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1. THE PROBLEM

A communications media may suffer economic injury if a new broadcast station enters its market or if an existing station improves or relocates its facilities and thus provides a more competitive signal. Assuming, for convenience, that two broadcasters operating the same type of station are involved, three of the possible results of increased competition are that (1) both stations will survive in the market without incurring significant injury, (2) one competitor or the other will be driven out of the market, allowing the survivor to serve the market without opposition, or (3) the competitors will inflict such financial injury on each other that, regardless of whether or not either one is eventually forced out of the market, the service provided to the public after the economic contest will not be as good as that available before the entrance of the new competitor in the market.

The possibility of an ultimate diminution in the quality of service provided to the public poses obvious public interest problems. These problems are compounded by the equally obvious public interest to be served by providing additional service. Further, nondestructive competition would presumably ensure better programming by both stations in their efforts to attract the listening public.[1]

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[1] See *e.g.* Report of the House Comm. on Interstate and Foreign Commerce, Network Broadcasting, H.R. Rep. No. 1297, 85th Cong., 2d Sess. 76 (1958).

Analysis of the indicated problem area will require discussion of relevant features of the basic statute in the broadcast industry, the Communications Act of 1934, as amended,[2] and survey of a variety of administrative and judicial decisions.

II. THE ACT

The licensing of a broadcast station by the Federal Communications Commission is accomplished in two steps.[3] An applicant, whether for new facilities or for changes in an existing station, must first apply for and receive a construction permit which authorizes the proposed construction.[4] From the time the applicant receives the construction permit, it is protected against the grant of new applications specifying facilities which would cause unreasonable amounts of destructive electrical interference.[5] However, by express provision of Section 3(h) of the act, the permittee is not a common carrier, so it does not receive utility protection. This being so, the act does not explicitly protect either a permittee or a licensee from the destructive economic interference which may be caused by a new competitor in its market.

Whenever an application is filed for a construction permit for a broadcast station, the Commission determines whether the applicant is legally, technically, financially and otherwise qualified to receive a construction permit.[6] If affirmative findings are made and no competing application is on file,[7] the Commission will be able to find that a grant of the construction permit will "serve the public interest, convenience, and necessity," the statutory guide-line for Commission actions, and grant the application.[8]

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[2] 48 Stat. 1064 (1934), as amended, 47 U.S.C.A. §§151-609(1960). The Federal Communications Commission operates pursuant to the Communication Act 68 Stat. 30 (1954), as amended, 47 U.S.C. §501 and appeals from its decisions in the broadcast field are normally taken only to the Court of Appeals for the District of Columbia Circuit; therefore the conventional terms "Commission," "act," and "court" will be employed hereafter.

[3] This discussion of the Commission's licensing function and the relevant statutory provisions is limited to a synopsis of provisions considered relevant to "economic impact" problems.

[4] 47 U.S.C.A. §§308(a) and 319(c) (1960).

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

[6] 47 U.S.C.A. §§308(b) and 319(a) (1960).

[7] If more than one application on file specifies the same facilities, it is necessary to conduct a comparative hearing to determine which applicant is best qualified. Ashbacker Radio Corp. v. Federal Communications Comm'n, 326 U.S. 327 (1945).

[8] 47 U.S.C.A. §309(a) (1960).

Upon completion of construction in accordance with the terms of the construction permit, the permittee files an application for license to cover construction permit.[9] Licenses are issued for a term of up to three years.[10] At the end of the license term, the licensee must file an application for renewal of license.[11] At this time, another party may file a competing application.[12]

The statutory obligations of the Commission, in passing upon unopposed applications for construction permits, are concerned primarily with the individual qualifications of an applicant. The act, however, offers two basic administrative remedies which allow third parties to object to applications, on economic or other grounds. In general, the broadest avenue of relief is offered by section 405 of the act which provides, in essence, that a petition for rehearing may be filed against "a decision, order, or requirement" by a party in a proceeding or by any other "person aggrieved or whose interests are adversely affected thereby." If the action complained of was the grant without hearing of an instrument of authorization, the Commission is required to act upon the petition within 90 days of its filing.

