> contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free .... It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." (34 U.S.L. Week 4419).

240 Moreover, in rejecting the lower court's argument that the statute was valid because it seemed "within the field of reasonableness" and served the "good purpose" of preventing editorials that could not be answered (in that case because of time factors) the Court said:

> "... We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime to do no more than urge people to vote one way or another in a publicly held election." (34 U.S.L. Week 4420).

Here, too, for example, a regulation that a station may not editorialize for or against a candidate without also inviting broadcast of a responsive statement on behalf of candidates opposing the one who was endorsed or on behalf of the candidate who was opposed by the editorial, without facing a fine of as much as $10,000, *is* a "muzzle" and *is* an abridgement of constitutionally guaranteed freedoms which cannot be saved by any test of reasonableness.

III. Even if the Proposed Rules Would Be Lawful, There Has Been No Showing That They Would Result In Improved Compliance—Their Stated Objective.

10. The Commission stated that it has proposed to adopt rules governing the instant two areas under the "fairness doctrine"—personal attack and support of or opposition to political candidates—to "make more precise licensee obligation in this important area" and to "assist the

Commission in taking effective action in appropriate circumstances when the procedures are not followed.''[1] In short, the rules appear to be directed at curing problems of non-compliance and enforcement. However, the
241 Commission has made no showing that there is or has been a substantial problem of non-compliance or enforcement in these two areas under the ''fairness doctrine,'' or that such problems as may have been encountered in these two areas are any more prevalent or significant than problems encountered in other areas under the ''fairness doctrine'' for which rules have not been proposed. Thus, the Commission has not shown the need for the proposed rules, even if it be assumed that such rules would be lawful.

11. Nor has the Commission shown that, whatever the present situation with respect to compliance and enforcement in the two areas, this would be improved by the proposed rules and their threat of lines. The fact is that the Commission, with its powers over renewal of license, appears to have achieved a high degree of compliance with and enforcement of its ''personal attack'' and ''candidate endorsement'' aspects of the ''fairness doctrine'' notwithstanding their doubtful legality.

12. Moreover, it is doubtful that improved compliance would in fact result from the proposed rules, for they present on their face new and troublesome questions about their scope and meaning. For example, the proposed provision dealing with attacks by a person ''associated'' with one candidate in a campaign upon a person ''associated'' with another candidate in the campaign could lead to great confusion as to what may be required of a station in a particular case. In the give and take of political campaigns it is not always clear who is ''associated'' with a

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[1] Notice of Proposed Rule Making, paras. 3, 7.

candidates in a campaign, and it is not unheard of for candidate and others to become "disassociated" or to change associations during a campaign.

242 III. The Proposed Rules Seek to Codify Aspects of the "Fairness Doctrine" Which are Unsuitable for Codification; More Precise Licensee Responsibility In These Areas Would Not Be Achieved By the Proposed Rules.

13. The Commission has stressed its view that the proposed rules would "emphasize and make more precise licensee obligation in this important area."[1] While the proposed rules, carrying with them the threat of fines, would inevitably "emphasize" the "personal attack" and "candidate endorsement" areas of the "fairness doctrine," the Commission's attempt to make licensee responsibility "more precise" in these areas is unnecessary, inappropriate, undesirable and unsuccessful.

14. Even assuming the lawfulness of the "fairness doctrine," the proposed rules are *unnecessary* to define "licensee obligation" because the Commission has already spelled out its views in these areas in its general policy statements and in case-by-case determinations. The proposed rules add little to the previously established Commission policy, and such new clarifications as are set forth in the proposed rules (*e.g.,* the one week requirement for personal attacks, the 24-hour requirement for candidate endorsement or opposition editorials, and the exceptions in the Note to proposed Section 73.123(b)) could all be covered by a further policy statement.

15. Again apart from their lawfulness, the proposed rules are *inappropriate* and *undesirable* because the areas they would cover should more properly be left to case-by-

[1] Notice of Proposed Rule Making, para. 3.

case determinations based on *all* of the facts of the
243 situation. The Commission itself has stated:

> "we recognize that in some instances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle . . . ."[1]

It simply has not been shown that there is reasonable basis for singling out for purportedly precise enforcement certain aspects of a concept so inherently imprecise as "fairness." What may reasonably be concluded to be "fair" in one case may not be "fair" in another, notwithstanding what a specific rule may purport to declare is "fair" in all cases.[2]

16. Finally, the proposed rules would be largely *unsuccessful* in achieving greater precision of licensee obligation with respect to important aspects of the personal attack and candidate endorsement areas, for in many instances they do not even focus on problem areas. Thus, for example, the proposed personal attack rule leaves open such important questions as (a) within what time a person must accept a station's invitation to respond to an attack or to a candidate endorsement or opposition editorial, (b) the matter of licensee inquiries into the willingness of an attacked person to pay for time for the response, (c) the time or other limitations a station may impose on a response to a candidate endorsement or opposition
244 editorial,[3] and (d) the proper relationship of Section 315 and the fairness doctrine where they over-

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[1] Notice of Proposed Rule Making, para. 4. See also paras. 5 and 7.

[2] Indeed, the proposed rules may be so vague as to present questions of due process.

[3] This point is particularly difficult in view of the Commission's statement that the person responding to a candidate endorsement or opposition editorial may be entitled to more than "equal time." Notice of Proposed Rule Making, para. 7.

lap.[1] Moreover, the proposed exception for attacks by candidates, their authorized spokesmen, or those associated with them in the campaign, *against other* candidates, spokesmen, or persons associated with them in the campaign, may well give rise to more problems than it solves. There is no indication of what qualities characterize "spokesmen or persons associated" with a candidate in a campaign. Nor, apparently, has any thought been given as to how a licensee would proceed to determine such questions within the time limits imposed, or what it would do if there were disagreement, even among the candidates, as to whether an individual was a spokesman or an associate. For all of their apparent simplicity and precision, the proposed rules fail to give guidance in important areas —areas in which a licensee could be subjected to fines if he makes a decision (often under time duress) with which, having the valuable twin benefits of opportunity for unhurried reflection and hindsight, the Commission or its staff may later disagree.

IV. Liability for Forfeitures Should Not Be Created in Areas As Inherently Imprecise as "Fairness" Where Reasonable Men in Good Faith Can Differ on What, in Fact, Is "Fair."

17. In support of the proposed rules the Commission states that they "will assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed."[2] By this, the Commission apparently means that it would be able to seek to impose fines of up to $10,000 for each willful or repeated violation of the proposed rules. This attempt to extend the Commission's power to levy for-

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[1] Notice of Proposed Rule Making, paras. 5-7.

[2] Notice of Proposed Rule Making, para. 3.

feitures in an area as inherently imprecise as "fairness" would be undesirable.[1]

18. The Commission apparently recognizes the doubtful nature of seeking to apply monetary forfeiture procedures to the inherently imprecise area of "fairness," for it goes out of its way to stress that it does not *intend* "to use the proposed rule as a basis for sanctions against those licensees who in good faith seek to comply," and that it *intends* to limit sanctions to cases where "there could be no reasonable doubt under the facts that a personal attack had taken place."[2] But the inappropriateness of rules in the "fairness" area that could lead to monetary forfeitures simply cannot be cured by the present Commission's assurances of its present intentions. The fact is that both intentions and Commissioners can and do change. Moreover, the fact remains that under the proposed rules licensees will be forced to make decisions in the areas in question more at their peril than in the past. Cases which, with the benefit of hindsight and time for leisurely reflection, appear to present "no reasonable doubt," may not be so clear at the time licensee decision is required, especially when there are time pressures. A station that decides in a close case that a person has not been personally attacked, or that decides that a person who has been attacked is an exempt associate of an opposing candidate, could be fined if it is later determined

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that it made an error of judgment on the question of whether there was in fact a "personal attack," or whether there was an exemption. Under these circumstances, the proposed rules unreasonably—indeed, unfairly—expose licensees to liability for fines as much as $10,000

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[1] This would be especially true if "willful" is interpreted to include a conscious act even though taken without specific intent to violate a rule, and if "repeated" is interpreted to cover such situations as failure to give timely notice to two persons "attacked" in the same broadcast.

[2] Notice of Proposed Rule Making, para. 4.

for isolated "wrong" decisions. This defect is especially glaring in light of the absence of any showing of past or present widespread or serious departures from the Commission's "fairness doctrine" policies and rulings under present practices and procedures.

WHEREFORE, the Commission should not only not adopt the new rules here proposed, but should abandon altogether its unlawful "fairness doctrine."

Respectfully submitted,

CORINTHIAN TELEVISION CORPORATION (KOTV)
GREAT WESTERN BROADCASTING CORPORATION (KXTV)
GULF TELEVISION CORPORATION (KHOU-TV)
INDIANA BROADCASTING CORPORATION (WISH-TV and WANE-TV)
POST-NEWSWEEK STATIONS (WTOP, WTOP-TV and WJXT)
W.A.V.E., INC. (WAVE and WAVE-TV)
WFIE, INC. (WFIE-TV)
WFRV, INC. (WFRV-TV)

By /s/ EDGAR F. CZARRA, JR.
Edgar F. Czarra, Jr.

By /s/ JONATHAN D. BLAKE
Jonathan D. Blake

Covington & Burling
701 Union Trust Building
Washington, D. C. 20005
Their Attorneys.

June 20, 1966.

246-A American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

* * *

June 17, 1966

Mr. Ben F. Waple, Secretary
Federal Communications Commission
2605 Avena Street
Wheaton, Maryland

Dear Mr. Waple:

The American Civil Liberties Union wishes to present its views on the Federal Communications Commission's proposed rule-making concerning the "fairness doctrine," and, more specifically, codifying the procedures which licensees are required to follow in personal attack situations and implementing the Commission's ruling on station editorials endorsing or opposing political candidates. (Docket No. 16574)

The Union's general support of the "fairness doctrine" was presented to the Commission in December, 1964. We endorsed the standards of the doctrine, which encourage the broadcasting of controversial points of view on public issues, as a significant step toward the implementation of the First Amendment's guarantee of freedom of expression, a guarantee designed to assure citizens a diversity of information and opinion. While noting that government regulation always holds the possibility of censorship, a danger to which civil libertarians are particularly sensitive, the ACLU stated its full backing for Commisison actions promoting diversity without interfering with program content.

In its 1964 statement the ACLU did express reservations, however, regarding the FCC's procedural requirements necessitating the submission of broadcast transcripts by

licensees to persons or groups attacked on the air. The Union was concerned lest the transcript procedure would place such an onerous administrative burden on the stations that it might result in their refraining from presenting controversial points of view at all. Questioning the advisability and practicality of such requirements, the Union urged the Commission to "re-evaluate them in light of their own experience and the practicalities of the broadcasting industry, especially in the context of this last election campaign [in November, 1964]".

In considering the Commission's present proposal, 246-B the ACLU has re-examined its own position on the procedural implementation of the "personal attack" principle. Under the proposed rule-making, "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. . . . 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." The rule-making would leave to the "reasonable judgment of the licensee and to good faith negotiations" such other matters as the imposition of a reasonable time limit in which the person notified would be required to respond.

The Commission's proposed rule-making specifically exempts personal attacks in the context of the discussion of controversial issues and personal attacks by political candidates, their spokesmen and their campaign associates. These two exemptions remove the core of the ACLU objection to the original, broader procedural arrangement, which we felt would impose too heavy a transcript requirement on the stations. Therefore, the Union supports the FCC's proposed rule, directed, as it is, to the one

category of attacks on individuals and groups. The Union believes that the Commission's revision of the rule represents a positive step in the direction of diversity of opinion on the air, and it will still adequately protect the individual against unanswered attacks, in the interest of innate fairness.

The Union also agrees with the Commission's further exclusion from the "personal attack" rule-making of foreign groups and foreign political figures. As a practical matter, the ACLU believes, it would be virtually impossible to notify all foreign figures attacked on the air, and, in any event, it would be most inhibiting of free discussion to impose such a requirement. For example, it would be obviously impractical, indeed absurd, to require stations to make the "personal attack" machinery available to such personalities as President Charles de Gaulle, or Queen Elizabeth, or President Ho Chi Minh.

Finally, the ACLU also endorses the Commission's proposed rule-making that "the appropriate candidate (or candidates) be informed of the station's editorial opposing his (or their) candidacy or supporting the candidacy of a rival, and be given 24 hours notification of the editorial and an opportunity to respond," with notification being required prior to broadcast in the case of station editorializing close to the election. In terms of fairness to both the candidate and the electorate, this proposal provides the opportunity for the candidate to present his points of view on public issues with the greatest accuracy, and it gives the electorate the full information which it needs to make intelligent choices in exercising the right of franchise.

All in all, the Union believes that the proposed rule acts in the interest of broadcasting diversity, by broadening

the scope of debate on issues of current importance and by this letter is happy to support it.

