In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 717

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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EXHIBITS TO BRIEFS OF COLUMBIA BROADCASTING SYSTEM, INC. IN COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RELEVANT DOCKET ENTRIES

Radio Television News Directors Association, et al. v. *Federal Communications Commission,* No. 16369

7–27–67	Docketed cause
7–27–67	Filed original and 4 copies joint petition to review an order of the F.C.C., service
8– 8–67	Filed original and 4 copies supplement to joint petition to review an order of F.C.C., service
9– 5–67	Filed original and 4 copies motion to accept certified index to record
9– 7–67	Entered order granting motion of September 5, 1967
9– 8–67	Filed index to record per order of 9–7–67
10– 2–67	Filed original and 4 copies joint motion for approval of stipulation as to procedural schedule, affidavit and service
10– 2–67	Entered order granting procedural schedule for filing of briefs and appendix
10–23–67	Filed original and 4 copies motion to consolidate for the purpose of briefing, affidavit and service

[Subsequent entries set out below]

National Broadcasting Company, Inc. v. *United States of America and Federal Communications Commission,* No. 16498

10–14–67	Docketed cause (Transfer from Second Circuit)
10–14–67	Filed original file of U.S.C.A.–2 per order of September 25, 1967
10–23–67	Filed original and 4 copies motion to consolidate for the purpose of briefing, affidavit and service

[Subsequent entries set out below]

Columbia Broadcasting System, Inc. v. *United States of America and Federal Communications Commission,* No. 16499

10–14–67 Docketed cause (Transfer from Second Circuit)
10–14–67 Filed original file of U.S.C.A.–2 per order of September 25, 1967
10–23–67 Filed original and 4 copies motion to consolidate for the purpose of briefing, affidavit and service

[Subsequent entries set out below]

The following entries appear with substantial uniformity in the docket sheets for each of Nos. 16369, 16498 and 16499:

10–24–67 Entered order that cases be consolidated for briefing and argument, etc.
11–21–67 Filed original and 4 copies motion of petitioner for leave to file a separately bound exhibit with brief, service
11–21–67 Entered order granting leave to file separately bound printed exhibit with brief
11–21–67 Filed 30 copies brief for petitioner (National Broadcasting Co.), service
11–21–67 Filed 30 copies printed copies exhibit to brief for petitioner
11–21–67 Filed 30 copies petitioner brief, service
11–21–67 Filed original and 4 copies petition of King Broadcasting Co. for leave to file brief as amicus curiae, service
12– 5–67 Filed 30 copies of amicus curiae brief
12– 6–67 Entered order granting motion of November 21, 1967
12–14–67 Filed original and 4 copies motion to extend time to file respondent brief to January 22, 1968, affidavit and service
12–18–67 Entered order granting motion of December 14, 1967
12–18–67 Filed original and 4 copies motion of respondent to hold petition for review in abeyance
12–18–67 Filed original and 4 copies motion of respondent to correct motion for extending time to file brief, affidavit and service

12–29–67	Filed original and 4 copies answer to motion to hold cases in abeyance
1– 2–68	Entered order granting motion of December 18, 1967, etc.
1– 3–68	Filed motion for certificate of record, affidavit and service
1– 3–68	Entered order granting motion of January 3, 1968
1– 4–68	Filed original and 4 copies designation of record for use in Supreme Court in connection with petition for certiorari, service
1– 4–68	Filed copy of record of F.C.C. and transmitted to Supreme Court in connection with petition for certiorari (per order)
1– 4–68	Entered order granting motion of January 4, 1968
1–12–68	Filed notice of docketing in Supreme Court as No. 993
1–30–68	Filed original and 4 copies motion to transfer transcript of record to F.C.C., service
2– 5–68	Filed certified copy order of Supreme Court denying certiorari
2– 8–68	Entered order granting motion of January 30, 1968
2– 8–68	Filed 30 copies of petitioner brief, corrected, and service
2– 9–68	Forwarded record to F.C.C. per order of February 8, 1968
2–23–68	Filed original and 4 copies of F.T.A.S. motion to file a brief and participate in oral argument as amicus curiae, affidavit and service
2–27–68	Filed original and 4 copies motion to extend time to file respondent brief to March 4, 1968, affidavit and service
2–27–68	Entered order granting extension of time to file respondent brief to March 4, 1968
2–27–68	Entered order granting leave to National Academy of Television Arts and Sciences to file brief as amicus curiae, etc.
2–28–68	Filed original and 4 copies of motion for leave to file an amici curiae brief and appearance for the United Church of Christ, affidavit and service
2–29–68	Filed 30 copies of Comm. of United Church of Christ, et al. brief amicus curiae
2–29–68	Entered order granting motions of February 28, 1968

3– 4–68 Filed original and 4 copies of motion of respondent to hold cases in abeyance and to authorize further proceedings, service

3–13–68 Filed original and 4 copies response to motion to hold cases in abeyance and to authorize further proceedings, affidavit and service (N.B.C.)

3–14–68 Filed original and 4 copies response to motion of respondent to hold cases in abeyance and to authorize further proceedings, affidavit and service (C.B.S.)

3–14–68 Filed original and 4 copies answer of petitioner to motion to hold cases in abeyance (Radio Television News Directors Association, et al.)

3–22–68 Entered order denying motion of March 4, 1968 and that Government brief be filed on April 1, 1968 and petitioner brief within fifteen days thereafter, etc.

3–22–68 Filed original and 4 copies of respondent reply to petitioner response to hold cases in abeyance, etc., affidavit and service

3–22–68 Filed original and 4 copies amendment to answer of R.T.N.D.A. to motion to hold cases in abeyance, etc., affidavit and service

4– 1–68 Filed original and 4 copies motion for enlargement of time to argue orally and to permit separate counsel to argue for petitioners in each case, affidavit and service

4– 1–68 Filed 30 copies of respondent brief

4– 2–68 Entered order granting motion of April 1, 1968 (oral argument set for 1½ hours for each side)

4–4–68 Filed original and 3 copies of respondent motion for acceptance of supplemental index to official record, affidavit and service

4– 8–68 Entered order granting motion to file certified copy of supplemental index

4– 8–68 Filed certified copy of supplemental index

4–12–68 Filed 30 copies of amicus curiae brief (N.A.A.S.)

4–15–68 Entered order granting extension of time to file reply brief for N.B.C. to April 19, 1968

4–15–68 Filed original and 4 copies of motion to extend time to file reply brief of N.B.C. to April 19, 1968, affidavit and service

4–16–68	Filed 30 copies of Columbia reply brief
4–16–68	Filed 30 copies of R.T.V.N.D. reply brief
4–16–68	Filed original and 4 copies motion of petitioner for leave to file supplemental exhibit, affidavit and service (16498 only)
4–17–68	Entered order granting motion of April 16, 1968 (C.B.S. supplemental exhibit)
4–18–68	Filed 30 copies of reply brief for N.B.C., service
4–17–68	Filed 30 copies of supplemental exhibit to reply brief for C.B.S.
4–19–68	Filed 30 copies of joint appendix, service (16369, 16498–99)
5–14–68	Filed original and 4 copies motion of amici curiae to present oral argument, affidavit and service
5–14–68	Filed original and 4 copies opposition to motion for leave to present oral argument, affidavit and service
5–15–68	Entered order denying motion of amici curiae
5–17–68	Heard and taken under advisement (16369, 16498, 16499)
9–10–68	Entered judgment that the FCC order adopting the personal attach and political editorial rules, as amended, be set aside, in accordance with the opinion of this Court filed this day
9–10–68	Entered opinion by Judge Swygert
9–30–68	Filed original & 3 copies motion of respondent to stay mandate, affidavit & service (16369–16498)
10– 3–68	Filed original & 4 copies of petitioner's answer to motion of respondent to stay mandate, affidavit & service (16369–498)
10 7–68	Filed original & 3 copies of opposition to motion for stay of mandate, affidavit & service (16369–498)
10–11–68	Entered order granting motion of 9–30–68 per rule 41(b) (16369–16498)
11–12–68	Filed notice of docketing in Supreme Court as No. 71[7] (16369–498)
1–17–69	Filed order of Supreme Court granting certiorari entered 1–13–69

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Nos. 16,369, 16,498 and 16,499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

COLUMBIA BROADCASTING SYSTEM, INC., *Petitioner*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

NATIONAL BROADCASTING COMPANY, INC., *Petitioner*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

On Petitions to Review an Order of the Federal Communications Commission

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JOINT APPENDIX

Summary of Proceedings Below

1. F.C.C. Notice of Proposed Rule Making, adopted April 6, 1966, released April 8, 1966.

2. F.C.C. Order extending time for filing comments from May 16, 1966, to June 20, 1966, and for filing reply comments from May 31, 1966 to July 5, 1966, released May 4, 1966.

3. F.C.C. Memorandum Opinion and Order adopting Rules, adopted July 5, 1967, released July 10, 1967.

4. F.C.C. Memorandum Opinion and Order amending Rules, adopted August 2, 1967, released August 7, 1967.

5. F.C.C. ERRATUM to its Memorandum Opinion and Order of August 7, 1967, released August 9, 1967.

6. F.C.C. Memorandum Opinion and Order revising Rules, adopted March 27, 1968, released March 29, 1968.

Notice of Proposed Rule Making

1 Before the

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

Docket No. 16574

In the Matter of

Amendment of Part 73 of the Rules to provide procedures in the event of a personal attack or where a station editorializes as to political candidates

Notice of Proposed Rule Making

By the Commission: Commissioner Hyde abstaining from voting; Commissioner Bartley dissenting to the issuance of a proposal that a rule be adopted in this area; Commissioner Loevinger absent.

1. Notice of Proposed Rule Making is hereby given in the above-entitled matter.

2. The "fairness doctrine" provides that if broadcast licensees permit their facilities to be used for the discussion of a controversial issue of public importance, they must afford a reasonable opportunity for the presentation of conflicting views. The basic enunciation of this doctrine is contained in the Commission's 1949 *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246. Subsequently, the doctrine was recognized by Congress in the 1959 amendments to Section 315 of the Communications Act (Public Law 86-274). In the Editorializing Report, the Commission stated that ". . . elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station." (p. 1258). This statement embodies a part of the fairness doctrine known as the "personal attack" principle, which is applicable "where there are statements, in connection with a controversial issue of public importance, attacking an individual's or group's integrity, character or honesty or

like personal qualities." Public Notice of July 1, 1964, (Fairness Primer) FCC 64-611, 29 F.R. 10415, page 17.

3. In its rulings the Commission has set forth the obligation of a station licensee when a personal attack occurs over his facilities, i.e., the licensee must send a transcript or summary of the attack to the individual or group attacked, together with an offer of time for an adequate response. See *Clayton W. Mapoles,* 23 Pike and Fischer, R.R. 586 (1962); *Billings Broadcasting Co.,* 23 Pike and Fischer, R.R. 951 (1962); *Times-Mirror,* 24 Pike and Fischer, R.R. 404 and 407 (1962); and *Springfield Television Broadcasting Corp.,* 4 Pike and Fischer, R.R. 2d 681, 685 (1965). We notified all licensees of their responsibility in this
2 respect, by transmitting to them the July 25, 1963 Public Notice (FCC 63-734) and the 1964 Fairness Primer, *supra.* Despite such notification and the Commission's rulings, the procedures specified have not always been followed even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now propose to codify the procedures which licensees are required to follow in personal attack situations. Two important purposes will be served by such codifications. First, it will emphasize and make more precise licensee obligation in this imporant area. Second, it will assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed.

4. We have used the phrase, "in appropriate circumstances", because we recognize that in some instances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance. The proposed rules are not designed to answer such questions. When they arise, licensees will have to continue making good faith judgments based on all of the relevant facts

and the applicable Commission rulings and interpretations. We emphasize that it is not our intent to use the proposed rule as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle. The rules are directed to situations where the licensees did not comply with the requirement of the personal attack doctrine as to notification and offer of time to respond, even though there could be no reasonable doubt under the facts that a personal attack had taken place (e.g., a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist).

5. As indicated, the proposed rule, with minor changes, codifies existing procedures in personal attack situations. Paragraph (a) places specific procedural responsibilities on the licensee over whose facilities a personal attack has been broadcast. A licensee would be required to send a tape, transcript or summary of the attack to the attacked person or group within a reasonable time and in no event later than one week after the attack.[2] The one-week outer time limit thus does not mean that such a copy should not be sent earlier or, indeed, before the attack occurs, particularly where time is of the essence. Along with the copy, the licensee would be required to send the attacked person or group a notice stating when the attack occurred and containing an offer of a reasonable opportunity to respond. This is all that would be required by the rule. Other matters would be left to the reasonable judgment of the licensee and to good faith negotiations. For example, the licensee could impose a reasonable time limit in which the person notified would be required to re-

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[1] In appropriate cases, licensees can and should promptly consult the Commission for interpretation of our rules and policies.

[2] Where a licensee determines that a personal attack has not occurred but recognizes that there may be some dispute concerning this conclusion, he should keep available for public inspection, for a reasonable period of time, a tape, transcript or summary of the broadcast in question.

spond. The licensee might make inquiries concerning willingness to pay along the lines described in our recent ruling in *Red Lion Broadcasting Co., Inc.*, 1 FCC 2d 1587, part. 1 (1965). The rule again is not designed to cover any of these other facets. Guidance in these respects would be available in the Commission's interpretative rulings, and any controversies would be considered by the Commission in the context of specific factual situations.

6. We have excluded from the proposed rule personal attacks on foreign groups or foreign public figures. Excluded also are situations where personal attacks are made by political candidates, their authorized spokesmen, or those associated with them in the campaign against other candidates, spokesmen, or persons associated with them in the campaign. The exclusion of attacks on foreign leaders follows present policy. Note, page 18, Fairness Primer, *supra*. The exclusion of attacks by candidates against other candidates recognizes that the "equal opportunities" provision of Section 315—and not the personal attack doctrine—is generally applicable to this situation. Finally, the fairness doctrine may, of course, be applicable to particular factual situations in the political broadcast field. The necessity for notice and other procedures in the event of a personal attack may be different in this field. We shall continue our present practice of interpretative rulings given in specific cases in the political broadcast area. With further experience, we may be in a position to delineate more precisely licensee responsibility in this area.

