

## FACILITATING THE PROMPT AND ORDERLY CONDUCT OF THE BUSINESS OF THE FEDERAL COMMUNICA- TIONS COMMISSION

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Mr. PASTORE, from the Committee on Commerce, submitted the following

### R E P O R T

[To accompany S. 2034]

The Committee on Commerce, to whom was referred the bill (S. 2034) to amend the Communications Act of 1934, as amended, in order to expedite and improve the administrative process by authorizing the Federal Communications Commission to delegate functions in adjudicatory cases, repealing the review staff provisions, and revising related provisions, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

#### AMENDMENTS

The bill as amended and approved by your committee reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That subsection (c) of section 5 of the Communications Act of 1934, as amended, is hereby repealed.

SEC. 2. Subsection (d) of section 5 of the Communications Act of 1934, as amended, is amended to read as follows:

“(c)(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise

acting as to any work, business, or matter, and may at any time amend, modify, or rescind any such rule or order. Nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in clauses (2) and (3) of section 7(a) of the Administrative Procedure Act, of any hearing to which such section 7(a) applies.

“(2) As used in this subsection (c) the term ‘order, decision, report, or action’ does not include an initial, tentative, or recommended decision to which exceptions may be filed as provided in section 409(b).

“(3) Any order, decision, report, or action made or taken, pursuant to any such delegation, unless reviewed as provided in paragraph (4), shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner as orders, decisions, reports, or other actions of the Commission.

“(4) Any person aggrieved by any such order, decision, report, or action, may file an application for review by the Commission, within such time and in such manner as the Commission shall prescribe. The Commission shall have authority on its own initiative to order any matters delegated under paragraph (1) before it for review on such conditions as it shall prescribe and shall make such orders therein, consistent with law, as shall be appropriate.

“(5) In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the panel of Commissioners, individual Commissioner, employee board, or individual employee, has been afforded no opportunity to pass.

“(6) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with section 405.

“(7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1). The time within which a petition for review must be filed in a proceeding to which section 402(a) applies or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.

“(8) The Secretary and seal of the Commission shall be the secretary and seal of each panel of the Commission, each individual Commissioner, and each employee board or individual employee exercising functions delegated pursuant to paragraph (1) of this subsection.”

SEC. 3. Section 405 of the Communications Act of 1934, as amended, is hereby amended to read as follows:

## "REHEARINGS

"SEC. 405. After an order, decision, report, or action has been made or taken in any proceeding by the Commission or by any designated authority within the Commission pursuant to a delegation under section 5(c)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(c)(1), in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b) in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or case, but any order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order."

SEC. 4. Section 409 (a), (b), (c), and (d) of the Communications Act of 1934, as amended, are amended to read as follows:

“(a) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, the person or persons conducting the hearing shall prepare and file an initial, tentative, or recommended decision, except where such person or persons become unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.

“(b) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to the initial, tentative, or recommended decision, which shall be passed upon by the Commission or by the authority within the Commission, if any, to whom the function of passing upon the exceptions is delegated under section 5(c)(1).

“(c) (1) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no person who has participated in the presentation or preparation for presentation of such case at the hearing or upon review shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case to the hearing officer or officers or, upon review, to the Commission or to any authority within the Commission to whom, in such case, review functions have been delegated by the Commission under section 5(c)(1), unless upon notice and opportunity for all parties to participate.

“(2) The provision in subsection (c) of section 5 of the Administrative Procedure Act which states that such subsection shall not apply in determining applications for initial licenses, shall not be applicable hereafter in the case of applications for initial licenses before the Federal Communications Commission.

“(d) To the extent that the foregoing provisions of this section and section 5(c) are in conflict with the provisions of the Administrative Procedure Act, such provisions of this section and section 5(c) shall be held to supersede and modify the provisions of that Act.”

SEC. 5. Notwithstanding the foregoing provisions of this Act, the second sentence of subsection (b) of section 409 of the Communications Act of 1934 (which relates to the filing of exceptions and the presentation of oral argument), as in force at the time of the enactment of this Act, shall continue to be applicable with respect to any case of adjudication (as defined in the Administrative Procedure Act) designated by the Federal Communications Commission for hearing by a

notice of hearing issued prior to the date of the enactment of this Act.

SEC. 6. Section 5(e) of the Communications Act of 1934, as amended, is hereby designated section 5(d).

#### PURPOSE OF LEGISLATION

The purpose of this legislation is to amend the Communications Act of 1934 so that the Federal Communications Commission will be able, by making better use of its own time and more effective use of its experienced and technically qualified personnel, to handle its large workload of adjudication cases with greater speed and efficiency than is presently possible. This would be done by authorizing the FCC to delegate functions in adjudicatory cases, repeal the review staff provisions, and modify certain related sections of the Communications Act that are affected thereby.

#### GENERAL STATEMENT

S. 2034 was introduced by Senator John O. Pastore, chairman of the Subcommittee on Communications of your committee, on June 7, 1961, at the request of the Federal Communications Commission. This bill has for its purpose the expediting and improving of the administrative process of the Commission. It would authorize the Commission to delegate review functions in adjudicatory cases, repeal the "review staff" provisions of section 5(c) of the Communications Act of 1934, as amended, and modify certain related provisions.

The bill is an outgrowth of Reorganization Plan No. 2 of 1961, transmitted by the President to the Congress on April 27, 1961, and disapproved by the House on June 15, 1961. The plan was designed to provide the Commission with greater flexibility in the handling of its business in order to (1) expedite the disposition of such business and (2) permit the Commissioners to concentrate on major matters of planning and policy. The plan would have given the Commission the widest possible discretion to delegate its functions.

It was generally agreed that the objectives of plan No. 2 were desirable and meritorious, but objection was raised on the ground that it would amend substantive provisions of the Communications Act—specifically, those in section 409(b) giving parties the right to file exceptions to initial decisions of examiners and to have oral argument thereon before the full Commission. It was suggested that these basic provisions of the act should be amended by the legislative process rather than a Presidential reorganization plan. In addition, it was urged that section 2 of the plan which proposed to transfer to the Chairman of the Commission the function of assigning Commission personnel, including Commissioners, to perform the delegated functions, would concentrate too much power in the Chairman.

In the hearings before this committee on May 23, there was division of opinion among the Commissioners of the Federal Communications Commission with respect to the meaning or legality of some of the provisions of plan No. 2. At the hearing before your committee, the Commissioners were urged by the subcommittee chairman to resolve their differences and to submit to your committee as quickly as possible

a legislative proposal that would bring about the desirable objectives of Reorganization Plan No. 2. S. 2034 was the result of the cooperative effort then undertaken by the Commissioners.

S. 2034 would give the Commission considerable discretion in handling its caseload. The Commission would be empowered to use a panel of Commissioners or employ boards to review those cases which it deems of insufficient importance to warrant review by the full Commission. The parties aggrieved by the decision of the panel or employee board could apply to the Commission for review, but such further review would be solely in the discretion of the Commission, and could be denied without specifying reasons therefor. This procedure is patterned on that long used by the Supreme Court in passing on petitions for writ of certiorari.

In addition, the Commission would be permitted full use of its staff in adjudicatory cases where that staff had not been engaged in the investigation or prosecution of the case or a factually related one. This is accomplished by the elimination of section 5(c) and amending certain portions of section 409(c) of the present act. By eliminating section 5(c) and modifying portions of section 409(c) of the Communications Act, the Commission would have available to it the expert advice and services of qualified personnel in the Office of General Counsel, Office of Chief Engineer, and Office of Chief Accountant, as well as the full use of the members of the review staff.

