LICENSING REGULATION OF FCC CONCERNING NETWORK-STATION RELATIONSHIP HELD A REVIEWABLE ORDER*

The Federal Communications Commission issued an order which stated that "no license shall be granted to a standard broadcasting station which has" any of certain defined types of contracts with a broadcasting network.[1] The plaintiff network, alleging that this impaired its contractual relations with its affiliated stations, sought to have the enforcement of the order enjoined under the Federal Communications Act.[2] The complaint was dismissed by the district court for lack of jurisdiction,[3] but on direct appeal to the Supreme Court, as provided by the act,[4] *held*, the order was one subject to review under the Federal Communications Act and the Urgent Deficiencies Act. *Columbia Broadcasting System v. United States.*[5]

The Urgent Deficiencies Act conferred jurisdiction on a special three-judge district court for review of orders issued by the Interstate Commerce Commission, and provided for direct appeal to the Supreme Court.[6] The Federal Communications Act adopted this provision and made it applicable to "suits to enforce, enjoin, set aside, annul, or suspend any order of the Federal Communications Commission,"[7] with certain designated exceptions.[8]

Although neither act defines the word "order" the Supreme Court has limited the meaning to those orders which embody an unequivocal command.[9] An exam-

* Columbia Broadcasting System v. United States, 62 S. Ct. 1194 (1942).

[1] In the Matter of the Investigation of Chain Broadcasting, F.C.C., Docket No. 5060 (1941).

[2] 48 Stat. 1093 (1934), 47 U.S.C.A. § 402(a) (Supp. 1941). This section of the act provides for the extension of the Urgent Deficiencies Act, 38 Stat. 219 (1913), 28 U.S.C.A. §§ 47–47(a) (1927).

[3] Columbia Broadcasting System v. United States, 44 F. Supp. 688 (1942).

[4] 48 Stat. 1093 (1934), 47 U.S.C.A. § 402(a) (Supp. 1941).

[5] 62 S. Ct. 1194 (1942). At the same time, a companion case, National Broadcasting Co. v. United States, 62 S. Ct. 1214 (1942), was decided. Both cases presented similar facts and issues of law, and the same conclusions were reached in each.

[6] 38 Stat. 219 (1913), 28 U.S.C.A. §§ 47–47(a) (1927).

[7] 48 Stat. 1093 (1934), 47 U.S.C.A. § 402 (a) (Supp. 1941).

[8] 48 Stat. 1093 (1934), 47 U.S.C.A. § 402(b) (Supp. 1941). This differentiation in the matter of procedure has no bearing on the issues involved in the instant case, since ". . . . the differentiation was in large measure the product of Congressional solicitude for the convenience of litigants. It had no relation to the scope of the judicial function. . . . . Congress provided the two roads to judicial review only to save a licensee the inconvenience of litigating an appeal in Washington in situations where the Commission's order arose out of a proceeding not instituted by the licensee." Scripps-Howard Radio v. Federal Communications Com'n, 316 U.S. 4, 15–16 (1942).

[9] Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939); United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299 (1927).

ple of the type of order which has been excluded was presented in *United States v. Los Angeles & Salt Lake R. Co.*[10] There the Court said, "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation."[11] And in the recent and leading case of *Rochester Telephone Corp. v. United States*,[12] it was said, "Where the action sought to be reviewed may have the effect of compelling conduct .... but only if some further action is taken by the commission .... the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. .... In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province."[13]

The regulations complained of in the instant case were worded in such a way that on first reading they appear to be the type described in the above quoted paragraphs. Indeed, Mr. Justice Frankfurter, who wrote the opinion in the *Rochester* case, led the dissent in this case. The order of itself did not require anyone to do anything, he said, and hence was not a final, enforceable order, subject to review. It could not be binding on the stations, he explained, because it was not addressed to the stations, but only to the commission itself. And despite the tenor of finality in the order, it could not be binding on the commission itself because, first, an administrative agency is always free to amend its own regulations, and, secondly, because the act, in fact, requires a notice and hearing before any license is denied or revoked. The commission must determine whether the particular station's operation accords with "public interest, convenience, and necessity."[14] Because of this clause in the statute, no generally applicable statement made prior to the individual licensing proceedings could be conclusive, the dissent indicated, for the commission was legally incapable of relieving itself ahead of time of its statutory obligation to examine each application on its merits.

The majority, however, reasoned less technically. "It is not an answer," they said, "to say that the regulations are addressed only to the Commission .... and that accordingly all stations are left free to enter into contracts or not as they choose. They are free only in the sense that all those who do not choose to conform .... are free by their choice to accept .... loss of .... licenses."[15]

[10] 273 U.S. 299 (1927).

[11] Ibid., at 309–10.

[12] 307 U.S. 125 (1939).

[13] Ibid., at 130.

[14] 48 Stat. 1093 (1934), 47 U.S.C.A. § 309(a) (Supp. 1941).

[15] Columbia Broadcasting System v. United States, 62 S. Ct. 1194 (1942).

