Michigan Law Review

Volume 38 | Issue 3

1940

NOTES ON PRACTICE BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

Herbert M. Bingham
Member of the Executive Committee of the Federal Communications Bar Association; member of the bars of California, Montana, Virginia, and the District of Columbia

NOTES ON PRACTICE BEFORE THE FEDERAL COMMUNICATIONS COMMISSION*

Herbert M. Bingham†

IT is the purpose of this paper to discuss the broadcast license practice and procedure before the Federal Communications Commission as it exists today. No attempt at criticism or suggestions for reform will be made.

The commission promulgated its present rules of practice and procedure on July 17, 1939.[1] In 1937 and 1938 the commission's rules underwent an intensive examination, and in July of 1938 proposed rules were published. Thereafter the Federal Communications Bar Association made a thorough study of the proposed rules and published its recommendations in a forty-six page pamphlet. Its recommendations were considered and in some instances adopted. One of the considerations deemed to be extremely important by the executive committee which drafted the recommendations was that of utilizing the Federal Rules of Civil Procedure, in so far as possible, as a basis for the pertinent commission's rules. Several of the commission's rules as finally adopted are patterned after the federal rules. Examples are the rules relating to the computation of time,[2] the subscription and verification of pleadings,[3] the serving of pleadings,[4] the proof of official records,[5] the service of subpoenas,[6] and the use of depositions.[7] The language used by the Supreme Court in the *Morgan* case,[8] con-

* Based on an address before the American Bar Association Institute on Practice and Procedure before Administrative Tribunals, held in Washington, D.C., November 13-17, 1939.

† Member of the Executive Committee of the Federal Communications Bar Association which drafted proposed rules for the Federal Communications Commission; B.S., Pennsylvania; J.D., Stanford; member of the bars of California, Montana, Virginia, and the District of Columbia.—*Ed.*

[1] Published in the FEDERAL REGISTER of July 19, 1939, starting at p. 3341.

[2] Federal Rules of Civil Procedure, No. 6 (a), incorporated into Rule 1.9 of the Federal Communications Commission Rules of Practice and Procedure (hereinafter designated by the word "Rule").

[3] Fed. Rules Civ. Proc., No. 11, incorporated almost word for word in Rule 1.122.

[4] Fed. Rules Civ. Proc., No. 5, adopted by Rule 1.141.

[5] Fed. Rules Civ. Proc., No. 44, with minor changes, adopted in Rules 1.151 to 1.153.

[6] Fed. Rules Civ. Proc., No. 45, found in toto in Rule 1.174.

[7] Fed. Rules Civ. Proc., No. 26 to 32, found in 1.221 to 1.228.

[8] Morgan v. United States, 304 U. S. 1, 58 S. Ct. 999 (1938).

cerning the elements of a fair hearing before an administrative tribunal, undoubtedly had some bearing on the commission's adoption of the present practice of requiring the parties to submit proposed findings. Prior to November 1938 the examiner system was utilized and the examiner rather than the parties submitted the proposed findings.

Broadcast license practice and procedure was selected for discussion because the practice is unique and because the services of an attorney are more often necessary than in the case of other types of licenses. The licensing of carriers is similar to the Interstate Commerce Commision practice. The other forms of license, such as aircraft, ship and amateur, are generally granted without the formality of a hearing, and controversies rarely arise in the issuance of those classes of license.

Only attorneys admitted to practice by the Federal Communications Commission may appear before it.[9] The application is prescribed by the rules of procedure[10] and may be obtained from the secretary of the commission. No fee is charged. A lawyer from any place other than the District of Columbia may be admitted for a particular case in the discretion of the commission or the official presiding at the hearing.[11]

In the standard broadcast field there are now approximately eight hundred licensees. There are always applicants seeking new stations, and practicing attorneys may be called upon to represent either a client who desires to become a licensee or a client who is a licensee, and who is seeking additional privileges or who has a right to protect. There are five classes of broadcasters who might need to seek the advice and representation of an attorney:

1. An applicant for a new station.
2. An existing licensee desiring better facilities, such as increased hours of operation or increased power or a different frequency or a combination of any one or more of the three types of betterment.
3. An existing licensee who is in some difficulty with the commission, either by reason of the failure of the commission to renew his license,[12] or revocation;[13] or by reason of an alleged violation of the rules and regulations or statutes or treaties.

[9] Rule 1.33.

[10] Rule 1.34, Appendix form 1.

