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SENATE

{ REPORT
No. 1231

AMENDMENTS TO COMMUNICATIONS ACT OF 1934 (PROTEST SECTION)

JULY 28, 1955.—Ordered to be printed

Mr. PASTORE, from the Committee on Interstate and Foreign Commerce, submitted the following

R E P O R T

[To accompany H. R. 5614]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 5614) to amend section 309 (c) of the Communications Act of 1934 in regard to protests of grants of instruments of authorization without hearing, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

The bill H. R. 5614 was passed by the House of Representatives on July 21, 1955. It amended section 309 (c) of the Communications Act of 1934, as amended.

S. 1648, a companion bill, was introduced in the Senate at the request of the Federal Communications Commission. Detailed hearings were held on S. 1648 by the Subcommittee on Communications and the bill reported favorably to the full committee in the exact form as H. R. 5614 here reported.

GENERAL STATEMENT

H. R. 5614 amends section 309 (c) of the Communications Act of 1934, as amended, so as to remove ambiguities; to make definite and certain, procedural and legal steps involved in protests; and to prevent the abuse of the protest procedure by persons who in furtherance of their own private economic interests are in a position to use the existing provisions of the section to delay the institution of radio or television services which the Federal Communications Commission, without a hearing, has approved as being in the public interest. Generally, the bill attempts to remedy the situation by three principal means:

(1) Eliminating the necessity for holding full evidentiary hearings with respect to facts alleged by a protestant which, even if

proven to be true, would not constitute grounds for setting aside the grant which the Commission has made;

(2) Giving the Commission some discretion to keep in effect the authorization being protested where the Commission finds that the public interest requires the grant to remain in effect, but requiring the Commission to affirmatively find and set forth in a decision that the public interest requires the grant to remain in effect; and

(3) Authority to the Commission to redraft issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest.

Section 309 (c) was enacted by the Congress as a part of the Communications Act Amendments, 1952, after extensive and exhaustive hearings. The FCC opposed the enactment of section 309 (c). The Congress, in adopting the provision, attempted to provide a means whereby any "party in interest" would have an opportunity to obtain a hearing before the Commission where he raises legitimate public interest considerations which indicate that the authorization granted without hearing should not have been made. Under the present statute a protestant must satisfy the Commission that he is a "party in interest" and that he has specified with particularity the facts, matters, and things which he relies upon. If the protestant meets these threshold requirements, the statute requires that the application involved must be set for hearing on the issues set forth in the protest, as well as upon any other issues specified by the Commission. Pending the hearing and the Commission's decision on the protest, the Commission is required to postpone the effective date of the authorization which it has granted. The statute provides an exception to this mandatory stay only where the Commission finds that the authorization involved is necessary to the maintenance or conduct of an existing radio or television service. In the latter event, the Commission is permitted to keep the authorization protested in effect pending the Commission's decision after a hearing.

After considering all of the data and testimony which has been presented to it concerning how the existing provisions have operated, the committee is convinced that the public interest requires prompt amendment of section 309 (c). This conclusion is based primarily on two factors:

(1) Hearings which can in no way serve the public interest may have to be held. Under the court decisions, if a protestant establishes himself as a party in interest and sets forth with particularity the facts he relies upon, there is serious question whether the Commission has any choice but to designate the application for a full evidentiary hearing, regardless of the issues raised by the protest. (See *Clarksburg Publishing Company v. Federal Communications Commission*, case No. 12441, U. S. App. D. C., decided June 9, 1955.) At the present time, the Commission may be required to hold a full evidentiary hearing, even though the facts alleged by the protestant, even if proven true, would not be grounds for setting aside the grant previously made by the Commission.

(2) The public may be deprived unnecessarily for a prolonged period of time of new radio or television service pending the outcome of the protest hearing. The Commission is now required, except where the continuance of an existing service is concerned, to stay the effective-

ness of any protested grant until it issues a final decision on the protest after a full evidentiary hearing. [Even where there is a pressing need for the service in question and little or no likelihood exists that there will be any grounds shown for setting aside the grant, the Commission is given no discretion to consider whether the public interest requires the grant to remain in effect.]

The committee also wishes to call attention to the fact that the term "party in interest" encompasses a wide variety of persons, all of whom have standing to file protests, and thus have the power to force the holding of full evidentiary hearings and to delay the institution of new radio and television service. A radio station licensee may protest the grant without hearing of a radio station authorization or a television station authorization, and, likewise, a television station licensee may protest another television authorization. Moreover, even a newspaper with no radio interests is a party in interest with standing to protest the grant of radio or television authorizations which it alleges will cause it economic injury.