Sincerely yours,

/s/ JOHN DE J. PEMBERTON, JR.
John de J. Pemberton, Jr.
Executive Director

/s/ HARRIET PILPEL
Harriet Pilpel, Chairman
Radio-TV Committee

JdeJP & HP/ck

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251 **Comment of the United Steelworkers of America, AFL-CIO**

(1) The United Steelworkers of America is a labor organization affiliated with the AFL-CIO. Founded in 1938 it now represents over 900,000 workers in the United States and Canada.

(2) The United Steelworkers' interest in the proposed rule on Broadcast Fairness is twofold. First, it is interested as an organization which forwards policies which in large regions of the country are controversial. Second, it is interested in obtaining for its members and the public at large, a well-rounded discussion of controversial issues which affect the community.

(a) Our primary interest in this rulemaking proceeding arises from our desire to obtain a fair hearing in our promotion of legitimate trade union policies. Past 252 history and present realities make it clear that the labor movement remains a controversial issue in large areas of our nation. This is especially clear in the

South. In the South a regional prejudice against the labor movement exists. This prejudice has in the past and continues in the present to make it difficult for labor organizations to present their side of organizing campaigns, collective bargaining disputes and other related union activities. Local newspapers, radio and television stations are often controlled by interests unfriendly and often actively hostile to the labor movement. The communications facilities in many communities have presented only one side of the issue in labor disputes. Unions have time after time been denied access to the public forum to present their side of disputes. Documentation of this blackout was presented in Hearings, Administration of the Labor Management Relations Act by the NLRB, before the Subcommittee on National Labor Relations Board, in 1961.[1] We believe that some of these obstacles can be removed by the enactment of the proposed rule as expanded by our suggested amendment (see Attachment No. 1).

253 (b) The Steelworkers has a second reason for urging the adoption of the expanded rule. Our membership of almost one million has an interest as citizens of this nation in obtaining an open and fair forum for discussion of ideas of interest to the community. The expanded rule would serve as a positive force for encouraging such discussion, insuring a more informed public. The policy of encouraging open discussion of controversial topics in the broadcasting industry was announced in 1948 by Congress in Section 315 (47 U.S.C.), of the Federal Communications Act. The Commission has consistently forwarded the Congressional policy.[2] The adoption of the expanded rule would be a step toward the realization of

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1 87th Cong. 1st sess. (1961), Part I, pp. 292-331.

2 Commission; 1949 Report, Editorializing by Broadcast Licensee, 13 F.C.C. 1246; Fairness Primer, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, F.C.C. 64-611, FR 10415.

a broadcasting industry in tune with the Congressional mandates.

(3) The broadcasting industry and its spokesmen in comments already presented on this issue seem to forget that a broadcast license is a public trust, not an ordinary property interest. The licensee must, under Section 315
254 of the Federal Communications Act, afford reasonable opportunity for the discussion of conflicting views on issues of public importance. The expanded rule will help the Commission carry out the intention of Congress.

The industry's argument rests on two grounds. First, the proposed rule would violate rights granted by the First and Fifth Amendments. Second, even if the rule is constitutional, it is unnecessary. The industry has failed to substantiate either of these arguments.

No court has ever upheld the industry's claim of total exemption under the First Amendment from Government regulation. The cases cited in a number of the industry's comments are applicable to newspapers but not to the broadcasting industry.[3] The broadcasting industry is not in the same position as newspapers are with regard to the protection of the First Amendment. This long standing view was made clear again in the recent case, *Office of Communications of United Church of Christ* v. *FCC*, F. 2d , March 25, 1966, before the United States Court of Appeals for the District of Columbia Circuit, where the Court made the following comment:

255 "A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligation imposed by law. A broad-

[3] *New York Times* v. *Sullivan*, 376 U.S. 254 (1963); *Mills v. Alabama*, 34 L.Week 4418, May 23, 1966.

> caster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts the franchise it is burdened by an enfoceable public obligation. A newspaper can be operated at the whim or caprice of its owner, a broadcast station cannot."

This *United Church* case also makes evident the fallacy of the industry's Fifth Amendment argument. The broadcast license is not an ordinary property interest, it is a qualified grant of a monopoly subject to Government regulation. The licensee takes the property interest under an agreement to follow the rules laid down by the Commission. The industry is claiming an absolute property right which it never had.

The industry argues that even if the proposed rules are constitutional, they are unnecessary. The Congressional mandate is not an expression of an intent to leave to the industry the decision as to how it will act in this area. Self-regulation in many areas may be the best way of achieving the goals of national policy. The guarantee of a free forum for discussion in the broadcasting industry is not such an area. A free forum with access open to divergent points of view must be guaranteed. To allow one group, no matter how well motivated, absolute control over access to this forum would defeat the intention of Congress.

256 In summary we argue that the public interest can best be served through a clear codification of the fairness doctrine. To this end we support the proposed rule put forward by the Commission and urge its adoption. In addition, we urge two amendments to the proposed rule which would make it clear that Section 315 of the Federal Communications Act is carried out by guaranteeing the broadcast station will afford reasonable opportunity for the

discussion of conflicting views on issues of public importance. The amendments are attached.

Respectfully submitted,

/s/ Elliot Bredhoff
Elliott Bredhoff
Michael Gottesman
Bredhoff & Gottesman
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036
Attorneys for United Steelworkers of America, AFL-CIO

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257 Amendments Suggested by United Steelworkers of America, AFL-CIO

Amendment No. 1

Change the title to read:

"Sec. 73.123—Personal Attack; Political Editorials; Obligation to Encourage the Discussion of Controversial Issues."

* * *

Amendment No. 2

Add the following paragraph:

"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 Federal Communications Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

258 FLORIDA ASSOCIATION OF BROADCASTERS

Gainesville, Florida

4th Floor, Stadium Building

Box 14444—University Station

* * *

RESOLUTION IV

Fairness Doctrine

WHEREAS, the vast majority of broadcast station licensees make conscientious and sincere efforts to comply with the Commission's "fairness doctrine", and such compliance involves both judgment and good faith and is not susceptible to determination by the letter of a rule but only by the spirit of the policy,

THEREFORE, the Florida Association of Broadcasters, Inc., opposes the adoption of the Rules to control personal attacks and political editorializing as proposed in Docket 16574.

Adopted this 21st day of June, 1966 at Jacksonville, Florida.

/s/ ARNOLD F. SCHOEN, JR.,
President

Attest: KENNETH F. SMALL,
Secretary

346 **Memorandum Opinion and Order**

Adopted July 5, 1967; Released July 10, 1967

By the Commission: Commissioner Bartley dissenting and issuing a statement; Commissioner Loevinger concurring and issuing a statement; Commissioner Wadsworth absent.

1. On April 6, 1966 the Commission adopted a Notice of Proposed Rule Making (FCC 66-291) to provide procedures in the event of certain personal attacks and where a station editorializes as to political candidates. This Notice was published in the Federal Register of April 13, 1966 (31 Fed. Reg. 5710). Upon the request of the National Association of Broadcasters, the time for filing comments and reply comments was extended to June 20 and July 5, 1966, respectively (31 Fed. Reg. 6838, May 7, 1966).

2. Comments were timely filed by Carrol M. Barringer (WLCO), Bedford Broadcasting Corp. (WBIW), *et al.*,[1] Cape Fear Telecasting, Inc., Colorado Broadcasters Association, Columbia Broadcasting System, Inc., Corinthian Television Corp., *et al.,* Golden Empire Broadcasting Co., Griffin-Leake TV, Inc., Interstate Broadcasting Co., Meridith Broadcasting Co., Mutual Broadcasting System, Inc., Mission Broadcasting Co., National Association of Broadcasters, National Broadcasting Co., Inc., Storer 347 Broadcasting Co., Trigg-Vaughn Stations, Inc., WIBC, Inc. and WPSD-TV, generally in opposition to the rules. Comments favoring the rules were received

[1] On July 8, 1966 Bedford Broadcasting Corp., *et al.*, submitted, together with a motion to accept the Addendum, an Addendum to their comments, consisting of excerpts from an "Economic Analysis of Competition in the Daily Newspaper Business," prepared by Jesse Markham, Professor of Economics, Princeton University. No reason was given for the failure to submit the material in a timely fashion. The motion to accept the addendum is denied. (47 C.F.R. 1.415(d)).

from the American Civil Liberties Union,[2] Joseph H. Chislow, International Typographical Union (AFL-CIO), Laborers' International Union of North America (AFL-CIO), National Council of the Churches of Christ, National Rifle Association of America, The Pacifica Foundation, and the United Steel Workers of America, AFL-CIO.

3. The purpose of embodying the procedural aspects of the Commission's long-adhered-to personal attack principle and political editorial policy in its Rules is twofold. It will clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks and editorials regarding political candidates. Further, in the event of failure to comply with these rules, the Commission will be in a position to impose appropriate forfeitures (§ 503(b) of the Act) in cases of clear violations by licensees which would not warrant designating their applications for hearing at renewal time or instituting revocation proceedings but on the other hand do warrant more than a mere letter of reprimand. Of course, pursuant to § 503(b) of the Act, only the willful or repeated violation of these rules can result in forfeiture. We stress that the personal attack principle is applicable only in the context of the discussion of a controversial issue of public importance. See par. 10, *infra.*

4. These rules will serve to effectuate important aspects of the well established Fairness Doctrine; they do not alter or add to the substance of the Doctrine.[3] As set forth in the 1949 *Report of the Commission in the Matter of Editoriali-*

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[2] The informal comments submitted by the A.C.L.U. reflect an apparent mis-reading of the proposed rules in that the comments state the "rule-making specifically exempts personal attacks in the context of the discussion of controversial issues . . ." In fact this is the situation expressly covered by the proposed rules.

[3] The only new requirement in these rules are the time limits, discussed in paragraphs 12 and 15, *infra,* within which licensees must act to fulfill their substantive obligations when they have broadcast personal attacks or political editorials.

zation by Broadcast Licensees, 13 F.C.C. 1246 at 1249 (1949), "the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day" is the keystone of the Fairness Doctrine. "It is this right of the public to be informed rather than the 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 348 of broadcasting" *Ibid.* The Fairness Doctrine as a basic delineation of a standard of public interest in broadcasting was given specific Congressional approval in the 1959 amendment of Section 315(a) of the Communications Act, 73 Stat. 557, 47 U.S.C. 315(a). The personal attack principle is simply a particular aspect of the Fairness Doctrine. The principle stems from the Commission's language in the 1949 *Report* that "elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station . . ." 13 F.C.C. 1252. The standard of fairness similarly dictates that where a licensee editorializes for or against a candidate the appropriate spokesman for the conflicting point of view is the opposed candidate's representative, or, if the licensee so chooses, the candidate himself. "These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public." 1949 *Report, supra,* 13 F.C.C. 1250.

5. Several of the parties contend that the Fairness Doctrine and the personal attack principle are unconstitutional infringements of broadcasters' rights of free speech and free press under the First Amendment. We believe these contentions are without merit. We have discussed the constitutionality of the fairness doctrine generally in the *Report on Editorialization,* 13 F.C.C. 1246-1270. "We adhere

fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report." *Letter to John H. Norris* (WGCB), 1 F.C.C. 2d 1587, 1588 (1965). The court in reviewing the constitutionality of the personal attack principle of the Fairness Doctrine in *Red Lion,*[4] concluded "that there is no abrogation of the petitioners' [licensees'] free speech right . . . I find in the Fairness Doctrine a vehicle completely legal in its origin which implements by use of modern technology the 'free and general discussion of public matters [which] seems absolutely essential for an intelligent exercise of their rights as citizens,' *Grosjean* v. *American Public Press, supra* at 249." *Red Lion, supra,* at 41. As to these particular rules, we stress again that they do not proscribe in any way the presentation by a licensee of personal attacks or editorials on political candidates. They simply provide that where he chooses to make such presentations, he must take appropriate notification steps and make an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting viewpoint. That such rules are reasonably related to the public interest is shown by consideration of the converse of the rules —namely operation by a licensee limited to informing the public of only one side of these issues, i.e., the personal attack or the licensee's editorial.[5]

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6. The addition of Section 73.123(a), (b) (and also 73.300-FM; 73.598—Educational FM; 73.679-TV of identical language) to the Rules serves to codify what has long been the Commission's interpretation of the personal attack as-

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[4] *Affirmed sub nom., Red Lion Broadcasting Co., Inc.* v. *F.C.C.,* Case No. 19,938, D.C. Cir. (June 13, 1967).

