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Regulation of Business - Antitrust Laws - Effect Upon a Subsequent Antitrust Suit of FCC Approval of an Exchange of Television Stations

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REGULATION OF BUSINESS—ANTITRUST LAWS—EFFECT UPON A SUBSEQUENT ANTITRUST SUIT OF FCC APPROVAL OF AN EXCHANGE OF TELEVISION STATIONS—*United States v. Radio Corporation of America*—Creation of independent regulatory agencies presented the courts with the problem of allocating jurisdiction whenever the determination of proper judicial action was found to require the resolution of issues which an administrative agency was competent to resolve. To meet this problem the doctrine of "primary jurisdiction" was developed whereby administrative issues are to be decided by the agency prior to the court's determination of issues not within the realm of the agency. Application of the doctrine is based on the need for efficient and uniform agency regulation and the desirability of utilizing agency expertise in regard to issues beyond the conventional experience of judges. Such application is guided by a determination of often-elusive legislative intent. Where appropriate, agency determinations will be conclusive in subsequent judicial proceedings as to matters within the scope of the agency's power regardless of whether the issue was brought to the agency initially[1] or whether it was referred to the agency under the primary jurisdiction doctrine.[2] It is not surprising that "50 years of constant litigation have failed to formulate the doctrine in a manner which enables litigants to choose the proper forum with a reasonable degree of certainty."[3]

The problems in regard to the applicability of primary jurisdiction in antitrust suits involve the additional requirement of harmonizing the antitrust laws with a regulatory statute which in large measure is meant to provide a substitute for competition. This harmonizing may range from complete applicability of the antitrust laws to supercession of the antitrust remedies by remedies provided under the regulatory statute, or to a complete antitrust exemption. In the recent case of *United States v. Radio Corporation of America*,[4] the United States Supreme Court held that a de-

[1] D. L. Piazza Co. v. West Coast Line, Inc., (2d Cir. 1954) 210 F. (2d) 947; Black River Valley Broadcasts, Inc. v. McNich, (D.C. Cir. 1938) 101 F. (2d) 235. See comment, 58 COL. L. REV. 673 at 698 (1958).

[2] United States v. Railway Express Agency, Inc., (D.C. Del. 1951) 101 F. Supp. 1008.

[3] Comment, 25 UNIV. CHI. L. REV. 192 (1957).

[4] 79 S. Ct. 457 (1959). The decision was unanimous, with Justices Frankfurter and Douglas taking no part in the consideration or decision of the case.

termination by the Federal Communications Commission that there was no antitrust violation connected with a requested license transfer would not be conclusive in a subsequent antitrust suit against one of the parties to the transfer since the FCC has no power to determine antitrust issues as such. The Court also held that the doctrine of primary jurisdiction did not operate to exempt the transfer from the applicability of the antitrust laws.

I

On May 16, 1955, National Broadcasting Co. (a wholly owned subsidiary of the Radio Corporation of America) and Westinghouse Broadcasting Co. entered into a written agreement under which Westinghouse would acquire the television and radio broadcasting facilities of NBC in Cleveland plus $3,000,000 and NBC would acquire the television and radio broadcasting facilities of Westinghouse in Philadelphia. Applications for FCC approval of the exchange were filed on June 15, 1955. The FCC notified the Justice Department on August 12, 1955 of the applications and that possible antitrust questions were raised by the applications.[5] The FCC issued letters on October 17, 1955 pursuant to section 309(b) of the Communications Act[6] requesting additional information on various issues including the antitrust questions, and received answers furnishing detailed data. The FCC also conducted an extensive investigation and analysis of its own in regard to the proposed exchange. The Justice Department stipulated in the antitrust action that the FCC had before it all of the evidence relating to the antitrust issues, that it had a duty to, and did, consider whether the evidence showed any violation of the antitrust laws, and that it decided all issues relating to the exchange which it could lawfully decide. The FCC granted the exchange applications on December 21, 1955 without having held a hearing on the applications.[7] The parties effected the exchange on January 26, 1956.[8] The Justice Department also stipulated in the antitrust suit that

5 H. Hearings before the Antitrust Subcommittee of the Committee on the Judiciary, 84th Cong., 2d sess., part 1, vol. 1, p. 19 (1956).

6 48 Stat. 1085 (1934), as amended, 47 U.S.C. (1952) §309(b).