Under S. 2034 there would be a right to obtain review of the initial decision but not necessarily before the full Commission. This bill makes no provision for the transfer of assignment functions from the Commission to the Chairman. Section 5(a) of the Communications Act now gives the Chairman broad authority to coordinate and organize the work of the Commission. Your committee agrees with the Commission that any additional specification of authority, such as to assign personnel, should be accomplished by Commission rule.

The committee wishes to point out one other background fact. The above-described revisions in S. 2034 are designed to modify the requirements imposed upon the Commission by the Communications Act Amendments of 1952. The amendments adopted by the Congress in 1960 (Communications Act Amendments of 1960, Public Law 86-752, approved Sept. 13, 1960) were one step taken to afford the Commission sufficient flexibility in its administration and procedures. S. 2034, as amended by your committee, is another step in that direction. In the judgment of your committee, this legislation will bring about much needed administrative improvements within the Commission and will also speed up its adjudicatory proceedings while providing the necessary safeguards to assure due process.

In the further hearings before your subcommittee on June 28, 1961, on S. 2034 concern was expressed that if S. 2034 is enacted, the Commission might appoint to an employee board of review, employees of less qualification and stature than examiners whose decisions they would be reviewing.

Your committee has noted the intention of the Commission to use employee boards to review initial decisions in adjudicatory cases involving purely routine issues. The committee has been assured by the Commission that it will select for such work the very best employees, including examiners, who by reason of their training, experience, competence, and character are especially qualified to

perform such review functions. In addition, your committee urges the Commission in designating employees to serve on review boards, to select individuals who, at the time of their designation, are in grade classification or compensation level equivalent to or higher than hearing officers whose decisions they would be reviewing.

Concern was also expressed that while the Commission, under the proposed revision of section 405 of the Communications Act relating to rehearings, shall take action within 90 days on a petition for rehearing with respect to an instrument of authorization granted without a hearing, a panel of Commissioners or an employee board would not be required to take action within such 90-day period. Accordingly, your committee has provided in section 3 of the bill an appropriate amendment to the proposed revision of section 405 of the Communications Act to require action by a review panel or board within 90 days of the filing of such a petition. Your committee recognizes that the decision of the designated authority within the Commission, unlike that of the Commission, may not be final and effective if an application for review is filed pursuant to proposed section 5(c)(3) but believes that the same time limitation should be applicable. In the judgment of your committee, the 90-day period provided in your committee's amendment should be clearly sufficient to act on any petition for rehearing.

#### CONCLUSION

Your committee feels that the public interest will be served by the adoption of this legislation. The strengthening of the Communications Act provided by the grant of additional authority to the Commission to delegate its adjudicatory review functions should be of material assistance to the Commission in increasing its efficiency, cutting down on its backlog of pending cases, and permitting the Commissioners to concentrate on the more important and far-reaching policy problems with which they are faced, such as the one involving a space satellite communications system.

Your committee urges enactment of this legislation.

#### SECTION-BY-SECTION DISCUSSION

1. Section 1 would repeal the provisions of section 5(c) of the Communications Act, relating to the review staff. Under these provisions, the review staff, even though it has no other functions than assist the Commission in adjudicatory cases, is nevertheless precluded from making any recommendations to the Commission. This restriction is wasteful and inefficient, since it deprives the Commission of the full assistance of which this review staff is capable, and requires the two-step procedure of instructions and draft order even as to the most routine interlocutory matters. The repeal of these unduly restrictive provisions should contribute to speedier action, without depriving parties of any rights in view of the continuing safeguards of section 409(c) of the Communications Act and section 5(c) of the Administrative Procedure Act.

2. Section 2 would permit the Commission to delegate any of its functions, including those in adjudicatory cases, to a panel of Commissioners, or individual Commissioners or employees, or an employee board (with the exception that adjudicatory hearings could only be conducted by one of the three authorities specified in sec. 7(a) of the

Administrative Procedure Act). The decision of the authority to whom the matter was delegated could then be reviewed, in whole or in part, by the Commission, either upon its own initiative or upon an application for review filed by a person aggrieved by the decision, but the Commission could deny such application without assigning any reasons therefor. The filing of an application for review is made a condition precedent to judicial review of a delegated decision; and the application cannot rely on questions of fact or law upon which the delegated authority has been afforded no opportunity to pass. In this way, the case will be presented to the Commission (and if the application is denied, to the courts) with a ruling on every issue, and the Commission will have an opportunity to review the decision before the matter goes before the courts. The statutory language also makes clear that the application for review procedure is inapplicable to the initial decision in adjudicatory cases; such decisions are to be reviewed solely by the filing of exceptions (as provided in sec. 409(b)).

These provisions would give the Commission much needed authority, now withheld under present section 5(d)(1), to employ panels of Commissioners or employee boards to pass on adjudicatory cases. Under the present law, it is necessary for the full Commission to hear every adjudicatory case, including such matters as fishing boat suspensions or the most routine aural broadcast cases. With the new authority the Commission would be able to concentrate on the important cases involving major policy or legal issues, and the hearing of all cases by some authority within the agency should be substantially expedited.

3. Section 3 would revise section 405, relating to petitions for rehearing, so as to reflect the above-described statutory scheme. As revised, the section would permit an aggrieved party to file a petition for rehearing only to the authority making the decision, that is, to the Commission, if it made the decision, or to the designated authority under the new 5(c)(1), if it issued the decision.

4. Section 4 would make extensive revisions in section 409, which contains general provisions relating to adjudicatory proceedings. First, the restriction in the present subsection (a) that the hearing shall be conducted only by the Commission or one or more examiners is dropped. This means that the Commission, like other agencies, will be governed by the provisions of section 7(a) of the Administrative Procedure Act and therefore, that one or more Commissioners may also conduct the hearing.

Second, subsection (b) would retain the right of a party to file exceptions, which must be passed upon by the Commission or a designated authority within the Commission (e.g., a panel of Commissioners or employee board). It would eliminate the last sentence of the present section 409(b) as unnecessary in view of the provisions of section 8 of the Administrative Procedure Act; the first sentence of the present provision is retained as the new section 409(a).

Further, subsection (b) would change the existing law by making oral argument discretionary rather than mandatory. This does not mean that oral argument will no longer be available. On the contrary, it is expected that this valuable procedure would still be greatly employed by the Commission or the panels or employee boards. But the Commission would now have the discretion not to allow such argument in those instances where in its judgment it would serve no

useful purpose, as for example, in the case of a frivolous appeal or one having no merit or designed largely to gain delay. Every other major Federal regulatory agency presently has such discretion; clearly, the Commission should be given similar flexibility.

Third, the provisions of subsection (c) relating to ex parte presentations by persons who have participated in the presentation or preparation for presentation of the case at the hearing or review stage would be retained. But the separation of functions provisions of the present section 409(c) would be deleted, and the provisions of section 5(c) of the Administrative Procedure Act would be made applicable to the Commission, including Commission proceedings to determine initial licenses. Specifically, the law would be changed as follows:

(i) There would be eliminated the provisions in present sections 409(c) (2) and (3) proscribing in adjudicatory cases any staff contact with the Commission by the offices of General Counsel, the Chief Engineer, or Chief Accountant. Instead, under the standard of section 5(c) of the Administrative Procedure Act, only staff persons who had engaged in the performance of investigative or prosecuting functions in the case or a factually related one would be precluded from participating in the intra-Commission discussions leading to the issuance of the decision. Virtually all the major administrative agencies have functioned well under it. There is thus every reason to permit the Commission to return to it. For it is clearly wasteful to cut off the Commission in an adjudicatory case from the valuable assistance of its chief legal and engineering officers, where these officers have had no investigative or prosecutory connection with the case (or a factually related one).