However, H. R. 5614 does not attempt to limit those who have standing as a "party in interest" to file protests. It is the committee's opinion that such a limitation is not required if the Commission is given authority to curb the abuses of the protest procedure through the power, in appropriate cases, to dispose of protests without holding a full evidentiary hearing, and the authority to continue protested grants in effect where the public interest so requires.

In the first place, this bill would amend section 309 (c) to make it perfectly clear that the Commission does have the authority to dispose of protests without holding a full evidentiary hearing where the Commission finds that the facts alleged in the protest, even if proven true, would not constitute grounds for setting aside the grant being protested. Thus, the amended section 309 (c) would permit the Commission to demur to any or all of the issues which the protestant has raised. This authority would be akin to the power traditionally exercised by the courts to dispose of appropriate cases by a summary judgment. The committee believes that such authority is necessary in order that unnecessary evidentiary hearings may be avoided, and to prevent protestants from employing the protest procedure merely as a means of keeping a competitive radio or television service off the air.

Secondly, section 309 (c) as amended by this bill (H. R. 5614) would permit the Commission, even where it is necessary to hold a full evidentiary hearing, to continue the protested grant in effect if the Commission affirmatively finds that the public interest so requires and sets forth the reasons for its determination in its decision. The committee believes it is necessary and appropriate that the Commission be given this limited discretion. It must be recognized that there will be cases where protestants will plead facts to which the Commission cannot demur, although, on the basis of all of the facts available, it is clear that the likelihood is extremely remote that the protested grant will ultimately have to be set aside. In such circumstances, the Commission should not be precluded from considering whether the public interest requires the protested authorization to remain in effect, but the Commission must affirmatively find and set forth reasons in its decisions as to why the public interest requires the grant to remain in effect.

The committee is well aware of the very real inconvenience to the public which would result if a protested grant is permitted to stay in effect and it is ultimately determined that the grant must be set aside and the service terminated. However, in exercising its limited discretion to continue a protested authorization in effect, the Commission would have to consider not only the need for the new service in question, but also the likelihood that the grant in question would ultimately have to be set aside. The committee feels that these requirements will minimize the possibility of the public being deprived of a service on which it has come to rely. In any event, we do not believe that, to insure against the remote possibility that an operating service may have to be taken off the air, it is necessary or advisable to preclude any operation by a station pending a protest hearing regardless of any countervailing public interest considerations.

Your committee was specifically concerned about the possible retroactive effect of enactment of this legislation upon pending protest proceedings. The Commission through its witnesses and in a letter made part of this report stated that where the Commission has already made a determination that a protest should be set for evidentiary hearing or that the effectiveness of a grant should be postponed pending such hearing and the matter has proceeded on this basis, reconsideration of these determinations would not appear to be required and would normally appear to serve no public purpose. Your committee concurs with this view and construes this to apply to any protest on file with the Commission prior to the enactment of this bill. In addition, your committee agrees with the Commission's view, however, that where it has finally acted on a protest and denied it, either with or without an evidentiary hearing, and where, as a result, the grantee has built his station and gone on the air, the Commission should have the authority, in the event its decision is subsequently reversed on appeal, to consider such further proceedings as may be required by the court's decision in the light of the amended provisions of section 309 (c), if they have been enacted into law. Your committee feels this special authority is necessary in view of the real problems involved of depriving the public of established service upon which it has come to rely. Your committee feels, therefore, that the retroactive effect of this legislation shall apply only to those situations where the stations are now on the air and shall not apply to any other protest pending prior to the enactment of this bill.

AMENDMENTS

The Federal Communications Bar Association, in submitting its testimony on this bill, as well as on the companion bill, S. 1648, proposed two amendments which were adopted and made part of H. R. 5614. These amendments were reported favorably by the Subcommittee on Communications considering S. 1648. One of the amendments provides that the Commission shall afford the protestant an opportunity for oral argument before it may eliminate as insufficient any issue which has been raised. The Commission indicated that it has no objection to this requirement being written into the statute.