7. We also propose a rule to implement the *Times-Mirror* ruling as to station editorials endorsing or opposing political candidates. Such political editorials are increasing,[3] with some indication of failure to comply with the
4 corresponding obligation to observe the *Times-Mirror* requirement. The rule would require that the appro-

[3] In 1960, 53 Standard broadcasting and 2 television stations carried political editorials during the general elections. Their number had increased to 103 standard broadcasting and 13 television stations by 1964.

priate candidate (or candidates) be informed of the station's editorial opposing his (or their) candidacy or supporting the candidacy of a rival, and be offered reasonable opportunity to respond. We have used the phrase "reasonable opportunity" here and in the proposed personal attack rule because such opportunity may vary with the circumstances; in many instances, comparable opportunity in time and scheduling is clearly appropriate. But in some, where the endorsement involved may be one of many and involve just a few seconds time, reasonable opportunity may call for more than a few seconds if there is to be a meaningful response. See *Final Report of the Senate Committee on Commerce,* Sen. Report 994, Part 6, 87th Cong., 2d Sess., p. 7. We also propose that the notification time in this respect be within 24 hours of the editorial; time is much more of the essence in this field, and there would appear to be no reason why the licensee could not readily inform the candidate of the editorial. Indeed, the licensee might again make the notification required before the broadcast of the editorial; such prior notification and opportunity for response would be required in the case of a political editorial broadcast close to the election. As in the case of the personal attack proposal, the rule does not purport to deal with all facets of the *Times-Mirror* ruling. The licensee could impose reasonable limitations, such as the appearance of a spokesman for the candidate, in order to avoid any Section 315 "equal opportunities" cycle; the matter of time of scheduling would also be left to reasonable judgment and negotiation. Finally, the rule is directed only to station editorials endorsing, or opposing, political candidates. The applicability of *Times-Mirror* to other situations would be left to rulings in particular factual settings.[4]

8. Pursuant to applicable procedures set out in Section 1.415 of the Commission's Rules, interested parties may

[4] Thus, *Times-Mirror* itself did not involve a station editorial. The *Times-Mirror* situation, since it did involve personal attacks, would come within paragraph (a) of the proposed rule.

file comments herein on or before May 16, 1966, with reply comments due on or before May 31, 1966. In reaching its decision herein, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

5 9. Authority for adoption of the rules proposed herein is found in Sections 4(i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended.

10. In accordance with the provisions of Section 1.419 of the Rules, an original and 14 copies of all written copies shall be furnished to the Commission.

FEDERAL COMMUNICATIONS COMMISSION

(SEAL) BEN F. WAPLE
Secretary

Attachment
Adopted: April 6, 1966
Released: April 8, 1966

6 APPENDIX

Section 73.123 is added to read as follows:

§ 73.123 Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (i) a script or tape (or an accurate summary, if a script or tape is not available) of the attack; (ii) notification of the date, time and identification of the broadcast; and (iii) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) shall be inapplicable to attacks on foreign groups or foreign public figures or where such attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign.

Note: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See Section 315(a) Applicability of the Fairness Doctrine, 29 F.R. 10415.

(c) Where a licensee, in an editorial, endorses or opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to the other qualified candidate or candidates for the same office (i) a script or tape of the editorial; (ii) notification of the date and the time of the editorial; and (iii) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities.

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13 **Comments of International Typographical Union (AFL-CIO)**

1. These comments are filed on behalf of International Typographical Union (AFL-CIO), a labor organization headquartered in Colorado Springs, Colorado with a current membership of over 100,000. The International Typographical Union was established in 1852 and is the oldest labor organization in the United States.

2. The International Typographical Union is particularly interested in the fairness doctrine because of the use of the public airwaves in connection with labor disputes and the fair treatment of public issues generally by broadcasters is an essential element of the rights of the citizen in a democ-

racy. The International Typographical Union long ago adopted a fairness doctrine for its own elections whereby candidates for international office receive free space in *The Typographical Journal,* giving each candidate an equal opportunity to make his views known to the members. Therefore, when we endorse, as we do, the Commission's fairness doctrine, we know whereof we speak. Democracy is promoted by giving candidates an equal oportunity to disseminate their views in public elections as well as in union elections.

3. We therefore endorse and urge adoption of the proposed rule codifying the fairness doctrine. We envision that broadcasters will complain that this rule deprives them of their rights under the First and Fifth Amendments, but they forget all too easily that a broadcast license is not a property right and that they hold these licenses in trust for the public and not primarily for their own financial welfare.

Nor is there a First Amendment right to use the pub-
14 lic airwaves to foreclose opposing views from obtaining equal public audience.

4. We urge that the proposed rule should be expanded to embody also the statutory policy requiring broadcasters to open their facilities to public groups to state their views on issues of importance. Promulgation of such a provision simultaneously with or as a part of the proposed rule is necessary lest the rule have the undesired effect of discouraging broadcasters from discussion of public issues.

5. Such an amendment to the proposed rule would be consonant with what Congress itself did in amending § 315 in 1959. At the same time that Congress reaffirmed the equal time doctrine, Congress said:

> "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from

> the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.''

This provision was inserted lest the requirement for equal time be read to discourage the broadcasting of discussion of public issues. The same reason militates in favor of a similar provision in the Commission's rule. Indeed, we think that the language the Congress itself has chosen would be appropriate for the rule.

6. We are particularly concerned with this issue because of the difficulties which we and other unions have experienced in publicizing our position in labor disputes. Many broadcasters also own newspapers and for that reason, or perhaps because they are themselves employers, generally favor the employer's position against that of the union in any labor dispute. Moreover, in many communities, particularly in the South, the major media of communication fail to provide the public with the union's side of the issue. They fail to do so either due to their own views or because they fear reprisals from advertisers. When a newspaper is one-sided, its failure to fulfill its responsibilities to the public is protected by the Constitution; nor would we have it otherwise. However, the public airwaves are a material resource which in a democracy can have no more important use than to promote the exchange of views on matters of public importance. The failure of other media of mass communication to deal adequately with labor disputes serves rather to increase than to decrease the obligations of broadcasters lest the public remain ignorant, or what is perhaps worse, hear only one side of the story.

7. A current situation in Lafayette, Louisiana is illustrative of this problem. Since December 1964 there has been a strike by Lafayette Typographical Union No. 832, one of

the affiliates of the International Typographical Union, against the publisher of the Lafayette Advertiser, a daily newspaper which is the only newspaper in the Lafayette area. There has been a refusal of this company to recognize the union, a refusal which is presently the subject of a complaint against the company issued by the General Counsel of the National Labor Relations Board. The issue is obviously one of great public importance and interest in the community and for obvious reasons the struck newspaper is not available to the union as a medium for the expression of its views. Accordingly, the union has made strenuous efforts to obtain air time on the local broadcasting stations. It offered to submit the script for its proposed program for review by the station. In every instance the union was denied the opportunity to purchase the time. The dereliction of the broadcasters in Lafayette is noteworthy in this rule-making proceeding because it is symptomatic of a prevalent practice contrary to the public interest as defined by Congress. Local counsel has written this Commission with specific reference to that case and we trust that these broadcasters will soon be disabused of their excessively narrow view of their duty. However, other broadcasters doubtless share their misconception and the proposed rule's emphasis on equality may mislead others into believing that a neutral silence respecting controversial issues is the extent of their duty. The Lafayette situation of total blackout of the union's views in a labor dispute has recently been duplicated in Sioux Falls, South Dakota and Pensacola, Florida.

8. We urge, therefore, that the Commission adopt its proposed rule, but amending it as follows:

1. Change title to read "Section 73.123—Personal Attacks; Political Editorials; Obligation to Encourage the Discussion of Controversial Issues."

16 2. Add a new paragraph as follows:

"Nothing in the foregoing rule shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under the Communications Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Respectfully submitted,

/s/ GERHARD P. VAN ARKEL
Gerhard P. Van Arkel

/s/ GEORGE KAUFMANN
George Kaufmann

1730 K Street, N.W.
Washington, D. C., 20006
Attorneys for International Typographical Union (AFL-CIO)

VAN ARKEL & KAISER
Of Counsel

May, 1966

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WPSD-TV
P. O. Box 1037
PADUCAH, KENTUCKY 42001

May 9, 1966

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D. C. 20554

Dear Mr. Waple:

This letter is in response to the Commission's Public Notice B, Report No. 5947, dated April 8, 1966, in which the commission invited comments on its proposal to incorporate the "fairness doctrine" in its broadcast rules.

The incorporation of this new rule might well bring about a result quite different from that intended.

The apparent purpose of the new rule is a good one: to insure that broadcasters treat both sides of a controversial issue or campaign fairly.

However the proposed rule includes some broad language which, in its untried state, could prove quite uncertain to a conscientious broadcaster.

For instance, the proposed rule would provide that when "an attack is made upon the . . . character . . . of a group," the licensee shall furnish a script, tape or summary to the group and offer an opportunity to respond.

A broadcaster who has encouraged lively discussion of important public issues can easily imagine the following:

A Republican saying that Democrats are war-mongers (or a Democrat saying that Republicans are war-mongers).

A John Birch society member saying that pacifists are spineless.

A liberal saying that conservatives are selfish.

A conservative saying that liberals are reckless.

18 The broadcaster must then decide whether a charge that someone or some group is reckless, selfish, spineless or a war-monger is "an attack upon the character or like personal quality" of that person or group.

And if he decides that there was such an attack, he must determine who among the liberals, conservatives, pacifists or party members should receive the tape and an offer of time to respond.

We realize that the broadcaster has the obligation to inform aggrieved persons of an attack, and to offer the use of his facilities for a response. But this obligation is already implicit in the Fairness Doctrine, and no further action is necessary to satisfy it.

Under the broad language of an untested new rule, however, the broadcaster may see himself confronted with a mammoth task of providing tapes or scripts to far-flung people with little assurance that he is even then satisfying the rule.

It is not likely to encourage the presentation of spirited public debate on volatile issues. And it will not provide any new rights to persons or groups who might be attacked.

We therefore respectfully recommend that proper handling of controversial issues and campaigns be left to fair-minded broadcasters and commissioners without complex new rules.

Sincerely,

/s/ FRED PAXTON
Fred Paxton
Managing Director

FP/cc

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Peace Valley Road
Towaco, New Jersey
May 11, 1966

Federal Communications Commission
Washington, D. C. 20554
Attention: Mr. Ben F. Waple,
Secretary

Gentlemen:

Attached is an original and 14 copies of comments filed in the matter of proposed Commission rulemaking in Docket 16574. While my general response is favourable to the proposed rule changes, I respectfully offer suggestions aimed at making the significance of Commission effort more meaningful.

Should the Commission find that further comment in the matter of instant concern would be useful, I should

appreciate the opportunity to place myself at your disposal for this purpose.

Very truly yours,

/s/ JOSEPH H. CHISLOW
Joseph H. Chislow

Att.
Comments Docket 16574

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20 **Comments for File on Proposed Rulemaking in Docket No. 16574**

Pursuant to solicitation by the Commission for comment by interested persons in the matter of proposed rulemaking in the above listed Docket, comment thereon is herewith respectfully filed.

No exception is taken in respect to Commission intent to regulate abuses in the application of the "fairness doctrine" by broadcast station licensees. Rather, flagrant broadcaster disregard for the elementary principles of fairplay have become so frequent in recent years, as almost to argue that militance to protect free speech from becoming license, is long overdue. This is not a criticism of the Commission, it is instead an expression of admiration for the patient and long-suffering tolerance of the FCC toward the mounting disregard by broadcasters for the principles enunciated by the Congress as stated in the Conference Report on the 1959 Amendment to Section 315 (a) to wit:

> "Nothing in this sentence shall be construed as relieving broadcasters—from the obligation imposed on them under this act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Comments of Joseph H. Chislow

The undersigned wishes to congratulate the Commission for their proposal to codify the serial behavior required of broadcasters who use their public interest, station-licensed facilities to air personal attacks on individuals or groups.

To the extent that the proposed rulemaking seeks to establish criteria, calling for positive implementation of the "fairness doctrine", no other expression but full concurrence is intended. However the language of § 73.123 (a) neglects aspects of application to which the body of the instant rulemaking proposals alludes.

21 The Commission has defined the personal attack principle as applying to the besmirchment of the "honesty, character, integrity or like personal quality of an identified person or group." Yet a fundamental technique of the personal attack art is to quote incontextually from comments elicited from persons or groups on subjects not necessarily related to the subject at broadcast issue and by film-clip or tape-editing, to present those comments as the instant and, implicitly, the total attitude of persons or groups to controversial issues of public importance. Editorializing can be made to appear as solely the derisive appearance on the face of a program editorialist. Admittedly, it is difficult to restrain the facial contortions of commentators on issues of public importance. A large part of their function is to "act" before the televiewing audience and, if their sole inflammatory contributions to the viewing public were attributable to facial mobility, little harm to public opinion would be likely.

But, when the incontextual quotation ploy is verbally exploited, through what can only be regarded as the primary opinion forming medium in the United States, serious personal attacks is deliberately possible and often occurs.

A typical case of this precise sort is readily available to illustrate the practice. On June 10, 1964, a national TV

network carried a widely viewed, sponsored, one hour, network documentary on prime time, entitled "Murder and the Right to Bear Arms."

A purportedly reportorial, rather than editorial presentation, it nonetheless featured a highly covered bias favouring the views of proponents of stringent firearms regulation. The design of the program was so deliberate as to discredit the case for the opponents of stringency in this matter. Further, it served as a blatant pedestal for developing public fervour for the passage of the "Dodd (firearms registration and control) Bill" at a time when our citizenry was justifiably incensed over the assassination of our President.

To accomplish this objective, it sought to ridicule the officers and membership of the National Rifle Association of America. Through the device of the incontextual film-clip the broadcasters were able to pit "expert" rebuttal against the pre-collected, pre-canned expression of the incontextual and unresponsive views of the NRA, to controversial issues of public importance. Of course, since the program was billed as reportorial, no access for personal attack response was ever provided by the network.

22 In direct consequence of this propaganda technique, more reminiscent of Nazi Germany and Communist extremism, than hopefully of our own United States, opinion generation has led to impactive hysteria, receptive to a rash of stringent anti-gun laws, either now on the books, or well on the way to that end, in communities and states across the nation.

The example cited is offered because it is believed to be a familiar manifestation of an abuse with which the Commission must come to grips, if the blessing of freedom of expression is not to become a monster engine, ordering its own destruction.

Comments of Joseph H. Chislow

In expressing sympathy for the problem which the Commission faces, it is appreciated that no mechanical formula within a fairness doctrine will always work, if scheming evasion is deliberately planned. The dilemma of what to do when seeking to encourage freedom of expression without encouraging license, cannot easily be solved when one deals with intangibles of right or wrong, of fairness or unfairness, of reasonable opportunity for unprejudiced argument on all sides of a public issue, as opposed to a tolerated capability for unreasonable, rigid, capricious suppression or distortion of an opponent view to the benefit of the proponent position.

The Commission is uniquely qualified and indeed, uniquely obliged, to give leadership to the resolution of a code of broadcaster ethics. In proposing authority now to deal with that codification, the Commission is properly exercising the will of the Congress. To implement that will along the lines herein designated, calls for no more than a minor clarification to the language of your proposed rulemaking. That modification is herewith respectfully offered in the hope that it will stimulate your expression, if not in the precise words suggested, at least toward the objectives sought.

The need, not provided for in your proposed rulemaking to enunciate "reasonable time" in terms which will not make ridiculous a formula 7-day response to an issue to be publicly decided on the day following the airing of a broadcast editorial, is obvious. Equally obvious, it is trusted, is the need to provide for network responsibility for a network-incurred personal attack obligation, as the logical alternative to individual station response to conceivably in excess of a hundred network station licensees, which distribute, but do not initiate a personal attack.

Clearly, the privilege of response to each station's
23 individual responsibility under § 73.123(a) could be more burdensome than the attack. In defining the

mutual responsibilities of member stations in a network, Commission codification in this matter would be made meaningful.