[11] Rule 1.33.

[12] Communications Act of 1934, 48 Stat. L. 1064 at 1083, § 307(d), 47 U. S. C. (1935), § 307 (d) (hereinafter cited as Communications Act of 1934).

[13] Communications Act of 1934, § 312 (a); Rule 1.401.

4. An existing licensee who desires to oppose the granting of a pending application, and would therefore seek to intervene.[14]

5. An existing licensee who desires to sell or transfer control of a license, or a proposed licensee who desires to purchase an existing facility—the so-called voluntary assignment case.

The practice differs in each of the classes of cases to some extent and I will briefly endeavor to set forth the procedure in each.

I

APPLICATION FOR CONSTRUCTION PERMIT

The Application Form

Let us first examine the case of an applicant for a new station. The attorney would secure a construction permit application blank[15] from the secretary of the commission or from any of its field offices.[16] At least four blanks should be secured as the application is required to be filed in duplicate,[17] and, at least one copy will be desired for the attorney's office file. The fourth copy is needed for subsequent filing,[18] as will be explained later.

The broadcaster probably will have consulted a radio engineer before consulting an attorney, as he has had to determine whether or not there is an engineering consideration which would prohibit a grant of a license. If he has not done so, the attorney should advise him to secure the services of an engineer, as there are engineering problems involved in the selection of a frequency and, further, his services will be needed in filling out the engineering portions of the application pertaining to equipment, antenna, frequency, etc. The advice of an engineer will also be needed in most cases involving a betterment of operating facilities, as well as in the case of a new station. A financial statement is filed with the application[19] and may or may not require the services of an accountant for preparation, depending on the complexity of the financial set up.

Upon completion, the application must be subscribed and verified by the applicant.[20] At the time the application is filed, an appearance,

[14] Rule 1.102.
[15] F. C. C. form 301.
[16] Rule 1.71.
[17] Rule 1.351.
[18] Rule 1.382 (b).
[19] F. C. C. form 706.
[20] Rules 1.71 and 1.121. Applications and amendments to applications must, with certain exceptions (Rule 1.121), be personally signed by the applicant. Other pleadings may be signed and, if required, verified by counsel. Rule 1.121.

in duplicate, as counsel for the applicant, should be entered on the appropriate forms furnished by the secretary.[21]

I shall not endeavor to trace the course of the application for a construction permit through the accounting, legal and engineering divisions of the commission. Suffice it to say, the application receives scrutiny from each staff and winds up before the commission with a recommendation either to grant the application or to designate it for hearing.

The commission has the authority to make a grant without a hearing where it finds public interest, convenience or necessity would be served thereby if it can arrive at such a conclusion from an examination of the application.[22] If it does not reach such a decision after examination of the application, it is required to notify the applicant of the designation for hearing and must give him notice of the time and place and afford him an opportunity to be heard.[23]

The issuance of a license is a matter of course, after certain preliminary requirements, should the commission make the grant after examination, and therefore let us assume the commission designates the application for hearing.

Designation for Hearing

The applicant and his counsel each receive a copy of the notice advising the applicant the commission has examined his application and that it has designated it for hearing for reasons set forth and there follow, in the simple case, at least three reasons or issues, namely:

1. To determine the legal, technical, financial and other qualifications of the applicant to construct and operate the proposed station.
2. To determine the nature and character of the service proposed to be rendered.
3. To determine whether the granting of the assignment requested would be in accordance with the commission's plan of allocation, rules and regulations, and standards of good engineering practice.

The notice is dated and also contains an admonition that the application will not be granted unless the issues are determined in favor of the applicant on the basis of a record duly and properly made at a

[21] Rule 1.39, Appendix, form 2.
[22] Communications Act of 1934, § 309 (a).
[23] Ibid.

formal hearing and advises the applicant of his right to such a hearing.[24] Persons other than the applicant who desire to be heard must file a petition to intervene.[25] Appended to the notice is a copy of the pertinent rules referred to in the notice.[26]

Appearance and Desire to be Heard

Counsel must, within fifteen days[27] of the mailing date of the notice, file with the secretary an additional copy of the application[28] and all papers incorporated as a part thereof. In addition he must file an original and fourteen copies[29] of a pleading captioned "Appearance and Desire to be Heard," which sets forth that the applicant will appear and desires to be heard at such time and place as the commission may designate, and that the applicant will present evidence to establish affirmatively the issues presented in the notice of hearing. The pleading, if signed by counsel, need not be verified.[30]

