

STATEMENT OF E. WILLIAM HENRY, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION, BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS OF THE SENATE COMMERCE COMMITTEE ON S. 708, S. 1005, AND S. 1193, BILLS TO AMEND THE COMMUNICATIONS ACT OF 1934.

My name is E. William Henry, and I am Chairman of the Federal Communications Commission. I appear here today to present the views of the Commission regarding S. 708, S. 1005, and S. 1193. All of these proposals would amend the Communications Act in various respects.

I would first like to discuss Senator Proxmire's bill, S. 708.

This bill would amend section 308(b) of the Communications Act of 1934 by adding at the end thereof the following new sentence: "In considering the application made by any person for any construction permit or station license, or any modification or renewal thereof, the Commission may not consider as a factor favoring the granting of that application the fact that such applicant is a Member of Congress or the fact that any Member of Congress has any direct or indirect pecuniary interest in the applicant."

This proposal was first offered on August 26, 1960, by Senator Proxmire in the 86th Congress as a floor amendment to S. 1898 (Communications Act Amendments of 1960, P. L. 86-752) and was subsequently introduced as a separate bill in the 87th Congress as S. 1397.

In remarks accompanying the introduction of S. 708 (108 Cong. Rec. 1767, Feb. 6, 1963), Senator Proxmire stated:

"The Federal Communications Commission has in the past justified the award of a lucrative television channel in part on the ground that stockholders of the company were Members of Congress. This was held to give the applicant an edge in the civic participation criterion--one of the yardsticks used by the FCC in deciding contested cases.

"I sharply disapprove of this criterion. Members of Congress have great authority over the FCC. They enact its basic law, provide the annual appropriations, and, in the case of Senators, confirm the appointment of the Commissioners.

"To specifically favor an application because a Congressman participates in it could turn into a form of 'payola.' We in Congress benefit from the practice. It is up to us to end it.

"The FCC itself, dependent as it is on Congress, cannot be expected to reverse a policy so favorable to Senators and Congressmen, unless Congress acts. Silence by Congress on this subject means that the special advantage to Congressmen in the award of lucrative broadcast franchises will continue.

"I do not expect the Commission to reverse this decision on its own. Rather, it is my view that Congress has a clear, immediate responsibility to state a firm policy against giving favorable weight to ownership or pecuniary interest by a Member of Congress in a broadcasting firm.

"My bill does not prohibit Members of Congress from ownership or participation in television or radio stations; but it does prevent such ownership from favorably influencing the FCC."

It is evident from the foregoing remarks of Senator Proxmire that his concern stems from the Commission's decision, and also the Initial Decision of the Hearing Examiner, in the comparative proceeding which involved the mutually exclusive applications of Veterans Broadcasting Company, Inc., and Capital Cities Television Corporation for a new television station to operate on Channel 10 at Vail Mills, New York. The Initial Decision was released by the Hearing Examiner on August 11, 1959, FCC 59D-77, Dockets 12493-12494, and the Commission's Decision granting the application of Capital Cities and denying the application of Veterans

was released on July 18, 1960, FCC 60-828, 29 FCC 83, 19 Pike & Fischer RR 339. Copies of these decisions have been previously furnished to Counsel for the Committee.

In that case, the Commission found in its decision, as did the Hearing Examiner in his initial decision, that Capital Cities was the better qualified applicant in three comparative areas--local residence, civic participation and broadcast experience. Capital Cities was found to be "manifestly superior" by the Hearing Examiner in locally acquired familiarity with civic affairs of the Albany area, and the Commission agreed with his conclusion in this regard. Taken into account in reaching this conclusion were findings of participation in the civic affairs of Albany by Capital's vice-president and manager of its Albany operation and by members of a Stockholders' Committee, certain of whom were Members of Congress, who, in addition to their political activities, had participated in non-political civic activities in the Albany area. The Commission stated that the Examiner's findings that these Congressmen represented Districts in Congress principally within Capital's Grade A service contour are relevant in the comparative consideration of participation in local civic affairs of the applicant. Specifically, the decision said:

"As members of the Stockholders' Committee, each of them informally advises the principal officers of Capital concerning programs and other matters, and their political activities, like their other civic activities, can be presumed to give them an insight into the areas community problems and needs."

The Commission observed that "participation in civic activities on the part of stockholders is one of the factors taken into account by the Commission in the comparative consideration of competing applicants; such participation in the local civic affairs of a community indicates a positive interest in and acquaintance with the needs of that community, and gives practical expression to the attributes of local residence.... Of interest to the Commission is the fact that a principal, officer, director or stockholder who will be active in the affairs of a competing applicant has engaged in such activities, since they provide a basis for insight into and understanding of a community's needs. Political activities are in this regard of no less significance than other activities which project the participants into contact with various elements of the community to be served."

Of particular relevance, however, to the pending legislation, is the following language:

"A fair reading of the Examiner's Initial Decision will clearly indicate that he did not award an independent preference to Capital Cities simply because certain of its stockholders were Congressmen. On the contrary, the preference awarded was for participation in civic activities which has been considered traditionally as an indication of awareness of community needs. Obviously, it would be unseemly and arbitrary either to favor or penalize an applicant solely because it numbers Members of Congress amongst its officers, directors, or stockholders. We have had no such discriminatory policies in the past and we have none now."

The Capital Cities case states that the Commission does not have nor has it ever had a policy of favoring or penalizing an applicant for a broadcast license because a member of Congress is numbered among the officers, directors, or stockholders of such applicant.

We certainly endorse the essential purpose of S. 708--namely, that an applicant should not obtain a grant simply because it numbers among its stockholders a member of Congress--the body which among other pertinent things, appropriates funds for Commission activities and deals with the Commission's legislative program. To award valuable privileges upon such a basis would, of course, be wholly improper.

