[124] Yankee Network Inc. v. Federal Communications Comm., (App. D. C. 1939) 107 F. (2d) 212.

[125] Stuart v. Federal Communications Comm., 70 App. D. C. 265, 105 F. (2d) 788 (1939).

Two decisions have been handed down since October 1, 1939, viz: WOKO Inc. v. Federal Communications Comm., (App. D. C.) Docket No. 7312, decided December 11, 1939; Florida Broadcasting Co. v. Federal Communications Comm., (App. D. C.) Docket No. 7347, decided December 11, 1939, which set forth with greater particularity the necessary allegations in a notice of appeal in order to enable an appellant to invoke the jurisdiction of the court under section 402(b)(2). Thus the allegation in a statement of reasons for appeal that the "result of the Commission's decision will be to destroy the ability of the appellant to carry on—or to render service —in the public interest," is sufficient to invoke the jurisdiction of the court. Florida Broadcasting Co. case, supra. But a reduction in income, a loss of a large portion of a station's listening audience, or a depletion of talent and program material which will result in the deterioration of the program service of an existing licensee are not sufficient to give the court jurisdiction to entertain the appeal. Appellant must allege that he is aggrieved to the extent that the public interest, convenience, or necessity would suffer. WOKO Inc. case, supra. The importance of the statement of points on appeal was stressed by Justice Miller, "A Judge Looks at Judicial Review of Administrative Determinations," 26 A. B. A. J. 5 at 9 (1940).

[126] Crosley Corp. v. Federal Communications Comm., (App. D. C. 1939) 106 F. (2d) 833, cert. denied (U. S. 1939) 60 S. Ct. 142.

[127] Paragraph 117 of the Commission's Rules and Regulations, now superseded by § 3.22 of FEDERAL COMMUNICATIONS COMMISSION, RULES GOVERNING STANDARD

Radio Corporation, licensee of station WLW, to increase its power from fifty to five hundred kilowatts upon "the express condition that it may be terminated by the Commission at any time without advance notice or hearing if in its discretion the need for such action arises." Renewals of this authorization were made from time to time to 1939. After an extended hearing before a committee of three commissioners, the commission refused to renew WLW's experimental authorization. Appellant sued out an appeal, under section 402(b)(1), wherein it alleged and likewise urged in its brief that this temporary authorization was a license. The commission moved to dismiss the appeal on the ground that the court had no jurisdiction to entertain the appeal under any of the provisions of the appeal section of the act. The majority of the court did not deem it necessary to decide whether the temporary authorization was a license. The appeal was dismissed on the ground that the temporary special authorization was a contractual arrangement which could be withdrawn by the commission. Justice Stephens concurred in the result but was of the opinion that the majority should

> "limit itself to the narrow ground that either the 'special temporary experimental authorization' was void because beyond the power of the Commission under the statute, or it was a kind of license not subject to the provisions of the statute concerning notice, hearing and review, and that in either such event the appellant would have no right of appeal to this court."[128]

There is no provision in the statute authorizing the commission to grant temporary experimental authorizations; neither does the statute authorize the commission to attach conditions in granting licenses or permits. It would therefore appear that the commission in fact granted a license under several provisions of the act,[129] or else the authorization was void

BROADCAST STATIONS, effective August 1, 1939, 4 FED. REG. 2715 (1939), which provides that the maximum power for clear channel stations is 50 kilowatts.

[128] Crosley Corp. v. Federal Communications Comm., (App. D. C. 1939) 106 F. (2d) 833 at 836.

[129] 48 Stat. L. 1081 (1934), 47 U. S. C. (1934), § 301: "No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act." 48 Stat. L. 1085 (1934), 47 U. S. C. (1934), § 309(a): "If upon examination of any application for a station license or for the renewal or modification of a station license the Commission 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 Commission 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

because beyond the power of the commission. The majority opinion avoids this conflict of issues. But if the "special temporary experimental authorization" is not a license, then the operation of WLW was a criminal offense, and it is clear that neither the commission nor the owners of WLW intended that the operation should be anything but lawful. It is believed that the commission's administrative practice[130] and the provisions of the act quoted in the margin[131] spell out a license.

In the *Pulitzer* case,[132] the court ruled that an existing licensee which had applied for an increase of hours of operation and had not as yet been refused could not invoke section 402(b)(1) to complain against the granting of a new broadcasting facility in the same community. The *Pittsburgh Radio Supply House* decision[133] affirmed the principle established in the previous opinion. Existing licensees of regional stations with applications pending to increase power to five kilowatts at night, which application violated the commission's regulation[134] limiting the maximum power of regional stations to one kilowatt at night, had no appealable interest to challenge the grant of a station on the same frequency. Appellants had assigned as error the action of the commission in entering its order, first denying the application in the morning, and then in the afternoon granting the aforesaid application

applicant an opportunity to be heard under such rules and regulations as it may prescribe." 48 Stat. L. 1100 (1934), 47 U. S. C. (1934), § 501: "Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or wilfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both."

[130] Caldwell, "Developments in the Law of Federal Regulation of Broadcasting," VARIETY YEAR-BOOK 896, 966 (1939-1940): "The same device of 'special experimental authorization' has been used for years to cover up departures from regulations so as to permit duplication on certain of the clear channels, power in excess of the maximum permitted on regional channels, and other special privileges which have been continuously enjoyed on a regular commercial basis."

[131] Supra, note 129.

[132] Pulitzer Publishing Co. v. Federal Communications Comm., 68 App. D. C. 124, 94 F. (2d) 249 (1937).

[133] Pittsburgh Radio Supply House v. Federal Communications Comm., 69 App. D. C. 22, 98 F. (2d) 303 (1938).