[5] In situations not involving a personal attack or an editorial on a political candidate, the licensee may of course exercise his good faith reasonable judgment as to the appropriate spokesman for a contrasting point of view which the licensee determines should be presented. 1949 *Report, supra,* 13 F.C.C. at 1251.

pect of the Fairness Doctrine. *Report on Editorialization by Broadcast Licensees,* 13 F.C.C. 1246, 1258 (1949); *Clayton W. Mapoles,* 23 Pike & Fischer, R.R. 586 (1962); *Billings Broadcasting Co.,* 23 Pike & Fischer, R.R. 951 (1962). "Thus, we have repeatedly stated that when a licensee, in connection with its coverage of a controversial issue, broadcasts a personal attack on an individual or organization, it must 'transmit the text of the broadcast to the person or group attacked . . . either prior to or at the time of the broadcast, *with a specific offer of his station's facilities for an adequate response.'* Public Notice of July 26, 1963; Controversial Issue Programming, F.C.C. 63-734 (emphasis supplied)." *Springfield Television Broadcasting Corp.,* 4 Pike & Fischer, R.R. 2d 681, 685 (1965). This duty devolves upon the licensee, because other than in the case of a broadcast by political candidates, the licensee is responsible for all material broadcast over his facilities.

7. As the Notice pointed out, the Commission has set forth the obligation of a licensee when a personal attack occurs during the discussion of a controversial issue of public importance, i.e., the licensee must notify the individual or group attacked of the facts, forward a tape, transcript or accurate summary of the personal attack, and extend to the individual or group attacked an offer of time for the broadcast of an adequate response. See *Clayton W. Mapoles,* 23 Pike & Fischer, R.R. 586 (1962); *Billings Broadcasting Co.,* 23 Pike & Fischer, R.R. 951 (1962); *Times-Mirror,* 24 Pike & Fischer, R.R. 404 and 407 (1962); and *Springfield Television Broadcasting Corp.,* 4
350 Pike and Fischer, R.R. 2d 681, 685 (1965); *Radio De Land, Inc. (WJBS),* 1 FCC 2d 935 (1965). We notified all licensees of their responsibility in this respect, by transmitting to them the July 26, 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 codify the procedures which licensees are required to follow in personal attack situations. These rules will in no way lessen the force and effect of the Fairness Doctrine as it obliges licensees who permit their facilities to be used for the discussion of controversial issues of public importance to afford a reasonable opportunity for the presentation of conflicting views. Nor do they detract in any manner from a licensee's duty not to "withhold from expression over his facilities relevant news or facts concerning a controversy or . . . slant or distort the presentation of such news." *Report on Editorialization, supra.*

8. The obligation for compliance with these rules is on each individual licensee as it is for compliance with the Fairness Doctrine generally. *Capitol Broadcasting Co.,* 2 Pike & Fischer, R.R. 2d 1104 (1964). Where a personal attack or editorial as to a candidate on a network program is carried by the licensee, the licensee may not avoid compliance with rules merely because the attack or editorial occurred on a network program. Of course, if the network provides appropriate notice and opportunity for response and the licensee carries such response, its obligation would be satisfied.

9. A major purpose of the rules is to clarify and make more precise the procedures which licensees are required to follow in personal attack situations. The long-applied standard of what constitutes a personal attack remains unaffected by this codification:

> [T]he personal attack principle 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, and not when an individual or group is simply named or referred to. *Applicability of the*

Fairness Doctrine in the Handling of Controversial Issues of Public Importance, Public Notice of July 1, 1964, footnote 6.

351 Thus, no matter how strong the disagreement as to views may be, the personal attack principle is not applicable (See *Letter to Pennsylvania Community Antenna Television Association, Inc.,* 1 FCC 2d 1610); it becomes applicable only where in the context of the discussion of a controversial issue of public importance, there is an attack on an individual's or group's integrity, etc., as noted above. As stated in the Notice of Proposed Rule Making, we recognize that in some circumstances 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, or whether the group or person attacked is "identified" sufficiently in the context to come within the rule. The 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 interpretations.[6] As we stated in the Notice of Proposed Rule Making, the rule will not be used as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle. We point out that in the analogous case of the equal opportunities provision of Section 315, we have not employed sanctions in the situation where a licensee has a good faith, reasonable

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

This would be the appropriate procedure should there arise a question of the applicability of the principle to a factual situation, such as the hypothetical one posed by the National Broadcasting Company's comments, of an attack made in the context of a discussion of controversial issue of public importance, which does not itself constitute such an issue. We note that in our experience thus far, the attack made in the context of the controversial issue has been germane to the issue.

doubt as to the provision's applicability. The rules here are thus directed to situations where the licensees do not comply with the requirements of the personal attack principle as to notification and offer of time to respond, even though there can be no reasonable doubt under the facts that a personal attack has taken place (e.g., a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist). Statements that the rules will discourage, rather than encourage, controversial programming ignore the fact that the rules do no more than restate existing substantive policy—a policy designed to encourage controversial programming by insuring that more than one viewpoint on issues of public importance are carried over licensees' facilities. See footnote 3, *supra*. Further, we do not perceive any discouragement to controversial issue programming, except for a licensee who wished to present only one side of such programming—namely, the personal attack and not the response by the individual attacked.

352 10. Several of the comments in this proceeding indicate the mistaken impression that an attack on a specific person or group constitutes, itself, a controversial issue of public importance requiring the invocation of the Fairness Doctrine. This misconceives the principle, based on the right of the public to be informed as to the vital issues of the day, which requires that an attack must occur within the context of a discussion of a controversial issue of public importance in order to invoke the personal attack principle. The use of broadcast facilities for the airing of mere private disputes and attacks would raise serious public interest issues, but such issues are not the focus of the Fairness Doctrine.

11. Under the principle it has always been the duty of a licensee to forward to a person or group attacked notification of the attack and an offer of an opportunity to respond,

rather than to await a request or complaint from the person attacked. The notification requirement is of the utmost importance, since our experience indicates that otherwise the person or group attacked may be unaware of the attack, and thus the public may not have a meaningful opportunity to hear the other side. Again the rule adds no new burden in this respect to the obligations of a broadcast licensee. If an unawareness of this obligation presently exists among licensees despite the Commission's language in *Mapoles, Billings, Times-Mirror, Springfield Television,* the Public Notice of July 25, 1963, and the 1964 Fairness Primer, this only highlights the need for the rule.

12. Paragraph (a) of the rule places specific procedural responsibilities on the licensee over whose facilities a personal attack has been broadcast. A licensee is required to send the attacked person or group, within a reasonable time and in no event later than one week after the attack, a notice of the attack which states when the attack occurred and contains an offer of a reasonable opportunity to respond. Along with the notice, he is required to send a tape, transcript or accurate summary of the attack to the attacked person or group. This time limit should be sufficient to allow a licensee to confer with counsel or with the Commission if there is doubt as to its obligation. In any event, in the doubtful situation, if the person who possibly has been attacked is notified promptly within the time limit and the licensee seeks clarification of his obligation from his counsel or the Commission, no sanctions would be imposed, because the matter is not finally resolved within the one week period. See par. 9, *supra.*[7] This one week outer time limit does not mean that such a copy should not

[7] As we stated in the Notice of Proposed Rule Making, 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.

be sent earlier or indeed, before the attack occurs, 353 particularly where time is of the essence. Other matters are left to the reasonable judgment of the licensee, good faith negotiations, and the Commission's interpretive rulings based on specific factual situations.[8]

13. As we pointed out in the Notice, following present policy (Public Notice of July 1, 1964, (Fairness Primer) FCC 64-611, 29 F.R. 10415, footnote 6) personal attacks on foreign groups or foreign public figures are excluded from coverage by the rule. Also excluded from coverage are personal attacks 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 by candidates against other candidates recognizes that the "equal opportunities" provision of Section 315—and not the personal attack principle—is usually applicable to this situation. The Fairness Doctrine may, of course, be applicable to particular factual situations in the political broadcast field. See, Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. 315(a); Public Notice of July 1, 1964, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 F.R. 10415 (1964).

14. Finally, subsection (c) of the rule clarifies licensee's obligations in regard to station editorials endorsing or opposing political candidates. The appropriate candidate (or candidates) must be informed of a station's editorial opposing his (or their) candidacy or supporting the candidacy of a rival, and must be offered a reasonable opportunity to respond through a spokesman of his choice

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8 Where the attack occurs on paid time, a question has arisen as to whether the response can also be required to be on paid time. We have ruled on this matter in *Letter to John H. Norris (WGCB), aff'd sub nom., Red Lion Broadcasting Co., Inc.* v. *F.C.C., supra.* In view of our ruling, this is a matter not covered by the rule.

including, if the licensee so agrees, himself. The language of subsection (c) has been altered from that appearing in the Notice of Proposed Rule Making (FCC 66-291) to make clear that where an editorial endorses a candidate notice and offer of an opportunity to respond must be sent to his opponent, and where an editorial opposes a candidate such notice and offer must be sent to the opposed candidate.

15. The phrase "reasonable opportunity" to respond is used here and in the personal attack subsection because such an opportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a "reasonable opportunity" may require more than a few seconds if there is to be a mean-
354 ingful response. See, *Final Report of the Senate Committee on Commerce,* S. Rep. No. 944, 87th Cong., 2d Sess., Part 6, page 7. Notification shall be within 24 hours of the editorial, since time is of the essence in this area and there appears to be no reason why the licensee cannot immediately inform a candidate of an editorial. In most cases licensees will be able to give notice prior to the editorial. Indeed such prior notice is required in instances of editorials broadcast close to the election date, i.e. less than 72 hours before the day of the election. For while such last-minute editorials are not prohibited, we wish to emphasize as strongly as possible that such editorials would be patently contrary to the public interest and the personal attack principle unless the licensee insures that the appropriate candidate (or candidates) is informed of the proposed broadcast and its contents sufficiently far in advance to have a reasonable opportunity to prepare a response and to have it presented in a timely fashion. We have accordingly made this requirement explicit in a proviso to subsection (c).

16. As in the case of the personal attack subsection, the licensee may impose reasonable limitations on the reply, such as requiring the appearance of a spokesman for the candidate to avoid any Section 315 "equal opportunities" cycle.[9] The matter of scheduling responses is left to reasonable judgment and negotiation. Subsection (c) is directed only to station editorials endorsing, or opposing, political candidates. Situations containing aspects of both personal attacks and political endorsements or oppositions may arise, and in such cases rulings on the particular factual settings may be necessary. *Times-Mirror,* 24 Pike & Fischer, R.R. 404 and 407 (1962).

17. Authority for the rules herein adopted is contained in Section 4 (i) and (j), 303 (r) and 315 of the Communications Act of 1934, as amended.

18. Accordingly, IT IS ORDERED, that the rules contained in the attached appendix ARE ADOPTED, effective August 14, 1967.

FEDERAL COMMUNICATIONS COMMISSION*

BEN F. WAPLE
Ben F. Waple
Secretary

Attachment

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[9] Barring extraordinary circumstances, the choice of the spokesman is, of course, a matter for the candidate involved.

* See attached statements of Commissioners Bartley and Loevinger.
NOTE: Rules changes herein will be covered by T.S. III(64)-18.

355 APPENDIX

In part 73 §§ 73.123, 73.300, 73.598 and 73.679 all to read identically are added to read as follows:

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 (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesman, 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) of the Act (47 U.S.C. 315(a)); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candi-

dates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

356 DISSENTING STATEMENT

OF

COMMISSIONER ROBERT T. BARTLEY

The Fairness Doctrine is in the process of being perfected on a case-by-case basis. I believe, therefore, that codification by rule is premature.

357 CONCURRING OPINION OF COMMISSIONER LEE LOEVINGER

(Re rule to provide procedure in case of personal attack, etc.)

I concur in the promulgation of a rule specifically providing for the right of reply by a person attacked in a broadcast and by political candidates disadvantaged by political broadcasts, as this seems correct in principle. However, I think that the rule would better achieve its purpose if it were drafted with a clearer delineation of scope and practical operation.

358 **Memorandum Opinion and Order**

Adopted: August 2, 1967 Released: August 7, 1967

By the Commission: Commissioners Bartley, Loevinger and Wadsworth absent; Commissioner Cox concurring in the result.

1. On July 5, 1967, the Commission adopted rules specifying procedures in the event of certain personal attacks and where a station editorializes as to political candidates. In subsection (b) of those rules, we exempted certain situations where the fairness doctrine generally, rather than the personal attack rule, may be applicable. In the processing of a recent complaint, we have become aware of a further instance where clarification of our rules is appropriate.