Should the applicant desire to amend or dismiss, without prejudice, his application, it may be done as a matter of right prior to the time it is designated for hearing but only on motion thereafter.[31] Should the amendment be permitted, the application would be removed from the hearing docket, reconsidered, and if necessary redesignated.[32]

Continuing with our assumption of the simple case, counsel and the applicant will be notified of the date set for the hearing, which will be a month or more later. The case is now on the trial calendar and will be tried on the day specified, unless continued. Continuances will be discussed later.[33] The hearing is in Washington, D.C., and as it may be inconvenient to have the witnesses present, the broadcaster's attorney may move to take depositions.

Depositions

The motion must be filed at least twenty-five days before the proposed date for the taking of the depositions and must set forth the

[24] Under Rule 1.382 (b).
[25] Rule 1.102.
[26] See Application of Valley Broadcasting Co., F. C. C. Docket No. 5784.
[27] Time is computed as in federal practice. Rule 1.9 is the same as Fed. Rules Civ. Proc., No. 6 (a).
[28] Rule 1.382 (b).
[29] Rule 1.142.
[30] Rule 1.122.
[31] Rule 1.73.
[32] Rule 1.73.
[33] Infra, "Continuances and Extensions—Motions Docket."

various details required by the rules.[34] An original and eight copies must be filed,[35] and a sufficient number of copies of the proposed order to be served on all parties must be furnished the secretary.[36]

Details of the requirements may be found in the Rules.[37] The rules are quite detailed but not complicated and in some respects very similar to Rule 30 of the Federal Rules of Civil Procedure.

Subpoenas

Upon written request to the commission[38] the attendance of witnesses and the production of relevant documentary evidence can be required by subpoena, issued by a commissioner or the presiding officer designated to hear the case.[39] If it is a duces tecum it must be subscribed and verified, and describe with particularity the document desired and the facts expected to be proved thereby.[40]

Documentary Evidence

Preparation for the hearing may require the utilization of records of the commission. Inspection of certain enumerated records is permitted.[41] Others may be inspected only at the discretion of the commission. I might add, I know of no case in which the commission permitted an inspection of any document in its so-called confidential files. Should any of the records, subject to inspection, be required as evidence at the hearing they may be obtained upon written request to the secretary,[42] who will furnish certified copies of the desired documents.

All exhibits must be offered in duplicate, and a copy furnished opposing counsel.[43] The Federal Rules of Civil Procedure covering the subject of proof of official records have been adopted, with minor changes, by the commission.[44]

[34] Rule 1.221. Depositions are authorized by the Communications Act of 1934, § 409 (e).

[35] Rule 1.142.

[36] Rule 1.221.

[37] Rules 1.221 to 1.228.

[38] Rule 1.172. The commission is authorized to issue subpoenas by the Communications Act of 1934, § 409 (a), (b).

[39] Rule 1.171.

[40] Rule 1.172. Service returns, witness fees, etc., are covered by Rules 1.173 and 1.174.

[41] Rule 1.5 (b).

[42] Rule 1.6.

[43] Rule 1.215.

[44] Fed. Rules of Civ. Proc., No. 44, embodied in Rules 1.151 to 1.153.

Continuances and Extensions—Motions Docket

At this point it might be well to discuss the motions docket and point out the procedure with reference to obtaining a continuance or an extension of time within which to file a pleading or perform some act required to be done within a specified time.

An appropriate petition is prepared, and accompanied by the proposed order,[45] served,[46] and an original and eight copies[47] of each are filed with the secretary along with the proof of service.[48] Five days must elapse before the petition is placed on the motions docket unless all interested parties consent to an earlier date.[49] Any party in interest may file an opposition to the petition within the five-day period with the usual proof of service[50] and the original and eight copies.[51]

On the hearing day,—at present it is Friday,—the party or parties appear. Each has the right to argue orally. That right may be waived, although the waiver does not preclude any of the other parties in interest from making an oral argument.[52] In the event the ruling of the presiding officer of the motions docket is adverse, counsel must except forthwith, otherwise the exception is considered waived.[53] Within two days from the date of the ruling the aggrieved party may petition for a review of the decision by a quorum of the commission but does not have to do it in order to preserve the exception.[54] In order to carry the exception into the record, the exception must in any event again be noted at the time the application comes on for hearing and unless counsel notes in the record his exception to the ruling, it is lost.[55]