[134] Paragraph 120 of the Rules and Regulations, now superseded by § 3.22(c) of FEDERAL COMMUNICATIONS COMMISSION, RULES GOVERNING STANDARD BROADCAST STATIONS, effective August 1, 1939, 4 FED. REG. 2715 (1935). Section 3.22(c) authorizes five kilowatt operation at night on regional frequencies, provided that the stations requesting the same meet certain minimum engineering standards.

on the basis of the identical record. The court stated that it had no right to consider this "claimed irregularity" since none of the appellants had an appealable interest. But there can be no doubt that this irregular action abetted a skeptical judicial attitude towards the administrative process. The appeal in the *Pittsburgh* case was dismissed, whereas the *Pulitzer* decision was affirmed. The significant difference between affirmance and dismissal is that the court considers all of appellant's contentions where a decision is affirmed—if one of the assignments of error is valid, the case would be reversed; whereas in a dismissal the court does not pass upon the alleged irregularity of administrative action because the appellant is not believed to be aggrieved or adversely affected. The *Pulitzer* and *Pittsburgh* cases are inconsistent in this respect.

A more difficult question, and one which will require further judicial definition, is to determine who may invoke the provisions of section 402(b)(2) permitting an appeal "by any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application." This much is clear. An existing licensee who alleges that the grant of an application will result in objectionable interference and cause a reduction in its service area is a person aggrieved or whose interests are adversely affected.[135] But may appellate jurisdiction be invoked by existing licensees who claim that the grant of additional facilities to the same community will result in destructive ruinous competition to the extent that their operation in the public interest will be impaired?

The next chapter in the story of the commission's position towards economic factors is now appropriate. The commission, in view of the dictum in the *Great Western* case,[136] included economic issues in hearing notices, and cited existing licensees as respondents on that basis. In the *Tri-State* case,[137] an existing licensee who sought protection against destructive competition with a consequent deterioration of program service appealed. The court did not discuss the question of appealable interest, but reversed the commission because of the latter's failure to

[135] Cases cited in notes 132 and 133, supra; Woodmen of the World Life Ins. Soc. v. Federal Communications Comm., (App. D. C. 1939) 105 F. (2d) 75, cert. denied (U. S. 1939) 60 S. Ct. 112.

[136] Great Western Broadcasting Assn., Inc. v. Federal Communications Comm., 68 App. D. C. 119, 94 F. (2d) 244 (1937).

[137] Tri-State Broadcasting Co., Inc. v. Federal Communications Comm., 68 App. D. C. 292, 96 F. (2d) 564 (1938).

make appropriate findings of fact. In the *Sanders Brothers* case[138] an existing licensee alleged financial and economic injury, a large loss of operating revenue, an impairment of service to the listening audience and a destruction of program service.

> "These reasons were clearly adequate to present an issue of 'economic injury to an existing station through the establishment of an additional station . . .' and that statement of issue is sufficient to furnish proper grounds of contest on appeal."[139]

A fortiori, appellant was an aggrieved person whose interests were adversely affected. A petition for rehearing was filed in the *Sanders Brothers* case suggesting that economic injury was *damnum absque injuria.*[140] The identical contentions were advanced in the *Yankee Network* case,[141] wherein an existing licensee alleged economic injury through the establishment of a new station in the same community. This appeal was dismissed because appellant had not assigned sufficient reasons of appeal to give the court jurisdiction. The opinion by Justice Miller fully reconsidered this problem and held that economic injury which will result in a severe loss of operating revenue so as to impair the service of a licensee and destroy its ability to render proper service in the public interest was within the purview of section 402(b)(2).

The court has thus restricted a "person aggrieved" to licensees who would suffer destructive objectionable interference or destructive economic competition.[142] It would appear that this represents a rather

[138] Sanders Brothers Radio Station v. Federal Communications Comm., 70 App. D. C. 297, 106 F. (2d) 321 (1939), cert. granted (U. S. 1939) 60 S. Ct. 294.

[139] Ibid., 106 F. (2d) at 323.

[140] The commission's petition for rehearing in the Sanders case was denied on August 2, 1939.

[141] Yankee Network, Inc. v. Federal Communications Comm., (App. D. C. 1939) 107 F. (2d) 212.

[142] Four decisions have been handed down by the United States Court of Appeals of the District of Columbia since October 1, 1939, viz: Tri-State Broadcasting Co. v. Federal Communications Comm., (App. D. C. 1939) 107 F. (2d) 956; Ward v. Federal Communications Comm., (App. D. C. 1939) 108 F. (2d) 486; WOKO Inc. v. Federal Communications Comm., Docket No. 7312, decided December 11, 1939; and Florida Broadcasting Co. v. Federal Communications Comm., Docket No. 7347, decided December 11, 1939, which further define a "person aggrieved." Aggrievement is measured not by injury to an existing licensee, but by injury which will affect the public interest, convenience, or necessity. Thus in the Tri-State case, supra, a reduction in income to an existing licensee "cannot be the criterion of economic injury herein. . . ." In the Ward case, supra, it would appear that the court will apply the same principles when an aggrieved person claims he will suffer objectionable electrical interference. In other words, electrical interference, or a reduction in the service area of an existing licensee, is not sufficient to invoke the jurisdiction of the court. Appellant must allege and prove that as a result of such aggrieve-

narrow and constrained construction of section 402(b)(2). The legislative history of this provision[143] discloses that Congress intended "that any person in interest feeling aggrieved should have the right of appeal from the action of the commission to the Court of Appeals of the District of Columbia. . . ."[144] Congress expressly used lay terminol-

ment the public interest, convenience, or necessity would suffer. The effect of these decisions is that an existing licensee must allege, and more important, prove, that the establishment of a new station will so affect the operation of the former, that the public interest will suffer thereby. Since every renewal of license must be based on the finding that the public interest, convenience, or necessity will be served thereby, and since the grant of interest of a new facility must also be based on a finding of public interest, the ultimate issue before the commission is the balance of convenience between the existing licensee and the new facility. Since the findings of fact by the commission are conclusive in the court if supported by substantial evidence, and provided that there is a rational basis in the evidence to support the commission's conclusions, an aggrieved person would have difficulty in proving that the public interest, convenience, or necessity would suffer thereby.

[143] "This portion of the Radio Act [referring to the 1930 Amendment which substituted a new appellate provision] was re-enacted in the form of Section 402(b) of the 1934 Act and we can presume that the language was used in the latter Act in the same sense as in the former." Yankee Network, Inc. v. Federal Communications Comm., (App. D. C. 1939) 107 F. (2d) 212 at 214, note 2.

