

MEMORANDUM OF THE FEDERAL COMMUNICATIONS
COMMISSION ON S. 658

76872

1. Sections 5 and 15, Sections 5 and 15 of S. 658, as reported on April 8, 1952 by the House Committee on Interstate and Foreign Commerce contains provisions which would deprive the Commission of the benefits of consultation with any members of its staff in adjudicatory proceedings which have been designated for hearing, including those members who perform no investigatory or prosecutory functions which might conceivably affect their impartiality. This result would flow from the proposed Section 409(c)(2) contained in Section 15 of the bill (page 65 of the Committee Print, Union Calendar No. 559), which prohibits Commissioners from consulting with, or receiving recommendations from, any members of its staff in such hearing cases, with the exception of a single professional assistant appointed by each Commissioner pursuant to the provisions of the proposed new Section 4(f)(2) of the Communications Act. This complete separation is emphasized by the provisions of the proposed Section 5(c) of the Act contained in Section 5 of the bill (appearing at page 38 of the Committee Print), which, while directing the Commission to establish a "review staff" to aid it in hearing cases, limits such staff to summarizing, without recommendation, the evidence in hearing records and exceptions to initial decisions and replies thereto, and to preparing without recommendations and in accordance with specific directions, memoranda opinions, decisions and orders.

In view of these provisions, except for the limited degree of help the Commission could secure from the review staff, it would have to make all decisions on contested issues of fact, law and policy upon consultation limited solely to the Commissioners themselves, and each Commissioner in turn could receive recommendations as to such determinations only from his single personal professional assistant. The Commission would be prohibited from securing the advice of the review staff which had made the analyses, or any other members of its staff, even though the latter had had absolutely no part in the investigation or prosecution of the particular case, either during the hearing, or prior thereto.

In our opinion the principal effect of these provisions would be to paralyze the Commission's functions at a time when it is imperative that the Commission be able to act efficiently and expeditiously to permit the proposed nationwide expansion of television broadcasting to become a reality, as well as to take care of its heavy workload in other vital areas of the communications field. For in all adjudicatory cases coming to the Commission for review of an examiner's initial decision, the Commission itself would apparently be required to consider each exception filed to either a finding of fact or conclusion of law contained in the initial decision, and then instruct the review staff with respect to each such exception. The magnitude of this task, for which each Commissioner could rely only on the advice of his single professional assistant, can be appreciated when it is realized that it is not uncommon for the exceptions filed by a single party in a hearing case to run to well over 100 in number. Moreover, since the proposed provisions would not permit consultation between professional assistants, or between any Commissioner and the assistants to other Commissioners, the Commission would be forced to devote a disproportionate amount of time to conferences, at which the seven professional assistants could not be present, held for the purpose of drawing up point

by point directions to the review staff on each matter of fact or law raised upon exceptions to initial decisions. The same cumbersome procedure would necessarily be required in disposing of every question raised in all interlocutory motions made in hearing cases, and in petitions for rehearing of hearing cases.

Furthermore, it is believed that this isolation of the Commissioners from the members of its staff, who have been employed for the very reason that they have particular specialized skills not available to each of the individual Commissioners, is a fundamental departure from the traditional concept of bipartisan administrative agencies, and is completely unnecessary to achieve the purposes of the proposed legislation. Since the Commission's rules, adopted pursuant to the Administrative Procedure Act, already prohibit consultation with members of the Commission staff who, because of their previous participation in the case, might conceivably lack an objective perspective, the only conceivable result of the proposal would be to prohibit the Commission from making effective use of its staff specialists in a dynamic and complicated field where such specialized knowledge is particularly essential.

The apparent attempt of the bill to equate Commissioners in their consideration of adjudicatory proceedings with judges of appellate courts, ignores the fundamental distinction between Commissioners and judges with respect to both their functions and the relationship of their experience and training to the tasks they are required to perform. While members of the judiciary are required to resolve conflicts of law and fact presented to them by the parties to a proceeding, a Commissioner's job in deciding particular cases goes beyond this. For, in addition to resolving the conflicts on the record presented to them in exceptions to the initial decisions of examiners, Commissioners have the duty and responsibility of determining the results of contested proceedings on the basis of policy considerations as to how the legislative standard of public interest, convenience and necessity, and of encouraging the larger and more effective use of radio, can best be met. This important responsibility rests primarily on the Commissioners themselves rather than on the examiners who preside at the hearings, or on the judges to whom interested parties may subsequently take an appeal. In addition, while a judge is called upon to decide questions of a legal nature to which his previous training has pointed, and can perform this function effectively with the aid of one or two law clerks whose training is along the same professional lines, every member of the Federal Communications Commission must deal with a wide variety of questions involving economic, engineering, legal and other facets of the communications field. No one Commissioner can be expected to make satisfactory decisions in these several fields without the assistance and advice which may be gained from free consultation with members of the staff possessing specialized training in each of the fields.