A procedure for pre-grant objections is provided by section 309(d) of the act which permits a "party in interest" to file a petition to deny before grant an application for an instrument of authorization. If a substantial and material question of fact is presented, or the Commission is unable to find that a grant of the application will serve the public interest, convenience, and necessity, it will be designated for an evidentiary hearing in which a party in interest, upon a proper showing of the nature of its interest, will be able to participate.[13]

Appeals may be taken from Commission decisions to the Court of Appeals for the District of Columbia Circuit, pursuant to section 402 of the act. Though section 402 presents a number of problems which are beyond the scope of this article, it should be

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[9] 48 Stat. 1064, as amended, 47 U.S.C.A. §§309(A), 319(C) (1960).
[10] 48 Stat. 1064, as amended, 47 U.S.C.A. §§309(A), 319(c), §307(d) (1960).
[11] 47 U.S.C.A. §§307(b), 307(d), & 307(e) (1960).
[12] Hearst Radio, Inc., 6 R.R. 944 (1951). (It should be noted that there is no permanent reporter containing all Commission decisions. Citation to "R.R." refers to "Pike and Fischer Radio Regulation," an unofficial reporter established after the Second World War. The Commission publishes selected opinions in "Federal Communications Commissions Reports," cited "F.C.C.". Slip opinions and orders are cited "FCC" and may be obtained from the Commission's Office of Reports and Information.)
[13] 47 U.S.C.A. §309(e) (1960).

noted that subsection (b)(6) grants a right of appeal to "any other person who is aggrieved or whose interests are adversely affected."

Although the act does not define either phrase of art, it is clear that both a "person aggrieved or whose interests are adversely affected" and a "party in interest" must be very closely related. As it happens, the phrases appear to be synonomous.[14] There has been little difficulty in concluding that a party threatened with electrical interference has standing,[15] but, in the past, there was quite some confusion as to whether economic injury gives a third party standing to object to the grant of a construction permit. This question was answered affirmatively in the leading case *Federal Communications Commission* v. *Sanders Brothers Radio Station*,[16] which is discussed for other features in the next section. This case established the distinction that a party may show private economic injury to obtain standing, even though it must then show some other reason for the Commission to reconsider an action. Mr. Justice Roberts justified this theory on the ground that,

> [O]ne likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission granting the license. It is within the power of Congress to confer such standing. . . .[17]

III. THE ROAD TO SANDERS BROTHERS

The problems resulting from economic impact arose first before the Federal Radio Commission, and have continued to reappear since then.[18] It is unnecessary to follow minutely the early variations in the administrative treatment of the problem,[19] but some of the early court cases preceeding *Sanders Brothers* deserve attention for the fluctuating view points they represent. The first of these cases was *Woodmen of the World Life Insurance*

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[14] *E.g.*, Application of Kansas State College of Agriculture and Applied Science, 8 R.R. 261 (1952).

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

[16] 309 U.S. 470 (1940).

[17] *Id.* at 477.

[18] This body was established by the Radio Act of 1927, 44 Stat. 1162, and was the predecessor of the present Commission.

[19] The interested reader may find an exhaustive discussion of this topic in Warner, Radio and Television Law 120 (1953).

Association v. *Federal Radio Commission.*[20] Station KICK, Red Oak, Iowa, received a grant without hearing of an application to move to Carter Lake, Iowa, within the metropolitan district of Omaha, Nebraska. Three Omaha stations objected on economic grounds but the grant was affirmed after hearing as the Commission found that:

> 4. It does not appear from this record that the operation of KICK at Carter Lake would so affect the interests and advertising revenues of any of the respondent stations as would necessitate any curtailment of either the quality or quantity of the service now rendered by them to the public.[21]

On appeal, the court had no difficulty in affirming the Commission after determining that the record contained adequate support for the quoted finding. This case is particularly interesting in view of the apparent willingness of the Commission and the court to examine and rule on the merits of the objection. As will be seen, this attitude did not long continue.

WGN, Inc. v. *Federal Radio Commission*[22] featured a quick retreat from the initial willingness to consider the basic merits. Station WBBM, Chicago, Illinois, was granted an experimental authorization which allowed it, among other things, to increase its hours of operation. Another Chicago station, WGN, objected on a number of grounds, including economic injury, but did not allege any public injury resulting from its financial loss. The decision of the case turned on the experimental character of the authorization granted and on other considerations irrelevant to the present problem; however, the court mentioned the economic impact issue but only to dismiss it as "so vague, problematical, and conjectural, as not to furnish a present substantial objection to the Commission's decision."[23] This statement might be ignored as unrelated dictum, especially since it is not directed squarely within the economic impact area, as WGN had not claimed that its injury would redound against the public.[24]

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[20] 65 F. 2d 484 (D.C. Cir. 1933).

