FEDERAL COMMUNICATIONS COMMISSION REORGANIZATION

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

EIGHTY-SEVENTH CONGRESS

FIRST SESSION

ON

H.R. 7333

A BILL TO AMEND THE COMMUNICATIONS ACT OF 1934, FOR THE PURPOSE OF FACILITATING THE PROMPT AND ORDERLY CONDUCT OF THE BUSINESS OF THE FEDERAL COMMUNICATIONS COMMISSION

JUNE 13, 14, AND 15, 1961

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FEDERAL COMMUNICATIONS COMMISSION REORGANIZATION

TUESDAY, JUNE 13, 1961

HOUSE OF REPRESENTATIVES,
SPECIAL SUBCOMMITTEE ON REGULATORY AGENCIES
OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to call, in room 1334, New House Office Building.

Present: Representatives Harris (presiding), Moss, Rogers of Florida, Springer, Younger, Thomson, Hemphill, and Collier.

Also present: Kurt Borchardt, professional staff member; Allen H. Perley, legislative counsel, House of Representatives; Charles P. Howze, Jr., subcommittee chief counsel; Rex Sparger, subcommittee special assistant; and Herman Clay Beasley, subcommittee clerk.

The CHAIRMAN. The committee will come to order.

This morning the committee is meeting to hold hearings on H.R. 7333, which is a result of the submission to Congress of Reorganization Plan No. 2 by the President of the United States and subsequent actions by this committee and other committees, regarding that proposal. The following consideration has been given to the plan:

I had the staff prepare a bill along the general lines of the plan. In view of the fact that two important amendments to the basic act, the Federal Communications Act, were involved, it was thought much more desirable to consider the matter through the regular legislative channels.

(H.R. 7333 and report follow:)

[H.R. 7333, 87th Cong., 1st sess.]

A BILL To amend the Communications Act of 1934, for the purpose of facilitating the prompt and orderly conduct of the business of the Federal Communications Commission

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (c) of section 5 of the Communications Act of 1934 (47 U.S.C. 155(c)), relating to a "review staff", is hereby repealed.

SEC. 2. Subsection (d) of such section 5 is amended to read as follows:

"(d)(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may by published rule or order delegate any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter, and may at any time amend, modify, or rescind any such rule or order. Any such rule or order may be adopted only by vote of a majority of the members of the Commission then holding office, but may be rescinded by vote of a majority, less, one, of the members of the Commission then holding office. The requirements of paragraphs (a), (b), (c), and (d) of section 4 of the Admin-

istrative Procedure Act shall apply in the case of any such rule. Nothing in this paragraph shall authorize the Commission to delegate to any person or persons, other than the persons referred to in clauses (2) and (3) of section 7(a) of the Administrative Procedure Act, the function of conducting any hearing to which such section 7(a) applies.

"(2) Any order, decision, or report made, or other action taken, pursuant to any such delegation, unless reviewed as provided in paragraph (3), shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner as an order, decision, report, or other action of the Commission.

"(3) Any person aggrieved by any such order, decision, report, or other action may, within such time and in such manner as the Commission shall by rule prescribe, make application for review by the Commission, and every such application shall be passed upon by the Commission; and the Commission on its own initiative, within such time and in such manner as it shall by rule prescribe, may review any such order, decision, report, or other action. A vote of a majority, less one, of the members of the Commission then holding office shall be sufficient to bring any such order, decision, report, or other action before the Commission for review. Whenever the Commission grants an application for review, or on its own initiative takes action to review, it may affirm, modify, or set aside the order, decision, report, or action being reviewed or may order a rehearing upon such order, decision, report, or action under section 405.

"(4) There is hereby transferred from the Commission to the Chairman of the Commission the authority to assign Commission personnel, exclusive of members of the Commission, to perform such functions as may be delegated by the Commission pursuant to paragraph (1) of this subsection.

"(5) The Secretary and seal of the Commission shall be the Secretary and seal of each division of the Commission, each individual Commissioner, each examiner, and each employee board or individual employee exercising functions delegated pursuant to paragraph (1) of this subsection."

SEC. 3. Section 409 of such Act (47 U.S.C., sec. 409) is amended by striking out subsections (a), (b), and (c) thereof and inserting in lieu of such subsections the following:

"(a) The officer or officers conducting the hearing in any case of adjudication (as defined in the Administrative Procedure Act) arising under this Act shall prepare and file an initial decision, except where the hearing officer becomes unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision. All decisions, including the initial decision, shall become a part of the record and shall include a statement of (1) findings and conclusions, as well as the basis therefor, upon all material issues of fact, law, or discretion, presented on the record; and (2) the appropriate decision, order, or requirement.

"(b) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no officer conducting or participating in the conduct of such hearing shall, except to the extent required for the disposition of ex parte matters as authorized by law, consult any person (except another officer participating in the conduct of such hearing) on any fact or question of law in issue, unless upon notice and opportunity for all parties to participate. In the performance of his duties, no such officer shall be responsible to or subject to the supervision or direction of any person engaged in the performance of investigative, prosecutory, or other functions for the Commission or any other agency of the Government. No officer conducting or participating in the conduct of any such hearing shall advise or consult with the Commission or any member or employee of the Commission (except another officer participating in the conduct of such hearing) with respect to the initial decision in the case or with respect to exceptions taken to the findings, rulings, or recommendations made in such case.

"(c) No person or persons engaged in the performance of investigative or prosecuting functions for the Commission, or in any litigation before any court in any case arising under this Act, shall advise, consult, or participate in any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, except as a witness or counsel in public proceedings."

SEC. 4. Notwithstanding the foregoing provisions of this Act, the second sentence of subsection (b) of section 409 of the Communications Act of 1934 (which

relates to the filing of exceptions and the presentation of oral argument), as in force at the time of the enactment of this Act, shall continue to be applicable with respect to any case of adjudication (as defined in the Administrative Procedure Act) set for hearing by the Federal Communications Commission by a notice of hearing issued prior to the date of the enactment of this Act.

REPORT OF THE FEDERAL COMMUNICATIONS COMMISSION

H.R. 7333 would markedly change the present procedural provisions of the Communications Act in the following essential respects: (*a*) it would abolish the review staff created by section 5(c) and significantly revise the separation of functions and ex parte ban provisions of section 409(*c*) (1) and (2); (*b*) it would abolish the present right to obtain review, including oral argument, of any initial decision and substitute therefor discretionary review, upon the vote of a majority, less one, of the Commissioners in office; (*c*) it would permit the Commission to delegate adjudicatory matters (now precluded by secs. 5(d)(1) and 409(b)), subject to rescission by a vote of a majority, less one, of the Commissioners in office; and (*d*) it would transfer from the Commission to the Chairman the authority to assign Commission personnel, excluding Commissioners, to perform the functions delegated by the Commission.

We shall state our views on each of these four areas in the ensuing discussion. In general, the Commission supports the objectives of the bill in each area but, with the exception of the provision abolishing the review staff, would urge substantial revisions for the reasons set forth. We have attached, as appendix A, a draft of a bill which would carry out the objectives of H.R. 7333 but along the lines of the revisions suggested by a majority of the Commission.

I

(1) The Commission strongly favors the repeal of the provisions of 5(c), relating to the review staff. Under these provisions, the review staff, even though it has no other functions than to assist the Commission in adjudicatory cases, is nevertheless precluded from making any recommendations to the Commission. This restriction, which is not applicable to the opinion writing staff of any other Federal regulatory agency (Davis, "Administrative Law Treatise," vol. 2, p. 197), is both wasteful and inefficient. It is wasteful in that it deprives the Commission of the full assistance of which this review staff is capable; it is inefficient because it requires a two-step procedure (of instructions and draft order) even as to the most routine interlocutory matters. The repeal of these unduly restrictive provisions should contribute to speedier action, without in any day depriving parties of any rights. On the contrary, the safeguards of section 5(c) of the Administrative Procedure Act would be applicable; and any deficiency in this act (such as with respect to initial licensing proceedings) could be supplied by an appropriate provision in section 409(c)(2) (see propsed revision of 409(c)(2) in appendix A, attached hereto).

(2) In section 3(c), the bill would retain the separation of functions provisions of subsection (3) of 409(c) but would eliminate the present subsection (2). The Commission believes that the proposal in section 3(c) is unsound. First, the ban in (c)(2) against ex parte presentations by a "person who has participated in the presentation or preparation for presentation of [an adjudicatory] case * * *" should not be dropped. While it is true that ex parte presentations would be barred irrespective of section 409(c)(2),[1] that provision does serve the function of proscribing such conduct by parties and thus could be the basis of criminal action under section 501. Furthermore, it is desirable that the law be explicit on this subject, and not dependent on case precedent, however well established. For this reason, we propose in the draft in appendix A to keep the proscription of (c)(2) and, indeed, to remove the present limitation, which restricts its application only to those persons who have participated in the case.

Second, it would be much sounder to return to the separation of functions provisions of section 5(c) of thhe Administrative Procedure Act. For again, it is wasteful and serves no valid purpose whatever to cut off the Commission in adjudicatory cases from its chief legal officer, the General Counsel (see pp. 57–58,

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[1] See, e.g., *Morgan* v. *United States*, 298 U.S. 468, 480; *Morgan* v. *United States*, 304 U.S. 1, 19–20; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 304; *Sangamon Valley Television Corp.* v. *United States*, 269 F. 2d 221, 224 (C.A.D.C.).

"Attorney General's Manual on Administrative Procedure Act"); yet (c)(3) does this with its reference to "* * * persons engaged * * * in any litigation before any court * * *." The test laid down in the Administrative Procedure Act (sec. 5(c)) is the only valid one; namely, whether the staff person has engaged in investigative or prosecuting functions "in that or a factually related case." This test is directed squarely to the fairness problem involved. We have therefore proposed in appendix A a return to the standard of the Administrative Procedure Act, with the exception that this standard would be applicable to all cases of adjudication, including initial licensing.

(3) Section 409(c)(1) is revised in section 3(b) only by the substitution of "officer" for "examiner". Here again we suggest a return to the standard of the Administrative Procedure Act, section 5(c)[2]. The conduct of hearing officers clearly should be governed by one general standard, and not by ad hoc legislation for one particular agency; the functions of an FCC examiner in conducting an FCC case in no way differ from the functions of a FTC, ICC, etc. examiner, all of whom are governed by the Administrative Procedure Act. Rather than amending the Communications Act, the Administrative Procedure Act should be revised, if it is desired to alter the governing standard for examiners (as, for example, to permit consultation on questions of law only with fellow examiners)[3].

II

The bill would repeal the second sentence of 409(b) and would make review of an examiner's initial decision discretionary, upon the vote of a majority of the Commissioners less one. The Commission believes that a party should have a right to obtain some administrative review of an examiner's initial decision. This is the general pattern in the Federal courts, where (with certain exceptions) a party can obtain review of a trial court's decision in the court of appeals. See 28 U.S.C. 1291. He cannot require the appeals court en banc to hear such an appeal, nor can he, as a matter of right, obtain oral argument in every case. So, also, we would bestow upon the Commission the authority to use panels or (since we are in the administrative field) employee boards and to act without oral argument in those few instances where it is appropriate to do so. But we would afford the right to administrative review.

It is no answer, we think, to say that a party can obtain judicial review of the examiner's decision, when the Commission denies further administrative review. For, the agency has far greater, and indeed completely different, leeway in reviewing an examiner's decision than does a court passing on an agency decision. Compare, *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474; *Gray* v. *Powell*, 314 U.S. 402; *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17; *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726. The cited cases make clear that it is the agency which has "the power of ruling on facts and policies in the first instance" (*Federal Communications Commission* v. *Allentown Broadcasting Corp.*, at p. 364; sec. 8(a) of the Administrative Procedure Act). Thus, a party may be effectively cut off from upsetting a routine administrative decision which could go either way (compare, *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105), simply because he cannot obtain further administrative review.

Nor do we think such mandatory review will result in clogging the Commission's processes, provided that the Commission is given full discretion with respect to delegations and oral argument. If the appeal involves routine matters, it can be heard by a panel or employee board; if it is wholly lacking in substance, it could be quickly resolved on the pleadings. Any application for discretionary review of the panel's or board's decision could be promptly determined, after consideration of the staff's analysis and recommendation. In short, we feel that the procedure set out in appendix A will greatly benefit the Commission, particularly in freeing the Commissioners to concentrate on important policy matters.

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[2] This section provides, in pertinent part: "* * * Save to the extent required for the disposition of ex parte matters as authorized by law, no such [hearing] officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. * * *"

[3] If sec. 409(c)(1) is to be retained, we suggest that it be revised to permit examiners to consult fellow examiners on questions of law. Such consultation would appear desirable and does not infringe on the fairness of the proceeding. We have in app. A, sec. 409(c), so revised the Communications Act.

without diminishing in any substantial way the parties' rights to full and fair administrative process.

III

(1) The Commission strongly endorses the provision in H.R. 7333 (sec. 2) giving the Commission authority to delegate in adjudicatory cases. Such provision is needed to permit the use of panels of Commissioners or employee boards to pass on cases other than those involving major policy or legal issues. Without this provision, it would still be necessary for Commissioners to hear such cases as fishing boat suspensions or routine aural broadcast matters. With it, the Commission will be able to concentrate on the important case, and the hearing of all cases by some authority within the agency should be substantially expedited. We would not expect the provision for discretionary reveiw of a delegated decision to add a new factor of delay, since we would hope that, for the most part, such decisions made in these routine cases would be correct and thus the application could be quickly acted upon.

(2) We do, however, disagree with several aspects of section 2 of the bill:

(i) The section provides that any delegation rule or order may be rescinded by a vote of a majority, less one. We think this provision is unnecessary. First, it is apparently based on the fact that review under H.R. 7333 is discretionary, and therefore should be controlled by a "rule of three" comparable to the Supreme Court's "rule of four" with respect to the discretionary certiorari review; thus, if our suggestion is adopted that review be afforded as matter of right, the provision is no longer needed. More important, experience does not support its inclusion. The Commission has long had complete discretion to delegate all nonadjudicatory matters and in fact has made extensive delegations. These delegation activities have worked well—and without any indication of partisan abuse—under the present provisions of 5(d)(1), which do not contain any "rule of three."

(ii) The section provides that the requirements of paragraphs (a), (b), (c), and (d) of section 4 of the Administrative Procedure Act shall apply in the case of any delegation rule. This provision is somewhat ambiguous (since 4(a) exempts rules of agency organization, procedure, or practice, except where notice is required by statute, and sec. 2 of the bill does not in terms require such notice). But it presumably is meant to require the Commission to give notice and an opportunity for comment whenever it proposes to enter a delegation rule. Such a rule is a matter very largely within the judgment of the agency, which alone knows and can evaluate the demands upon its time and the capabilities of its staff. We have issued and revised many such delegation rules (see, e.g., 0.201–0.333, 47 CFR 0.201–0.333), always as an internal matter, without notice or opportunity for comment. This does not mean that we would not employ the formal rulemaking procedures of 4 (a) and (b) in some future instance. But we strongly believe that the matter should be one within the Commission's discretion: otherwise, revisions or extensions of the many present delegations will all have to go through the somewhat lengthy and, we think, in this respect, largely useless procedure of formal rulemaking. Significantly, interested parties such as the bar could always petition under 4(d) for amendment or repeal of any rule, including these delegation regulations.

(iii) In our view, the Commission would not be required, under 5(d)(3), to give reasons for denial of an application for review; this is our interpretation of the provision as it now appears in similar language in section 5(d)(2). But an argument has been made that under sections 6(d) and 8(a) of the Administrative Procedure Act and the last sentence of section 409(b) (retained in the bill as part of 409(a)), rulings on the merits of the application would be required. Since it is of critical importance that the application for review may be denied (or granted) without assigning reasons therefor, we think the law should be explicit on this score. We would suggest the inclusion of a provision similar to 409(d) in appendix A or the revision of 409(a) in the bill to read as follows:

"All decisions, including the initial decision, shall become a part of the record and, except for decisions granting or denying an application for review under section 5(d)(3), shall include a statement of (1) findings and conclusions, as well as the basis therefor, upon all material issues of fact, law, or discretion, presented on the record; and (2) the appropriate decision, order, or requirement."

This revision, as complemented by the present 409(d), would remove all doubts.

(iv) We think the statutory scheme should make clear that an application for review is a condition precedent to judicial review and that no such applica-

tion may rely upon questions of fact or law which the designated authority within the Commission has been afforded no opportunity to pass. In this way, the case will be presented to the Commission (and if the application is denied, to the courts) with a ruling on every issue, and the Commission will have an opportunity to review the decision before the matter goes before the courts. In appendix A, we have set out such a scheme, and have revised section 405 to reflect it.

IV

Section 2 of the bill also provides for the transfer of assignment functions (excluding assignment of commissioners) from the Commission to the chairman. We do not believe any revision of existing law is needed to this respect. The Commission has already delegated to the chairman a great deal of authority in this area and undoubtedly would delegate further authority to assign personnel to hear adjudicatory cases, should H.R. 7333 become the law. For the chairman is the agency's chief executive officer, with the duty "generally to coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission" (section 5(a)). But the Commission feels that such assignment authority should stem from the Commission and not the statute: In this way a future chairman will be bound to act fairly in his assignments. While it is true that other checks on abuse of such authority would exist (such as rescission of the delegation and consideration of the matter by the full Commission), such checks are more cumbersome and do not, we think, carry the same psychological weight. This, in effect is, the way several of the Federal courts of appeals operate: Under a general provision requiring that assignments are to be made as the court directs (28 U.S.C. 46), several circuits have delegated to the chief judge the authority to assign the judges to the panels. In short, we agree with the objective of this provision but think it can be more wisely accomplished by agency, rather than statutory, action.

APPENDIX A—FCC PROPOSAL

A BILL To amend the Communications Act of 1934, as amended, in order to expedite and improve the administrative process by authorizing the Federal Communications Commission to delegate functions in adjudicatory cases, repealing the review staff provisions, and revising related provisions

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (c) of section 5 of the Communications Act of 1934, as amended, is hereby repealed.

Section 2. Subsection (d) of section 5 of the Communications Act of 1934, as amended, is amended to read as follows:

(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by rule or order, delegate any of its functions to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business or matter, and may at any time amend, modify, or rescind any such rule or order. Nothing in this subsection shall modify the provisions of section 7(a) of the Administrative Procedure Act.

(2) Any order, decision, or report made or other action taken, pursuant to any such delegation, unless reviewed as provided in subsection (3), shall have the same force and effect, and shall be made, evidenced and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

(3) Any person aggrieved by any such order, decision or report may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe. The Commission shall have authority on its own initiative to order any matters delegated under subsection (1) before it for review on such conditions as it shall prescribe and shall make such orders therein, consistent with law, as shall be appropriate.

(4) In passing upon applications for review, the Commission may grant in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the individual commissioner, panel of commissioners, employee board, or individual employee, has been afforded no opportunity to pass.

(5) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, or report made, or other action taken in accordance with section 405.

(6) The filing of an application for review shall be a condition precedent to judicial review of any order, decision, or report made or other action taken. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all applications for review or exceptions filed in any case.

(7) The Secretary and seal of the Commission shall be the secretary and seal of each panel of the Commission, each individual commissioner, and each employee board or individual employee exercising functions delegated pursuant to subsection (1) of this section.

Section 3. Section 405 of the Communications Act of 1934, as amended, is hereby amended to read as follows:

After a decision, order, or requirement has been made in any proceeding by the Commission or designated authority within the Commission under section 5(d)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making the decision, order, or requirement; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(d)(1), in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. Petitions for rehearing must be filed within thirty days from the date upon which public notice is given of any decision, order, or requirement complained of. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision, order, or requirement, except where the party seeking such review (1) was not a party to the proceedings resulting in such decision, order, or requirement, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish.

The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in any case, but any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.

Section 4. Section 409 (a), (b), (c), and (d) of the Communications Act of 1934, as amended, is amended to read as follows:

(a) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated for hearing by the Commission, the hearing shall be conducted in accordance with the provisions of the Administrative Procedure Act and such other rules as the Commission may prescribe not inconsistent therewith.

(b) In such cases any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to such initial, tentative, or recommended decision, which shall be passed upon by the Commission or the authority to whom the matter may have been delegated under section 5(d)(1).

(c) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for hearing by the Commission, no person except to the extent required for the disposition of ex parte matters as authorized by law, shall directly or indirectly make any presentation respecting such case to the hearing officer, unless upon notice and opportunity for all parties to participate; provided that a Commissioner conducting the hearing shall be

permitted to consult with his assistants and to participate, without restriction because of his conduct of the hearing, with the Commission upon review of the case or any other matter; providing further that examiners shall be permitted to consult with other examiners on questions of law. No person except to the extent required for the disposition of ex parte matters as authorized by law, and except for officers, employees, or agents of the Commission not engaged in the performance of investigative or prosecuting functions for the Commission in such case or a factually related case, shall directly or indirectly make any presentation respecting such case to the Commission or designated authority within the Commission, unless upon notice and opportunity for all parties to participate.

(d) To the extent that the foregoing provisions of this section and section 5(d)(4) are in conflict with the provisions of the Administrative Procedure Act, such provisions of this section and section 5(d)(4) shall be held to supersede and modify the provisions of the Act.

Section 5. Notwithstanding the foregoing provisions of this Act, the second sentence of subsection (b) of section 409 of the Communications Act of 1934 (which relates to the filing of exceptions and the presentation of oral argument), as in force at the time of the enactment of this Act, shall continue to be applicable with respect to any case of adjudication (as defined in the Administrative Procedure Act) set for hearing by the Federal Communications Commission by a notice of hearing issued prior to the date of the enactment of this Act.

The CHAIRMAN. I want to say at the outset that I am well aware of the great interest in this matter. It is my hope, because of the deep interest that we have and perhaps the controversies that have arisen in the minds of a lot of people, that we will not lose sight of the fact that there is much room for improvement yet in administrative procedures and that we will not let our prejudices about the very fact that a reorganization plan has been submitted or, that there are different proposals relating to various agencies, many of which have the same objective and certainly the intention of reaching the same result, that these things will not overcome our better judgment toward working out the kind of legislative procedures that will be helpful.

I have no special or particular interest in the bill that I introduced. That was a result of the promise that I made to the Committee on Government Operations when I was before it regarding the reorganization proposal. I have had some discussion with a good many other people about it.

In many respects those of us who tried to approach the question have approached it identically, but in two or three respects there are some sharp differences. I think those could be very easily and readily worked out if we will all join together and put in our best efforts toward a final objective that will help the Commission.

I do not claim to have any special intuition or otherwise in connection with the FCC, any more so than the other regulatory agencies. I want to say that I am very well pleased, however, at the progress that has been made within these various regulatory agencies themselves, by some of the things that the Congress has accomplished, and by what I see now is on the way to fruition. I am very well pleased and I think I could speak for the entire committee when I say that we are very well pleased by the way these agencies are conducting their business and carrying on the business of the public. And with these improved procedures, if we will just not let prejudices get in and not let ourselves be persuaded by who is trying to do what, but everyone work toward the same objective, I think we will come out a lot better in the end.

I know the Commission is here with us today. I believe I observe all the members. I appreciate the fact that you are here. I know of your concern in this program and I believe that with all heads of the members of the Commission, putting your brains and minds to work, working together with members of this committee, and with those who are equally interested in cooperating, as well as the practitioners who are here in the District of Columbia, and perhaps others, and the industry recognizing a need and helping us work it out, we will come out with something that will be very, very helpful to the future of this program.

As I say, I hold no particular brief for the bill as I introduced it. I have said that if the bill contained all the provisions of the reorganization plan, there are some provisions of it that I would change. But the overall objective is good and we all ought to recognize that. I do not believe in being against a proposal just to be against something.

I know it is difficult to arrive at a solution to these problems even though we have gone through a lot of misery and pain and difficulty dealing with them over the years. It is easy to get in the midst of developing something where the dramatic headlines are facing you, but it is awfully difficult to carry through and bring about the needed changes, and we are right now at that particular point.

To my way of thinking, we have enough initiative, the brains, and foresight to all get together to do what should be done in the best interest of the people. That is who we are working for.