Respectfully submitted,

/s/ JOSEPH H. CHISLOW
Joseph H. Chislow

Att.
Appendix 73.123 as modified

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24 APPENDIX

73.123—(a) When, during the—an identified person or group, (or that person or group is held to ridicule by opponent presentations inflammatory to the public view of the person or group, or when incontextual quotations attributable to that person or group are unfavorably presented as the specific attitude or response of that person or group to a public issue), the Licensee shall—

b(1) Reasonable time shall be understood to be governed by the timeliness of public response to a controversial issue of public importance. Where public opinion may be expected to be influenced in matters affecting legislation, or to exert influence on legislation, editorial attacks calling for the serial performance of (i), (ii) and (iii) by the broadcaster, shall not occur unless there is sufficient reasonable time for the person or group attacked to take timely access to the station licensee's facilities for considered response.

b(2) It shall be further understood that where a personal attack or political editorial adverse to a person or group is carried by affiliates of a network, the obligation for conformity with paragraph (b) shall rest with each station licensee involved and shall call for compliance with the

Letter of the National Council of the Churches of Christ

provisions of its requirements, by providing adversary access to the same network facilities as were employed in the initiating personal attack or political editorial.

(c) Formerly (b) unchanged.

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25 NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.

475 RIVERSIDE DRIVE, NEW YORK, N.Y. 10027

May 16, 1966

The Chairman
Federal Communications Commission
Pennsylvania Avenue at 12th Street
Washington, D. C.

Dear Mr. Chairman:

With regard to Report No. 5947, dated April 8, 1966, a proposal of the Commission to amend broadcast rules in matter of personal attacks and political editoralizing, the Broadcasting and Film Commission of the National Council of the Churches of Christ in the U.S.A. has considered this matter and has taken action in support of the Commission's proposal.

We believe that this portion of the so-called Fairness Doctrine has been in fact a guiding principle for rulings of the Commission for some time. Further, we believe the provision requiring licensees to notify any person or group whose character, integrity, or like personal qualities is attacked on their station is entirely consistent with the public interest. Finally, we believe that requiring a licensee to offer a reasonable opportunity to persons attacked to respond over his facilities places proper responsibility upon the licensee and does not cause him undue hardship.

Comments of Laborers' International Union

For these reasons we encourage the Commission to incorporate these elements of the Fairness Doctrine into its broadcasting rules.

Sincerely,

/s/ WILLIAM F. FORE
William F. Fore

WFF: CP

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26 **Comments of Laborers' International of North America**

These comments are filed on behalf of Laborers' International Union of North America (AFL-CIO), a labor organization headquartered in Washington, D.C., with a current membership of approximately half a million. This International Union was established in 1903 and is the sixth largest in the AFL-CIO, and is the largest per capita paying affiliate of the Building Construction Trades Department.

This labor organization is especially interested in the fairness doctrine because of the ever increasing use of the public air waves in connection with organizational campaigns and the presentation of labor-management matters, to the public. The concept of the citizens' "right to know" all sides of issues is part and parcel of the fairness doctrine and an essential ingredient in a democratic society.

In the course of our organizational activities, particularly in the South, we have come to know first-hand what one-sided communication media can be. It is a well known fact that the organized business community has accesses to local "civic" organizations, local newspapers, local Chamber of Commerce, and law enforcement groups, etc. The National

Labor Relations Board has examined and set aside representation elections where these "local" forces operated to deny employees the right to freely exercise their choice in representation elections in industries affecting commerce. In a recent decision the NLRB set forth the rule that prior to a representation election all interested parties are entitled to the list of employees' names and addresses so that an equal opportunity can be given to the union to urge the employees and respond to the employers' and communities' propaganda as well as to tell its own story. Thus, efforts are being made to equalize the communication channels which presently favor the entrenched establishments, and we submit that the Commission's
27 fairness doctrine would constitute an important step in the direction of assuring that one of the major media of communication is kept open to provide the public with the union's side of the issue.

It is unquestioned that a broadcast license is clothed with the "public interest" and is granted in trust not for the licensee's personal profit or to serve a divided interest, but rather, as the Congress itself stated in amending Section 315 in 1959, "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

We urge, therefore, that the Commission adopt its proposed rule, but amending it as follows:

1. Change title to read "Section 73.123—Personal Attacks; Political Editorials; Obligation to Encourage the Discussion of Controversial Issues."

2. Add a new paragraph as follows:

"Nothing in the foregoing rule shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries,

and on-the-spot coverage of news events, from the obligation imposed upon them under the Communications Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Respectfully submitted,

/s/ ROBERT J. CONNERTON
Robert J. Connerton
General Counsel
Laborers' International Union of North America, AFL-CIO
905 Sixteenth Street, N.W.
Washington, D. C. 20006

May 1966

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29 **Statement to the FCC on the Proposed Rule on Personal Attacks and Political Editorials From Hallock Hoffman, President of the Pacifica Foundation**

June 15, 1966

To: The Federal Communications Commission

The Pacifica Foundation, as owner and operator of three non-commercial radio stations, is grateful for the opportunity to comment on the proposed rule, under the existing "fairness doctrine," in respect to the obligations of licensees of the Federal Communications Commission in cases of attack on persons and in cases of the endorsement or opposition to the candidacy of a legally qualified candidate for public office.

THE PACIFICA FOUNDATION SUPPORTS THE FAIRNESS DOCTRINE

On its face the fairness doctrine is reasonable. No one argues against fairness, and therefore every broadcaster

ought to support the fairness doctrine if it actually achieves fairness. Arguments against the doctrine might once have been based on some notion of illegality or unconstitutionality of the doctrine, as exceeding the powers of the FCC or the government; or as improperly invading the rights of licensees. This line of argument is now dead. The constitutional status of the FCC and the government in respect to regulation of broadcasting has been firmly established. The differences between broadcasting and other forms of public affairs communications, like newspapers, are generally admitted—despite ritualistic outcries from time to time by leaders of the broadcasting "industry"—and most sensible people recognize that broadcasting must be regulated even to exist. Further, it is becoming clear from a line of cases before the Supreme Court, under the general theme of "state action," that broadcasters may be regarded as exercising governmental power through grant of licenses, and have therefore some of the obligations of government to treat those who seek their services without improper discrimination.

Broadcasters as federal licensees are franchised to use a communication medium that has to be under public control; the FCC, as agent of the government charged with allocating the right to use the limited frequencies to some and not to others, must regulate the licensees in the general interest of the public. No argument against the fairness doctrine can be made on the basis of legal or constitutional principle. Any argument against the doctrine, and especially against the proposed rules in respect to personal attacks or political editorials, must therefore be on practical grounds. It is Pacifica's belief that the burdens imposed by the proposed rules are not too heavy, that the purpose served by the rules is worth the cost in administration, attention and air time, and that the rules should be adopted.

Statement of the Pacifica Foundation

THE FAIRNESS DOCTRINE IS PRACTICABLE

I do not mean to discount the cost of conducting a broadcasting station under these rules. The Pacifica stations are not typical, since our costs do not include those of the commercial broadcasters who must give away air time they might otherwise sell to comply with the rule. Our
31 costs, however, are severe. We are small; we have to raise as donations every dollar we spend; we have to skimp merely to survive; and we have to operate with short and often overworked staffs. Our interests are broad, and we devote a large share of our broadcast time to "public affairs" programs, as contrasted to the records and wire-service newscasts that make up the bulk of the broadcast day for many smaller commercial stations. As a result, our exposure to the operation of the fairness doctrine and the proposed rules is greater than that of the average radio station, and we spend a good deal of our limited resources trying to increase that exposure. The idea of Pacifica is the idea of free and open discussion, which leads inevitably to comments and views that seem to be "personal attacks" by those they refer to. The idea of Pacifica is the idea of freedom, and the idea of freedom encourages program participants to say what they might not say on other stations. It is our policy to inquire into the dark corners of our society, where the sacred cows are stabled. This policy often raises controversy and causes conflict. Pacifica is, therefore, well aware of the practical difficulties associated with the proposed rules. We know what we are getting into—we have tried to conduct our affairs in accord with the principles served by these rules in the past. We support the proposed rules from experience, as practicable, right and reasonable.

PACIFICA OPPOSES THE EXCLUSION OF FOREIGN GROUPS AND LEADERS FROM THE FAIRNESS DOCTRINE

We do object to the exclusion in section (b) of the proposed rule, which relieves the broadcaster of obligation

32 toward "foreign groups or foreign public figures . . ." I understand the reason for the exclusion: it may usually be difficult and sometimes impossible to find a spokesman for such groups and figures, to reply to charges made against them. The effect of the exclusion, however, is to license the cold war and the flaunting of national prejudice, and to encourage the lying and distortion that goes with them.

I believe our Republic would be better served by a modification of the obligations of section (a), rather than voiding those obligations. It might be possible, for example, to require that, as to foreign groups and foreign public figures, broadcasters make available air time for rebuttal or reply to (but not seek out) representatives of parties or groups in this country who defend the foreign groups or figures. The citizens of this country would have been spared a lot of nonsense and perhaps even a number of dangerous misconceptions if broadcasters had been obliged to make speakers on their stations answerable for their attacks on foreign governments and leaders.

The Rule for Editorials Is Sound

Since Pacifica is a non-profit educational foundation, we do not endorse or oppose candidates for public office, and it is against our policy to editorialize on any topic. We support section (c) of the proposed rule, however, as the only reasonable way to assure fairness when radio stations do broadcast political editorials in their own behalf.

33 Comments on the General Application of the Fairness Doctrine

I now presume upon this opportunity to make an additional comment on the fairness doctrine in its general application beyond cases of personal attack and political editorials.

The problem with the fairness doctrine in the past, in my judgment, has been that it was not enforced. The pro-

posed rules clarify the positive obligation of broadcasters to seek out those who have a claim to the right to rebut broadcast statements. The new rule will also fall heavily on the conscientious (as has the doctrine in the past) and lightly on those who take lightly their obligations as licensees unless it is enforced. One problem with enforcement is that the sanctions available to the FCC have been too limited. Refusing to renew a license or to give a full-term license to a broadcaster for violations of the fairness doctrine is too harsh a penalty for the violation; as one result, there is little conviction in the industry that the FCC will impose any penalty at all on those who flout the doctrine.

This situation could be improved if the FCC adopted a broader and less punitive range of sanctions. Since the problem of policing violations is one of the most difficult in trying to achieve equal application of the fairness doctrine to all licensees, such sanctions might have to depend on the interest and action of those offended. The FCC staff might be reserved for settling cases that could not be settled by the parties. For example, the FCC might adopt a rule requiring that a broadcaster who had violated
the fairness doctrine must produce and broadcast a
34 program of merit equal to the offending program,
satisfying the cause of the person or group offended.
This program would have to be recorded, and the recording made available to the offended party for such other use as it wished. If the offended party did not agree that the program matched the offending program, it could refer the dispute to the FCC for settlement.

The example is offhand, and may not be practical. It is one that we, in Pacifica, would be happy to try to live with. However hard to administer or subject to argument, it does have the advantage of making the licensee seek to repair the damage done. Present sanctions tend only to punish him severely or not at all, without repairing the damage. The cease and desist order, although useful in

fairness cases, also has the disadvantage of making the broadcaster correct his present and future conduct; it does nothing about his past errors. If the requirement of producing and broadcasting an equivalent program is not the way to accomplish the desired result, perhaps a system of fines or of minutes or hours off-the-air during regular broadcast hours might be developed.

A second comment aims at the application of the fairness doctrine to the networks.

The networks are not licensed. The fairness doctrine reaches them only indirectly, by way of individual station licenses. Their stake in the broadcasting industry is such that they ordinarily conduct themselves with remarkable fairness in connection with such matters as personal attacks, political candidates and editorials. What they do not do as well is to deal with the great issues of the age in sufficient depth and rationality.

The FCC could arrange an annual "post-audit," a review of the performance of the networks in connection with controversial issues and public affairs and events. The danger is not that Huntley and Brinkley will attack some individual; it is that neither they, nor NBC, nor any major network, will consistently pursue the job of informing the citizens of the Republic about underlying problems of war and peace, foreign policy, the stock market, the automobile industry, public education, urban blight, minority oppression, or others of the dozens of major problems facing the nation. They do, in a few special hours, devote their talents to some of those matters; when they do, the results are enormously gratifying. Such programs should be encouraged and commended. But there are too few of them; they are not consistent; they provide no base for general judgment by citizens of the state of the world in which they live.

An annual serious public review, to which public comment would be admitted, would call both public and broad-

casters' attention to the facts of their performance. Such hearings might afford an opportunity for station owners to expose the grip in which they are held by the combination of the large advertisers and the networks, which is itself one cause for the overall "unfairness" of the networks' programming allocations.

My proposal as to the networks is to cause them to come annually before the public they are supposed to serve, and set forth their claim to have served it well. Such an annual review could take the place of any enforcement effort designed to make the networks live up to the letter of the fairness doctrine in individual cases. The networks have shown that they are responsible, cautious, and "fair" in the sense covered by the proposed new rules. The
36 FCC could well avoid the troubles of trying to enforce upon the networks what they themselves have long since adopted as their regular practice. It ought instead to see what it can do to get the networks to measure up to a general standard of overall fairness, since that is the trouble the public has with network programmers.

The FCC ought, on the other hand, to enforce the fairness doctrine far more strictly than it has in respect to individual stations in their non-network broadcasts. The fairness of the networks in treating persons and individual issues is not uniformly exhibited by other broadcasters. The problem, as I have acknowledged, is with policing the broadcasters. I think the FCC could identify the irresponsible broadcasters through changed license renewal procedures.

The FCC already requires that stations announce their forthcoming license renewal applications, and solicit comment to the FCC from their audiences. It would be merely an extension of this practice to hold license renewal hearings in the cities where the stations are, rather than in Washington. The FCC should cause the broadcaster to

announce the time and place of such hearings, and should provide a real opportunity to affected members of the public to make their judgments of the stations' performance known. Present renewal procedures do not even bring in many comments; they certainly do not enable the FCC to judge whether, and to what extent, there is citizen satisfaction with the performance of the licensee.

I do not say that the standard of the FCC's judgment should be popularity or financial success. It is the
37 FCC's task to assure diversity and responsibility. It does not do so through its present procedures; it has not the manpower to monitor the performance of licensees; it does not instruct the public about its rights and opportunities to affect the performance of broadcasters. The FCC needs to know whether, over the period of a license, the licensee *has been in general fair;* it ought to raise this question generally, as well as in connection with specific cases.

I believe such an examination before its public would be good for every radio or television station. The statistics are unarguable—most people like what they are getting from the broadcasting industry. However, they have little chance to find out whether they would like something else better, and little chance to tell the broadcasters what they like or want. The FCC could see that the public had a wider choice. It could give the public a chance to report on broadcasting to the broadcaster, whose attention now is directed not toward what people want to hear, but primarily to what will make them buy sponsors' products.

Expanding the Concept of "Fairness"

Finally, I commend to the FCC the proposition that "fairness" is not merely a matter of making certain that each broadcasting station "balances" in some quantifiable

measure, like minutes of air time, what anybody says on a particular issue at a particular time on that particular broadcasting station. Pacifica has long held to the view that fairness obliges it to seek out and present those views rarely heard by the public. We make a practice of broadcasting comments by communists, for example, and
38 by members of the radical right (when we can find them) exactly because these views are not heard *at all* on most stations, and we believe it should be possible to hear them at least occasionally. Following this line of thought leads to the conclusion that, in an area where there are many broadcasting outlets, each might serve the "general fairness" by covering a part, not the whole, of the range of opinion on matters of public import. This would mean that the FCC, in considering new license applications, would be obliged to take into account what citizens of the area could already hear; it would also incline the FCC not to issue additional licenses for stations proposing to duplicate whatever was already widely available.