However, a question arose at the hearings concerning whether the oral argument required by this amendment would have to be held within 30 days from the date the protest is filed. The committee is in

agreement with the views expressed by the Commission that the amendment should not be construed as imposing such a requirement. Your committee believes the language of the bill, as amended, would permit the Commission to schedule oral argument upon the issues which it believes may be demurrable at the earliest practicable time after the Commission issues its initial decision as to the nature and status of the protest. The Commission would, of course, have to decide within the 30-day period not only whether the protestant was a party in interest and had specified with particularity why it believed the grant should not be made, but also whether particular issues should be immediately set for evidentiary hearing or designated for oral argument looking toward a decision on demurrer, and whether the grant in question should be stayed.

Your committee believes that any other interpretation of this amendment would make the entire procedure unworkable. Your committee is convinced that in many cases the Commission would not be able to consider a protest and the oppositions which may be filed thereto, issue an order designating some or all of the issues for oral argument, hold this oral argument, and then issue a further decision disposing of the matters which were the subject of the oral argument, all within a 30-day period following the filing of the protest. Many of the protests which have been and will be filed contain a number of issues, some of which, even though they may be demurrable, involve serious and difficult questions of law and policy. The entire objective of affording a protesting party oral argument before demurring to any of the issues which he has raised would be defeated if the Commission were to be afforded inadequate time to give the necessary consideration to the arguments advanced by the party. In this connection it is important to note that once the Commission designates a protest either for evidentiary hearing or for oral argument, the provisions of the Communications Act with respect to separation of functions (secs. 5 (c) and 409 (c)) become immediately applicable. As a result, the Commission would not be able to receive assistance in disposing of the difficult questions which may arise at the oral argument from those members of the staff who had had some familiarity with these problems, prior to its designation for oral argument, but would have to rely upon its review staff, which would have no previous contact or familiarity with the case. The committee has been assured by the Commission that it will expedite such proceedings.

Under the existing statute there has been some doubt as to the Commission's authority to redraft the issues specified by the protestant in his protest. Such authority to redraft the issues is considered necessary since those set forth by the protestant may not accurately reflect the facts alleged in the protest and may include matters which are irrelevant to a determination as to whether the grant in question is in the public interest.

The other proposed amendment to the bill (H. R. 5614) as well as S. 1648, (1) spells out the right of the Commission to redraft issues based on the facts alleged in the protest, and (2) makes it clear who has the burden of proof with respect to the issues in a protest hearing. The Commission has agreed to these changes.

The committee heard detailed testimony from the Federal Communications Commission, a representative of the Federal Communications Bar Association, a representative of the UHF Industry Coor-

dinating Committee, and from a number of individual broadcast operators. Although this testimony was heard on S. 1648, it applies equally to H. R. 5614 because both bills are exactly the same.

The comments of the Federal Communications Commission, Department of Justice, and the FCC Bar Association are set forth below.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D. C., March 21, 1955.

The VICE PRESIDENT,
United States Senate,
Washington, D. C.

DEAR MR. VICE PRESIDENT: The Commission wishes to recommend for the consideration of the Congress a proposed amendment to section 309 (c) of the Communications Act of 1934, as amended. A proposed bill is attached as an appendix to this letter. The objective of the proposed legislation is to clarify the so-called protest rule contained in section 309 (c) which was incorporated into the Communications Act by the Communications Act Amendments, 1952, 66 Stat. 711, so as to obviate the use of the new procedure as a device for delaying radio station grants which are in the public interest while at the same time retaining the rule's primary objective of providing interested parties with a means by which they may bring to the Commission's attention bona fide questions concerning grants made without hearing. The Commission proposed a bill to amend section 309 (c) in the 83d Congress. It was introduced in that Congress as H. R. 7795, but no action on the bill was taken.

Section 309 (c) now provides that all authorizations granted without a hearing shall remain subject to protest by any "party in interest" for a 30-day period. The protest must show that the protestant is a party in interest and must specify with particularity the facts relied on to sustain the protest. Within 30 days from the date of filing of a protest, the Commission must determine whether the protest meets these requirements. If the Commission so finds, it is directed to set the application involved for hearing on the issues specified in the protest as well as such additional issues as the Commission may prescribe. The protestant has the burden of proof and the burden of proceeding with the evidence on issues set forth in the protest and not specifically adopted by the Commission. The Commission is directed to expedite protest hearing cases, and the effective date of the Commission's action protested is to be postponed until the Commission's decision after hearing, unless the particular authorization is necessary to the maintenance or conduct of an existing service.

