

HEINL RADIO BUSINESS LETTER

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No. 1393

FCC SEES INJURY TO PUBLIC IN MONOPOLY INJUNCTION

It is the contention of the Government in a brief just filed in the District Court of the United States for the Southern District of New York that while no irreparable injury will be incurred by the plaintiffs as a result of the Federal Communications Commission's monopoly regulations pending final decision, real injuries will result to the public, to the Mutual Broadcasting System, and to radio stations generally, if a preliminary injunction is issued to the National Broadcasting Company, the Columbia Broadcasting and others seeking it.

The Government brief was submitted by Samuel Brodsky, Special Assistant to the Attorney General, and Telford Taylor, General Counsel of the FCC. The next hearing in the case is scheduled to be held in New York Monday, January 12th.

It is the further contention of the Federal attorneys that if an injunction is granted against the FCC that listeners in many cities will lose any possibility of receiving the programs of those networks which do not now have access to their service areas. "Non-network programs will be removable on 28 days' notice at the call of the networks. Stations not affiliated with a network will be prevented from broadcasting the programs of that network even though the regular affiliate in the area rejects the program, so that such programs will be irretrievably lost to listeners in that area. Moreover, the competition among networks, among stations, and between stations and networks which the regulations make possible will be postponed, to the general detriment of network broadcasting and to the disservice of radio listeners", the argument concludes.

"It is a well-settled principle of law that an injunction which restrains governmental action will not be granted if the injury which would result to the public from such an injunction outweighs the injury otherwise threatened to private parties plaintiff."

According to the brief the case presents the following questions:

1. Whether this Court has jurisdiction over the subject matter of this action.
2. Whether the plaintiffs have standing to maintain this action.
3. Whether the plaintiffs have stated a claim upon which relief can be granted.

4. Whether the Commission has statutory authority to adopt the regulations.

5. Whether, if the Communications Act authorizes the Commission to adopt the regulations, such Act is unconstitutional as delegating legislative power to the Commission or as taking the property of the plaintiffs without due process of law.

6. Whether the regulations are arbitrary or capricious.

7. Whether this Court should issue a preliminary injunction granting in whole or in part the relief requested by the plaintiffs.

It is the Government's argument that the Court is without jurisdiction to entertain the action; that the administrative process has not been completed and the regulations do not have any present legal effect and are therefore not reviewable; the administrative remedy has not been exhausted and this cause is not cognizable under "general equitable jurisdiction". It is maintained even if the Court has jurisdiction, the motions to dismiss for summary judgment should be granted; that the Communications Act authorizes the Commission to adopt regulations such as those here in question; the regulations are not arbitrary or capricious; the Communications Act, interpreted to authorize the FCC regulations is constitutional, and therefore the plaintiffs are not entitled to a preliminary injunction.

Some of the highlights of the brief are:

"The position taken by the plaintiffs is essentially that, in applying the public interest standard, the Commission is limited to considering physical and technical matters, and perhaps the 'moral' and financial qualifications and prior experience of applicants. Thus they construe Section 303 (i) as empowering the Commission to regulate only the engineering aspects of chain broadcasting operations by stations. As a corollary, the plaintiffs dismiss matters pertaining to competition or concentration of control as outside the Commission's ken.

"Such a view sits uneasily beside Supreme Court pronouncements that the Communications Act is a 'supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out the legislative policy', that Congress moved under the 'spur of a widespread fear' of monopolistic domination of broadcasting and sought to maintain 'a grip on the dynamic aspects of radio transmission', and that the broadcasting field is one 'of free competition'.

* * * * *

"Judicial approval of the plaintiffs' contentions would facilitate the very concentration of control which Congress sought to avert. The Commission would thereby be rendered powerless to avoid granting 'a monopoly in the field of broadcasting, a result which the Act itself expressly negatives, which Congress would not have contemplated without granting the Commission powers of control over the rates, programs, and other activities of the business of broadcasting.' "

With regard to optional time the brief states:

"The only 'difficulty' which NBC and CBS will have in negotiating with advertisers under Regulation 3.104 is that they must negotiate on more nearly equal terms with other networks, in that their competitors will be able, if the affiliates so choose, to offer firm commitments to advertisers with respect to hours which NBC and CBS are not already using for commercial programs.