[144] Statement by Mr. Davis, quoted further, infra. On April 14, 1930, Mr. White of Maine offered H. R. 11635 in the House. 72 CONG. REC. 7051 (1930). This bill contained some eleven amendments to the Radio Act of 1927. The 1930 amendment is a verbatim reproduction of section 9 of H. R. 11635. The latter bill was reported back without any amendments by the Committee on Merchant Marine and Fisheries on April 15, 1930. H. REP. 1179, 71st Cong., 2d sess.; 72 CONG. REC. 7099 (1930). H. Rep. 1179, p. 6, recites: "This bill amends 11 different sections of the radio act of 1927 by clarifying and amplifying provisions dealing with procedure and administration. . . . Section 9 substitutes for section 16 of the act a more efficacious and simple procedure in appeals." H. R. 11635 was debated in the House. See 72 CONG. REC. 8050 et seq. (1930). The members of the committee who reported out H. R. 11635 (H. REP. 1179), Messrs. Lehlbach, Davis, and Abernethy, explained the various amendments. See in particular the explanation of Mr. Davis, 72 CONG. REC. 8052 (1930). H. R. 11635 passed the House on April 30, 1930. 72 CONG. REC. 8055 (1930). H. R. 11635 was not considered in the Senate because the latter could not devote sufficient time or consideration to this legislation. Therefore on May 24, 1930, H. R. 12599 was introduced in the House and referred to the Committee on Merchant Marine and Fisheries. 72 CONG. REC. 9521 (1930). The committee report on this bill, H. REP. 1665, 71st Cong., 2d sess. (1930), points out that H. R. 12599 is that part of H. R. 11635 relating to the amendment of the appeals provision and was offered as a separate bill. H. REP. 1665, p. 2, states: "The purpose of the amendment is to clarify the procedure on appeal to the court from decisions of the Federal Radio Commission, to more clearly define the scope of the subject matter of such appeals, and to insure a review of the decisions of the Court of Appeals of the District of Columbia by the Supreme Court." The debate on H. R. 12599 was limited because it had previously been incorporated in H. R. 11635 and the latter had been fully discussed. Mr. Davis, a member of the committee that submitted H. REP. 1665, stated: "I am much gratified by the passage of this bill to amend

ogy as distinguished from legal phraseology in drafting this provision in order that the "independent man or the independent station [may obtain] more rights to appeal to the court. . . ."[145] The committee reports and the debates suggest that Congress intended that the court exercise broad supervisory powers in order to check the extensive discretionary authority vested in the commission.[146] A secular construction of section 402(b)(2) would obviously broaden the appellate jurisdiction of the court. For example, aggrievement caused by a loss in operating revenue, diminution in the number of listeners, or the depreciation of available talent material which would affect the ability of a licensee to operate in the public interest, would constitute an appealable interest.[147] Administrative determinations as to the quantum of

—in fact—rewrite the appeal section of the present radio act. It is not only in the interest of the public, but in the interest of orderly procedure. I never did like the language of section 16 of the radio act. When the bill culminating in that act was being considered, I criticized the appeal provision both in the committee and in the House. I insisted that the provision was ambiguous and would prove unsatisfactory and ineffective. In my minority views filed on said bill in the Sixty-ninth Congress, in discussing the appeal provision, which the bill we have just passed supplants, I declared, that 'the opportunity for review is a shadowy one, indeed.' In suggesting a number of amendments to the pending bill in said minority views, I stated with respect to the appeal provision, 'I further suggest that any person in interest feeling aggrieved should have the right of appeal from the action of the Commission to the Court of Appeals of the District of Columbia or some other Federal court and that such court have the right of review of the questions of law but that the findings of fact of the commission shall be conclusive.'" 72 CONG. REC. 11530. The minority reports referred to and which elaborate Mr. Davis' views are H. REP. 404, 69th Cong., 1st sess. (1926), which accompanied H. R. 9108, and H. REP. 464, 69th Cong., 1st sess. (1926), which accompanied H. R. 9971. The latter bills evolved into the Radio Act of 1927. The minority views of Mr. Davis as set forth in these reports are extremely significant in revealing the Congressional intent of the appeals provision. As a matter of fact, the minority views advanced in 1926 became legislation in 1930. H. R. 12599, identical with the House bill, was introduced in the Senate on June 24, 1930 and referred to the Committee on Interstate Commerce, 72 CONG. REC. 11553 (1930). It was reported back with S. REP. 1105, 71st Cong., 2d sess., which accompanied the bill on June 26, 1930. 72 CONG. REC. 11749. S. REP. 1105 filed a copy of H. REP. 1165 as its own views. There was little debate in the Senate, 72 CONG. REC. 11881. The bill passed the Senate on June 27, 1930, 72 CONG. REV. 11882, and was subsequently signed by the President.

[145] Statement by Mr. Abernethy in 72 CONG. REC. 8054 (1930).

[146] See minority views of Mr. Davis in H. REP. 464, 69th Cong., 1st sess. (1926), which accompanied H. R. 9971.

[147] WOKO, Inc. v. Federal Communications Comm., (App. D. C.) Docket No. 7312, decided December 11, 1939: "Although these words [referring to Section 402(b)(2)], when read literally, are susceptible of a very wide interpretation, it is obvious that no such interpretation should be given to them, in view of the considerations set out above. Instead, it is apparent that the appealable interest of such a person is dependent upon considerations of public interest inherent in the particular case." Cf.

the aggrievement would be binding on the court save where constitutional[148] or jurisdictional[149] issues are present; but if the record substantiates appellant's allegation that it would be aggrieved or adversely affected, regardless of the extent of the injury, the court should entertain the appeal on the merits and consider all assignments of error rather than circumscribe its jurisdiction to a consideration of the extent of the aggrievement.[150] There is no constitutional inhibition which would preclude the court from exercising such broad supervisory powers, since any injury, regardless of the extent, presents a case or controversy.[151] It must be remembered that since Congress is not required to provide a remedy in the courts from adverse action by the Federal Communications Commission, it may correspondingly create statutory rights supplementary to the common law which are subject to judicial protection.[152] Section 402(b)(2) is a statutory right which should be measured by congressional standards rather than by principles of the common law.[153]

The *Yankee Network* opinion is highly significant in revealing the changed judicial attitude toward the lower tribunal. Implicit therein and in answer to the commission's arguments is the desire of the court to leave open the avenues of judicial review. Thus the commission's contentions as set forth in its brief would restrict judicial review to a person whose application had been refused or denied. On oral argument, though not in issue, the law department expanded this argument by alleging that any possible grievance or affectation of interest—

Sprunt & Son v. United States, 281 U. S. 249, 50 S. Ct. 315 (1930); Edward Hines Yellow Pine Trustees v. United States, 263 U. S. 143, 44 S. Ct. 72 (1923).