Although the problems raised by the sections to which this letter is directed might be solved to a limited extent by permitting an extensive enlargement of the professional staffs assigned directly to each of the Commissioners, from the one to which they would be limited under the bill to whatever number might be found adequate, this solution would necessarily involve a seven-fold duplication of work and staff, as well as complicated, time consuming problems of

Intra-Commission coordination. The Commission respectfully urges, therefore, that both of the sections referred to should be deleted from the bill. The Commission has proposed, in the place of such provisions, a provision making it mandatory, as is presently the case under the Commission's rules, that members of the Commission's staff engaged in prosecutory or investigatory functions, or in any other respect involved in any adjudicatory case, be prohibited from consulting with or making recommendations to the Commission in such cases on an ex parte basis, after the case is once designated for hearing. Such a provision carries the separation principle beyond that required for all agencies under the Administrative Procedure Act in that it applies to all classes of adjudicatory cases while the Administrative Procedure Act does not. A copy of such language, to be substituted for the proposed Section 5(c), is attached.

2. Section 8 of the bill (pages 46 through 50 of the Committee Print, Union Calendar No. 559).-- This section of the bill, which would make extensive changes in the provisions of Section 309 of the Communications Act relating to the processing of radio and television applications is, in our opinion, completely unsound. The section would make two basic changes in the provisions of the existing law. Under the proposed new Section 309(b), before the Commission could designate an application for hearing on the ground that it was unable to determine that a grant would serve the public interest, it would be required to notify the applicant, as well as all other known parties in interest, of the reasons why it believed that the application could not be granted and to afford the applicant an opportunity to show why it believed that these reasons were not valid. Only after considering such a reply from the applicant could the Commission formally designate the application for hearing. The proposed Section 309(c) would establish a protest procedure whereby any "party in interest" could file a protest within 30 days of the making of a grant without a hearing, and upon the filing of such a protest the Commission would be required to set aside the grant and designate the application for hearing on the issues stated by the protestant.

The first of these two proposals would establish an unnecessary and burdensome procedure, entailing needless expense both upon new applicants and the government, whereby before the Commission could designate an application for hearing it would have to process the application twice, first upon consideration of the application as filed, and subsequently, upon consideration of the reply received from the applicant. This would be true even in the great number of cases where a hearing is automatically required because the application is inconsistent with the Communications Act or the Commission's rules, or because it is mutually inconsistent with another pending application. Moreover, this provision, which has apparently been inserted in order to avoid unnecessary hearings where further information from the applicant would make a hearing unnecessary, is absolutely unnecessary to achieve this purpose. For under existing Commission rules, where an application has been designated for hearing the applicant may, at any time before the hearing, petition the Commission for reconsideration of its action, pursuant to the provisions of Section 405 of the Act, and request that the hearing be set aside and the application granted. This procedure has been regularly used by applicants and in the substantial number of cases where the petition showed valid grounds for such action, the Commission has granted the petitions and cancelled the hearings. It seems clear that such a procedure which,

unlike the one proposed in the pending bill, does not require automatic re-processing of all applications, is very much to be preferred to the one contained in the proposed new Section 309(b).

The so-called protest rule procedure which would be established by the proposed Section 309(c) would, in our opinion, subject the Commission processes to greater and even more unnecessary delays. In this instance, to the burdens of delays caused to new applicants by the proposed procedure, would be added the likelihood of the greater expense in legal and engineering costs of prosecuting applications, costs which presently run to very substantial amounts, particularly in hearing cases.