The Hearing[56]

At the hearing the applicant occupies much the same position as a plaintiff in a civil action. His opponents are the intervenors, if any, and in a sense, the commission. The commission, theoretically, is seeking the facts and its counsel or the presiding officer act accordingly. In the simple case, the commission is not usually represented by counsel, and the presiding officer undertakes to question witnesses in the development of the relevant facts which have been testified to but which, in

[45] Rule 1.252.
[46] Rule 1.254.
[47] Rule 1.142.
[48] Rule 1.254.
[49] Rule 1.254. There is a 7-day limit for those western states set forth in Rule 1.10.
[50] Rule 1.255.
[51] Rule 1.142.
[52] Rule 1.255.
[53] Rule 1.256.
[54] Rule 1.256.
[55] Rule 1.256.
[56] The commission is authorized to hold hearings by §§ 309 and 409 (a) of the Communication Act of 1934.

his opinion, require amplification or clarification, just as a judge might question a witness to clear up some ambiguity or misunderstanding.

All witnesses are sworn with the usual oath or affirmation and the testimony is stenographically recorded and transcribed by the official reporter for the commission.[57]

The rules of evidence governing civil proceedings in federal courts govern formal hearings before the commission but may be relaxed to better serve the ends of justice.[58] The presiding officer may be inclined to be rather conservative in his application of the rules of evidence, and he may be quite technical. Due to court decisions, the tendency is to be strict rather than lax in the admission of evidence.[59]

The presiding officer rules upon objections to evidence, and exceptions are noted. The witness is generally permitted to answer the question propounded, subject to the exception, and the commission eventually may pass upon the ruling of the examiner. Exhibits may be offered but not admitted in evidence and are then offered for identification and become part of the record which goes to the commission for final action as to admissibility.

If there is an intervention, counsel for the intervenor cross-examines the applicant's witnesses and at the conclusion of the applicant's case may or may not offer testimony. In the event testimony is offered, the applicant may cross-examine. The applicant has the opening and closing privilege just as a plaintiff would have.[60]

The presiding officer has wide discretionary powers.[61] He may decide that the evidence is cumulative and therefore limit the number of witnesses on the issue being testified to,[62] or he may call for further evidence from any party at any time during the proceeding.[63]

The Communications Act of 1934[64] provides in effect that the commission shall determine that public interest, convenience or necessity is served before it can grant any application for a station license or for a renewal or modification thereof. The task of an applicant for

[57] In case of an appeal, transcripts may be ordered at the contract rate specified in the annual bid. I believe it is about 30 cents per folio at present. However, a transcript is available at the commission's office and there is no necessity for purchasing one although it is a great convenience in the preparation of proposed findings or exceptions.

[58] Rule 1.211.

[59] Interstate Commerce Commission v. Louisville & N. R. R., 227 U. S. 88, 33 S. Ct. 185 (1913); Tri-state Broadcasting Co. v. Federal Communications Commission, (App. D. C. 1938) 96 F. (2d) 564.

[60] Rule 1.204.

[61] Set forth in Rule 1.231 (a).

[62] Rule 1.212.

[63] Rule 1.213.

[64] § 309 (a).

a license is a difficult one because of the broad standard and the lack of statutory or stare decisis guides. It has been recently held that "a radio broadcasting station is not a public utility in the same sense as a railroad" and "that the term—public interest, convenience and necessity—should not be given such a broad meaning as has been applied to it elsewhere in the interpretation of public utility legislation." [65]

As explained above,[66] upon designating the application for hearing, the commission frames the issues upon the points it desires evidence in order to apply the statutory yardstick. The applicant has the burden of proof.

The first issue concerns the legal, technical, financial and other qualifications of the applicant to operate the proposed station.[67] The legal qualifications embrace a showing that the applicant is either a United States citizen, in the case of an individual, or a partnership or association or a United States owned and controlled domestic corporation [68] and that the applicant has not been adjudged guilty of monopoly or attempted monopoly in the radio field.[69] The applicant must either have had experience in the management and operation of a station or must have made plans and arrangements to hire competent personnel to operate the station, under his management, in accordance with the rules and regulations. Financial qualifications embrace the financial ability to construct the station and to finance an operating deficit during the period of getting established as a going concern. The phrase "other qualifications" is found in the statute,[70] but it has not been interpreted so far as I know. Evidence with reference to the character of the applicant, his standing in the community, positions held in private or civic organizations—in other words, evidence that the applicant possesses qualities of character and citizenship which would merit faith and confidence, should be offered. At this point I might state that letters to the commission relating to the merits of any pending application are not considered by the commission in determining any of the issues.[71] The writer or writers are notified of the hearing and may appear and testify provided their testimony is relevant and competent.[72]

The second issue concerns the nature and character of the proposed

[65] Sanders Bros. Radio Station v. Federal Communications Commission, (App. D. C. 1939) 106 F. (2d) 321 at 324.