7 Public Notice 27067 (1955), 13 PIKE AND FISCHER, RADIO REGULATION 374 (1956).

8 This was after the expiration of the 30-day period in which an appeal could have been taken from the approval of the commission. 48 Stat. 1093 (1934), 47 U.S.C. (1952) §402.

it had been kept fully informed as to the evidence in the FCC's possession relating to the exchange[9] and that the department had the right to request that the applications be set for a hearing under section 309(b) of the Communications Act,[10] to request reconsideration of the FCC decision under section 405,[11] to protest the decision under section 309(c),[12] and to obtain judicial review of the decision under section 402(b).[13] The department exercised none of these rights.

The Department of Justice filed a civil antitrust complaint on December 4, 1956 under section 4 of the Sherman Act[14] charging RCA and NBC with violations of section 1 of the Sherman Act.[15] Prior to the exchange, NBC owned five VHF (very high frequency) television stations, the maximum allowable,[16] three of which were in the nation's three largest markets. The complaint charged a conspiracy between RCA and NBC whereby NBC was to dispose of its two stations in the smaller markets and to acquire two stations within at least the eight largest markets; that NBC was to utilize its power to withhold network affiliation in order to induce station owners to exchange their stations; and that NBC threatened to discontinue Westinghouse's NBC network affiliations in both Boston and Philadelphia, to refuse affiliation for a station Westinghouse was acquiring in Pittsburgh, and to refuse affiliation for any stations which Westinghouse might acquire in the future.[17] The complaint charged that thereafter NBC and Westinghouse entered into a contract providing for the exchange subsequently approved. The Department of Justice requested that the court hold the conspiracy or combination and the exchange agreement illegal, require divestiture of the Philadelphia station, re-

[9] The stipulation is reprinted in appellee's brief as Appendix B. Also see H. Hearings before the Antitrust Subcommittee of the Committee on the Judiciary, 84th Cong., 2d sess., part 2, vol. 1, p. 3181 (1956).

[10] 48 Stat. 1085 (1934), as amended, 47 U.S.C. (1952) §309(b).

[11] 48 Stat. 1095 (1934), 47 U.S.C. (1952) §405.

[12] 48 Stat. 1085 (1934), as amended, 47 U.S.C. (1952) §309(c).

[13] 48 Stat. 1093 (1934), as amended, 47 U.S.C. (1952) §402(b).

[14] 26 Stat. 209 (1890), as amended, 15 U.S.C. (1952) §4.

[15] 26 Stat. 209 (1890), 15 U.S.C. (1952) §1.

[16] 47 C.F.R. (1958) §3.636.

[17] It is perhaps relevant to note that Westinghouse had paid $8.5 million in 1953 to acquire the Philadelphia station, the largest single station sale up to that time, and that $5 million of this figure was paid for the NBC-TV affiliation contract. H. Hearings before the Antitrust Subcommittee of the Committee on the Judiciary, 84th Cong., 2d sess., part 2, vol. 1, p. 3117 (1956).

voke the station license, grant injunctive relief, and require judicial approval of further acquisitions by NBC of any television station in the eight primary markets.[18] A preliminary hearing was held pursuant to rule 12(d) of the Federal Rules of Civil Procedure[19] to determine the validity of the defendants' affirmative defenses. The district court held that the affirmative defenses were valid and a bar to the suit,[20] stating that it lacked jurisdiction since the exclusive means for review of an order of the FCC is by appeal to the Court of Appeals for the District of Columbia Circuit under section 402 of the Communications Act;[21] that if it had jurisdiction it could not exercise it since the commission decided that the exchange did not violate the antitrust laws;[22] and that the suit should be dismissed because of the equitable doctrine of laches.[23] An appeal was taken directly to the Supreme Court under the Expediting Act of 1903, as amended.[24]

II

In reversing the district court on the ground that the FCC has no power to determine antitrust issues as such in a license proceeding and that such issues were meant to be subject to judicial scrutiny even after approval by the FCC, the Supreme Court relied heavily upon the legislative history of the Radio Act of 1927 which preceded the Communications Act of 1934. Section 313 of the Communications Act specifically declares the antitrust laws to be applicable to "interstate or foreign radio communications,"[25] and

[18] Appellant's brief, p. 10.

[19] Rule 12(b), Fed. Rules Civ. Proc. 28 U.S.C. (1952).

[20] United States v. Radio Corporation of America and National Broadcasting Co., (E.D. Pa. 1958) 158 F. Supp. 333, noted and criticized in 71 HARV. L. REV. 1558 (1958); 44 VA. L. REV. 457 (1958).