The protest rule has resulted in substantial delays in the construction and operation of new television or radio stations authorized by the Commission without hearing. For any "party in interest" may file a protest and the term "party in interest" has been held by the courts to include existing stations in the same service as the grantee who might be adversely affected economically by the grant. In addition, relevant court decisions appear to indicate that stations in other services or other persons who might suffer economic injury as a result of competition afforded by the new stations would be parties in interest entitled to protest. Furthermore, if the protestant shows himself to be a party in interest and details his objections to the grant, one interpretation of the present statute is that the Commission is required to designate the application for hearing on the issues specified in the protest and cannot dispose of the protest, as on demurrer, on the pleadings. The Commission has taken the position that where it finds that the matters raised by the protest would not require the grant to be set aside, even if the factual allegations are assumed to be proven, the protest may be disposed of on the pleadings or, where substantial legal questions are involved, after oral argument on the legal issues, without designating the application for a full evidentiary hearing. However, it is recognized that the present language of section 309 (c) leaves in doubt the Commission's authority to dispose of a protest on the basis of the pleadings or after oral argument. It is believed that the statute would be amended so as to make clear that the Commission has authority to demur to the pleadings, in order to insure that it would not be necessary to hold evidentiary hearings which could serve no useful purpose and which would therefore be contrary to the public interest by delaying the initiation of a new or improved radio service. Such hearings, it should be indicated, not only delay the effectiveness of the particular authorization involved but also occupy the time and efforts of mem-

bers of the Commission's limited staff who could otherwise be utilized in connection with other proceedings, including necessary hearings involving competitive television applications.

There is also some question under the present language of section 309 (c) as to whether the Commission must, in designating a protest for hearing, include the precise issues which the protestant has set forth regardless of the manner in which such issues have been drafted by the protestant. The Commission has held that where the protestant's issues are drawn too broadly or include matters not covered by the facts relied on, it has the authority to redraft the issues to reflect accurately the substantive matters raised in the protest. Here again, however, the Commission's authority is not entirely free from doubt, and a clarifying amendment to the statute is considered appropriate.

As indicated above, the final provision of section 309 (c) makes it mandatory for the Commission, once a protest has been granted, to postpone the effective date of the Commission's action to which protest is made until the effective date of the Commission's decision after the hearing on the protest. The only exception to this mandatory stay provision is when the authorization protested is necessary to the maintenance or conduct of an existing service, in which event the Commission may authorize the use of the facilities in question pending the Commission's decision after hearing. This has required staying the effectiveness of all authorizations for new facilities when protests have been granted, despite the fact that in some instances the public interest clearly required that the authorization remain in effect and the new series be inaugurated pending the outcome of the protest hearing. It is believed that an amendment is necessary which would give the Commission discretion to deny a stay in those cases where it can find on the record that the public interest clearly requires such action.

In order to obviate these difficulties the enclosed proposal would amend section 309 (c) to make clear that while any party in interest could protest a grant of a permit made without hearing, such protest would not automatically result in staying the effectiveness of the grant or require a hearing regardless of the merits of the claims advanced by the protestant. Instead, the proposed new language would provide that within 30 days of the filing of such a protest the Commission upon consideration of the protest, and any reply thereto, would issue a decision as to the legal sufficiency of the protest as to standing and the particularity of the matters alleged as grounds for setting aside the grant. In the event the Commissioner finds in the affirmative as to these matters, it would be required to designate the application for hearing upon issues relating to all matters raised in the protest, except that the Commission could exclude such matters as to which it finds that, even if the facts alleged by the protestant were proven, they would not constitute grounds for setting aside the grant. The amendment further provides that if a protest is designated for hearing, the effective date of the grant shall be postponed, unless the authorization is necessary for the continuation of an existing service, or unless the Commission affirmatively finds, for specified reasons, that the public interest requires the grant to remain in effect. It is believed that the revised language would achieve the apparent objective of the protest rule in affording interested parties an opportunity to bring to the attention of the Commission questions about grants made without hearing and to obtain a determination thereon. At the same time, it would avoid the utilization of the protest rule as a device for delay on the part of competitors.

The Commission, therefore, recommends that section 309 (c) should be amended as set forth in the attached proposed bill. The submission of this proposal to the Congress has been approved by the Bureau of the Budget. If there is any further information concerning this matter which the Commission can furnish, please do not hesitate to let us know. There are also attached the separate views of Commissioner Doerfer concerning this matter.

GEORGE C. McCONAUGHEY,
Chairman.