[66] See supra, "Designation for Hearing."

[67] Communications Act of 1934, § 308 (b).

[68] Ibid., § 310 (a).

[69] Ibid., § 311.

[70] Ibid., § 308 (b).

[71] Rule 1.195.

[72] Rule 1.195.

service. This, too, is rather a broad issue as it encompasses a showing of the need for service. Of course that includes the existing service or lack of it; the program service planned; and arrangements, if any, which have been made with the available talent, if any. In order to justify a need for service, a lack of available service must be shown. Population, need for an advertising outlet, need for civic, charitable and other quasi-public organizations to reach the public with their message, etc., are elements to be considered in making the showing. The availability of advertising support is of importance, as it tends to prove the station will be self-supporting. The Bureau of Census has a mass of statistics relating to the number of retail establishments, the number of wholesale establishments, dollar volume, etc., available for practically every village, town and city in the country and certified copies may be obtained at a nominal cost.

On the third issue, whether the requested assignment is in accordance with the commission's plans of allocation, rules and regulations and standards of good engineering practice, both the applicant's and the commission's engineer testify.

Corrections to Transcript

At the conclusion of the hearing the transcript of testimony, exhibits, and briefs, if any, are filed with the secretary.[73] He notifies counsel of the date of filing and within ten days after the filing date suggested corrections, if any, with proof of service on the other parties to the proceedings, must be filed.[74] An original and fourteen copies are required.[75] The officer who presided at the hearing passes upon motions to correct the record.[76]

Proposed Findings of Fact and Conclusions

An original and fourteen copies of proposed findings of fact and conclusions must be filed (accompanied by a proof of service), with the commission within twenty days of the filing of the transcript of record. Failure to file forfeits any right to further participate in the proceedings, including oral argument.[77] The proposed findings must be set forth in serially numbered paragraphs and must contain detailed, basic evidentiary facts with record citations in support of the conclusions proposed, which must be separately stated.[78] A brief may[79] be and usually is attached to the proposed findings and conclusions.

[73] Rule 1.231 (b).
[74] Rule 1.231 (c).
[75] Rule 1.142.
[76] Rule 1.231 (c).
[77] Rule 1.231 (d).
[78] Rule 1.231 (e).
[79] Rule 1.231 (e).

Commission's Proposed Decision

Thereafter, usually within a few months, either the commission will publish its proposed findings, conclusions and decision; or it will adopt the proposals of the parties if there is no substantial conflict and the commission agrees with the conclusions[80] and may issue a final order, with or without findings of fact.[81]

Within twenty days after the commission's report is filed, exceptions thereto may be filed and an oral argument[82] requested if the decision is adverse. Within thirty days after the commission's proposals are filed an opposing party may file a reply memorandum brief and request oral argument.[83] Should counsel desire to forego his right to file a reply, he must file a written notice of desire to appear and participate in the oral argument within five days after the opposing party's request for oral argument, otherwise his right will have been waived.[84] Fifteen copies of exceptions, briefs, reply memoranda, etc., are required[85] and an affidavit of service must accompany the pleading.[86]

The oral argument is calendared as soon as practicable, usually within a few months. It is generally held in the commission's meeting room on a Thursday before the full commission or a majority of the seven members. Twenty minutes are alloted to each side, with the applicant having the right to open and close.[87] It might be noted that the present chairman has recently requested counsel to submit to the commission not less than three days before the argument at least seven copies of the outline of argument or the points to be argued. There is no rule requiring such a memorandum but practitioners before the Federal Communications Commission are aware of the desire and, of course, comply. Commissioners propound questions from time to time and answers should be as brief and as direct as possible. There are but few interruptions and the commission usually makes an allowance for the time consumed answering their interrogatories.