"It follows from the foregoing that the third and last argument which NBC and CBS make against Regulation 3.104 - i.e., that advertisers will desert radio for competing advertising media - is likewise unsound. An advertiser negotiating with NBC or CBS for a contract at a certain hour can count on clearance over the stations which he desires to use, unless he himself or some other advertiser has purchased the same period through another network which is utilizing some of the desired stations. The national networks as a group will not lose business; whether NBC or CBS will lose business will depend upon their ability to compete with other national networks.

"The Commission endeavored to retain the advantages of option time as a business convenience, to the maximum degree compatible with the public interest in competition and station responsibility. In the light of the evidence, Regulation 3.104 is an eminently reasonable solution."

"Finally, in answer to all allegations of irreparable injury resulting from the option time regulation, it should be noted that NBC in fact operated without options from its formation in 1926 until 1933; and that Mutual operated without options until 1940 and for the most part still does. A reestablishment of the status quo ante can hardly engender any irreparable injury."

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COMMUNICATIONS PRIORITIES CONFERENCES CONTINUOUS

Asked if he contemplated any further conference with Leighton H. Peebles, head of the new OPM Communications Division, who will operate in close liaison with the Defense Communications Board in handling priorities needs for the communications industry - radio, telephone and telegraph - Chairman James L. Fly of the Federal Communications Commission said there would be a meeting practically every day. "It is a continuing job", the FCC head explained. "We don't arrange these conferences formally. They come up every day."

"Do these conferences include telephone equipment or radio equipment?" the official was asked.

"Communications equipment, broadly", he replied.

There is a DCB Priorities Committee made up of Gerald C. Gross, FCC Assistant Chief Engineer; William Bauer, FCC attorney, and Lieut. Col. Foster Stanley of the Army Signal Corps which is expected to work in close cooperation with Mr. Peebles in devising the priorities materials plan for the communications industry.

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SENATOR TOBEY INQUIRES ABOUT RCA CONSENT DECREES

Not having received a reply from a letter he wrote to Attorney General Biddle on the subject, Senator Charles W. Tobey(R), of New Hampshire has turned to Senator Frederick Van Nuys (D), of Indiana, Chairman of the Senate Judiciary Committee in connection with Radio Corporation of America consent decrees and other related matters.

Senator Tobey's letter to the Attorney General read in part as follows:

"There is pending before the Federal District Court for the Southern District of New York, and also before the New York State Supreme Court, two very similar minority stockholders' actions against officials of certain large corporations, namely the Radio Corporation of America, General Electric Co., and Westinghouse Electric and Manufacturing Co. In those actions it is charged that certain officials illegally diverted from the Radio Corporation of America many millions of dollars. It is my understanding that the charges pending before the Federal District Court for the Southern District of New York in the case of Salvatz et al. v. Radio Corporation of America et al. are similar to the charges contained in the case pending before the New York Supreme Court.

"It has come to my attention that while those cases were on trial recently before the New York State Supreme Court certain officials of the General Electric Co. and the Westinghouse Electric & Manufacturing Co., through their attorneys, rather than testify in open court and subject themselves and others to examination have offered to pay out of the moneys of those two companies the sum of \$1,000,000. One element in the case that is of great interest to me is that this offer is conditioned on the dismissal without trial of the similar charges pending in the Federal District Court for the Southern District of New York.

"I believe that the new Federal rules of civil procedure provide that the justices of Federal courts must approve consent decrees in representative suits, presumably because of the interest of the great number of stockholders involved. According to that rule, it is my understanding that the justices of the Federal District Court for the Southern District of New York must approve such a settlement before such charges can be withdrawn.