If the bill does not accomplish the purpose as I have analyzed it along with the bill as proposed by the Commission, we must seek some other solution. The way I see it, there is only one major difference between the two, regardless of the difference in the language. I think that the major difference can be resolved. In the hearings, it is my hope that these things can be adequately resolved, taking into consideration the views expressed by the members of the Commission who are going to have to deal with these problems in the future.

Finally, I have one other thing in mind. I was a member of this committee when the McFarland amendments were reported in 1950 and 1951. I had a great deal to do with those amendments and I have felt during these 10 years that had I not become interested in it at the time, because the Senators and some others had importuned me, it is very doubtful that that bill would have ever gotten out of this committee. I think in some respects that those amendments went too far and I think they have in some ways been a burden to the Commission, and that these years of experience have taught me that if we have made a mistake in the past, even though it has been some time and we need to move cautiously and slowly, we ought to correct them and bring about some improvements in the way that our Government works. To that extent, there are some things that we did then that I hope we will correct to some degree.

We are very glad to have back with us this morning Dean Landis, special assistant to the President of the United States. Dean, I understand that you have not been feeling too well the last few days, but we are glad you are able to be with us, and even though you did testify on the plan before the committee, we would be very glad to have your

expression of views and suggestions with reference to this proposal and perhaps the proposal, which I think you must be familiar with, recommended by the Commission.

STATEMENT OF JAMES M. LANDIS, SPECIAL ASSISTANT TO THE PRESIDENT

Mr. LANDIS. Thank you, Mr. Chairman.

Mr. Chairman, I think that you have very rightfully described this bill as being one designed to carry out the prime objectives of Reorganization Plan No. 2. Those objectives have been to bring about a more efficient dispatch of business before the various regulatory agencies and with regard to plan No. 2, the Federal Communications Commission.

The prime drive or thrust of plan No. 2 was to permit delegation of matters that should not have required the attention of the full Commission to hearing examiners to panels of Commissioners, to Commissioners individually, and to boards of employees. If I may just take this bill section by section and indicate how those objectives are carried out in the bill with certain emendations, which I think have come as a result of discussion before this committee, I would like to do that.

Section 1 of this bill which repeals section 5(c) of the Communications Act relating to the review staff, I think, needs very little comment. I think there is general unanimity both in this committee and in the Commission itself that that section is not too desirable.

I come to section 2, and section 2 provides for the type of delegation that was envisaged by plan No. 2 and adds certain safeguards with reference to that delegation. The first safeguard that it adds is to make explicit the concept of rescission of any rule delegating a matter by the Commission. It does more than that.

It makes explicit the concept of bipartisanship that is present throughout our regulatory agencies as a whole, and provides that a minority of the Commission can effectively rescind action that has been taken by a majority. It is difficult to see any real harm in that provision.

The importance of any rule of this nature would be such that it should be approved, generally speaking, by the Commission as a whole, and if a substantial minority, which would consist of at least three in the case of the Federal Communications Commission, feels that that kind of delegation is undesirable, probably the wise thing to do is to rescind the rule, and section 2 of this bill provides for that.

That section also makes explicit what I think was implicit in plan No. 2, namely, that section 4 of the Administrative Procedure Act with regard to publication and notice of rulemaking is applicable to any rule which is promulgated pursuant to this section.

I think that was implicit in plan No. 2 and to make it explicit is certainly not unwise because that will make it very, very clear that the procedures of section 4 of the Administrative Procedure Act apply to these proceedings.

Paragraph (3) of section 2 is perhaps the only real point upon which there is some division of opinion. There is no division of opinion as that paragraph applies to the objectives of plan No. 2. That

paragraph provides for the concept of discretionary review with the safeguards that are inherent in it, and the objection, as I understand from the result of earlier hearings before this committee, is a desire on the part of certain members of the Commission and also certain members of the Federal Communications Bar Association to have a mandatory administrative review inside the Commission.

What worries me about that and why I think that the concept of discretionary review is a better concept is that it may tend to throw an additional piece of machinery into the disposition of business before the Commission. I should not like to see that kind of thing happen.

Unfortunately, that kind of procedure was characteristic of the Interstate Commerce Commission for a while and did succeed in delaying proceedings before that Commission. The Interstate Commerce Commission is working itself out of that intermediate appellate procedure. The point I would like to make and the point that I think is present in this bill, and also in plan No. 2, is that the petitions for review of decisions that have been delegated are handled by the Commission itself. That, to my mind, is a very important thing, because it will keep the Commission alive as to the current business that flows through it and not to have those things handled by the Commission itself would, I think, be an act of delegation that would exceed what is essential to enable this Commission to dispatch its business.

I can recall my own experience as a law clerk to a Justice of the Supreme Court of the United States. The petitions for certiorari were always handled personally by that Justice. It was a very important thing to him that he should handle petitions for certiorari because he then would have a concept of the flow of business through the inferior or lower courts of the Federal judicial system, as well as the State courts themselves. That the petitions for review be handled by the Commission itself, I think is a wise procedure. Certainly the burden of handling these petitions will be far less than the burden of handling mandatory review as it exists today under the Federal Communications Act.

Moving to paragraph (4), the difference between paragraph (4) and plan 2 is that the assignment of Commission personnel under this will be by minute of the Commission and not by action of the chairman. It seems to me a difference that is not too significant and I should imagine that it can be handled that way. It is handled that way in some of the courts of appeals. I know it is handled that way in the Court of Appeals here in the District; that is, really by minute of the judges themselves, rather than by action of the Chief Judge.

If the Commission wants to give this authority to the chairman it can give that authority to him by minute itself, but naturally, it can withdraw that authority if there is any abuse.

Turning to section 3, I think section 3 is very wise in abolishing section 409(a) of the Communications Act and rewriting it, because section 409(a) prohibits the assignment of an adjudicative matter to a single Commissioner, which assignment is contemplated in the Administrative Procedure Act of 1946. To permit the Commission to act within the scope and contemplation of the Administrative Procedure Act seems to me a very wise thing to do.

I think I might add that section 3 generally handles matters that were not handled by plan No. 2 and goes furher to correct certain matters that are deemed wise to correct in the Communications Act of 1954.

I have a suggestion with regard to section 3. In paragraph (b) of that section, in fact in line 4 of page 5, there is a prohibition against any hearing examiner discussing not merely questions of fact with anyone else of any matter that is before him, but also questions of law.

This is in the Communications Act at present. This is not new legislation. But it seems to me unwise to prohibit the discussion of questions of law by a hearing examiner, particularly with his colleagues. I would say it is true of the decisions of the Federal Communications Commission as well as many other regulatory agencies that they are not too well indexed and very frequently, it may be true that a hearing examiner of long standing will remember a decision dealing with a point of law that a younger colleague of his will have difficulty in putting his fingers on.

It is not uncommon, and certainly not uncommon among judges who have not necessarily presided over the same case, to discuss questions of law with each other that have arisen, and I think that prohibition is not too wise. There is no reason why a question of law that arises in a particular case cannot be batted up against somebody else to get his opinion and his knowledge with regard to the law governing that particular issue.

Another suggestion that I make, with due deference, is with regard to paragraph (c) of section 3. Paragraph (c) is a repetition of section 409(c)(3). There again, it seems to me that injunctions that that paragraph places both upon Commissioners, hearing examiners, and the like, is not too wise. It prevents a Commissioner actually from discussing the disposition of a case with his general counsel. The general counsel, if he has been active in a particular case, would be prohibited from discussing that case as a result of paragraph (b) of section 3, and that is right, but if he has had nothing to do with the investigation or prosecution of the case it does not seem to me to be too wise for him to be prohibited from giving his advice to members of the Commission as to matters of law. The elimination of subparagraph (c) would, I think, be wise and would constitute an improvement in the Communications Act.

I come back to one point as to which there is some difference. In paragraph (b) of section 3, that in substance is the same as section 409 subparagraph (c) of the Communications Act of 1934 with one difference.

Section 409(c) places a prohibition upon the examiners discussing certain matters that are pending before them with other individuals. This goes further and places that injunction upon officers. I see no harm in that.

If a Commissioner or some other employee of the Commissioner is exercising the same functions as a hearing examiner exercises; namely, that of dealing with the pending case, the same prohibitions should attach to him as attach to the hearing examiner. These prohibitions are wise with regard to the hearing examiner. They seem to me just as wise with regard to anybody who exercises that

function, and I think, if I may say so, this is an improvement of section 409(c) of the Communications Act.

I would particularly like to make one further observation which is a general observation. I think this act carries out a very important concept that is inherent in the Administrative Procedure Act, and that is our system of hearing examiners. I cannot conceive of our administrative process not having this corps of hearing examiners. No regulatory agency can actually handle all the business that comes to it and it must delegate to what I have called nisi prius judges in the first place, to hear and determine the facts and to make an initial decision. It has been important in my mind and my thinking, for the last decade in fact, that this corps of hearing examiners should be built up. Perhaps one can be critical of certain aspects of that corps today, but I believe that it is essential that they should be built up, their prestige should be increased, and their responsibilities should be increased. This bill follows that theory.

If, for example, you would follow a concept of instituting an intermediate board over the hearing examiner, and not making him directly responsible to the Commission, I think his prestige would be reduced, and my own concept, and this is simply my thinking, is that we should do everything that we can to build up these men who have the initial decision in their hands and who have to determine the credibility of witnesses that come before them. They are important and their stature should not be reduced. This bill does not do that. It follows, I think, the objectives of plan No. 2 in that respect, in encouraging them to take more and more responsibility with regard to the disposition of matters before them.

I think that is all I have to say at this moment, Mr. Chairman.

The CHAIRMAN. Dean, thank you very much for your statement analyzing the proposal. Have you had occasion to consider the proposal which the Commission has suggested itself?

Mr. LANDIS. They have reference to that proposal. I think the chief point of difference between this bill and a bill that was introduced by Senator Pastore, which I understand is the Commission bill, is the retention of the mandatory right of review, somehow, inside the Commission. I think that is the chief difference.

The CHAIRMAN. Yes; that is one major difference between them, and then, of course, to a lesser extent the question of the Chairman's power to make certain delegation of authority.

Outside of those two differences, I do not think there is much difference between the two bills.

Mr. LANDIS. No; that to my knowledge, is the significant difference. There is one other difference; namely, that the right to judicial review under the Pastore bill is circumscribed by requiring, as a condition precedent, that you exhaust the entire administrative review inside the Commission, whatever that administrative review may be. I do not see that that is objectionable. One can easily come to a conclusion that that exhaustion of administrative remedy might be spelled out because the courts might really insist on that and if you want to avoid any potential litigation along that line, it might be spelled out here in one of the paragraphs.

However, that again is certainly not a material matter.

The CHAIRMAN. Mr. Springer, any questions?

Mr. SPRINGER. Dean Landis, as I understand it, through all of your investigations extending from last fall down to the culmination of this thing in reorganization plan No. 2, it was your feeling that one of the things that ought to be improved was the expedition of business. That has been one of your main criticisms of the FCC. Is that true?

Mr. LANDIS. That is right.

Mr. SPRINGER. Do you feel that this bill, H.R. 7333, will do that?

Mr. LANDIS. I certainly do.

Mr. SPRINGER. How do you feel that this would expedite business over the present procedure? Can you just spell off one, two, or three things?

Mr. LANDIS. I feel this way: that it will remove from the necessity of attention by the seven members of the Commission a series of matters that do not really deserve the attention of the full Commission, and in that way, it will allow them to spend more time on the things that are more important.

Mr. SPRINGER. Is it your feeling presently that under this proposed bill it would be the delegation in an adjudicatory proceeding that would be speeded up?

Mr. LANDIS. Primarily, I think, in the adjudicatory matters. I think it will also speed up certain of the noncontested matters that the Commission has to dispose of.

Mr. SPRINGER. Is that by virtue then of the assignment of personnel to perform delegated functions?

Mr. LANDIS. No; I would not say that. It would be by virtue of giving a degree of finality to the act of delegation, which does not exist now.

Mr. SPRINGER. I follow from that then that you mean by virtue of the fact that there would be no appeal?

Mr. LANDIS. No mandatory right of appeal.

Mr. SPRINGER. And one of your main contentions is that there should be no mandatory right of appeal?

Mr. LANDIS. That is right.

Mr. SPRINGER. I take it then that is the reason you favor H.R. 7333 over S. 2034?

Mr. LANDIS. That is right.

Mr. SPRINGER. Are you familiar with S. 2034?

Mr. LANDIS. I have read it and studied it; yes, sir.

Mr. SPRINGER. Under that plan the Chairman could not assign either Commissioners or staff. Thus, all assignments would be made by the Commission; is that right?

Mr. LANDIS. Yes, sir.

Mr. SPRINGER. Pardon us just a second. We want to be sure we are together up here on what the law is.

To clarify a matter, Dean Landis, when I was talking about an appeal, I was talking, under the language of the statute, about a rehearing, and that is what I termed an appeal.

Mr. LANDIS. I see.

Mr. SPRINGER. I want to be sure it is your feeling that there should not be any right of appeal on a rehearing.

Mr. LANDIS. Oh, a right to a rehearing is always present. There is no doubt about that.

Mr. SPRINGER. Not mandatory?

Mr. LANDIS. It is not mandatory under the law today. You have the right to file for rehearing, but the granting of rehearing is certainly not mandatory.

Mr. SPRINGER. Did I understand you to say that presently the Chairman may assign the staff under present law?

Mr. LANDIS. I think he has that right. I think you better ask that of members of the Commission. As I recall it, there is a minute of the Commission which authorizes him, generally, to do that, except with regard to people in charge of the divisions.

Mr. SPRINGER. It was my understanding that he did not have that at the present time.

Mr. LANDIS. My understanding is a little different than that, but I may be wrong on that matter.

The CHAIRMAN. I think if the gentleman would permit, this whole matter ought to be cleared up somewhat. We have had a great deal of information about the authority, assignments, delegations, and functions, and so forth which came up in the course of the hearing a few days ago, but section 5(d) of the Communications Act does provide that—

Except as provided in section 409—

section 409 has to do with adjudications—

the Commission may, when necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, by order assign or refer any portion of its work, business, or functions to an individual Commissioner or to a board composed of one or more employees of the Commission to be designated by such order for action thereon, and may at any time amend, modify, or rescind any such order of assignment or reference.

That is the section which refers, insofar as the Federal Communications Act is concerned, to the authority of the Commission with reference to the assignment of the staff personnel, and so forth only in nonadjudicatory matters.

Mr. Borchardt calls our attention to the fact, Dean, that there is some misunderstanding about some of the explanations that have been given here with reference to some of the provisions of the act. I think it might be helpful if, as soon as members of the committee can conclude what questions we have of you, we get the Chairman of the Commission and his colleagues here with him, since they wrote the bill, and let them explain what it would propose to do.

I believe that would be a pretty good thing to do and not further get the record cluttered up here with a lot of information that is not in accordance with what is proposed and what the facts are.

Mr. SPRINGER. In essence, Mr. Chairman, I take it, they can assign if the Commission so sees fit in nonadjudicatory matters. In adjudicatory proceedings they cannot.

The CHAIRMAN. That is true, and under the procedure of the Commisson, in certain matters the Commission has delegated certain authority to the Chairman to carry out.

Mr. SPRINGER. That is nonadjudicatory matters?

The CHAIRMAN. Yes.

Mr. SPRINGER. I would like to go on to the second point. This refers, Dean Landis, to delegations in adjudicatory proceedings. H.R. 7333 provides for delegation that would require a majority of the Commissioners then holding office. This delegation could be revoked

by three Commissioners. That is in essence and substance what that section refers to.

Now, the question is what difference is there between the provisions in H.R. 7333 on this matter and Reorganization Plan No. 2?

Mr. LANDIS. The difference is that in Reorganization Plan No. 2 if a petition for review was filed in a matter that had been delegated, a minority could require a hearing en banc by the Commission. Here, however, the very rule that authorizes the delegation can be revoked by that same minority.

Mr. SPRINGER. I thought that under Reorganization Plan No. 2 that could be revoked by a minority of the Commission.

Mr. LANDIS. No, it could not be.

Mr. SPRINGER. Senate 2034 on rehearing would make no change in the present law; is that correct?

Mr. LANDIS. I think it makes a slight change with regard to section 405 of the Communications Act.

Mr. SPRINGER. Would you develop that, please, if there is a change?

Mr. LANDIS. I am afraid I cannot. I thought that it perhaps did, but I do not believe it does.

Mr. SPRINGER. Dean Landis, as to the restrictions on the staff in adjudicatory proceedings, H.R. 7333 eliminates restrictions going beyond the Administrative Procedure Act on Commission consulting with legal, engineering, and accounting staffs; is that right?

Mr. LANDIS. That is right.

Mr. SPRINGER. How does that differ from Reorganization Plan No. 2?

Mr. LANDIS. Reorganization Plan No. 2 never touched that question at all.

Mr. SPRINGER. It did not touch question at all?

Mr. LANDIS. It did not touch that question. May I say with regard to your earlier question, Mr. Springer, on rehearing, there is possibly this slight difference; namely, that if you apply for a rehearing under this bill, the application is made to the authority that made the decision. It is not necessarily made to the Commission as a whole. It is made to the authority that made the decision. I think that is the possible difference.

Mr. SPRINGER. As to the discretionary review by the full Commission, you would have under this bill a certiorari procedure in lieu of mandatory review?

Mr. LANDIS. That is right.

Mr. SPRINGER. Is there any change in that provision from Reorganization Plan No. 2?

Mr. LANDIS. I do not think so. I think, in substance, it is the same. I have not checked every word, but I think in substance, it is the same.

Mr. SPRINGER. That is all, Mr. Chairman.

The CHAIRMAN. Mr. Rogers.

Mr. ROGERS of FLORIDA. No questions.

The CHAIRMAN. Mr. Younger.

Mr. YOUNGER. Dean Landis, do I understand that H.R. 7333 is satisfactory to you?

Mr. LANDIS. To me personally, yes.

Mr. YOUNGER. If such legislation were proposed in regard to your other reorganization plans, would it be satisfactory to you?

Mr. LANDIS. I would have difficulty in saying that because this particular bill has been very, very carefully drawn and it has been drawn in the light of objections that have been advanced by members of the Federal Communications Commission, whereas in the other cases, there have practically been no objections at all, and I think you have to understand that the Federal Communications Act is distinguished from the basic acts for the SEC, and the National Labor Relations Board and other agencies. The Federal Communications Act is much more detailed with regard to its procedural requirements, and therefore, the problem is a different one.

Mr. YOUNGER. Do you not think that a bill could be drawn just as carefully in connection with the other regulatory agencies as this has been drawn in connection iwth the Federal Communications Commission?

Mr. LANDIS. It seems to me immaterial as to whether you operate through a plan or through legislation if the plan is a satisfactory one, and is not subject to objection.

Mr. YOUNGER. I think there is quite a bit of difference as to whether or not it should be done by legislative act rather than by Executive order.

Mr. LANDIS. A reorganization plan is not an Executive order. A reorganization plan is law, if it is not disapproved by either House of the Congress. An Executive order is issued——

Mr. YOUNGER. It originates there.

Mr. LANDIS. It originates there, that is true.

Mr. YOUNGER. That is all, Mr. Chairman.

The CHAIRMAN. Mr. Hemphill.

Mr. HEMPHILL. Thank you, Mr. Chairman.

When you propose the elimination of mandatory review all across the board, is there danger of neglecting some areas where mandatory review ought to be had?

Mr. LANDIS. There could be danger of that. I should think that you would have to place a considerable degree of confidence in the Commission as to what areas it would use this power of delegation.

Mr. HEMPHILL. My question does not arise from the lack of confidence in this Commission, but the thought occurred to me that if there is some extreme penalty or denial such as with respect to free licensing or something of that nature, within the scope of this Commission's authority, once the order of extreme penalty or denial is published, and it would be published, then the effect on that particular installation to continue its business and make a profit for its investors is seriously encumbered, if not actually jeopardized entirely, so, looking at the industry, which is still a part of the private enterprise system of America, and which I still believe in, I do not want us to write anything into the law with such strict provisions that the industry itself under those strict provisions has no right of mandatory review, regardless of the seriousness of the question.

I would certainly like to have your thinking on that.

Mr. LANDIS. I would say this: that it has the right to petition for review and I should think in any important case where there were issues of controverted factor, where there was a new question of law involved, that there would be no hesitation to grant the review so that the case would be heard by the Commission en banc.

I think there is that safeguard. There is the further safeguard that if the Commission itself is arbitrary in denying petition for review, judicial review is available.

Mr. HEMPHILL. That poses my next question.

Is it your opinion that the right to granting certiorari by a minority of the Commission gives a protection in lieu of the mandatory review that was supplanted?

Mr. LANDIS. I think so. I think that safeguard is written in here and I should think that in any case where one or two Commissioners felt strongly about the situation, the Commission would grant hearing en banc. That would be customary.

Mr. HEMPHILL. At the same time, would you recommend that, when that petition for certiorari is granted or approved or is written into the law, automatically there is a stay of execution until that proceeding is reviewed?

Mr. LANDIS. That is in the discretion of the Commission.

Mr. HEMPHILL. If it is of such a serious nature that the required number of Commissioners granted a certiorari, should there not be a stay of the proceeding at that point to protect the industry in the event a mistake had been made in the lower hearing decision?

Mr. LANDIS. Normally, I would say that would be the answer, that a stay would be granted under those circumstances. There might be situations where really the public interest was so much at stake that you would deny a stay, but in the normal case, thinking of the business that is before the Commission, the stay would be, I should think, normal procedure that would be adopted.

Mr. HEMPHILL. One more question, sir.

You stated, as I understand it, that the judicial review would come into the picture after remedies had been exhausted which this bill would provide before the hearing examiner, then by petition for certiorari, if denied, before the Commission, and then he could go into the courts. If we do not write into the law some provision for stay, then the delay of getting into the courts in the event of an adverse decision within the prescribed procedures before the Commission, is going to cause such a delay, if the execution is carried out, that you are going to wipe out somebody's business. Is that a possibility in your opinion?

Mr. LANDIS. There is a possibility of that nature. Of course, the grant of a stay with regard to an ultimate Commission order if you appeal to a court, is in the discretion of the court today. Of course, even the Commission may grant a stay, too, but it is a matter of discretion there with the Commission. I am not worried by that phase of it, I must say, Mr. Hemphill.

Mr. HEMPHILL. Suppose we had a revocation of the right to broadcast for a certain number of days or a certain period of time. I am thinking about the peculiarities of the industry with which I have tried to familiarize myself, of course, being on this committee. Of course, if you have an order which to me is as extreme as this and he has to suspend with just no stay, then you just, in effect, put him out of business almost because his advertisers are going to say we

cannot depend on him if he is in jeopardy with the Federal Communications Commission. The people who are listening are going to say there has been an interruption. We will channel our usual listening devices to another station, or some other show that we can see; and that I think is the impact that the industry itself presently fears from this particular legislation.

I hate to ask you so many questions, but I would like you to comment on that.

Mr. LANDIS. I do not see how this bill affects that situation, if I may say so.

Mr. HEMPHILL. Supposing we have a relicensing. A hearing examiner makes the decision that he is not going to relicense them. The station or the network, if a network, would be involved, would petition immediately for certiorari, but the order of the hearing examiner, as I understand it, would be a public record which the competitors would carry such to the newspapers, and most of them would be quick to pick it up in competition. Then what protection does the industry have in such a situation under the provisions of this bill?

Mr. LANDIS. You see, if you have a hearing before the hearing before the hearing examiner in a situation of that nature, then there is a petition for review filed. I think you do not have a final order of the Commission until that petition for review is denied or granted, and some other order of the Commission entered.

Mr. HEMPHILL. Then, you think there is an automatic stay of execution?

Mr. LANDIS. Yes, I think when you file the petition for review, you are asking, really, for a final order of the Commission, and you do not have a final order until the Commission acts. If no petition is filed within the time limit, then, of course, the decision below becomes the final order of the Commission.

Mr. HEMPHILL. Thank you very much, sir.

The CHAIRMAN. Anything further, Mr. Hemphill?

Mr. HEMPHILL. No, thank you.

The CHAIRMAN. Mr. Thomson.

Mr. THOMSON. No questions.