[21] 158 F. Supp. 333 at 334.

[22] Id. at 335.

[23] Id. at 336.

[24] 32 Stat. 823 (1903), as amended, 15 U.S.C. (1952) §29.

[25] "All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed

section 311 directs the commission to refuse a license to any person "whose license has been revoked by a court under §313."[26] These provisions were taken from the Radio Act of 1927[27] and seem to have originated in a prior bill in which what is now section 311 appeared as the third paragraph of section 2(C) and what is now section 313 appeared as section 2(G).[28] In the hearings on this bill, it was stated that the Secretary of Commerce[29] would have no discretion to refuse a license under section 2(C) to a party believed to be violating the antitrust laws since this was a judicial question and not within the discretion of the secretary.[30] Upon its subsequent reintroduction, a minority report on the bill stated that section 2(C) might be wholly ineffective since it did not prohibit or guard against "the issuance or renewal of licenses to parties unlawfully monopolizing or attempting to unlawfully monopolize radio communication, etc., unless and until such party shall have been found guilty thereof by a Federal Court."[31] This report proposed that a commission be established which would hold hearings to determine whether the applicant is violating the antitrust laws and, if it is so determined, that the Secretary of

by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date of the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court." 48 Stat. 1087 (1934), 47 U.S.C. (1952) §313.

26 "The Commission is directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313 of this title." 48 Stat. 1086 (1934), as amended, 47 U.S.C. (1952) §311.

27 H. Rep. 1918, 73d Cong., 2d sess., pp. 47, 49 (1934).

28 H.R. 5589, 69th Cong., 1st sess. (1925). Section 2(G) was identical to the present §313. The third paragraph of §2(C) stated: "The Secretary of Commerce is hereby directed to refuse a station license and/or permit hereinafter required for the construction of a station to any person, firm, company, or corporation, or any subsidiary thereof, which has been found guilty by any Federal court of unlawfully monopolizing or attempting to unlawfully monopolize radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means. The granting of a license shall not estop the United States or any person aggrieved from prosecuting such person, firm, company, or corporation for a violation of the law against unlawful restraint and monopolies and/or combinations, contracts, or agreements in restraint of trade."

29 A large part of the administration of the act, as then phrased, was to be by the Secretary of Commerce.

30 H. Hearings on H.R. 5589, 69th Cong., 1st sess., p. 27 (1925).

31 H. Rep. 404, 69th Cong., 1st sess., p. 16 (1926).

Commerce shall then refuse to grant the license.[32] During the Senate consideration of a version of the bill, it was stated that "the bill does not attempt to make the commission the judge as to whether or not certain conditions constitute a monopoly; it rather leaves that to the court."[33] Congress adjourned prior to action on the bill but the next session reported out a version which became the Radio Act of 1927.[34] These two sections were subsequently incorporated into the Communications Act of 1934 as sections 311 and 313.[35] Section 311, as enacted, contained a sentence stating, "The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the [antitrust laws]. . . ."[36] This sentence was repealed in 1952,[37]

[32] Id. at p. 23. Likewise, the House defeated an amendment which was attempted to be inserted when the bill reached the floor and which would have required that a license be refused to any person "found by any Federal court *or the Commission* to have been unlawfully monopolizing or attempting to unlawfully monopolize" radio communication. 67 CONG. REC. 5502, 5555 (1926).

[33] 67 CONG. REC. 12507 (1926).

[34] 44 Stat. 1162 (1927).

[35] H. Rep. 1918, 73d Cong., 2d sess., pp. 47, 49 (1934).

[36] "The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation." 48 Stat. 1086 (1934).

This section was based upon §13 of the Radio Act [and §2(C) of the earlier bills] "modified to leave the Commission discretion in refusing licenses where the applicant has been adjudged by a court to be guilty of a violation of the antitrust laws but where the judgment has not extended to the revocation of the existing licenses." H. Rep. 1918, 73d Cong., 2d sess., p. 49 (1934).