At the present time, where an application for a radio license is granted without hearing, persons who would be aggrieved or adversely affected thereby may always petition for reconsideration pursuant to the provisions of Section 405 of the existing Act and the relevant provisions of the Commission's rules. To the extent that the protest procedure would merely give such a right to "parties in interest," an undefined term which presumably means no more and no less than the term "aggrieved or adversely affected," the new procedure would appear to be merely redundant. However, there are two important distinctions between the present procedure under Section 405 of the Act and the proposed protest procedure. In the first place, filing a petition for reconsideration under Section 405 does not, in the absence of independent action by the Commission, operate to stay the effectiveness of the grant against which the petition is directed. Of even greater importance, however, is the fact that filing of a petition for reconsideration or rehearing pursuant to Section 405 of the existing Act does not automatically result in the setting aside of the grant and the designation of the application for hearing. In all cases the Commission is entitled to consider the petition upon its merits and to determine whether upon the basis of the facts alleged any valid claim has been made which would warrant setting aside the grant and designating the application for hearing. The right of the Commission to consider such petitions upon the pleadings and without first holding a formal hearing thereon has been specifically upheld by the Supreme Court in the case of Federal Communications Commission v. WJR, The Goodwill Station, Inc., 377 U. S. 265.

Under the protest procedure, protestants are required to specify in their petition allegations of fact showing that they are a party in interest, and to specify with particularity the "facts, matters and things relied upon." If the Commission finds that they have met these two requirements, i. e., they have shown that they are a party in interest and have specified the substantive grounds for their protest, the Commission is apparently required to set the application for hearing upon the issues set forth in the protest. No provision whatsoever is made for the Commission to consider the protest upon its merits and determine without a hearing that it states no valid reason for setting aside the grant, where such a decision can be made as a matter of law, similar to a judicial decision that a cause of action is not stated. The result is, of course, that the protest procedure affords any party in interest, including, presumably, an existing station whose only interest is that it might be economically injured by competition from the new licensee, the right to hold up a grant for an indefinite

period of time and to require new applicants to go through the expense of the hearing, even where the successful outcome of such a hearing is clear. The possibilities inherent in such a procedure for existing television licensees to delay the entering of newcomers into the field are obvious.

The Commission believes therefore that the entire proposed revision of Section 309 is undesirable and unnecessary and that the existing provisions of Section 309 of the Communications Act should be retained in their present form.

ATTACHMENT

No person engaged directly or indirectly in any prosecutory or investigatory function in any adjudication proceeding or who is subject to the supervision or direction of any person performing or supervising any such prosecutory or investigatory activity shall advise or consult with the Commission with respect to decisions by it after formal hearing in any adjudication as defined in section 2(d) of the Administrative Procedure Act.

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Sec. 402. ¹(a) The provisions of the Act of June 25, 1948 (62 Stat. 992 ¹), as amended, relating to the enforcing or setting aside of orders of the Interstate Commerce Commission are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under the provisions of subsection (b) hereof), and such suits are hereby authorized to be brought as provided in that Act.

The effect of this language is to reestablish a method of review of those orders of the Federal Communications Commission, other than those issued in the exercise of its radio-licensing functions, which was in existence prior to the enactment of Public Law 901 on December 29, 1950. ² Prior to the enactment of that law, section 402 (a) of the Communications Act of 1934, as amended, to and including May 24, 1949, provided that the provisions of Title 28 U. S. C. relating to the enforcing or setting aside of orders of the Interstate Commerce Commission should be applicable to suits to enforce, enjoin, set aside, annul or suspend any order of the Communications Commission, except those issued in the exercise of its radio-licensing functions. 47 U. S. C. Sec. 402 (a). The pertinent provisions of Title 28 are embodied in Sections 2321 to 2325, inclusive, and Section 1253. Sections 2321 to 2325 provide for the review of orders of the Interstate Commerce Commission by a District Court of three judges, consisting of a Circuit Judge and two District Judges. Section 1253 provides

1. The reference to page 992 of 62 Stat. is apparently in error. The correct citation would appear to be 62 Stat. 969.

2. In Senate Report 44 to accompany S. 658 on page 11, under the title of "Section 15," it is stated that subsection (a) "substantially restates existing law with necessary clarification..." This statement apparently overlooks the existence of Public Law 901.

for a direct appeal to the Supreme Court from the decisions of such three-judge courts.³ Similar provisions existed in the statutes for review of the orders of the Secretary of Agriculture under the Packers and Stockyards Act under the Perishable Agricultural Commodities Act and the orders of the United States Maritime Commission, or of the Federal Maritime Board or of the Maritime Administration. This method of review not only disrupted the ordinary conduct of litigation of the courts by requiring the services of two District Judges and one Circuit Judge, when in ordinary litigation only one District Judge is needed for a trial, but also required the Supreme Court to review many cases of minor importance involving lengthy records and thus unduly added much to the burden of that Court.