[148] Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 S. Ct. 527 (1920); St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 56 S. Ct. 720 (1936).

[149] Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285 (1932).

[150] Cf. Woodmen of the World Life Ins. Soc. v. Federal Communications Comm., (App. D. C. 1939) 105 F. (2d) 75, and cases cited supra, note 142.

[151] Muskrat v. United States, 219 U. S. 346, 31 S. Ct. 250 (1911); Tutun v. United States, 270 U. S. 568, 46 S. Ct. 425 (1926).

[152] Dismuke v. United States, 297 U. S. 167, 56 S. Ct. 400 (1936); Lynch v. United States, 292 U. S. 571, 54 S. Ct. 840 (1934); Tutun v. United States, 270 U. S. 568 at 577, 46 S. Ct. 425 (1926).

[153] Justice Miller in Yankee Network, Inc. v. Federal Communications Comm., (App. D. C. 1939) 107 F. (2d) 212 at 217, 218: "In the same manner as the rights and equities of licensees are statutory in character so are their remedies. . . . To contend that . . . administrative [and legal] remedy [remedies] provided under such circumstance must be interpreted in terms of rights which might have been protected in a court of law, would beg the question."

electrical, economic, or otherwise—of an existing licensee was not an appealable interest. The court held that

> "to accept the argument of the Commission on this point would not only leave the licensee without any opportunity for any relief whatever, even from action so arbitrary as to destroy it, but would deprive Section 402(b)(2) of meaning and eliminate it from the Act as effectively as if it were repealed."

The commission contended that the interpretation placed by the Supreme Court upon the powers of the Interstate Commerce Commission under the Transportation Act of 1920 to consider economic factors cannot properly be applied by analogy to that portion of the Communications Act which deals with broadcasting. Justice Miller concluded that the judicial interpretation of the Transportation Act was applicable to radio broadcasting.

> "The powers of regulation possessed by the Federal Communications Commission over broadcasters are comprehensive and inclusive; and judicial review of its actions is highly important just as it is in the case of the Interstate Commerce Commission."

The opinion further recites:

> "In order to attain the purposes of the Act, the Commission must assume the full responsibility cast upon it by Congress with respect to each applicant and each protesting licensee. In order to assure full assumption of that responsibility and full performance of its duty, in situations such as exist in the present case, Congress made the Commission's action subject to judicial review. In the absence of such possibility of review the Commission—while admitting its duty—could arbitrarily avoid it; thus indulging in an abusive exercise of its administrative discretion."[154]

The reluctance of the court to adopt the commission's arguments must be attributed not only to the legal analysis of the commission's contentions, but also to a judicial apprehension that the administrative seeks to immunize itself from judicial review. The opinion suggests a critical judicial attitude of the administrative process.

This judicial attitude is better exemplified by the *Pottsville*[155] and

[154] Yankee Network, Inc. v. Federal Communications Comm., (App. D. C. 1939) 107 F. (2d) 212 at 219, 221-222, 223.

[155] Pottsville Broadcasting Co. v. Federal Communications Comm., 69 App. D. C. 7, 98 F. (2d) 288 (1938), (App. D. C. 1939) 105 F. (2d) 36, reversed in (U. S. 1940) 60 S. Ct. 437.

related cases.[156] The decisions of both the court of appeals and the Supreme Court will be set out *in extenso* since they clearly illustrate contrasting judicial attitudes.

The commission had denied the application of the Pottsville Broadcasting Company to construct a local daytime broadcasting station on two grounds: first, the applicant was not financially qualified, and, second, the principal stockholder, a non-resident of Pottsville, Pennsylvania, was not familiar with the needs of the listening audience in that area. The lower court ruled as a matter of law that the applicant was financially qualified. On the question of the propriety of confining grants of a local nature to local people, Justice Groner said that,

> "the Commission has not given any indication of a fixed and definite policy. If the contrary of this were true, we should be slow to say that the establishment of such a policy would be either arbitrary or capricious. But the policy should be applied with substantial uniformity and the lack of that uniformity convinces us that the Commission has not sought to lay down a hard and fast rule."[157]

This statement by the court represents a marked departure from its earlier philosophy. Whereas the *Symons* case[158] implies that each decision should be decided on its individual merits, the *Pottsville* opinion suggests that the commission curb its administrative discretion by crystallizing policies and adhering to administratively defined standards. The Pottsville case was remanded to the commission on the sole ground that it reconsider and establish a definite policy on the issue of confining local grants to local people. The lower court stated that it had no intention of exercising supervisory control over questions of policy, and that any uniformly applied policy would be acceptable.

Following this remand, Pottsville petitioned the commission to grant its original application. This the commission refused, and set for argument Pottsville's application along with two rival applications for the same facility. The latter applications had been filed subsequently to that of Pottsville and were still undisposed of when the Pottsville case returned to the commission. The commission announced it would

[156] McNinch v. Heitmeyer, (App. D. C. 1939) 105 F. (2d) 41,reversed in (U. S. 1940) 60 S. Ct. 443, sub nom. Fly v. Heitmeyer; per curiam opinion in Courier Post Publishing Co. v. Federal Communications Comm., (App. D. C.) dated June 30. 1939 and order dated August 2, 1939.

[157] Pottsville Broadcasting Co. v. Federal Communications Comm., 69 App. D. C. 7 at 9-10, 98 F. (2d) 288 (1938).