[37] 66 Stat. 716 (1952). The 1952 amendment repealed both the above-mentioned sentence and the portion of the previous sentence giving the commission discretion to refuse licenses to an applicant previously adjudged by a court to be violating the antitrust laws when the court did not order such revocation. The evolution of this section has thus been from a mandatory refusal of a license to a person found guilty by a court of violating the antitrust laws (note 28 supra), to a discretionary refusal (note 36 supra), to a refusal only when the person's license has been revoked by a court (note 26 supra). The 1952 amendment would seem to indicate a congressional intent that the FCC have no control over either the determination of antitrust violations or the granting of relief for court-determined antitrust violations. See S. Rep. 44, 82d Cong., 1st sess., p. 9 (1951).

but the Conference Committee stated, "It is the view of the members of the conference committee that the last sentence of the present section 311 is surplusage and that by omitting it from the present law the power of the United States or of any private person to proceed under the antitrust laws would not be curtailed or affected in any way."[38] Although the omitted sentence could arguably have been intended to apply only to antitrust violations subsequent to the license grant,[39] the Court appears correct in its view that such a restrictive interpretation would not seem natural in light of other legislative history.[40]

Apart from the legislative history, the FCC has disavowed a power to determine antitrust issues as such,[41] and this position had previously been approved by the Supreme Court.[42] Indeed, in approving the exchange in the principal case, the commission acted under the express assumption that this approval would not foreclose subsequent antitrust suits by other government agencies.[43]

Commission approval of the exchange necessarily meant that the "public interest, convenience, and necessity will be served thereby."[44] Antitrust issues can be considered by the commission in determining the public interest,[45] but the determination must be based on the commission's own judgment on matters within its special competence and not merely upon a national policy favoring competition.[46] An applicant's competitive practices, however, may

38 H. Rep. 2426, 82d Cong., 2d sess., p. 19 (1952).

39 The district court opinion in the principal case, 158 F. Supp. 333 at 335.

40 Principal case at 464.

41 FCC Report on Chain Broadcasting 83 (1941); Report on Uniform Policy as to Violation by Applicants of Laws of United States, FCC Docket No. 9572, 1 PIKE AND FISCHER, RADIO REGULATION, Part III, 91:495 (1950).

42 National Broadcasting Co. v. United States, 319 U.S. 190 at 223 (1943).

43 13 PIKE AND FISCHER, RADIO REGULATION 374 (1956). Commissioner Bartley dissented from the approval of the exchange. He favored a hearing since he felt that the approval might foreclose any effective action being taken under certain provisions of the Clayton Act (viz., 15 U.S.C. §18). He did not seem to fear that future action under the Sherman Act would be barred. Commissioner Doerfer wrote a rebuttal, Commissioner Mack concurring, in which he stated, at p. 382, "It is difficult to see how approval of this exchange may effectively preclude other governmental agencies from examining into this or any other transaction of the network Companies." See also H. Hearings before the Antitrust Subcommittee of the Committee on the Judiciary, 84th Cong., 2d sess., part 2, vol. 1, p. 3181 (1956).

44 48 Stat. 1086 (1934), as amended, 47 U.S.C. (1952) §310(b).

45 National Broadcasting Co., Inc. v. United States, 319 U.S. 190 (1943).

46 Federal Communications Commission v. RCA Communications, Inc., 346 U.S. 86 (1953).

be such as to impair the applicant's ability to serve the public and cause him to fall short of the public interest standard even though the practices do not amount to a violation of the antitrust laws.[47] Although antitrust considerations are but one factor in determining the "public interest," it seems clear that section 313,[48] in specifically making the antitrust laws applicable to the broadcasting industry, would prohibit the commission from granting a license whenever the commission concluded that the license application was an essential part of an antitrust violation. Conversely, whenever the commission approves a license or exchange application, it would seem that the commission must necessarily have concluded, on the basis of the facts before it, that the application is not part of an antitrust violation. In accord with this view, it would appear that the commission found that NBC's activities were a legitimate use of a superior bargaining position and did not constitute an antitrust violation.[49] The commission has exclusive jurisdiction to determine the "public interest, convenience, and necessity" in connection with an application for a license[50] or exchange[51] and, unless reversed on appeal, this determination will be conclusive.[52] Since a commission determination that an applicant meets the public interest standard will be given conclusive effect, a paradox seems to exist. Such a determination necessarily requires that the commission has found the application not a part of an antitrust violation. Yet the principal case holds that the determination as to the antitrust issue will not be given conclusive effect even though all the facts relevant to such issue were considered by the commis-

47 Mansfield Journal Co. v. Federal Communications Commission, (D.C. Cir 1950) 180 F. (2d) 28.

48 48 Stat. 1087 (1934), 47 U.S.C. (1952) §313.

49 "In the instant case there is no scintilla of evidence that NBC conspired with anyone to monopolize production of network or local programs. No price fixing for advertisers is remotely apparent. NBC exercised its superior bargaining position to exchange a smaller market station (Cleveland) for a larger one (Philadelphia).