I recognize the thorny issues of public policy and judgment raised by this notion. I cannot permit the moment to pass, however, without asking the FCC to think a little about the whole of the public and the place of individual broadcasters in serving the whole public. It seems to me that the FCC lets itself be confounded by the narrowness of its vision when it examines a single licensee and the operation of his single station without regard for the other broadcasting services within the context of which the signals from that station are emitted. The post-audit public hearing, in the place where the licensee operates, is one means of bringing this context to the addition of the FCC at a time when it might properly affect its judgment.

42 **Comments of WIBC, Inc.**

WIBC, Inc., by its attorneys, respectfully submits herewith its comments in response to the Notice of Proposed Rule Making in the above-captioned proceeding, released on April 8, 1966. WIBC, Inc. is the licensee of Stations WIBC and WIBC-FM, Indianapolis, Indiana and Station WAII-TV, Atlanta, Georgia.

WIBC, Inc. opposes the adoption of the rules proposed in the above-captioned proceeding. The Commission has not demonstrated any need for such rules, and WIBC, Inc. believes that not only is there an absence of need, but that the "fairness" area is one in which no specific rules should be set forth.

Operation in accordance with the principles of the fairness doctrine involves, as indeed the Commission recognizes, the exercise of a great deal of discretion by the individual licensee. The licensee should not be unduly restricted by a set of specific regulations which do not, as they can-
43 not, provide specific solutions to specific problems but do deprive it of the full use of its discretion in solving such problems.

WIBC, Inc. therefore respectfully urges that the above-captioned rule making proceeding be terminated without the adoption of any rules concerning "fairness doctrine" procedures.

Respectfully submitted,

WIBC, Inc.

By Haley, Bader & Potts
/s/ Andrew G. Haley
Andrew G. Haley
/s/ Lois P. Siegel
Lois P. Siegel
Its Attorneys

June 20, 1966

1735 DeSales Street, N. W.
Washington, D. C. 20036

45 **Comments of Storer Broadcasting Company**

Storer Broadcasting Company, by its attorney, herewith submits the following comments in the above-styled proceeding.

1. The Notice of Rule Making proposes to adopt rules codifying the "personal attack" portion of the fairness doctrine and the procedures to be used in the case of editorials endorsing or opposing legally qualified candidates.

2. According to the Notice:

> "Two important purposes will be served by such codifications. First, it will emphasize and make more precise licensee obligation in this important area. Second, it will assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed."

3. It is the opinion of Storer Broadcasting Company that a proposal such as this will inhibit the use of broadcasting for the airing of controversial issues discussions, and thus will work at cross-purposes with the alleged objective of the fairness doctrine itself.

4. In an area such as that encompassed by the fairness doctrine, the Commission must guard against estab-
46 lishing inflexible "penal" provisions; it should follow its own oft-repeated affirmation of the need for responsible licensee flexibility of judgment. Yet the proposed rules are little more than procedural devices upon which to base fines and forfeitures, and they are inflexible. Storer agrees with NAB and the other commentators in this proceeding who point out that police court procedures and police court atmospheres are not appropriate to the subject matter here involved, from the standpoint of con-

stitutional policy and also from the standpoint of administration—at the government *and* station level. While it is true that the Congress only recently gave the Commission the authority to assess fines and forfeitures for violations of its rules, it is doubtful that Congress contemplated the adoption of rules under which a government agency would determine *what* speech is fair and *whose* speech is fair, while holding the threat of immediate penalty over the remainder.

5. In granting renewal of license to Station KTYM, Inglewood, California, the Commission only three days ago stated:

> "To require every licensee to defend his decision to present any controversial program that has been complained of in a renewal hearing would cause most—if not all—licensees to refuse to broadcast any program that was potentially controversial or offensive to any substantive group. More often than not this would operate to deprive the public of the opportunity to hear unpopular or unorthodox views." (Mimeo 85496, June 17, 1966)

It is difficult to see how this same result—suppression of controversial viewpoint broadcasts—could be avoided if the Commission were to adopt the instant proposal, which contemplates close federal supervision of the licensee's judgment and swift and sure punishment if he cannot successfully defend his judgments against "today's" official notion of what is fair.[1] The only sure way out of this dilemma would be for the broadcaster to avoid controversial matter entirely.

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[1] It is the history of communications censorship, of course, that the prevailing notion of today is more often than not the rejected notion of tomorrow.

6. For these reasons it is submitted that any proposal to codify and police "fairness" would be inappropriate, and that the instant proposal should be withdrawn.

Respectfully submitted,

STORER BROADCASTING COMPANY

By /s/ WARREN C. ZWICKY
Warren C. Zwicky
Vice President and
Washington Counsel

711 Madison Building
1155 - 15th Street, N. W.
Washington, D. C. 20005

June 20, 1966

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48 Comments of the National Association of Broadcasters

On April 8, 1966, the Commission released a Notice of Proposed Rule Making in the above-entitled proceeding seeking codification into rules of its current policies pertaining to personal attacks and editorials in support of or in opposition to a legally-qualified political candidate.

The Commission states its action is for two purposes: "First, it will emphasize and make more precise licensee obligation in this important area. Second, it will assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed."

At the outset, it should be recognized that the proposed rules may not be isolated from the rest of the fairness doctrine. If the entire doctrine itself cannot be sustained as a proper instrument of government policy, then the rules themselves, as an integral part thereof, must also fail.

Thus, the question is whether, both in concept and operation, the fairness doctrine encourages communication of controversial matters, promotes the communication
49 of unpopular as well as popular views and otherwise serves the objective of a fully-informed society. In our view, it does none of these. It discourages communication of controversial matters, restrains the vigorous debate of controversial questions and keeps serious issues beneath the surface of community attention. Therefore, it cannot be sustained because not only can it not increase the knowledge of the public, but actually operates in the opposite direction.

I. History of the Fairness Doctrine

The genesis of the fairness doctrine is said by the Commission to be contained in the public interest standards of the Radio Act of 1927. As early as 1929 the Federal Radio Commission stated in its Third Annual Report:

> "It would not be fair, indeed it would not be good service to the public to allow a one-sided presentation of political issues of a campaign. Insofar as the program consists of discussion of public questions, public interest requires ample play for the fair and free competition of opposing views, and the Commission believes that the principle applies not only to addresses of political candidates, but to discussion of issues of importance to the public.[1]

This moral obligation to be fair and to avoid bias was accepted by broadcasters from the very beginning. However, in 1941 we find that the moral obligation is being transmuted into a legal one. The Commission, by dicta, in an unreviewable order, imposed a ban upon broadcast

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[1] 3 FRC Annual Report.

editorials that was to last until 1949. In its May-
50 flower decision the Commission wrote:

> Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.[2]

This situation continued until 1949 when the Commission, following lengthy hearings, issued a detailed report in which it confirmed the right of broadcasters to editorialize. At the same time, however, it stated that the general public interest standard of the Communications Act required a licensee to (1) devote a reasonable amount of broadcast time to the discussion and consideration of controversial issues of public importance; and (2) that in doing so, he be fair—that is he affirmatively endeavor to make his facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented.[3]

Thus, the Commission assumed the right to condition the presentation of controversy upon the obligation to be fair. One can hardly envision the uproar that would result if the Post Office Department attempted to require the New York Times, the Washington Post or the Chi-
51 cago Tribune to present, under threat of legal sanction, the other side as a condition precedent to taking a position on any controversial subject. Yet this is pre-

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[2] Mayflower Broadcasting Corp., 3 FCC 333, 340 (1941).

[3] 13 FCC 1246, 1249, 1252 (1949).

cisely the burden the Commission imposed upon broadcasters.

The next significant event in the chain came in 1959 when the Congress passed an amendment to Section 315 of the Communications Act exempting certain types of programming from the equal opportunities requirements of the section. It stated, in part:

> "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligations imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[4]

By this time, the curious combination of factors that had permitted the doctrine to go unchallenged had also caused it to become so entrenched as to have its validity go unquestioned at both the administrative and congressional level.

Following the 1959 amendment, the Commission continued to apply the fairness doctrine on an *ad hoc* basis. Then in 1963 it saw fit to send to all licensees a Public Notice in which it called attention to three situations, one of which involved a licensee's obligations when a personal attack was broadcast:

52 "(a) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific

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[4] 73 Stat. 557 (1959), 47 U.S.C. Sec. 315 (a).

offer of his station's facilities, for an adequate response." [5]

Now the Commission proposes to take this situation out of the policy area and adopt specific rules enforceable not only through revocation proceedings, but also through the use of the power to levy forfeitures.

What the Commission ignores is the fact that broadcasters agree they should be fair. The only area of disagreement is whether the obligation is a legal or moral one. The Government has always assumed it to be legal and, therefore, the power to apply sanctions in the event the vagaries of fairness are not met. And so, from an uncertain and ambiguous origin we see the fairness doctrine merge into an unquestioned position as basic regulatory philosophy.

In view of this, it might be well, as Professor John P. Sullivan of the George Washington University Law School suggests, to "test the validity of the reasons given for the rule in the decades past. Perhaps broadcasting is, as Professor Chafee stated, different. Perhaps licensing, or physical limitation, or the fact that the ether is in the public domain (if this latter concept has any meaning) breaks down the newspaper analogy, but the first
53 amendment ramifications alone justify another long look and more than a little renewed reflection." [6]

II. The Fairness Doctrine Constitutes an Abridgement of the Right of Free Speech.

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting

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[5] 25 Pike & Fischer, RR 1899.

[6] Editorials and Controversy: the Broadcaster's Dilemma, 32 G.W. Law Review 719 (April, 1964).

the free exercise thereof; or *abridging* the freedom of speech, or of the press . . .'' (emphasis supplied)

We think it significant that the word used in the Constitution is ''abridge'' rather than ''censor.'' Censorship connotes the suppressing of a particular communication or deleting part of its contents, a prior restraint as it were. The word ''abridgement,'' however, has a broader connotation. It means a dimunition, lessening or reduction. In other words, neither Congress nor its creature, the FCC, may diminish, lessen or reduce the right of free communication.

This is precisely the net result of the fairness doctrine. It discourages the use of broadcasting for the expression of opinion and thus abridges the right of the broadcaster as a communicator.

Historically, there are several limitations on speech that have been held not to violate the First Amendment. First, there are those which find their constitutionality in history and tradition, such as the common law of
54 defamation. Second, there are the prohibitions of speech which are offensive to the basic mores of our society, such as obscenity, profanity and the circulation of information about lotteries. Third, there are those limitations which prohibit the use of speech as a part of or as an incident to a prohibited course of conduct, such as disturbance of the peace, false advertising, and injury to the public health. Fourth, there are those limitations which prohibit words which are ''used in such cimsumstances and of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.'' [7]

While conceivably a single program or an editorial might fall within one of the above, broadcasting per se does not

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[7] *Schenck* v. *United States*, 249 U.S. 47, 52.

defame, is not offensive to the basic mores of our society, is not injurious to the public health, and does not present a clear and present danger.

Let us now consider the arguments which are usually made to justify the abridgement of freedom of speech by means of radio. One argument that finds favor is that broadcasting is different. Of course, broadcasting is different. It is different from the press. It is different from speech. But there is nothing in the First Amendment which says that because one medium is different from the other it loses its status as one of the fundamental freedoms.

55 Another favorite argument is that there is a limited number of frequencies available for broadcasting. The facts do not justify such an argument. There are today far more frequencies available than we had any idea of when we first began to regulate broadcasting. It is common knowledge that broadcasting stations outnumber daily newspapers by almost four to one.

Apart from this, however, there is nothing in the First Amendment which says that it is proper to abridge freedom of speech because of scarcity, whether it be a scarcity of public halls, of soap boxes, or churches, or printing presses, or newsprint. As a matter of fact, we are warned by conservationists that the supply of timber is being rapidly exhausted and we may have an acute shortage of newsprint in the not too distant future. Will this justify a fairness doctrine for newspapers?

Finally, it is said that the people own the airways and broadcasters operate in the public domain. Therefore, since private persons can be prohibited from using the spectrum, their privilege to use it can be conditioned in any way that Congress or the FCC, in their own discretion, deem desirable.

It is axiomatic that the power of government to grant or withhold a privilege does not carry with it power to bargain with a citizen for the surrender of his constitutional rights, the exercise of which can be directly or indirectly forbidden. This principle was set forth in clear and unequivocal language by Justice Brennan in *Sherbert* v. *Verner*.[8] "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

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In sum, it is clear that even though it be said that Congress merely extends a privilege which it is free to withhold—access to a microphone in the public domain—it nevertheless may not exact for that privilege the surrender of the right to freedom of speech. Assuming that the Constitution no more guarantees the private use of a microphone than it guarantees the private use of government buildings, once that use is permitted, the constitutional rights attach to and govern it. Indeed, if anything, the assumption that the Government has absolute discretion to refuse the private use of a means of communication makes it more than ever necessary that the constitutional rights be given the broadest reach.

III. The Fairness Doctrine Discourages Communication of Controversial Matters

By its very nature, any government regulation is restrictive to some degree. A rule or policy seeking to promote "free and open discussion" is no exception. It is one thing to acknowledge that an individual is "fair" to all parties with whom he deals. It is quite another to decree, by federal fiat, what conduct is considered "fair" and what is "unfair." This distinction is especially important

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[8] 347 U.S. 398 (1963).

in maintaining a continuing public dialogue on the important issues of the day. Yet, such a presentation is greatly inhibited by enforcement of the fairness doctrine.

When a broadcaster is faced with sanctions for
57 violating an amorphous policy or rule, he will weigh his actions in the regulated area with great circumspection. This may be a good result in situations conducive to regulation, but, as previously stated, in the realm of First Amendment rights, freedom from restriction is paramount. This freedom is the very essence of the atmosphere necessary for the open discussion of issues that the Commission seeks to preserve.

The basic problem with a legal concept of a fairness doctrine is that it has the effect of discouraging the use of broadcasting for expression of opinion. There is a basic inconsistency in a policy that encourages the voicing of controversy on the air while at the same time making it clear that the execution of fairness will be closely supervised. The mere idea of supervision in this area will discourage many broadcasters. Strict ground rules, such as proposed herein, will discourage more. The result will be the antithesis of what the rules hope to accomplish.

The existence of an obligation implies the existence of a sanction. However, not every obligation requires the same type of a sanction and, therefore, there must be a clear determination of the type of obligation before an appropriate sanction can be applied.

If a legal obligation exists, the Commission must examine the substance of the material broadcast; consider whether the subject matter is controversial or, in the case of the proposed rules, involves a personal attack; weigh what is given to each side; test the format for inherent fair-
58 ness; determine whether proper notice was given; and then tell the licensee he was either right or

wrong. This is the type of administrative fiat that has been the classic tool of censors from the beginning of communications. It involves judgments which just cannot be made by a government agency without inviting the evils of censorship. The establishment of such an obligation to be fair does nothing in our opinion to encourage the presentation of important public issues.