The CHAIRMAN. Mr. Moss, do you have any questions?

Mr. MOSS. No questions.

The CHAIRMAN. Thank you very much, Dean Landis.

Mr. LANDIS. Mr. Chairman, may I make one small further suggestion with regard to paragraph (4) of section 2 relating to the assignment of personnel by the chairman?

Obviously, that section should not apply to what might be called the staff members of the individual Commissioners. That ought to be under the control of the individual Commissioners, and a small amendment would cure any inference that the chairman had any power to deal with those individuals.

Thank you very much.

The CHAIRMAN. Thank you, Dean.

Mr. LANDIS. Thank you.

The CHAIRMAN. Mr. Minow.

STATEMENT OF HON. NEWTON N. MINOW, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION, ACCOMPANIED BY MAX D. PAGLIN, GENERAL COUNSEL; AND HENRY GELLER, ASSOCIATE GENERAL COUNSEL

Mr. MINOW. Mr. Chairman and members of the committee, I appear today to present the views of the Federal Communications Commission regarding H.R. 7333, which has the purpose of facilitating the prompt and orderly conduct of the Commission's business.

The views which follow can be said to be "consensus" views. By that I mean that the Commissioners, as a matter of individual preference, adhere to the positions which they took on Reorganization Plan No. 2 of 1961, which as you know, is similar in many respects to H.R. 7333. But they have unanimously agreed on the submission of these views and the report which was transmitted to the committee, in order to give the committee the benefit of their combined or "consensus" judgment. The same consideration applies to the "consensus" bill attached to the report.

Since the report will, I trust, be made a part of the record, I will not go over in detail all the points which appear in it. Instead, I will try to present here what I think are the highlights.

The CHAIRMAN. I think at this time, it might be well to have a copy of the bill, H.R. 7333 and your report, together with your own proposed bill included in the record at the appropriate place at the beginning of the hearing.

Mr. MINOW. Thank you, Mr. Chairman.

Mr. SPRINGER. May I ask, is your bill appendix A?

Mr. MINOW. Yes. That is the bill introduced by Senator Pastore. The Commission prepared it at his request as a result of our hearing over at the Senate side.

Mr. PPRINGER. Your bill is Senator Pastore's bill?

Mr. MINOW. Yes. I think it would be helpful to the committee if I explained. When we were before the Senate Commerce Committee on the reorganization plan, Senator Pastore asked us if we could get together on a suggested piece of legislation. That is what we did, and that is the attachment to our report.

Mr. SPRINGER. Was that unanimous?

Mr. MINOW. Yes. As I say, in the interest of unanimity, we have all agreed to it, but I think each of us would have individual preferences. However, it is fair to state that it is the consensus of our collective views.

Mr. SPRINGER. Thank you.

Mr. MINOW. First, we wholeheartedly support the objectives of the bill. The Commission clearly needs more flexibility on procedural matters. At the present time, all seven Commissioners must hear oral argument in every adjudicatory case. This means that the Commissioners' time is preempted by such questions as the revocation of a fishing boat ship station license or the most routine oral broadcast matters.

And, the oral argument is just the part of the iceberg above the water. It takes much more time to study the issues, decide the case, and review the decision prepared. Let me expand on that for a moment. The Commission is designed to be a deliberative body.

That is its strength and its experience. But that strength becomes a weakness when the full Commission is required to take up every routine matter. For, the Commission cannot cease being a deliberative body, just because the matter is routine. As a consequence, we tend to spend almost as much time on such routine matters as we do on the much more important issues coming before us.

H.R. 7333 would change that. The proscription against delegating in adjudicatory cases would be eliminated, and the Commission would be able to delegate review of such cases to panels of Commissioners or employee boards. Applications for review of the decisions of the panel or board could be denied by the Commission without giving reasons.

We heartily endorse this statutory scheme. It would expedite the decisional process and thus cut down on the administrative lag. Equally important, it would permit us to concentrate on major matters of policy and planning.

Let me emphasize that last point. We are not going to delegate the development of policy or major legal doctrines to an employee board or even a panel of Commissioners. We have not done so in the rulemaking field, where we have long had power to delegate, and we will not do so with any new authority given us.

But we must be free to concentrate on such urgent problems as space satellite communications and TV allocations. We want this flexibility not to avoid our job, but for the very opposite reason—so that we can do the job that should and must be done by the Commissioners.

I cannot now tell you what cases we would hear or what ones we would delegate—or what delegated cases would go to a panel of Commissioners as against an employee board. These would be judgments for the full Commission. All I can do is assure you that we would proceed very carefully in developing our delegation procedures.

The Commission also favors the repeal of the provisions of 5(c), relating to the review staff. Under these provisions, the review staff, even though it has no other functions than to assist the Commission in adjudicatory cases, cannot make any recommendations to the Commission.

This restriction is, I believe, not applicable to the opinion-writing staff of any other Federal regulatory agency. It is both wasteful and inefficient. For, it deprives the Commission of the full assistance of which this review staff is capable.

Further, it requires the Commission to pursut a cumbersome, two-step process in disposing of interlocutory matters. Because the review staff cannot make recommendations, it must first receive instructions from the Commission on all interlocutory matters, no matter how simple or routine, and then return again with a draft opinion and order for the Commission's approval.

Many, indeed most, of these matters could be disposed of at one meeting by permitting the staff to attach a draft recommended order. The new discretion given by the bill would thus be used to eliminate the present inefficient method of handling interlocutory matters. This would represent a substantial saving in time and energy for the Commission. In 1960, the full Commission was called upon to dispose of 363 interlocutory motions.

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The repeal of these unduly restrictive provisions should thus contribute to speedier action, without, in any way, depriving parties of any rights.

On the contrary, the safeguards of section 5(c) of the Administrative Procedure Act and section 409(c) of the Communications Act would be applicable.

Our main disagreement with the bill lies in the provision which would repeal the second sentence of 409(b) and make review of an examiner's initial decision discretionary, upon the vote of a majority of the Commissioners less one. The consensus of the Commission is that a party should have a right to obtain some administrative review of an examiner's initial decision. This is the general pattern in the Federal courts, where a party can obtain review of a trial court's decision in the court of appeals. He cannot require the appeals court en banc to hear such an appeal, nor can he, as a matter of right, obtain oral argument in every case.

So, also, we agree that the Commission should be given the authority to use panels or, since we are in the administrative field, employee boards and to act without oral argument in those few instances where it is appropriate to do so. But we would afford the right to administrative review.

We do not think such mandatory review will result in clogging the Commission's processes, if—and I emphasize this—the Commission is given full discretion with respect to delegations and oral argument.

If the appeal involves routine matters, it can be heard by a panel or employee board. If it is lacking in substance, it could be quickly resolved on the pleadings.

Any application for discretionary review of the panel's or board's decision could be promptly determined, after consideration of the staff's analysis and recommendation.

We would not expect such applications to add a new factor of delay, since we would hope that, for the most part, the decisions made in these delegated, routine cases would be correct and thus the application could be quickly acted upon.

For these reasons, we feel that the procedure that we recommend will greatly benefit the Commission, without diminishing in any substantial way the parties' rights to full and fair administrative process.

Section 2 of the bill also provides for the transfer of assignment functions, excluding assignments of Commissioners, from the Commission to the Chairman. We do not believe any revision of existing law is needed in this respect. The Commission has already delegated to the chairman a great deal of authority in this area and undoubtedly would delegate further authority to assign staff personnel to hear adjudicatory cases or handle other matters, should H.R. 7333 become law. For the chairman is the agency's chief executive officer, with the duty—and I quote from section 5(a) of the act "generally to coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission." But the Commission feels that such assignment authority should stem from the Commission and not the statute. In this way, a future chairman will be bound to act fairly in his assignments.

While it is true that other checks on abuse of such authority would exist, such as rescission of the delegation and consideration of the matter by the full Commission, such checks are more cumbersome and do not, we think, carry the same psychological weight.

In short, we agree with the objective of this provision but think it can be more wisely accomplished by agency, rather than statutory, action.

Turning to section 3 of the bill, we would urge that the ban in section 409(c)(2) against ex parte presentations by a—

person who has participated in the presentation or preparation for presentation of (an adjudicatory) case * * *

should not be dropped.

While it is true that ex parte presentations would be barred irrespective of section 409(c)(2), that provision does serve the function of proscribing such conduct by parties and thus could be the basis of criminal action under section 501.

Furthermore, it is desirable that the law be explicit on this subject, and not dependent on case precedent, however well established.

Second, rather than retaining the separation of functions provisions of the present 409(c)(3), it would be sounder to return to the separation of functions provisions of section 5(c) of the Administrative Procedure Act.

For again, it is wasteful and serves no valid purpose whatever to cut off the Commission in adjudicatory cases from its chief legal officer, the General Counsel; yet 409(c)(3), or 409(c) in the bill, does this with its reference to—

* * * persons engaged * * * in any litigation before any court * * *

The test laid down in the Administrative Procedure Act is, whether the staff person has engaged in investigative or prosecuting functions—

in that or a factually related case.

Because this test is directed squarely to the fairness problem involved, we urge its adoption in the bill. Of course, this standard should be applicable to all cases of adjudication, including initial licensing.

The other points are fully covered in the report and I respectfully refer the committee to that report. May I say in concluding that the Commisison deeply appreciates the committee's decision to hold hearings so promptly on H.R. 7333. We recognize this as indicating the committee's great desire to aid the Commission in the important tasks before it. We will cooperate in every way to facilitate the passage of much needed legislation along the lines of H.R. 7333.

Mr. Chairman, I should like to say here in passing that, in behalf of the Commission, we appreciate the spirit of your remarks opening the hearing. It is in that spirit that we got together on a suggestion of our own. As far as my own individual views are concerned, and my colleagues are here to express theirs should the committee desire, I would personally adhere to the position that I took on Reorganization Plan No. 2. This means that I would favor the provisions of H.R. 7333 with minor revisions; specifically, that I would make a review of an initial decision discretionary rather than mandatory.

That does not mean, however, that I oppose the "consensus" bill we submitted to you as an attachment to our report. I think it is a

good bill, that it would be of great help to us, and I would enthusiastically welcome its passage.

My only point in saying that is that I think H.R. 7333 is a better bill and if I had my "druthers," I would prefer it.

I would be pleased to answer any questions.

The CHAIRMAN. Mr. Minow, I want to thank you for your statement, and your clear analysis of this problem and the efforts that have been made by the Commission in coming up with some appropriate suggestions in regard to the approach to the problem.

Mr. Moss, do you have any questions?

Mr. MOSS. Mr. Chairman, I have not had the opportunity to digest this material.

The CHAIRMAN. Mr. Springer?

Mr. SPRINGER. Mr. Chairman, would you turn to page 5 of your statement?

Mr. MINOW. Yes, sir.

Mr. SPRINGER. This has to do with review and I assume that you and the members of the Commission have gone over this matter of review rather carefully?

Mr. MINOW. Yes, sir. We have, sir.

Mr. SPRINGER. Now, I take it that there would be instances where the Commission would hear a matter in its entirety. That would be true in some instances?

Mr. MINOW. I think there would be no doubt about that, by way of my own judgment, in any case let us say of failure to renew a broadcast license.

Mr. SPRINGER. You are talking about "major" and you classify that as major?

Mr. MINOW. Yes, that or revocation of a license.

On matters which we would categorize as being of very substantial importance I can assure the committee that the full Commission would review these matters.

Mr. SPRINGER. That is one where the Commission would hear it en banc, right?

Mr. MINOWS Yes. I can only speak personally on that. This would have to be subject to a Commission decision.

Mr. SPRINGER. Secondly, I take it that you would also have what you call a panel. Would that be a panel of Commissioners?

Mr. MINOW. Well, we would like the discretion to have several kinds of panels. I think we would have panels of Commissioners in certain classes of cases. We might also, should the Commission agree, have panels of employees and boards to hear other kinds of cases.

Mr. SPRINGER. That is three kinds thus far. That is panels of the Commission, one.

Mr. MINOW. Right.

Mr. SPRINGER. And panels of employees, and boards. That is three. I take it the fourth would be those where it was not felt necessary to have a panel of the Commission or panel of employees but it would be resolved on the pleadings. You have these words "It would be quickly resolved on the pleadings."

Mr. MINOW. Right, but to clarify that, there would have to be some entity to make that judgment on the pleadings.

It would have to be an individual Commissioner or one of these panels or somebody to do that.

Mr. SPRINGER. Do you have any idea of having individual employees of the board hear these matters?

Mr. MINOW. I do not think we have formed any judgment on it yet. I think that it would be unlikely in my personal opinion but it would not be impossible.

If we had one particular category of case in which a particular employee had long experience or special qualifications I could see the possibility of it but I think it unlikely.

Mr. SPRINGER. Then you are contemplating hearings on oral argument and hearings merely, we will say, on something similar to a writ of certiorari where you might do it on the pleadings without hearing anybody in oral argument, is that correct?

Mr. MINOW. Well, the certiorari principle does not encompass oral argument usually.

Mr. SPRINGER. Well, as a result of certiorari, you have the discretion to grant it either orally or not orally?

Mr. MINOW. Well, the one that I would be most familiar with would be the U.S. Supreme Court practice. Their certiorari is a written petition filed, considered by the full court, and then either denied or granted.

If denied, that is the end of the matter.

If granted, then the matter is set down for oral argument before the court and briefs are filed in support of the oral argument. That would be the principle, as I understand it, of H.R. 7333 but not of the Commission's bill.

The Commission's bill contemplates that there would be mandatory review in every case. The only difference is that it would not always be by the full seven Commissioners. It might be some other panel or group that would do the review.

Mr. SPRINGER. Then I take it that, if certiorari or something like that is granted, that in all of these cases you would have oral argument. It that contemplated?

Mr. MINOW. I do not think I could say that with complete confidence.

I would say that it is the sense of the Commission to provide oral argument at some level in the Commission but there may be some categories of cases where that would not happen.

Mr. SPRINGER. There would be some categories where you would not have oral argument?

Mr. MINOW. Not have oral argument? On this some Commissioners would prefer to have oral argument always at some level of the Commission but this is a judgment that we have not agreed upon, pending whatever authority we are given by the legislation.

Mr. SPRINGER. You have not reached anything concrete?

Mr. MINOW. No, sir. We get some cases, I might say in explanation, which just by reading the pleadings are frivulous and obviously filed for purposes only of delay; in such a category of case we might decide that the thing to do was just to deny it and then, if somebody wanted to seek review in court, they could.

Mr. SPRINGER. Now, referring to the delegation of adjudicatory proceedings, H.R. 7333 provides for delegation which would require a majority of the Commissioners, less one, then holding office. Now,

that is delegation in adjudicatory proceedings, and it would provide that this delegation could be revoked by three Commissioners, correct?

Mr. MINOW. That is right, assuming that you had a full Commission at the time.

Mr. SPRINGER. Under present law can the Commission assign Commissioners?

Mr. MINOW. Can the Commission?

Mr. SPRINGER. Yes.

Mr. MINOW. We can in nonadjudicatory matters; yes.

Mr. SPRINGER. Now, H.R. 7333 would change that so that the Commissioners could assign the Commissioners.

Mr. MINOW. In adjudicatory matters as well.

Mr. SPRINGER. In adjudicatory matters as well.

Would this provide in any way that the Commission could assign the right to the Chairman to assign the Commissioners?

Mr. MINOW. Well, I think the Commission could do that; yes.

Mr. SPRINGER. Under this language?

Mr. MINOW. Of 7333?

Mr. SPRINGER. Yes, sir.

Mr. MINOW. I think the Commission could adopt such a rule if it so desired.

Mr. SPRINGER. That is what I want to be sure of. Then, if that is true, Mr. Chairman, is there any change from Reorganization Plan No. 2?

Mr. MINOW. Well, it can be rescinded, of course, under 7333 very easily by a vote of the majority less one.

The CHAIRMAN. Would the gentleman yield?

Mr. SPRINGER. Yes.

The CHAIRMAN. If I understand what the gentleman said I would probably take issue with him on it. I purposely left out of this bill the authority of the Chairman of the Commission to assign Commissioners.

Mr. SPRINGER. That is not my question.

The CHAIRMAN. I thought you asked that.

Mr. SPRINGER. My question was whether or not the Commission, by a rule, could assign to the Chairman of the Commission the right to assign individual Commissioners. That is what I am trying to find out, if that power is there.

Mr. MINOW. The difference, as I understand it, is that one would have done it by statute and what this does is give the Commission the discretion, so that it can do it or not do it as it sees fit.

Mr. YOUNGER. Will the gentleman yield?

Mr. SPRINGER. Yes.

Mr. YOUNGER. What is the meaning of this paragraph (4) of section 2? It says:

> There is hereby transferred from the Commission to the Chairman of the Commission the authority to assign Commission personnel, exclusive of members of the Commission. * * *

Now, does that not exclude the right of the Chairman to assume authority even if it is given to him by the Commission?

Mr. MINOW. I think this means that the statute does not authorize the Chairman to do so, but my interpretation is that the Commission, if it wanted to, could so authorize the Chairman. That is why I

want to emphasize this because I think this should be made very clear.

That is why the Commission's version of its bill just leaves this whole subject out.

We feel that, as a commission, we can manage this pretty well and have managed it all through the years and we would be perfectly happy and that includes me, to leave it the way we have it.

This has always been my view all through these past weeks.

Mr. SPRINGER. Would you repeat that?

Mr. MINOW. I say this has always been my view. I so testified on this.

Mr. SPRINGER. Would you repeat what you testified to? I did not get that.

Mr. MINOW. That I did not care one way or the other about the provision of the delegating to the Chairman.

Mr. SPRINGER. This is the point that I am raising, Mr. Chairman, and as I said over at the meeting I think that Brutus is an honorable man and I did not say it in the same way that Shakespeare meant it which was rather sinister, as you know.

What I meant to say was that I did feel that there was a considerable danger in any one party having control of the Commission by virtue of four to three and automatically by some Chairman saying, "I want to assign this and by virtue of the fact that I can get four people to give this to me I can then have it," you see.

That is the point that was raised as to whether or not the Commission ought to be able to assign to the Chairman that duty which would give him that much power. That is the problem raised.

I take it from your testimony that it is possible for the Commission to assign to the Chairman the authority to assign the Commissioners.

Mr. MINOW. I think the confusion is that we have this now except we did not have it in the field of adjudication. We have this presently and we have been living with it and getting along all these many years and the only question that is before us now is whether this is going to carry over to another field, the field of adjudication.

On that, the issue, as I understand it, is whether by statute this problem should be handled one way or another, or should it be left to the Commission to decide in its day-to-day operations.

Mr. SPRINGER. That is all, Mr. Chairman.

The CHAIRMAN. Mr. Hemphill?

Mr. HEMPHILL. I have no questions.

The CHAIRMAN. Mr. Younger?

Mr. MINOW. If I may go back 1 minute, I testified earlier and I want to repeat this: If the Chairman, meaning in this case me, were given the power to assign Commissioners, I would do it on a rotational basis in cases and would have no objection whatever to putting that into the statute if the committee decides it wants to handle the problem by statute.

The CHAIRMAN. Governor Thomson?

Mr. THOMSON. I have no questions.

The CHAIRMAN. Of course, section 2 of this bill does provide for authority for the Commission "by published rule or order" to make delegations.

Mr. MINOW. Yes, sir.

The CHAIRMAN. Now, this would permit the present law to be expanded where those assignments could be made in the case of a hearing examiner or examiners which coincides with the present law, or a Commissioner which is the present law, and this would then expand the present law to include the authority to establish panels of Commissioners or panel boards of employees.

Mr. MINOW. Right.

The CHAIRMAN. And the Commission would have the authority to make that delegation?

Mr. MINOW. That is right, Mr. Chairman.

The CHAIRMAN. So the present law is merely being expanded in order to give the Commission an opportunity to meet the vast amount of work that it has to deal with?

Mr. MINOW. Exactly, Mr. Chairman. We want to do our job and we found that under our present system it is exceedingly difficult, if not almost impossible, to give our best attention to the problems that deserve it.

The CHAIRMAN. Now, I notice that your main objection to the bill under consideration which conflicts with the bill that your Commission recommends has to do with the right of review.

Mr. MINOW. That is right. I think that is the principal element, Mr. Chairman.

The CHAIRMAN. Of course, I have stated heretofore that I recognize that there is a problem and I have some mixed feelings about it.

Some of these commissions, as we have come to know, have been plagued with the fact that some people just for the sake of opposing things and to delay will come in and make a request for a review and, whether it is an interlocutory matter or some significant problem, it clutters up the docket and holds up the business of the Commission when actually they have no real justification for doing so. Those are the things that I would like to meet.

I assume, however, that everyone is in accord in protecting the right of the party who really has an interest to be heard, and, from your explanation here, you try to sort of split the line on it and say that the Commission will make that determination to be sure that parties who really have an interest in an important matter will be given an opportunity to be heard but those who come in just in order to be arbitrary and delay and hold things up, you could deal with by the provisions in your bill?

Mr. MINOW. That is exactly right, Mr. Chairman. I can assure the committee and the Congress that anyone who has a serious and substantial claim will get the full due process accorded to him by the Commission.

The CHAIRMAN. Of course, if that revision were to be agreed to, then the further question on that particular point with reference to the minority position of the majority less one would be unnecessary?

Mr. MINOW. That is right. That is the principal difference.

The CHAIRMAN. So that issue would be taken care of in the Commission's approach.

Now, the other difference, which I believe Dean Landis himself recommended, has to do with permitting the examiners to discuss questions of law among themselves.

Mr. MINOW. That is right. We regard this as quite important because some of our examiners are much more experienced on legal questions than others and our suggestion is consistent, Mr. Chairman, with the explicit provision of the Administrative Procedure Act on that point.

Mr. SPRINGER. Would the gentleman yield?

The CHAIRMAN. Yes.

Mr. SPRINGER. I have just this one question. Since in H.R. 7333, Mr. Chairman, there is no comparable provision with S. 2034, does that mean then that the review provisions that presently exist in the law would continue?

Mr. MINOW. If H.R. 7333 were passed you mean?

Mr. SPRINGER. Yes.

Mr. MINOW. I think that is right. I am not sure we understand the question exactly.

Mr. SPRINGER. Do you understand that Mr. Counselor?

Mr. GELLER. As I understand, if H.R. 7333 became the law, the question is, Would the present provisions of review continue?

Mr. SPRINGER. Yes.

Mr. GELLER. I think they would not. Review then would be entirely discretionary upon the vote of three Commissioners, a majority less one. If the three Commissioners voted to uphold the decision of the examiner or person conducting the hearing, then there would be no review. That would be a drastic change.

Mr. SPRINGER. In other words, there just would not be any review except the vote of three Commissioners?

Mr. GELLER. Review would become discretionary.

The CHAIRMAN. Then the proposal which the Commissioners make would be to give a party the right of review but the Commission would not necessarily have to grant it?

Mr. GELLER. No; under our proposal, Mr. Chairman, there would be a right of review and the Commission would have to pass upon the parties' exceptions.

The CHAIRMAN. They would have to pass upon the exceptions but they would not have to grant a full review or oral argument.

Mr. GELLER. They would not have to grant oral argument and the review could be by a panel or an employee board instead of the full Commission. That also would be a big difference from the existing law.

Mr. MINOW. If we had two panels of Commissioners alone and nothing less than that we could do twice as many cases as we have now. Now all seven of us have to hear every single case.

Mr. GELLER. One further point that Commissioner Bartley pointed out is that, on the decision of that panel or employee board, you could file an application of review to the Commission but the Commission could deny that application for review without giving reasons. That is essential to our proposal.

Mr. SPRINGER. Is that not important, Counselor, for this reason: He has the right of appeal to a court; does he not?

Mr. GELLER. Yes; he does.

Mr. SPRINGER. If you state no reasons for denying his bill of exceptions, do you not prejudice his case?

Mr. GELLER. No; because every issue which he has brought up will be ruled upon and the Commission, by denying the application for review, will be adopting all the reasons given by the panel or employee board. They will become the decision of the Commission and in court will be reviewed as such; the party, before going to court, would have to raise every issue of fact or law upon which he intended to rely in court before some authority within the agency. Before he could apply for review to the Commission he would have to raise to the panel or employee board every question which he wanted to put in that application for review and have them pass upon it.