2. Specifically, the personal attack rule is inapplicable to the bona fide newscast or on-the-spot coverage of a bona fide news event. In these situations the general fairness doctrine is applicable, and licensees are required to make reasonable good faith judgments upon the particular facts of the case in accordance with that doctrine. See Section 315(a) of the Communications Act of 1934, as amended; *Applicability of the Fairness Doctrine In the Handling Of Controversial Issues of Public Importance,* 29 F.R. 10416. Thus, licensees must make good faith, journalistic judgments as to what is newsworthy and how it should be presented. If the licensee adjudges an event containing a personal attack to be newsworthy, in practice he 359 usually turns, as part of the news coverage to be presented that day or in the very near future, to the other side and again makes the same good faith journalistic judgment as to its presentation and what fairness requires in the particular circumstances. That is normal journalism and fairness in this area. To import the concept of notification within a week period, with a presentation of the person attacked on some later newscast when other news might normally be broadcast, is impractical and might

impede the effective execution of the important news functions of licensees or networks. Such a result is not intended under the rules adopted. Finally, the exemption is also being extended to on-the-spot coverage of a bona fide news event, since this category is akin to the newscast area; in this connection, we have also taken into account the consideration that the number of personal attacks occurring in on-the-spot coverage of bona fide news events is unlikely to be large in number, that the notification aspect is relatively less needed in this area, and that on the whole it can be administered readily by applying the fairness doctrine to the specific facts of each case, when and if disputes arise.

3. The exemption resulting from the above clarification does not extend, however, to editorials or similar commentary, embodying personal attacks, broadcast in the course of the newscasts. The foregoing considerations are inapplicable. Rather, since the licensee has chosen to present a personal attack in his editorial, he should not be the one to determine wholly what the public shall or shall not hear on the other side of a matter affecting the integrity, honesty, and like personal qualities of the person attacked. Under elemental fairness, the person attacked should be afforded a comparable opportunity to give that side, subject to reasonable conditions set by the licensee. See, e.g., Letter to *Station WALG,* FCC 65-50 (1965). More important, the person attacked is the most appropriate spokesman to inform the public of the other side of the attack issue. As noted, the time and practical considerations, discussed with respect to the news itself in par. 2, are not usually applicable to an editorial, and even if applicable in an attenuated form, are outweighed by the foregoing factors. Finally, the argument that this might impede the presentation of editorials containing personal attacks is simply an assertion by the licensee that he wishes to broadcast such an editorial, but only if he does not have to present the other side of the attack issue or if he can wholly control

what the public may hear concerning this other side, rather than permitting the person so vitally affected
360 by his editorial and with the most knowledge of the issue a reasonable opportunity to reach his listeners.[1]

4. It may be that experience will indicate the need or desirability of other revisions, clarifications, or waivers of the rule in particular factual situations. If so, we shall act promptly to make whatever changes the public interest in the larger and more effective use of radio requires. See, e.g., Section 4(b), Administrative Procedure Act. We stress again the purpose of the rules: To delineate better the licensee's responsibilities in this important area and to afford the Commission a further needed sanction to deal with those who flagrantly violate the underlying policies in situations where there is no reasonable question as to the licensee's responsibility.

5. Authority for the rules herein adopted is contained in Section 4 (i) and (j), 303 (r) and 315 of the Communica-

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[1] For similar reasons, we have exempted news documentaries. We note that the latter ordinarily do not involve the time and practical considerations discussed in par. 2, and that a documentary, even though fairly presented, may necessarily embody a point of view. We believe, therefore, that the person attacked can readily, and should be, afforded the reasonable opportunity to present his side, as the most appropriate spokesman to inform the public on a matter affecting his integrity, etc.

Similarly, the news interviews show, which is akin to many other talk programs, is not exempted. The licensee has chosen to provide one person with an "electronic platform" for an attack, and elemental fairness and the duty to inform the public in the most appropriate manner, dictate that he should afford the person attacked a comparable opportunity. Again, the considerations set forth in par. 2 are inapplicable.

Finally, we note that there are already certain exemptions where the 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: Rules changes herein will be included in a revised edition of Volume III.

tions Act of 1934, as amended; see also, Section 1.108 of the Commission's Rules and Regulations.

6. Accordingly, IT IS ORDERED, that the rule revisions contained in the attached appendix ARE ADOPTED, effective August 14, 1967. See Section 4(c), Administrative Procedure Act. This proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION
BEN F. WAPLE
Ben F. Waple
Secretary

Attachment

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361 APPENDIX

In Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§ 73.123(b), 73.300(b), 73.598(b) and 73.679 (b) are revised to read identically as set forth in § 73.123 below:

§ 73.123 Personal attacks; political editorials.

* * * * *

(b) The provisions of paragraph (a) of this section shall be inapplicable (i) to attacks on foreign groups or foreign public figures; (ii) where personal 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; and (iii) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific

factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315 (a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415.

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Erratum

In the Memorandum Opinion and Order in the above entitled matter, FCC 67-923, released on August 7, 1967, the first sentence of footnote 1. to paragraph 3. is corrected to read as follows:

[1] For similar reasons, we have not exempted news documentaries.

FEDERAL COMMUNICATIONS COMMISSION
/s/ BEN F. WAPLE
Ben F. Waple
Secretary

Released: August 9, 1967

363 **Memorandum Opinion and Order**

Adopted: March 27, 1968 Released: March 29, 1968

By the Commission: Commissioners Bartley and Loevinger dissenting and issuing statements; Commissioner Cox concurring and issuing a statement; Commissioner Johnson concurring in the result.

1. On March 8, 1968, the Commission and the Department of Justice requested the Court of Appeals for the Seventh Circuit to hold in abeyance the cases pending before it seeking review of our personal attack and political editorial rules (*Radio Television News Directors Assn., et al.* v. *United States,* Case Nos. 16,369; 16,498; and 16,499), and to authorize the Commission to revise the personal attack rules. Such authority was granted by the Court, by order dated March 22, 1968 and this memorandum opinion and order deals with that revision. Since the revision is of a relatively narrow nature[1] and directed only to subsection (b) of Sections 73.123, 73.300, and 73.598, we shall not repeat the discussion in our prior opinions pertinent to subsections (a) and (c).[2] In short, we remain of the same view as to the legality and desirability of the personal attack rule, and are revising only one portion of it. See *Red Lion Broadcasting Co.* v. *United States,* 381 F. 2d 908 (C.A.D.C.), *certiorari granted,* 88 Sup. Ct. 470.

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[1] Some other matters simply call for a common sense reading of the rule. Thus, if the person attacked has previously been afforded a fair opportunity to address himself to the substance of the particular attack, fairness and compliance with the rule have clearly been achieved. Similarly, as shown by the introductory phrase, "when, during the presentation of views on a controversial issue of public importance . . .", the rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in that discussion.

[2] See Memorandum Opinions and Orders, 8 F.C.C. 2d 721 (July 5, 1967; 32 Fed. Reg. 10303) and 9 F.C.C. 2d 539 (Aug. 2, 1967; 32 Fed. Reg. 11531).

2. The issue with which we are concerned here is the alleged inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licensees. Even on the basis of the materials presented by the Columbia Broadcasting System (CBS) to the Court for the first time, the showing as to inhibiting effects remains speculative. But in view of the policy considerations discussed below, we believe that a revision would be appropriate.

364 3. We have consistently sought to promote the fullest possible robust debate on public issues. See Letter to Storer Broadcasting Co., January 31, 1968, FCC 68-120. We have also stated our belief that the fairness doctrine promotes that goal. *Ibid.* CBS does not dispute the latter, but does claim, *inter alia,* that the personal attack facet of the doctrine inhibits the discharge of important broadcast journalistic functions in areas such as news analysis or commentary by its newsmen or the presentation of controversial public figures on its news shows. As in the case of the 1959 Amendments to Section 315, what is called for is "balancing public policy considerations" (H. Rept. No. 802, 86th Cong., 1st Sess., p. 4). On the one hand, we take into account the considerations set forth in our prior discussion pertinent to this claim (see Memorandum Opinion and Order, 9 F.C.C. 2d 539, n. 1) and our assessment of the present showing in this respect as to inhibitions. On the other hand, there are two important considerations which, taken together, do make the case for revision:

(a) The 1959 Amendments to Section 315 stressed the importance of broadcast journalism in informing the public "with respect to political events and public issues" (H. Rept. No. 802, 86th Cong., 1st Sess., p. 4) and, on that basis, exempted four categories of programs—bona fide newscasts, new interviews, and news documentaries, and on-the-spot coverage of bona fide news events—from the "equal opportunities" requirement of Section 315, stating that the

fairness doctrine would remain applicable. While there are practical differences in its impact, the personal attack facet can have some similarities to the "equal opportunities" requirement in its application in this area.

(b) We have not had problems in this area over our many years of applying the fairness doctrine. For example, the 1959 exemption has worked well with respect to political candidates and the fairness afforded them in these news-type programs. As a general matter, unlike areas such as editorializing by licensees or syndicated programming where we have found some flagrant failures by licensees to follow the requirements of the fairness doctrine with respect to personal attacks, there has been no similar pattern of abuses in these news categories. This may well stem from the consideration that what is involved is news gathering or dissemination—an area where the licensee must be scrupulously fair. See *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1254-55. As the Senate Report (No. 560, 86th Cong., 1st Sess.) stated in 1959, at page 11:

> "It should be noted that the programs that are being exempted in this legislation have one thing in common. They are generally news and information-type programs designed to disseminate information to the public and in almost every instance the format and production of the program is under the control of the broadcast station, or the network in the case of a network program."

365 In light of the above two considerations, we have decided to strike the balance in favor of exempting these news program categories, other than the news documentary. Such action avoids *any* possibility of inhibition in these important areas of broadcast journalism, without appearing to raise any greater problem of abuse than was the case in the 1959 exemption as to "equal opportunities."

The fairness doctrine remains specifically applicable to these programs. See Section 315(a); H. Conf. Report No. 1069, 86th Cong., 1st Sess., p. 5; see par. 5, below.

4. We are expanding the exemptions in (iii) of subsection (b) to include the bona fide news interview and news commentary or analysis in a bona fide newscast. Such commentary or analysis is an integral and important part of the news process involved in the category "bona fide newscast." The bona fide news interview is similarly a means of developing the news and informing the public which the Congress singled out in the 1959 Amendments and as to which factor (b) in the above paragraph is applicable.[3] We have not exempted the labelled station or network editorial, even if occurring in one of these exempt categories. Where a licensee's editorial discussing an issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in the discussion, his action is akin to that in the political editorializing area. We have stated that the licensee has the right to editorialize (see Hearing before a Subcommittee of the House Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., pp. 83-94), but that right carries, we believe, the concomitant duty in these two instances of notifying the appropriate group, person, or candidate attacked and offering an opportunity to respond. See par. 3, Memorandum Opinion and Order, 9 F.C.C. 2d 539.[4] We note that in this area we have found instances of

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[3] We stress that the program categories being exempted are defined in the 1959 Amendments, and that the legislative guides as to these categories, to the extent pertinent, will be followed in this field also. (See, e.g., H. Rept. No. 1069, 86th Cong., 1st Sess., p. 4, as to the legislative history of the term "bona fide news interview."

[4] We note that this duty is recognized in the industry. Thus, in 1963 the President of CBS told a Congressional committee that in 99 cases out of 100 CBS would try to get the subject of an adverse CBS editorial to reply, the 100th case being one where someone might want to come on and use foul language or other improper behavior. (1963 House Hearings on Broadcast Editorializing, pp. 266-267).

failure to comply fully with the requirements of the fairness doctrine. Finally, as stated, we have not exempted the news documentary. The Section 315 exemption is limited to bona fide news documentaries where the appearance of the candidate is incidental to the presentation of the subject matter of the documentary; his rivals may have no connection with the program at all. In the case where the licensee presents a documentary which makes the honesty, integrity, or character of a person an issue in its discussion of some controversial issue, the response of the person attacked is clearly germane and important to informing the public fully. There is no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time. Rather, the matter is one where the person's response can be readily obtained and, indeed, we would expect this to be the usual practice. See note 4, *supra.*

366 5. As stated, the fairness doctrine is applicable to these exempt categories. Under that doctrine, the licensee has an affirmative duty generally to encourage and implement the broadcast of contrasting viewpoints (par. 9, *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. at p. 1251). The licensee has considerable discretion in choosing ways to discharge that affirmative duty. See *Letter to Capital Broadcasting Co., Inc.* (*WRAL*), July 29, 1964, FCC 64-774. In the case of the personal attack there is not the same latitude. Under our revision with respect to the exempt categories, the licensee may choose fairly to present the viewpoint of the person or group attacked on the attack facet of the issue; in that event, and assuming that the licensee has acted reasonably and fairly, the doctrine is satisfied. But if the licensee has not done so or made plans to do so, the affirmative duty referred to above comes into play. And here it obviously is not appropriate for the licensee to make general offers of time for contrasting viewpoints, either over the air or in other ways in his community. There is a clear and appropriate spokesman

to present the other side of the attack issue—the person or group attacked. Thus, our revision affords the licensee considerable leeway in these news-type programs but it still requires that fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond.