"Those suits were filed on the part of certain shareholders or their attorneys, representing but a fraction of 1 percent of some 16,000,000 shares issued and presumably those suits were instituted for the benefit of all the shareholders or of all parties similarly situated.

"In view of the fact that 16,000,000 shares of stock have been issued by the Radio Corporation of America, and in view of the further fact that a dozen or more of the complainants' attorneys will deduct their fees, costs, and expenditures from the \$1,000,000 given in settlement, I fail to see how, under that agreement, any material financial benefit will accrue to the vast number of shareholders who invested their savings in this company.

"That tentative consent decree is of special interest to me from a legislative viewpoint because of the fact that the offer to pay \$1,000,000 is conditioned upon the withdrawal by complainants' attorneys, without trial, of the similar charges pending before the Federal District Court for the Southern District of New York.

"My interest is increased by the fact that that very matter was the subject some months ago of considerable discussion before the Senate Interstate Commerce Committee, of which I am a member.

The matter came before us in connection with the nomination of the late Federal Communications Commissioner, Thad H. Brown. At that time we were seeking to determine whether the officials of these large corporations had been guilty of dissipating the funds belonging to the stockholders. Two of the attorneys representing those large companies, namely, Messrs. Manton Davis and Joseph Proskauer, when questioned as to the details of the alleged dissipation of funds, begged the committee not to pry into the details thereof because those matters were pending before the courts where the charges would be fully met.

"For instance on page 311 of the hearings, copy of which I enclose, Mr. Proskauer says: 'We shall meet that case in court from the time it comes, and I will assure this committee that there will never be a settlement of that case. I think this will be litigated and that all these things will be tried out in a court of law.'

"On page 315 of the same hearings we are told of the official positions held by Mr. Davis and Mr. Proskauer. Mr. Davis there says: 'The R.C.A. has staff counsel, of which I am chief. In these cases we have trial counsel, and Judge Proskauer, who has addressed you, is the chief of the trial counsel for the defendants in this case.'

"If my recollection serves me, sir, the illegality of the cross-licensing agreements which was the issue in the Government suit that was withdrawn by consent decree is realleged in these cases.'

"For instance, when I asked Mr. Proskayer this question, 'That radio stock taken by General Electric and Westinghouse was not returned to R.C.A.?', Mr. Proskauer answered, 'I cannot try that case here.' (page 315).

"When I asked for further information, Mr. Davis replied: 'Those are issues that are pending before the Court in respect to which I think you ought not to make us disclose our defense.' (p. 316).

"There was a committee of Congress trying to determine whether irregularities existed in certain transactions. For 8 years cases had been filed against Radio Corporation of America by different individuals, but not once had Radio Corporation of America gone to trial on the issues, and the attorneys for Radio Corporation of America enjoined this committee from looking into the matter on the assurance that a full disclosure of the facts would be had at the trial.

"I appreciate the fact that you, as Attorney General of the United States, have no control over the activities or conduct of the judges of the New York State Supreme Court. However, I would appreciate receiving your opinion as to whether a case can thus be taken out of the Federal district court without proper

presentation of evidence before that court. Is it possible under existing rules of procedure to thus preclude trial on the merits of the case in a Federal court by a consent agreement approved by a State court, in a case such as this where minority shareholders seek an accounting of the moneys and other properties of the corporation?

"The Senate Committee on Interstate Commerce before which evidence was taken under oath on these matters, has not yet made a report to the Senate of the United States thereon. I am assuming that we will soon reach the point in our legislative work when we will have the time to consider the evidence taken and make such report and recommendations to the Senate as the members of the committee term advisable.

"After you have had an opportunity to consider the serious charges made before the Senate Committee on Interstate Commerce and the supporting evidence contained in the record of the hearings enclosed herewith, I would appreciate a statement from you as to whether or not, from your experience with Federal court procedure, there is need for additional legislation to protect parties involved in representative suits or whether there is any way under existing law whereby the interest of the shareholders can be protected for instance, by calling the attention of the chief justice of the supreme court of New York to the long line of consent decrees that have preceded this last tentative agreement and the possibility of fraud existing therein."