In 1942 the Judicial Conference commenced a study of this problem. This study continued, through committees of the Conference and reports of those committees and discussion in the Conference itself, for several years. The study resulted in a recommendation to Congress and in the drafting and enactment, on December 29, 1950, of Public Law 901. In place of a review in three-judge courts, with direct appeal to the Supreme Court, of the orders of the Federal Communications Commission (other than those issued in the exercise of its radio-licensing functions) and also of the orders of the Secretary of Agriculture and of the United States Maritime Commission, Board or Administration above referred to, that law substituted a review by the appropriate United States

3. The provisions of Title 28 referred to in the text are reenactments in substance of the Urgent Deficiencies Act of October 22, 1913.

Court of Appeals ⁴ upon the record made before the Commission, with further review on writ of certiorari by the Supreme Court in its discretion, as is the practice in most other cases coming to the Supreme Court from the Court of Appeals. This was the pattern of review which had been established by Congress for orders of the Federal Trade Commission in 1914 and which was thereafter established by Congress in respect of many other administrative boards, commissions and agencies, such as the Securities and Exchange Commission, the National Labor Relations Board, the Federal Power Commission and the Civil Aeronautics Board. It was thought by Congress in enacting Public Law 901 that a large saving of judicial time and energy would result. It was generally recognized that three-judge courts were not well adapted for conducting trials because of the necessity for holding conferences whenever questions arose, in the course of a hearing, as to the admissibility of evidence. Moreover, the appeal as of right to the Supreme Court from the decisions of three-judge courts was inconsistent with the system of review on writs of certiorari established for the Supreme Court by the Judicature Act of February 13, 1925. (43 Stat. 936.) Prior to the establishment of the system of review on certiorari, appeals to the Supreme Court from the United States Courts of Appeals for the several Circuits was as of right. But as a result of this the volume of business in the Supreme Court became so great that that tribunal could not both promptly and efficiently dispose of the appeals which reached it. Congress in setting up the system of review on certiorari made the United States Courts of Appeals courts of

4. Section 3 of Public Law 901 provided that the venue of any proceeding under the Act should be in the Judicial Circuit wherein is the residence of the party or any of the parties filing a petition for review, or wherein such party or any of the parties has its principal office, or in the United States Court of Appeals for the District of Columbia.

last resort in all of the cases appealed from either administrative agencies or United States District Courts, except those which reached the Supreme Court on writ of certiorari in its discretion. It was thought by Congress that one appeal as a matter of right from the order of an administrative agency or the judgment of a District Court was sufficient and that only those cases should go to the Supreme Court which were accepted by it within its discretion. This discretionary review is usually limited by the Supreme Court so far as cases in United States Courts of Appeals are concerned to those in which a Circuit Court of Appeals has rendered a decision in conflict with a decision of another Circuit Court of Appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by the Supreme Court; or has decided a federal question in a way probably in conflict with applicable decisions of the Supreme Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision; or to those cases wherein the United States Court of Appeals for the District of Columbia Circuit has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or statute of the United States which has not been, but should be, settled by the Supreme Court; or to those cases wherein that court has not given proper effect to an applicable decision of the Supreme Court.

Public Law 901 was a considered and deliberate step forward taken by the Congress in order to conform the review of those orders of the Federal Communications Commission presently under discussion to the pattern and theory

of review in the United States Courts of Appeals as a matter of right and in the Supreme Court on certiorari set up by Congress under the certiorari system above-described.

The Judicial Conference at its March meeting made the following recommendation:

The Judicial Conference of the United States having considered the provisions of Section 15 of S. 658 and H. R. 1730 of the Eighty-second Congress which deals with the judicial review of orders of the Federal Communications Commission, and the effect of such Section 15 upon Public Law 901 of the Eighty-first Congress, approved December 29, 1950; and it appearing that enactment of Section 15 in either of such bills would repeal the provisions of Public Law 901 insofar as review of Section 402 (a) orders of the Commission are concerned and again vest in a three-judge statutory court jurisdiction to review such orders; and it being the view of the Conference that Public Law 901 provides a greatly improved procedure for the review of such orders, the Conference urges that Section 15 be amended so that it will not modify or amend Public Law 901 with respect to the review of 402 (a) orders. (See Report of the Proceedings of a Special Session of the Judicial Conference of the United States, March 19-20, 1951, page 12.)

It is submitted, therefore, that the provision of S. 658 set forth above should be omitted from the Act, since it has the effect of repealing by implication Public Law 901 so far as that law is applicable to the orders of the Federal Communications Commission other than those issued in the exercise of its radio-licensing functions.