[158] Symons Broadcasting Co. v. Federal Radio Comm., 62 App. D. C. 46, 64 F. (2d) 381 (1933).

consider the several applications "individually on a comparative basis, the application which in the judgment of the Commission will best serve public interest to be granted." [159] Pottsville applied to the court of appeals for a writ of prohibition to enjoin the commission from exercising its powers except as required by the judgment of the court and for a writ of mandamus to require the commission to reconsider the application on the original record. The question before the judicial tribunal was whether the commission, having decided that the applicant was qualified in particular respects, might later disregard petitioner's priority and the case made by it and consider its application on a comparative basis with subsequent applications on records made after the commission's original decision. The lower court ruled that an appeal from the commission should have the same effect and be governed by the same rules as apply in appeals from a lower federal court to an appellate federal court in an equity proceeding. The court in remanding a case will determine whether the commission shall reconsider the case on the original record, remake the record on a showing of newly discovered evidence, or permit a hearing de novo. Pottsville's claim of priority and individual treatment of its application without consideration of subsequently filed applications was based on paragraph 106.4 of the commission's regulations.[160] The latter recognizes priority

[159] Quoted in Pottsville Broadcasting Co. v. Federal Communications Comm., (App. D. C. 1939) 105 F. (2d) 36 at 38.

[160] "In fixing dates for hearing the Commission will, so far as is practicable, endeavor to fix the same date for hearings on all related matters which involve the same applicant or arise out of the same complaint or cause and for hearings on all applications which by reason of the privileges, terms or conditions requested present conflicting claims of the same nature excepting, however, applications filed after any such application has been designated for hearing." In Colonial Broadcasters, Inc. v. Federal Communications Comm., (App. D. C. 1939) 105 F. (2d) 781, the interpretation of the rule as applied in the Pottsville case was reapproved as consistent with the provisions of the act because the regulation offered a fixed and easily applied standard rather than one of unlimited discretion. Judicial formalization of ambiguous procedural rules into established administrative standards confirms the judicial trend which suggests that the commission circumscribe its discretion by self-imposed administrative limitations. For example, in Pottsville Broadcasting Co. v. Federal Communications Comm., (App. D. C. 1939) 105 F. (2d) 36 at 40, the court said: "While it is true the authority to grant is exclusive in the Commission, and while it is also true, as we have said before, that the license conferred on the owner of a radio broadcasting station is permissive only and within the power of the Commission by congressional delegation, we cannot consent to the view that either the right to grant or the right to revoke is subject to the uncontrolled discretion of that tribunal. In granting licenses the Commission is required to act 'as public convenience, interest or necessity requires.' This criterion is not to be interpreted as setting up a standard so indefinite as to confer unlimited power." Federal Radio Comm. v. Nelson Brothers Bond & Mortgage Co., 289 U. S. 266, 53 S. Ct. 627 (1933); Yankee Network Inc. v. Federal Communica-

of filing when subsequent applications are made after the prior one has been set for hearing. After pointing out that the petitioner should not be put in any worse position than it occupied on the original hearing, the court went to the heart of the controversy and severely condemned the commission's conduct:

> "But we think it is obvious that the particular objections of the Commission to a reconsideration on the record—to which we have referred—are mere makeweights, and that the real bone of contention is the insistence by the Commission upon absolute authority to decide the rights of applicants for permits without regard to previous findings or decisions made by it or by this court."[161]

The Supreme Court, per Justice Frankfurter, reversed the lower tribunal. It held that the familiar doctrine, that the lower court is bound to respect the mandate of an appellate court and cannot reconsider questions which the mandate has laid at rest, has no application to administrative agencies. The latter, which differ in origin and function from the courts,[162] and have been invested with powers not pos-

tions Comm., (App. D. C. 1939) 107 F. (2d) 212; Heitmeyer v. Federal Communications Comm., 68 App. D. C. 180, 95 F. (2d) 91 (1937).

[161] Pottsville Broadcasting Co. v. Federal Communications Comm., (App. D. C. 1939) 105 F. (2d) 36 at 40. McNinch v. Heitmeyer, (App. D. C. 1939) 105 F. (2d) 41, reversed (U. S. 1940) 60 S. Ct. 443, sub nom. Fly v. Heitmeyer, represents the aftermath of Heitmeyer v. Federal Communications Comm., 68 App. D. C. 180, 95 F. (2d) 91 (1937). Heitmeyer filed a bill of complaint in the United States District Court for the District of Columbia asking that the commission be permanently enjoined from granting any construction permit or license to any other applicant for a radio station at Cheyenne, Wyoming, until after the commission had rendered a decision on the record as made at the original hearing. Competing applications were filed after the Heitmeyer application had been remanded to the commission by the court. The lower court ruled that mandamus or statutory appeal was the proper remedy and dismissed the bill without prejudice to the application by Heitmeyer to use mandamus if such application were necessary to protect his rights. The Supreme Court applied the principle established in the Pottsville case and reversed the lower court by ordering the writ of mandamus dissolved. Courier Post Publishing Co. v. Federal Communications Comm., (App. D. C.) per curiam opinion dated June 30, 1939, is the aftermath of Courier Post Publishing Co. v. Federal Communications Comm., (App. D. C. 1939) 104 F. (2d) 213. The court in its per curiam opinion authorized the hearing to be reopened only for the purpose of taking additional testimony on a technical issue of interference. The opinions of the Supreme Court in the Pottsville and Heitmeyer cases vacate the orders of the lower court and the cases will be remanded to the commission for whatever action the latter deems appropriate.

[162] Hanft, "Utilities Commissions as Expert Courts," 15 N. C. L. REV. 12 at 14 (1936), reprinted in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 592 at 595 (1938): "There are, it is true, many differences between courts and administrative commissions. Utilities commissions, for example, may initiate as well as try cases; may gather as well as pass upon evidence. They have powers of continuous control over the

sessed by the latter, cannot be assimilated into the judicial machinery under Article III of the Constitution. Congress has entrusted to the commission a legislative policy expressed by the standard of public interest, convenience, or necessity. The latter can only be effectuated by permitting the commission to establish its own procedure—whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings. The jurisdiction of the courts in reviewing an administrative determination is confined to errors of law. On remand the commission is bound to act upon the correction; but the remand does not preclude the commission from adopting whatever procedure and taking such further action as will be in accordance with the applicable law. The contingencies of judicial review and of litigation cannot create rights of priority in Pottsville as against later applicants.