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SAYS BLUE TO BE SOLD AND TRAMMELL TO BE ITS CHAIRMAN

In line with reports to that effect which have long been in circulation in the industry, the New York Times stated today (Friday) that it had learned that outright divestment of the Blue and Red networks of the National Broadcasting Company and the creation of direct competition between the two in the radio field has been decided upon by the management of the Radio Corporation of America, parent concern of the National Broadcasting Company.

"The Blue network, with WJZ of New York as the key station, is to be set up as an entirely new corporate organization and operated wholly independent of RCA control", the Times story continued. "Upon a final determination of the asset value of the Blue network, RCA intends either to distribute on a pro rata basis Blue network stock to RCA stockholders or sell the network in its entirety to Wall Street banking interests for redistribution to the general public.

"RCA officials have been negotiating in recent weeks with Dillon, Read & Co., with a view toward outright sale of the Blue system.....

"It is also reported that Mr. Trammell will relinquish his post as President of NBC to become Chairman of the Board of the new Blue network organization."

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FTC QUESTIONS SMALL PROPORTION OF ADVERTISING BROADCAST

The annual report of the Federal Trade Commission gives radio a pretty clean bill of health with regard to questionable advertising broadcast. Also it reveals that the advertising policing of the air by the FTC has grown into a tremendous task.

During the fiscal year ended June 30, 1941, the Commission received 857,890 copies of commercial radio broadcast continuities, amounting to 1,737,181 pages of typewritten script. These comprised 1,197,199 pages of individual station script, 529,820 pages of network script, and 10,162 pages of commercial recorded script.

The staff examined 871,909 commercial radio broadcast continuities, amounting to 1,749,557 pages of typewritten script. These comprised 519,640 pages of network script, 1,219,950 pages of individual station script, and 9,967 pages of script representing the built-in commercial portions of transcription recording productions destined for radio broadcast, through distribution of multiple pressings of such recordings to individual stations. An average of 5,755 pages of radio script were read each working day. From this material 24,535 commercial broadcasts were marked for further study as containing representations that might be false or misleading.

In general, the Commission has received the helpful cooperation of the 3 Nationwide network chains, 13 active regional networks, and transcription producers engaged in preparing commercial radio recordings, in addition to that of some 781 active commercial radio stations, 491 newspaper publishers, and 533 publishers of magazines, farm journals, and trade publications, and has observed an interested desire on the part of such broadcasters and publishers to aid in the elimination of false and misleading advertising.

Examination of current newspaper, magazine, radio, and direct mail-order house advertising, in the manner described, has provided the basis for 75.4 percent of the cases arising from radio broadcasts and published advertisements, initiated through the Radio and Periodical Division during the fiscal year ended June 30, 1941. Information received from other sources, including information from other divisions of the Commission, and from other Government agencies, formed the basis of the remainder of the division's work.

During the fiscal year the Commission sent questionnaires to advertisers in 374 cases and to advertising agencies in 19 cases, and accepted 234 stipulations pertaining to radio and periodical advertising. Of these, 19 stipulations (8 relating to drugs and 11 to hair dyes) contained agreements to publish appropriate warnings in advertisements as to the potential harm that might result from the use of the products in question.

A total of 605 cases were disposed of by the various methods of procedure. Of this number 222 cases were considered settled upon receipt of reports showing compliance with previously negotiated stipulations. The remaining 383 were closed without

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prejudice to the right of the Commission to reopen if warranted by the facts.

Nine hundred seventy-nine radio and periodical cases were pending on July 1, 1940, and 779 were pending on June 30, 1941.

The Commission, in its systematic review of radio advertising, issues calls to individual radio stations, generally at the rate of 4 times yearly for each station. However, the frequency of calls to such individual broadcasters is varied from time to time, dependent principally upon transmittal power, the service radius or area of specific stations, and the advertising record of certain types of stations, as disclosed in analyses of previous advertising reviews.