[21] Warner, *op. cit. supra* note 19 at 122 [quoting from F.R.C. Docket No. 1678 (1932)].

[22] 68 F. 2d 432 (D.C. Cir. 1933).

[23] *Id.* at 433.

[24] Warner, *op. cit. supra* note 19 at 123, states that an issue of public injury was raised. The court, however, interpreted WGN's argument that it was

(footnote continued on next page)

However, since the distinction between personal and public injury resulting from economic impact was not conclusively established until the *Sanders Brothers* decision, *WGN* may be taken as an early indication of judicial unwillingness to struggle with the elusive problems of economic impact.

The Commission soon took the lead of the court and ceased to grant intervention as a matter of right where economic injury was claimed. In *Sykes v. Jenny Wren Co.*[25] the Commission's refusal to allow intervention was attacked by an erstwhile objector which sought an injunction in district court to prevent a hearing until it could participate as a party. Issuance of a preliminary injunction was denied as was the Commission's motion to dismiss the complaint. The Commission took an interlocutory appeal on the grounds that the plaintiff's economic interest in the proceeding did not furnish a ground for intervention and that it had an adequate remedy at law under section 402 of the act. The Commission was affirmed by a divided court on the ground that the plaintiff could protect its interests by a subsequent appeal pursuant to section 402. Judges Groner and Hitz dissented on the basis that the plaintiff had a legal interest to protect, but would be unable to protect its interest on the basis of a record which it did not help to prepare.[26]

The dissenting view of Judges Groner and Hitz was adopted in *Great Western Broadcasting Association, Inc. v. Federal Communications Commission*[27] where the court stated:

> We are by no means in agreement with the contention frequently urged upon us that evidence showing economic injury to an existing station through the establishment of an additional station is too vague and uncertain a subject to furnish proper grounds of contest. On the contrary, we think it is a necessary part of the problem submitted to the Commission in the application for broadcast facilities. In any case where it is shown that the effect of granting a new license will be to defeat the ability of the holder of the old license to carry on in the public interest, the application

(Footnote continued from preceding page)
threatened with increased danger of loss or reduction of facilities as directed to operation of the so-called Davis Amendment, 45 Stat. 373, which established quotas for broadcast stations. 68 F.2d 432, 433 (D.C. Cir. 1933.)

[25] 78 F. 2d 729 (D.C. Cir. 1935), *cert. denied*, 296 U.S. 624 (1935).

[26] *Id.* at 732.

[27] 94 F. 2d 244 (D.C. Cir. 1937).

> should be denied unless there are overwhelming reasons of a public nature for granting it.[28]

Thus, the judicial wheel came full circle as the court dismissed the "vagueness" theory which it had first advanced in *WGN*.

The leading case of *Federal Communications Commission v. Sanders Bros. Radio Station*[29] followed *Great Western* but involved only a problem of private financial injury. The Telegraph Herald filed an application for a construction permit for a new station in Dubuque, Iowa, while Sanders Brothers, then licensee of Station WKBB, East Dubuque, Iowa, sought a modification of its license to allow it to move into Dubuque. Sanders Brothers was permitted to intervene in the hearing on the Telegraph Herald's application, where it argued that there was insufficient revenue available to support both stations in the Dubuque market and that it would be driven out of business by the new competition. Nonetheless, the Commission granted both applications without considering Sanders Brothers' showing of economic injury. Failure to consider the financial injury to Sanders Brothers led to reversal of the Commission's action as "arbitrary and capricious."[30]

Before the Supreme Court, the Commission argued that economic injury to a competitor is not a basis for refusing a license and, therefore, Sanders Brothers was not a party aggrieved within the meaning of section 402(b) of the act. In response to this argument, Mr. Justice Roberts, for the Court, produced the dichotomy referred to before, that economic injury to a private interest is a basis for standing but that,

> Resulting economic injury to a rival is not, *in and of itself*, and apart from considerations of public convenience, interest, or necessity, an element the petitioner must weigh.[31] [Emphasis added]

This holding was amplified and justified in terms of the policy of encouraging competition in broadcasting, as follows:

> Plainly it is not the purpose of the act to protect a licensee but to protect the public. Congress intended to

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[28] *Id.* at 248.
[29] Note 16 *supra.*
[30] Sanders Bros. Radio Station v. Federal Communications Comm'n, 106 F. 2d 321 (D.C. Cir. 1939).
[31] 309 U.S. 470, 473 (1940).