It must be remembered that the only means by which the broadcaster can obtain sufficient revenues to properly serve the public is through the sale of time. If the proposed rules were adopted, he would be forced to give away this product for a reply to a statement made over his facilities. If he did not do so, he would be subject to a forfeiture, a possible revocation of license, or, and this is entirely possible under the proposed rule, both. In short, he would be faced with the alternative of presenting all responsible sides under threat of government sanction or of not taking chances and avoiding all such presentations. This Hobson's Choice is sufficient to make broadcasters chary of committing any appreciable amount of time to the presentation of unpopular views or highly controversial subjects.

Perhaps the most invidious result of the fairness doctrine is that broadcasters are forced to do what the Constitution prohibits government from doing: acting in a manner that is tantamount to censorship. It is true that a licensee is responsible for everything that is transmitted over
59 his facilities, with the exception of statements made by a legally-qualified candidate. It is also true that the First Amendment is not absolute, and in certain carefully delineated areas, the freedom to speak is proscribed. It is the broadcaster's duty to prevent those utterances that are not given Constitutional protection. But he should not be forced to act in a manner which, directly or indirectly, tends to discourage the fullest exercise of free speech by others over his facilities. Government cannot interfere in this area and the fairness doctrine is not made

Constitutional by requiring broadcasters, under fear of sanctions, to act as censors.

Few would disagree with the objectives of the fairness doctrine, at least as applied to the media of mass communications. The vice, however, is that a government agency determines what is fair and what punishment shall be meted out to those judged unfair. When there is an end result that must be achieved at a licensee's peril, then a leverage is available to government that can induce conformity with certain preconceived ideas; and while it may not be deliberate or conscious, this does not make the result any less certain or more palatable. What in most businesses is a constitutional right to continue an honorable calling can become, because of a license system a mere privilege to be dispensed periodically to those who sustain successfully the burden of proving conformity with whatever standards of conduct the dispenser of the privilege may espouse.

60 CONCLUSION

In all men of good will there is a drive to improve the world of which they are a part. That drive found a unique expression in this country in the establishment of our form of government, a government to which was granted certain specified powers and to which was forbidden by the Bill of Rights certain acts that might have been taken under those powers. It was delegated the power to regulate interstate commerce. It was forbidden the power to abridge freedom of speech. As the technology of the nation grew, so did the application of the Congressional reach to regulate commerce. In the 1920's radio communications had developed to the point that its regulation by the federal government as a species of interstate commerce became necessary for technical reasons.

Those who fashioned that regulatory framework established that public interest, convenience and necessity were

to be the tests under which licenses would be granted to communicate by radio broadcasting. At the same time it is clear that they wished to preserve the concept of freedom embraced within the First Amendment. So that there could be no doubt as to their intent, a specific provision was incorporated within the Act forbidding the Commission to censor or to pass or to promulgate or to fix any regulation or condition which interferes with free speech by means of radio communications. They left to the predecessors of this Commission and to this Commission the workable reconciliation between the injunction against interference with free speech and the power to regulate radio.

61 To the man who impatiently seeks the perfect world in his lifetime, wisdom has cautioned restraint lest when in a position of power he should set himself up as the arbiter over what may be transmitted and received in the flow of communications. It is not enough to be well-meaning. In fact, good intentions on the part of an encroaching authority may well be more dangerous than bad ones. Justice Brandeis put it this way: "Experience should teach us to be more on our guard to protect liberty where the government's purposes are beneficient."

In view of the above, the Association respectfully requests that the instant rule making be withdrawn and that broadcasters like other communicators be permitted to present one side or all sides from case to case as their expert judgment of the exigencies dictates.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D. C. 20036

/s/ DOUGLAS A. ANELLO
Douglas A. Anello
General Counsel

June 20, 1966

62 **Comments of Mutual Broadcasting System, Inc.**

MUTUAL BROADCASTING SYSTEM, INC. (hereinafter referred to as "Mutual"), by its attorneys, hereby respectfully submits the following comments on the Commission's "Notice of Proposed Rule Making", in the above-captioned proceeding:

I. INTRODUCTORY

1. Mutual operates a national radio network to which are affiliated over 500 radio stations throughout the United States. Over 200 newscasts a week, plus a wide variety of programs of news commentary, public affairs and discussion programs are made available to affiliated stations through the network facilities of Mutual. Moreover, Mutual also provides its affiliates with on-the-spot, de-
63 tailed coverage of special events, such as Presidential news conferences, manned space flights, national political conventions, and election news coverage. Mutual's comments herein will be directed principally to those matters which have a direct bearing on its network operations, including its relations with its affiliates.

II. THE PROPOSED AMENDMENT TO SECTION 73.123 OF THE RULES IS IMPROPER AND UNWARRANTED

2. The Commission is here attempting to spell out, by rule, a licensee's obligations where, in the course of a program dealing with a controversial issue of public importance, a personal attack is made upon a person or group. To this end, the Commission seeks to formally codify the "personal attack principle" now embodied in its Fairness Doctrine. At the same time, the Commission also proposes to implement, by a specific rule, its pronouncements dealing with station editorials endorsing or opposing political candidates. Mutual is opposed to both proposed actions.

3. First, Mutual submits that the proposed amendments to Section 73.123 of the Rules represents an encroachment by the Commission upon the fundamental and exclu-
64 sive right of broadcasters to determine the content of their programming and the manner of presentation

thereof. For this reason, Mutual believes that grave Constitutional questions are presented by the proposed actions. (See Section 326 of the Communications Act.)

4. Secondly, the very proposal for such rules implies that broadcasters cannot be trusted to be "fair" in their presentation of controversial issues of public importance. Yet the paucity of cases dealing with the problem of concern herein establishes that Commission licensees do desire to be fair and have been fair, even in the absence of a published rule requiring the same. Hence, in Mutual's view, the proposed rules are unnecessary.

5. Thirdly, for all practical purposes, the proposed rules will discourage, rather than encourage, controversial programming and will promote bland, mediocre programming by licensees. Surely, if a broadcaster is in doubt as to whether or not the proposed rules will be applicable to a particular factual situation, and knows that his ultimate judgment on this might eventually be questioned, he will be inhibited, or will shy away from presenting controversial or provocative programming. Certainly such a result would not be consistent with the public interest.

65 III. THE TEXT OF THE PROPOSED RULE

6. The proposed rules are vague insofar as they set forth no concrete standard as to what constitutes a "personal attack". Hence, they place an unfair, and probably an unconstitutional burden, upon the licensee.

7. If, despite the foregoing, the Commission adopts rules such as those proposed, it is requested that certain additional provisions be incorporated therein to take cognizance of the fact that some programming involving personal attacks may originate with a network, rather than with a particular station.

8. Where the attack is contained in a network program, Mutual believes that each one of the hundreds of stations carrying that program should not be required to transmit

a separate copy of the script or tape of the program to the person or group attacked. Instead, the network alone, should bear the responsibility for providing the copy of the script or tape. Moreover, the rules (if adopted) should provide that under such circumstances, the obligation to provide reply time to a person or group which has been attacked on a network program should properly devolve upon the network. The rules could require that if a station carried the original program containing the
66 attack, it would be obligated to clear time for the network program containing the reply. In this latter connection, it must be recognized that not all Mutual affiliated stations carry all of its programs. Hence, machinery should be incorporated within the rules under which the network would notify its affiliated stations of the time being offered for reply purposes, thus providing the station with an opportunity to determine whether it is or is not obligated to carry the same. Absent some such provision, some stations might carry the reply which did not carry the original attack from its network.

9. The very complexity of the problem of network-station relations in this area is another reason why it is neither feasible nor desirable for the Commission to attempt to incorporate into its published rules its so-called "Fairness Doctrine".

Respectfully submitted,

MUTUAL BROADCASTING SYSTEM, INC.

By /s/ JACK P. BLUME
Jack P. Blume
Fly, Shuebruk, Blume and Gaguine
1612 K Street, N.W.
Washington, D. C.

Its Attorneys

June 20, 1966

67 **Comments of Interstate Broadcasting Company**

Interstate Broadcasting Company, licensee of Stations WQXR and WQXR-FM, New York City, New York (hereinafter called Interstate), by its attorneys, respectfully submits these Comments, pursuant to the provisions of Section 1.415 of the Rules, with respect to the Commission's above-captioned rule-making proposal.

1. Interstate's interest in this proceeding relates, because of practical considerations, to the content of subparagraph (c) of the proposed rules relating to licensee endorsement of and opposition to candidates for public office. Interstate believes that adoption of the subparagraph (c) proposal would bring about a reduction in public service programming without any counterbalancing
68 benefit and that the fairness doctrine itself insures the aim sought to be achieved by the Commission without the necessity for rigid and unworkable requirements. Finally, by way of introduction, if the Commission finds it necessary to adopt specific rules dealing with licensee political editorials, such rules should be limited to situations where a licensee engages in an attack upon the "honesty, character, integrity or like personal qualities" of a candidate for public office.

2. Both the Commission and the broadcast industry have long recognized an obligation on the part of the broadcaster to be fair. The 1929 Annual Report of the predecessor Federal Radio Commission, for example, contained the following statement:

> "It would not be fair, indeed it would not be good service to the public to allow a one-sided presentation of political issues of a campaign. Insofar as the program consists of discussion of public questions, public interest requires ample play for the fair and free competition of opposing views, and the Commission

> believes that the principle applies not only to addresses of political candidates but to discussion of issues of national importance."

And in 1939 the NAB Code provided that stations shall provide for the presentation of questions of public concern, including those of a controversial nature. In doing so, the Code specified that broadcasters should allot time "with fairness to all elements in a given controversy."

69 3. Although the industry itself, even apart from Commission pronouncements, recognized an obligation on the broadcaster to be "fair," the Commission apparently believed that special treatment was needed where the broadcaster had his own views on the merits of the controversial issue of public importance. Thus, in 1940 the Commission announced the *Mayflower* doctrine:

> "A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate." *Mayflower Broadcasting Corp.*, 8 FCC 333 at 340.

The Commission, in effect, imposed by its *Mayflower* decision, an absolute ban on editorializing by its licensees with respect both to candidates for public office and other controversial issues of public importance.[1]

4. Owing to increasing broadcaster agitation against the editorial restriction imposed by *Mayflower,* however, the Commission undertook a reevaluation of the doctrine and,

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[1] In fairness to the Commission, it should be noted that at the time of the *Mayflower* decision many broadcasters agreed that a licensee should not editorialize over its facilities. In fact, the 1939 NAB Code contained what could be construed as a prohibition against editorial expression by licensees.

in 1949, issued its *Report on Editorializing,* 25 Pike
70 & Fischer RR 1901. By the *Report* the Commission retreated from the doctrine which it had espoused in *Mayflower,* and found no reason why broadcasters should not be extended the privilege of editorial voice subject always, of course, to the requirement of being "fair":

> "But where the licensee, himself, believes strongly that one side of a controversial issue is correct and should prevail, prohibition of his expression of such position will not of itself insure fair presentation of that issue over his station's facilities, nor would open advocacy necessarily prevent an overall fair presentation of the subject. It is not a sufficient answer to state that a licensee *should* occupy the position of an impartial umpire, where the licensee is *in fact* partial. In the absence of a duty to present all sides of controversial issues, overt editorialization by station licensees could conceivably result in serious abuse. But where, as we believe to be the case under the Communications Act, such a responsibility for a fair and balanced presentation of controversial public issues exists, we cannot see how the open espousal of one point of view by the licensee should necessarily prevent him from affording a fair opportunity for the presentation of contrary positions or make more difficult the enforcement of the statutory standard of fairness upon any licensee." *Report on Editorializing,* 25 Pike & Fischer RR 1901 at 1909-10.

Interstate thinks it fair to state that since the release of the *Report on Editorializing* the Commission has, and most particularly in recent years, actually encouraged,
71 through the various means at its disposal, editorialization by its licensees.[1] Interstate fears, however,

[1] See, for example, Address of Newton Minow before the National Association of Broadcasters, May 10, 1961.

that adoption of the rules proposed herein may result in an effective return to the *Mayflower* doctrine.

5. Interstate does not disagree with the aims sought to be accomplished by the Commission's fairness doctrine, and, correspondingly, by the rules proposed herein. As a broadcaster it readily admits to an obligation to insure a fair presentation of all responsible views on issues of public importance.[2] Similarly, the procedures reflected by subparagraph (a) of the proposal dealing with attacks upon the "honesty, character, integrity or like personal
72 qualities of an identified person or group" should be followed, as Interstate does, by broadcasters in order to protect the public and insure fairness. Interstate cannot, however, agree that there is any merit in the subparagraph (c) proposal which would eliminate virtually all licensee discretion when it editorializes in favor of or in opposition to a legally qualified candidate.

6. In reiterating the obligation of the broadcaster to be fair in the *Report on Editorializing,* the Commission there, and in numerous subsequent rulings, emphasized that this is an area for substantial licensee discretion. Perhaps, the Commission's best statement of this philosophy is contained in the *Report* itself wherein the Commission asserted:

> "[T]here can be no all embracing formula which licensees can hope to apply to insure the fair and

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2 Interstate does not, however, necessarily agree with the Commission that the obligation to be fair is appropriately considered a *legal* obligation. See, for example, Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma,* 32 George Wash. L. Rev. 719 (1964). Interstate realizes that at this late date the Commission will not decline to adopt rules on "First Amendment" grounds. At least as early as 1940, the Commission announced its belief that the obligation of a broadcaster to be fair is a "legal requirement," 6 FCC Annual Reports 55. The legal position of those advocating the unconstitutionality of a Commission-enforced fairness doctrine has been often stated (as in Mr. Sullivan's article cited above). For these reasons Interstate does not propose to engage in a dissertation on this point.

balanced presentation of all public issues . . . . The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesman for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as to whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or
73 whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request . . . . '' 25 Pike & Fischer RR at 1907.

7. With all due respect, Interstate submits that the Commission is evidencing ambivalence in the extreme by pronouncements such as the foregoing recognizing a broad area for licensee discretion in programming as compared with the rule-making proposals herein, particularly subparagraph (c), whereby the Commission would virtually eliminate all semblance of licensee discretion in a particular area of its programs. We also submit that subparagraph (c) of the proposed rules is far from consistent with the Commission's previous encouragement of licensee editorials unless the Commission can accept as palatable (which we cannot) the idea that a government agency has the prerogative to classify certain types of editorials as ''good'' but others as ''bad'' and to promote some as ''desirable'' and others as ''undesirable.''

8. In effect, subparagraph (c) of the proposed rule says there is only one way to be fair if a broadcaster editorial-

izes with respect to candidates for public office. In paragraph 7 of the Notice the Commission does assert that the rule is not all-encompassing and that judgments will
74 still have to be made by the licensee. Curiously, however, of the examples advanced by the Commission virtually all are designed to show that a licensee will have to do more than that required by the rule in order to be fair. Interstate submits that a licensee can editorialize with respect to political campaigns and still be fair in presenting the candidates to the public without adherence to the rigid requirements of subparagraph (c). The Commission should trust the broadcasters, the vast majority of which are responsible, with the discretion which has always inhered in fairness doctrine situations.

9. The Commission must realize that editorials, even in political campaigns, are not to be equated with personal attacks. By the proposed rule even an "endorsement" of candidates in an editorial requires notification and an offer of an opportunity to respond. Such an endorsement, however, will seldom involve any of the aspects of an attack, will seldom vilify or deprecate the unendorsed candidate and frequently will simply indicate a slight preference between two capable men. The Commission has offered no reason, practical or otherwise, why the licensee must send a transcript to unendorsed or opposed candidates with an offer for time to respond even where, as is to be
75 expected, the licensee's programming with respect to the campaign is in conformity with the fairness doctrine.