(ii) Under section 5(c) of the Administrative Procedure Act, the hearing officer would be precluded from consulting any person or party on any fact in issue but would be free to consult with other examiners or appropriate staff members (see (i), above) on legal or technical questions. Permitting such consultation should result in improving the quality of initial decisions and in expediting their preparation. (See Attorney General's Manual on the Administrative Procedure Act, pp. 54-55.) Significantly, examiners in other agencies are governed by the standard in section 5(c) of the Administrative Procedure Act. There is clearly no reason for proscribing appropriate consultation in the case of the examiners of this one agency.

Finally, subsection (d) would provide that to the extent the foregoing provisions or those of the new section 5(c) conflict with the provisions of the Administrative Procedure Act, the latter are superseded. This is made necessary by the statement in section 12 of the Administrative Procedure Act that no subsequent legislation shall be deemed to supersede the provisions of the act "except to the extent that such legislation shall do so expressly."

This legislation clearly goes beyond the Administrative Procedure Act by making (i) the proscription against ex parte presentations by parties applicable to any case of adjudication (including, therefore, Commission staff members who are parties in adjudicatory cases involving the validity or application of past rates, facilities, or practices of public utilities or carriers) and (ii) the separation of functions provisions of section 5(c) applicable to Commission initial license proceedings. Section 409(b) would also appear to go beyond the provisions of section 8 of the Administrative Procedure Act by

bestowing on the parties the right to file exceptions to the initial decision. Finally, it has been argued that a ruling on the merits of every pleading filed in the case is required under sections 6(d) and 8(b) of the Administrative Procedure Act. Whatever the validity of this argument, section 409(d) of the bill, by its explicit reference to the new section 5(c) which authorizes denial without assigning reasons of the application for review of a delegated decision, obviates any question on this score.

5. Section 5 would provide that all cases set for hearing by the Commission prior to the date of enactment shall continue to be governed by the second sentence of the present section 409(b). This means that in such cases the Commission must hear oral argument upon the request of the parties.

6. Section 5(e) of the Communications Act of 1934, as amended, would be redesignated as section 5(d).

#### AGENCY COMMENTS

The comments of the Federal Communications Commission and the Comptroller General of the United States are set forth below:

FEDERAL COMMUNICATIONS COMMISSION,  
*Washington, D.C., July 17, 1961.*

HON. JOHN O. PASTORE,  
*U.S. Senate, Washington, D.C.*

DEAR SENATOR PASTORE: I wish to call to the subcommittee's attention a mistake in my testimony on S. 2034 on June 28, 1961. In doing so, it is my hope that the subcommittee will be able to take corrective action.

When asked to comment on the differences between S. 2034, as introduced, and H.R. 7856, I gave as the first difference the following (p. 33, transcript of June 28, 1961):

"In section 5(d)(1), H.R. 7856, provides that a rule or order delegating a matter can be rescinded only by vote of a majority of the members of the Commission then holding office.

"In S. 2034, on the other hand, the rule or order could be rescinded by a vote of the majority of the members then participating."

Commissioner Cross and I indicated that we had no preference between the two provisions; Commissioners Hyde, Lee, and Craven indicated their satisfaction with the provision in S. 2034; and Commissioner Bartley thought there might "be merit in having the constitutional majority authorized to repeal a delegation" (pp. 33-35). He stated that in any event "we wouldn't take advantage of members in Europe on an international conference" (p. 35).

It is thus apparent that both Commissioner Bartley and I (and possibly others) misread the provision in H.R. 7856. For that provision is not limited to rescinding delegation orders or rules. It applies equally to their adoption (or modification). This means that when two Commissioners are absent because of illness or official duties, the Commission can make delegations only by a vote of four out of the five Commissioners participating, or just one vote short of unanimity. This is, I believe, much too restrictive. It would frustrate the purpose of S. 2034, which is to promote such delegations, where appropriate, in order to speed up the Commission's processes

and permit the Commissioners themselves to concentrate on the important matters of policy and planning.

Nor is the absence of two Commissioners a bizarre or rare occurrence. As you know, one Commissioner is frequently called upon to attend abroad lengthy international conferences. Indeed, both Commissioners Hyde and Craven were required to attend for several months the 1959 Geneva Conference. Further, the Defense Commissioner is also required to be absent from Washington on numerous occasions. I could, of course, give several more examples along these lines. I strongly believe, therefore, that the flexibility, which is the keystone of S. 2034, would be promoted by elimination of the requirement that a delegation rule or order may be adopted only by the vote of a majority of the members of the Commission then holding office.

I do not think that this would in any way lead to abuses. At the present time, the Commission can take action on any matter, including one of the most important substance, even though one or more Commissioners are absent. I assure you, however, that on the important matters, we await the Commissioners' return, unless they have given prior approval to its consideration in their absence. As Commissioner Bartley indicated in his testimony, such deference to absent colleagues is required as a matter of courtesy, good working relations, and practicality. For, it makes no sense to adopt a matter one week by a narrowly divided vote taken in the absence of two Commissioners, only to have it reversed the next week upon their return and participation in a motion to reconsider. In short, the restriction in H.R. 7856 is unnecessary as to any important matter such as a broad delegation rule; and it is unduly burdensome when it inhibits or blocks delegation orders with respect to routine cases, because of the prolonged absence of two Commissioners and the resultant requirement of four votes out of the five participants.

As I stated at the outset, I am writing essentially to correct the record. I hope the provision in section 5(c)(1) of S. 2034, as introduced, will be adopted. But I wish to make clear that whichever provision is adopted, I wholeheartedly support the bill.

Thank you again for your great interest in the legislative proposals to assist the Commission in the important tasks before it. We are deeply appreciative.

With all good wishes,

NEWTON N. MINOW, *Chairman.*

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COMPTROLLER GENERAL OF THE UNITED STATES,  
*Washington, June 22, 1961.*

HON. WARREN G. MAGNUSON,  
*Chairman, Committee on Commerce,  
U.S. Senate.*

DEAR MR. CHAIRMAN: Your letter of June 9, 1961, acknowledged June 12, transmitted a copy of S. 2034, entitled "A bill to amend the Communications Act of 1934, as amended, in order to expedite and improve the administrative process by authorizing the Federal Communications Commission to delegate functions in adjudicatory cases, repealing the review staff provisions, and revising related provisions," and requested our comments thereon.

Other than the explanation which was made a part of the record at the time S. 2034 was introduced, we have no information as to the necessity for or desirability of further amending the Communications Act of 1934, as amended, as proposed by S. 2034, and since the provisions of the bill would not affect the functions of our Office we have no comments with respect to its merits or recommendations regarding its enactment.