> 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.[32]

The holding was qualified, however, with a significant limitation similar to that of the *Great Western* decision, that,

> This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission. . . . It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. These matters, however, are distinct from the consideration that, if a license be granted, competition between the licensee and any other existing station may cause economic loss to the latter.[33]

Thus, despite its holding on the question of private financial injury as a basis for protection from new competition, the Supreme Court clearly recognized that in some cases the consequences of economic competition in broadcasting may injure the public rather than benefit it, and further recognized that the public is entitled to protection from such an injury.

IV. THE FATE OF THE SANDERS BROTHERS' DICTUM

The intervention of the Second World War, which prevented the construction of new stations for a number of years, and the subsequent improvement in economic conditions forestalled further economic injury cases for a number of years. However, in 1950, the problem reappeared in *Voice of Cullman.*[34] An existing station brought itself within the *Sanders Brothers'* dictum[35] by objecting to an application for a construction permit for a new station on the ground that the economic injury it would receive

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[32] *Id.* at 475.
[33] *Ibid.*
[34] 6 R.R. 164 (1950).
[35] 309 U.S. 470(1940).

would redound against the public interest. Nonetheless, the Commission dismissed the objection while stating that, "... as a matter of policy, the possible effects of competition will be disregarded in passing upon applications for new broadcast stations."[36] This position was justified on the basis that,

> Moreover, assuming the worst possible results arose from the establishment of the new station, the situation would be self-correcting, and injury to the public, if any, would be of short duration. If either station by reason of lack of revenue becomes unable to discharge its responsibility of providing a program service in the public interest, that station will likewise be unable to secure a renewal of license and must leave the field clear for the other station. If both stations should cease operations, the way would then be open for the establishment of a new station for which ... there would be adequate support.[37]

Commissioner Jones, in a concurring opinion, objected that the effect of this rationale would be to permit "competition to drive the service to which the public is entitled below the the low water mark permitted. ..."[38]

Montana Network (KCOK),[39] decided soon after *Cullman,* restated the basis of decision in *Cullman* to meet Commissioner Jones' previous objection, as follows:

> We also hold that the possibilities of competition between radio stations resulting in detriment to the public by reason of lowered quality of program service are too speculative in nature as against the recognized benefits of competition and the dangers inherent in according existing stations a monopoly or quasi-monopoly position to warrant our consideration in passing upon applications for new stations.[40]

In 1955, the *Cullman* approach was somewhat modified in *American Southern Broadcasters (WPWR)*[41] when the Commission amplified its previous statements regarding the "speculative" nature of proof in economic impact cases and categorized it as

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[36] 6 R.R. 164, 170 (1950).
[37] *Ibid.*
[38] *Id.* at 171.
[39] 6 R.R. 445 (1950).
[40] *Id.* at 446-447.
[41] 11 R.R. 1054 (1955).

"a fact which is incapable of proof."[42] Further, the Commission indicated that it doubted whether any type of economic impact should properly prevent it from issuing a license to an applicant.[43]

Two years later, in 1957, a rash of economic impact cases came before the Commission and led to a further evolution of the *Cullman* doctrine. The suggestion contained in *American Southern,* that the Commission might not have jurisdiction of the problem, was adopted as holding in *Southeastern Enterprises,*[44] where a majority of the Commission stated that "We take this opportunity now to disclaim any power to consider the effects of legal competition upon the public service."[45] In support of its position, the Commission assumed the consequences of a contrary rule, as follows:

> 45. Assuming this Commission finds . . . that there are insufficient revenues to support two stations . . . it would seem that we should then determine whether the existing station or the new station should provide the only service to the community which, in turn, would involve a further determination of which program service would be the best for the area and which would be operated the most efficiently.
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> 46. Once we have decided which of the two parties will render the service, we must assume the responsibility of preventing an avoidance of our determination or we in reality will have given that person a license to do otherwise; we must impose conditions upon him to render the service that we found was necessary and to maintain an efficient and effective operation to that end, which would be nothing more than the regulation of his business—to a degree even greater than that exercised of common carriers.[46]

The final embellishment of the *Cullman* doctrine came in *Kaiser Hawaiian Village Radio, Inc.*[47] where the Commission reaffirmed its policy statement in *Southeastern Enterprises,* that it had no power to consider the effects of competition, but added that if it had such power then the policy stated in *Cullman* would be applied and it would not consider the economic injury.