10. We fear that the result of such a rule would be a reduction in public service programming. An editorial can be of any effect only if the editorialist has the respect of the public for well-reasoned judgment and, we submit, with perhaps rare exception, only the responsible gain that respect. But a rule such as that proposed would, because

of "logistics" problems, result in editorials simply not being aired.

11. Interstate's stations are located in New York City, New York. For a number of years it has been the policy of Interstate, which is a wholly-owned subsidiary of *The New York Times,* to broadcast editorials. It has done so in the belief that such broadcasting is a service to the public. Further, it has been the policy and practice of Interstate to read on the air certain editorials which are scheduled to appear the following morning in *The New York Times.* The broadcast editorials may deal with local or national issues, or with local or national political campaigns.

12. As one example of the "logistics" problems involved, consideration should be given the large number of United States House of Representatives Districts in the New
76 York City metropolitan area and the considerable number of candidates involved in primary and later elections. *The New York Times* will often use a column of editorial page space designating its preferences in all of these races. Under the proposed rule, if Interstate broadcasts such an editorial, which would be both interesting and helpful to its listeners, it would be subjected to the requirement that all candidates be notified and offered time for a "meaningful response."

13. When this requirement is projected in terms of multiple campaigns in metropolitan markets, the prospects of administration become awesomely formidable. The net result would be that the editorial would not be broadcast and that listeners would be deprived of a respected editorial voice with no corresponding benefits because fairness is already insured by the doctrine itself.

14. Furthermore, when the proposed rule is thought of in terms of the national elections, the result becomes

ludicrous—perhaps more so for a small market station than others, but only to a degree. We submit that it would be absurd to have required a station endorsing President Johnson in the last campaign, be it located in New York City, New York, or Truckee, California, to offer Mr. Goldwater an opportunity specifically to respond or vice
77 versa. Since stations are already committed to a standard of fairness there is simply no reason to retreat to the days of *Mayflower* relegating broadcasters to second-class journalistic status, by such rigid and unworkable requirements.

15. We think some objection should be voiced also to the Commission's assertion at paragraph 7 of its Notice that by subparagraph (c) it is proposing simply to "implement the *Times-Mirror* ruling as to station editorials endorsing or opposing political candidates." What the Commission is in fact doing is seeking to convert dicta from *Times-Mirror,* 24 Pike & Fischer RR 404, into a specific rule which would be applied to factual situations far different from that which existed in *Times-Mirror.*

16. The rules proposed herein cover mere endorsements of candidates as well as personal attacks. In *Times-Mirror,* however, an aggravated factual situation was presented. There, the licensee permitted the use of its facilities by two broadcast commentators who were given to repeated and rather harsh personal attacks upon political candidates and who could not have been considered "responsible spokesmen" for any side of a particular issue involved. Clearly, personal attacks were present and while perhaps any editorial favoring or opposing a political candi-
78 date might be said to be within the purview of dicta in the *Times-Mirror* case, we submit that the holding in that case must be considered in light of, and limited to, its own exaggerated factual setting. To assert unilaterally,

as the Commission has, that subparagraph (c) of the proposal is simply an embodiment of the *Times-Mirror* ruling, is, we submit, an unfair presentation on an issue of importance.

17. If the Commission persists in its apparent aim to adopt rules in this area, Interstate believes that it would be far better to limit the requirements of subparagraph (c) to "personal attacks" and, in this regard, Interstate suggests the following:

> "(c) When a licensee, during the presentation of an editorial, endorsing or opposing a legally qualified candidate or candidates for public office, attacks or criticizes by name the ability, qualifications, honesty, character, integrity or like personal qualities of a legally qualified candidate or candidates for public office, the licensee shall, within 24 hours after the presentation of the editorial, transmit to the candidate or candidates so attacked or criticized (i) a script or tape of the editorial; (ii) notification of the date and the time of the editorial; and (iii) an offer of a reasonable opportunity for the candidate or a spokesman of the candidate to respond over the licensee's facilities."

18. The suggested modification would still impose upon a licensee engaging in a personal attack on a candidate for public office, *procedural* obligations beyond those
79 contained in subparagraph (a). On the other hand, it would entrust to the licensee the good faith discretion which the Commission has always honored in fairness doctrine situations to ensure a fair presentation, where an endorsement or opposition in a political campaign does not constitute an attack upon a candidate's "ability, qualifications, honesty, character, integrity or like personal qualities."

Comments of Trigg-Vaughn Stations, Inc.

CONCLUSION

WHEREFORE THE PREMISES CONSIDERED, Interstate respectfully urges that the Commission terminate this proceeding without the adoption of rules or, in the alternative, that it adopt the proposed rules only as modified consistent with the suggestions contained herein.

Respectfully submitted,

INTERSTATE BROADCASTING COMPANY

/s/ REED MILLER
Reed Miller

/s/ DAVID H. LLOYD
David H. Lloyd
Arnold & Porter
1229 19th Street, N.W.
Washington, D. C. 20036

June 20, 1966

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81 **Comments of Trigg-Vaughn Stations, Inc.**

Trigg-Vaughn Stations, Inc., by its attorneys, respectfully submits herewith its comments in response to the Notice of Proposed Rule Making in the above-captioned proceeding, released on April 8, 1966. Trigg-Vaughn Stations, Inc., is the licensee of Station KOSA-TV, Odessa, Texas, Stations KROD and KROD-TV, El Paso, Texas, Station KITE, Terrell Hills, Texas and Station KRNO, San Bernardino, California. It is also affiliated in ownership with Station KOSA, Odessa, Texas, Station KHOW, Denver, Colorado and Stations KDEF and KDEF-FM, Albuquerque, New Mexico.

Trigg-Vaughn Stations, Inc., opposes the adoption of the rules proposed in the above-captioned proceeding. The Commission has not demonstrated any need for such rules, and Trigg-Vaughn believes that not only is there an ab-

sence of need, but that the "fairness" area is one in which no specific rules should be set forth.

Operation in accordance with the principles of the fairness doctrine involves, as indeed the Commission
82 recognizes, the exercise of a great deal of discretion by the individual licensee. The licensee should not be unduly restricted by a set of specific regulations which do not, as they cannot, provide specific solutions to specific problems but do deprive it of the full use of its discretion in solving such problems.

Trigg-Vaughn Stations, Inc. therefore respectfully urges that the above-captioned rule making proceeding be terminated without the adoption of any rules concerning "fairness doctrine" procedures.

Respectfully submitted,

TRIGG-VAUGHN STATIONS, INC.

By HALEY, BADER & POTTS

/s/ ANDREW G. HALEY
Andrew G. Haley

/s/ LOIS P. SIEGEL
Lois P. Siegel

Its Attorneys

June 20, 1966

1735 DeSales Street, N. W.
Washington, D. C. 20036

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84 **Comments of Meredith Broadcasting Company**

Meredith Broadcasting Company, by its attorneys, respectfully submits herewith its comments in response to the Notice of Proposed Rule Making in the above captioned proceeding, released on April 8, 1966. Meredith Broadcasting Company is the licensee of Stations KCMO, KCMO-

FM, and KCMO-TV, Kansas City, Missouri and Stations KPHO and KPHO-TV, Phoeniz, Arizona, and is the corporate parent of Stations WOW, WOW-FM and WOW-TV, Omaha, Nebraska, and Stations WHEN and WHEN-TV, Syracuse, New York.

Meredith Broadcasting Company opposes the adoption of the rules proposed in the above-captioned proceeding. The Commission has not demonstrated any need for such rules, and Meredith believes that not only is there an absence of need, but that the "fairness" area is one in which no specific rules should be set forth.

Operation in accordance with the principles of the fairness doctrine involves, as indeed the Commission
85 recognizes, the exercise of a great deal of discretion by the individual licensee. The licensee should not be unduly restricted by a set of specific regulations which do not, as they cannot, provide specific solutions to specific problems but do deprive it of the full use of its discretion in solving such problems.

Meredith therefore respectfully urges that the above captioned rule making proceeding be terminated without the adoption of any rules concerning "fairness doctrine" procedures.

Respectfully submitted,

MEREDITH BROADCASTING COMPANY

By HALEY, BADER & POTTS

/s/ ANDREW G. HALEY
Andrew G. Haley

/s/ LOIS P. SIEGEL
Lois P. Siegel

June 20, 1966 *Its Attorneys*

1735 DeSales Street, N. W.
Washington, D. C. 20036

86 **Comments of National Broadcasting Company, Inc.**

National Broadcasting Company, Inc. ("NBC") herewith submits its comments on the Commission's proposed rule set forth in the Notice of Proposed Rulemaking in this proceeding ("Notice").

In submitting these comments NBC does not wish to be understood as favoring the Commission's "fairness doctrine", since NBC has serious question as to the principle of governmental intervention in broadcast journalism. NBC agrees that the public should receive a fair representation in discussion of controversial issues of public importance, but NBC does not favor governmental action to enforce such representation by regulations.

87 SUMMARY OF NBC POSITION

NBC is opposed to the rule proposed in the Notice, for the following reasons: (1) the fairness doctrine does not apply to personal attacks as such; (2) no public interest is served by the proposed rule; (3) the proposed rule contravenes standards of fairness heretofore established; and (4) the proposed rule imposes an unreasonable obligation on the licensee.

I. THE FAIRNESS DOCTRINE DOES NOT APPLY TO PERSONAL ATTACKS AS SUCH

The fairness doctrine applies only to the discussion of controversial issues of public importance. This is clear from the proviso to Section 315(a) of the Communications Act, upon which the Commission relies for its authority to adopt the proposed rule, and from the Commission's own definition of the fairness doctrine in paragraph 2 of the Notice. The Commission has itself made the distinction that the fairness doctrine applies to *issues,* not individuals. (Letter of October 10, 1960 to Freedman and Unger).

88 NBC does not believe that a personal attack, even if made during the course of a discussion of a controversial issue of public importance, is necessarily in and of itself a discussion of a controversial issue of public importance. For example, instances in which NBC has been asked by the Commission to comment on complaints of alleged personal attacks have included one in which a governor referred to an individual as a communist and another in which a candidate referred to a named organization as scurrilous. Both comments were made in the course of discussions of controversial issues of public importance, but those issues were not the "character" of the person or organization involved. Neither "attack" could be deemed itself to be a controversial issue of public importance, and in fact in neither case did the Commission rule that the fairness doctrine required time to be given the person or organization "attacked".

The Notice apparently recognizes that it is converting the "fairness doctrine" from its past application to controversial issues of public importance, and applying it to "personal attacks" not necessarily constituting controversial issues of public importance. Thus, although the Rule speaks in terms of personal attacks which occur
89 "during the presentation of views on a controversial issue of public importance", it does not require that the personal attack *itself* be a controversial issue of public importance.

This is not merely a semantic difference. Most "personal attacks"—even those taking place during a discussion of a controversial issue of public importance—do not themselves constitute controversial issues of public importance. It has been NBC's experience that during the course of programs presenting controversial issues of public importance, the names of many public officials and other persons are mentioned, and indeed many of these individuals may themselves be discussed. However, these ref-

erences are only incidental to the substantive issue which constitutes the controversial issue of public importance being discussed and which heretofore has been considered to be the only area subject to the Commission's "fairness doctrine".

It must also be noted that the proposed Rule applies only to those personal attacks which take place during the presentation of views on a controversial issue of public importance. This, of course, does not alter the
90 nature of the attack itself, although it does introduce a further inconsistency—an attack in a variety entertainment show would give rise to no action under the rule, while an attack on a news interview program might.

II. No Public Interest is Served by the Proposed Rule

In its 1949 *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246, and again in its *Fairness Primer,* Public Notice of July 1, 1964 29 Federal Register 10415, the Commission stated the basis of the fairness doctrine:

> "It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting."

The right of the public to be informed is not promoted by requiring a licensee to make time available for reply to a personal attack. Rather, unless there is a controversial issue of public importance involved, the proposed rule would in effect legislate a requirement that the public broadcast channels be used to afford a private remedy for a private wrong for which the remedy at law has sufficed for many years.

91 The Commission, in its *Editorializing Report,* did not suggest any such private remedy. A fair read-

ing of a fuller portion of the *Editorializing Report,* 13 FCC 1246, 1251-52* (1949) than is quoted in paragraph two of the Notice demonstrates that that Report did not consider that an attack on a specific person or group would *itself* constitute a controversial issue of public importance requiring the invocation of the "fairness doctrine". Rather, the fact that a person or group has been specifically attacked over the station was stated as possibly being a factor which must be considered along with such other questions as the subject, the particular format of the programs, and the different shades of opinion to be presented, as part of the station's general consideration of whether to honor a specific request by a particular person or group. It was only in discussing licensee treatment of such a request that the question of personal involvement or "attack" was adverted to in the Report. The full paragraph was as follows:

> "It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues.
>
> 92 "Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a

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* Erroneously cited in the Notice as page 1258.

> sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist. Undoubtedly, over a period of time some licensees may make honest errors of judgment. But there can be no doubt that any licensee honestly desiring to live up to its obligation to serve the public interest and making a reasonable effort to do so, will be able to achieve a fair and satisfactory resolution of these problems in the light of the specific facts." (13 FCC at 1251-52)

Thus, the Notice quoted half of the sentence referring to "attacks", and constructed on it a wholly different principle than originally intended. Instead of a fairness
93 doctrine issued to serve the public interest in controversial issues of public importance, the Notice proposes a private remedy for individuals and groups, with only a tangential relationship to controversial issues of public importance.

III. The Proposed Rule Contravenes the Standards of Fairness Heretofore Established by the Commission

The Commission has properly made no attempt to codify its concept of the fairness doctrine. Instead, it has outlined in the *Fairness Primer* (29 F.R. 10416) a broad standard of good faith effort by the licensee to be fair in the treatment of controversial issues of public importance:

> " . . . . . the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in

> good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming. In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. . . . . "

94 The proposed rule completely ignores such a standard, substituting a rigid approach. If a personal attack were made, the licensee would be required to take the specific steps of (1) notifying the person or group attacked of the date, time, and identification of the broadcast on which the attack was made and a script, tape, or summary of the attack; and (2) offering a reasonable opportunity to respond over the licensee's facilities.

Instead of leaving licensees free to determine in what fashion the controversy should be handled, the proposed rule would adopt the personal "equal time" approach previously confined to the special situation of candidates for public office. The only real judgment a licensee would be permitted to make—and that made subject to being "second-guessed" by the Commission—is one whether a personal attack had occurred over his facilities.

Beyond that point, the proposed rule would substitute the Commission's judgment for that of the licensee by imposing on the licensee a rigid standard of conduct determined by the Commission.

95 Similarly, the proposed rule disregards the above-quoted language from the *Editorializing Report,* which spelled out at some length that the licensee need only

act reasonably and in good faith on a request for time to present a point of view on a controversial issue of public importance—in which a personal attack on the requester over the station is a factor to be considered.