Mr. SPRINGER. H.R. 7333 just has no provision for review. It is at the Commission's discretion. They can either review it or not.

Mr. MINOW. That is right.

Mr. SPRINGER. Under S. 2034 it is given there and they can file a bill of exceptions or writ of certiorari?

Mr. GELLER. Exceptions.

Mr. SPRINGER. But there does not have to be any statement as to why it is denied?

Mr. GELLER. No; under S. 2034, the Commission would have to pass on those exceptions and give reasons. When I say the Commission, I want to make clear that it would have to be either the Commission or some authority within the Commission which would have to pass on the exceptions and give the reasons for denial of each exception.

Mr. SPRINGER. Under S. 2034?

Mr. GELLER. Under S. 2034.

Mr. SPRINGER. Mr. Howze, would you listen for just a second? I understood that under S. 2034 it specifies that no statment of reason for denial of review is required.

Mr. GELLER. Let me be clear on this, Congressman Springer. In 408(b) of S. 2034 it provides that "any party to the proceedings shall be permitted to file exceptions." So that there is a right to file exceptions and the APA requires that each one of those be ruled upon.

Mr. MINOW. The term "exceptions" is a technical term. I think this is where the confusion comes. Under the Administrative Procedure Act this is a technical term. That means that, if a bill for exceptions is filed, it must be ruled on on the merits. It cannot be denied by saying, "This is an unimportant case."

Mr. SPRINGER. You just cannot use the word "deny"?

Mr. MINOW. No. An exception means you have to decide it.

Mr. SPRINGER. Is that the only way in which an appeal could be denied?

The CHAIRMAN. Let him proceed and explain just what the procedure is first.

Mr. GELLER. They would have a right to file exceptions under section 8 of the Administrative Procedure Act. They would have a right to a ruling on each exception and reasons would have to be supplied; but those exceptions could be passed upon now either by the Commission or by a designated authority within the Commission. The Commission cannot delegate that today, but under S. 2034 that would be changed and now a panel or employee board could pass on those exceptions. It would be discretionary whether or not that panel or employee board would hold oral argument.

In most cases, I think the sense of the Commission is that they would. Only where the appeal is frivolous or lacked any merit would they do it just on the pleadings.

After the decision of the panel or employee board there would be provided a right to apply to the Commission for review, through application for review. That is in section 5(d) (3) and (4), and the Commission in passing on that application for review could grant or deny it without giving any reasons for its action.

After that, the party would then have a right to go to court and the panel or board decision, upon the denial of the application for review, would become the final decision of the agency.

Mr. SPRINGER. Just a moment. I think we are in an intervening thing which none of us understands.

I take it that, when you file the exceptions, that would go then to a panel or board of employees or the Commission?

Mr. GELLER. Or the Commission.

Mr. SPRINGER. And to those exceptions that appeal board or review board, is that right, would have to give the reasons for denying his appeal?

Mr. GELLER. That is correct.

Mr. SPRINGER. Now, if he makes an appeal, then you take it to the full Commission.

Mr. GELLER. Yes; from the employee board or the panel to the full Commission; yes, sir.

Mr. SPRINGER. This is really a second review, then, is it not; an appeal for a second review?

Mr. GELLER. This is an appeal for a second review.

Mr. SPRINGER. In that case he does not have to give the reasons for the exceptions which are denied.

I did not understand this intervening appeal. It was my understanding that it went either to the panel or to the full Commission. I did not know that there was an intervening panel.

Mr. GELLER. You understand though, Congressman, that the Commission can decide to hear a case itself.

Mr. SPRINGER. Yes.

Mr. GELLER. And to pass on the exceptions.

Mr. SPRINGER. And cut out the intervening board.

Mr. GELLER. It will have that discretion when there is an examiner's initial decision to choose whether it wants to hear it itself, whether it wants the panel to hear it, or an employee board to review the decision. Review of the panel or employee board decision is purely discretionary and can be denied without giving any reason.

Mr. SPRINGER. Is the appeal under S. 2034 from the hearing examiner to the panel, either one, the Commission or the employee board, automatic?

Mr. GELLER. If the party seeks it, it is. He has a right.

Mr. SPRINGER. And it must be granted.

Mr. GELLER. The exceptions must be permitted under 409(b) and must be passed upon under the Administrative Procedure Act.

Mr. MINOW. I am glad that came out here.

The CHAIRMAN. Let us not leave the issue the way it is. There is still one element missing. Mr. Springer is talking about the panel

or employee board but the Commission itself could pass on the exceptions.

Mr. GELLER. Definitely, sir.

The CHAIRMAN. And have to give reasons why it denied the exceptions.

Mr. GELLER. That is right.

The CHAIRMAN. Now then, on a petition for reconsideration the Commission could deny it and not have to give reasons?

Mr. GELLER. No, if the Commission denied a petition for reconsideration, section 405 would still be applicable and the Commission would still have to give a concise statement of the reason for denying the petition for reconsideration.

The CHAIRMAN. Then under that proposal, S. 2034, the only time that the Commission would not have to give reasons for a decision would be on a petition for consideration of a matter that had been passed on either by a panel or an employee board?

Mr. GELLER. Correct.

Mr. MINOW. That is exactly right.

Mr. HEMPHILL. May I ask one more question?

The CHAIRMAN. Yes.

Mr. HEMPHILL. Do you agree with Dean Landis when he says that, when there is this petition for review or a petition for what we call in court certiorari that there is an automatic stay of execution?

Mr. MINOW. This is specific under the law. This is explicitly covered by the law.

Mr. HEMPHILL. If we pass H.R. 7333, that rule would not change?

Mr. MINOW. Not a bit.

The CHAIRMAN. Now, with reference to the delegation of authority, does the Commission, by order or rule, decide what matters will be referred to a panel or employee board or do you do it case by case?

Mr. MINOW. This is one place, I think, where there is a difference between H.R. 7333 nd S. 2034. Our suggestion is that we be allowed to do this without having an informal rulemaking proceeding, just as we now do any internal arrangement of our functions; that is one of the differences between the two bills.

We would prefer not to have to undertake informal rulemaking of notice and comments in order to change or make delegation rules.

The CHAIRMAN. In other words, as it stands now, it would be pretty much on a case-by-case basis?

Mr. MINOW. My prediction would be that we would hit on certain categories. I think the ICC has done this with some success. We would hit a certain category of cases and say, "That category in the safety and special field will go to a panel and this category will go to a panel of Commissioners." We would hit on certain groups of cases.

The CHAIRMAN. Referring to a statement that you just made a moment ago regarding the exparte problem, I think it would be appropriate to state that H.R. 7333 omits that provision because that particular aspect was covered for all agencies in H.R. 14 which has been a matter of hearings.

Mr. MINOW. We assumed that was the case, Mr. Chairman. We wanted to call that to the committee's attention.

The CHAIRMAN. Mr. Moss, do you have any further questions?

Mr. Moss. No.

The CHAIRMAN. I wonder if any other member of the Commission has any further comment to make?

Mr. MINOW. Commissioner Ford, I think, knows more about the drafting of this thing than anyone else.

STATEMENT OF FREDERICK W. FORD, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. FORD. I have only two things, Mr. Chairman. One is with respect to the mandatory review. This makes oral argument discretionary and I personally feel that oral argument should be preserved as a matter of right at some stage of the proceeding, not necessarily before the Commission but at some stage in the proceeding. In view of the fact that we were undertaking here to get a bill to which the Commissioners could all agree, and since in practically every other administrative agency the right of oral argument is discretionary, it seemed to me that in the major cases and the ones where it really made any different like in revocation, renewals, hearings on renewals, matters of that kind or important cases, comparative cases, the Commission would give oral argument. There has not been any difficulty with that in other agencies.

So I receded from that point even though I think it should be preserved.

The second thing is this question of discretion. We talk about discretionary review under the House bill and I am concerned that the courts will say, "If you do not state the basis for your discretion, how can we review it to determine whether or not you have abused it," and so on. In the end, we will end with a requirement by the court that we state in detail the basis for the exercise of our discretion.

Now, in the Senate bill we complete the entire hearing process, the initial decision, exceptions, oral argument where appropriate, before either the Commissioner or an employee board or panel of Commissioners and the entire exceptions are all there.

Now, of course, we do reserve in that the right to order any proceeding before the Commission at any stage for full review but, as soon as the hearing is held, the evidence is taken, the exceptions, the parties have their oral argument, then the Commission, in order to control the policy—and a good bit of policy is made in these hearing cases—the Commission, before they could go to court would have an opportunity to review and say, "We want to bring this up," or "This is fine." In other words, it gives us that supervisory authority over these adjudicatory cases and, once we decide "This is one that we should hear further," then we would bring it before the full Commission. In that case, of course, we would follow the procedure of 405 which would require concise statements of the basis for our ordering further rehearing and so on, so that, it seems to me that the Senate bill does spell out and relieve the Commission of the great detail that I am afraid the courts would enforce on us in the exercise of this question of discretionary review.

Those are my only two points.

The CHAIRMAN. Do you feel, Mr. Ford, that the bill such as you recommend, appendix A to the statement here, would be desirable?

Mr. FORD. I think that it is almost indispensable that the Commission have some relief in the nature in that bill, and it seems to me that the bill was drawn as carefully as could be done, and, while there is not too much difference between that and the House bill——

The CHAIRMAN. Only on a couple of major points.

Mr. FORD. There is a difference in language.

The CHAIRMAN. Yes.

Mr. FORD. And there are good reasons for each of those changes in language, to try to make it more in conformance with the Administrative Procedure Act. Therefore, court decisions involving other agencies would be precedent here.

Now, we have seen in the last few weeks the difficulties involved when detailed procedures are spelled out in one act in these administrative agencies and not in another. Witness the difficulty we got into with Reorganization Plan No. 2 as applied to the Communications Act whereas that same difficulty did not present itself with respect to other acts.

So that, this really undertakes to bring it into line with other administrative agencies and give the Commission the flexibility we need.

Sometimes it seems to me as though the Commissioners are involved in sitting in justice of the peace cases instead of devoting their time and energies to the national problems in communications, and this has been a really serious problem with us.

We spent many days in recent weeks, and will in the future, in listening to many oral arguments which could much better be disposed of by subordinate boards.

The CHAIRMAN. The Commission then took Reorganization Plan No. 2 and this bill, H.R. 7333?

Mr. FORD. That is right, sir.

The CHAIRMAN. And considered the objectives of it and drafted the bill attached to the Commission's report, which has become the Senate bill?

Mr. FORD. What we were undertaking to do was to take the objectives of the House bill, of Reorganization Plan No. 2, and preserve all of the objectives of those bills and fit them into the Communications Act and the Administrative Procedure Act in what we thought would be the most workable way.

The CHAIRMAN. You think it is highly imperative that you have something along that line?

Mr. FORD. I think it is just indispensable for us, to do the other work which is tremendously important, to have this bill.

The CHAIRMAN. May I inquire of the other members of the Commission if that is your feeling about it? Mr. Hyde?

STATEMENT OF ROSEL H. HYDE, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. HYDE. Mr. Chairman, I think my views, or any additional views that I might wish to offer have been covered by Commissioner Ford's statement. If I might have just one moment on the provision of H.R. 7333, section 2, paragraph (4), where the bill would transfer from the Commission to the Chairman the authority to assign Commission personnel, I would just make this observation: that I think that the purposes of that provision would be more effectively accom-

plished if this were a delegation from the Commission to the Chairman. The Chairman must work with the assistance of his fellow Commissioners and it would give them a sense of participation and responsibility. I thought those reasons were significant enough to mention at this time.

The CHAIRMAN. That is what your proposal would do?

Mr. HYDE. Right, sir.

Mr. SPRINGER. Could I ask a question, Mr. Chairman?

The CHAIRMAN. Yes.

Mr. SPRINGER. Would you repeat that and tell me the section you refer to?

Mr. HYDE. I am referring to H.R. 7333, page 3, subparagraph (4). It begins at line 17.

There is hereby transferred from the Commission to the Chairman of the Commission the authority to assign Commission personnel * * *.

And my thought was that, if this delegation to the Chairman were made by the Commission as a continuing matter subject to review by the Commission, that the Chairman then would always be conscious of the delegation from the other members.

I am not saying that Chairman Minow would not be aware of the interest of the other Commissioners but what I am saying is that in any situation any Chairman would be working under notice that he was exercising authority delegated by the Commissioners and for that reason would find it appropriate to ask for and get a sense of teamwork. The other Commissioners would feel a responsibility which they might not feel if the Chairman were exercising authority given to him by statute.

Mr. SPRINGER. Now, Mr. Hyde, the question I raised with the Chairman a moment ago was not that because, as I understand it, in section (4) that is delegated by the Commission. The Chairman only has the powers that the Commission gives him even in section (4), is that right?

Mr. HYDE. Under our present statute the Chairman has certain responsibilities as Chairman in the sense that he is appointed to be the chief executive officer. However, we have by administrative order given him certain administrative duties as a delegation from the Commission but he, of course, exercises those with an awareness that they are from the Commission and I think with a feeling that it is appropriate to discuss with them how he exercises that authority.

Mr. SPRINGER. Under this section (4) it would still be delegated by the Commission.

Mr. HYDE. I believe not. I believe if paragraph (4) becomes law that this right of the Commission to assign matters would have been effectively transferred to the Chairman.

The CHAIRMAN. Except for Commissioners.

Mr. HYDE. Except for Commissioners, thank you.

Mr. SPRINGER. I still am not clear yet, Mr. Hyde:

There is hereby transferred from the Commission to the Chairman of the Commission the authority to assign Commission personnel.

Let us leave out the rest.

* * * authority to assign Commission personnel * * * to perform such functions as may be delegated by the Commission * * *.

That still is delegated by the Commission, is it not?

Mr. HYDE. I think that this "as may be delegated by the Commission" relates to functions.

The CHAIRMAN (reading):

* * * pursuant to paragraph (1).

Of course the authority is in paragraph (1).

Mr. HYDE. That is right. But the authority to assign personnel to carry out those functions would be given to the Chairman by paragraph (4).

The CHAIRMAN. Not until the Commission gave him that authority under paragraph (1).

Mr. HYDE. May I put it this way. The delegation of functions would have to be made by the Commission, as the Chairman has stated, the delegation of functions; but, the Commission having delegated the functions, the Chairman under paragraph (4) could assign personnel.

The CHAIRMAN. That is right.

Mr. SPRINGER. I think we are talking about the same thing. It does have to be delegated by the Commission pursuant to paragraph (1), does it not?

Mr. HYDE. The functions do have to be delegated by the Commission.

Mr. SPRINGER. I want to come back to this. This is a matter of public policy, Mr. Commissioner. I raised a question as to whether or not, by this section providing for the assignment of Commissioners by the Chairman, he is voted that authority. Now in substance the question is simply this: Do you believe that the Commission ought to be able to assign to the Chairman the right to assign Commissioners?

Mr. HYDE. I believe that it would be appropriate and desirable for the Commission to give the Chairman authority to designate personnel. It does not include Commissioners here.

Mr. SPRINGER. Did you get my question, Mr. Commissioner?

Mr. HYDE. I understood you to ask me if the Chairman ought to be authorized to assign Commissioners to duties.

Mr. SPRINGER. That is right. Ought we to grant, as a matter of public policy, a section of the law which says that the Commission may assign to the Chairman the right to assign Commissioners? That is what my question is. That is a matter of public policy.

Mr. HYDE. It is a matter of public policy. I do not understand the bill before us as proposing this. Commissioners are exempted here. I do not think that it would give any particular difficulties because the Commissioners, having made the delegation, could change it at any time any difficulties would arise.

Mr. SPRINGER. That is true. That is true. They could, but that is not my question. The question is, as a matter of public policy, ought he to have this right? That is the question.

Mr. HYDE. Actually in practice at the Commission when it has been a matter of assigning a Commissioner to a particular task, it has been done in conference. It is actually a matter of nomination by the Chairman and acquiescence or approval by the Board. I would expect it would continue to operate that way.

Mr. SPRINGER. I will let your answer rest, Mr. Commissioner.

I will not push it any further.

That is all, Mr. Chairman.

The CHAIRMAN. Mr. Bartley, do you have any comments to make?

STATEMENT OF ROBERT T. BARTLEY, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. BARTLEY. Mr. Chairman, after studying the reorganization bill and H.R. 7333, the Commission prepared what has been introduced as S. 2034 which I much prefer, and it is not just a consensus with me. I endorse it heartily.

The CHAIRMAN. Thank you.

Mr. Craven, do you have any comments?

STATEMENT OF T. A. M. CRAVEN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. CRAVEN. Mr. Chairman and members of the committee, as I testified before, I am not an attorney and I endorse what our Chairman said in his statement as well as I will agree to S. 2034.

I must admit that sometimes I am persuaded by the last lawyer who talks.

The CHAIRMAN. Thank you.

Mr. Lee?

STATEMENT OF ROBERT E. LEE, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. LEE. All I care to say is that I have relied a great deal on the lawyers on the Commission in the draftsmanship of this bill.

I had only one reservation. I can say that, in my experience, I have not found the oral argument process to be a great hardship on me and I would like to see the right of oral argument preserved.

In my 8 years I can think of only several cases that perhaps I should not have heard but it was not apparent to me until after I heard them.

Mr. SPRINGER. Could I ask a question?

The CHAIRMAN. Mr. Springer.

Mr. SPRINGER. This is very quick, Mr. Lee. As I understood from what you have said and what one other Commissioner said, Mr. Ford, you felt that there was a definite advantage in preserving the right of oral argument?

Mr. LEE. Yes, that is my feeling.

Mr. SPRINGER. Under this, as I understand it, you would have to answer the bill of exceptions but you would not have to grant oral argument.

Mr. LEE. It would be discretionary. I went along because every time a request would come to me for oral argument I think I would vote to have it. I think I can afford this 20 minutes.

Mr. SPRINGER. That is all, Mr. Chairman.

The CHAIRMAN. Mr. Cross?

STATEMENT OF JOHN S. CROSS, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. CROSS. Mr. Chairman and gentlemen of the committee, I testified as you may remember in favor of Reorganization Plan No. 2 and, since H.R. 7333 closely parallels that plan in my opinion, I would

prefer that bill with minor amendments, like the chairman said. However, I am in general agreement with my colleagues on the Commission's report on H.R. 7333. The report, reflecting as it does the composite views of all seven Commissioners, necessarily embodies various compromises of preferences advanced by individual Commissioners. Without detracting from Commission unanimity in the adoption of its report, I nevertheless desire to apprise this committee of the parts of the report which are not in full accord with my individual views, to wit:

(1) I prefer that provision in section 2 of H.R. 7333 (which specifies that any rule or order delegating Commission functions may be rescinded by a vote of a majority, less one, of Commissioners then holding office) to the Commission's proposed draft bill, which is absent in this regard. Ours is a bipartisan agency in which no more than four Commissioners may be of the same political party. In my opinion, H.R. 7333 wisely provides that no bare majority of Commissioners may ride roughshod over a bare minority by repeatedly delegating functions which the minority would be powerless to rescind.

(2) I also prefer that provision of section 2 of H.R. 7333 (which would transfer to the chairman authority to assign Commission personnel, exclusive of Commissioners) to the Commission's proposed draft bill, which would not change existing law. I believe that the Commission could more effectively and expeditiously accomplish its functions by reposing this power in its chairman.

In this connection, I would, of course, exempt the employees on the personal staff of the individual Commissioner. That is all I have.

The CHAIRMAN. Are there any questions?

Mr. MOSS. Yes, I have a question.

You are proposing that the rescinding of a delegation by the Commission be accomplished by one vote less than it requires to delegate?

Mr. CROSS. Yes, sir.

Mr. MOSS. I think that is a very novel proposal. On many occasions I would have appreciated, as a Member of the Congress and the committees here, the right to rescind actions of some of the committees with less than a majority. I think it could lead to stagnation on the Commission.

Mr. CROSS. No, sir. I do not think so. I just feel that this is a safeguard which was part of the Reorganization Plan No. 2 which I think is a wise one, and one I would like to see preserved.

Mr. MOSS. Sir, I would disagree that it was part of Plan No. 2. Part of No. 2 was that a majority less than one could bring the matter up for consideration by the Commission, not that it could rescind the action of the Commission.

The division in the Commission I imagine, as in the committees of Congress, is that usually your minorities are not necessarily partisan minorities.

Mr. CROSS. That is true.

Mr. MOSS. There is a matter of philosophy that enters into the handling of that, so that the bipartisan nature is not going to be preserved by this but you are going to give to a minority philosophically a power greater, in some respects, than the majority.

The majority could adopt and the minority could then rescind.

The CHAIRMAN. I do not believe, if the gentleman will permit, that the Reorganization Plan No. 2 provided that the action of the Commission in making a delegation could be rescinded by a majority less one. The reorganization plan dealt only with the right to review with reference to a majority less one.

Mr. MOSS. That is correct.

The CHAIRMAN. Thank you very much, Mr. Cross.

Is there anything further, Mr. Ford?

Mr. FORD. Mr. Chairman, there has been a lot of discussion about the public policy with respect to the authority of the Commission to delegate to the chairman to assign Commissioners and whether or not that is in the present law and whether or not it should be continued. In H.R. 7333, in the delegation sections, the proposed bill would say that—

> * * * the Commission may, by published rule or order delegate any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner * * *

and so on, which in effect would say that the Commission could delegate to any member of the Commission in addition to the chairman the authority to assign, which of course would be entirely inconsistent with the whole philosophy of the thing; so that, it must mean the chairman.

So that, under the proposed bill, H.R. 7333, it would be permitted. Under S. 2034, in section 2 of that bill it provides that

> The Commission may, by rule or order, delegate any of its functions to a panel of Commissioners, an individual Commissioner

and so on. Under the present law which is section 5(d)(1), it provides:

> Except as provided in section 409, the Commission may * * * assign or refer any portion of its work, business * * *

and so on.

There is another provision in section 4(j) which says that

> The Commission may conduct its proceedings in such manner which will best conduce to the * * * ends of justice.

and so on. So that, over the years, the Commission has had its authority and has exercised that authority to delegate to the chairman in Administrative Order No. 1, and preceding that it was Administrative Order No. 8, the authority to assign personnel. It spells out the extent of that authority but it pretty generally gives him the right to employ people up to grade 14. It gives him the right to assign people.

In certain instances he is required to report it to the Commission. In other instances he is not and he can subdelegate some of those functions.

So that there has never been any difficulty at all about the Commission itself having the power to delegate to the Chairman the authority to assign. They have never given him the authority to assign Commissioners and in all probability never will, but you have to remember that the Congress has provided in title 28, section 46, I believe, that the courts shall assign the preparation of decisions.

Now, in practice, I think Weiner's book on "Appellate Advocacy" indicates that most courts delegate that authority to the chief judge to assign the various judges; so that there is an equality among the Commissioners, including the Chairman. The Commissions all read the same so that no group of Commissioners is going to impose on any one particular Commissioner, particularly if he feels that he is not particularly well qualified to do that. So that, over the years, the authority of the Commission to assign Commissoners or to delegate the authority to the Chairman to assign personnel has not caused any difficulty at all and I agree with Commissioner Hyde that the law, as it presently stands or the law as proposed, either one, would continue to operate in substantially the same fashion it has in the past.

Now, with respect to the question of the majority, less one, that was left out of S. 2034, and the reason for that was that it was put in this initially because of the delegation of authority by statute to the Chairman.

Now, when that comes out, the basis for the majority, less one, no longer exists and therefore it was left out of this draft.

The CHAIRMAN. You distinguish then a difference between the delegation of functions and the assignment of personnel?

Mr. CROSS. Oh, yes.

The CHAIRMAN. What is the difference between delegating a function to a Commissioner and assigning the Commissioner to a task?

Mr. CROSS. Well, in one you delegate a function. I would put that as class. For instance, the delegation to the Chairman, the delegation to examiners. You delegate a class of things.

When you assign a Commissioner you normally assign him to a particular thing.

For instance, at the present time Commissioner Craven is in charge of an ad hoc group made up of staff members throughout the Commission. He is assigned to that particular job by the Commission to try to work out our program with respect to space. That is a specific assignment.