Sincerely yours,

JOSEPH CAMPBELL,  
*Comptroller General of the United States.*

#### CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill are shown as follows: (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic; and existing law in which no change is proposed is shown in roman):

#### COMMUNICATIONS ACT OF 1934, AS AMENDED

##### ORGANIZATION AND FUNCTIONING OF THE COMMISSION

SEC. 5. (a) \* \* \*

(b) \* \* \*

[(c) The Commission shall establish a special staff of employees; hereinafter in this Act referred to as the "review staff," which shall consist of such legal, engineering, accounting, and other personnel as the Commission deems necessary. The review staff shall be directly responsible to the Commission and shall not be made a part of any bureau of divisional organization of the Commission. Its work shall not be supervised or directed by any employee of the Commission other than a member of the review staff whom the Commission may designate as the head of such staff. The review staff shall perform no duties or functions other than to assist the Commission, in cases of adjudication (as defined in the Administrative Procedure Act) which have been designated for hearing, by preparing a summary of the evidence presented at any such hearing, by preparing, after an initial decision but prior to oral argument, a compilation of the facts material to the exceptions and replies thereto filed by the parties, and by preparing for the Commission or any member or members thereof, without recommendations and in accordance with specific directions from the Commission or such member or members, memoranda, opinions, decisions, and orders. The Commission shall not permit any employee who is not a member of the review staff to perform the duties and functions which are to be performed by the review staff; but this shall not be construed to limit the duties and functions which any assistant or secretary appointed pursuant to section 4(f)(2) may perform for the commissioner by whom he was appointed.]

[(d)(1) Except as provided in section 409, the Commission may,] (c)(1) *When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, [by order assign or refer any portion of its work, business, or functions to an individual commissioner or commissioners or to a board composed of one or more employees of the Commission, to be designated by such order for*

action thereon, and may at any time amend, modify, or rescind any such order of assignment or reference. Any order, decision, or report made, or other action taken, pursuant to any such order of assignment or reference shall, unless reviewed pursuant to paragraph (2), have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other action of the Commission. **】** *the Commission may, by published rule or by order, delegate any of its functions to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter, and may at any time amend, modify, or rescind any such rule or order. Nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in clauses (2) and (3) of section 7(a) of the Administrative Procedure Act, of any hearing to which such section 7(a) applies.*

(2) *As used in this subsection (c) the term "order, decision, report, or action" does not include an initial, tentative, or recommended decision to which exceptions may be filed as provided in section 409(b).*

(3) *Any order, decision, report, or action, made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4), shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.*

**【(2)】** (4) Any person aggrieved by any such order, decision, **【or】** report, or action, may file an application for review by the Commission, within such time and in such **【form】** manner as the Commission shall prescribe. **【,** and every such application shall be passed upon by the Commission. If the Commission grants the application, it may affirm, modify, or set aside such order, decision, report, or action, or may order a rehearing upon such order, decision, report, or action under section 405. **】** *The Commission shall have authority on its own initiative to order any matters delegated under paragraph (1) before it for review on such conditions as it shall prescribe and shall make such orders therein, consistent with law, as shall be appropriate.*

(5) *In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the panel of Commissioners, individual Commissioner, employee board, or individual employee, has been afforded no opportunity to pass.*

(6) *If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with section 405.*

(7) *The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1). The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.*

**【(3)】** (8) The Secretary and seal of the Commission shall be the secretary and seal of each panel of the Commission, each individual

commissioner , [or board.] and each employee board or individual employee exercising functions delegated pursuant to paragraph (1) of this subsection.

### [REHEARINGS BEFORE COMMISSION]

#### REHEARINGS

SEC. 405. After [a decision, order, or requirement] an order, decision, report, or action has been made or taken in any proceeding by the Commission, [in any proceeding, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission,] or by any designated authority within the Commission pursuant to a delegation under section 5(c)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(c)(1), in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. [Petitions] A petition for rehearing must be filed within thirty days from the date upon which public notice is given of [any decision, order, or requirement] the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any [decision, order, or requirement] order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such [decision, order, or requirement,] order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such [decision, order, or requirement,] order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission , or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission , shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission , or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b) in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding [any] or case, but any [decision, order, or requirement] order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the

original order shall be subject to the same provisions with respect to rehearing as an original order.

GENERAL PROVISIONS RELATING TO PROCEEDINGS—WITNESSES AND DEPOSITIONS

SEC. 409. (a) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, [the hearing shall be conducted by the Commission or by one or more examiners provided for in section 11 of the Administrative Procedure Act, designated by the Commission.] *the person, or persons conducting the hearing shall prepare, and file an initial, tentative, or recommended decision, except where such person or persons become unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.*

[(b) The officer or officers conducting a hearing to which subsection (a) applies shall prepare and file an initial decision, except where the hearing officer becomes unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision. In all such cases the Commission shall permit the filing of exceptions to such initial decision by any party to the proceeding and shall, upon request, hear oral argument on such exceptions before the entry of any final decision, order, or requirement. All decisions, including the initial decision, shall become a part of the record and shall include a statement of (1) findings and conclusions, as well as the basis therefor, upon all material issues of fact, law, or discretion, presented on the record; and (2) the appropriate decision, order, or requirement.] *(b) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to the initial, tentative, or recommended decision, which shall be passed upon by the Commission or by the authority within the Commission, if any, to whom the function of passing upon the exceptions is delegated under section 5(c)(1).*

(c) (1) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no [examiner conducting or participating in the conduct of such hearing shall, except to the extent required for the disposition of ex parte matters as authorized by law, consult any person (except another examiner participating in the conduct of such hearing) on any fact or question of law in issue, unless upon notice and opportunity for all parties to participate. In the performance of his duties, no such examiner shall be responsible to or subject to the supervision or direction of any person engaged in the performance of investigative, prosecutory, or other functions for the Commission or any other agency of the Government. No examiner conducting or participating in the conduct of any such hearing shall advise or consult with the Commission or any member or employee of the Commission (except another examiner participating in the conduct of such hearing) with respect to the initial decision in the case or with respect to exceptions

taken to the findings, rulings, or recommendations made in such case.】 *person who has participated in the presentation or preparation for presentation of such case at the hearing or upon review shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case to the hearing officer or officers or, upon review, to the Commission or to any authority within the Commission to whom, in such case, review functions have been delegated by the Commission under section 5(c)(1), unless upon notice and opportunity for all parties to participate.*

(c)(2) 【In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no person who has participated in the presentation or preparation for presentation of such case before an examiner or examiners or the Commission, and no member of the Office of the General Counsel, the Office of the Chief Engineer, or the Office of the Chief Accountant shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case, unless upon notice and opportunity for all parties to participate.】 *The provision in subsection (c) of section 5 of the Administrative Procedure Act which states that such subsection shall not apply in determining applications for initial licenses, shall not be applicable hereafter in the case of applications for initial licenses before the Federal Communications Commission.*

【(3) No person or persons engaged in the performance of investigative or prosecuting functions for the Commission, or in any litigation before any court in any case arising under this Act, shall advise, consult, or participate in any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, except as a witness or counsel in public proceedings.】

(d) To the extent that the foregoing provisions of this section *and section 5(c)* are in conflict with *the* provisions of the Administrative Procedure Act, such provisions of this section *and section 5(c)* shall be held to supersede and modify the provisions of 【the】 *that* Act.

#### ORGANIZATION AND FUNCTIONING OF THE COMMISSION

##### SEC. 5. (a) \* \* \*

【(e)】 (d) Meetings of the Commission shall be held at regular intervals, \* \* \* and the Commission shall promptly report to the Congress each such case which has been pending before it more than such three- or six-month period, respectively, stating the reasons therefor.