"No suggestion is made that NBC is attempting to keep other networks out of the Philadelphia market or any other market. Nor that it has conspired with anyone to keep independent broadcasters out of the markets under consideration. Even Westinghouse is free to re-enter the Philadelphia market with another network company or as an independent, if it be so advised. No restraint of trade, or attempt to monopolize television services in any of the trading areas involved are discernible in this exchange transaction." Statement by Commissioner Doerfer, Commissioner Mack concurring, 13 PIKE AND FISCHER, RADIO REGULATION 376 at 381, 382 (1956).

50 48 Stat. 1085 (1934), as amended, 47 U.S.C. (1952) §309(a).

51 48 Stat. 1086 (1934), as amended, 47 U.S.C. (1952) §310(b).

52 Black River Valley Broadcasts, Inc. v. McNich, (D.C. Cir. 1938) 101 F. (2d) 235.

sion. Nevertheless, there is a satisfactory explanation for this result. The congressional intent as evidenced by legislative history showed a design to withhold from the FCC any power to determine antitrust issues as such and to keep within the courts the jurisdiction to pass on such issues. Moreover, as previously indicated, the FCC has disavowed any power or desire to pass on antitrust issues as such and this policy had been approved by the Supreme Court.[53] The FCC determination of the public interest in connection with a license application is not an adversary proceeding and need not involve a hearing,[54] and the commission is not expressly required to notify the Justice Department that antitrust issues have been raised in a license or exchange application proceeding.[55] In addition intervention and appeal by the Justice Department could only result in a denial of the application,[56] requiring further antitrust relief to be sought elsewhere. Thus, when viewed as a practical matter, the holding in the principal case that the FCC has no power to decide antitrust questions seems wholly proper, any logical paradox notwithstanding.

III

Although it could not decide antitrust issues as such, the commission would still be able to foreclose subsequent antitrust suits if the doctrine of "primary jurisdiction" operated to exempt approved activities from the operation of the antitrust laws. The Communications Act itself seems clearly to deny the power to exempt approved license exchange transactions from the applicability of the antitrust laws.[57] Sections 221 and 222[58] affirmatively authorize the FCC to approve consolidations or mergers of telephone and telegraph companies and specify that the approved consolidations or mergers will not be subject to the antitrust laws,

[53] National Broadcasting Co. v. United States, 319 U.S. 190 at 223 (1943).

[54] 48 Stat. 1085 (1934), as amended, 47 U.S.C. (1952) §309(b).

[55] Ibid.

[56] 48 Stat. 1093 (1934), as amended, 47 U.S.C. (1952) §402.

[57] In fact, appellees stated in their brief, at p. 20, that "they do not now contend, and they never have contended, that the FCC had the power to authorize the transfer if it violated the antitrust laws or to authorize NBC to operate the stations in violation of the antitrust laws."

[58] 48 Stat. 1080 (1934), 47 U.S.C. (1952) §221(a), 57 Stat. 5 (1943), 47 U.S.C. (1952) §222(c).

while section 313[59] makes the antitrust laws applicable to "interstate or foreign radio communications." Furthermore, section 222(c)[60] requires a public hearing and notice to the Attorney General, among others, prior to commission approval and section 221 (a)[61] contains similar safeguards, whereas sections 309 and 310[62] require neither a hearing nor notice to the Attorney General prior to commission approval of an exchange application. Had Congress intended the approval of license or exchange applications to exempt the approved transactions from the application of the antitrust laws it presumably would have explicitly so provided and would have included the procedural safeguards of sections 221 and 222. In deciding that primary jurisdiction did not apply to exempt the approved exchange, however, the Court in the principal case relied primarily upon the type of regulatory scheme provided by the Communications Act rather than upon legislative history or a comparison of the terms of sections 221 and 222 with sections 310 and 313.[63]

The doctrine of primary jurisdiction originated in the case of *Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co.*[64] A shipper claimed that a carrier rate, duly filed with the Interstate Commerce Commission, was unreasonable and sued in a state court to recover the excess. The Supreme Court held that the court action would not lie since the purpose of the Interstate Commerce Act was to abolish preferences and discriminations by establishing uniform published rates and the power of a court to revise a published rate would destroy this uniformity and "render the enforcement of the act impossible."[65] Despite the fact that the act itself provided that it did not "in any way abridge or alter the remedies now

59 48 Stat. 1087 (1934), 47 U.S.C. (1952) §313.