Petition for Rehearing

In due course the commission enters its final order, which we will assume is adverse. The final order will either adopt its proposed decision or will be a finding of facts and conclusions. In any event it will specify an effective date, as the act provides for a twenty-day period

[80] Rule 1.231 (f).
[81] Rule 1.231 (f).
[82] Rule 1.231 (g).
[83] Rule 1.231 (h).
[84] Rule 1.231 (j).
[85] Rule 1.231 (k).
[86] Rule 1.231 (i).
[87] Rule 1.204.

after the effective date of the order within which to apply for a rehearing.[88]

The petition for rehearing must specifically request the relief which is desired and the request may be in the alternative.[89] Reconsideration, reargument, rehearing, amendments of findings or other appropriate relief, including a postponement of ordered action, may be requested.[90] The mere filing of the petition does not stay required action unless the commission so orders.[91]

If newly discovered evidence is claimed, a verified statement of the facts, together with the facts relied upon to show that petitioner could not have, with diligence, known or discovered the evidence at the time of the hearing,[92] is required. The errors must be set out in detail and if complaint is made of findings of fact, record citations are required.[93] The usual original and fourteen copies with proof of service is required,[94] of both the petition and the opposition thereto, which must be filed within ten days after the filing of the petition.[95]

Appeals

The Communications Act of 1934[96] grants a right of appeal to applicants or others who are aggrieved or whose interests are adversely affected by a decision of the commission granting or refusing to grant an application for a construction permit, a radio station license or a renewal or modification thereof. The appeal must be to the Court of Appeals of the District of Columbia[97] and must be taken within twenty days after the effective date of the decision complained of.[98]

It will be remembered that petitions for rehearing must also be filed within twenty days after the effective date of the adverse decision.[99] The seeming conflict between the provisions of the act relating to appeals and petitions for rehearing has been adjudicated, the court of appeals having held that the filing of a petition for rehearing suspends the running of the appeal period and that an appellant has twenty days from the date of final action on the petition for rehearing within which to file his notice and reasons for appeal.[100]

[88] Communications Act of 1934, § 405.
[89] Rule 1.271.
[90] Rule 1.271.
[91] Communications Act of 1934, § 405.
[92] Rule 1.271.
[93] Rule 1.271.
[94] Rule 1.272.
[95] Rule 1.273.
[96] § 402 (b).
[97] Ibid.
[98] Communications Act of 1934, § 402 (c).
[99] Ibid., § 405.
[100] Saginaw Broadcasting Co. v. Federal Communications Commission, (App. D. C. 1938) 96 F. (2d) 554, cert. den. 305 U. S. 613, 58 S. Ct. 72 (1938).

At this point it might be well to discuss the election, if any, of the course to follow, i.e., to appeal or petition for rehearing. The precise question has never been litigated so far as I know. The language used by the court in the *Saginaw Broadcasting* case[101] indicates that the petition for rehearing is an administrative benefit to the commission. In a subsequent case the court had occasion to state, in commenting on various administrative remedies available to appellant, that "it is a well-settled rule of judicial administration that no one is entitled to judicial relief until he has exhausted all prescribed, applicable, administrative remedies."[102] It would, therefore, seem that the only safe course would be to exhaust the administrative remedy by petitioning for rehearing before seeking to appeal.

The manner of taking the appeal is set forth in the statute, and certain duties are imposed on the commission in connection with the giving of notice to interested parties and the filing of papers and documents pertinent to the appeal.[103] The right to intervene is granted to interested parties.[104] The court rule[105] sets forth in detail the required contents of the printed record necessary to the determination of the appeal, the manner in which the record is to be designated and the time within which the various steps must be taken.

The case is docketed on the special calendar upon the completion of the record upon which the appeal is to be heard, and thereafter the general rules of the court regulating the practice on appeals from the district court apply. Intervenors may in the discretion of the court be afforded an opportunity to argue orally.[106] The court is limited to a review of questions of law. Findings of fact by the commission, if supported by substantial evidence, are conclusive unless it clearly appears that the findings are arbitrary or capricious.[107] The court's judgment is final,[108] subject only to review by the Supreme Court of the United States upon certiorari.[109]

[101] Ibid. 96 F. (2d) at 558.

[102] Red River Broadcasting Co. v. Federal Communications Commission, (App. D. C. 1938) 98 F. (2d) 282 at 284. The court cited cases in footnote 3. Cert. den. 305 U. S. 625, 58 S. Ct. 86 (1938).

[103] Communications Act of 1934, § 402 (c).