## FACILITATING THE PROMPT AND ORDERLY CONDUCT OF THE BUSINESS OF THE FEDERAL COMMUNICA- TIONS COMMISSION

JULY 19, 1961.—Ordered to be printed

Filed under authority of the order of the Senate of July 18, 1961

MR. PASTORE, from the Committee on Commerce, submitted the following

### R E P O R T

[To accompany S. 2034]

The Committee on Commerce, to whom was referred the bill (S. 2034) to amend the Communications Act of 1934, as amended, in order to expedite and improve the administrative process by authorizing the Federal Communications Commission to delegate functions in adjudicatory cases, repealing the review staff provisions, and revising related provisions, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

#### AMENDMENTS

The bill as amended and approved by your committee reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That subsection (c) of section 5 of the Communications Act of 1934, as amended, is hereby repealed.

SEC. 2. Subsection (d) of section 5 of the Communications Act of 1934, as amended, is amended to read as follows:

“(c)(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by published rule or by order, delegate any of its functions to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise

acting as to any work, business, or matter, and may at any time amend, modify, or rescind any such rule or order. Nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in clauses (2) and (3) of section 7(a) of the Administrative Procedure Act, of any hearing to which such section 7(a) applies.

“(2) As used in this subsection (c) the term ‘order, decision, report, or action’ does not include an initial, tentative, or recommended decision to which exceptions may be filed as provided in section 409(b).

“(3) Any order, decision, report, or action made or taken, pursuant to any such delegation, unless reviewed as provided in paragraph (4), shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner as orders, decisions, reports, or other actions of the Commission.

“(4) Any person aggrieved by any such order, decision, report, or action, may file an application for review by the Commission, within such time and in such manner as the Commission shall prescribe. The Commission shall have authority on its own initiative to order any matters delegated under paragraph (1) before it for review on such conditions as it shall prescribe and shall make such orders therein, consistent with law, as shall be appropriate.

“(5) In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the panel of Commissioners, individual Commissioner, employee board, or individual employee, has been afforded no opportunity to pass.

“(6) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with section 405.

“(7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1). The time within which a petition for review must be filed in a proceeding to which section 402(a) applies or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.

“(8) The Secretary and seal of the Commission shall be the secretary and seal of each panel of the Commission, each individual Commissioner, and each employee board or individual employee exercising functions delegated pursuant to paragraph (1) of this subsection.”

SEC. 3. Section 405 of the Communications Act of 1934, as amended, is hereby amended to read as follows:

## "REHEARINGS

"SEC. 405. After an order, decision, report, or action has been made or taken in any proceeding by the Commission or by any designated authority within the Commission pursuant to a delegation under section 5(c)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(c)(1), in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b) in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or case, but any order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order."

SEC. 4. Section 409 (a), (b), (c), and (d) of the Communications Act of 1934, as amended, are amended to read as follows:

“(a) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, the person or persons conducting the hearing shall prepare and file an initial, tentative, or recommended decision, except where such person or persons become unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.

“(b) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to the initial, tentative, or recommended decision, which shall be passed upon by the Commission or by the authority within the Commission, if any, to whom the function of passing upon the exceptions is delegated under section 5(c)(1).

“(c) (1) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no person who has participated in the presentation or preparation for presentation of such case at the hearing or upon review shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case to the hearing officer or officers or, upon review, to the Commission or to any authority within the Commission to whom, in such case, review functions have been delegated by the Commission under section 5(c)(1), unless upon notice and opportunity for all parties to participate.

“(2) The provision in subsection (c) of section 5 of the Administrative Procedure Act which states that such subsection shall not apply in determining applications for initial licenses, shall not be applicable hereafter in the case of applications for initial licenses before the Federal Communications Commission.

“(d) To the extent that the foregoing provisions of this section and section 5(c) are in conflict with the provisions of the Administrative Procedure Act, such provisions of this section and section 5(c) shall be held to supersede and modify the provisions of that Act.”

SEC. 5. Notwithstanding the foregoing provisions of this Act, the second sentence of subsection (b) of section 409 of the Communications Act of 1934 (which relates to the filing of exceptions and the presentation of oral argument), as in force at the time of the enactment of this Act, shall continue to be applicable with respect to any case of adjudication (as defined in the Administrative Procedure Act) designated by the Federal Communications Commission for hearing by a

notice of hearing issued prior to the date of the enactment of this Act.

SEC. 6. Section 5(e) of the Communications Act of 1934, as amended, is hereby designated section 5(d).

#### PURPOSE OF LEGISLATION

The purpose of this legislation is to amend the Communications Act of 1934 so that the Federal Communications Commission will be able, by making better use of its own time and more effective use of its experienced and technically qualified personnel, to handle its large workload of adjudication cases with greater speed and efficiency than is presently possible. This would be done by authorizing the FCC to delegate functions in adjudicatory cases, repeal the review staff provisions, and modify certain related sections of the Communications Act that are affected thereby.

#### GENERAL STATEMENT

S. 2034 was introduced by Senator John O. Pastore, chairman of the Subcommittee on Communications of your committee, on June 7, 1961, at the request of the Federal Communications Commission. This bill has for its purpose the expediting and improving of the administrative process of the Commission. It would authorize the Commission to delegate review functions in adjudicatory cases, repeal the "review staff" provisions of section 5(c) of the Communications Act of 1934, as amended, and modify certain related provisions.

The bill is an outgrowth of Reorganization Plan No. 2 of 1961, transmitted by the President to the Congress on April 27, 1961, and disapproved by the House on June 15, 1961. The plan was designed to provide the Commission with greater flexibility in the handling of its business in order to (1) expedite the disposition of such business and (2) permit the Commissioners to concentrate on major matters of planning and policy. The plan would have given the Commission the widest possible discretion to delegate its functions.

It was generally agreed that the objectives of plan No. 2 were desirable and meritorious, but objection was raised on the ground that it would amend substantive provisions of the Communications Act—specifically, those in section 409(b) giving parties the right to file exceptions to initial decisions of examiners and to have oral argument thereon before the full Commission. It was suggested that these basic provisions of the act should be amended by the legislative process rather than a Presidential reorganization plan. In addition, it was urged that section 2 of the plan which proposed to transfer to the Chairman of the Commission the function of assigning Commission personnel, including Commissioners, to perform the delegated functions, would concentrate too much power in the Chairman.

In the hearings before this committee on May 23, there was division of opinion among the Commissioners of the Federal Communications Commission with respect to the meaning or legality of some of the provisions of plan No. 2. At the hearing before your committee, the Commissioners were urged by the subcommittee chairman to resolve their differences and to submit to your committee as quickly as possible

a legislative proposal that would bring about the desirable objectives of Reorganization Plan No. 2. S. 2034 was the result of the cooperative effort then undertaken by the Commissioners.

S. 2034 would give the Commission considerable discretion in handling its caseload. The Commission would be empowered to use a panel of Commissioners or employ boards to review those cases which it deems of insufficient importance to warrant review by the full Commission. The parties aggrieved by the decision of the panel or employee board could apply to the Commission for review, but such further review would be solely in the discretion of the Commission, and could be denied without specifying reasons therefor. This procedure is patterned on that long used by the Supreme Court in passing on petitions for writ of certiorari.

In addition, the Commission would be permitted full use of its staff in adjudicatory cases where that staff had not been engaged in the investigation or prosecution of the case or a factually related one. This is accomplished by the elimination of section 5(c) and amending certain portions of section 409(c) of the present act. By eliminating section 5(c) and modifying portions of section 409(c) of the Communications Act, the Commission would have available to it the expert advice and services of qualified personnel in the Office of General Counsel, Office of Chief Engineer, and Office of Chief Accountant, as well as the full use of the members of the review staff.