Usually the way those assignments are made, and we have many assignments of that kind, is that the Chairman, in balancing out the various Commissioners and what they do, recommends the assignment of a particular Commissioner and talks to him about it and he agrees, and then the Commission makes the assignment on the recommendation of the Chairman.

That is the way we have been functioning over the years and I would expect in that particular area we would function the same.

There is one other matter that seems to have become confused. That is this question of oral argument. The oral argument would not necessarily be before the Commission.

The oral argument would be before a subordinate authority or whoever was passing on these exceptions.

The CHAIRMAN. It could be before the Commission?

Mr. CROSS. It could be before the Commission but not necessarily before the Commission. Normally, the oral argument in the case in which review was not granted would be before the employee board or panel of Commissioners. Then, if it came before the full Commission, in all probability there would be another argument; but, if it came up and the Commission denied review, then they would say "denied" as

the court does in certiorari and there would be no oral argument further.

Mr. SPRINGER. There is no preservation of the right of argument in either S. 2034 or H.R. 7333.

Mr. CROSS. At no stage. It is discretionary at all stages. Under S. 2034 the difference that I was pointing out is that at the lower stages whoever is writing the final decision in the case should hear oral argument before he writes that final decision whether it is the Commission, the individual panel of Commissioners, or employee board.

The CHAIRMAN. Thank you very much, Mr. Cross.

Mr. Chairman and other members of the Commission, thank you very much for your testimony.

Mr. MINOW. Mr. Chairman, in closing, I would like to say that I do not think the Commission has even been divided about objectives throughout the consideration of the reorganization bill or now. I should like to pay particular thanks to all of them for cooperating and particularly to Commissioner Ford, my predecessor as Chairman, who carried a large load in drafting the Commission's bill. I wanted the committee to know that we have worked in very good spirit in all of this.

The CHAIRMAN. Thank you very much.

This has been very helpful to us and we appreciate your contribution.

The committee will adjourn until 10 o'clock in the morning.

(Whereupon, at 12:30 p.m., the committee adjourned to reconvene at 10 a.m., Wednesday, June 14, 1961.)

FEDERAL COMMUNICATIONS COMMISSION REORGANIZATION

WEDNESDAY, JUNE 14, 1961

HOUSE OF REPRESENTATIVES,
SPECIAL SUBCOMMITTEE ON REGULATORY AGENCIES
OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The committee met at 10 a.m., pursuant to recess, in room 1334, New House Office Building.

Present: Representatives Harris (presiding), Rogers of Texas, Moss, Younger, Thomson, and Hemphill.

Also present: Kurt Borchardt, professional staff member; Allan H. Perley, legislative counsel, House of Representatives; Charles P. Howze, Jr., subcommittee chief counsel; Rex Sparger, subcommittee special assistant; and Herman Clay Beasley, subcommittee clerk.

The CHAIRMAN. The committee will come to order.

This morning we are glad to have as a witness in further hearings on H.R. 7333 and related matters, Mr. Robert M. Booth, Jr., president of the Federal Communications Bar Association.

Mr. Booth, we are glad to have you with us.

STATEMENT OF ROBERT M. BOOTH, JR., PRESIDENT, FEDERAL COMMUNICATIONS BAR ASSOCIATION

Mr. BOOTH. It is a pleasure to be here. I have prepared a written statement, which I think has been distributed and I would like to go through it, if I may, because there are two or three points I would like to elaborate upon.

The CHAIRMAN. Very well.

Mr. BOOTH. I am Robert M. Booth, Jr., an attorney engaged in the practice of law in Washington, D.C., with offices at 1735 DeSales Street NW. I appear as president of the Federal Communications Bar Association, an association composed of some 500 attorneys, most of whom specialize in practice before the Federal Communications Commission.

My appearance in support of the objectives and many of the provisions of H.R. 7333 has been authorized by appropriate resolution approved unanimously by the executive committee of the association.

As the representatives of the Federal Communications Bar Association, I testified before a subcommittee of the House Government Operations Committee in opposition to Reorganization Plan No. 2 of 1961 which, by modification of a number of provisions of the Communications Act of 1934, as amended, sought to provide for greater

efficiency in the dispatch of the business of the Federal Communications Commission. The association recommended that changes in the act be made only by Congress after full and complete hearings. I concluded my testimony with the following statement:

> The association stands ready, willing, and able to assist the President, the Congress, and the Commission in achieving the objectives of Reorganization Plan No. 2 by appropriate legislation.

H.R. 7333 proposes to achieve the objectives of Reorganization Plan No. 2 by the legislative process, and is directed primarily to the manner in which adjudicatory proceedings would be conducted.

Section 409(b) of the Communications Act now provides that the full Commission must consider exceptions, hear oral argument, and issue a final decision in every adjudicatory case upon request of any of the parties.

In testimony in hearings on Reorganization Plan No. 2, a number of the Commissioners stated that many of the adjudicatory cases the full Commission is required to hear involve relatively unimportant and routine matters and that, as a result, they are unable to concentrate on the important cases involving major policy or legal issues. The association concurs in their views.

The solution proposed in H.R. 7333 is in two steps. First, section 3 would amend section 409(b) of the Communications Act to eliminate the mandatory right of review by the full Commission of all initial decisions. H.R. 7333 would permit review of an initial decision, as well as orders, reports and other actions, only if the Commission grants an application for review, or on its own initiative, takes action to review.

Second, H.R. 7333 would permit the Commission to delegate the review to—

> a division of the Commission, an individual Commissioner, a hearing examiner, an employee board, or an individual employee.

The association supports the proposal to authorize the Commission to delegate the review of an initial decision, order or action of a hearing examiner provided the delegatee or delegatees are the same persons who, under section 7(a) of the Administrative Procedure Act contemplates that a hearing examiner shall possess unusual and superior qualifications, ability, and experience.

To permit a review of a hearing examiner's actions and decisions by a person with less ability and experience and fewer qualifications would effectively destroy the hearing examiner system.

The association recommends that the same principle be applied to the delegation of reviews of other orders, reports and actions. The review should be conducted by a person or persons having greater experience and responsibility.

For example, if an individual Commissioner should conduct an adjudicatory hearing, the review should not be made by one or more employees of the Commission, but by a division of the Commission or the full Commission.

The association most strongly recommends that the right of at least one administrative review be retained and that exceptions be permitted after the issuance of an initial decision. When Congress enacted section 8(b) of the Administrative Procedure Act and section 409(b)

of the Communications Act, it recognized the possibility of error by the presiding officer.

The right to file exceptions and the right to review would eliminate many applications for review which otherwise would have to be studied and passed upon by the Commission and, when an application for review by the full Commission should be granted, would enable the case to be considered by the Commission at an earlier date.

Further, the right of at least one administrative review would decrease the number of appeals under section 402(b) of the Communications Act to the U.S. Court of Appeals for the District of Columbia Circuit.

I might add, Mr. Chairman, that we believe that actually a mandatory right to file exceptions would save time in many cases because otherwise, you would file a petition for review, and it would take some time to pass upon that. After it was granted, then you would come forward to file exceptions.

In other words, you would be taking two steps and the time required for those two steps, rather than the one step of filing your exceptions and, if you want the Commission to consider it, file your petition for review by the full Commission at the same time.

Section 3 of H.R. 7333 would amend section 409 of the Communications Act to eliminate the right of oral argument and make it discretionary. The importance of oral argument long has been recognized by the courts and by some of the Commissioners who testified yesterday before this committee.

Oral argument occupies only an insignificant percentage of the time required for an adjudicatory hearing, affords the reviewing officer or officers the opportunity to ask questions, and promotes confidence and respect in administrative decisions because the parties know that their views have been heard and carefully considered. The association recommends that the right of oral argument be retained.

I might add, Mr. Chairman, that the importance of oral argument or oral presentation is illustrated by the hearings being held here today.

The Legislative Oversight Subcommittee of this committee, in a report issued on January 3, 1959, under the heading "Individual Responsibility of Commissioners for Commission Decisions," made the following recommendation:

> The subcommittee has been impressed with the need for change in the practices followed by some commissions letting the commission staff rather than individual commissioners assume responsibility for the preparation of commission decisions and opinion. It the view of the subcommittee that inconsistencies in commission decisions over the years are traceable to a considerable extent to the failure of following the practice of having the commission, or the majority of the commission, designate individual commissioners to assume responsibility for the preparation of the decisions or opinions of the commission, or the majority of the commission. It is the view of the subcommittee that this practice, which is traditional with the courts and which has been followed by some commissions, should be adopted by all commissions. It is the hope of the subcommittee that this change will produce a sense of personal responsibility of individual commissioners for the decisions and opinions of the commission and will avoid the practice of having commission staffs assume the burden of reconciling inconsistent decisions reached by the commissions.

A similar recommendation is contained in the President's message which transmitted Reorganization Plan No. 2 of 1961 to the Congress. The President said that:

> Section 3 of the plan also abolishes the "review staff" together with the functions established by section 5(c) of the Communications Act of 1934 (66 Stat. 713), as amended. They can be better performed by the Commissioners themselves, with such assistance as they may desire from persons they deem appropriately qualified.

The association concurs in these recommendations and urges that these proposals of the President and this committee be adopted in legislation. We recognize that some of the Commissioners are not attorneys and that some of the Commissioners have opposed similar suggestions in the past.

However, if additional qualified and experienced legal assistants are assigned to each Commissioner, we are confident that the quality of the decisions and opinions will be greatly improved and expedited.

Section 1 of H.R. 7333 proposes to repeal section 5(c) of the Communications Act and to abolish the review staff. One of the principal criticisms of the present statute is that the review staff has been forbidden to submit recommendations and drafts of orders on interlocutory matters.

May I, Mr. Chairman, point out that the association did support legislation in the Senate a year ago, or 2 years ago, which would give the review staff authority to make recommendations and prepare orders on interlocutory matters.

Under the procedures now being considered, as recommended by the association, hearing examiners would consider exceptions to an initial decision and prepare a final decision in cases delegated to them. In such instances, the review staff would be unnecessary.

If the recommendations of the President and the subcommittee of this committee that the Commissioners be responsible for the preparation of final decisions and orders are adopted, the work should be performed by the Commissioner's personal assistants and staff. These changes would eliminate the necessity for a review staff.

The association supports the proposal to abolish the review staff provided its duties and personnel are reassigned as the association has recommended. If the Commission is authorized to abolish the review staff, but actually keeps it substantially intact, we fear that the basic objectives of the reorganization would not be achieved unless the present prohibition of ex parte recommendations concerning final decisions is retained.

Section 3 of H.R. 7333 would repeal section 409(c) of the Communications Act and would permit the Commission to consult with its key employees, such as the General Counsel and chief engineer, in certain instances in adjudicatory cases.

The association recommends that the present prohibitions be retained. I have been directed to report that this is the only recommendation of the association which was not unanimously approved by our executive committee.

We recognize the desirability of the Commission obtaining expert advice but believe it should be obtained only after notice to all interested parties. The association continues to oppose all ex parte communications in adjudicatory cases except on interlocutory matters.

I might give an example of the type of situation with which we are concerned. If there is an adjudicatory hearing which involves testimony, say, of two expert witnesses, two engineers, and their testimony is at variance, their opinions are different, if the Commission would call on its chief engineer, it might be possible for that chief engineer to tell the Commission, "Well, I believe in this man's testimony and not in this man's. You should accept his and not his." We would not know the basis of the recommendation or to question the chief engineer or to point out certain matters which he may not have considered in making his recommendation. We believe that if the Commission needs this expert assistance, and I think it does sometimes, it can request it on the record, or by notifying the other parties. Copies of the memorandum can be made available, and the Commission can call in its chief engineer or its General Counsel, I believe, in oral argument or in other session, if the other parties are represented and get his advice. In other words, I don't think that the present prohibitions really tie the Commission's hands as much as has been indicated in some of the testimony in the past.

The members of the association's committee on legislation and executive committee have devoted many hours in the last few weeks to study of various proposals for improvement of the efficiency and operation of the Federal Communications Commission. The solutions are not simple. We had hoped to have been able to suggest specific language for revisions of H.R. 7333 before this hearing was held. Unfortunately, time did not permit preparation of more specific proposals. If the committee should so desire the association would welcome the opportunity to submit specific language at the earliest possible date.

Irrespective of what changes are made in the Communications Act, there must be close cooperation between the Commission and the bar in developing the specific rules of practice and procedure necessary to implement the change. Cooperation between the association and the Commission has been quite close for some years. We usually have been able to understand the other's views and problems and to arrive at mutually acceptable solutions. The association stands ready, willing, and able to work with the Commission in formulating rules of practice and procedure which will achieve the objectives of the legislation under consideration.

We appreciate the opportunity to appear before this committee on this most important proposal.

The CHAIRMAN. Thank you, Mr. Booth, for your statement.

Mr. Moss?

Mr. Moss. I have no questions at this time.

The CHAIRMAN. Mr. Younger.

Mr. YOUNGER. Yes. Mr. Chairman, from my standpoint, I would like to have the recommendations of the bar before we make a final decision on this matter. I am wondering whether you considered S. 2034?

Mr. BOOTH. Yes, sir; we have considered carefully S. 2034 in just the few days we have had available to us.

Mr. YOUNGER. Would you want to comment on that bill as compared with H.R. 7333?

Mr. BOOTH. I think S. 2034 more nearly reflects the views of our association. The main change we would suggest would be the right of oral argument, which is discretionary. Some of the suggestions we have made in my statement today go more to the way the basic objectives of the two statutes would be implemented.

We think that perhaps it is more desirable to spell out in a little more detail how the Commission should delegate its functions in these adjudicatory cases, but we are in substantial agreement with the objectives of both bills and particularly with S. 2034.

Mr. YOUNGER. Then, it is your opinion that in the legislation itself, the delegation of authority should be spelled out more clearly, rather than leave it to rules and regulations?

Mr. BOOTH. I think it is desirable to do that, sir, in adjudicatory cases. I think it should be made clear that you don't expect a hearing examiner to have his work passed upon at the review stage by an employee, for example, a lawyer, who has been out of law school 2 or 3 years.

If the hearing examiner is to achieve the stature intended, and Dean Landis spoke on this yesterday, I think that you have to give him the proper support at review time to make sure that they do have qualified people passing upon the petitions for review and the exceptions. I think it is desirable to either spell it out in the act, or at least in the legislative history.

Mr. YOUNGER. I think you have made a good suggestion about the review being conducted by employees or members who have greater experience than the trial examiner. In other words, you do not want to downgrade the review. It ought to be upgraded.

Mr. BOOTH. We have some fine hearing examiners. I think the quality of their work is improving right along. We can always do better, of course, and I think this procedure which we are working on now, the suggestions we have made, would help achieve the objectives of superior opinions.

I think if the hearing examiners knew that their work was to be reviewed by either the Commissioners themselves, or by other hearing examiners, for example, perhaps the older hearing examiners, from the standpoint of service and experience, they would do an even better job. I think they would have more pride in their work and more confidence in their work.

Mr. YOUNGER. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Hemphill.

Mr. HEMPHILL. I have three questions. What are the qualifications for belonging to the Federal Communications Bar Association?

Mr. BOOTH. Member of a bar of any of the States.

Mr. HEMPHILL. The same as the rule for practice before the Commission?

Mr. BOOTH. Yes, generally, sir. The Commission eliminated its own bar some years ago. I would say 7 or 8 years ago. Prior to that, an attorney desiring to practice before the Commission would make an application and certify that he had been admitted to practice in one of the States or the District of Columbia.

Mr. HEMPHILL. Then, did I understand you to say that you support the idea that the hearing examiner would have the right to make a decision at that level?

Mr. BOOTH. I am not quite certain that I understand your question. Let me put it this way. At the present time, the hearing examiner issues an initial decision which becomes effective in 50 days unless exceptions are filed by one of the parties or unless the Commission on its own motion stays the effective date of the initial decision.

Under the procedure which we suggest exceptions would be filed by the parties as they are now, but the Commission could decide whether or not it would itself, sitting as the full Commission, consider the exceptions and write a final decision, whether it would delegate it to a division of Commissioners, whether it would delegate it to a specific Commissioner, or whether it would delegate it to an employee or an employee board. What we are trying to point out is we think the employee or the employee board should also be hearing examiners, or somebody with qualifications even superior to those of the average hearing examiner, and they would prepare the final decision.

Did I understand your question, sir?

Mr. HEMPHILL. Yes, in a way; but you post another thing. We have no control in this committee about the 50 days. It seems to me that it a pretty long time to get up exceptions. Of course, I believe the Federal district courts allow you 40 days. Some State courts allow you only 10 days to get up exceptions from the trial court to the appellate or review court. Since I assume the purpose of this legislation is to speed up the machinery of the Commission, would not H.R. 7333 speed up that machinery as it is written now?

Mr. BOOTH. I don't think so, sir. I don't think it would have any effect upon it. Actually, the practice has been after the issuance of an initial decision to file exceptions and a supporting brief within 30 days, or to request an extension of time.

From a practical standpoint, the filings of exceptions or the request of an extension of time to file exceptions, because of the size of the record and the complications of the record, stays the effective date of the initial decision. In the courts, for example, when we take an appeal from the Commission's decision, we have 30 days in which to file a notice of an appeal, but we don't have to submit our brief, and our joint appendix, and other pleadings until a date some months later set by the court at a prehearing conference or by an agreement of the parties.

You see, we don't have in the practice before the Commission the filing of the notice of appeal or intent to file an appeal. We just go ahead with the appeal in the form of exceptions, and the Commission has limited the length of exceptions and supporting brief, but it still is quite a job in a big case to prepare exceptions so that they are meaningful.

Mr. HEMPHILL. If they had mandatory appeals which you propose today, it would be the same system we have in effect now.

Mr. BOOTH. We have that in effect, yes. I might say, said, that the Commission also has recommended that the present system be continued in its recommendations here yesterday, and its recommendations on S. 2034.

Mr. HEMPHILL. I was here when the Commission testified yesterday on the purpose. I thought I understood that this bill, H.R. 7333, was approved by the Commission. Did I misunderstand that? I am sorry.

Thank you very much.

The CHAIRMAN. Mr. Moss, do you have any questions now?

Mr. MOSS. Yes.

As I understand it, your principal objections to the language of H.R. 7333 go to the making of oral argument discretionary rather than mandatory. You want it retained as a mandatory right. Is that correct?

Mr. BOOTH. That is our principal objection to S. 2034. H.R. 7333 would also eliminate the mandatory right to file exceptions and would require us to file a petition for review, which if granted, would then authorize us to file exceptions. We think those two steps are unnecessary. We think we should go right ahead with the exceptions.

Mr. MOSS. Do you think you should go right ahead with exceptions as a matter of right and not a matter of discretion?

Mr. BOOTH. Yes, sir; I think it would actually speed up the process. The delays are not in the filing of the exceptions. It is after the exceptions have been filed and the manner in which they are studied by the review staff, and it is not all together the manner in which they are studied by the review staff, but the tremendous workload of the review staff. They have many, many problems up there, many of interlocutory matters that the Commission has testified about, so that I think the Commission agrees with us, although I have not discussed it with any of the Commissioners specifically, that the speeding up could occur after the exceptions have been filed. That is actually where our biggest delay is in adjudicatory cases now.

Mr. MOSS. I was trying to recall the name of the Commissioner who so testified yesterday. I know in the matter of oral argument that Commissioner Lee indicated that it should be retained.

However, it is my recollection that he was the only Commissioner to make that recommendation. I recall none of them on the matter of exceptions.

Mr. BOOTH. As I recall, Commissioner Ford stated his personal preference that oral argument be retained and Commissioner Lee said that he found it a very important step and that he would probably always vote for it.

Mr. MOSS. Mr. Ford made a further comment. He stated that that had been his position; however, he had receded from that position because of the experience gained by other agencies.

Mr. BOOTH. You are quite right, sir. That is as I recall his testimony, too. He receded from it to join with the other Commissioners in their recommendations both on H.R. 7333 and S. 2034, but I gained the distinct impression that he personally shared the views of Commissioner Lee that he thought oral argument was an important element.

Mr. MOSS. That is where we differ in interpreting his remarks, because I recall his very specific statement. In fact, at the time of his testimony, I made the note "has receded because of experience in other agencies."

Mr. BOOTH. I recall that. I don't disagree with you on your recollection.

Mr. MOSS. It was not a case of joining in the consensus of the Commission, but rather a conviction changed because of experience in other agencies following a similar practice.

Mr. BOOTH. I have the impression and recollection that he joined with the others because of the experience of the other agencies.

Mr. MOSS. It really is a matter of semantics.

Mr. BOOTH. With respect to this question of exceptions, Chairman Minow's statement of yesterday on page 5 states as follows:

> Our main disagreement with the bill lies in the provision which would repeal the second sentence of 409(b) and make review of an examiner's initial decision discretionary, upon the vote of a majority of the Commissoners less one. The consensus of the Commission is that a party should have a right to obtain some administrative review of an examiner's initial decision. This is the general pattern in the Federal courts, where a party can obtain review of a trial court's decision in the court of appeals.

As I recall, in the last page or so of the statement, Chairman Minow said he personally believed that the right to file exceptions and the right of administrative review should be discretionary rather than absolute or mandatory.

Mr. MOSS. Do you subscribe to that portion of the statement of Chairman Minow?

Mr. BOOTH. The one I have read?

Mr. MOSS. On page 5.

Mr. BOOTH. Yes, sir; I do.

Mr. MOSS. The entire paragraph, or the portion you read?

Mr. BOOTH. The portion read with respect to the mandatory right to file exceptions. We think that oral argument should be retained because it takes such a small amount of time.

Mr. MOSS. The portion that you do not subscribe to then would be the additional three sentences at the end of that paragraph? Would that be a correct interpretation of your position?

Mr. BOOTH. I don't altogether understand the statement of the chairman, Mr. Moss.

Mr. MOSS. You do not understand my statement, or the statement of the chairman?

Mr. BOOTH. The statement of the chairman here with respect to oral argument in the courts. The practice in the Court of Appeals in the District of Columbia Circuit is that an appeal is heard and considered usually by a panel of three judges. You can petition for hearing before the court en banc, or it can, on its own motion, decide to consider the matter en banc, but it is my understanding, or at least it has been my experience, that oral argument on appeals from decisions of the Commission is mandatory. It is always granted. I think you can waive it, but I don't know of any instances in which it has been done in the years I have been practicing. To that extent I don't altogether agree——

Mr. MOSS. Do you think these matters should be considered by the full Commission rather than a panel of Commissioners or a single Commissioner?

Mr. BOOTH. We think that the oral argument should be held before the person making the review. If the full Commission is considering this case on review, the oral argument should be before them.

Mr. MOSS. Then, it would not appear that you are in disagreement with that portion of the statement.

Mr. BOOTH. No, sir. I think I agree with the general principle, as I understand this statement. We think that the person considering

the review, whether it is the full Commission, a division of Commissioners, an individual Commissioner, an employee, or employee board, whoever is conducting the review of the exceptions to the initial decision should be the one to whom the oral argument should be presented.

Mr. Moss. And that should be mandatory?

Mr. BOOTH. We think that should be mandatory because actually it does not take very much time. I think it would be very helpful.

Mr. Moss. Have we had a report of the time spent in the past year or two in oral argument before the Commission?

Mr. YOUNGER. Yes; we have. In the original testimony of Mr. Minow, when he was here he said the number of cases called to his attention amounted to about 1 week's time to hear all of the oral arguments.

The CHAIRMAN. Of course, that argument has been made by the gentleman from California before, and it is in the record now on a number of occasions. If it meant the time consumed during the actual time that you sit and listen to the oral argument that would be one thing.

Mr. YOUNGER. That is what I mean.

The CHAIRMAN. But no Commissioner can sit and listen to an oral argument in any case and do a job without reviewing the record and seeing what is in the record so when he hears the oral argument he knows what they are talking about.

It is time consuming, as the Chairman of the Commission mentioned here yesterday, in having to go into all that as an individual Commissioner and taking the time to go through these records and look them over so that they can then find out when the oral argument comes on what it it all about, and listen to it.