It is recommended that there be substituted for the language in question, the following:

Sec. 15. Section 402 of such Act is amended to read as follows:

Sec. 402. (a) Any suit ~~to enforce~~^{to}, enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under the provisions of subsection (b) hereof) shall be governed by the Act of December 29, 1950 (Public Law 901, 81st Congress.)

II

The provision of S. 658 on pages 26 and 27 to which the attention of the Judicial Conference was called is a part of section 402 (b) which provides that appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia Circuit in cases involving construction or operation of apparatus for the transmission of energy or communications, or signals by radio. The provision in question is in the following language:

(j) The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States as hereinafter provided--

(1) an appeal may be taken direct to the Supreme Court of the United States in any case wherein the jurisdiction of the court is invoked, or sought to be invoked, for the purpose of reviewing any decision or order entered by the Commission in proceedings instituted by the Commission which have as their object and purpose the revocation of an existing license or any decision or order entered by the Commission in proceedings which involve the failure or refusal of the Commission to renew an existing license. Such appeal shall be taken by the filing of an application therefor or notice thereof within thirty days after the entry of the judgment sought to be reviewed, and in the event such an appeal is taken the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such an appeal is allowed under such rules as may be prescribed.

This provision is also inconsistent with the pattern of review set up by Congress in the Judicature Act of 1925 as above-described. In respect of this provision the Conference said in its report above cited:

And it further appearing to the Conference that the effect of such Section 15 would be further to amend Section 402 of the Communications Act of 1934 so as to provide for an appeal as of right to the Supreme Court from judgments of the Court of Appeals of the District of Columbia on review of Section 402 (b) orders of

the Communications Commission which involve the revocation of existing licenses, or the failure to renew existing licenses, and that such amendment would carve out a small segment of Section 402 (b) orders, all of which under existing law are reviewable in the Supreme Court by petition for certiorari; and it being the view of the Conference that review procedure legislation should be kept within the pattern established by the Act of February 13, 1925, 28 U. S. C., Sec. 1254, and since generally adhered to, namely, that where appeal as of right lies to a United States court of appeals, review in the Supreme Court shall be by petition for certiorari; the Conference therefore urges that Section 15 be further amended so as to leave all of Section 402 (b) orders reviewable in the Supreme Court only by petition for certiorari. (See Report of the Proceedings of a Special Session of the Judicial Conference of the United States, March 19-20, 1951, pages 12 and 13.)

Senate Report No. 44 to accompany S. 658, at pages 12 and 13, justifies the provision authorizing an appeal as of right to the Supreme Court from the Court of Appeals for the District of Columbia Circuit, in the classes of cases presently under discussion, in the following comment:

Subsection (j) contains important amendments to existing law. Under the present law, review by the Supreme Court of decisions of the United States Court of Appeals for the District of Columbia is limited to certiorari proceedings and to certification by the court of appeals. This subsection provides that, in a limited class of cases, appeals may be taken directly and as a matter of right to the United States Supreme Court.

Experience to date has clearly demonstrated that it is extremely difficult for private litigants to secure an ultimate Supreme Court review of Commission action by the certiorari method. Since 1927, only one such petition has been granted upon request of a private litigant, whereas only one such petition has been denied when filed by the Government. The result has been that many cases involving Commission action on applications for renewal and modification of licenses have, during this period, been reviewed by the Supreme Court upon request of the Government, and only one has received such consideration upon petition of a private litigant. Since either revocation or renewal proceedings may result in absolute or final loss of license, the committee believes that adequate opportunity should be given the parties affected in such cases to litigate their claims; and that, in this limited class of cases, opportunity should extend to and include review by the highest judicial tribunal. Such appeals, as a matter of right, are given in practically all cases

involving decisions and orders of the Interstate Commerce Commission and are given under section 402 (a) of the Communications Act in cases such as the network cases (National Broadcasting Company, Inc., et al v. U. S. et al., (319 U. S. 190)) which involve the exercise by the Commission of its legislative, as distinguished from its judicial powers.

The committee sees no basis for the distinction made so long as the result reached is determinative and final in either case and goes to the right of a litigant to remain in the business of his choice. The inclusion of such a provision should impose no undue hardship upon the Supreme Court because of the limited number of such cases. On the contrary, it would make possible the development of an authoritative body of law upon a subject vital to those engaged in the communications business and of substantial importance to the public generally.