National and regional networks respond on a continuous weekly basis, submitting copies of commercial continuities for all programs wherein linked hook-ups are used involving two or more stations.

Producers of electrical transcription recordings submit monthly typed copies of the commercial portions of all recordings produced by them for radio broadcast. This material is supplemented by periodic reports from individual stations listing the programs of recorded commercial transcriptions and other data.

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ANOTHER NEW YORK TELEVISION STATION AUTHORIZED

The Allen B. DuMont Laboratories, Inc., in New York City, have been granted a construction permit by the Federal Communications Commission for a new television station to operate on 78000-84000 kilocycles (Channel No. 4), with an ESR of 950; A5 emission and special emission for frequency modulation; unlimited time, and to be completed within 90 days.

Up to now the DuMont television station, which is located at 515 Madison Avenue, has been operating experimentally. Test programs have been put on the air several nights a week which have been received well into Connecticut. It was said that the station might be operated commercially later if it was possible to secure the equipment.

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Having received a number of complaints of interference to radio reception in south Texas by the operation of certain electric signs, the Federal Communications Commission has requested the cooperation of the manufacturer of these signs to remedy the situation. It points out that radiation effects are experienced not only in the broadcast bands but also in the frequency bands used by aviation and police services.

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 ::: TRADE NOTES :::
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Estimates of \$5,991,219 for the Federal Communications Commission for the budget in the forthcoming fiscal year are \$77,510 below the 1942 appropriations for that agency.

An Illinois broadcaster has been advised by the Federal Communications Commission that all transfers of broadcast station stock must be reported to the Commission within 30 days, even if no actual transfer of control is involved.

Milton Auster, member of the sales staff of the New York Sylvania Radio Tube distributor, The Dale Radio Company, was appointed recently and is now functioning as business specialist on radio parts in the Emergency Management Office of the Office of Price Administration, Washington. Mr. Auster has been associated with the radio business for twenty years.

A new yearly high for total WOR time sales by one man is said to have been set by Otis P. Williams, WOR account executive, who in the past 11 months sold over a half million dollars worth of business. And he's still got a month to go!

A standard American Red Cross course in First Aid will be offered Columbia Broadcasting System employees in New York City. The course will be given in conjunction with the CBS Air Raid Precaution System.

Station WMFG, Hibbing, Minnesota, and WHLB, Virginia, Minnesota, both owned by the Head of the Lakes Broadcasting Co., have become supplementary outlets to the Basic Blue and NBC Red Networks.

How the Navy take civilians and, in four months time, turn them into efficient radio operators and technicians will be answered on Columbia network's "Spirit of '42" Sunday, January 11, when the program goes to the U. S. Naval Training School at Noroton Heights, Connecticut (WABC-CBS, 2:00 to 2:30 P.M., EST).

This item was recently carried by Leonard Lyons, New York columnist:

"The final message from R.C.A.'s staff in Manila was addressed to their boss in New York. He immediately dispatched a reply - and then they destroyed the station."

A North Carolina radio station has been told that the Federal Communications Commission has no say in deferment from military service of licensed radio engineers. It explains that the Selective Service Act prohibits group deferments as such, and that the granting of occupational deferments in individual cases is at the discretion of local draft boards.

The life story of DeForest captioned "Magnificent Failure" by Samuel Lubel will appear in next week's Saturday Evening Post (Jan. 17). A foreword reads:

"On January 29, 1907, a thirty-four-year-old inventor, impoverished and battered by misfortune, filed a patent on a discovery which changed the course of history and the destiny of mankind. Lee DeForest's grid audion tube introduced a new era in communication and is already responsible for a \$6,000,000,000 industrial development and more than a million new jobs.

"And yet this man who was the father of radio is still, today, a 'magnificent failure'. Mr. Lubell traces a strange career of achievement and frustration in three articles."