6. In sum, since our goal is to encourage robust, wide-open debate, we have re-examined the question presented here, and have concluded that the application of the personal attack principle to these news-type programs can be more limited, thus simplifying the licensee's responsibility in fulfilling his journalistic functions without materially interfering with the public interest objectives of the personal attack principle. In so doing, we further accord with the 1959 Amendment to Section 315(a) of the Communications Act by which Congress sought to give greater latitude to licensees in carrying out their journalistic role in political campaigns toward the goal of an informed electorate. We believe similar considerations call for broadcast licensees to have largely comparable freedom in determining the method of presenting the contrasting viewpoints as to personal attacks occurring in the news-type programs here exempted. The long-standing and fundamental obligation of the broadcast licensee to present news impartially provides the foundation upon which we rely in exempting these news-type programs from the precise requirements of the personal attack rules so as to eliminate *any* possibility of inhibitory effects.[5]

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[5] We recognize that an argument can be made that news commentary or analysis within the bona fide newscast is exempted but comparable material is not exempted if broadcast outside one of the exempt program categories. The short answer is that we are following the line drawn by the Congress, which would also exempt a film clip of a candidate in, for example, a news analysis or commentary segment only if it comes within an exempt program. Further, while our action here exempts these categories upon the basis of the parallel to the 1959 Amendments and the absence of any pattern of abuse

367 7. We have acted here to expand the exemption of program categories further along the lines of the exemption made on August 2, 1967 (FCC 67-923),[6] on the basis of the notice and the comments received in this docket (No. 16574). In urging the adoption of the 1959 Amendments, the Senate Report (No. 562) states (p. 14):

> " . . . the public interest should benefit from it. If not, adequate opportunity to remedy it is available."

That is equally apt here, both from the standpoint of this revision and any other revisions which may be called for upon the basis of experience.

8. Authority for the rules herein adopted is contained in Sections 4(i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended.

Accordingly, It Is Ordered, that the rule revisions contained in the attached Appendix Are Adopted effective April 5, 1968. See Section 4(c), Administrative Procedure Act. This proceeding is terminated.

Federal Communications Commission*

Ben F. Waple
Secretary

Attachment

* See attached statements of Commissioners Bartley, Loevinger and Cox.

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of fairness in these news areas, it is important to bear in mind that the action is taken as a precautionary step, to eliminate any possibility of inhibiting effects in these areas which were singled out by the Congress. We have found no such effects, and therefore stress that we are not saying or indicating that inhibition of robust, wide-open debate is appropriate or likely in areas other than those exempted here.

6 While a further notice is not legally required, we considered the desirability of such a further notice. However, we believe that such a notice and further proceedings are unnecessary in light of the nature of our action and the grounds therefor (par. 3, *supra*), and would be undesirable in view of the uncertainty that would beset this important field during this critical election year period. Our present action also facilitates the earliest possible review of these rules—another highly desirable consequence.

Note: Rules changes herein will be covered by T.S. III(68)-1.

368 APPENDIX

In Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§ 73.123(b), 73.300(b), 73.598(b) and 73.679(b) are revised to read identically as set forth in § 73.123 below:

§ 73.123 Personal attacks; political editorials.

* * * * * * * * *

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which 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; and (iii) to bona fide newscasts, bona fide news interviews, and on on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

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369 *Dissenting Statement of Commissioner Robert T. Bartley*

I dissented to the Commission's action of July 5, 1967, adopting these personal attack rules and stated:

> "The Fairness Doctrine is in the process of being perfected on a case-by-case basis. I believe, therefore, that codification by rule is premature." (Docket No. 16547)

I hold to that view.

370 *Dissenting Opinion of Commissioner Lee Loevinger*

(Re: Revised personal attack rules)

This proceeding presents the issue whether the so-called "personal attack rules" as now revised by the Commission abridge free speech in violation of the First Amendment to the Constitution. No more important issue, has ever confronted this Commission. I dissent to adoption of the present rules because I believe that the Commission reasoning and procedure throughout this case have been wholly inadequate to the issue and that the rules as now revised are unwise, invalid, and unconstitutional in abridging free speech.

To see this matter in perspective it is useful to review the history of the problem. The Commission first squarely confronted the editorializing issue in Mayflower Broadcasting Corp., 8 FCC 333 (1941). The applicant there was accused of broadcasting "so-called editorials from time to time urging the election of various candidates for political office or supporting one side or another of various questions in public controversy." The Commission held that this was inconsistent with the responsibilities of a broadcast licensee, saying:

> "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. . . . And while the day-to-day decisions applying these requirements are the licensee's responsibility, the ultimate duty to review generally the course of conduct of the station over a period of time and to take appropriate action thereon is vested in the Commission." 8 FCC 340.

In that case the Commission accepted an affidavit of applicant promising not to broadcast any more "editorials" and renewed its license. The decision was unanimous.

In 1947 the Commission undertook, on its own motion, to review the prohibition against broadcast editorializing; and, after lengthy proceedings, it issued a report on Editorializing by Broadcast Licensees, 13 FCC 1246 (1949). Two Commissioners did not participate, one Commissioner issued additional views, one Commissioner issued a separate opinion, and one Commissioner dissented, so the report represented the views of only two, or possibly 371 three, of the seven Commissioners. Nevertheless, that report has continued to be regarded as the authoritative statement of Commission policy in this area up to the present time.

The 1949 report on editorializing cited the Mayflower case, with apparent approval, for the proposition that in the "presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in

the community on the various issues which arise." 13 FCC 1250.

The report said:

> "(E)ditorial expression may take many forms ranging from the overt statement of position by the licensee in person or by his acknowledged spokesman to the selection and presentation of news editors and commentators sharing the licensee's general opinions or the making available of the licensee's facilities, either free of charge or for a fee to persons or organizations reflecting the licensee's viewpoint either generally or with respect to specific issues." 13 FCC 1252.

Without expressly overruling the Mayflower case, the report concluded:

> "(W)e have therefore come to the conclusion that overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness detailed above, is not contrary to the public interest." 13 FCC 1253.

In separate views, Commissioner Jones pointed out that the majority opinion contained no acknowledgement of the applicability of the First Amendment and stated that the Mayflower case was unconstitutional and should be expressly overruled. 13 FCC 1259, *et seq.* Commissioner Jones pointed out that the majority opinion equated "editorialization" with "news" and "comment." Commissioner Jones contended that the First Amendment required that broadcasters be free in this area, and stated that the majority opinion was unduly restrictive and unworkably vague. Commissioner Hennock dissented, contending that the Commission should continue to prohibit editorialization by licensees because the "standard of fairness as delineated in the report is virtually impossible of enforcement . . ." 13 FCC 1270.

The present case started with a Notice of Proposed Rulemaking issued by the Commission April 8, 1966, with Commissioner Hyde abstaining, Commissioner Bartley dissenting and Commissioner Loevinger absent. FCC 66-291. The Notice began by referring to the Fairness Doctrine, citing the editorializing report of 1949 as containing the "basic enunciation of this doctrine." The Notice referred 372 to several cases involving application of the Fairness Doctrine, and stated, "we now propose to codify the procedures which licensees are required to follow in personal attack situations" under the Fairness Doctrine.

On July 5, 1967, the Commission adopted the personal attack rules, in virtually the form previously proposed, with Commissioner Bartley dissenting, Commissioner Loevinger concurring with a separate statement, and Commissioner Wadsworth absent. 8 FCC 2d 721 (1967). The Commission opinion said that the purpose of codifying the personal attack principle in rules was to "clarify and make more precise the obligations of broadcast licensees," and to enable the Commission to "impose appropraite forfeitures . . . in cases of clear violations by licensees . . ." The Commission opinion also said, "These rules will serve to effectuate important aspects of the well established Fairness Doctrine; they do not alter or add to the substance of the Doctrine." The 1949 editorializing report was cited and a footnote added, "The only new requirement in these rules are [sic] the time limits . . . "

On August 2, 1967, the Commission, *sua sponte,* adopted a further "clarification" of the recently codified personal attack rules, Commissioners Bartley, Loevinger and Wadsworth absent, and Commissioner Cox concurring in the result. 9 FCC 2d 539 (1967). The amendment made the rules inapplicable

> "to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be ap-

> plicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events.)"

The rules as thus formulated and adopted were attacked in the cases now pending in the Court of Appeals for the Seventh Circuit by the Radio Television News Directors Association, the networks and others. CBS filed a brief (in case no. 16,498) contending that the rules unconstitutionally abridge free speech and violate the Communications Act. The thrust of the argument was that the rules illegally burden the discussion of controversial issues of public importance in news analysis, news interviews, and news documentary programs. The brief was accompanied by an exhibit setting forth verbatim transcripts of some 31 commentaries by Eric Sevareid, some 34 extracts from the news interview series Face the Nation, and excerpts from 6 CBS news documentaries.

The CBS brief and accompaning exhibit convinced some of the Commissioners and legal staff that the rules would burden and inhibit news programs and commentary and that it was necessary to amend the rules in order to defend them successfully in the pending litigation. The Commission, therefore, instructed its legal counsel to seek permission in the Court of Appeals to amend the rules further, and, pursuant to such permission, has now adopted another amendment to the rules.

373 I dissent to the present action of the Commission for several reasons. First, the amendments now adopted, like the preceding rules, have been inadequately considered and are badly drafted. Second, the amendments are unreasonably and unconstitutionally vague. Third, the amendments will impose more regulation and a greater burden on the free expression of ideas and news than the rules without the amendments. Fourth, I have come to doubt the competence of a Government agency such as the

Commission to promulgate and administer rules such as these in the area of speech.

The first point is almost self-evident. The tortuous and changing course of the Commission with respect to the present rules is evidence of the inadequacy of research and consideration underlying the rules. Despite the lengthy period these rules have been pending since their proposal by the Commission, there has yet been no consideration of the numerous analogous and relevant statutes and precedents in other jurisdictions. More than 20 years ago the Commission on Freedom of the Press recommended:

> "As an alternative to the present remedy for libel, we recommend legislation by which the injured party might obtain a retraction or a restatement of the facts by the offender or an opportunity to reply." Chafee, Government and Mass Communications (1947) 801.

The problems involved in "personal attacks" on groups and individuals, and the various methods of dealing with such problems, including the "right of reply" statutes which had been enacted in numerous states and some foreign countries, were extensively discussed by Professor Zechariah Chafee, Jr., in 1947. Chafee, Government and Mass Communications (1947) pp. 77-195. More recently, there have been a number of scholarly published discussions of the policy, constitutionality and legislative background of the Fairness Doctrine. See Harry Kalven, Jr., Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15 (1967); Glen O. Robinson, the FCC and the First Amendment, 52 Minn. Law Rev. 67 (1967); Legislative History of the Fairness Doctrine, Staff Study for House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (Feb. 1968).

None of this material, the sources from which these discussions are derived, or the underlying facts or authorities,

has been examined, analyzed or considered by the Commission in relation to these rules. The memoranda on which the Commission has relied and the opinions it has issued consist of endless reiteration of the same vague, high-flown, meaningless phrases, quoted from prior Commission opinions and relying entirely on citations of prior Commission repetitions of the same language.

374 The opinion and version of the rules now adopted by the Commission has been hastily drafted, has not been discussed or considered with any care or at any length by the Commission, has not been subjected to any test of comment by others or even of careful analysis within the Commission, and is simply a hurried effort to buttress the Commission's argument in the cases now pending in the Court of Appeals. Regardless of the formal requirements of the Administrative Procedure Act, elementary principles of intellectual discipline require more than this for rational decision of an important problem. It is dubious whether the course followed here is ever warranted. It is clear that this procedure is wholly inadequate when we are dealing with First Amendment issues, involving, as they do, the most fundamental of our constitutional principles.

In the second place, the rules now adopted are intolerably and unconstitutionally vague. The rules as amended August 2, 1967, applied to "editorial or similar commentary" included in newscasts and similar programs. The substance of the present revision is to move "similar commentary" from the category of inclusion in the rules to the category of exclusion, leaving "editorials" in the rules. Thus, the rules as now revised apply to "editorials," whether or not included in newscasts or news programs; do not apply to "commentary or analysis" included in newscasts or news programs; yet may apply to "commentary or analysis" in some circumstances.