And the mere fact that the commission might amend this pre-licensing standard did not lessen the present damaging effect of the order. The commission had said that no license would be issued to anyone signing certain contracts, and ordinary businessmen owning stations had a right to believe it meant what it said. Therefore, since loss of license[16] is the most drastic of penalties for a radio station, conformity to the prescribed plan was only to be expected. It would be the rare station which would dare risk such a penalty merely on the chance that the commission might change its mind at a hearing, or that its decision might be reversed on appeal from the licensing proceedings. Conformity by all or a majority meant that one by one they would and did notify the network that they would not renew their existing contracts. This, according to the complaint, was leading rapidly to a complete disruption of the plaintiff's business. Such a consequence seemed sufficiently injurious to the court to form the basis of a cause of action in equity.

Had the harm caused by the order been less complete, review might easily have been denied. In *United States v. Los Angeles & Salt Lake R. Co.*,[17] review of a property evaluation order was denied, although the plaintiff argued that the unjustifiably low valuation which had been placed on its property was greatly impairing its credit. In another case the Court refused to review an order to appear at a hearing although the plaintiff complained that unless the hearing were restrained, it would be put to great expense and inconvenience.[18]

A large number of orders, on the other hand, have been extended review when more severe harm was caused, as in the instant case.[19] It should be noted, however, that in each of this latter group, the order challenged was immediately enforceable by criminal prosecution, injunction, or fine, and not, as here, by a further administrative proceeding. The dissent, with reason, cited the doctrine which requires exhaustion of all administrative remedies before judicial relief can be had. The Court, however, has never applied the doctrine strictly, and the instant case accentuates its ineffectiveness as a deciding factor. Actually the dissent appears to have been swayed more by a general reluctance to restrict the administrative process in a borderline situation. One foreseeable consequence which may have been feared is the discouragement of the plan suggested by the Attorney-General's Committee on Administrative Procedure. This committee urged that licensing agencies make public their policies whenever possible, as an

[16] The act authorizes the commission to revoke a license for any reason which would justify failure to grant one on original application. 48 Stat. 1093 (1934), 47 U.S.C.A. § 312(a) (Supp. 1941). Hence, the announcement that "No license will be issued" under certain conditions may mean as well that "Any license will be revoked" under the same conditions.

[17] 273 U.S. 299 (1927). [18] United States v. Illinois Central R. Co., 244 U.S. 82 (1933).

[19] Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939); Powell v. United States, 300 U.S. 276 (1937); American Tel. and Tel. Co. v. United States, 299 U.S. 232 (1936); United States v. Baltimore & Ohio R. Co., 293 U.S. 454 (1934); Chicago, Rock Island & Pacific R. Co. v. United States, 284 U.S. 80 (1931); Assigned Car Cases, 274 U.S. 564 (1927); Kansas City So. Ry. v. United States, 231 U.S. 423 (1913); Interstate Commerce Com'n v. Goodrich Transit Co., 224 U.S. 194 (1911).

aid to predictability.[20] If these pre-licensing statements are to be subjected to immediate judicial review, however, agencies can scarcely be expected to make them freely.

The instant case is a warning that these announcements, though addressed only indirectly to members of the public, and enforceable only on the contingency of an administrative hearing, are nevertheless reviewable if they invite reliance by the ordinary businessman, and this reliance results in irreparable harm.

RIGHT OF MUNICIPAL CORPORATION TO DISPOSE OF PROPERTY ACQUIRED BY CONDEMNATION*

In 1914, the Sanitary District of Chicago acquired certain land by condemnation under a statute providing, "Such sanitary district may acquire by purchase, condemnation or otherwise, any and all real and personal property, right-of-way and privilege .... that may be required for its corporate purposes .... and when not longer required for such corporate purposes, any such sanitary district may sell .... all such real and personal property, right-of-way, and privilege."[1] The condemnation order awarded compensation "for the taking of said fee simple title of said real estate for the corporate purposes of said petitioner and for all other lawful purposes." In 1937, the Sanitary District undertook to sell and convey the land to the defendant. Upon a tender of a warranty deed, the defendant declined to accept on the ground that the Sanitary District had only a right-of-way and not the fee simple. The Sanitary District then sued for specific performance of the contract. The defendant argued that the condemnation statute did not authorize the taking of a fee simple and furthermore, that if it did, it was unconstitutional because it would permit the Sanitary District to condemn for a private use in violation of the Illinois Constitution. From a decree for the Sanitary District the defendant appealed. *Held:* Affirmed. The statute authorized the taking of the fee simple and the statute was not unconstitutional. The Sanitary District had acquired a fee simple which it could convey to the defendant in performance of the executory contract. *The Sanitary District of Chicago v. Manasse.*[2]

The decision seems sound. The express stipulation in the Illinois Constitution which limits the interest which may be condemned for railroad tracks to an easement[3] and the omission of a similar limitation in the sections of the constitution and of the statutes applicable to this case would appear to bring the case within the maxim, *expressio unius est exclusio alterius.*

[20] Administrative Procedure in Government Agencies: Report of the Committee on Administrative Procedure, 77th Cong. 1st Sess., at 26–27 (1941).

* The Sanitary District of Chicago v. Manasse, 380 Ill. 27, 42 N.E. (2d) 543 (1942).

[1] Ill. Rev. Stat. (1941) c. 42, § 327. In a portion of the section which has not been copied the sale of specified tracts without the approval of the Department of Purchases and Construction is prohibited.

[2] 380 Ill. 27, 42 N. E. (2d) 543 (1942). [3] Ill. Const. art. 2, § 13.