60 57 Stat. 5 (1943), 47 U.S.C. (1952) §222(c).

61 48 Stat. 1080 (1934), 47 U.S.C. (1952) §221(a).

62 48 Stat. 1085 (1934), as amended, 47 U.S.C. (1952) §309; 48 Stat. 1086 (1934), as amended, 47 U.S.C. (1952) §310.

63 Justice Harlan concurred in the result but not in the discussion of primary jurisdiction since he felt that the legislative history showed that "a Commission determination of 'public interest, convenience, and necessity' cannot either constitute a binding adjudication upon any of the antitrust issues that may be involved in the Commission proceeding or serve to exempt a licensee *pro tanto* from the antitrust laws, and that these considerations alone are dispositive of this appeal." Principal case at 468.

64 204 U.S. 426 (1907). As to the development of the primary jurisdiction doctrine, see DAVIS, ADMINISTRATIVE LAW 664-673 (1951); Jaffe, "Primary Jurisdiction Reconsidered. The Anti-Trust Laws," 102 UNIV. PA. L. REV. 577 (1954).

65 Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 at 441 (1907).

existing at common law or by statute,"[66] the Court, although admitting that the action lay at common law, nevertheless held that the "act cannot be held to destroy itself."[67] Professor Davis has said that this result was "obviously judicial legislation but the reasons the court gave to justify its holdings were powerful ones."[68] Subsequent to the *Abilene* case it was held that while an attack on the tariff as unreasonable had to be decided by the commission,[69] an attack on the discriminatory application of the tariff could be resolved by the courts as a question of law.[70] In *Texas and Pacific Ry. Co. v. American Tie Co.*[71] the Court held in a damage action that whether oak railroad ties were "lumber" under a tariff for "lumber" was a question which the ICC alone could resolve. In *Great Northern Ry. Co. v. Merchants Elevator Co.*,[72] however, the Court limited the agency's power to interpret a tariff to the situation where the words of the tariff were allegedly used in a special sense, since the construction of a tariff presents only a question of law when "the words of a written instrument are used in their ordinary meaning."[73] Agency interpretation is then not necessary since uniformity as to a question of law can be secured by action of the Supreme Court. The Court stated that the question of reasonableness, as in *Abilene,* was solely for the agency. This was said to be true not only because of the necessary uniformity but also because the "determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found in a body of experts."[74] The Court also relied on the expertise factor as a justification for its distinction between

[66] 24 Stat. 387 (1887), 49 U.S.C. (1952) §22.

[67] Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 at 446 (1907).

[68] DAVIS, ADMINISTRATIVE LAW 665 (1951). Chief Justice Taft, in a eulogy address, called Chief Justice White's opinions in the Abilene case and the cases which followed it ". . . a conspicuous instance of his unusual and remarkable power and facility in statesmanlike interpretation of statute law." 257 U.S. xxv (1922). Cf. Convisser, "Primary Jurisdiction: The Rule and its Rationalizations," 65 YALE L. J. 315 (1956).

[69] Robinson v. Baltimore and Ohio Ry. Co., 222 U.S. 506 (1912).

[70] Pennsylvania Ry. Co. v. International Coal Mining Co., 230 U.S. 184 (1913).

[71] 234 U.S. 138 (1914).

[72] 259 U.S. 285 (1922).

[73] Id. at 291. Cf. United States v. Western Pacific Ry. Co., 352 U.S. 59 (1956), note 55 MICH. L. REV. 864 (1957). See also COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 319 (1951).

[74] Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285 at 291 (1922).

ordinary and peculiar words.[75] Thus the necessity of uniform regulation and the advantages of utilizing agency expertise emerged as the two factors justifying the application of the doctrine of primary jurisdiction.[76]

The application of primary jurisdiction in antitrust suits presents the additional problem of harmonizing the agency's application of the regulatory statute with the court's application of the antitrust laws.[77] In *Keogh v. Chicago & N.W. Ry.*,[78] a shipper sued for damages alleging a conspiracy to fix rates. The Court dismissed the suit since the rates had been approved by the ICC and a recovery of damages would offend the requirement of uniformity. The Court held that the remedy under the antitrust laws had been superseded by the remedies provided under the Interstate Commerce Act.[79] In *United States Navigation Co. v. Cunard S.S. Co.*,[80] a shipping company sued to enjoin an alleged conspiracy violating the antitrust laws by maintaining dual rates not filed with and approved by the Shipping Board, but the Supreme Court dismissed on the ground that the Shipping Board had jurisdiction over the alleged practices. In *Georgia v. Pennsylvania R. Co.*,[81] Georgia was allowed to maintain a bill to enjoin an alleged conspiracy to fix rates even though the rates had been approved by the ICC since the ICC did not have jurisdiction either to approve cooperative rate filing or to give relief against it.[82] The Court held that an injunction, unlike a damage recovery, would not interfere with the regulatory scheme. In *Far East*