The distinction between "editorials" and "similar commentary" not only defies definition but is completely in-

consistent with all that the Commission has previously said on this subject. In the 1949 report on editorializing, which is still cited as the basic authority on this subject, editorializing is said to include the "presentation of news editors and commentators." The opinion on adoption of the present rules said that they made no change in substantive principles but merely codified existing precedents and added time limits. The present opinion offers neither rationale nor criterion for distinguishing between "editorials" and "commentary." Far from giving any enlightenment on this subject, the present opinion appears to be merely a random collection of words and phrases from earlier Commission opinions expressing the Commission's faith in robust discussion and regulation. Ever since the Mayflower case the Commission has continued to use the language and vocabulary of free speech to justify the regulation and restriction of broadcast speech. It is significant that the Commission has not yet explicitly repudiated the Mayflower opinion or the Commission power asserted there; and the Commission has never attempted to analyze, or even examine, the limitations on its own power flowing from the First Amendment. On occasion the Commission has suggested that, and it has often acted as though, the First Amendment imposed no limitation on Commission power. See 375 Loevinger, Religious Liberty and Broadcasting, 33 Geo. Wash. L. Rev. 631, 654, footnote 101. So the history of the Fairness Doctrine and the Commission opinions relating to it add confusion and obscurity rather than specificity or clarity to the opaque and unintelligible meaning of the present revision of the second clarification of the first clarification of the personal attack principle of the general Fairness Doctrine.

I have reviewed all of the Sevareid commentaries presented in the CBS Exhibit to its brief and am quite unable to determine whether any one of them is an "editorial" or "commentary" within the meaning of the rules. It would

seem that this exercise should have been undertaken before any revision to the rules was drafted; but, as pointed out above, the course followed here allowed no such precautions or efforts. It is clear that up to the moment of adoption of the present revision of the rules the Commission regarded "editorials" and "commentaries" as being synonymous. The present rules not only differentiate between these terms but make the application of the rules themselves turn upon that differentiation. This is clearly contrary to the mandate of the Constitution as construed by the Supreme Court.

The Supreme Court has said:

> "(S)tandards of permissible statutory vagueness are strict in the area of free expression * * *"
>
> "The objectionable quality of vagueness and over-breadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual applications of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."
>
> "Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

N.A.A.C.P. v *Button,* 371 US 415, 432-433, 438 (1959). To the same effect are *Smith* v. *California,* 361 US 147, 151 (1959); *Cramp* v. *Board of Public Instruction,* 368 US

278, 287 (1961); *Ashton* v. *Kentucky,* 384 US 195 (1966); *Keyishian* v. *Board of Regents,* 385 US 589 (1967).

As I have previously pointed out, the proscription of statutory vagueness in this field applies at least as 376 strongly to administrative rules as to statutes. *F.C.C.* v. *American Broadcasting Co.,* 347 US 284 (1954); *Bridges* v. *California,* 314 US 252 (1940); *Anti-Defamation League of B'nai Brith,* 6 FCC 2d 385, 393, 395 (concurring opinion of Commissioner Loevinger). It therefore appears that the present rules are void for vagueness.

However, there is a third and greater vice in these rules. This is that the rules as now revised will limit and burden speech to a degree that makes broadcast expression of views subject entirely to the whim of the Commission or its staff.

It is clear from the circumstances of adoption of the present revision, and will not be controverted by the Commission, that the purpose of the present revision is to exempt from the rules commentary of the kind contained in the CBS Exhibit to its brief. Much of the force of the CBS argument derives from the great respect which the Commission, its lawyers and the public have for Eric Sevareid. It would not be inappropriate to call the present revision of the rules the "Eric Sevareid rule." Certainly it is the intention of the Commission to exempt the Eric Sevareid commentaries from its personal attack rules.

However, the Commission cannot draft or apply rules that operate on the basis of its attitude toward particular individuals. If the commentaries of Eric Sevareid are entitled to exemption from the rules, then so are the commentaries of Richard Cotton, Carl McIntire, and a host of other lesser commentators. This does not imply that Eric Sevareid is comparable to other commentators in any respect other than that of being a commentator. But that

is all we are entitled to consider under the law. I yield to no man is my respect for Eric Sevareid. But I think I know Eric Sevareid well enough to assert that he would neither seek nor approve a rule which exempted him from regulatory requirements of the Commission while subjecting commentators with other views to such regulatory requirements.

The effect of the vagueness and lack of definition or criterion in the revised rules is that there is simply no means of ascertaining what may be considered a "commentary" and what may be considered an "editorial." The result is going to be that opinions which the Commission, or, more often, its staff, finds pleasing or tolerable will be called "commentaries" and exempted from the rules, while opinions which the Commission or its staff finds unpleasant or intolerable will be called "editorials." There is no principle involved in this distinction and not even an attempt to provide a verbal facade to mask the arbitrary choice which the Commission reserves to itself in categorizing broadcast expression of views on current topics as "commentary" or "editorial." Thus, under the revised rules the Commission and its staff would have the untrammelled power to say that any broadcast expression of views or analysis related to any matter of current interest is either subject to these rules or not 377 subject to these rules. Unless the Commission grants blanket exemptions to commentators by name, no commentator will know from one broadcast to the next whether his comments are subject to the rules or not. The Commission and its staff will be involved in an endless series of rulings as to the status of individual broadcasts, and every newscaster and commentator will operate in constant peril of being declared under the rules, and therefore subject to penalties, without any means of knowing in advance what the status of a particular broadcast will be. Such uncertainty and arbitrary power will be even greater

burdens on broadcasters than those which CBS presented in persuading the Commission to adopt the present revision.

Further, the present rules will be greater burdens on free speech than those which the Supreme Court has found in other cases to be unconstitutional. The personal attacks which come within the present rules are not merely the kind of vicious verbal assaults suggested by the term "attack." On the contrary, even a fair, factual and temperate statement that reflects adversely on a group or individual constitutes an "attack" under the present rules. (Numerous examples are set forth in the CBS Exhibit.) Consequently whenever there is a broadcast statement of fact or opinion that may reflect adversely on any individual or group the broadcaster must either determine that the statement is within one of the exemptions to the rule (such as exempt "commentary") or follow the precise procedure prescribed by the rule as to notification and offering time to reply. If the broadcaster guesses wrong on this—that is, if his judgment differs from that of the Commission or its staff—then he is subject to forfeitures which may aggregate $10,000 or to revocation or denial of renewal of his license. Such penalties are considerably more severe than those involved in cases such as *Terminiello* v. *Chicago,* 337 US 1 (1949), where free speech was held unconstitutionally burdened by an ordinance providing fines of $100 to $200.

The Commission will, of course, strongly and sincerely protest that it will not enforce these rules in a crude or oppressive manner, that whether a statement is held to be a "commentary" exempt from the rules or an "editorial" subject to the rules will not depend upon the Commission or staff approval or disapproval of the views expressed, and that only "flagrant" violations of the rules will be subject to penalties. But constitutional rights, particularly in the field of free speech, cannot be made dependent on the good-will, self-restraint or discretion of administrative

officials. *Cantwell* v. *Connecticut,* 310 US 296 (1940); *Bantam Books* v. *Sullivan,* 372 US 58 (1963).

Thus I come to the fourth reason to dissent to adoption of the revised rules, which is that they give the Commission greater power to influence or control the expression of ideas than should be given to any Government agency.

378 In the case of Brandywine-Maine Line Radio, decided by the Commission March 19, 1968, FCC 68-298, I dissented from the refusal of the Commission to suspend proceedings in a case involving application of the personal attack principle of the Fairness Doctrine pending determination of the Commission position in the present proceedings. The event has justified my position, for the Commission has either substantially changed the scope and application of the personal attack principle or rendered its application uncertain and arguable in many common situations or both. The concurring opinion in that proceeding suggests that there may be some inconsistency in the fact that I "originally endorsed" the personal attack rules, but now "regard [the rules] with distaste." The point is worth exploration.

When the personal attack rules were adopted I concurred, stating that "the right of reply by a person attacked in a broadcast and by political candidates disadvantaged by political broadcasts . . . seems correct in principle." My opinion added that "the rule would better achieve its purpose if it were drafted with a clearer delineation of scope and practical operation." Events since then, including the several revisions which the Commission has made in the rule, certainly demonstrate that the latter judgment was entirely correct. But there is a more important point.

When the rule was adopted I thought that the "right of reply" for a person unfairly attacked or wronged in a broadcast or publication was a wise and just principle

if embodied in a clear and practical statement. I am still of that opinion. However, I have come increasingly to doubt the ability of the Commission either to formulate a clear and practical statement of the principle or to administer such a principle wisely and justly. It is neither necessary nor appropriate to attempt to show that the Commission has been unwise or unjust in its regulatory actions in this area. It is enough to say that there are serious doubts as to the wisdom and justness of its actions. Let us note only recent examples.

The Commission initially ruled that the Fairness Doctrine was applicable to cigarette advertising after receiving a single letter of complaint and without notifying the station, examining any of the advertisements, or permitting or receiving any response to the complaint. See 9 FCC 2d 921, 952, 953 (1967) (concurring opinion).

In the KING cases the Commission undertook to judge precisely the amount and distribution of response time that was adequate or inadequate for a candidate who was not attacked but whose opponent was endorsed in broadcast editorials. See FCC 67-1194; 67-1049; 11 RR 2d 628 (1967); and footnote 34 at pages 27-28 of the CBS Brief.

379 In the Brandywine-Main Line case, cited above, a licensee was in hearing on an application for renewal of its license with a principal issue being compliance with the personal attack principle of the Fairness Doctrine. After the Commission moved the Court of Appeals for permission to revise that principle (or the Commission's interpretation or codification of that principle), the Commission refused to suspend the Brandywine-Main Line hearing long enough to permit the parties there to learn what the Commission's revised version of the personal attack principle might be. Thus the Commission in effect held that the personal attack principle should mean one thing in proceedings then pending before it but something

else in the court cases in which the Commission is defending the validity of that principle.

In the present matter the Commission's changeable, erratic and confusing course in its efforts to codify and clarify its own uncertain precedents demonstrates an absence of such consideration, skill and precision as is required in this area.

Perhaps it is inherent in the institutional administrative process, particularly of agencies burdened with the overwhelming volume of the FCC, that the scope of consideration will be limited, specialized and parochial and the skills will be technological. See Loevinger, The Administrative Agency as a Paradigm of Government, 40 Indiana L.R. 287 (1965). If so, that cannot serve to validate unwise or unconstitutional policies. But it does warn that such agencies are not the appropriate bodies to formulate rules of social policy; and that they should regulate only within the fields of their specialized technical competence.

Certainly in the area of First Amendment freedoms doubts should be resolved against the existence or exertion of government power to control. It seems to me that it is peculiarly inappropriate for an administrative agency to make rules creating or extending its own power in the area of First Amendment freedoms. Here, more than elsewhere, the creation or delegation of power and the formulation of rules should be by elected legislative bodies, with only enforcement and application left to administrative agencies. The Commission course with respect to these rules argues strongly against the wisdom of their adoption. The rules as revised seem clearly to burden, and thus abridge, free expression through the broadcast media. In case of even arguable conflict between administrative action or power and First Amendment protections I will not hesitate to resolve every doubt in favor of maintaining the First Amendment freedoms.

380 *Concurring Statement of Commissioner Kenneth A. Cox*

I join fully in the majority opinion in this matter, but believe it desirable to comment on certain of the statements in Commissioner Loevinger's dissent. Due to the pressure of time I will touch on only a few of the points he tries to make—there are others which are either inaccurate or irrelevant, but which cannot be treated adequately in the time available.

On page 3 of his dissent,[1] Commissioner Loevinger asserts that "The CBS brief and accompanying exhibit convinced some of the Commissioners and legal staff that the rules would burden and inhibit news programs and commentary and that it was necessary to amend the rules in order to defend them successfully in the pending litigation." I do not think this is true. Since this assertion purports to analyze and characterize the mental processes of others on the basis of discussion in a Commission meeting which was confidential and closed to the public, I believe it inappropriate to comment further, except to say that I know of no basis for this statement. The grounds for our action are clearly set forth in our opinion, which points out that we do *not* believe that the personal attack rule, as originally drawn, inhibited free discussion or was otherwise invalid, but concludes that we should make a minor revision in the rule to parallel Congressional policy in the 1959 amendments to Section 315 of the Communications Act, thereby removing any possible claim of inhibitory effect in the vital news areas favored by Congress and in which no pattern of abuse has developed. Commissioner Loevinger's effort to confess error for the majority of his colleagues is not only without factual basis, but is also presumptuous. He is free to discuss the facts involved

[1] The page references used herein have reference to the typewritten version of the dissent available at the time of preparation of this opinion.

in the pending litigation and to set forth his view of the applicable law. But I do not think he can give aid to the parties challenging the Commission's rule by publicizing an inaccurate version of the views of other Commissioners and members of our staff expressed in the discussions leading up to the official action reflected in our opinion.[2]

381 Commissioner Loevinger first argues (page 4) that the amendments the majority have adopted "have been inadequately considered and are badly drafted." As I noted in my earlier concurring opinion in this matter, I do not recall that he offered any suggestions for revision of the form of the rule adopted on July 5, 1967.[3] Instead, he concurred in the adoption of the rule but added that "the rule would better achieve its purpose if it were drafted with a clearer delineation of scope and practical application." I don't know quite what that meant, but it has served as a handy escape hatch now that Commissioner Loevinger has changed his mind about the feasibility of regulating personal attacks by rule. Perhaps because of that, he has not made a single suggestion for improving the form of the revised rule we have now adopted. He likes to complain of the poor quality of draftsmanship displayed by all of the rest of us, but is chary about contributing to improved performance of our duties in this area.