SEPARATE VIEWS OF COMMISSIONER JOHN C. DOERFER

Commissioner Doerfer believes that section 309 (c) of the Communications Act should be repealed in its entirety. It is inconsistent with the philosophy of the act which seeks to provide for the public interest within the framework of competition.

"Plainly it is not the purpose of the act to protect a licensee against competition, but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not

interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public" (the *Sanders* case, 309 U. S. 470 (1940)).

Experience has shown that section 309 (c) demands an undue amount of Commission time, is used primarily for delay by competitors, and accomplishes no useful purpose. In effect, it creates two attorneys general to protect the public interest, the FCC, and private parties. Governmental agencies are established upon the theory that they are competent and conscientious to protect the public interest. There is no more need for two attorneys general in such matters than for two district attorneys in a criminal case.

If the Commission, through inadvertence, illegality, or impropriety, makes a grant, all that is necessary to protect the public interest is to call the Commission's attention to the facts and to submit evidence or indicate a source of probative evidence to protect the public interest. Misfeasance, if any, on the part of the Commission should be dealt with directly, not by the creation of an official kibitzer. The idea that the public should be denied a service pending selfish and self-serving maneuvers by competitors is wholly foreign to the American concept of administrative agencies. These were created primarily to expedite matters. Section 309 (c) is an obstruction to the prompt expedition of many matters before the Federal Communications Commission. To illustrate: Recently out of 1,400 minutes of deliberation by 7 members of the Commission, 397 minutes were spent considering protest matters, or a total of 28 percent of full Commission time. This constitutes a demand for an undue proportion of time on matters which eventually prove to contribute little, if anything, to the protection of the public interest.

JUSTICE DEPARTMENT,
June 23, 1955.

HON. WARREN G. MAGNUSON,
*Chairman, Committee on Interstate and Foreign Commerce,
United States Senate, Washington, D. C.*

DEAR SENATOR: This is in response to your request for the views of the Department of Justice concerning the bill (S. 1648) to amend section 309 of the Communications Act of 1934, in regard to protests of grants of instruments of authorization without hearing.

The bill would amend subsection (c) of section 309 of the Communications Act of 1934 (47 U. S. C. 309), which provides for the filing of protests to licenses granted, pursuant to section 309 (a), without a hearing. Under the present provisions of section 309 (c) the filing of such a protest postpones the effective date of the authorization until after hearing and decision by the Commission unless the authorization involved is necessary to the maintenance or conduct of an existing service, in which event the Commission shall authorize the applicant to utilize the authorization pending the Commission's decision. The bill would change the existing law so as to permit the applicant to use the authorization not only when the use thereof is necessary to the maintenance or conduct of an existing service, but also if the Commission finds that the public interest requires that the grant remain in effect.

Whether the bill should be enacted involves a question of policy concerning which this Department prefers to make no recommendation.

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

WILLIAM P. ROGERS,
Deputy Attorney General.

FEDERAL COMMUNICATIONS COMMISSION,
Washington 25, D. C., July 11, 1955.

HON. JOHN L. PASTORE,
United States Senate, Washington 25, D. C.

DEAR SENATOR PASTORE: Pursuant to permission which you granted to the Commission on Thursday last to supplement its testimony with respect to S. 1648, we are writing this letter to address ourselves to several of the problems which arose during the course of the hearing before your subcommittee.

First of all, we should like to comment on the statement made by Mr. Benedict P. Cottone on behalf of the UHF Industry Coordinating Committee and object-

ing to the provision in the bill which would give the Commission discretion to authorize a grantee to utilize his facilities while a protest hearing is proceeding where the Commission "affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect." As we understand Mr. Cottone's objection to this proposal, it is primarily based upon his contention that where the Commission has found a protest must be set for evidentiary hearing, it is inconceivable that the public interest would not require the protested grant be stayed. This position in turn apparently rests upon Mr. Cottone's assumption that where the Commission is unable to demur to an issue, it must be assumed that the issue raises such substantial questions of public interest that it would not be appropriate to permit the grant to become effective until the issue is resolved.