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[42] *Id.* at 1056.
[43] *Id.* at 1057.
[44] 13 R.R. 139 (1957).
[45] *Id.* at 147.
[46] *Id.* at 151.
[47] 15 R.R. 84a (1957).

The first appellate test[48] of this doctrine came in *Carroll Broadcasting Company v. Federal Communications Commission.*[49] Relying on the *Sanders Brothers'* dictum, the court sharply rebuffed the Commission's *laissez faire* policy. First, the underlying policy was stated:

> So economic injury to an existing station, while not in and of itself a matter of moment, becomes important when on the facts it spells diminution or destruction of service.[50]

On the basis of this policy, the court continued:

> We hold that, when an existing licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for presentation of such proof. . . .[51]

The impact of this holding was limited, however, by the court's recognition that "If the protestant fails to bear the burden of proving his point (and it is certainly a heavy burden), there may be an end to the matter."[52] The weight to be attached to this qualification is still an open question since, as yet, the Commission has not sustained an objection based on the *Carroll Broadcasting* grounds.

Since the *Carroll Broadcasting* decision, there has been little further development of the threshold doctrine of economic injury affecting the public and thus precluding the grant of an application.[53] In one respect, however, the Commission seems to have gone beyond the technical requirements of the *Carroll Broadcasting* decision. In *Martin Karig,*[54] an intervenor claimed that economic injury would impair its ability to serve the public and was granted intervention on a *Carroll Broadcasting* issue even though it did not claim that the totality of service available to the public would be diminished or impaired.

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[48] During the long period without an appellate test of the *Cullman* doctrine, the Court by way of dictum affirmed its support of the rule stated in the *Sanders Brothers'* dictum. Democrat Printing Co. v. Federal Communications Comm's, 202 F. 2d 298, 302, n. 14 (D.C. Cir. 1952).

[49] 258 F. 2d 440 (D.C. Cir. 1958).

[50] *Id.* at 443.

[51] *Ibid.*

[52] *Id.* at 444.

[53] The doctrine has, however, also been applied to applications before the Civil Aeronautics Board. Delta Air Lines, Inc. v. Civil Aeronautics Bd., 275 F. 2d 632, 638 (D.C. Cir. 1959).

[54] 19 R.R. 1084 (1960).

V. THE PROBLEMS YET TO COME

Since the decided cases have been directed to the problem of whether economic impact furnishes a sufficient basis for refusing to grant an application, they have, by and large, failed to reach the important practical question of the action which should follow a finding that the grant of an application would adversely affect the public interest. This problem has not faced the Commission and the court has not confronted it in a communications case.

It seems implicit in the *Carroll Broadcasting* doctrine that the Commission can not grant the new application after finding that its grant would have an adverse effect on the public interest. The most recent treatment of the subject by the court, in *Delta Air Lines, Inc. v. Civil Aeronautics Board*,[55] supports this view, as follows:

> [I]n many fields, including both communications and air transportation, an operating license requires a preliminary finding of public interest, convenience and necessity. The public interest requires service for the public. It therefore requires that, if there be only enough business to support operation by one licensee, there must be only one licensee.[56]

The above quotation, however, is misleading as it applies to the communications field. Inherent in the act is the requirement that licensees submit periodic renewal applications, which must then be governed by the same considerations which affect the grant of an original application.[57] Consequently, even though an application may be denied on *Carroll Broadcasting* grounds, the existing station is not granted an indefinite period of *de facto* monopoly since the applicant may file a mutually exclusive application against the existing station's renewal application.

The situation at renewal time could present a host of problems. In any market with more than one existing station seeking renewal of license, a question would immediately arise whether all renewal applications should be treated as mutually exclusive with the new application. To the extent that the rationale of

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[55] 275 F. 2d 632, (1959).

[56] *Id.* at 637-638.

[57] Radio Station WOW v. Federal Communications Comm'n, 184 F. 2d 257, 260 (D.C. Cir. 1950).

the *Sanders Brothers*' dictum and of the *Carroll Broadcasting* decision is interpreted as requiring that the sum of the broadcast services provided to the public be the best available, it would seem that all other stations in the market would need to be included in further proceedings since they might propose and/or provide less satisfactory public service than either the new applicant or the objecting station. In practical terms, such multiparty hearings would be involved and expensive, for all concerned, and would increase the problems of administering the act. Thus, although subsequent decisions may reveal that this possibility is mere idle speculation, it is noteworthy that *Carroll Broadcasting* has opened a new problem area while closing an old one.

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