Mr. Moss. Could we request the Commissioners to give us an approximate figure of the time involved in the full process of hearing oral argument and have it placed in the record at this point.

The CHAIRMAN. We will be glad to ask the Commissioner if they can do that, but I might say to the gentleman that there is one case I can think of now down there that has been in oral argument about 5 years.

Mr. Moss. Yes; I think we uncovered a number, as I recall, in the Subcommittee on Legislative Oversight.

Mr. YOUNGER. Would the gentleman yield?

I think that same point was covered in Commissioner Lee's testimony.

Mr. Moss. Commissioner Lee made a statement which would indicate that it was very minimal. That surprised me because in recalling the testimony before the Subcommittee on Legislative Oversight by members of the Commission, it would seem to me that they indicated it was very demanding and bogged the Commission down rather seriously.

The CHAIRMAN. I would like to say this for the record and to recall the work of our committee. In all of the cases, and there were 23, I believe, major cases that were boiled down to 17, before this Commission that we went into and investigated during these last 3 or 3½ years, if the gentleman will recall, and I believe I am correct, the thing that caused the great concern—Robert McMahon filed a

report with this committee on it—in leaving it wide open was during the time of oral argument, this business of holding everything up continually so everything else can be done that one wants, and it seems to me that is something that should be met head on. You remember when one case was cited wherein it was said rush down to Washington and put out the fire. Do you remember that?

Mr. Moss. I do.

The CHAIRMAN. That was oral argument.

Mr. Moss. Mr. Booth, you have indicated the need for very close cooperation between the Commission and the bar. Is it your judgment that in the absence of specific recommended language—you do not make the recommendation in specific language, but you state a specific objection at the bottom of page 2 as to the requirements of the persons who would be assigned to review panels. The Commission would conceivably assign such review work to persons less qualified than the examiner making the initial decision?

Mr. BOOTH. I think it is conceivable. I would certainly hope they would not. As I recall, and again I am just going from memory, one of the Commissioners yesterday indicated that there were many matters which had to be studied as to how to implement this authority if given, and that they had not completely thought it through as to how they would implement this authority and delegation.

This CHAIRMAN. There was only one that was brought up on that and that is that the Commission had not yet decided the method of how they would delegate certain functions, that is, to whom it would be delegated. They had not come to the conclusion yet. That was the only question that was left open in connection with their interpretation yesterday.

Mr. BOOTH. That is what I was referring to, and I think what we try to do is to go one step further.

Mr. Moss. I raise that point because I think at some point in this matter of considering legislation, we must have confidence in the Commission. After all, we have vested them with tremendous authority, indicating that we have confidence. It seems inconceivable to me that they would undertake the assignment of persons less qualified than examiners to handle these review proceedings, but you think it would be quite necessary that it be made very clear?

Mr. BOOTH. I think it should be made clear either in the statute or in the legislative history that this is the interpretation placed upon the delegation. I think it is a reasonable interpretation. I think they would probably come up with it, anyway, and I don't think any harm is done by spelling it out.

Mr. Moss. You made no comments on the matter of delegations to the Chairman of the Commission. Am I correct in recalling that your testimony before the Government Operations Committee did deal with that matter of delegations to the Chairman and his right to redelegate?

Mr. BOOTH. Yes, sir.

Mr. Moss. Have you resolved all of your doubts on that question?

Mr. BOOTH. We have resolved some of our doubts on it in view of the specific language in H.R. 7333, and I think the other reason that I did not include it in this statement or comment upon it in this statement is because it is not included, as I recall, in S. 2034.

Mr. Moss. Then you do not object to the language in H.R. 7333?

Mr. BOOTH. Not to any great extent, no.

Mr. Moss. Because, as I recall, this differs between S. 2034 and H.R. 7333 in the matter of delegation.

Mr. BOOTH. There is a difference in the two, yes, sir.

Mr. Moss. But do you subscribe to either?

Mr. BOOTH. I think if the other proposals are adopted that the delegation spelled out in H.R. 7333 would not cause any great amount of difficulty.

Mr. Moss. I may have, in the rapid reading of your statement, been left dangling, but in referring to the abolishing of the review staff, you state no objections, "provided its duties and personnel are reassigned as the association has recommended."

Mr. BOOTH. Yes, sir.

Mr. Moss. I am trying to recall the precise recommendations.

Mr. BOOTH. The recommendations are these: first of all, that many of the interlocutory matters and many of the reviews of initial decisions be handled by boards or employees and that the individuals on the boards would be hearing examiners. If that is done, you do not need the review staff to advise them. These are experienced people. They can do the job.

Second, if the Commissionrs are to assume the responsibility for preparing initial decisions, we think that by giving them additional personnel on their staff, their staff can do a real good job, and we suggest that the new members of the Commissioners' staff be obtained from the review staff, people who are experienced in working on this, but they would be responsible and be under the guidance of one particular Commissioner rather than a pool operation, as they now are.

Mr. Moss. Do you think this is a matter that requires specific language in the proposed legislation, or one which the Commissioner can handle at his discretion if we act to abolish this staff?

Mr. BOOTH. There may be specific legislation required to authorize the enlargement of the Commissioners' staff.

As I recall the statute, and I am not certain on this, does provide for each Commissioner to have a legal assistant and an engineering assistant. Whether there needs to be legislation to enlarge that staff, I just do not know.

Mr. Moss. I would not think so. If we abolish that staff, I imagine it would be reassigned in the Commission. I think we should make certain of that. That is all I have at the moment, Mr. Chairman.

The CHAIRMAN. I think probably, in taking up where Mr. Moss left off, the plan contemplated either by H.R. 7333 or S. 2034, and I might say any other proposal that has been made, would abolish the review staff, but the present staff would be retained within the Commission. Under the proposal they would be assigned in accordance with either the Commission itself in one proposal, or the Chairman of the Commission under another proposal. Regardless of what might be done one way or the other, if there is anything done, it is contemplated that the present review staff will be utilized by assignment to a particular job that would be appropriate for that individual in connection with his work, whatever specialty it might be.

I do not see—maybe you can enlighten me on it—how, by legislation, we can authorize or direct that certain staff be employed by each Commissioner and bring about the effective operation and efficiency within

the agency that we should have. If it is not left flexible with the Commissioners, you might have a Commissioner that is utilizing the services of, say, a half dozen staff members today, and tomorrow he might need a dozen. Would you agree with that type of procedure or not?

Mr. BOOTH. I think that the whole objective, the spirit of this legislation, is to provide flexibility in the Commission without telling them how to organize it.

The thing that we hope will not occur is that we go back to the situation which existed before the McFarland Act amendments, where there was a professional opinion-writing staff which could make recommendations of an ex parte nature to the Commission. That is the biggest concern we have.

If the Commissioners are made responsible for the particular decision and the employees are responsible to the Commissioner as a member of his staff, surely they can advise the Commissioner. That is the purpose of having his own staff.

The CHAIRMAN. It is the ultimate objective of this committee to see that Commissioners are assigned responsibility for decisions. That does not mean that they will individually write all those decisions—that would be impossible—but that they will be responsible for the decision, and several of the Commissions already, as you know, have adopted that policy. Has the FCC adopted that policy?

Mr. BOOTH. No, sir.

The CHAIRMAN. Several of them have and it is working out, as I understand, quite satisfactorily and ultimately we hope to do that. I know the problems they had prior to the McFarland amendments and something needed to be done then.

As a matter of fact, I think if we had had a good investigation during that time, there would have been something a whole lot better than the McFarland amendments. Some of them went too far, and for the last several years have hamstrung the Commission and prevented it from doing the job that the public demands. That is precisely what we are trying to do here with this legislation, and it is a whole lot harder to work out in the FCC than any other agency because of the highly restrictive amendments that were passed in 1951.

You stated that you were somewhat familiar with the provisions of the proposed Commission bill, that is, as incorporated in S. 2034.

Under that bill, in your opinion, would the Commission designate Commission employees to hear exceptions from the examiner's findings, and decisions?

Mr. BOOTH. Yes, sir.

The CHAIRMAN. You specify, in your statement on page 2 in the last paragraph, that the reviewing personnel should be limited to persons who may conduct adjudicatory hearings. I might say that I am impressed by this recommendation. I do not know just how it can be reached, but it seems to me that you have a very good point in asking that someone conduct the review that possesses at least the qualifications of an examiner who has heard the testimony and developed the record, rather than some employee with lesser qualifications. I do not think the Commission has any intention of assigning these to employee boards comprised of clerks.

Mr. BOOTH. I do not think so, either. I am quite certain they will not.

The CHAIRMAN. But you think that there should be language that would assure that that would not be the case?

Mr. BOOTH. I think so and I think it would improve the hearing examiner system and improve the overall operation of the adjudicatory process if it is spelled out.

The CHAIRMAN. Section 7 of the Administrative Procedure Act is applicable to presiding officers, hearing powers, evidence, the record, and so forth, but is not applicable to review. Is that your understanding?

Mr. BOOTH. That is my understanding. We have not been faced with it so far because the review has always been by the full Commission.

The CHAIRMAN. I have the act here before me and it has to do with the taking of evidence and so forth. It has no reference to any review at all. I would assume from what you suggest here that the one approach to it would be to amend the Administrative Procedure Act to require the same type of personnel to hear reviews as you do in hearings proceedings. Is that what you have in mind?

Mr. BOOTH. I do not know whether it would be desirable to amend the Administrative Procedure Act because it is applicable to so many agencies, but I do believe that it could be spelled out in the amendment to the Communications Act.

I do not know how the other agencies are operating in the area of review, whether they are following similar procedures that we have recommended or not. If they are, then there would be no need to spell it out in the APA.

The CHAIRMAN. What would be your thought with reference to a statement in the report to go along with what was intended in carrying out the provisions for the Commission?

Mr. BOOTH. I think that would probably be acceptable, sir, because legislative history is very important.

The CHAIRMAN. In other words, if the report and the debates were to make it quite certain or quite obvious and definite that it was intended that these personnel boards for review purposes would be people that possess special qualifications equal to the hearing officers' or greater, then you think that that would be sufficient to meet the problem?

Mr. BOOTH. I personally think it would. I do not know how some of my fellow association members would feel.

The CHAIRMAN. I can see that it would be a little difficult to tell the Commission, "Now, this delegation you must assign to a man who has civil service status as GS–15," or "GS–19," or something like that. I do not think that that would be appropriate to include in this bill, but I do think it is a very good point and certainly the committee will consider it.

I want to get back to this right of oral argument. The Interstate Commerce Commission has a procedure whereby the hearing officer will develop a record and render an initial decision. As I understand the procedure, that will be filed within a certain time and if there are no exceptions or some action taken, it automatically goes into full force and effect; however, the individual in that proceeding has a right

to file exceptions. The exceptions under the present procedure, I think, go to whatever division has jurisdiction. That panel has to pass on the exceptions. When the panel or that division passes on the exceptions, then there is a right of individual to request review by the Commission. I think under reorganization procedures now they go to the boards and so forth, and then they pass on it and the exceptions are filed. The panel then takes it up and if there is any appeal from that it goes on, unless there are questions of national transportation importance involved. There has just been a shift within the Commission on that as to procedures.

Now, when a request is made for oral argument and review the Commission then has discretionary authority, as I understand it, to grant the oral argument, if it feels like it needs to have it. Do you practice before the Interstate Commerce Commission?

Mr. BOOTH. No, sir, I don't. I have only been down there two or three times in the last few years.

The CHAIRMAN. Have you ever heard among your fellow associates of the bar that there was any great injustice being done in that procedure?

Mr. BOOTH. No, sir, I have not.

The CHAIRMAN. Is it not assumed that a member of the Commission, whether sitting as a panel or a full Commission, would at least do justice in the case and if an oral argument was desired and would be helpful it would be granted. However, if it was considered to be of no consequence or of no help to the Commission it would be denied?

As a matter of practice and procedure, would that not be better?

Mr. BOOTH. I am not certain, sir, because the cases which are relatively unimportant that they would not want to take their time on, and by they, I mean the Commission or individual Commissioners, would be the cases which are delegated to the employee or employee board for review. Those individuals in making that review are going to have to study the record. They are going to spend some days on it, and we think that 15 or 20 minutes in those days of study would be very helpful to the parties and to the examiner, and we think that it should be a matter of right.

The CHAIRMAN. I very strongly support the principle of the party in the proceedings having his rights protected. I am equally as strong against someone who, just for the sake of postponing something, and stalling for time, clutters up the docket and causes what I think are inequities as far as the American people are concerned, through use of that opportunity. I started to say a right. It is not a right at all. However, I do know from information we have developed that there are certain types of people who hang around. I was told recently about certain people before a particular Commission who would go to a case in hearing, sit back and listen to the thing as it developed and within this time find some way they could get into it. Then just get in for the purpose of injecting themselves in it for what they could get out of it.

I do not think that that ought to be permitted. Having an oral argument just for the sake of postponing the thing, to put things off where there is no real interest by that individual, is the thing that I deplore.

Mr. BOOTH. If the request and if the proposal was to make mandatory the right of oral argument before the Commission, then it could

be used to bring about delays. However, if the oral argument is held by the person making the review I cannot conceivably see how these few minutes for oral argument would have any effect whatsoever upon delaying the ultimate disposition of the case.

At the present time, on a petition for rehearing under 405, it is not unusual for the parties to request oral argument before the Commission. I do not know of a single instance in the last few years in which that oral argument has ever been granted, and we are not saying that there should be the right of oral argument at that time. I fully agree with you that that would bring about delays. We do not want to hamstring the Commission that way. We want to make it flexible. We want them to do the best job they can and as expeditiously as possible, and we think the right of oral argument for the person to present his argument, his summary or analysis of the case, to the person making the review and the right to have questions asked by the hearing examiner would be very helpful.

The CHAIRMAN. Then, I assume that you would recommend Senate 2034 with the two amendments that you have suggested?

Mr. BOOTH. Yes, sir.

The CHAIRMAN. In preference to H.R. 7333?

Mr. BOOTH. Yes, sir, unless we in further study of S. 2034 have other recommendations. I do not think we will, but our study so far indicates that those are the two major amendments we would recommend.

The CHAIRMAN. Any further questions?

Mr. Rogers.

Mr. ROGERS of Texas. Mr. Chairman, just one question. Mr. Booth, I am sorry I was late, but I have been getting quite a few telegrams from broadcasters in opposition to H.R. 7333. Do you know anything about the source of those or why they are deeply alarmed about it?

Mr. BOOTH. No, sir, I do not know anything about the source. I would guess, if I could, and speaking perhaps as a broadcaster now, because I am one, that the concern with H.R. 7333 is the same that they had with Reorganization Plan No. 2. I do not think they understand what the differences are in H.R. 7333.

Mr. ROGERS of Texas. Thank you, sir.

That is all, Mr. Chairman.

The CHAIRMAN. Are there any further questions?

Mr. Howze, do you have any questions?

Mr. HOWZE. No, sir.

The CHAIRMAN. Mr. Younger?

Mr. YOUNGER. No questions.

The CHAIRMAN. Mr. Booth, thank you very much for your appearance here today and the contribution that you have made to this question.

I might say to the gentleman from Texas who raises the question about the broadcasters, I have a letter for the record that has just been submitted from the Honorable LeRoy Collins, president of the National Association of Broadcasters, with reference to this proposal in which they suggest the Senate proposal, S. 2034. They support the objectives of these proposals, but they have reviewed the situation and they feel that the Commission recommendations would present a workable and acceptable plan. We have also from the

Columbia Broadcasting System a rather full discussion in a letter signed by a Mr. Thomas K. Fisher, vice president and general counsel, and Mr. Leon Brooks, assistant general attorney, in which the bill is analyzed and discussed, and I notice that it says:

We support section 1 of H.R. 7333.

I do not know whether they support the rest of it or not. It is a rather lengthy letter with a full discussion. They suggest amendments on the particular subject that Mr. Booth was discussing regarding the assignment of the personnel. They suggest that it be made by the majority of the members of the Commission holding office.

I would like, Mr. Clerk, to have copies of this made. I would like to commend it to the members of the committee because I think it would be very helpful in considering the problem, and this letter will also go into the record.

I have a statement from Mr. Lauren A. Colby. Mr. Colby is an attorney licensed to practice before the courts of New York State, the U.S. District Court for the District of Columbia, and the U.S. Court of Appeals for the District of Columbia, and without objection, Mr. Colby's statement will be included in the record.

(Documents referred to follow:)

NATIONAL ASSOCIATION OF BROADCASTERS,
Washington, D.C. June 14, 1961.

Re H.R. 7333.

Hon. OREN HARRIS,
Chairman, Special Subcommittee on Regulatory Agencies,
Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the National Association of Broadcasters, I respectfully request that this letter be made a part of the hearing record on the above as an expression of the views of the board of directors of this association.

This bill proposes revisions in the procedures of the Federal Communications Commission. The same broad objective of improved efficiency was included under Reorganization Plan No. 2, submitted to the Congress on April 27 by the President, and by S. 2034 now pending before the Senate Commerce Committee.

With this broad objective we are in accord, as we have indicated previously in a statement of position filed in the record on the President's proposal. We reaffirm our feeling that this subject should be dealt with by legislative action rather than by Executive order.

The two pending legislative proposals (H.R. 7333 and S. 2034) have been carefully reviewed, and we are pleased to note that the delegatory features of Reorganization Plan No. 2 which met with very wide objection have not been carried forward in this proposed legislation.

S. 2034, according to our understanding, represents the "consensus" view of the FCC, and has been submitted to your subcommittee by the Commission in its report on H.R. 7333. This is the agency most affected, and its members should be most knowledgeable of its procedural needs. In our view, it presents a workable and acceptable plan.

Sincerely,

LEROY COLLINS.

COLUMBIA BROADCASTING SYSTEM, INC.,
Washington, D.C., June 13, 1961.

Hon. OREN HARRIS,
Chairman, Special Subcommittee on Regulatory Agencies, Interstate and Foreign Commerce Committee, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is with reference to H.R. 7333 which has been referred to the Committee on Interstate and Foreign Commerce and with respect to which hearings before the Special Subcommittee on Regulatory Agencies have been scheduled for June 13–15, 1961. Columbia Broadcasting System, Inc.

is submitting to you herewith its views with respect to that bill and requests that they be made a part of the record of the hearing thereon.

ELIMINATION OF THE REVIEW STAFF

Section 1 of H.R. 7333 would repeal subsection (c) of section 5 of the Communications Act. The effect of repeal would thus be to eliminate the special "review staff" created by that subsection. We believe that it should be eliminated and its special functions abolished for the reasons set forth in the hearings on H. Res. 303 (to disapprove Reorganization Plan No. 2 of 1961) before the Subcommittee on Executive and Legislative Reorganization of the House Committee on Government Operations.

The limitations imposed by section 5(c) of the act on the utilization by the Commission of members of the review staff are unduly restrictive and are unnecessary. Section 5(c) of the Administrative Procedure Act and section 409(c) of the Communications Act contain all the safeguards required to assure against participation in the hearing process of Commission personnel engaged in presenting the case at the hearing or otherwise involved in preparation of the case for hearing. If section 5(c) of the Communications Act were repealed, the Commission could use its review staff as it saw fit, and would be free to consult with and ask help from all members of the staff not involved in the case under adjudication.

We support section 1 of H.R. 7333.

OPPORTUNITY BY PRIVATE PARTIES TO PARTICIPATE IN DELEGATION

Section 2 of H.R. 7333 would amend subsection (d) of section 5 of the Communications Act[1] dealing with the assigning or referring of a portion or portions of the Commission's work or functions to an individual Commissioner, or Commissioners, or to Commission staff. Under the amendment, the commission could do this only by published rule or order, subject to rescission by the vote of a majority less one of the members of the Commission then holding office. The amendment also provides that the requirements of paragraphs (a), (b), (c), and (d) of section 4 of the Administrative Procedure Act shall apply in the case of any such rule.

Subsections (a), (b), (c), and (d) of section 4 of the Administrative Procedure Act in general requires that a notice of proposed rulemaking be issued prior to promulgation of a rule and that an opportunity be afforded interested parties to participate in the rulemaking through submission of written data or arguments. We do not believe that any useful purpose would be served by requiring an issuance of a notice of proposed rulemaking and the opportunity to be heard with respect to rules or orders delegating functions to Commissioners or Commission staff . This is a matter relating primarily to agency management or personnel, which is presently exempt from the notice and opportunity requirements of section 4 of the Administrative Procedure Act. Thus, the insertion of those requirements here appears to supersede that provision with respect to rules or orders of delegation. We suggest that the sentence: "The requirements of paragraphs (a), (b), (c), and (d) of section 4 of the Administrative Procedure Act shall apply in the case ony any such rule." be deleted from subsection (d)(1) of section 5 as proposed in H. R. 7333.

DISCRETIONARY REVIEW BY THE COMMISSION

Subsection 5(d)(3) as proposed in H.R. 7333 makes it discretionary with the Commission whether or not to review any order, report, or action issued or taken under a delegation of authority and provides that the vote of a majority less one of the members of the Commission then holding office shall be sufficient to bring any such order, decision, report or other action before the Commission for review. This provision is similar to that contained in Reorganization Plan No. 2.

We believe that the fact that three Commissioners, or a majority less one, may require review by the Commission affords protection to parties, so long, however, as in cases of adjudication parties are assured the right to file exceptions and to oral argument before an intermediate appellate body, or before the

[1] Since H.R. 7333 proposes to delete sec. 5(c) of the act, sec. 5(d), which is proposed to amend, should be redesignated as "5(c)" and sec. 5(e) of the act should be redesignated as "5(d)."

Commission when review before the full Commission is granted. We will comment further on these qualifications when we discuss the proposed amendment to section 409(b) of the Communications Act.

ASSIGNMENT OF PERSONNEL BY THE CHAIRMAN

Subsection 5(d)(4) as proposed in H.R. 733 grants the Chairman the sole authority to assign Commission personnel, exclusive of members of the Commission, to perform such functions as may be delegated by the Commission. This varies from Reorganization Plan No. 2 in that it does not permit the Chairman to assign delegated functions to other Commissioners.

At the hearings on the reorganization plan referred to above, the fear was expressed that the Chairman, under such provision, could assign work to personnel who had been permanently assigned to the offices of the individual Commissioners; for example, the Commissioners' legal assistants, engineering assistants, or administrative assistants. We do not know the extent to which this might become a problem, but suggest that if the Commissioners believe that it might eventuate as a problem, the phrase "exclusive of members of the Commission" in proposed subsection 5(d)(4) be expanded to read "exclusive of members of the Commission and of personnel permanently assigned to the staffs of such members."

Fear has also been expressed that delegating to the Chairman the power to assign Commission personnel to perform delegated functions constitutes a grant of too much power to the Chairman. Apparently for that reason H.R. 7333, in proposed subsection 5(d)(1), provides that any rule or order of delegation may be rescinded by a vote of a majority less one of the members of the Commission then holding office.

However, it would appear that once the Chairman has assigned a member of the staff or a panel of the staff to a case pursuant to an order of delegation by the Commission under which the Chairman is authorized to assign personnel for a class of cases in which such case falls, the rescission of the order of delegation may not affect such assignment, for the assignment would have been made under an order validly issued. The rescission of the order affecting the delegation would serve only to prevent future assignments in the class of cases theretofore covered by the delegation.

Also, it would not be conducive to good administration to require public manifestation of the displeasure of three or more Commissioners of the Chairman's selection of personnel to perform delegated functions; this, too, might be a significant factor in inducing the Commissioners not to vote to rescind despite their disagreement.

We suggest that there be added a provision that the assignment by the Chairman of Commission personnel to perform a delegated function or functions shall be subject to the consent or approval of the majority of the Commission. Thus, the Chairman would require but three other Commissioners to approve his selection; four Commissioners would have a veto power over the Chairman's choice. The Chairman would still retain considerable authority in this area since, by reason of his responsibility to initiate all assignments, he would have a veto power over the selection of personnel to perform delegated functions.

Accordingly, it is recommended that there be inserted in proposed section 5(d)(4) of H.R. 7333, at the end thereof, the clause: "each such assignment to be subject to the approval of the majority of the members of the Commission then holding office."