75 Id. at 292. See comment, 25 UNIV. CHI. L. REV. 192 (1957).

76 Justice Frankfurter has described primary jurisdiction as ". . . a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined." Far East Conference v. United States, 342 U.S. 570 at 574 (1952).

77 See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 278-293 (1955); Jaffe, "Primary Jurisdiction Reconsidered. The Antitrust Laws," 102 UNIV. PA. L. REV. 577 at 592-604 (1954); von Mehren, "The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction," 67 HARV. L. REV. 929 (1954).

78 260 U.S. 156 (1922).

79 Id. at 162.

80 284 U.S. 474 (1932).

81 324 U.S. 439 (1945).

82 Id. at 455, 460.

Conference v. United States,[83] the allegations of the government were almost the same as those in *Cunard* and the doctrine of primary jurisdiction was applied against the government's bill[84] to enjoin a dual rate system which had not been filed with the Maritime Board.[85] The Court held that if the Maritime Board refused to immunize the rate agreement in question, an antitrust suit could then be brought.[86]

When the same set of facts would give rise to both a violation of the antitrust laws and of a regulatory statute, the availability of the antitrust remedy will depend upon the congressional intent in fashioning remedies under the regulatory statute. If the agency can give adequate relief the agency remedy will then be held to supersede the antitrust remedy.[87] Where the agency cannot give relief against the alleged activity, primary jurisdiction will nevertheless apply if utilization of agency expertise is thought advisable or if the agency may be able to bar antitrust action by approving the challenged activities. The application of primary jurisdiction may thus require a plaintiff to prove his case before an agency which can not give him relief, before he can apply to a court for relief.[88] This should result only where

83 342 U.S. 570 (1952).

84 Prior to the Far East case it had been thought that primary jurisdiction would not be applied to bar a bill for an injunction sought by the government. See Jaffe, "Primary Jurisdiction Reconsidered. The Antitrust Laws," 102 UNIV. PA. L. REV. 577 at 595 (1954); von Mehren, "The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction," 67 HARV. L. REV. 929 at 940, 941 (1954); comment, 64 HARV. L. REV. 1154 (1951).

85 The dissenting justices in the Far East case felt that primary jurisdiction should not be applicable to permit retroactive exemption where the defendants failed to pursue the statutory procedure for securing the antitrust exemption. Far East Conference v. United States, 342 U.S. 570 at 578-579 (1952). See also Staff Report to Subcommittee No. 5 of the House Committee on the Judiciary, 84th Cong., 2d sess., "Judicial Doctrine of Primary Jurisdiction as Applied in Antitrust Suits" 30, 31 (1956); comment, 58 COL. L. REV. 673 at 692 (1958). But see von Mehren, "The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction," 67 HARV. L. REV. 929 at 958-960 (1954).

86 Far East Conference v. United States, 342 U.S. 570 at 577 (1952). If the Maritime Board does approve the rate agreement, an appeal can then be taken as to whether the Shipping Act authorized the approval of the questioned rates. Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958), note 57 MICH. L. REV. 605 (1959). See also comment, 58 COL. L. REV. 1069 (1958).

87 United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474 at 485 (1932). See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 281-282 (1955); comment, 58 COL. L. REV. 674 at 681 (1958).

88 See Convisser, "Primary Jurisdiction: The Rule and its Rationalization," 65 YALE L. J. 315 at 335 (1956); Schwartz, "Primary Administrative Jurisdiction and the Exhaustion of Litigants," 41 GEO. L. J. 495 (1953); Schwartz, "A Decade of Administrative Law: 1942-1951," 51 MICH. L. REV. 775 at 828-831 (1953).

initial court relief would upset a uniform rate system or where the utilization of agency expertise or the requirements of effective regulation clearly outweigh the disadvantages placed upon the plaintiff. In utilizing primary jurisdiction to harmonize the antitrust laws and the regulatory statute, the courts must avoid both an abdication of their responsibility to enforce the antitrust laws[89] and an overzealous application of antitrust laws in areas where the competitive standard has been replaced by regulation.[90] The necessity of resort to the agency because of the requirements of effective regulation will thus be largely dependent upon the comprehensiveness of the regulatory system in question.