> "Only Congress could confer such a priority. It has not done so. The Court of Appeals cannot write the principle into the statute as an indirect result of its power to scrutinize legal errors in the first of an allowable series of administrative actions."[163]

The *Pottsville* opinions offer a study in what are almost antithetical attitudes towards the commission. The Supreme Court for all practical purposes has established the commission as an independent and autonomous agency subject to a minimum of judicial supervision. The effect of this opinion may well be to nullify the lower court's efforts to compel the commission to enunciate definitive standards in the latter's administration of the act. The court of appeals, on the other hand, has sought to apply to the Communications Commission the principles which control its jurisdiction over lower federal courts to the end that administrative and judicial standards are reflected in the administrative process. The opinion of the lower court suggests an intimate knowledge of the commission's administrative machinery and practice. It must be remembered that the Supreme Court has insulated itself from reviewing the administrative activities of the agency for seven years; the lower court has had an unending stream of cases which have exposed the administrative process in its entirety. The Supreme Court, in nulli-

utilities which occasionally appear as litigants before them, and they are thereby enabled to understand the litigation by reason of long familiarity with the problems out of which it grew." See also Root, "Public Service by the Bar," 41 A. B. A. REP. 355 at 368-369 (1916).

[163] Federal Communications Comm. v. Pottsville Broadcasting Co., (U. S. 1940) 60 S. Ct. 437.

fying the lower court's interpretation of rule 106.4,[164] relied on the commission's interpretation of the rule as set forth in the commission's brief.[165] But the administrative interpretation of a regulation is gleaned not from a self-serving declaration in a brief but rather by the operation of the administrative process where the rule has been applied. In at least three cases the commission refused to consider competing applications after the prior applications had been designated for hearing.[166]

[164] Quoted at note 160, supra.

[165] Commission's Brief in Federal Communications Comm. v. Pottsville Broadcasting Co., pp. 47-48: "The Commission Rules of Practice provide that 'the Commission will, so far as practicable, endeavor to fix the same date . . . for hearings on all applications which . . . present conflicting claims . . . excepting, however, applications filed after any such application has been designated for hearing.' The excepting clause in this rule of procedure seems to have been read by the court below as giving an absolute right of priority of consideration to applicants whose applications have been set for hearing before other applications are filed. But the rule, as the commission urged in the court below and has consistently interpreted it, merely provides, in the interest of avoiding undue delay, that a newly filed application will not ordinarily be set for hearing on the same date as those already set for hearing, and has no bearing upon the order in which applications will finally be acted upon by the commission."

[166] Re Wichita Cases (West Texas Broadcasting Company et al.), Dockets Nos. 4218, 4354, 4356, 4355, decided February 20, 1939: "The Wichita Broadcasting Company filed an application on October 19, 1936 for construction permit to establish a new radiobroadcast station at Wichita Falls, Texas, to operate on 620 kilocycles, with power of 250 watts night, one kilowatt local sunset, unlimited time. This application was designated for hearing on December 8, 1936, and was heard (together with several other applications for facilities at Wichita Falls) on February 10 to 13, and March 29 and 30, 1937. On May 26, 1937 the examiner submitted his report (I-435).

"On March 15, 1937, Station KTBS filed an application for the use of the same frequency at Shreveport, Louisiana. That application was designated for hearing on April 2, 1937, and was dismissed on May 25, 1937, at the request of the applicant. The second application for the use of the same frequency at Shreveport, Louisiana, was filed by Station KTBS on June 2, 1937. This application was designated for hearing on August 18, 1937.

"In the Commission's 'Statement of Facts, Grounds for Decision, and Order' granting the Wichita Broadcasting Company's application, it was noted that the application of Station KTBS has been withdrawn. At that time, and now, the records of the commission show such to be a fact. In its Motion for Rehearing, Station KTBS charges that there could be no testimony in the record concerning the withdrawal of its first application, which was dismissed May 25, 1937, after hearing was closed, and contends that the Commission would not have granted the Wichita application had it taken notice of the pendency of a later application filed by it.

"The contentions of Station KTBS are not persuasive. The facts disclose that when the hearing on the Wichita case commenced (February 10, 1937) there was no application pending on behalf of Station KTBS. Its first application was filed on May 15, 1937, and as that application was not on file when the Wichita Broadcasting Company's application was set for hearing, the application of Station KTBS was not entitled to be heard simultaneously. See Rule 106.4 of the Commission relating to

This had the practical effect of creating a right of priority in the first applicant which precluded the grant of the second application for the same facilities. And in one decision the commission, among other grounds, recognized priority of filing where competing applications were involved.[167] The lower court's interpretation of rule 106.4 would appear to harmonize with actual administrative practice, which has in effect established a right of priority.

From the broad perspective of administrative law it is unquestionably true that the extent of judicial control derived from the interrelationship of appellate to trial courts has not been applied in toto to govern the relationship of courts to administrative agencies.[168] Historically and functionally, commissions differ from courts; but from a practical point of view they exercise judicial functions affecting the

applications for conflicting facilities; and see Pulitzer Publishing Company v. Federal Communications Commission [68 App. D. C. 124, 94 F. (2d) 249 (1937)].

"The last application of Station KTBS was filed after the hearing and the proceeding under consideration was closed."

Compare the facts in the Wichita cases with the Heitmeyer case. In the latter case, applications for the same facility requested by Heitmeyer were filed after the Heitmeyer case had been remanded to the commission by the lower court. To the same effect are Re Standard Life Insurance of the South, 5 F. C. C. 349 at 350 (1938), and Re Lucas, 5 F. C. C. 464 at 466 (1938), affirmed in Colonial Broadcasters, Inc. v. Federal Communications Comm., (App. D. C. 1939) 105 F. (2d) 781.