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[2] As I have indicated before [Public Notice of March 1, 1968, Mimeo No. 13493, concurring statement] I did not originally favor revising the rule, because I think that it is valid in the form before the Court and that it would not inhibit freedom of speech or journalistic expression by qualified and effective licensees. Indeed, while I concurred in the modification of the rule last August, I did not believe it necessary or completely desirable. I have always believed that fairness in the personal attack field is best served by a prompt and willing offer of time to reply, and believe that this not only is fair to the person attacked but also permits licensees to present any material they consider in the public interest—except for the well recognized exceptions of obscenity, incitement to riot, etc.

[3] 8 FCC 2d 721.

Commissioner Loevinger says we have followed a "tortuous and changing course" with respect to this rule. It is true that we have twice modified the rule, but always in the same, consistent direction and for the sole purpose of removing any possible grounds for concern that the rule would inhibit freedom of speech in the area of broadcast news. The rule adopted in July 5, 1967, provided, in substance, that when, in discussion of 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 specified time, transmit to the person or group attacked a notice of the broadcast, a script, tape, or summary of the attack, and an offer of time to respond. Exceptions were made for attacks on foreign groups and public figures and for attacks on candidates or their associates by other candidates or their associates.

On August 2, 1967, we amended the rule on our own motion to provide an additional exemption for bona fide newscasts and on-the-spot coverage of bona fide news events.[4] As is true of all the exceptions provided for in the rule, the general Fairness Doctrine remains applicable. That narrowing of the applicability of the rule itself was designed—like the change now being made—to eliminate any possibility that our rule "might impede the effective execution of the important news functions of licensees or networks." We indicated at that time that the added exemption did not extend "to editorials or similar commentary, embodying personal attacks, broadcast in the course of the newscasts." We have now decided that commentary within newscasts and the other exempted news formats should also be excluded from the rule—though still subject to the Fairness Doctrine—but have again con-

[4] 9 FCC 2d 539.

cluded that the licensee's editorials should be subject 382 to the rule. In formulating our August 2, 1967, revision we also considered news documentaries and news interviews but decided not to take them out of the rule. We have now reconsidered and are acting to exempt news interviews, while still leaving news documentaries subject to its requirements. We said, in our Memorandum Opinion and Order of August 2, 1967:

> "It may be that experience will indicate the need or desirability of other revisions, clarifications, or waivers of the rule in particular factual situations. If so, we shall act promptly to make whatever changes the public interest in the larger and more effective use of radio requires."

We have now done just that. We have not moved erratically, but in a single coherent direction, to meet the concerns of responsible people that the rule might inhibit broadcast journalism. While I do not fully agree that those concerns were valid, I think that the effort to eliminate any possible inhibitory effect is commendable.

Commissioner Loevinger cites certain published commentaries on freedom of the press and on the Fairness Doctrine,[5] and then says:

> "None of this material, the sources from which these discussions are derived, or the underlying facts or

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[5] He refers to three articles on the Fairness Doctrine. Prof. Kalven's paper "is largely based on a memorandum written a year ago for the Columbia Broadcasting System." CBS is one of the parties challenging our personal attack rule. Prof. Robinson was one of the participants in a panel discussion before the House Subcommittee on Investigations, while Mr. Manelli is a member of that Committee's staff. Toward the end of the two-day consideration of Fairness and Section 315, Representative William L. Springer, ranking minority member of the full Committee on Interstate and Foreign Commerce, is quoted as saying "I don't believe anyone on this Committee favors abolishing the fairness doctrine." See *Television Digest*, Vol. 8, No. 11, March 11, 1968.

authorities, has [sic] been examined, analyzed or considered by the Commission in relation to these rules. The memoranda on which the Commission has relied and the opinions it has issued consist of endless reiteration of the same vague, high-flown, meaningless phrases, quoted from prior Commission opinions and relying entirely on citations of prior Commission repetitions of the same language."

I do not think that this is true. Commissioner Loevinger is again attempting to characterize the processes by 383 which others have reached conclusions with which he now disagrees—though he has not in the past. We have a competent legal staff to advise us on these matters, and some of the rest of us try to keep up with relevant commentary to the extent our attention to other duties permits. We have tended to rely substantially on our own experience, as reflected in our decisions disposing of specific Fairness complaints—in most of which Commissioner Loevinger joined.

Specific attention must be given to the sentence at the top of page 5 of Commissioner Loevinger's opinion to the effect that this revision of the rule "has not been discussed or considered with any care or at any length by the Commission, has not been subjected to any test of comment by others or even of careful analysis within the Commission, and is simply a hurried effort to buttress the Commission's argument in the Court of Appeals." While it is true that our consideration of this matter had to meet the Court's schedule,[6] this important action was fully discussed by the Commissioners, after substantial basic staff work. I do not presume to speak for my colleagues, but I know I gave the matter most careful attention, going

[6] I have already addressed myself to Commissioner Loevinger's charge that we are simply trying to improve our posture in Court. See item referred to in Note 2, *supra*.

over it several times with different elements of our staff and suggesting changes in the language proposed. As for acting without further Notice of Proposed Rulemaking, our reasons are set out in Note 6 in the majority opinion. Commissioner Loevinger never pressed for such notice and, indeed, fully subscribed to the desirability of the procedure we have followed, which will facilitate the earliest possible review of this important matter by the Court.

Commissioner Loevinger's second argument is that the rule is now unconstitutionally vague. On pages 5 to 7, he asserts that it is impossible to differentiate between "editorials" and "commentary". I think the difference is clear.

It is true that the 1949 Report on Editorializing by Broadcast Licensees said:

> "11. It is against this background that we must approach the question of 'editorialization'—the use of radio facilities by the licensees thereof for the expression of the opinions and ideas of the licensee on the various controversial and significant issues of interest to the members of the general public afforded radio (or television) service by the particular station. In considering this problem it must be kept in mind that such editorial expression may take many forms ranging from the overt statement of position by the 384 licensee in person or by his acknowledged spokesmen to the selection and presentation of news editors and commentators sharing the licensee's general opinions or the making available of the licensee's facilities, either free of charge or for a fee to persons or organizations reflecting the licensee's viewpoint either generally or with respect to specific issues. It should also be clearly indicated that the question of the relationship of broadcast editorialization, as defined above, to operation in the public

interest, is not identical with the broader problem of assuring 'fairness' in the presentation of news, comment or opinion, but is rather one specific facet of this larger problem."

* * *

"13. The narrower question of whether any overt editorialization or advocacy by broadcast licensees, identified as such is consonant with the operation of their stations in the public interest, resolves itself, primarily into the issue of whether such identification of comment or opinion broadcast over a radio or television station with the licensee, as such, would inevitably or even probably result in such over-emphasis on the side of any particular controversy which the licensee chooses to espouse as to make impossible any reasonably balanced presentation of all sides of such issues or to render ineffective the available safeguards of that overall fairness which is the essential element of operation in the public interest. We do not believe that any such consequence is either inevitable or probable, and we have therefore come to the conclusion that overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness detailed above, is not contrary to the public interest."[7]

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[7] 13 FCC 1246, at p. 1252 (1949). The Commission thus tacitly reversed the ultimate holding in *Mayflower Broadcasting Corp.*, 8 FCC 333 (1941), while continuing to cite it with respect to the basic requirement of Fairness. Contrary to Commissioner Loevinger's charge, the Commission expressly considered "the limitations on its own power flowing from the First Amendment" in the Editorializing Report, and stated: "We fully recognize that freedom of the radio is included among the freedoms protected against governmental abridgement by the first amendment." We have often considered the matter since then. *Pacifica Foundation*, 36 FCC 147 (1964). *Anti-Defamation League of B'nai B'rith*, 4 FCC 2d 190 (1966), 6 FCC 2d 385 (1967). I do not think we have taken any action violative of the First Amendment.

I think this recognizes a distinction between editorialization in general—the injection of the licensee's 385 opinions in program matter—and editorials—discrete program elements clearly presenting the licensee's opinions as such, which the Report calls "overt editorialization." In the years since this distinction has become quite clear and is generally understood in the broadcast industry. Thus *Editorializing on the Air,* 2nd edition, 1963, prepared by the Committee on Editorializing of the National Association of Broadcasters, defines editorials as follows:

> "A broadcast editorial is an on-the-air expression of the opinion of the station licensee, clearly identified as such, on a subject of public interest."

I do not think, therefore, that broadcasters will have the difficulty with this distinction which Commissioner Loevinger does. As he himself correctly points out, "the rules as now revised apply to 'editorials,' whether or not included in newscasts or news programs; do not apply to 'commentary or analysis' included in newscasts or news programs; yet may apply to 'commentary or analysis' in some circumstances." I would only add, by way of clarification, that the rule *is* clearly applicable to commentary or analysis not included in any of the three exempt news type programs.

The Commission is here exempting all commentary or analysis *in* newscasts or other exempt programs, since such commentary or analysis is an integral part of the news function; it can, for example, occur at any point in a newscast and, indeed, the trend is more and more toward such "in depth" presentation of the news. What is not exempt is the *labelled editorial of the licensee.* To put it in terms of the situation of CBS, as Commissioner Loevinger does, the commentary and analysis of Walter Cronkheit and Eric Sevareid in newscasts are exempt, but the presenta-

tion by a network official, or by an announcer, of the editorial opinion of CBS is not. No real problem of differentiation is presented, and the reasons for the different treatment are set out in the majority opinion. I think that there is a great difference, in terms of the policy considerations with which we are dealing, between presentation of the news, in all its forms, and the labelled editorial opinions of the licensee. Finally, our revision does not turn on Eric Sevareid or any other particular person, though it is useful to discuss the issue in such personalized terms. Rather, our changes in the rule are based on the same considerations that moved Congress to amend Section 315 of the Act in 1959, and our action extends to all these news programs without regard to the individuals who may be involved in presenting them.

Commissioner Loevinger's third objection to the revised rule is that it "will limit and burden speech to a degree which makes broadcast expression of views subject entirely to the whim of the Commission or its staff." If I thought that were true, I would be as concerned as he is—but it isn't. I do controvert his contention "that the purpose of the present revision is to exempt from the rules commentary of the kind contained in the CBS 386 Exhibit" if, as seems to be the case, he uses the word "kind" to refer to the character or quality of such commentary. While I greatly admire Eric Sevareid, this is no "Sevareid rule". Mr. Sevareid's commentary will be exempt from the rule only so long as it is contained within a bona fide newscast, a bona fide news interview, or on-the-spot coverage of a bona fide news event.

Thus there will be no difficulty in identifying editorials—they are the broadcast expression of a licensee's opinion, usually identified as such. I am sure Mr. Sevareid quite clearly understands that he is not expressing the official opinions of CBS. As for commentary, it will be classified not according to the identity of the commentator or the

Commission's agreement or disagreement with his views, but according to the nature of the program in which it is presented. The Commission will have no "untrammelled power" and commentators and licensees will have no such difficulties as Commissioner Loevinger envisions.

On page 8, Commissioner Loevinger contends that the present rule imposes a great burden on freedom of speech because "even a fair, factual and temperate statement that reflects adversely on a group or individual constitutes an 'attack' under the present rules." First, the present rules makes no change in this respect from our long established policy going back many years. Commissioner Loevinger voted for the July 26, 1963 Public Notice which referred to the present attack principle in precisely the terms now in the rule.[8] Further, the concept of a personal attack is appropriately delineated. The rule does not come into play merely because a statement is made adversely reflecting on a group or individual. There must be a personal attack which makes the integrity, honesty, character or like personal qualities of the person or group an issue in the discussion of some controversial issue of public importance. Contrary to Commissioner Loevinger's suggestion, almost all of the examples set out in the CBS Exhibit are not personal attacks under the rule and do not raise any significant question in that respect. The Commission thus has been at pains to state that there can be vigorous disagreement with someone's views without bringing into play the personal attack rules. Indeed, I believe the *Pennsylvania Community Antenna Television* case, 1 FCC 2d 1610, cited in our first opinion, constitutes

[8] FCC 63-734. See also letter to John H. Norris, (Red Lion Broadcasting Co.), 1 FCC 2d 1587; Letter to Allen Woodall (Radio Albany, Inc.) FCC 65-50; Letter to Warren Zwicky (Storer Broadcasting Co.), January 31, 1968, FCC 68-120. In all these rulings Commissioner Loevinger joined in finding a violation of the personal attack principle stated in exactly the same terms as here.

the short answer to Commissioner Loevinger on this 387 score. Finally, Commissioner Loevinger is simply wrong in his assertion that if the broadcaster "guesses wrong" on the various facets, he will be fined. This is contrary both to our consistent statements and actions. See Letter to Roy Barthold (Station KUHT), January 31, 1968, FCC 68-121; Letter to L. E. White, Jr., January 31, 1968, FCC 68-122; Par. 9, Memorandum Opinion and Order, July 5, 1967, 8 FCC 2d 724.