Under S. 2034 there would be a right to obtain review of the initial decision but not necessarily before the full Commission. This bill makes no provision for the transfer of assignment functions from the Commission to the Chairman. Section 5(a) of the Communications Act now gives the Chairman broad authority to coordinate and organize the work of the Commission. Your committee agrees with the Commission that any additional specification of authority, such as to assign personnel, should be accomplished by Commission rule.

The committee wishes to point out one other background fact. The above-described revisions in S. 2034 are designed to modify the requirements imposed upon the Commission by the Communications Act Amendments of 1952. The amendments adopted by the Congress in 1960 (Communications Act Amendments of 1960, Public Law 86-752, approved Sept. 13, 1960) were one step taken to afford the Commission sufficient flexibility in its administration and procedures. S. 2034, as amended by your committee, is another step in that direction. In the judgment of your committee, this legislation will bring about much needed administrative improvements within the Commission and will also speed up its adjudicatory proceedings while providing the necessary safeguards to assure due process.

In the further hearings before your subcommittee on June 28, 1961, on S. 2034 concern was expressed that if S. 2034 is enacted, the Commission might appoint to an employee board of review, employees of less qualification and stature than examiners whose decisions they would be reviewing.

Your committee has noted the intention of the Commission to use employee boards to review initial decisions in adjudicatory cases involving purely routine issues. The committee has been assured by the Commission that it will select for such work the very best employees, including examiners, who by reason of their training, experience, competence, and character are especially qualified to

perform such review functions. In addition, your committee urges the Commission in designating employees to serve on review boards, to select individuals who, at the time of their designation, are in grade classification or compensation level equivalent to or higher than hearing officers whose decisions they would be reviewing.

Concern was also expressed that while the Commission, under the proposed revision of section 405 of the Communications Act relating to rehearings, shall take action within 90 days on a petition for rehearing with respect to an instrument of authorization granted without a hearing, a panel of Commissioners or an employee board would not be required to take action within such 90-day period. Accordingly, your committee has provided in section 3 of the bill an appropriate amendment to the proposed revision of section 405 of the Communications Act to require action by a review panel or board within 90 days of the filing of such a petition. Your committee recognizes that the decision of the designated authority within the Commission, unlike that of the Commission, may not be final and effective if an application for review is filed pursuant to proposed section 5(c)(3) but believes that the same time limitation should be applicable. In the judgment of your committee, the 90-day period provided in your committee's amendment should be clearly sufficient to act on any petition for rehearing.

#### CONCLUSION

Your committee feels that the public interest will be served by the adoption of this legislation. The strengthening of the Communications Act provided by the grant of additional authority to the Commission to delegate its adjudicatory review functions should be of material assistance to the Commission in increasing its efficiency, cutting down on its backlog of pending cases, and permitting the Commissioners to concentrate on the more important and far-reaching policy problems with which they are faced, such as the one involving a space satellite communications system.

Your committee urges enactment of this legislation.

#### SECTION-BY-SECTION DISCUSSION

1. Section 1 would repeal the provisions of section 5(c) of the Communications Act, relating to the review staff. Under these provisions, the review staff, even though it has no other functions than assist the Commission in adjudicatory cases, is nevertheless precluded from making any recommendations to the Commission. This restriction is wasteful and inefficient, since it deprives the Commission of the full assistance of which this review staff is capable, and requires the two-step procedure of instructions and draft order even as to the most routine interlocutory matters. The repeal of these unduly restrictive provisions should contribute to speedier action, without depriving parties of any rights in view of the continuing safeguards of section 409(c) of the Communications Act and section 5(e) of the Administrative Procedure Act.

2. Section 2 would permit the Commission to delegate any of its functions, including those in adjudicatory cases, to a panel of Commissioners, or individual Commissioners or employees, or an employee board (with the exception that adjudicatory hearings could only be conducted by one of the three authorities specified in sec. 7(a) of the

Administrative Procedure Act). The decision of the authority to whom the matter was delegated could then be reviewed, in whole or in part, by the Commission, either upon its own initiative or upon an application for review filed by a person aggrieved by the decision, but the Commission could deny such application without assigning any reasons therefor. The filing of an application for review is made a condition precedent to judicial review of a delegated decision; and the application cannot rely on questions of fact or law upon which the delegated authority has been afforded no opportunity to pass. In this way, the case will be presented to the Commission (and if the application is denied, to the courts) with a ruling on every issue, and the Commission will have an opportunity to review the decision before the matter goes before the courts. The statutory language also makes clear that the application for review procedure is inapplicable to the initial decision in adjudicatory cases; such decisions are to be reviewed solely by the filing of exceptions (as provided in sec. 409(b)).

These provisions would give the Commission much needed authority, now withheld under present section 5(d)(1), to employ panels of Commissioners or employee boards to pass on adjudicatory cases. Under the present law, it is necessary for the full Commission to hear every adjudicatory case, including such matters as fishing boat suspensions or the most routine aural broadcast cases. With the new authority the Commission would be able to concentrate on the important cases involving major policy or legal issues, and the hearing of all cases by some authority within the agency should be substantially expedited.

3. Section 3 would revise section 405, relating to petitions for rehearing, so as to reflect the above-described statutory scheme. As revised, the section would permit an aggrieved party to file a petition for rehearing only to the authority making the decision, that is, to the Commission, if it made the decision, or to the designated authority under the new 5(c)(1), if it issued the decision.

4. Section 4 would make extensive revisions in section 409, which contains general provisions relating to adjudicatory proceedings. First, the restriction in the present subsection (a) that the hearing shall be conducted only by the Commission or one or more examiners is dropped. This means that the Commission, like other agencies, will be governed by the provisions of section 7(a) of the Administrative Procedure Act and therefore, that one or more Commissioners may also conduct the hearing.

Second, subsection (b) would retain the right of a party to file exceptions, which must be passed upon by the Commission or a designated authority within the Commission (e.g., a panel of Commissioners or employee board). It would eliminate the last sentence of the present section 409(b) as unnecessary in view of the provisions of section 8 of the Administrative Procedure Act; the first sentence of the present provision is retained as the new section 409(a).

Further, subsection (b) would change the existing law by making oral argument discretionary rather than mandatory. This does not mean that oral argument will no longer be available. On the contrary, it is expected that this valuable procedure would still be greatly employed by the Commission or the panels or employee boards. But the Commission would now have the discretion not to allow such argument in those instances where in its judgment it would serve no

useful purpose, as for example, in the case of a frivolous appeal or one having no merit or designed largely to gain delay. Every other major Federal regulatory agency presently has such discretion; clearly, the Commission should be given similar flexibility.

Third, the provisions of subsection (c) relating to ex parte presentations by persons who have participated in the presentation or preparation for presentation of the case at the hearing or review stage would be retained. But the separation of functions provisions of the present section 409(c) would be deleted, and the provisions of section 5(c) of the Administrative Procedure Act would be made applicable to the Commission, including Commission proceedings to determine initial licenses. Specifically, the law would be changed as follows:

(i) There would be eliminated the provisions in present sections 409(c) (2) and (3) proscribing in adjudicatory cases any staff contact with the Commission by the offices of General Counsel, the Chief Engineer, or Chief Accountant. Instead, under the standard of section 5(c) of the Administrative Procedure Act, only staff persons who had engaged in the performance of investigative or prosecuting functions in the case or a factually related one would be precluded from participating in the intra-Commission discussions leading to the issuance of the decision. Virtually all the major administrative agencies have functioned well under it. There is thus every reason to permit the Commission to return to it. For it is clearly wasteful to cut off the Commission in an adjudicatory case from the valuable assistance of its chief legal and engineering officers, where these officers have had no investigative or prosecutory connection with the case (or a factually related one).