In the principal case the Court held that effective regulation did not require that the FCC be able to exempt the activity in question from the antitrust laws. Primary jurisdiction was not justified since there were no rate structures which could be upset by the antitrust suit and, rather than being comprehensively regulated, the field of broadcasting is one of free competition.[91] Prior to the principal case it had been thought that dictum in *Federal Broadcasting System, Inc. v. American Broadcasting Co.*[92] might authorize the FCC to exempt challenged transactions previously approved by the commission.[93] This decision by the Court of Appeals for the Second Circuit affirmed an order denying a motion for a preliminary injunction and was based on the principle that such orders are discretionary. The court said that there was a lack of persuasive evidence of a violation and mentioned that the commission had "sanctioned" many of the terms of the affiliation contracts in question.[94] It appears, however, that the court was not implying that the commission could exempt

89 See Schwartz, "Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility," 67 HARV. L. REV. 436 (1954); Jaffe, "Primary Jurisdiction Reconsidered. The Antitrust Laws," 102 UNIV. PA. L. REV. 577 at 603 (1954).

90 Von Mehren, "The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction," 67 HARV. L. REV. 929 at 953-958 (1954).

91 FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940).

92 (2d Cir. 1948) 167 F. (2d) 349, cert. den. 335 U.S. 821 (1948).

93 See H. Hearings before the Antitrust Subcommittee of the Committee on the Judiciary, 84th Cong., 2d sess., part 2, vol. 1, pp. 3111-3112 (1956); Staff Report to Subcommittee No. 5 of the House Committee on the Judiciary, 84th Cong., 2d sess., "Judicial Doctrine of Primary Jurisdiction as Applied in Antitrust Suits" 28 (1956); comment, 44 VA. L. REV. 1131 (1958).

94 Federal Broadcasting System, Inc. v. American Broadcasting Co., (2d Cir. 1948) 167 F. (2d) 349 at 352, cert. den. 335 U.S. 821 (1948).

such contracts from the impact of the antitrust laws but looked upon the commission approval merely as further evidence to justify denial of the temporary injunction.

IV

The decision in the principal case declares for the first time that FCC approval under its "public interest" standard will not exempt approved transactions from subsequent attack under the antitrust laws even though the commission has considered all evidence bearing on the antitrust question and necessarily concluded that there was no antitrust violation. The Court also refused to expand the possibility of antitrust exemptions under the doctrine of primary jurisdiction beyond cases involving rate structures or industries subject to comprehensive regulation. It is likely that the impact of the principal case will not be limited to the television industry. Although the natural gas industry is more extensively regulated, this case may directly affect pipeline construction and operation which is subject to the approval of the Federal Power Commission.[95]

The decision of the Court seems eminently proper.[96] It is true that much inconvenience is caused to the parties by suit being brought almost a year after consummation of a transaction involving millions of dollars and vast changes in facilities and personnel. But as the Court pointed out,[97] any business judgment as to the desirability of a contemplated transaction must take into account possible infringement of the antitrust laws. The decision made by the parties in the principal case differed from decisions made by completely unregulated concerns only in that they had to obtain the approval of the commission. No coercion by the commission was involved. Even after approval, they could complete the exchange or not, solely upon the basis of sound business judgment. Since the scope of the agency approval is limited to the "public interest, convenience, and necessity," any reliance upon such approval as a shield against subsequent anti-

[95] See 52 Stat. 824 (1938), as amended, 15 U.S.C. (1952) §717f(c).

[96] The Court also pointed out that the other contentions of the appellees fell of their own weight. There could be no estoppel or laches since the antitrust issue was not before the commission, and the government did not have a duty to intervene in the FCC proceedings or to seek review of the license grant. Principal case at 468.

[97] Principal case at 467.

trust suits is clearly misplaced.[98] Nevertheless, it is clear that after a careful consideration of all the evidence, the commission found no antitrust violation. Although such a determination has now been held not binding, it should be given substantial evidentiary weight in a subsequent judicial determination of antitrust issues.

John F. Powell, S.Ed.

[98] In fairness to RCA and NBC, the failure of the Justice Department to intervene when FCC approval was sought provided the parties with at least some basis for acting in reliance on the commission's order without fear of committing an illegal act. The principal case now warns that such reliance is unfounded.