EXCEPTIONS AND ORAL ARGUMENT

Section 409(b) of the act provides that in every case of adjudication which has been designated for hearing, the Commission shall permit the filing of exceptions by any party to the proceeding and shall, upon request, hear oral argument on such exceptions before the entry of any final decision, order or requirement. This right to file exceptions to and have oral argument on an initial decision has been deleted from section 409(b) as it would be amended by section 3 of H.R. 7333.

Although, as the act would be amended by H.R. 7333, review of an initial decision is discretionary with the Commission, we are of the opinion that at the least, when the Commission does decide to exercise its discretion in favor of review, the right to file exceptions and to oral argument should be afforded interested

parties.[2] These are very important rights generally recognized in judicial proceedings. They are not only essential to the parties; they are of invaluable assistance to the Commission.

Analogy to the discretionary aspect of the right of review by the full Commission to U.S. Supreme Court procedure has often been cited as justification for making review by the Commission discretionary. But it should be noted that when that Court grants a petition for certiorari or review, it generally affords the right to file briefs and to oral argument. We think the same procedure should be followed here. Thus, we recommend that the following sentence be included in section 409(b) as proposed in the bill:

"In any case where the Commission has decided to review an initial decision under section 5(d)(3), the Commission shall permit the filing of exceptions by any party to the proceeding and shall upon request hear oral argument on such exceptions."

THE RIGHT TO AT LEAST ONE REVIEW

During hearings on Reorganization Plan No. 2, the view was expressed that in every case of adjudication decided by a hearing officer there ought to be at least one review of his decision. It is clear that one of the purposes of the reorganization plan, as well as of H.R. 7333, is to relieve the full Commission of the burden of listening to oral argument, reading the exceptions, and writing a decision in every case of adjudication, however minor, and however it may appear on initial examination that the hearing officer's decision was correct. Hence the suggestion has been made that some intermediate appellate group be set up by the Commission composed of Commission staff members or perhaps, in more important cases, a panel of Commissioners, pursuant to the authority to delegate contained in section 5 of the act. We subscribe to that view.

Thus, all parties would have the right to at least one review by an appellate body, with the concomitant right to file exceptions and have oral argument, of the decision of the hearing officer. The right to review before the full Commission would still be discretionary. We submit that if such a procedure is set up in the act, the number of cases in which the full Commission would feel impelled to exercise its review authority in order to correct errors in the initial decision, would be considerably lessened. Similarly, the number of cases in which the Commission would be reversed by a reviewing court for a decision of a hearing officer not reviewed by the full Commission may also be decreased.

Accordingly, we urge the subcommittee to include in the bill a requirement that such an intermediate appellate reviewing body be created by the Commission to review cases of adjudication not reviewed directly by the full Commission, with the right to the parties to file exceptions with and have oral argument before such body.

OFF-THE-RECORD PRESENTATIONS IN CASES OF ADJUDICATION

In its proposed amendment to section 409(c) of the act, H.R. 7333 omits the requirement now in section 409(c)(2), that in any case of adjudication no person who has participated in the presentation or preparation for presentation of a case before a hearing officer, and no member of the Office of the General Counsel, the Office of the Chief Engineer, or the Office of the Chief Accountant, shall directly or indirectly make any additional presentation respecting such case, unless upon notice and opportunity for all parties to participate. We are in agreement that that portion of section 409(c)(2) which prohibits the Commission from seeking advice from the Office of General Counsel, the Office of the Chief Engineer, or the Office of the Chief Accountant, serves no useful purpose where members of those offices have not participated in the presentation of the case. In fact, it appears to deprive the Commission of the opportunity to benefit from the considerable expertise of the Commission's staff. We agree that that portion of section 409(c)(2) should be deleted. However, we believe that that portion of present section 409(c)(2) which prohibits persons who have participated in the presentation of the case from directly or indirectly making any presentation unless upon notice or opportunity for all parties to participate should be retained in the act, whether or not this provision is deemed to apply only to outsiders or whether it applies also to Com-

[2] It can be argued that sec. 8(b) of the Administrative Procedure Act would afford the right to file exceptions if the Commission should decide to exercise its review authority. However, this is not clear; and it clearly does not include the right to have oral argument.

mission personnel, such as the attorneys of the Broadcast Bureau who represent the Commission and the public in the hearings. Under that provision the present practice of the Commission's hearing attorneys is to file its exceptions, motions, etc., on the record and serve copies on the other parties to the proceedings so that they may have an opportunity to reply. This practice should continue. We are concerned that if the subject provision is deleted, it may be contended that such practice is no longer required and that the Commission staff member who has participated in the hearing, in effect as a party, need no longer make his views, proposals, or recommendations on the record.

We note that section 409(c) as proposed in H.R. 7333 retains the provision of the present section 409(c)(3) to the effect that no person engaged in the performance of investigative or prosecuting functions for the Commission, or in any litigation before any court in any case arising under this act, shall advise, consult, or participate in any case of adjudication designated for hearing, except as witness or counsel in public proceedings. We believe that this provision is broader than is necessary to protect the parties in a hearing and in part negates what H.R. 7333 proposes to do in eliminating the requirement that the Commission may not seek advice from the Office of General Counsel, since that office handles litigation for the Commission and performs most of its prosecuting functions, as well as many of its investigative functions. We think it sufficient that persons engaged in the performance of investigative or prosecuting functions for the Commission or in any litigation be disqualified from counseling with the Commission off the record only in those cases which they investigated or litigated, or in factually related cases. This would then be consistent with the other provisions of the act disqualifying all those who participated in the presentation of the case from communicating with the Commission off the record and with section 5(c) of the Administrative Procedure Act.

Accordingly, we recommend that there be added to proposed section 409(c) of H.R. 7333 the following: "and no person who has participated in the presentation or preparation for presentation of such case before an officer conducting the hearing or the Commission, or who has engaged in the performance of investigative or prosecuting functions for the Commission, or in any litigation before any court, in connection with such case or a factually related case, shall directly or indirectly make any additional presentation respecting such case, unless upon notice or opportunity for all parties to participate."

We wish to express our thanks to the subcommittee for this opportunity to submit our views with respect to H.R. 7333.

Respectfully submitted.

COLUMBIA BROADCASTING SYSTEM, INC.,
THOMAS K. FISHER,
Vice President and General Counsel.
LEON R. BROOKS,
Assistant General Attorney.

STATEMENT OF LAUREN A. COLBY WITH RESPECT TO H.R. 7333

(1) I am an attorney, licensed to practice before the courts of the State of New York, the U.S. District Court for the District of Columbia, and the U.S. Court of Appeals for the District of Columbia. For 2 years, I was a member of the staff of the Federal Communications Commission, and for the past 4 years I have been actively engaged in the private practice of law before the FCC and other agencies. For the following reasons, I am opposed to the provisions of H.R. 7333, in the present form.

(2) Section 409(b) of the Communications Act presently provides, in substance that in hearing cases before the FCC, the examiner conducting the hearing shall prepare and file an initial decision and "the Commission shall permit the filing of exceptions to such initial decision by any party to the proceeding and shall, upon request, hear oral argument on such exceptions before the entry of any final decision * * *." Among other things, H.R. 7333 would amend the Communications Act to eliminate the right to file exceptions, and to substitute instead a procedure whereby aggrieved parties may petition the Commission for a discretionary review of the initial decision of a hearing examiner. H.R. 7333 makes no provision, however, for any right of oral argument before the Commission en banc, or even before the examiner.

(3) The right of oral argument is a particularly valuable one, since it offers virtually the only opportunity for two-way contact between counsel and judge. Unlike the filing of pleadings, which allows only one-way communication—from the litigant to the court or agency—oral argument allows the members of the agency to ask questions of the litigant, and permits counsel to discover and to try to answer possible objections to his argument, which may not have been raised in the written pleadings in the case. Many times the questioning of counsel by the court or agency will call counsel's attention to points which may have been previously overlooked, or will focus attention on points which the questioner believes to be particularly important. Manifestly, the proper administration of justice is served by affording an opportunity for such points to be raised in open court, where they can be answered by counsel. In this way, litigants are enabled to make the best possible presentation of their cases, and the agency has the benefit of a complete exchange of views by all parties, on all the factors which it considers relevant and material.

(4) In courts of law, the right to oral argument is basic, at all the various stages of a case. In the trial of a lawsuit, for example, the parties are afforded oral argument on the different motions—such as the motion for a directed verdict; oral argument before the jury, in summation; and oral argument on appeal, before the appellate tribunals. Unfortunately, there is normally no comparable right to oral argument on the whole case in proceedings before FCC hearing examiners—notwithstanding the fact that proceedings before the Commission oftentimes involve franchises worth many times the amount which is at stake in most lawsuits. Consequently, the oral argument before the Commission en banc is the only oral argument normally allowed to counsel, on the whole of his case.

(5) For the above reasons, it is respectfully submitted that the right of oral argument, presently afforded by section 409 of the Communications Act, should not be abolished. If, however, the committee is nonetheless disposed to recommend some change in the statute, it is submitted that, at a minimum, oral argument should be permitted on any applications for review of the decisions of hearing examiners. This could be accomplished by revising page 3, lines 1–5 of H.R. 7333, to read as follows:

"(3) Any person aggrieved by any such order, decision, report, or other action may, within such time and in such manner as the Commission shall by rule prescribe, make application for review by the Commission. After affording an opportunity for oral argument, the Commission shall pass upon every such application; and * * * "

(6) The retention of the right of oral argument should not place an undue burden on the Commission. The Commission holds only about 60 oral arguments per year.[1] These oral arguments run about an hour in length, and the Commission makes it a practice to generally schedule more than one argument on any particular day. Thus, there are probably less than 30 days a year in which the Commission sits for oral argument. By way of comparison, the Supreme Court of the United States held oral arguments on 148 cases at its 1960 term, and the Justices themselves were required to write decisions in each of these cases, whereas Commission decisions are normally written by the staff.

The CHAIRMAN. There is one additional witness to be heard tomorrow.

The committee will adjourn until 10 o'clock tomorrow morning.

(Whereupon, at 11:25 a.m., the committee recessed, to reconvene at 10 a.m., Thursday, June 15, 1961.)

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[1] Report of hearings before Subcommittee on Government Operation, May 18 and 19, 1961, p. 144.

FEDERAL COMMUNICATIONS COMMISSION REORGANIZATION

THURSDAY, JUNE 15, 1961

HOUSE OF REPRESENTATIVES,
SPECIAL SUBCOMMITTEE ON REGULATORY AGENCIES
OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The committee met at 10 a.m., pursuant to recess, in room 1334, New House Office Building.

Present: Representatives Harris (presiding), Rogers of Texas, Moss, Rogers of Florida, Bennett of Michigan, Springer, Younger, and Hemphill.

Also present: Kurt Borchardt, professional staff member; Allen H. Perley, legislative counsel, House of Representatives; Charles P. Howze, Jr., subcommittee chief counsel; Rex Sparger, subcommittee special assistant; and Herman Clay Beasley, subcommittee clerk.

Mr. ROGERS of Texas (presiding) The subcommittee will come to order for the further consideration of H.R. 7333.

Our witness this morning is Mr. Leonard H. Marks, a Washington attorney.

Mr. Marks, you do not have a written statement as I understand it.

STATEMENT OF LEONARD H. MARKS, ATTORNEY, WASHINGTON, D.C.

Mr. MARKS. That is right, Mr. Chairman.

Mr. ROGERS of Texas. You may proceed, Mr. Marks, with your oral statement.

Mr. MARKS. Thank you.

Mr Chairman and Mr. Moss, I appreciate the opportunity of appearing before you and presenting my views on H.R. 7333 and the problems which it was designed to eliminate.

I regret that I was out of the city the early part of this week and therefore unable to appear when you heard the other witnesses.

H.R. 7333 is designed to prevent delays in the processing of applications in the conduct of the business of the Federal Communications Commission. Considerable testimony has previously been offered, both to this committee and to the Senate, on what causes the delays before the Federal Communications Commission.

I speak from 20 years of experience as a member of the Commission staff and as a practicing attorney specializing in communications matters. I was formerly president of the Federal Communications Bar Association and 2 years ago we realized that substantial delays were causing considerable detriment to the industry and to the public and Mr. Booth, the present president of the bar association, has told

this committee and the Senate committee that, as a result of the efforts during my administration, a special group was organized, members of the Commission's staff, lawyers and engineers, to try to avoid delays. Work was carried on over a year. Reports have been filed with the Commission but unfortunately at this stage no definite action has been taken as a result of those studies.

This is a problem that has permeated all administrative agencies and courts.

Several years ago I had the privilege of appearing at a meeting of bar association presidents. One hundred and fifty men throughout the country were selected and we invited Lord Goddard of England, the chancellor of their courts, to address us and to sit with us and discuss the problems of delay.

As a result of that we came to the conclusion that each agency or each court has its own unique problems and there is no one cure-all which will eliminate delays in the processing of applications or the conduct of hearings or the disposition of appeals.

I want to focus my attention specifically on the Federal Communications Committee with the thought in mind that it has its own peculiar problems.

The testimony which has been introduced during the past several weeks on H.R. 7333 and companion reorganization bills has dealt solely and exclusively with the problem of hearings.

The Chairman of the Commission and members of the Commission have told you the amount of time consumed in listening to hearing cases and that, if they could delegate the responsibility of these hearing cases to panels, a great deal of time would be saved.

I would like to talk about the work of the Commission in the nonhearing field.

The average week of the Commissioner is taken up, 75 percent of the time I would estimate, by the study of routine matters that do not involve a hearing. For example, Mr. A. has a radio station. He wants to increase his power from 250 watts to 1,000 watts. That application is studied by the engineers. It is studied by the accountants. It is studied by the lawyers. There is no objection to it. There is no interference. There is no party aggrieved. There is no complaint. What happens? Those reports are mimeographed and distributed to all Commissioners and their assistants. Once a week the Commission meets in a hearing. A member of the staff gets up and repeats what is in the report. Fifteen or twenty minutes of time is taken up and the Commission routinely says "Granted." They have no alternative. The law says that, if certain regulations are complied with, the application must be granted. Yet the weekly agenda of cases such as I have just described takes up one or two days of the Commissioner's time in Commission meetings alone.

In addition to that, this constitutes the principal homework of the Commissioner. He receives a stack of papers fully 3 or 4 inches high each week and in each case it is a routine administrative decision that has been made for him by the Commission's staff. This includes the moving of a radio station location from site "A" to site "B"; the transfer of a radio station from one owner to another; increases in power; and the myriad of applications in not only the broadcast field but the common carrier field, the safety and special services field.

It is possible for the Commission under existing legislation to delegate that work today. By a simple administrative order the Commission could say:

> All noncontested cases, all noncontested applications are hereby delegated to the Chief of the Broadcast Bureau, the Chief of the Common Carrier Bureau, and the Chief of the Safety and Special Services Bureau.

Instead of applications being held up for a full week or 2 weeks until the Commissioners can meet and put their rubberstamp on it, the Chief of the Bureau could work every day processing these cases and tremendous amounts of time would be saved and delays avoided.

Now, I do not believe that the Commissioners want to delegate this responsibility and I do not say this critically. I say it objectively. Perhaps there is some value in seeing the individual when he comes to Washington after his case has been pending for 18 months and he calls on a Commissioner and says:

> My application to move from site A to site B has been on file for 18 months. Can't you do something about it?

And the Commissioner then interests himself and perhaps may make a phone call and try to move it along. But that is not the value of administrative process. It is not necessary for the Commissioner to take off his time to see the owner of a radio station and spend the time checking on where that application is. This should be a function of the staff if there is no contest. If my suggestion is followed, the Commission will be transformed into an appellate board which is, I think, the principal function that any administrative agency should perform; and here are the methods that I would use to arrive at that result.

One, I would like to see this committee in its report amend H.R. 7333 by providing for the appointment of an Administrator appointed by the President, subject to the confirmation of the Senate, to hold a term of office for the same period of time as a Commissioner. The Administrator's job would be to act on all noncontested applications such as I have described. Any matter on which there is no protest, no complaint, no interference, would be acted on by the Administrator. If a party was aggrieved by the action of the Administrator, he could appeal to the seven Commissioners. If an application involved interference or if there was a complaint or if there was a deficiency, the Administrator would set it for a hearing. It would go to a hearing examiner. Decisions of the hearing examiners would be appealed to the full Commission. Decisions of the Administrator, if there could be any complaint, would be appealed to the full Commission. This would make the FCC, the seven Commissioners, into an appeals board rather than an agency devoting a substantial amount of its time to consideration of noncontested routine matters. That is the recommendation that I would like to see you make.

Now, failing that, if the legislation is not amended to include the Office of Administrator, I would like to see in the committee report a recommendation to the Commission that, under existing law, it delegate to the chiefs of the respective bureaus the functions which I have just described. It can be done without the passage of any additional legislation. If this takes place and if H.R. 7333 is put into effect with respect to hearing cases, I believe we will have substan-

tially avoided the long delays that have taken place at the present time before the FCC.

Mr. ROGERS of Texas. Mr. Marks, I do not want to interrupt your train of thought but why do you think the Commission wants to retain the opportunity to do this visiting in the noncontested cases?

Mr. MARKS. I think it is human nature, Mr. Chairman, to be able to visit with the constituents and discuss their local problems with them. It may not be the most efficient way of getting the business done but it is one way of keeping close touch with the industry and perhaps making your constituents realize that the functions that you do perform are in their best interests.

Mr. ROGERS of Texas. I do not understand their thinking since they do not have to run for those offices.

Mr. MARKS. Neither can I but I have informally discussed this with many Commissioners over the years. They say:

> You are probably right. It is more efficient for you to do it this way but it is good for us to keep in touch with the industry and keep in touch with their problems.

Mr. ROGERS of Texas. Of course, we have to recognize the fact that these boards and bureaus are not set up for visiting purposes. If they are going to do that, we had better divide visiting and business hours like we do in some eleemosynary institutions.

With regard to the delegation of authority, you have stated, that they presently have that authority. That authority is limited to nonadjudicatory cases and it would require an amendment to section 5(c), would it not, to authorize delegation of the adjudicatory cases to an administrator?

Mr. MARKS. Mr. Chairman, let me make a distinction and define the word "adjudicatory." If two people seek the allocation of a radio frequency, you have an adjudicatory matter which must go to to a hearing examiner. That is the present procedure under the Administrative Procedure Act.

An appeal from the hearing examiner would lie to the full Commission or to a review panel. That would require legislation; yes. You may also call a matter adjudicatory where there is no other party than the applicant. If you are using the term in that sense, the present Communications Act would permit the Commission to delegate to the Chairman of the Broadcast Bureau the right to grant an uncontested application, the right to the Chief of the Common Carrier Bureau the same power in his own field, but I would prefer an administrator who would act on all noncontested matters whether in the broadcast field, the common carrier field, or the safety and special services field.

I believe that, if the Commission delegated responsibilities pending legislation, if there should be a delay beyond this session, it would be a step in the right direction; but ultimately I favor an administrator appointed by the President, subject to confirmation by the Senate, who would be more than a staff official subject to the orders of the Commission or the chairman, who would have the discretionary power to say, "This application has no problems. I grant it." Or, "It does have a problem. I set it for hearing."

Mr. ROGERS of Texas. You would not go so far as to say that you are changing the thinking of adjudicatory and nonadjudicatory over into the category of contested and noncontested?

Mr. MARKS. I would divide it into contested and uncontested and I would make that the dividing line so that the Commission would only be called upon to review contested matters. I see no reason for the Commission to review a noncontested matter. That is the principal work of the Commission.

Mr. ROGERS of Texas. Yes.

I yield to Mr. Moss.

Mr. Moss I am interested, Mr. Marks, in your recommendation that we create an administrator and then your further elaboration as to the method of selection and the powers that would be vested in this office of administrator.

Now, I understand you would have him appointed by the President for a set term.

Mr. MARKS. That is right, sir.

Mr. Moss. Confirmed by the Senate.

Mr. MARKS. Right.

Mr. Moss. And he would make the determinations as to whether or not a matter was to be assigned for administrative decision or considered by the Commission?

Mr. MARKS. No, sir; Mr. Moss. If there were no objections to an application, he would grant it. If there were objections, he would set it for hearing before a hearing examiner.

Mr. Moss. Then you would be delegating to him much of the powers of the present Commission?

Mr. MARKS. On noncontested matters.

Mr. Moss. It would be a radical change in the present setup of the independent agency.

Mr. MARKS. No, sir. I do not think it would be a radical change. At the present time you have delegations of many noncontested matters to the staff.

Mr. Moss. Mr. Marks, as I recall, one of the strongest objections voiced to Reorganization Plan No. 2, both before this subcommittee and before the Committee on Government Operations, was the charge that the delegations which would be permitted to the commission—and remember, here is a case where the commission would delegate to the chairman for redelegation to staff or Commissioners—would impair the independence of the agency. I did not accept that as having any validity whatsoever because the commission clearly retained the right to descind any delegation.

However, if we were, by statute, to create this office of administrator responsible only to the President and he would be a presidential appointee and we would give him the right to make all of these administrative determinations, then I believe that we would have in fact impaired the independence of the agency to a very substantial degree because the Commission would not retain any right to rescind any delegation. It would be an absolute delegation by law.

Mr. MARKS. Mr. Moss, I would like to disagree with you for the following reasons: No. 1, any action of the Administrator would be subject to appeal to the seven Commissioners who could reverse it.

Mr. Moss. Let us look at that. You are talking of noncontested matters where it is almost routine that a grant will be made.

Mr. MARKS. Right.

Mr. Moss. Who is going to appeal?

Mr. MARKS. Let us suppose that an application is on file for a change in location of a radio station from site A to site B. There is no intervening party. There is no interference and the Administrator grants it.

Mr. MOSS. Let us identify an intervening part in that instance.

Mr. MARKS. Let us say another radio station that might suffer interference.

Mr. MOSS. Is that the limit of parties who might be intervening?

Mr. MARKS. No, there might be the neighborhood zoning commission which feels that the location of the radio station in the new place would cause a problem as far as housing or it may be a detriment to the expansion of that area as a commercial location. There are many people who might have interests.

Mr. MOSS. Might it be a Member of Congress who felt that the change in location would impair, to some extent, the possibility of his community at a future date getting another channel?

Mr. MARKS. Right.

Mr. MOSS. Would he be a proper party of interest in a matter of this type?

Mr. MARKS. I would not call those parties interveners in the legal sense but they would be interested parties.

Let us suppose they made no objection and the application was reviewed by the engineers and found to be complete. The administrator would grant it just as the Federal Communications Commission would grant it, the seven men.

Mr. MOSS. Mr. Marks, would we not preserve the independence of the agency by suggesting that it wisely delegate under existing authority. I believe that section 5(d) is sufficiently broad to permit the delegation you feel desirable, and yet to retain in the Commission the power to review not only a specific case but the overall exercise of the delegated authority by those to whom it is delegated. A wise delegation here would just as effectively accomplish your objectives as the creation of an additional position in the Commission would, would it not?

Mr. MARKS. You are right, sir. The same objectives would be created. We differ only as to the procedure and I would be very satisfied and I believe the industry would be benefited and the public would be benefited if the delegation took place under existing legislation; but I believe it is going to take a mandate from your committee to make this change possible.

Mr. MOSS. To make it possible?

Mr. MARKS. To order it.

Mr. MOSS. Because it is possible now.

Mr. MARKS. I should not say "make it possible," but to bring it into effect.

I think that your committee is going to have to tell the Commission in a report that this is a wise delegation.

Mr. MOSS. Suppose that we can, by suggestion or mandate, create wise Commissioners. If this is a wise proposal, and I agree with you that it is, are we going to accomplish this act of wisdom by suggesting to men who are so socially inclined that they want to visit?

Mr. MARKS. If they will not take a recommendation of your committee, then it requires legislation. It does not have to be by an

Administrator. You would write into H.R. 7333 the same provisions without an administrator.

Mr. Moss. If that is the case, they are only going to do exactly that which is required by the language we insert and we are still not going to get the most efficient operation if we have to direct their every step.

Mr. MARKS. I agree with you. You can lead a horse to water but you cannot make him drink. You can point out the advantages; and I believe this Commission is a wise Commission intending to do what is best. However, I do not believe that there has ever been sufficient attention directed to the fact that a delegation of these noncontested cases will save them far more time than the hearing casework which they have.