(ii) Under section 5(c) of the Administrative Procedure Act, the hearing officer would be precluded from consulting any person or party on any fact in issue but would be free to consult with other examiners or appropriate staff members (see (i), above) on legal or technical questions. Permitting such consultation should result in improving the quality of initial decisions and in expediting their preparation. (See Attorney General's Manual on the Administrative Procedure Act, pp. 54-55.) Significantly, examiners in other agencies are governed by the standard in section 5(c) of the Administrative Procedure Act. There is clearly no reason for proscribing appropriate consultation in the case of the examiners of this one agency.

Finally, subsection (d) would provide that to the extent the foregoing provisions or those of the new section 5(c) conflict with the provisions of the Administrative Procedure Act, the latter are superseded. This is made necessary by the statement in section 12 of the Administrative Procedure Act that no subsequent legislation shall be deemed to supersede the provisions of the act "except to the extent that such legislation shall do so expressly."

This legislation clearly goes beyond the Administrative Procedure Act by making (i) the proscription against ex parte presentations by parties applicable to any case of adjudication (including, therefore, Commission staff members who are parties in adjudicatory cases involving the validity or application of past rates, facilities, or practices of public utilities or carriers) and (ii) the separation of functions provisions of section 5(c) applicable to Commission initial license proceedings. Section 409(b) would also appear to go beyond the provisions of section 8 of the Administrative Procedure Act by

bestowing on the parties the right to file exceptions to the initial decision. Finally, it has been argued that a ruling on the merits of every pleading filed in the case is required under sections 6(d) and 8(b) of the Administrative Procedure Act. Whatever the validity of this argument, section 409(d) of the bill, by its explicit reference to the new section 5(c) which authorizes denial without assigning reasons of the application for review of a delegated decision, obviates any question on this score.

5. Section 5 would provide that all cases set for hearing by the Commission prior to the date of enactment shall continue to be governed by the second sentence of the present section 409(b). This means that in such cases the Commission must hear oral argument upon the request of the parties.

6. Section 5(e) of the Communications Act of 1934, as amended, would be redesignated as section 5(d).

#### AGENCY COMMENTS

The comments of the Federal Communications Commission and the Comptroller General of the United States are set forth below:

FEDERAL COMMUNICATIONS COMMISSION,  
*Washington, D.C., July 17, 1961.*

HON. JOHN O. PASTORE,  
*U.S. Senate, Washington, D.C.*

DEAR SENATOR PASTORE: I wish to call to the subcommittee's attention a mistake in my testimony on S. 2034 on June 28, 1961. In doing so, it is my hope that the subcommittee will be able to take corrective action.

When asked to comment on the differences between S. 2034, as introduced, and H.R. 7856, I gave as the first difference the following (p. 33, transcript of June 28, 1961):

"In section 5(d)(1), H.R. 7856, provides that a rule or order delegating a matter can be rescinded only by vote of a majority of the members of the Commission then holding office.

"In S. 2034, on the other hand, the rule or order could be rescinded by a vote of the majority of the members then participating."

Commissioner Cross and I indicated that we had no preference between the two provisions; Commissioners Hyde, Lee, and Craven indicated their satisfaction with the provision in S. 2034; and Commissioner Bartley thought there might "be merit in having the constitutional majority authorized to repeal a delegation" (pp. 33-35). He stated that in any event "we wouldn't take advantage of members in Europe on an international conference" (p. 35).

It is thus apparent that both Commissioner Bartley and I (and possibly others) misread the provision in H.R. 7856. For that provision is not limited to rescinding delegation orders or rules. It applies equally to their adoption (or modification). This means that when two Commissioners are absent because of illness or official duties, the Commission can make delegations only by a vote of four out of the five Commissioners participating, or just one vote short of unanimity. This is, I believe, much too restrictive. It would frustrate the purpose of S. 2034, which is to promote such delegations, where appropriate, in order to speed up the Commission's processes.

and permit the Commissioners themselves to concentrate on the important matters of policy and planning.

Nor is the absence of two Commissioners a bizarre or rare occurrence. As you know, one Commissioner is frequently called upon to attend abroad lengthy international conferences. Indeed, both Commissioners Hyde and Craven were required to attend for several months the 1959 Geneva Conference. Further, the Defense Commissioner is also required to be absent from Washington on numerous occasions. I could, of course, give several more examples along these lines. I strongly believe, therefore, that the flexibility, which is the keystone of S. 2034, would be promoted by elimination of the requirement that a delegation rule or order may be adopted only by the vote of a majority of the members of the Commission then holding office.

I do not think that this would in any way lead to abuses. At the present time, the Commission can take action on any matter, including one of the most important substance, even though one or more Commissioners are absent. I assure you, however, that on the important matters, we await the Commissioners' return, unless they have given prior approval to its consideration in their absence. As Commissioner Bartley indicated in his testimony, such deference to absent colleagues is required as a matter of courtesy, good working relations, and practicality. For, it makes no sense to adopt a matter one week by a narrowly divided vote taken in the absence of two Commissioners, only to have it reversed the next week upon their return and participation in a motion to reconsider. In short, the restriction in H.R. 7856 is unnecessary as to any important matter such as a broad delegation rule; and it is unduly burdensome when it inhibits or blocks delegation orders with respect to routine cases, because of the prolonged absence of two Commissioners and the resultant requirement of four votes out of the five participants.

As I stated at the outset, I am writing essentially to correct the record. I hope the provision in section 5(c)(1) of S. 2034, as introduced, will be adopted. But I wish to make clear that whichever provision is adopted, I wholeheartedly support the bill.

Thank you again for your great interest in the legislative proposals to assist the Commission in the important tasks before it. We are deeply appreciative.

With all good wishes,

NEWTON N. MINOW, *Chairman.*

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COMPTROLLER GENERAL OF THE UNITED STATES,  
*Washington, June 22, 1961.*

HON. WARREN G. MAGNUSON,  
*Chairman, Committee on Commerce,  
U.S. Senate.*

DEAR MR. CHAIRMAN: Your letter of June 9, 1961, acknowledged June 12, transmitted a copy of S. 2034, entitled "A bill to amend the Communications Act of 1934, as amended, in order to expedite and improve the administrative process by authorizing the Federal Communications Commission to delegate functions in adjudicatory cases, repealing the review staff provisions, and revising related provisions," and requested our comments thereon.

Other than the explanation which was made a part of the record at the time S. 2034 was introduced, we have no information as to the necessity for or desirability of further amending the Communications Act of 1934, as amended, as proposed by S. 2034, and since the provisions of the bill would not affect the functions of our Office we have no comments with respect to its merits or recommendations regarding its enactment.