[167] Re Stevens and Stevens, 5 F. C. C. 177 at 182 (1938): "Moreover, even if all other facts and circumstances were equal (and they are not), the Port Huron Broadcasting Company application was filed more than a year prior to the application of Willim W. Ottaway and the granting therefore of the Port Huron Broadcasting Company reaches a more equitable result." The public notice in the commission's proposed decision in Re Barnes and Weiland tr/as Martinsville Broadcasting Co. (Mimeograph No. 38477, published on January 11, 1940) is extremely significant. The public notice of a proposed decision is a press release which quotes verbatim from the conclusions of a proposed decision. The press release recites: "Having fully considered all relevant and material facts and circumstances in the record in each case, the Commission concludes, and so finds that public interest, convenience and necessity will be better served by the granting of the application of the Martinsville Broadcasting Company, by reason of the priority of the filing of the original applicant, and further on the grounds that both William C. Barnes and Jonas Weiland have had considerable experience in the operation of broadcasting stations, whereas none of the partners in the application filed by the Patrick Henry Broadcasting Company have had any experience whatsoever in the operation of broadcasting stations." The proposed findings of fact and conclusions of the commission (Dockets Nos. 5425, 5497, released on January 12, 1940) do not refer to the priority of the Martinsville Broadcasting Company as one of the grounds for preferring that applicant.

[168] Compare Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 59 S. Ct. 301 (1939); United States v. Morgan, 307 U. S. 183, 59 S. Ct. 795 (1939).

rights of litigants to the same extent as the adjudications of courts.[169] A pragmatic approach to this problem suggests that administrative agencies be recognized as courts and placed under the judicial supervision of the appellate courts to the same extent as lower federal courts. The effect of the *Pottsville* opinion would appear to establish administrative agencies in the long run as independent and autonomous systems of administrative courts.[170] This approach may be attributed in part to the desire of the Supreme Court to establish habits of responsibility in administrative agencies.[171] This will ameliorate the conflict between law and administration, but at the expense of the law.[172]

The *Courier Post Publishing Company* case[173] merits discussion because the opinion contains language which appears to deviate from principles established in previous cases. The commission had denied appellant's application to construct a new broadcasting station in Hannibal, Missouri, on the ground that there was no public need for broadcasting facilities. The court, per Justice Vinson, carefully examined the record and ruled that the evidence contradicted the foregoing conclusion and that there was a public need for a local station in Hannibal. The opinion went one step further by including therein detailed findings of fact to show the public need for broadcasting facilities.[174]

The commission in its brief contended that there was no demand by local merchants which would insure the commercial operation of the station. Justice Vinson responded by referring to statistical data in the commission's decision which disclosed that three hundred thirty-three retail merchants and sixty-three factories were potential customers

[169] Compare Pillsbury, "Administrative Tribunals," 36 HARV. L. REV. 405, 583 (1923), first part reprinted in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 367 (1938); Brown, "Administrative Commissions and the Judicial Power," 19 MINN. L. REV. 261 (1935), reprinted in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 384 (1938).

[170] Hanft, "Utilities Commissions or Expert Courts," 15 N. C. L. REV. 12 (1936), reprinted in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 592 (1938); Rosenberry, "Powers of the Courts to Set Aside Administrative Rules and Orders," 24 A. B. A. J. 279, 333 (1938); Cooper, "The Proposed United States Administrative Court," 35 MICH. L. REV. 193 (1936), 565 (1937); Fuchs, "Concepts and Policies in Anglo-American Administrative Law Theory," 47 YALE L. J. 538 (1938).

[171] Justice Brandeis in St. Joseph Stock Yards Co. v. United States, 298 U. S. 38 at 92, 56 S. Ct. 720 (1936): "Responsibility is the great developer of men." See also LASKI, AUTHORITY IN THE MODERN STATE 91 (1919).

[172] United States v. Morgan, 307 U. S. 183 at 191, 59 S. Ct. 795 (1939).

[173] Courier Post Publishing Co. v. Federal Communications Comm., (App. D. C. 1939) 104 F. (2d) 213.

[174] But cf. Saginaw Broadcasting Co. v. Federal Communications Comm., 68 App. D. C. 282 at 291, 96 F. (2d) 554 (1938).

and supporters of the proposed station. He further stated, "Uncontradicted testimony is that more than thirty business enterprises have been personally contacted by the manager of the proposed station and this number has promised to use the new facilities. . . ."[175] The action of the court in making the foregoing findings appears to be in conflict with the *Tri-State* decision,[176] wherein Justice Stephens excluded similar testimony because it was hearsay. In the latter case, one Roderick, over the objection of appellant, reported the results of his conversations with various people. "Those I talked to were unanimously of the opinion that another station would be very beneficial, and the majority of them promised financial support to it." The court ruled that the admission of this testimony "deprived appellant of the right to cross-examine those a composite of whose views Roderick was reflecting in the record."[177] The *Courier* case may be distinguished on the ground that no party to the proceeding objected to the introduction of this hearsay testimony.

The Courier Post Publishing Company had assigned as error the failure of the commission to apply the same standards adopted in similar cases wherein comparable or smaller communities had been granted local stations. Justice Vinson declared that these cases show that the commission had established a definite policy of granting permits for local stations to communities served with clear channel and regional stations but having no local station. The court was unable to subscribe to appellant's theory that previously decided cases control the action of the commission, since it is difficult to find cases that square on the facts.

> "In administering the law, the Commission must consider each case on its individual grounds. The permit should be granted if it meets the statutory criterion of public convenience, interest or necessity, if not, it should be denied. In the instant case, it seems to us there has been a departure from the policy of the Commission expressed in the decided cases, but this is not a controlling factor upon the Commission."[178]

This language appears inconsistent with the pronouncements of the court in the *Pottsville* and related cases wherein the commission was

[175] Courier Post Pub. Co. v. Federal Communications Comm., (App. D. C. 1939) 104 F. (2d) 213 at 218.

[176] Tri-State Broadcasting Co. v. Federal Communications Comm., 68 App. D. C. 292, 96 F. (2d) 564 (1938).

[177] Ibid., 68 App. D. C. at 294, 295.

[178] Courier Post Publishing Co. v. Federal Communications Comm., (App. D. C. 1939) 104 F. (2d) 213 at 218.

required to formulate and adhere to administratively defined standards.

