

Honorable Sam Rayburn
Speaker of the
House of Representatives
Washington 25, D.C.

Speaker Rayburn:

The Federal Communications Commission believes that it has a responsibility to call to your attention certain provisions of S. 658, a bill to amend the Communications Act of 1934, which was reported favorably by the Committee on Interstate and Foreign Commerce on April 8, 1952 and is now pending before the House of Representatives. In view of the extensive comments which the Commission has already made to both the House and Senate Committees which have considered this legislation, we should ordinarily refrain from further comment at this time, were we not convinced of the importance of bringing to your attention certain provisions of the bill which we believe are contrary to the basic principles of the Communications Act and, if enacted, would seriously impede the Commission in carrying out its statutory responsibilities. The present letter is limited to consideration of two provisions of the bill relating to the organization of the Commission to which the Commission believes particular attention should be directed. A subsequent letter dealing with certain other important provisions, principally procedural in nature, is in process of preparation and will be submitted for your consideration in the very near future.

The provisions of the bill which this letter is concerned with are those appearing in Sections 5 and 15 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 Section 5(c) 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 bi-partisan 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.

Because of absence from the city, Commissioner Jones did not participate in the formulation of the views expressed in this letter.

By Direction of the Commission

Paul A. Walker
Chairman

Att.

~~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.