We think this argument misconceives both the nature of the demurrer procedure and the limited scope of discretion which the amendment in question would give to the Commission to refrain from staying the effectiveness of a protested grant. While the power to demur to individual issues set forth in a protest is a valuable one, it is limited by the requirement that all unresolved questions of fact must, for the purposes of the demurrer, be assumed to be as protestant alleges. This will inevitably mean that there would be situations where an evidentiary hearing will still be required to resolve these issues of fact even though, on the basis of information supplied by the opposing parties or otherwise known to the Commission, the likelihood is extremely remote that the protested grant will ultimately have to be set aside. In the second place, there appears to be an assumption that the Commission would exercise its discretion to keep protested grants in effect as a matter of course. It is clear, however, from the language of the proposal itself, that the Commission would be authorized to exercise this discretion only where considerations of public interest so required.

It must be kept in mind in considering this problem that, from the standpoint of those protestants whose principal concern is protecting themselves from competition, the stay of the grant's effectiveness is a primary objective of the protest. Therefore, it can be expected that such protestants will, to the extent possible, include factual allegations in their protests which will have to be resolved by an evidentiary hearing rather than upon demurrer. Their success in such endeavors, however, will by no means necessarily indicate any probability of success in proving that the grant would not serve the public interest. On the contrary, as indicated above, the Commission will in many cases be in possession of information strongly indicating the probable invalidity of the protestant's claim, and yet be unable to dispose of it without an evidentiary hearing. It is not a sufficient answer to say that since a protest must be filed under oath it may be assumed that the facts alleged therein are necessarily or even probably correct. As you are aware, there are innumerable situations where, even with the best of intentions, facts alleged to exist—particularly allegations based "on information or belief"—in fact do not exist. The ingenuity of the protestant in pleading non-demurrable facts should not be confused with either the validity of the basic claim to which these facts relate or their relation to the public interest in authorizing new or additional radio facilities.

It is for these reasons that the Commission strongly believes it must be afforded the limited degree of discretion it has asked to permit a grant to remain in effect where it affirmatively finds that the public interest so requires. And it must be stressed that this discretion to decide whether the effectiveness of the grant should be suspended is substantially less than that presently enjoyed by the Commission in passing upon petitions for rehearing or reconsideration under section 405 of the act and by the courts in considering requests for stays upon appeal. There have been several recent cases involving appeals from Commission actions in protest cases in which the courts, in the exercise of their discretion, have denied a request for stay pending appeal, but have in the very same order specifically indicated that the appeal presented substantial and serious questions of law. (See *Signal Hill Telecasting Corporation v. Federal Communications Commission*, Case No. 12211, C. A. D. C., Order of May 18, 1954; *Channel 16 of Rhode Island, Inc. v. Federal Communications Commission*, Case No. 12537, C. A. D. C., Order of January 28, 1955.) In these cases the court recognized that in spite of the substantial issues found to be involved, the paramount consideration of the public interest required denying a stay. Similar considerations may be present at the time the Commission passes upon protests. And, as indicated above, there is no reason to assume that in all such protest cases, as in the two cited appeal cases, substantial issues of fact and law will necessarily be involved.

We are well aware of the very real inconvenience to the public attendant upon any removal from the air of a radio and television service once it has commenced operation. For that reason, the Commission, in exercising the discretion we are urging it be given, would not only consider whether the protested authorization is required to provide important services to substantial areas or populations which would otherwise have to do without, but also whether the issues designated for hearing present probable grounds for setting aside the Commission's previous determination that the grant in question would serve the public interest. We recognize that these judgments by the Commission will not always be infallible and that in some instances where the protested grant has been allowed to go to effect, the Commission may after hearing determine that it must be set aside or the courts may on appeal reverse the Commission's determination affirming the grant. However, we think it clear that the interest of the public both in securing needed services at the earliest practicable moment and in not having established services upon which they rely subsequently terminated, can best be protected where these determinations are made on the basis of the disinterested exercise of the Commission's discretion, subject to court review, rather than upon the basis of any automatic requirement for stay which does not take the paramount interests of the public into account.

We should also like to comment upon the question of whether the oral argument, which would be required under the bar association's amendment before the Commission could demur to a protest, would have to be held within 30 days from the date the protest was filed. The Commission does not construe the amendment proposed by the Federal Communications Bar Association as imposing any such requirement. We believe that a fair reading of the language of the bill as proposed to be amended would permit the Commission to schedule oral argument upon the issues which it believes may be demurrable within a reasonably short period subsequent to the Commission's initial decision as to the nature and status of the protest. Of course, the Commission would have to decide within the 30-day period not only whether the protestant was a party in interest and had specified with particularity why it believed the grant should not be made, but also whether particular issues should be immediately set for evidentiary hearing or designated for oral argument looking towards a decision on demurrer.