[104] Ibid., § 402 (d).

[105] Rules of the United States Court of Appeals of the District of Columbia, No. 32.

[106] Rules 32 (8) of the U. S. C. A. D. C. Rules.

[107] Communications Act of 1934, § 402 (e); Courier Post Pub. Co. v. Federal Communications Commission, (App. D. C. 1939) 104 F. (2d) 213 at 215, citing cases in footnote 2.

[108] Communications Act of 1934, § 402 (e).

[109] Under § 240 of the Judicial Code as amended, 28 U. S. C. (1935), § 347.

After determination of the appeal, the opinion and judgment are certified to the commission in lieu of mandate.[110] The judgment may be a dismissal, an affirmance, or a reversal and remand. The court will not make findings for the commission,[111] but it will remand for proceedings in accordance with its opinion and order, and has held it is the duty of the commission to comply with that order.[112]

I cannot be too emphatic in stressing the importance of making a record. The statutory standard is so broad that counsel cannot afford to leave matters susceptible of concrete proof to inference. If the facts are available, competent evidence should be introduced to prove them. A replete record is invaluable as it forms the foundation of the proposed findings and of the appeal, and unless it is adequate there is only a shell. The oral argument may be brilliant, but time may dull its brilliance and the commission will not determine the application until weeks later.

The appellate court does not pass upon questions of fact, but it does pass upon the commission's findings of fact in those cases in which the appellant alleges the commission ignored the record facts. If the facts are not in the record, the appeal is lost. Oral argument does not form a part of the appellate record, and it is only the evidentiary facts which the court can consider in determining whether the commission has acted in an arbitrary and capricious manner.

II

APPLICATION FOR BETTER FACILITIES

In the main the practice in the other classes of cases is the same as the procedure hereinabove outlined. The licensee desiring better facilities files an application for modification of license.[113] The procedural steps are quite similar and all that has been said with reference to depositions, subpoenas, hearing, exceptions and so forth applies to the modification application as well. In fact there is only one radical departure from the practice which I have described, and that occurs in revocation proceedings.

[110] Rule 32 (9) of the U. S. C. A. D. C. Rules.

[111] Saginaw Broadcasting Co. v. Federal Communications Commission, (App. D. C. 1938) 96 F. (2d) 554 at 563.

[112] Pottsville Broadcasting Co. v. Federal Communications Commission, (App. D. C. 1939) 105 F. (2d) 36 at 39, cert. granted (U. S. 1939) 59 S. Ct. 107.

[113] F. C. C. form 304.

III

REVOCATION OR RENEWAL

The grounds for revocation are set forth in the act[114] and include false statements in applications; a change of conditions which would warrant the commission in refusing to grant a license on an original application; violations of the act or of the rules and regulations or of treaties;[115] or a conviction under the anti-trust laws.[116]

The applicable rule of the commission[117] has followed the requirements of the statute by providing that the proceeding shall be initiated by serving upon the licensee an order of revocation, effective not less than fifteen days thereafter. The order contains a statement of the grounds and reasons for the proposed revocation and advises the licensee of his right to file a written request for hearing within fifteen days after the receipt of the order.[118]

If the request for hearing is filed, the order stands suspended until the hearing is concluded.[119] However, if no request for hearing is made, the order becomes final without any further action by the commission.[120]

In revocation hearings the commission opens and closes and has the burden of proof.[121] But a station can be deleted (license revoked) by setting the application for renewal of license for hearing, thereby placing the burden of proof on the applicant to show that its continued operation is in the public interest.[122] In fact, during the existence of the regulatory bodies there has been but one true revocation hearing.[123] Two true revocation proceedings are now pending.[124]

The right to petition for rehearing is available and it would be repetitious to further discuss it as the procedure and practice is identical.

[114] Communications Act of 1934, §§ 312 (a), 313.
[115] Ibid., § 312 (a).
[116] Ibid., § 313.
[117] Rule 1.401.
[118] Communications Act of 1939, § 312 (a).
[119] Ibid.; Rule 1.401.
[120] Rule 1.401.
[121] Rule 1.204.
[122] Boston Broadcasting Co. v. Federal Radio Commission, (App. D. C. 1933) 67 F. (2d) 505; Trinity Methodist Church v. Federal Communications Commission, (App. D. C. 1932) 62 F. (2d) 850; KFKB Broadcasting Assn. v. Federal Radio Commission, (App. D. C. 1931) 47 F. (2d) 670; Sproul v. Federal Radio Commission, (App. D. C. 1931) 44 F. (2d) 444.
[123] In re KGMP, Elk City, Okla., Revoked September 1, 1931.
[124] In re WSAL, Docket 5795; In re KUMA, Docket 5608.