The question raised by the commission's use of confidential memoranda submitted by its staff *dehors* the record in arriving at its decision was in issue in the *Sanders* case.[179] The commission specifically denied this allegation. The court applied the presumption of regularity of official conduct, but warned the commission that "the necessity of administrative efficiency cannot excuse the use of star chamber procedures to deprive a citizen of a fair hearing." Two opinions have admonished the commission to give greater attention to the reports of its examiners.[180] The court in several cases has suggested that broadcast stations represent large investments of capital which serve as the basis for large commercial enterprises and that existing arrangements of broadcast facilities be not disturbed without reason.[181]

From the fall of 1937 to October 1, 1939, the court handed down twenty-three written opinions. Fourteen opinions upheld the commission's action by either affirming the administrative decision or dismissing the appeal because the court lacked jurisdiction; nine cases were reversed and remanded to the lower tribunal. In the main, the court's activities have been directed in three channels. First, the court has spelled out the administrative procedure which must be followed before appellate jurisdiction can be invoked. Second, the procedural and substantive provisions of section 402 have been clarified to some extent. Third, the court has suggested improvements in the administrative process, in particular adequate and detailed findings of fact and crystallization of administrative policies and standards. But in no sense can it be said that the court in exercising its supervisory powers has invaded the administrative functions of the commission. The appellate tribunal acknowledges its deference to the technical and skilled competence of the commission; administrative finality attaches to factual findings on technical issues.[182] The court has been extremely careful not to superimpose its views and direct administrative policies.

[179] Sanders Brothers Radio Station v. Federal Communications Comm., 70 App. D. C. 265, 106 F. (2d) 321 at 326 (1939), cert. granted (U. S. 1939) 60 S. Ct. 294.

[180] Heitmeyer v. Federal Communications Comm., 68 App. D. C. 180, 95 F. (2d) 91 (1937); Courier Post Publishing Co. v. Federal Communications Comm., (App. D. C. 1939) 104 F. (2d) 213.

[181] Yankee Network, Inc. v. Federal Communications Comm., (App. D. C. 1939) 107 F. (2d) 212; Evangelical Lutheran Synod v. Federal Communications Comm., (App. D. C. 1939) 105 F. (2d) 793.

[182] Woodmen of the World Life Ins. Soc. v. Federal Communications Comm., (App. D. C. 1939) 105 F. (2d) 75; Ward v. Federal Communications Comm., (App. D. C. 1939) 108 F. (2d) 486.

The factors which have prompted the court to change its judicial attitude have been previously set forth. Decisions, such as the *Heitmeyer, Pottsville,* and *Yankee* cases, clearly reflect a skeptical approach toward the activities of the commission. Perhaps this new judicial attitude may be attributed in part to the rapid change in personnel of the Federal Communications Commission.[183] Some of the new appointees lack the technical background and experience of their predecessors.[184] But there can be no doubt that this changed judicial attitude reflects to some extent a judicial disapproval of the commission's administrative process.

The conclusion is warranted that the appellate tribunal gave the commission a wide latitude in the early administration of communications and exercised restricted judicial supervision. Since the fall of 1937 there has been a decided change in the judicial attitude. The failure of the Communications Commission to crystallize policies and establish definite standards in its administrative interpretation of the yardstick of public interest, convenience, or necessity, and haphazard and inaccurate findings of fact have resulted in a lack of public respect for the agency. This has produced the changed judicial attitude and contributed to a broader judicial supervision.

This extension of the supervisory powers of the court has resulted in several reforms in the administrative process.[185] The commission's decisions are clearer and more concise. The basic facts are spelled out and differentiated from conclusions of law. Whereas at one time two, and at the most three, commissioners handled all broadcast matters, the administrative machinery has been reorganized, and now all seven commissioners participate in broadcast matters.[186] The procedure has been streamlined. The examiner's staff has been abolished and the

[183] Four of the seven commissioners appointed when the Federal Communications Commission was established in 1934 are active as commissioners. The commission has had four different chairmen since its inception. 1 F. C. C. ANNUAL REPORT 1 (1935); 5 ibid. II (1939).

[184] HERRING, FEDERAL COMMISSIONERS 121-122 (1936). A notable exception is Commissioner T. A. M. Craven appointed July 1, 1937. Commissioner Craven was, prior to his appointment, chief engineer of the commission and is an outstanding expert in the field of communications.

[185] The appointment of Frank R. McNinch as chairman of the commission on October 1, 1937, and William J. Dempsey as general counsel on December 16, 1938, are highly significant. Both gentleman instituted changes in the administrative machinery and procedure of the commission. Several of the changes preceded the increased activity of the court.

[186] Commission Order No. 20, 4 F. C. C. 41 (1937).

commission, in lieu of examiner's reports, issues proposed decisions.[187] Parties may file exceptions to proposed decisions and obtain oral argument before the commission. In the long run this new procedure will unquestionably accelerate the speed of the administrative process, but it is believed that this increased efficiency has removed the safeguard of personal responsibility which attached to reports issued by examiners. The latter were disassociated from the commission's law department, heard the witnesses and submitted reports under their own names. Under the new procedure the examiner's division has been integrated into the law department; there is no clear-cut division between prosecuting and judicial functions, and it is quite probable that proposed decisions are prepared by attorneys who have not participated in the hearing. At the present time it is impossible to determine whether the commission has crystallized policies in its administrative interpretation of the act. There is an imperative need for a thorough investigation and analysis of the commission's administrative process as reflected in its decisions. A cursory examination of the decisions indicates that the commission is still floundering around in the turbulent seas of policy-making and experimentation with various administrative policies.[188] The reluctance to crystallize policies and adhere to administratively defined standards may be attributed in part to the promulgation of new engineering standards.[189]

Such has been the effect of the court's increased judicial supervision on the commission's administrative practice. Perhaps the court may in the future change its judicial attitude and give thorough approval to the administrative process. The latter can be accomplished only if the commission develops a reputation for fairness and thoroughness. This is the commission's task.

[187] F. C. C., RULES OF PRACTICE AND PROCEDURE, § 1.231(f), 4 FED. REG. 3347 (1939).

[188] The writer expects to publish at some time in the near future an extended article on the commission's administrative process as exemplified by its decisions.

[189] F. C. C., STANDARDS OF GOOD ENGINEERING PRACTICE, effective August 1, 1939, 4 FED. REG. 2862 (1939).