Sincerely yours,

JOSEPH CAMPBELL,  
*Comptroller General of the United States.*

#### CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill are shown as follows: (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic; and existing law in which no change is proposed is shown in roman):

#### COMMUNICATIONS ACT OF 1934, AS AMENDED

##### ORGANIZATION AND FUNCTIONING OF THE COMMISSION

SEC. 5. (a) \* \* \*

(b) \* \* \*

[(c) The Commission shall establish a special staff of employees, hereinafter in this Act referred to as the "review staff," which shall consist of such legal, engineering, accounting, and other personnel as the Commission deems necessary. The review staff shall be directly responsible to the Commission and shall not be made a part of any bureau or divisional organization of the Commission. Its work shall not be supervised or directed by any employee of the Commission other than a member of the review staff whom the Commission may designate as the head of such staff. The review staff shall perform no duties or functions other than to assist the Commission, in cases of adjudication (as defined in the Administrative Procedure Act) which have been designated for hearing, by preparing a summary of the evidence presented at any such hearing, by preparing, after an initial decision but prior to oral argument, a compilation of the facts material to the exceptions and replies thereto filed by the parties, and by preparing for the Commission or any member or members thereof, without recommendations and in accordance with specific directions from the Commission or such member or members, memoranda, opinions, decisions, and orders. The Commission shall not permit any employee who is not a member of the review staff to perform the duties and functions which are to be performed by the review staff; but this shall not be construed to limit the duties and functions which any assistant or secretary appointed pursuant to section 4(f)(2) may perform for the commissioner by whom he was appointed.]

[(d)(1) Except as provided in section 409, the Commission may,] (c)(1) *When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business,* [by order assign or refer any portion of its work, business, or functions to an individual commissioner or commissioners or to a board composed of one or more employees of the Commission, to be designated by such order for

action thereon, and may at any time amend, modify, or rescind any such order of assignment or reference. Any order, decision, or report made, or other action taken, pursuant to any such order of assignment or reference shall, unless reviewed pursuant to paragraph (2), have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other action of the Commission. **]** *the Commission may, by published rule or by order, delegate any of its functions to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter, and may at any time amend, modify, or rescind any such rule or order. Nothing in this paragraph shall authorize the Commission to provide for the conduct, by any person or persons other than persons referred to in clauses (2) and (3) of section 7(a) of the Administrative Procedure Act, of any hearing to which such section 7(a) applies.*

(2) *As used in this subsection (c) the term "order, decision, report, or action" does not include an initial, tentative, or recommended decision to which exceptions may be filed as provided in section 409(b).*

(3) *Any order, decision, report, or action, made or taken pursuant to any such delegation, unless reviewed as provided in paragraph (4), shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.*

**[(2)]** (4) *Any person aggrieved by any such order, decision, [or] report, or action, may file an application for review by the Commission, within such time and in such [form] manner as the Commission shall prescribe. [ , and every such application shall be passed upon by the Commission. If the Commission grants the application, it may affirm, modify, or set aside such order, decision, report, or action, or may order a rehearing upon such order, decision, report, or action under section 405.] The Commission shall have authority on its own initiative to order any matters delegated under paragraph (1) before it for review on such conditions as it shall prescribe and shall make such orders therein, consistent with law, as shall be appropriate.*

(5) *In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the panel of Commissioners, individual Commissioner, employee board, or individual employee, has been afforded no opportunity to pass.*

(6) *If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with section 405.*

(7) *The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1). The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.*

**[(3)]** (8) *The Secretary and seal of the Commission shall be the secretary and seal of each panel of the Commission, each individual*

commissioner , [or board.] and each employee board or individual employee exercising functions delegated pursuant to paragraph (1) of this subsection.

### [REHEARINGS BEFORE COMMISSION]

#### REHEARINGS

SEC. 405. After [a decision, order, or requirement] an order, decision, report, or action has been made or taken in any proceeding by the Commission, [in any proceeding, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission,] or by any designated authority within the Commission pursuant to a delegation under section 5(c)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(c)(1), in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. [Petitions] A petition for rehearing must be filed within thirty days from the date upon which public notice is given of [any decision, order, or requirement] the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any [decision, order, or requirement] order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such [decision, order, or requirement,] order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such [decision, order, or requirement,] order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b) in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding [any] or case, but any [decision, order, or requirement] order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the

original order shall be subject to the same provisions with respect to rehearing as an original order.

GENERAL PROVISIONS RELATING TO PROCEEDINGS—WITNESSES AND DEPOSITIONS

SEC. 409. (a) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, [the hearing shall be conducted by the Commission or by one or more examiners provided for in section 11 of the Administrative Procedure Act, designated by the Commission.] *the person, or persons conducting the hearing shall prepare, and file an initial, tentative, or recommended decision, except where such person or persons become unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.*

[(b) The officer or officers conducting a hearing to which subsection (a) applies shall prepare and file an initial decision, except where the hearing officer becomes unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision. In all such cases the Commission shall permit the filing of exceptions to such initial decision by any party to the proceeding and shall, upon request, hear oral argument on such exceptions before the entry of any final decision, order, or requirement. All decisions, including the initial decision, shall become a part of the record and shall include a statement of (1) findings and conclusions, as well as the basis therefor, upon all material issues of fact, law, or discretion, presented on the record; and (2) the appropriate decision, order, or requirement.]

*(b) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to the initial, tentative, or recommended decision, which shall be passed upon by the Commission or by the authority within the Commission, if any, to whom the function of passing upon the exceptions is delegated under section 5(c)(1).*

(c) (1) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no [examiner conducting or participating in the conduct of such hearing shall, except to the extent required for the disposition of ex parte matters as authorized by law, consult any person (except another examiner participating in the conduct of such hearing) on any fact or question of law in issue, unless upon notice and opportunity for all parties to participate. In the performance of his duties, no such examiner shall be responsible to or subject to the supervision or direction of any person engaged in the performance of investigative, prosecutory, or other functions for the Commission or any other agency of the Government. No examiner conducting or participating in the conduct of any such hearing shall advise or consult with the Commission or any member or employee of the Commission (except another examiner participating in the conduct of such hearing) with respect to the initial decision in the case or with respect to exceptions

taken to the findings, rulings, or recommendations made in such case. ] *person who has participated in the presentation or preparation for presentation of such case at the hearing or upon review shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case to the hearing officer or officers or, upon review, to the Commission or to any authority within the Commission to whom, in such case, review functions have been delegated by the Commission under section 5(c)(1), unless upon notice and opportunity for all parties to participate.*

(c)(2) [In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no person who has participated in the presentation or preparation for presentation of such case before an examiner or examiners or the Commission, and no member of the Office of the General Counsel, the Office of the Chief Engineer, or the Office of the Chief Accountant shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case, unless upon notice and opportunity for all parties to participate.] *The provision in subsection (c) of section 5 of the Administrative Procedure Act which states that such subsection shall not apply in determining applications for initial licenses, shall not be applicable hereafter in the case of applications for initial licenses before the Federal Communications Commission.*

[(3) No person or persons engaged in the performance of investigative or prosecuting functions for the Commission, or in any litigation before any court in any case arising under this Act, shall advise, consult, or participate in any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, except as a witness or counsel in public proceedings.]

(d) To the extent that the foregoing provisions of this section *and section 5(c)* are in conflict with *the* provisions of the Administrative Procedure Act, such provisions of this section *and section 5(c)* shall be held to supersede and modify the provisions of [the] that Act.

#### ORGANIZATION AND FUNCTIONING OF THE COMMISSION

SEC. 5. (a) \* \* \*

[(e)] (d) Meetings of the Commission shall be held at regular intervals, \* \* \* and the Commission shall promptly report to the Congress each such case which has been pending before it more than such three- or six-month period, respectively, stating the reasons therefor.