IV. The Proposed Rule Imposes An Unreasonable Obligation on the Licensee

The proposed rule would place upon the licensee a greater obligation and a heavier burden than that imposed by the Commission with respect to equal opportunity. Section 73.657(e) of the Commission's Rules requires that a request for equal opportunities be submitted *to* the licensee within one week of the day on which occurred the use for which equal opportunity is claimed. The licensee is not required to take any *affirmative* action—only to pass upon a timely request by the candidate seeking equal opportunities.

96 Furthermore, under the proposed rule, if a personal attack occurred on a licensee's station, the licensee should be required to offer the person attacked a "reasonable opportunity" to reply, even though the attack was a spontaneous utterance as to which the licensee had no advance knowledge.

Hence, not only would the proposed rule charge the licensee with responsibility for attacks which he cannot guard against in advance; by requiring him to *volunteer* time for a reply, rather than await a request, the proposed rule would imperil his license every time he was called upon to decide whether a personal attack had occurred in the presentation of views on a controversial issue of public importance. Depending upon how the Commission were to interpret a "personal attack", the licensee would be faced with the alternative of jeopardizing his license or giving time to a complainant to reply to a spontaneous remark of a critical personal nature; maybe, even, giving time

to the manager of a cellar-dwelling baseball team to assert that he is not, either, a bum.

97 This possibility is not a far-fetched one. The Notice herein stated that the phrase "reasonable opportunity" had been used rather than "comparable opportunity", because the broadcast calling the rule into operation may involve only a few seconds, and reasonable opportunity may call for more than a few seconds if there is to be a meaningful response. (Paragraph 7)

Finally, the proposed rule would require the licensee to offer time for reply to any person or group attacked by a candidate, unless the person or group fell within the category excluded in paragraph (b) of the proposed rule, although the licensee has no power to censor the candidate and no legal liability for any defamation the candidate may utter.

In contrast to these consequences, both the proviso to Section 315(a) of the Communications Act and the Commission's own declaration of the fairness doctrine call only for the licensee to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. The proposed rule is a far cry from one in which the licensee is called upon "to exercise his best judgment and good sense in determining what sub-
98 jects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view". (*Editorializing Report,* paragraph 10)

On the other hand, where a personal attack is broadcast by or at the direction of a licensee, or a licensee editorial presented supporting or opposing specific candidates, considerations of fairness would ordinarily point to the licensee's affording an opportunity for a reply, regardless of

the existence or non-existence of a specific rule on the matter.

V. Other Comments

Paragraph (b) of the proposed rule would make the rule inapplicable to personal attacks by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign. Since NBC opposes the proposed rule in its entirety, NBC is in favor of any exclusions from the proposed rule. However, the exclusion should be
99 phrased more generally. As phrased, it gives rise to the question who is an authorized spokesmen or a person associated with the candidate; the question can be avoided by excluding all attacks "by a legally qualified candidate or his supporters", regardless of upon whom made. Along the same line, paid political programs or announcements should be entirely excluded from the proposed rule.

VI. Conclusion

In view of the foregoing considerations and with the reservation above expressed as to the basic validity of the fairness doctrine, NBC submits that the proposed rule should be rejected and the proceeding terminated, or at most a rule adopted which would apply only to personal attacks broadcast by the licensee or at his direction and to licensee editorials supporting or opposing candidates. If not rejected or restricted as suggested above, the rule (a) should under no circumstances apply to statements in any paid political program or announcement or to any statements by a candidate or his supporters, and (b) should not require the licensee to take affirmative action in offering time for reply, except where the attack has been made
100 by the licensee or at his direction, or in the case of a partisan licensee editorial; and except in either of

the latter situations, the person or group attacked should have a limited time, such as seven days, within which to request time for a reply.

Respectfully submitted,

/s/ THOMAS E. ERVIN
Thomas E. Ervin
Vice President and General Attorney
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, New York 10020

/s/ B. D. RAUB
Benjamin D. Raub
Assistant General Attorney
30 Rockefeller Plaza
National Broadcasting Company, Inc.
New York, New York 10020

/s/ HOWARD MONDERER
Howard Monderer
Washington Attorney
National Broadcasting Company, Inc.
1725 K Street, N. W.
Washington, D. C. 20006

June 20, 1966

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102 **Comments of Columbia Broadcasting System, Inc.**

Columbia Broadcasting System, Inc. (CBS) respectfully submits these Comments in response to the Commission's Notice of Proposed Rule Making (Notice) in this proceeding, which looks toward the adoption of rules establishing procedures to "make more precise licensee obligation" in the area of "personal attacks" and certain political editorials and to "assist the Commission in taking effective action in appropriate circumstances where the procedures are not followed." (Par. 3, Notice.)

Comments of Columbia Broadcasting System, Inc.

Section 73.123(a) of the proposed rules would provide that, when, "during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group," the licensee must furnish to such person or group a script, tape or summary of the "attack" along with other information about the broadcast and offer such person or group "a reasonable opportunity to respond over the licensee's facilities"—subject to certain exemptions provided for in Section 73.123(b).

103 Section 73.123(c) would require that when "a licensee, in an editorial, endorses or opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to the other qualified candidate or candidates for the same office" a copy of the editorial along with other information about the editorial together with an offer of "a reasonable opportunity . . . to respond over the licensee's facilities." Thus, the Commission, is for the first time, proposing to impose by specific rules "precise" obligations on licensees in their application of some aspects of the fairness doctrine with all the attendant penalties which accompany violations of Commission rules.

CBS opposes the adoption of these rules. While we do not condone unfair personal attacks on the air, we believe these rules come dangerously close to, if they do not actually encroach on, the boundary lines of the First Amendment. They are not required by public interest considerations, and, in fact, will not serve the goals the Commission seeks to advance.

* * *

The personal attack doctrine was formulated as a special case under the broader and more fundamental fairness doctrine. The fairness doctrine was intended to serve the

public interest in the widest dissemination of information and conflicting views on current affairs and public issues rather than to provide an extrajudicial remedy for *private* parties. In implementing the doctrine, the Com-
104 mission stated in its 1949 report on "Editorializing By Broadcasting Licensees" and reemphasized in its July 6, 1964 Public Notice on the fairness doctrine that the licensee must have complete discretion to determine "what subjects should be considered, the particular format of the programs to be devoted to each subject, the dfferent shades of opinion to be presented, and the spokesmen for each point of view." The Commision pointed out, in its 1949 report, that in some cases an individual's "personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist." Clearly this language anticipated an exercise of discretion on the part of the licensee. The Commission now proposes for the first time rules that would inflexibly require that, whenever such "personal attacks" occur, then without any exercise of discretion on the part of the licensee and without any consideration of the varying circumstances necessarily involved in such cases, the station must turn over its facilities to another regardless of his relationship to the main issue involved. As a consequence of the rules, the Commission would have the power to levy fines and possibly revoke licenses for non-compliance.

The proposed rules in this matter raise serious questions within the purview of the First Amendment and with respect to the proper scope of the Commission's powers in regulating program content and the day-to-day
105 operations of licensees. CBS believes that these rules would place constraints on freedom of speech

and freedom of the press. The First Amendment is media blind; it is as much violated by the Commission's directing a licensee to present an individual speaking on an issue the Commission finds "controversial" as it would be if the United States Post Office Department demanded the publication by *The New York Times* of the same statement at the risk of losing its special mailing privileges. CBS agrees that:

> ". . . the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgment of freedom of speech and press flatly forbids governmental interference, benign or otherwise."

This was the Commission's response (in its 1960 Report and Statement in the En Banc Program Inquiry) to suggestions that it require licensees to present specific types of programs on the theory that such action would enhance freedom of expression.

In the Notice the Commission recognizes "that in some instances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred . . ." (Par. 4.) We believe this uncertainty will be the usual rather than the exceptional case, especially for stations which broadcast a substantial amount of informational programming. Uncertainties such as this, together with the threat of burdensome administrative proceedings and pos-
106 sible forfeiture or revocation of licenses, will inhibit broadcasters from presenting vigorous opinions on current issues; rather, the bland and innocuous will in effect be encouraged. In proposing these rules the Commission seeks to assume the role of arbiter in determining whether certain speech in a particular broadcast is "controversial" and whether the language complained of in-

volves the "honesty, character, integrity or like personal qualities" of a person or group and where the licensee's decison is found wanting by the Commission—to punish the station through fines and possible license revocation. The Commission cannot arm itself with this power.

The proposed rules are therefore inherently incompatible with the constitutional requirement that channels of expression must be free of governmental coercion.

Further, the proposed rules intertwine the public interest in free debate with consideration for the private interests of individuals. This protection for private interests is not an objective of the fairness doctrine and is not an appropriate subject for rigid administrative regulation. In covering current issues of the day, basic journalistic techniques impel a broadcaster to obtain the views of a person subjected to attack. Inflexible governmental rules are unnecessary and undesirable in this area. Moreover, the fairness doctrine is concerned with the presentation of issues, not with the personal interests of any individual in his own prestige or reputation.

The proposed rules, to the extent they seek to protect private interests of persons who may be involved in
107 public controversy, would unnecessarily intrude the Commission into the day-to-day operations of licensees and jeopardize their legal rights. The definition of "personal attack" (an attack on an "individual's or group's integrity, character or honesty or like personal qualities") closely parallels the traditional standard of defamation. The private interests of persons who may be the subject of "personal attacks" are protected by the law of defamation. In some instances, of course, the public interest in free and unfettered discussion requires a limitation on such private remedies for there is indeed a:

> "profound national commitment to the principle that debate on public issues should be uninhibited, robust,

> and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times* v. *Sullivan,* 376 U. S. 254, 270 (1964).

The broadcaster, no less than any other journalist or indeed any other individual, has certain defenses against charges of defamation, among which are truth and privilege of fair reporting of legislative, administrative and judicial proceedings. These defenses are rooted in the overriding public interest embodied in the First Amendment in uninhibited public debate and free flow of information to the public. The proposed rules, by requiring admissions on the part of the broadcaster, could well jeopardize these defenses. In addition, as a result of the rules proposed, the broadcaster might become subject to administrative penalties in a Commission proceeding where none of his legal defenses would be available.

108 Moreover, we submit that the proposed rules will not guide but will confuse. The Commission recognizes in its Notice the uncertainties involved in administering and interpreting the proposed rules. Thus the Commission states "in some instances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance. The proposed rules are not designed to answer such questions." It is difficult to reconcile this uncertainty with the Commission's announced objective of achieving a more precise delineation of licensee responsibility in this area. While the Commission states that the rules are directed to situations where "there could be no reasonable doubt under the facts that a personal attack had taken place", the Commission then cites, as examples of situations clearly within the proposed rule, statements calling a public official or other

person an embezzler or a Communist. We are not, however, convinced that even these situations are as clear as the Commission suggests. Assume that the persons involved are Communists. The Commision itself, in ruling number 6 in its July 6, 1964 Public Notice "Applicability Of The Fairness Doctrine In The Handling Of Controversial Issues Of Public Importance", stated that "it was not and is not the Commission's intention to require licensees to make time available to communists or the communist viewpoint." There is no indication that the Commission intends to change its position on this for the Notice states that the Commission proposes "to codify the procedures which licensees are required to follow in personal attack situations." Many other comparable situations spring to mind where the appearance of a
109 particular individual would not further the public dialogue. We believe that these decisions should best be left to the licensee directly involved who is, of course, possessed of more information on the personalities and issues involved.

Another indication of the confusion which the adoption of the proposed rules will cause is that while the rules appear to apply to all types of broadcasts, we must assume that they are inapplicable to those classes of broadcasts which the Commission has previously excluded from the scope of the personal attack rule. Thus in the *Times-Mirror* ruling, 24 R.R. 404 (1962), which the Commission cited in the Notice, the Commission wrote:

> "The Commission's ruling, however, must be construed in the context of the facts giving rise thereto. Thus, newscasts, news interviews, etc., or, indeed, the above-mentioned discussion programs would not, as a general matter and absent conditions such as those discussed in the Commission's telegram, appear to be encompassed by the Commission's ruling. As

to the above-mentioned discussion program, it appers that both parties were equally represented, and, therefore, it seems clear that opportunity was afforded for opposing viewpoints on all of the issues discussed."

Moreover, in connection with the broadcasting of the CBS REPORTS documentary "Biography of a Bookie Joint", although allegations were made to the Commission that the broadcast represented an attack on the Massachusetts Legislature through the remarks made in the documentary by a member of that legislative body, CBS did not offer time to the Legislature and was not required to do so by the Commission.

We believe that the rule proposed by the Commission relating to station editorials in favor of or in opposition to political candidates is unwise and is open to many of the objections we have previously noted with respect to the personal attack rules. Here again the Commission has failed to indicate the reasons which require adoption of a rule in this area. Its latest (1964) SURVEY OF POLITICAL BROADCASTS, likewise gave no indication of any abuses by licensees in this area. In effect, the Commission proposes through this rule to broaden the "equal opportunities" provision of the Communications Act. Similarly, the proposed rule is made mechanically applicable to all such station candidate editorials, regardless of the time a station otherwise makes available to candidates in its total schedule. It is indeed possible that a licensee's attempt to comply with the proposed rule might lead in some instances to a serious imbalance of time on its facilities, in favor of the candidate who is the recipient of the station offer of time required by the proposed rule.

While the procedure prescribed by proposed Section 73.123(c) may seem desirable to some licensees, there does

not appear to be any compelling reason for it to be embodied in an inflexible rule and forced upon all licensees. Since a licensee is, in any case, required to maintain fairness and balance in its overall coverage of a
111 campaign, its editorial statement which is merely a part of that coverage, should be judged within that framework. In this connection, it may be noted that the rule purports to prescribe conduct in the event a licensee "endorses" a candidate in an "editorial" without defining what constitutes either an "editorial" or an "endorsement."

The proposed rule will deter some broadcasters from engaging in political activity in the same way that the Commission's interpretation of the "equal opportunities" requirements of Section 315 has curtailed the time which some licensees would otherwise make available to political candidates. We cannot believe that this is the intention of the Commission. The proposed rule seems to be at cross purposes with the exercise of First Amendment freedoms by broadcasters and with the public interest in having broadcasters contribute through their broadcasting to the ascertainment and discussion of community problems.

* * *

In conclusion we believe that proposed Sections 73.123(a), (b) and (c) are inconsistent with the basic principles of the First Amendment and are not in accord with the public interest. We believe that adoption of these rules will result in a continuing and growing involvement of the Commssion in the news judgments of licensees. For the first time since the Commission promulgated its fairness doctrine, it now seeks to judge licensee compliance
112 with the fairness doctrine on the basis of individual incidents. The proposed rules would substitute inflexible Commission-dictated procedures for the good-faith exercise of discretion by licensees. For these reasons,

CBS opposes the adoption of proposed Sections 73.123(a), (b) and (c).

Respectfully submitted,

COLUMBIA BROADCASTING SYSTEM, INC.