We feel, therefore, that the policy set out in the Capital Cities case is consistent with the public interest. While we thus do not urge passage of S. 708, we recognize Congress' special interest in matters of this nature and would, of course, defer to its judgment on the matter.

Let me turn now to S. 1005. This bill, which is a part of the Commission's legislative program, would amend paragraph (2)(G) of subsection 309(c) of the Communications Act of 1934, as amended, 47 U.S.C. 309(c)(2)(G), by granting the Federal Communications Commission additional authority to grant special temporary authorizations for sixty days for certain nonbroadcast operations.

In relevant part, paragraph (2)(G) of subsection (c) of section 309 now exempts from the public notice and thirty-day waiting period requirements of subsection 309(b) those applications for "a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or pending the filing of an application for such regular operation."

The Commission believes that this subsection should be amended to permit it to grant special temporary authorizations (STA) for sixty days in those cases where the application for the STA is filed pending the filing of an application for regular operation. We are not suggesting any changes in the thirty-day limitation on those STA's in cases not contemplating a subsequent application for regular operation.

The purpose of paragraph (2)(G) of subsection 309(c) is to permit short-term radio operation in the nonbroadcast field without the delay of a thirty-day waiting period (as provided in subsection 309(b)) after the issuance of public notice by the Commission of the acceptance for filing of such application. The Commission has found that this purpose is frustrated by the thirty-day limitation on STA's in those cases where the short-term operation relates to a radio system for which an application for regular operation is filed later. In those cases, the provisions of subsection 309(b) are applicable and a thirty-day waiting period is required before the Commission can act on the application for regular

operation. As a result, and since it is not always possible to complete action on the regular license application within thirty-days, there is often a hiatus between the expiration of the STA and the Commission's grant of the application for regular operation. During the period of the hiatus, the applicant would be unlicensed and would, as a consequence, be unable to operate his radio. This defeats the purpose for which Congress made special provision for granting special temporary authorizations. Moreover, it does not appear that the Commission has authority to remedy this statutory defect by renewing the STA until it can grant the application for regular operation.

The Commission believes that this deficiency in the statutory scheme can be corrected by extending the time to sixty days and that such a liberalization is most desirable. Therefore, we recommend that paragraph (2)(G) of subsection 309(c) be amended to give us this additional authority.

The third bill for consideration is S. 1193. The Commission's proposed amendment to section 309(e) would require a party in interest who wishes to intervene in a hearing to signify his intention to do so ". . . not more than thirty days after publication of the hearing issues, or any substantial amendment thereto, in the Federal Register."

This amendment will enhance the effectiveness of the pre-hearing conference which is one of the chief techniques the Commission has for expediting formal hearings. The Commission is particularly concerned that pre-hearing conferences be utilized to the fullest extent possible in every proceeding, to the end that there may be no unnecessary delays in the progress of a formal hearing once it is commenced. Our experience has been that pre-hearing discussions and negotiations, and the stipulations and agreements of the parties reached as a result thereof, are an effective means of insuring, not only an expeditious hearing, but, as well, that the hearing record may be kept down in size to the minimum consistent with the rights of the participants. Under present law a party in interest has a right to take part in the formal hearing if he seeks intervention ten days before commencement of the hearing. Obviously, the effectiveness of all pre-hearing techniques and the effect of valuable stipulations and time-saving agreements reached by other participants during several pre-hearing conferences held over a period of months may be destroyed simply because an intervenor did not become a party to the case at an early date.

Once the hearing issues are published, any interested person knows at the time whether he will have to participate in the hearing to protect his own interests. There is no reason why parties should be given the legal right to delay their intervention when the issues are clear in advance of the hearing. The Commission feels that by requiring a party in interest to intervene within thirty days of publication of the hearing issues, an ample and reasonable period is afforded to parties to determine whether it is necessary for them to intervene to protect their interests and to indicate their intention to participate. The requirement will discourage the dilatory tactics now possible under the present provisions of section 309(e) and will substantially eliminate the need for holding repeated pre-hearing conferences. It will also have the virtue of providing a date certain for intervention, thus eliminating the present situation where the date for intervention changes every time the date for commencement of the hearing is changed.

The 30-day period provided in the proposal is consistent with the time allowed in many other sections of the Communications Act. For example, section 402(e) allows interested persons to intervene in appeals from Commission decisions within 30 days after the filing of any such appeal with the Court of Appeals. (See also sections 402(c) and 405).

We also wish to point out that section 309(e) deals only with the time within which parties in interest can intervene as of right. The Commission has the discretion to permit intervention by any person (including parties in interest) at any time (even after the period specified in the section or in the Commission's rules) where a showing of good cause and that the public interest would be served thereby, is made. See sections 4(j), 303(r) of the Act: Section 1.104(d) of the Commission's rules, 47 C.F.R. 1.104(d). This discretion to permit intervention after the time specified in section 309(e), either on the Commission's own motion or on petition, would be equally available under the proposed amendment. Moreover, in any matter in which the hearing issues are substantially amended, it will be possible for new parties to intervene as of right if the changes affect their interests.

Delays in the administrative process are of serious concern to the public, the bar, administrative agencies, and the Congress. In order to promote efficiency, the Commission has been seeking methods of expediting its administrative process while at the same time fully safeguarding the rights of private parties. One of the areas in which undue delay seems to be a special problem is in the hearing process. The Commission's legislative proposal, as embodied in S. 1193, is one which we believe will go a long way towards promoting orderly and prompt decisions without sacrifice of any procedural rights.

#