The act[125] makes available to a licensee whose license has been revoked the provisions of a previous statute,[126] relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission. The proceeding therefore must be initiated in a United States District Court.

The act provides for a maximum license period of three years[127] and the commission has prescribed a license period of one year.[128] A renewal application has to be filed at least sixty days prior to the expiration date of the license sought to be renewed.[129] Appropriate forms are issued by the secretary[130] and if the renewal application is in proper form, it is usually issued as a matter of course.

Where a broadcaster has been operating a station in a manner not entirely satisfactory to the commission, the commission can set the renewal application for hearing, and, in effect, conduct a revocation proceeding, but with the burden of proof shifted to the applicant. In those proceedings the usual notice is issued. Among the issues will be general statements as to the causes of the dissatisfaction, and one of the issues will undoubtedly be that of whether the granting of the application and the continued operation of the station will serve public interest, convenience and necessity.[131]

The practice and procedure with reference to a renewal application hearing, decision and review is identical with the practice and procedure described in the illustrative case heretofore discussed.

IV

INTERVENTION

Any one who has some claim that his intervention will be in the public interest may file a petition to intervene. The petition for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and the facts on which the petitioner bases his claim that his intervention will be in the public interest.[132] The petition must be subscribed or verified[133]

[125] Communications Act of 1934, § 402 (a).

[126] 38 Stat. L. 219 (1913); 28 U. S. C. (1935), §§ 43, 44; 49 ibid., §§ 16, 50.

[127] Communications Act of 1934, § 307 (d).

[128] Rule 3.34, published in the FEDERAL REGISTER of June 30, 1939, p. 2717, "Rules Governing Standard Broadcast Stations."

[129] Rule 1.360.

[130] F. C. C. form 303.

[131] See renewal application of WQDM, Docket 5788, designated for hearing November 6, 1939.

[132] Rule 1.102.

[133] See requirements of Rule 1.122.

and an original and eight copies of the petition and an equal number of copies of a proposed order must be filed.[184]

The usual petition is filed by an existing licensee who desires to oppose the granting of a pending application by reason of the grant affecting the operation of the station in some manner, such as economic competition or electrical interference. If the petitioner can demonstrate that his participation in the proceeding will be helpful to the commission in arriving at a correct determination, the petition will be granted by the presiding officer of the motions docket, usually a commissioner.

The rule governing the preservation of exceptions and petition for review has heretofore been discussed.[185]

Assuming that the ruling is adverse to the petitioner, the petitioner must forthwith except to the ruling and within two days from the date of the ruling may petition for a review of such ruling by a quorum of the commission.[186] In the event the commission also decides adversely to the petitioner, it would seem that the petitioner can do nothing more than await the final determination of the application by the commission, and if the application should be granted, petitioner could then petition for a rehearing[187] and could point out specifically wherein the decision is erroneous and the manner in which he has been aggrieved by not having been afforded an opportunity to participate in the hearing. Should the commission continue to rule adversely, the petitioner will be in a position to resort to appeal as he has exhausted his administrative remedy.[188]

V

VOLUNTARY ASSIGNMENT

The fifth class of case to be considered is that of voluntary assignment. Counsel may be called upon to represent either the vendor or vendee, as both parties must join in the application which is filed on appropriate forms furnished by the secretary.

The act requires that the commission be fully informed as to all voluntary or involuntary transfers of licenses or transfer of control of

[184] Rules 1.142, 1.252.

[185] Rule 1.256, discussed supra at note 55.

[186] Rule 1.256.

[187] Rule 1.271.

[188] Red River Broadcasting Co. v. Federal Communications Commission, (App. D. C. 1938) 98 F. (2d) 282.

licensees, whether the transfer be direct or indirect.[139] Three forms are involved in this type of application, namely, the voluntary assignment application;[140] an inventory of station property,[141] and a profit and loss statement.[142]

The practice and procedure followed is identical with that heretofore described.

[139] Communications Act of 1934, § 310 (b).
[140] F. C. C. form 314.
[141] F. C. C. form 316.
[142] F .C .C. form 705, 706.