By /s/ LEON R. BROOKS
/s/ ALBERT HAYDEN DWYER
/s/ JOSEPH DEFRANCO
/s/ PAUL N. STERNBACH
/s/ RALPH E. GOLDBERG
/s/ ELEANOR S. APPLEWHAITE

Its Attorneys

51 West 52 Street
New York, New York 10019

June 20, 1966

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113 **Comments of Carroll M. Barringer**

Carroll M. Barringer, licensee of Radio Station WLCO, Eustis, Florida (WLCO), by its attorneys, submits these Comments in opposition to the Commission's proposal to amend its Rules relating to Editorializing. In support hereof, the following is shown:

1. It is believed that the proposed Rules are essentially based upon the concept that broadcast licensees are lacking in "responsibility" and, therefore, specific Rules are required in order to "enforce" responsibility. It is submitted that the facts dictate the contrary. The vast majority of licensees have demonstrated a substantial sense of responsibility and awareness of the obligations of broadcasters. Stations which are operated by such
114 responsible licensees, in treating upon controversial issues, are entirely competent to effectively produce

a contradictory point of view and to substantiate this viewpoint without the inference of personal character defamation. Moreover, the "attack" concept is impossible of precise definition. Certainly in cases where an "attack" is made, the subject of the attack already has ample remedies available. For example, a specific ruling may be requested of the Commission and a determination made whether the licensee involved has sufficiently discharged his obligation to insure fair presentation of all viewpoints and, if not, that licensee may then be required to discharge that obligation. Should there, in fact, be actual character defamation, there already exist ample civil remedies in way of damages—actual *and* punitive—which may be imposed by a judicial body entertaining a greater expertise in what is then essentially a "civil" matter.

2. It is the opinion of WLCO that the Commission would better fulfill its role by imposing more intensive standards regarding the qualification of applicants before facilities are granted to such applicants, rather than attempting to, in effect, regulate program content after having granted a license. Once the Commission has granted
115 a license, in the opinion of WLCO, full and complete responsibility for program content should thereafter be vested in the licensee of the facility involved. As already noted, any flagrant violation—such as defamatory conduct—or any infringement upon the legal and constitutional rights of any individual, group or organization, may then be reconciled and resolved in a court of law.

3. It is also believed that administration of the proposed Rule would be a practical impossibility. It cannot be conceived that the Commission is in a position to effectively comprehend all of the background involved in a particular Editorializing situation. For example, a licensee—*in the discharge of licensee responsibility*—may necessarily be required to "attack" a corrupt official. Such action, while

a responsible one, may not be consistent with "political" wisdom. The official, for example, may be in an influential position and thus able to bring pressure to bear upon the Commission in a manner that precludes the licensee from adequately presenting the basis of his attack. In the alternative, the licensee may be compelled to refrain from Editorializing until it is too late to accomplish what the community interest requires. At the very least, promulgation of fixed Rules and Standards can only serve to dissuade licensees, at the risk of penalty, from effectively serving the public interest and discharging the responsibilities as a broadcast licensee.

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In summary, if licensees are deemed to have Editorial responsibilities, then licensees must be given broad leeway in the discharge of such a responsibility. The promulgation of fixed Standards and Rules, with attendant punitive devices, is a contradiction of the freedom necessary to the effective implementation of the responsibilities of a licensee.

Respectfully submitted,

CARROLL M. BARRINGER

By /s/ KEITH E. PUTBRESE
Keith E. Putbrese

By /s/ JASON L. SHRINSKY
Jason L. Shrinsky

By /s/ B. JAY BARAFF
B. Jay Baraff

Dated: June 20, 1966

Of Counsel:
GROVE, JASKIEWICZ, GILLIAM
& PUTBRESE
600 Madison Building
Washington, D. C. 20005

118 **Comments of Cape Fear Telecasting, Inc.**

Cape Fear Telecasting, Inc., licensee of Television Station WWAY (TV), Wilmington, North Carolina (WWAY), by its attorneys, submits these Comments in opposition to the Commission's above-referenced proposal to amend Part 73 of its Rules relating to Editorializing. In support hereof, the following is shown:

1. The Commission has generally recognized and acknowledged the desirability of retaining a degree of flexibility with regard to matters generally coming under the purview of the fairness doctrine. WWAY believes this a necessity in view of the practical impossibility of making *a priori* determinations as to "what" constitutes fairness; unfairness; controversy; or an "attack". As in so many matters which involve questions of freedom of speech,
119 these are not concepts which readily lend themselves to narrow categorization or codification in a set of Rules.

2. In its *Public Notice* released July 6, 1964, dealing with the Fairness Doctrine,[1] the Commission stated that:

> "In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee . . . but rather to determine whether the licensee can be said to have acted reasonably and in good faith. There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the 'Equal Opportunities' requirement".

The Commission also went on to state:

> "In an area such as the fairness doctrine, the Commission's rulings are necessarily based upon the facts of the particular case presented, and thus a variation

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1 2 RR, 2d 1901, 1904 (1964).

in facts might call for a different or revised ruling. We therefore urge that interested persons, in studying the rulings for guidance, look not only to the language of the ruling but the specific factual context in which it was made."[2]

In its Report on Editorializing By Broadcast Licensees,[3] at Paragraph 10, the Commission also stated:

120 "It should be recognized that there can be no one all-embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered . . .".

3. It is believed that the Commission has, therefore, itself acknowledged the subject matter of its proposal to be so ephemeral as to be an improper subject for the establishment of rigid and fixed standards. Thus, it would likewise be both impractical and inordinately burdensome to impose upon licensees, where the applicability of such standards is so contingent upon uncertainty, the threat of violation. If there is to be a fairness doctrine, then its administration can best be handled on an *ad hoc* basis. There already exists, of course, a body of case law and Commission rulings. If the Commission would then promptly extend further interpretive rulings upon the request of licensees, this would afford a much more feasible alternative. The role of the Commission in this area should be administratively helpful rather than judicially punitive.

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[2] *Ibid.*

[3] 13 FCC 1246 (1949).

121 4. Moreover, to promulgate fixed rules in this area, with their attendant penalties for failure to comply, would be to encourage pusillanimity on the part of broadcast licensees. The natural tendency on the part of most broadcasters would be to "play it safe" and not endanger their licenses or finances by broadcasting matters of a controversial nature. It would create a deleterious effect with respect to those few crusading radio and television journalists, who, in the exposure of graft or corruption in a community, would run the risk of violating the personal attack doctrine even though exposing the "corrupt" official. In short, the proposed Rules, while designed to "enforce" responsibility, would have the actual effect of "discouraging" licensee responsibility. This is hardly consistent with the public interest standard.

Respectfully submitted,

CAPE FEAR TELECASTING, INC.

By /s/ KEITH E. PUTBRESE
Keith E. Putbrese

By /s/ JASON L. SHRINSKY
Jason L. Shrinsky

By /s/ B. JAY BARAFF
B. Jay Baraff

Dated: June 20, 1966

Of Counsel:
GROVE, JASKIEWICZ, GILLIAM
& PUTBRESE

123 **Comments of**

Bedford Broadcasting Corporation (WBIW), Bedford, Indiana

Central Broadcasting Corporation (WKBV-AM-FM), Richmond, Indiana

Continental Broadcasting Corporation (WHOA), Hato Rey, Puerto Rico

The Evening News Association (WWJ-AM-FM-TV), Detroit, Michigan

Marion Radio Corporation (WBAT), Marion, Indiana

Moline Television Corporation (WQAD-TV), Moline, Illinois

Radio Television News Directors Association

Reams Broadcasting Corporation (WCWA-AM-FM), Toledo, Ohio

RKO General, Inc. (WOR-AM-FM-TV), New York, New York; (WHBQ-AM-TV), Memphis, Tennessee; (KHJ-AM-FM-TV), Los Angeles, California; (WNAC-AM-TV, WRKO-FM), Boston, Massachusetts; (WGMS-AM), Bethesda, Maryland; (WGMS-FM), Washington, D.C.; (KFRC-AM-FM), San Francisco, California

Royal Street Corporation (WDSU-AM-FM-TV), New Orleans, Louisiana

Roywood Corporation (WALA-TV), Mobile, Alabama

Time-Life Broadcast, Inc. (KLZ-AM-FM-TV), Denver, Colorado; (WFBM-AM-FM-TV), Indianapolis, Indiana; (WOOD-AM-FM-TV), Grand Rapids, Michigan; (KOGO-AM-FM-TV), San Diego, California; (KERO-TV), Bakersfield, California

WKY Television System, Inc. (WKY-AM-TV), Oklahoma City, Oklahoma; (WTVT), Tampa, Florida; (KTVT), Fort Worth, Texas; (KHTV), Houston, Texas; (WVTV), Milwaukee, Wisconsin

* * *

130 INTRODUCTION

The Commission in the instant proceeding proposes to adopt as a formal regulation two phases of its "fairness doctrine." Proposed Section 73.123(a), which relates to personal attacks on an "identified person or group" in the course of "the presentation of views on a controversial issue of public importance," contains specific directions requiring the licensee to notify the "person or group attacked" and to offer "a reasonable opportunity to respond over the licensee's facilities." Similarly, proposed Section 73.123(c), which deals with editorials by a licensee endorsing or opposing a political candidate, provides for the notification (including transmittal of the tape or script) of the opposing candidate or candidates within 24 hours and requires the licensee to offer "a reasonable opportunity for a candidate or a spokesman for the candidate to respond over the licensee's facilities." The notice accompanying the proposed rules makes clear that they are based upon

the Commission's overall "fairness doctrine" as to

131 "controversial issues of public importance" and

further cites as statutory authority for adoption of the rules Sections 4(i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended.

While perhaps more direct than heretofore, the two instant proposals constitute further evidence of a Commission purpose to interfere with the exercise of the journalistic and editorial function of the electronic press. The "fairness doctrine," which the proposed rules are intended to supplement, has long been an instrument of Commission regulation which has impinged upon the free exercise of the journalistic function by broadcasters. Likewise, the remaining requirements of Section 315 have long compelled the broadcast industry to operate in a manner abhorrent to the freedoms protected by the First Amendment to the Constitution. Since the Commission has bottomed its asser-

tion of authority and power to adopt the proposed rules upon Section 315 and the "fairness doctrine," it is our purpose herein to challenge the constitutionality of the reliance the Commission has placed thereon as a basis for justifying its dubious intrusions into the constitutionally-protected area of freedom of speech and freedom of the press. Whatever other weaknesses the proposed rules may have, their ultimate validity must rest upon the constitutional validity of the statutory and regulatory concepts upon which the Commission asserts they rest.

We are not so naive or lacking in sophistication as to believe that, however compelling our argument, the Commission will decide that Congress acted unconstitutionally in adopting Section 315 and its amendments or that the Court of Appeals has been wrong from *Trinity*[1] to now in endorsing program regulation by the Commission. Our only relief, as a practical matter, in view of the concurrence of the Commission and the Court of Appeals, is in
132 fully and fairly presenting the issue to the Supreme Court. Our presentation, therefore, is not a futile exercise in dialectics but a serious attempt to lay the foundation for determination by that supreme tribunal. We expect only that the Commission will sharpen the issue by candidly and thoroughly treating with the questions we present. We are aware that the Court of Appeals recently, by way of dicta, impliedly endorsed the "fairness doctrine" as "a sine qua non of every licensee."[2] It is our fervent goal to re-establish the freedom of the electronic press protected by the First Amendment as the "sine qua non" of broadcast regulation.

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[1] *Trinity Methodist Church, South* v. *FEC*, 61 App. D.C. 311, 62 F. 2d 850 (1932), *cert. denied*, 288 U.S. 599 (1933).

[2] *Office of Communication of the United Church of Christ* v. *FCC*, 7 R.R. 2d 2001, 2017 (D.C. Cir. 1966).

I.

Preliminary Considerations

A. Broadcasting Is Entitled to the Same Constitutional Protection Afforded Other Communications Instruments Making Up the Constitutionally-Protected Press.

The fairness doctrine policies and the equal opportunity provisions of Section 315 were developed and adopted by Congress and the Commission at a time when conventional wisdom doubted that radio and television were entitled to the protection of the First Amendment of the Constitution guaranteeing freedom of speech and of the press. The equal opportunity requirements of Section 315 have been part of the law, in one form or another, since the Radio Act of 1927. The fairness doctrine had a somewhat ambiguous *ad hoc* origin during the early 30's and was first set forth as a definitive policy by the Commission in dicta in the *Mayflower* decision in 1940.[3]

The doubts of the 20's and 30's about the inclusion
133 of electronic media in the term "press" were eliminated in the 40's and 50's. The premise that radio and television are excluded can no longer serve as justification for the type of government abridgement reflected by the fairness doctrine and the equal opportunity provisions of Section 315. Thus, the Supreme Court has made clear that radio and television, as well as other instruments of communication that inventive genius may bring into being, are entitled to the protection of the First Amendment to the Constitution guaranteeing freedom of speech and of the press.[4] In short, the "press" in its historic con-

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[3] *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940).

[4] *Estes* v. *Texas*, 381 U.S. 532, 540, 585, 589, 604, 615 (1965); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502 (1952); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938). See *American Broadcasting Co.* v. *United States*, 110 F. Supp. 374, 389 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 284 (1954). Compare FCC Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry, 20 R.R. 1901 (1960).

notation comprehends every sort of communication instrument which affords a vehicle of information and opinion.[5] Thus, broadcasting as part of the press in the constitutional context is entitled, without qualification or exception, to the same protection afforded to all other communication instruments making up the "press" protected by the Constitution. Any impingement upon broadcasting's constitutional rights and privileges can be no greater than the permissible constitutional impingements which may be applicable to all other communication instruments embraced by the Constitntion. The shibboleth that "radio and television are different" no longer can serve as a password for government intrusion.

We need not further belabor this point, since the Commission, in its program policy statement,[6] even
134 though ignoring or unaware it was acting to the contrary, nevertheless, recognized the applicability of the First Amendment to broadcasting, when it stated:

> "[W]e are constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgement of freedom of speech and press flatly forbids governmental interference, benign or otherwise." 20 R.R. at 1907.

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[5] *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938). The fact that broadcasting devotes itself to disseminating entertainment as well as information and opinion is not grounds for withholding First Amendment protection from it—"What is one man's amusement, teaches another's doctrine." *Winters* v. *New York*, 333 U.S. 507, 510 (1948).

[6] FCC Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry, 20 R.R. 1901, 1905-07 (1960).

B. The Fairness Doctrine and the "Equal Opportunity" Provision of Section 315 Have Resulted in Less, Not More, Broadcasting of Information in the Public Interest.

Being both communicators and citizens in a free and open society, we can easily and most heartedly endorse the need of a democratic society for an informed electorate. The issue here is not that goal, but the means of getting there. Experience has demonstrated that the means which the Commission and Congress have selected to reach this goal —the fairness doctrine and the political candidate equality requirements of Section 315—reflect presumptions that offend reality. The application of these manufactured restraints upon broadcasting has neither increased the broadcast of diversity of opinion nor expanded free speech, but, rather, has compelled suppression and blackout. These restraints promote pusillanimity and weakness of voice among a host of competent contributors—the electronic press.

For example, it is widely recognized that the four classic Kennedy-Nixon debates during the 1960 campaign for President could not have been held in the absence of congressional suspension of the equal opportunity requirements for presidential candidates. In the absence of such suspension, in order to hold these four one-hour debates, the networks and stations could have been subjected to governmentally-supported demands for equal time, aggregating as much as 56 hours of additional free time under the equal opportunity provisions, from fourteen other presidential candidates. Presently, the "trade-off" with government to carry four hours is the elimination of 52 hours of other communications in order to make way for the government-dictated program.

Prior to and since the temporary suspension of the Section 315 requirement for presidential candidates in 1960,