We are stressing the interpretation the Commission intends to give to this proposed amendment because we are convinced that any other interpretation would make the entire procedure absolutely unworkable. For we are convinced that in many cases the Commission will not be able to consider a protest and the oppositions which may be filed thereto, issue an order designating some or all of the issues for oral argument, hold this oral argument and then issue a further decision on the matters which have been there discussed, all within a 30-day period following the filing of the protest. It must be remembered in this connection that many of the protests which have been and will be filed contain a number of issues, some of which, even though they may be demurrable, involve serious and difficult questions of law and policy. The entire objective of affording a protesting party oral argument after demurring to any of the issues which he has raised would be defeated if the Commission were thus to be afforded inadequate time to give the necessary consideration to the arguments of the parties.

Finally, with respect to the question of the possible retroactive effect of the enactment of S. 1648 upon protest proceedings which are presently pending before the Commission or on appeal in the courts, we wish to reaffirm the position expressed in the letter to Congressman Harris which was read into the record last Thursday by the Acting General Counsel. The Commission is of the opinion that in the absence of any congressional statement of intent on the matter, it might be legally possible for the Commission to reconsider previous determinations as to whether evidentiary hearings are required or the effectiveness of grants should be postponed. However, we do not believe that the public interest would be served by reconsidering these determinations in the protest proceedings still pending before the Commission. The only exception to this view which the Commission has is with respect to cases where the Commission has issued a final decision denying a protest, either before or after hearing, and in which, pending a court appeal, the grantee has constructed its station and begun operation. Under these special circumstances the Commission believes that if it is reversed by the Court of Appeals, it should have the opportunity, in the event that the amendments to section 309 (c) have been enacted into law, to conduct any further proceedings upon the basis of the amended language of section 309 (c).

I hope that the above comments will help to clarify some of the questions which arose during the course of the hearings before your subcommittee. If there are

any further comments which your subcommittee may desire, the Commission will, of course, be pleased to provide them. I wish to reiterate that the Commission considers this proposal to be of extreme importance and we hope that it will receive prompt and favorable consideration by your subcommittee.

Sincerely yours,

GEORGE C. McCONAUGHEY, *Chairman.*

FEDERAL COMMUNICATIONS BAR ASSOCIATION,
Washington, D. C., July 14, 1955.

Re S. 1648, proposed amendment of section 309 (c) of the Communications Act.

HON. JOHN L. PASTORE,
United States Senate,
Washington 25, D. C.

DEAR SENATOR PASTORE: At the recent hearings before your subcommittee, held July 7, 1955, on S. 1648, I presented the views of the majority of the executive committee of the Federal Communications Bar Association. One of the recommendations of the bar association was that S. 1648 should expressly provide for oral argument before the Commission prior to the decision by the Commission that, even if the facts alleged in a protest were to be proven, no grounds for setting aside the protested grant of an application are presented.

The executive committee of the Federal Communications Bar Association agrees with the statements in the letter dated July 11, 1955, from Chairman George C. McConaughy to you that our proposed amendment to S. 1648 stipulating that an oral argument be held is not intended to mean that the oral argument must be held within 30 days from the date the protest was filed, and that "the language of the bill as proposed to be amended would permit the Commission to schedule oral argument upon the issues which it believes may be demurrable within a reasonably short period subsequent to the Commission's initial decision as to the nature and status of the protest. Of course, the Commission would have to decide within the 30-day period not only whether the protestant was a party in interest and had specified with particularity why it believed the grant should not be made, but also whether particular issues should be immediately set for evidentiary hearing or designated for oral argument looking toward a decision on demurrer."

The executive committee desires to call your attention to the fact that when the Commission has designated a protest for evidentiary hearing or for oral argument, the separation of functions provisions of sections 5 (c) and 409 (c) of the Communications Act become applicable, thus making it substantially impossible for the Commission to hold the oral argument within the 30-day period from the date the protest was filed.

Sincerely yours,

PERCY H. RUSSELL, Jr., *President.*

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics, existing law in which no change is proposed is shown in roman):

ACTION UPON APPLICATIONS: FORM OF AND CONDITIONS ATTACHED TO LICENSES

SEC. 309. (a) * * *

(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the

protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest, and may also specify in such decision that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing subsequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) hereof, but with respect to issues resulting from facts set forth in the protest and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