Attention should be called to the fact that the assertion in the last sentence of the second paragraph of the foregoing quotation is in error so far as section 402 (a) of the Communications Act is concerned. The assertion reflects the law as it existed prior to the enactment of Public Law 901 on December 29, 1950. Since the enactment of that law, as is pointed out in the comments above concerning section 15 of S. 658 as it amends section 402 (a) of the Communications Act, review of the orders of the Commission, other than those issued in the exercise of its radio-licensing functions, is by the appropriate United States Court of Appeals on the record made before the Commission, with further review by the Supreme Court at its discretion on writ of certiorari.

It is true, as indicated in the Senate Committee Report, that, since 1927 (the year of the creation of the Radio Commission, the predecessor of the Federal Communications Commission), the Commission has been much more successful in securing affirmative action on petitions in the Supreme Court for writs of certiorari than have private litigants. The records of the Court of Appeals for the District of Columbia Circuit show, so far as

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Commission cases generally are concerned, that since 1927 there has been a total of 28 cases in which applications for writs of certiorari have been made to the Supreme Court and that in 10 of these, applied for by the Commission, all of the applications were granted, and that in 18, applied for by private party litigants, 1 application was granted and 17 denied. ⁵ The records of the court show further that within those 28 cases, 10 involved Commission revocations of radio licenses or refusals to renew such licenses, and that within these classes of cases 4 applications for writs of certiorari filed by the Commission were granted and that 6 filed by private party litigants were denied.

It is submitted, however, that the inference seemingly drawn in the Senate Committee Report from these bare statistics that the Supreme Court is inhospitable to private litigants applying for writs of certiorari is not warranted. In the absence of a clear showing to the contrary -- and none is made -- it is to be presumed that in the cases in which private party litigants/for writs of certiorari the questions involved were not such as to satisfy the criteria for the granting of writs described earlier in this statement,

5. It is to be noted that from 1927 until 1930 the Supreme Court lacked jurisdiction to review decisions of the Court of Appeals for the District of Columbia relating to orders of the Federal Radio Commission. Federal Radio Commission v. General Electric Co., 281 U. S. 464 (May 19, 1930). It acquired such jurisdiction under the Act of July 1, 1930, 46 Stat. 844. Federal Radio Commission v. Nelson Bros. B. & M. Co., 292 U. S. 613 (1934). Of the 27 cases mentioned in the text, three arose during these years when the Supreme Court was without jurisdiction to review: a writ of certiorari was granted on petition of the Radio Commission in Federal Radio Commission v. General Electric Co., supra, and subsequently dismissed, and writs of certiorari were denied the private party petitioners in Agricultural Broadcasting v. Federal Radio Commission, 281 U. S. 706 (June 2, 1930), and City of New York v. Federal Radio Commission, 281 U. S. 729 (March 12, 1930).

It is submitted also that the position taken in the Senate Committee Report -- that the result in cases involving revocations by the Commission of radio licenses or refusals by the Commission to renew such licenses is determinative of the right of the litigant to remain in the business of his choice -- does not warrant an invasion of the certiorari system which was set up by Congress in the Judicature Act of 1925: As pointed out earlier in this statement, the volume of business in the Supreme Court prior to 1925 when appeals to that tribunal from the United States Courts of Appeals were as of right, had become so great that the Supreme Court could not promptly and efficiently dispose of the cases which reached it. It was thought by Congress as said above that one appeal -- to a United States Court of Appeals -- as a matter of right from an order of an administrative agency or a judgment of a District Court was sufficient, and that review thereafter in the Supreme Court should be at its discretion only. Congress in providing in the Judicature Act of 1925 this system of review set up, so to speak, a dike against the flood of appeals which was so far overwhelming the work of the Supreme Court as to make it substantially impossible for it competently to deal with its docket. The provision in S. 658 presently under discussion that there shall be appeals as of right to the Supreme Court from the decisions of the United States Court of Appeals for the District of Columbia Circuit in cases involving Commission revocations of or refusals to renew radio licenses will create a breach in that dike. Such a breach will be likely to widen. There are many other cases in which the action of courts or commissions results in the termination of a business, for example, revocation of or refusals to renew permits to graze upon the public domain or to fish in public waters. Indeed the action of courts at

times terminates not merely a litigant's business, but his liberty or even his life. If in such cases an appeal as of right to the Supreme Court from the decisions of the United States Courts of Appeals is not thought necessary as a matter of justice, review of such cases being on writs of certiorari only, a fortiori an appeal of right is not necessary in the classes of cases presently under discussion.

It is, therefore, recommended that the language above quoted from pages 26 and 27 of S. 658 be omitted from the bill and that the following be substituted therefor:

(j) The court's judgment shall be final, subject however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28 of the United States Code, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.