without action an inquiry into the exclusivity matter (BROADCASTING, Sept. 26). And NCTA has appealed that decision to the U.S. Court of Appeals in Washington. The Supreme Court action denying review, he said, "is not the victory it should be because of that outstanding question that has to be resolved."

The ex parte dilemma: Can they or can't they?

One matter that the Supreme Court action leaves clouded in uncertainty is the effect of the lower court's ruling directing the commission to avoid ex parte contacts in all rulemaking proceedings. The commission had appealed that portion of the decision as well as one dealing with the sports-siphoning rules. (The decision dealing with both the movie and sports rules were appealed by NAB and ABC.)

Solicitor General Wade McCree, in urging the Supreme Court to deny review, said that ruling "does not appear to be the law of the circuit." He noted that another panel of the court, in the children's television proceeding, said ex parte contacts are prohibited in rulemakings only if they involve "competing claims to a valuable privilege." And he said differences among the judges of the circuit should be initially resolved by the circuit.

Commission lawyers last week began studying the ex parte question. In effect, they are attempting to determine "the law of the circuit," as that can be inferred from the pay cable and children's programing decisions and from other case law.

But the last word from the general counsel's office on the subject—issued while the Supreme Court's decision on whether to review the pay cable case was pending—was that commissioners and decision-making staff were restricted by the ex parte rules from contacts with interested parties on matters affecting pending rulemakings.

MBS purchaser under FTC gun

Trade commission charges Amway with restraint of trade, price-fixing, but company defends practices

The Federal Trade Commission has accused Amway Corp., the new owner of Mutual Broadcasting System, of engaging in unfair trade practices. It says the company has imposed unfair restraints on its independent distributors and that it has set up "an endless chain" of dealerships among its independent retail sales force.

The 1975 complaint against the Ada, Mich.-based manufacturer and distributor of personal-care and household products could result in an FTC order prohibiting Amway from engaging further in the alleged unfair actions and would require it to disclose to its distributors more information about the nature of their relationship with the company.

Named in the complaint in addition to Amway, which purchased the Mutual Broadcasting System for a reported $18 million (BROADCASTING, Oct. 3), are Amway Distributors Association of the U.S.; the company's chairman, Jay Van Andel, and its president, Richard De Vos.

Hearings have been under way in Washington for the summer, and, according to Amway's attorney, Lee Loevinger, the testimony phase of the initial proceeding is almost completed.

Mr. Loevinger, a former FCC commissioner and before that head of the Justice Department's Antitrust Division, said that thus far in the hearing more than 130 witnesses and 1,500 exhibits have been presented. The official transcript now runs to some 7,000 pages of testimony. Mr. Loevinger said an initial decision (from Administrative Law Judge James P. Timony) is not expected until early next year. After that, he said, the case will "almost certainly go to the commission."

According to the FTC's chief investigator in the case, Joseph S. Brownman, the judge has refused to allow him to discuss the case. Mr. Brownman said, however, that such orders are not unusual during FTC proceedings.

The FTC complaint alleges in five counts that Amway (1) attempted to "fix, maintain, control or tamper with the resale prices" at which the company's independent distributors sold its products; (2) tried to "restrict the outlets through which distributors and dealers may resell their products" and that it may have "coerced" its distributors "to refrain from soliciting the business of retail customers and commercial accounts of other distributors"; (3) sought to "restrict the advertising and promotional activities in which distributors and dealers may or would otherwise engage"; (4) falsely represented to potential distributors that "substantial income or profit" could be made through "multiplication, duplication and geometrical, unlimited or endless chain increases in the number of distributors or dealers recruited," and (5) falsely represented "directly or by implication" that it is easy to recruit persons for the Amway sales force and that distributors "can anticipate or will receive substantial profits or earnings."

According to Mr. Loevinger, the evidence presented thus far in the hearings has failed to uphold the commission's allegations. He admitted, however, that the FTC's case at this point rests heavily on the "pyramid-type operation" outlined in count four of the complaint. It is "not an endless chain," said Mr. Loevinger. He also called it a "viable, practical" business practice, the "kind of thing that business does."

On the other counts of the complaint, Mr. Loevinger said the testimony was "uniform" that Amway did not engage in vertical price fixing. He said Amway has made "no attempts" to control the advertising of its distributors except with regard to their use of Amway trademarks. "You have to control your trademarks," he said.

Concerning count two of the complaint, Mr. Loevinger acknowledged that in the