The Bell Laboratories Record for January 1942 contains the following articles: "160-Trunk Incoming Frames", A. E. K. Theuner; "Loading Coils With Cores of Molybdenum Permalloy", R.M.C. Greenidge; "Cellulose Acetate Yarn Replaces Silk for Wire Insulation", D. R. Brobst; "Stevens Point and Minneapolis Linked by Coaxial System", K. C. Black; "An Improved Capacitance Bridge for Precision Measurements", W. D. Voelker; "Abrasion Test for Finishes"

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ACTION TAKEN BY THE FCC

Applications Granted: KFI, Earle C. Anthony, Inc., Los Angeles, Calif., granted special temporary authority to operate the 5-KW auxiliary transmitter between the hours of 12 midnight and 6 A.M., PST, daily for a period not to exceed 30 days, in order to permit necessary servicing of the 50-kw main transmitter; K45LA, Don Lee Broadcasting System, Los Angeles, Calif., granted modification of construction permit for new high frequency broadcast station, for extension of commencement and completion dates only to Feb. 14, 1942 and August 13, 1942, respectively; KSEE, Earle C. Anthony, Inc., Los Angeles, Cal., granted modification of construction permit for new television broadcast station, to specify commencement date of January 15, 1942, and for extension of completion date from Jan. 15 to July 15, 1942.

Also, W2XGE, General Electric Co., Schenectady, N.Y., granted license to cover construction permit for new television relay broadcast station on experimental basis only, conditionally; WFTL, Ralph A. Horton, Fort Lauderdale, Fla., granted construction permit to install a new transmitter and directional antenna for night use, increase power from 250 watts unlimited time to 10 KW, change frequency from 1400 to 710 kc., and move transmitter locally; WHKY, Catawba Valley Broadcasting Co., Inc., Hickory, N.C., granted construction permit to install a new transmitter, directional antenna for night use, increase power from 250 watts to 1 KW night, 5 KW LS, DA-N, change frequency from 1400 to 1290 kc; WKWK, Community Broadcasting, Inc., Wheeling, W. Va., granted modification of license to increase power from 100 to 250 watts day and night

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AGAINST USING FOUR CHAINS EXCEPT IN GREAT EMERGENCY

Unanimously expressing disapproval of tying together the four national networks for simultaneous broadcasts, the Planning and Advisory Committee of the Red Network of the National Broadcasting Company adopted a resolution to that effect as follows:

"In considering how network operation can best serve the interests of the nation during this war period, we urge that each network retain independent operation and independent program building. The simultaneous use of national networks, except in the instances when the President of the United States addresses the nation, or in the event of a sudden emergency, or military necessity should be avoided. Our vast radio audience is a result of, and responds to, the excellence and variety of programs, a product of the American system of broadcasting. Tying up four networks for one program is in effect attempting to coerce listeners and will fail in its purpose, and will not attract a maximum audience, neither will it spur competition efforts for program quality. The interests and welfare of the nation can best be served by following the present pattern of independent separate network operation."

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TELEVISION PROVES PRACTICAL IN DEFENSE INSTRUCTION

Television was tried out as a defense weapon of national importance, when instructions for air raids were broadcast by NBC last week in New York City, and relayed to the General Electric Company's receiver in the Helderberg Mountains near Schenectady, 129 miles northwest of New York City.

Air raid wardens, police chiefs, fire chiefs, who were invited from the nearby villages of Altamont and Berne to witness the experiment at the G-E relay station, expressed the opinion that the television class was the most practical method of instruction yet devised. They were most enthusiastic over the completeness possible in this method of training, and stated, according to a G.E. bulletin, that they had "learned more through this one show than through all the literature read and all other courses of instruction combined."

Officials of the General Electric Company expressed the belief that television relay receivers installed at strategic points throughout New York State would be a most efficient means of assuring proper and complete instruction of air raid wardens and other war work volunteers on the farm and small communities.

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