Mr. Moss. Do you think we should nudge them gently in the record and urge that they more wisely delegate and see how that works?

Mr. MARKS. Yes, I do, Mr. Moss. I think that is one step we can take right now.

Mr. Moss. Thank you.

Mr. ROGERS of Texas. Mr. Younger?

Mr. YOUNGER. Mr. Marks, I do seriously object to your recommendation about an Administrator. All you would be doing is appointing two men. You would have a direct conflict between the Administrator and the Chairman of the Commission and the members of the Commission, all of whom derive their power, derive their appointment from the President and confirmation from the Senate. Personally, I would never agree to that. I think, if there is anything done in the way of creating of an Administrator, it has to be done as a man employed by the Board and under the Board, and he holds his office by and with the consent of the Board. But, aside from that, you made the statement that the chiefs of the bureaus sat around waiting all the time for assignments.

Mr. MARKS. No. I am sorry, sir. I did not say that or at least I hope I did not say that. The chiefs of the bureaus are quite busy.

Mr. YOUNGER. Now repeat what you said about the assignments to the bureaus.

Mr. MARKS. I said, Mr. Younger, that under existing legislation it would be possible for the Commission to delegate right now to the chiefs of the bureaus.

Mr. YOUNGER. Just a minute. It is not what would be possible. It is when you were outlining what is actually done at the present time and what caused the delay. You go back to that testimony.

Mr. MARKS. Let me repeat this to you.

Let us take one of these routine applications for an increase in power of a radio station of which there are hundreds every year. That application goes to an engineer for study. It goes to an accountant and a lawyer for study. They write reports. The chiefs of the bureaus review them. They send them down to the full Commission. At a meeting of the full Commission a member of the staff gets up and reviews what is in the written report and recommends that the application be granted. The Commission then grants it. The chiefs of the bureaus are quite busy because they have these tremendous numbers of applications going through their offices which they review and send to the Commission for approval.

Mr. YOUNGER. I do not know how we are going to get back to what you said before.

You were talking about the assignment, that somebody came in and said, "Where is my application? It has been here for 5 weeks or so and has not been assigned."

Mr. MARKS. That is the Commissioners. The Commissioners are visited by members of the industry, very properly. When there is delay an individual affected will come to the Commission, will come to Washington and say, "I want action. It is imperative for me, my very existence may depend on getting permission to move from this place to that place," or "get an increase in power."

The Commissioners very properly will try to check and find out why there has been this delay. They will try to find out why the staff has not been able to process it.

That is what I said, sir.

Mr. YOUNGER. Then it is not because the Commission has not assigned the case?

Mr. MARKS. Oh, no, sir. No. I am sorry if you got that impression.

Mr. YOUNGER. When you read your previous testimony I think you will find that you gave the impression that the delay was occasioned by the fact that the Commission had not assigned the case.

Mr. MARKS. No, sir. That is not so.

Mr. MOSS. Will the gentleman yield at that point?

Mr. YOUNGER. Yes.

Mr. MOSS. Using the word "assigned," it would be true that your testimony was that the failure to delegate in these instances brought about the delay because the Commission itself has to sit and, as you recited, have a staff member come up and read the content of these reports; and you said it took 15 or 20 minutes on each of these inconsequential matters.

Mr. MARKS. It depends upon the case. Sometimes they could take 15 minutes and sometimes 5 minutes.

Mr. MOSS. The failure to delegate causes the delay?

Mr. MARKS. The delay comes after the staff has finished its report and from that point until the Commission itself acts on its there is a delay. It can be a month. It can be 3 weeks. But there is a delay which is unnecessary because it is a routine matter.

Mr. MOSS. That is a little different than the testimony so far because originally the delays were occasioned by the oral arguments.

Mr. MARKS. That is right.

Mr. MOSS. This is in a nonadjudicatory or at least a noncontested matter.

Mr. YOUNGER. But the reason for all this consideration sprang from the oral arguments which are mandatory and which took so much time of the Commissioners that they did not have time for the important work.

Now you say it is the time that it takes for the uncontested case, not the oral argument.

Mr. MARKS. That is right, Mr. Younger. I wanted to focus your attention on a different phase of delay. I do not believe any other witness has talked to you about that and that is why I feel so strongly about it, that if you could eliminate the noncontested and not

the oral argument problem, you would find that there would be greater efficiency.

Mr. YOUNGER. That is all.

Mr. ROGERS of Texas. Mr. Rogers.

Mr. ROGERS of Florida. Mr. Marks, I am not quite clear as to whether I understood your feelings on appeal from those matters which are not contested.

Mr. MARKS. Yes.

Mr. ROGERS of Florida. You would allow an appeal?

Mr. MARKS. Yes; I would say that, if the delegation took place to the Chief of the Bureau, the Commission, on its own motion, could at any time set aside and review it if for any reason it wanted to.

In addition to that, let us suppose the Broadcast Bureau Chief acted and then somebody came in awakened to the fact that an action had been taken. I would allow the Commission to review it and to set it aside.

Mr. ROGERS of Florida. But the only appeals, then, from administrative decisions, and not broad policy decisions would have to be initiated by the Commission itself?

Mr. MARKS. That is right, because there are no intervening parties. There are no parties affected if it is noncontested, by its very definition.

Mr. ROGERS of Florida. Unless the decision were adverse. Unless the administrative ruling were adverse to the party?

Mr. MARKS. It could not be adverse without giving him a hearing, sir. Any matter which the Commission wishes to deny must be set for hearing under existing law.

Mr. ROGERS of Florida. So that you could continue that?

Mr. MARKS. That is right.

Mr. ROGERS of Florida. So that any person turned down on his request would have a hearing?

Mr. MARKS. Right.

Mr. ROGERS of Florida. Before the Commission?

Mr. MARKS. Before an examiner, as is presently the case.

Mr. ROGERS of Florida. I realize that. But suppose the examiner rules against him?

Mr. MARKS. Then I would urge the continuance of the present procedure of review by the full Commission.

I want to point out that I feel it is imperative that due process be accompanied by one review. If an examiner acts, it should be reviewed by either the full Commission or by a panel of the Commission. I believe this is fundamental in due process and, incidentally, it is not only confined to our jurisdiction. It is the world over.

There was a meeting of international commissions of jurists in New Delhi, India, last year and one of the resolutions was that due process must be accompanied by one review of the action of the hearing officer or judge, so that I would urge that in hearing cases there be a review by the Commission.

Mr. ROGERS of Florida. So that actually then your proposal would provide that, on all of the questions that are not contested and that are acted on favorably, there would be no need for further actions?

Mr. MARKS. That is right, sir.

Mr. ROGERS of Florida. But those who are denied in uncontested matters would have the right of appeal either to a panel of Commissioners or to the full Commission?

Mr. MARKS. That is right, Mr. Rogers.

Mr. ROGERS of Florida. Thank you very much.

Mr. ROGERS of Texas. Mr. Hemphill.

Mr. HEMPHILL. The thing that concerns me from a practical standpoint is the fact that, in uncontested applications, in the situation as it presently presents itself they are so waterlogged at the Commission, through no fault of their own or because they do not have the facilities that we seek to give them by this legislation, that in uncontested matters in one field that I know of they are 120 days behind, I believe they told me.

From a practical standpoint in giving service to the people of the district of the State where I live, that is a matter of concern.

Mr. MARKS. Yes, sir.

Mr. HEMPHILL. The question we are concerned with here is how to step up the procedure to facilitate the service to the public and at the same time not delegate so much power that this Commission or any other could get out of control. I think that is why this committee is so cautious.

It seems to me that, if in uncontested matters you could assign a staff member under the present legislation or you could assign a hearing examiner, if he has sense enough to examine the contested matters he certainly has sense enough to discharge administration on uncontested matters.

If there were no appeal that decision would become final.

Why could it not work within the framework of the present legislation?

Mr. MARKS. When you use the term "hearing examiner," you by the very use of the word, indicate that there is some reason for a hearing, namely a contest or problem involving the application so that it has to go to a hearing.

My principal discussion today is on those applications which have no problems which could be acted on routinely, which meet all of the requirements.

The 120 days' delay which you refer to, and I do not know the field, is a very expeditious processing. In the broadcast field delays are a year or more and it is not due to the fault of the Commission probably as much as it is to the tremendous workload that they have.

I say that the Commissioners need not concern themselves with these matters and, if they divorce themselves from the uncontested case, they would have time to think about space communications and TV allocations and clear channels.

I agree with you that, if a hearing examiner has the ability to handle a contested matter the man with the same qualifications should handle an uncontested matter.

Mr. HEMPHILL. I think we both failed to say what the trouble is: that the Commission is so loaded down with all sorts of matters, including the initial decision sometimes on contested matters, that that is where the backlog is coming. It is not the Commission's fault. It is the fact that we have not given sufficient authority for any delegation by the Commission on uncontested matters.

I think that is the fault now.

Mr. MARKS. There are two problems with the Commission.

First, they act as an appeals board; they act as a rulemaking board, and the volume of work is so great that they do not have time to give to the mature reflection of policy. That is the chairman's statement.

Now I say remove from their workload the routine, the uncontested matters. Remove from their workload the hearing case which does not involve major policy and then you leave to them a great deal of time to handle the important problems of space communications and what have you.

Mr. HEMPHILL. Yes, but leaving off any play on semantics, to say, that, just because he is hearing a matter, an examiner has to have a hearing, could we not designate the man who is now a hearing examiner as an examiner and have him assigned so many uncontested cases to make some decision on and expedite it? It seems to me that the fact that he is a hearing examiner when it is contested and an examiner when it is not contested would facilitate this thing and is a practical solution. I think that is what this legislation proposes now.

Mr. MARKS. Mr. Hemphill, you would not take up the time of a judge, which is what a hearing examiner is, with the question of whether or not a zoning permit should be issued. A clerk could do that.

My concern is that the clerical problems be handled by clerks and not be reviewed by the seven Commissioners.

Now, I think it comes to a question of definition. Uncontested matters need not go to any hearing examiners except to engineers and lawyers and they can act on them very quickly just as a clerk can issue a zoning permit.

Mr. HEMPHILL. That is not being done today.

Mr. MARKS. It is not, sir, and that is the thrust of my testimony.

Mr. HEMPHILL. We are faced with this proposition. We have to work somehow within the framework of the setup that we have; that is, of seven Commissioners and the various personnel assigned to various duties within the Commission or for the Commission.

What I am trying to do is take this legislation, instead of some new proposal that will cause a lot of consequences.

That was the reason for my proposition.

I do not have a particular interest in it except that I want to help the Commission and I want to help the public.

Mr. MARKS. This legislation will do a great deal. I favor the objectives of the legislation.

My testimony has been to an additional problem of delay which will also acomplish your objectives within the framework of this legislation.

Mr. HEMPHILL. The Commission under this legislation if enacted can designate to someone who is familiar with looking over the uncontested applications and determining from the experience in the field whether or not there is a hidden problem and saying, "There is no hidden problem. There is no problem on the face of it. Let us just pass it." I think it can be accomplished.

The question in my mind is whether it will be accomplished.

You have the opportunity but it is a question of whether or not the thing works.

Mr. MARKS. That is Mr. Moss' observation.

Mr. ROGERS of Texas. Mr. Marks, why do you think it was required in the first instance in the act itself, that these matters be reviewed by the Board.

Mr. MARKS. I do not think that anybody in 1934 dreamed that the volume of work would be so great as it is today. We did not anticipate television and the many uses of radio, not only for home entertainment and information but commercially. We did not anticipate the problems of space communication, the international complications. We have just grown.

This is a multi-billion-dollar industry. In 1934 it dealt with millions. Today we deal with billions. Instead of 150 radio stations we have 5,000. That is the reason.

Mr. ROGERS of Texas. You just think it was inadvertently required as a Commission responsibility and, if the act were being written today and the matter came up, the determination would hinge on whether or not the responsibility of the Commission itself would require it to review uncontested or nonadjudicatory cases?

Mr. MARKS. I agree with you, Mr. Chairman. I think if it came up today you would approach it in an entirely different light. You would say, "This Commission, chosen from all walks of life, seven men from different political parties, is to lend its wisdom to policy, to matters of international and national importance, not as to whether a radio station is to move from location A to B with no complaint about it."

Mr. ROGERS of Texas. Mr. Marks, have you, as an attorney practicing before these regulatory agencies, or have any of your colleagues, ever given much thought to the formation of an independent regulatory agency appeal board or court?

Mr. MARKS. That has been considered at administrative meetings of the American bar and has been considered by committees of the FCC bar. It involves not only the FCC but CAB, ICC, and the host of regulatory agencies.

I am one who favors, strongly, the administrative setup of the independent agency. I believe there is a purpose for it. It is not a court. It is not a legislature, but it is a combination of quasi-legislative, quasi-judicial, and quasi-executive. I believe its creation and its operation are very necessary; but the only problem we have is improving it, not eliminating it. I would not transfer everything to a court, no.

Mr. ROGERS of Texas. If you set up a court or an independent review agency, to review the decisions of each of the regulatory agencies, you still would not answer the question that you have here insofar as your procedure in a particular regulatory agency is involved?

Mr. MARKS. That is right, sir.

Mr. ROGERS of Texas. What you are suggesting is simply the addition of an administrator or another phase to screen these matters and to relieve the Commission of the obligation to go into the noncontested matters. I would not say nonadjudicatory matters because that is not entirely clear. Let us just say to go into the noncontested matters with the power in the Commission, on its own motion or on

the motion of any party who might be aggrieved or interested, to thoroughly review the matter.

Mr. MARKS. That is right, sir.

Mr. ROGERS of Texas. Then that would take away from the Commission a lot of the work that is consuming the time that they ought to be using in hearing oral argument which is necessary in controversial matters.

Mr. MARKS. And oral arguments on matters of extreme importance to the country and to the world like space satellites.

Mr. ROGERS of Texas. Policy matters.

Mr. MARKS. Policy matters.

Mr. ROGERS of Texas. Now, could not this be done in the present framework of the act if you separated the noncontested matters that have to be determined into several different divisions and put a cloak of authority on a present employee there for handling these matters, thus writing the law so that the Commission would not have to assume responsibility for something that they did not do if something should come up later on to bring embarrassment as a result of a maladministration of one of these matters?

Mr. MARKS. Mr. Chairman, you have summarized very aptly the testimony I have intended to offer and I want to say to Mr. Moss particularly that I am not wedded to the idea that the Administrator be appointed by the President. The Administrator can be appointed by the Commission and they retain all of the authority.

I am not desirous of taking the authority away from the Commission as much as I am interested in seeing them removed from the tedium, from the time-consuming task of handling matters of a nonpolicy nature, and that is why I think the Administrator would solve it.

Mr. ROGERS of Texas. Mr. Marks, that is my observation about this insofar as an administrator is concerned, and I think we have a like situation in two or three other agencies of this Government at the present time. When the Administrator is tied too closely to the Commission, in the situation you suggest, you do not have pure appellate power. In my way of thinking it presupposes that there will be a complete break between the original decision and the body giving the review, so that they will not be in any manner influenced by what happened lower down on the totem pole.

I think that sometimes when you try to work these things together you run into that sort of situation. I think we do it in some of our agencies where, although there are different individuals doing it, they are reviewing their own decisions. I do not think it is a very healthy situation from an adjudicatory standpoint.

Mr. MARKS. Well, there are two views as to whether an administrator should be independent or come within the authority of the creating body. I say that the concept of an Administrator is more important to me than who appoints him or to whom he reports because it is like an auditor going over the routine reports and putting his initials on them. It is moving the papers which are important at this stage and you must have a person of intelligence and ability looking at the papers to make such that they comply; but it is far more important that he move the papers once they comply than to have seven men looking at the routine reports.

Mr. ROGERS of Texas. Mr. Marks, if we take this as an appellate situation and constituted the Commission as an appellate body, I think it would be absolutely necessary that the Administrator be appointed by the President and confirmed by the Senate. If you do not do that, I do not think you are going to get into the appellate situation at all.

I think you are simply adding another employee. If that is what we want to do, I think we should have the legislation amended so as to meet this requirement at the present time.

Now, do you feel that H.R. 7333 as it is presently written would result in saving time and cutting delays?

Mr. MARKS. Yes, I do, sir. I would like to support the comments made by the bar association with respect to the right of review, however. I believe that whenever a hearing examiner has handed down a decision there should not be a discretionary review. There should be a mandatory review consistent with the policy that no action of a trial judge should go unreviewed. I do not particularly feel that it should be by all seven Commissioners but I do believe that somebody should review the actions of the hearing examiner if we are to have a due process of law.

Mr. ROGERS of Texas. You mean if a proper request is made?

Mr. MARKS. Yes.

Mr. ROGERS of Texas. I certainly agree with you on that.

I do not think the question of review should be a matter of discretion in a situation of this kind. Would that be your only observation? What about the difference now between H.R. 7333 and S. 2034?

Mr. MARKS. Sir, I am sorry that I have not studied S. 2034 with the same particularity so that I could comment intelligently. So I am going to pass that one.

Mr. ROGERS of Texas. Did you have questions?

Mr. MOSS. I may be guilty of having failed to listen to the last response to your question. As I recall your statement, Mr. Marks, you indicated that the change that you advocated is this greater delegation under existing authority in 5(d) together with 7333 and that would accomplish the objectives of the committee appointed by you when you were president of the Communications Bar Association. Now, from that do I infer that you endorse H.R. 7333?

Mr. MARKS. I endorse the objectives of 7333 with the change I have just pointed out.

Mr. MOSS. That is what I wanted to get. You do not want review to be discretionary, is that correct?

Mr. MARKS. That is right, sir.

Mr. MOSS. You feel that any matter heard by an examiner should be reviewed as a matter of right?

Mr. MARKS. If requested.

Mr. MOSS. If requested. Now, do you feel that that review must be before the full Commission or before a panel of employees, an individual Commissioner, or a panel of Commissioners?

Mr. MARKS. I believe it should be by a panel of Commissioners or the full commission for the following reason: To me the Federal Communications Commission was created, the legislative history would indicate, in order to have men of different walks of life and perhaps different philosophies act as a policy-determining board. Only by

reviewing actions of trial judges will they make policy and therefore I believe Commissioners should make policy in reviewing hearing cases. I do not believe it should be by other employees or other hearing examiners.

Mr. Moss. If they feel that there is sufficient importance to a matter they can, as a full Commission, hear it under the proposed language of H.R. 7333 or S. 2034, can they not?

Mr. MARKS. That is right. They can.

Mr. Moss. They are not required to hear it?

Mr. MARKS. I would recommend that they be required. I think that a matter of hearing should be reviewed because, by reviewing hearing cases, you make policy and I think the Commission should make policy.

Mr. Moss. This is different than the situation in some of the other agencies where probably just as much policy exists as in matters brought before the Federal Communications Commission.

If a matter is heard by an examiner and appealed to the panel, why is not that appeal sufficient if the Commission feels there would be no objective served by their taking their time to review it? There are many of these matters which are not matters of broad public interest which may be prosecuted very vigorously.

Mr. MARKS. Mr. Moss, if you say that it is reviewed by a panel of Commissioners, I agree that it need not be the full seven Commissioners but it should be a panel of Commissioners rather than a panel of hearing examiners.

Mr. Moss. As I recall Mr. Booth's testimony yesterday, he suggested that the people constituting this review board be persons equally well qualified as those who heard it initially; not necessarily Commissioners but persons equally as well qualified.

Mr. MARKS. Well, I am sorry. I did not hear Mr. Booth's testimony but I would disagree with any recommendation which would be that a review be by other than Commissioners.

Let me tell you why, sir.

Mr. Moss. As I recall there was only one of the recommendations made by Mr. Booth that was not unanimous and the recommendation which was not unanimous was not the one we are now referring to.

Mr. MARKS. Well, I do believe, from reading his statement, that you are correct that the executive committee divided on that recommendation and, to the extent that there is a division, I support the review by Commissioners.

Let me give you an illustration.

Mr. Moss. I want to get this straight because here we have the immediate past president of the Communications Bar and yesterday we had the current president of the Communications Bar.

Reading from Mr. Booth's statement, he says:

> Section 3 of H.R. 7333 would repeal section 409(c) of the Communications Act and would permit the Commission to consult with its key employees, such as the General Counsel and Chief Engineer, in certain instances in adjudicatory cases. The association recommends that the present prohibitions be retained. I have been directed to report that this is the only recommendation of the association which was not unanimously approved by our executive committee.

Now, as to the suggestion as to amending H.R. 7333:

> The Administrative Procedure Act contemplates that a hearing examiner shall possess unusual and superior qualifications, ability, and experience.

The statement then recommends that the review panel members be persons at least as well qualified.

This was a unanimous recommendation of the executive committee of the Communications Bar.

You are urging that the position be changed and that only the panel of Commissioners be permitted to undertake this review function in the absence of review by the full Commission.

Mr. MARKS. That is right, Mr. Moss, and I speak for myself on this as a past president. I am not on the executive committee and did not participate in these deliberations, but I have strong feelings, sir, that matters of policy whether you call them routine or not, matters of appeal and review should be acted on by the full Commission because I can conceive of a situation where the Commission might feel that a matter is routine after it had been through a contested hearing and delegate it to hearing examiners.

I will give you an extreme illustration which probably would not take place but we can never anticipate what will ultimately happen.

Let us suppose there was a contest for a television channel between a newspaper, the only newspaper in the town and a group of local people, and the examiner determined that there would not be a monopoly of communications and that the newspaper was better qualified. Now, that might be a decision which you personally might agree with or disagree with. It makes no difference but certainly it is a fundamental question of policy. To allow a board of hearing examiners to review the action of the initial examiner to me would be delegating the authority of the Commission contrary to legislative intent. It is by a review of contested cases that the Commission makes policy and sometimes even the most innocuous hearing case that has been contested will develop a question of policy and I believe the Commissioners, all seven or a panel, should sit on those cases.

Mr. MOSS. Of course, Mr. Marks, if I say at this point that the Commission has developed a policy after all of its hearings, and it has heard each of these cases involving the point you raise in connection with this, I would say at the moment that, on the matter of the control of communications media or creation of a monopoly in the community, the Commission has spoken out with considerable vigor on both sides of the question.

Mr. MARKS. Exactly.

Mr. MOSS. And has overruled one examiner on the same point that it has used to sustain another; so that, I do not think that it results in the producing of policy. It has produced confusion, as I study it, but not policy, unless the confusion is the policy.

Mr. MARKS. But giving it to a review board of examiners is not going to produce any better policy.

Mr. MOSS. I doubt if it produces any more confusion.

Mr. MARKS. Well, we are hoping for a point in our existence, Mr. Moss, where there will be consistent policy if that is possible in an administrative agency.

Mr. MOSS. You strive for utopia.

Mr. MARKS. We strive for utopia, sir.

The CHAIRMAN (presiding). Is there anything further?

I regret, Mr. Marks, that another matter prevented me from being here during the course of your testimony this morning. I am partic-

ularly interested in what you had to say. I certainly will go over this record very carefully. I have been briefed about the general approach that you have taken.

On behalf of the committee, I want to thank you for your appearance and the assistance that you have given in helping to develop this record and explore the problems involved here and in trying to come to a resolution that would be helpful in reaching the objectives for which all of us seem to strive.

The committee will take into consideration your suggestions, particularly in view of the long experience you have had in the past.

Mr. MARKS. Thank you, Mr. Chairman. I am honored by the attention the committee has given me.

I indeed appreciate that and I hope that my suggestions have provoked some thought.

If I can be of any further assistance I will certainly offer it.

Thank you.

The CHAIRMAN. Thank you very much.

I would like for the committee to remain in executive session for a moment.

This will conclude the hearings on this proposed bill.

I might say, for the information of the members and anyone else who is interested, that it is my purpose to hold an executive session the early part of next week by the subcommittee. I want to also advise the committee, not only the subcommittee but all the members of the committee, that I plan next week at such date as can be appropriately arranged, to start a series of executive sessions by the full committee to consider a number of bills that have already been acted upon by subcommittees and are pending before the committee and which need and must have consideration.

(Whereupon, at 11:10 a.m., the subcommittee proceeded to executive session and the hearings closed.)

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