Commissioner Loevinger's fourth reason for dissenting is that the revised rule "give[s] the Commission greater power to influence or control the expression of ideas than should be given to any Government agency." But this depends, of course, on his earlier conclusions that the rule is unconstitutionally vague and will subject broadcast expression of views entirely to the whim of the Commission. As indicated above, I think both of these are clearly erroneous.

While Commissioner Loevinger says that he still thinks the "right of reply" is a just principle if embodied in a clear and practical statement, he indicates that he has come "increasingly to doubt the ability of the Commission either to formulate a clear and practical statement of the principle or to administer such a principle wisely and justly." As indicated before, he has not sought to help us formulate such a statement of the principle.

On page 9, he cites two recent Commission actions as indicating serious doubt as to the wisdom and justice of our administration of the Fairness Doctrine. The first, our cigarette advertising rulings, need no special defense from me. Indeed, Commissioner Loevinger joined in both actions—without comment as to our letter of June 2, 1967 to WCBS-TV, and with a concurring statement attached to our Memorandum Opinion and Order of September 8, 1967, in which he seems to say that he doubts the legality

of our action but nonetheless concurs in it. The second, the *KING* cases, far from supporting Commissioner Loevinger, demonstrate the wisdom of our rules. In the first *KING* case, the station presented a series of 30 20-second editorials endorsing five candidates for office and offered each disadvantaged candidate 2 one-minute periods for reply. I have, of course, no quarrel with its right to editorialize in this way. But the station's offer to a rival candidate of only 2 one-minute spots, while it involved a reasonable total time (120 seconds), was clearly unreasonable in its disregard of the significance of the number of repetitions. The second *KING* case was similar in principle, again demonstrating that the public—and certainly the candidate involved—benefited from the application of our rule to require fair exposure of the responses to the station's numerous editorials.

On page 10, Commissioner Loevinger refers to our action in the *Brandywine Main Line* case, where we refused to suspend the hearing pending issuance of this revision of the personal attack rule. But there were several other issues in the case beyond any personal attack issues, and, as to the latter, only a narrow rule revision was contemplated which did not appear to affect the hearing in that case. See Commissioner Johnson's concurring 388 statement in connection with that ruling. In fact, our revision is of a narrow nature which cannot affect that case. Again, therefore, I believe that the Commission acted reasonably. Certainly we have not changed the underlying personal attack principle which applies in that case.

Finally, Commissioner Loevinger states, page 10, that he "will not hesitate to resolve every doubt in favor of maintaining the First Amendment freedoms." I fully agree with that purpose. Indeed, the basis of our present revision of the rule is a desire to avoid *any* possibility of

inhibiting robust, wide-open debate over the air. But my difference with Commissioner Loevinger is that, unlike him, I strongly believe that the Fairness Doctrine, including the personal attack facet, promotes the First Amendment freedoms, rather than restricting them. And I think his abandonment of any effort to maintain fairness in broadcast treatment of controversial issues simply because "arguable conflict" between the First Amendment and our regulatory action is urged by partisan interests leaves the public without needed protection. We are not creating or extending our own power—we could not if we wished to do so. We are simply pursuing policies developed over the years which contribute significantly to the democratic dialogue.

[Filed July 27, 1967]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16369

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION
BEDFORD BROADCASTING CORPORATION
CENTRAL BROADCASTING CORPORATION
THE EVENING NEWS ASSOCIATION
MARION RADIO CORPORATION
RKO GENERAL, INC.
ROYAL STREET CORPORATION
ROYWOOD CORPORATION
TIME-LIFE BROADCAST, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

Joint Petition To Review an Order of the Federal Communications Commission

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:

Petitioners present this joint petition for review of a final order of the Federal Communications Commission, FCC 67-795, released July 10, 1967, and in support thereof state as follows:

1. This petition is filed pursuant to 28 U.S.C. §§ 2341 *et seq.* (1966); Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a); and 5 U.S.C. §§ 702-704 (1966).

NATURE OF THE PROCEEDINGS

2. The Federal Communications Commission (hereinafter Commission) has asserted for a number of years its so-called "fairness doctrine" as an obligation of broadcast station licensees in their programming with regard to controversial public issues. Although its terms have been varied considerably at different times, the fairness doctrine requires in substance that whenever a radio or television station broadcasts a program discussing a controversial issue of public importance it must provide a reasonable amount of broadcast time for the presentation of conflicting views. The fairness doctrine has been the subject of policy statements and individual rulings by the Commission.

3. On April 6, 1966, the Commission issued a Notice of Proposed Rule Making (FCC 66-291) in which it proposed for the first time to codify in a regulation two phases of its fairness doctrine. A station which violates a Commission regulation becomes subject to revocation or nonrenewal of its station license, issuance of a cease-and-desist order and civil forfeitures (47 U.S.C. §§ 312, 502). The proposed regulation set forth detailed requirements concerning the obligations of station licensees (a) where the station has broadcast an editorial endorsing or opposing a political candidate and (b) in cases where a "personal attack" upon a group or individual has occurred during a broadcast relating to a controversial public issue. In cases of editorial endorsement of political candidates, a broadcast station would be required to give notice within 24 hours (or advance notice if the editorial is broadcast within 72 hours of election day) to other candidates for the same office, to provide such candidates with a script or tape of the editorial, and to offer broadcast time over the station's facilities for a response by spokesmen for such candidates. In "personal attack" cases, similar notice

and opportunity to respond would have to be afforded the group or person attacked.

4. Written comments in response to the Commission's Notice of Proposed Rule Making were filed by numerous organizations and groups, including these petitioners. In their detailed comments, petitioners contended, *inter alia,* that the proposed regulation (and the fairness doctrine of which it is a part) restricted the free conduct of journalistic functions by broadcasters in violation of the freedom of the press guaranteed by the First Amendment. Petitioners pointed out that in the context of journalistic media other than broadcasting a "fairness" requirement would clearly violate the First Amendment and that no valid basis exists for distinguishing between broadcasting and other media. Petitioners submitted evidence to show that the effect of the fairness doctrine is to restrict the presentation of programs concerning controversial public issues and to reduce the amount of such programming.

5. On July 10, 1967, the Commission released a Memorandum Opinion and Order (FCC 67-795) adopting, effective August 14, 1967, the proposed regulation. The Commission, among other things, rejected petitioners' constitutional contentions. (A copy of the Commission's Memorandum Opinion and Order is attached as Exhibit A hereto.)

Facts Upon Which Venue Is Based

6. Petitioner Radio Television News Directors Association (hereinafter RTNDA) is an unincorporated association of more than 1,000 news directors, news executives and other news personnel employed by radio and television stations or networks in the United States and Canada. It is authorized to represent its members in matters relating to the improvement of radio-television news services and freedom of information. RTNDA has its principal

office in Chicago, Illinois. The other petitioners are eight corporations which are licensees of radio and television stations located throughout the United States. Among the corporate petitioners, Bedford Broadcasting Corporation has its principle office in Bedford, Indiana; Central Broadcasting Corporation in Richmond, Indiana; and Marion Radio Corporation in Marion, Indiana.

7. Petitioners are "aggrieved" and "adversely affected" by the Commission's Order (FCC 67-795), within the meaning of 28 U.S.C. § 2344 and 5 U.S.C. § 702. The members of RTNDA will be hampered and restricted in the performance of their professional duties by reason of the regulation which is adopted by the Commission's Order. The other petitioners, as station licensees, are hampered and restricted by the instant regulation in their presentation of programs concerning controversial public issues and editorials endorsing or opposing political candidates. The regulation denies to each of the petitioners the freedom of speech and of the press guaranteed by the First Amendment. Unless the Commission's order is judicially reviewed at this time, petitioners will be compelled either to comply with a regulation which unconstitutionally interferes with their day-to-day performance of journalistic functions in the operation of radio and television stations, or, by failing to comply, to risk revocation or non-renewal of their station licenses, civil penalties, cease-and-desist orders, or (in the case of RTNDA members) loss of employment. Each petitioner was a party to the proceedings before the Commission.

Grounds Upon Which Relief Is Sought

8. The Commission's order (FCC 67-795) and the regulation which it adopts are unlawful for each of the following reasons:

(a) The order and regulation violate the First Amendment to the U. S. Constitution.

(b) The order and regulation violate Section 326 of the Communications Act of 1934, 47 U.S.C. § 326, which prohibits program censorship by the Commission.

(c) The statutory provisions upon which the Commission relied in promulgating its order and regulation are unconstitutionally vague and imprecise as a basis for regulating conduct in the area of First Amendment rights.

(d) The Commission's regulation is itself too vague and imprecise to serve as a basis for regulating conduct in the area of First Amendment rights.

(e) The asserted statutory authorization for the Commission's regulation lacks the explicitness necessary to support agency action in an area of doubtful constitutionality.

Relief Prayed

Wherefore, petitioners pray:

(1) that copies of this joint petition be served upon respondents and that the record upon which the Commission's final order here in question was entered be filed by the Commission in this Court, in accordance with 28 U.S.C. §§ 2344, 2346;

(2) that this Court review the Commission's order (FCC 67-795);

(3) that upon such review this Court set aside the Commission's order;

(4) that this Court declare invalid the Commission's regulation here in issue on the grounds that it is unconstitutional, unauthorized by law and violative of Section 326 of the Communications Act of 1934, 47 U.S.C. § 326; and

(5) that petitioners be granted such other relief as the Court may deem proper.

Respectfully submitted,

/s/ W. THEODORE PIERSON
W. Theodore Pierson
Vernon C. Kohlhaas
Harold David Cohen
Robert M. Lichtman
PIERSON, BALL & DOWD
1000 Ring Building
Washington, D. C. 20036

/s/ MAURICE ROSENFIELD
Maurice Rosenfield
HARRY KALVEN, JR.
208 S. LaSalle Street
Chicago, Illinois 60604

Attorneys for Petitioners

* * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 31560

COLUMBIA BROADCASTING SYSTEM, INC., *Petitioner*

v.

UNITED STATES OF AMERICA AND THE
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

Petition for Review of an Order of the Federal Communications Commission

Columbia Broadcasting System, Inc. (hereinafter Petitioner), by its attorneys presents this petition for judicial review of a final order of the Federal Communications Commission (hereinafter the Commission) and avers as follows:

I.

NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

1. Petitioner owns and operates, pursuant to license from the Federal Communications Commission, television station WCBS-TV and radio stations WCBS and WCBS-FM in New York City, as well as television and/or radio stations in Boston, Chicago, Los Angeles, Philadelphia, St. Louis and San Francisco. Radio and television stations owned and operated by Petitioner regularly carry news broadcasts and other programs involving discussion of issues of a controversial nature. Some of these stations also carry editorials endorsing candidates for political office. Petitioner also owns and operates a television network and a radio network, not licensed by the Commission, which furnish programs—including news and public affairs programs—daily to several hundred broadcast stations. Petitioner seeks review of an order of the Commission

entered in proceedings entitled "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" (Memorandum Opinion and Order No. FCC 67-795, Docket No. 16574, adopted July 5, 1967, and released July 10, 1967, attached hereto as Appendix A).

2. These proceedings were initiated on April 6, 1966, by the issuance of a Notice of Proposed Rule Making (FCC 66-291). The proposal included provisions purporting to codify the "personal attack" and "political editorial" branches of the Commission's "fairness" doctrine. Comments were filed by Petitioner and others in opposition to the proposed rule, while other parties favored its adoption.

3. The proposed rule was attacked on various grounds: as an unconstitutional restraint on free speech, as beyond the Commission's statutory authority, and as contrary to the public interest and general regulatory policies of the Commission. In the Memorandum Opinion and Order under review the Commission rejected the objections of Petitioner and others, and adopted the Rule in substantially the form proposed in the Notice of Proposed Rule Making. Commissioner Loevinger concurred in a separate opinion, and Commissioner Bartley dissented. Commissioner Wadsworth was absent. As authority for the adoption of the Rule, the Commission invoked Sections 4(i), 4(j), 303(r) and 315 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r) and 315.

4. The order under review amends Part 73 of the Commission's Rules (47 C.F.R.) by adding four identical sections (§§ 73.123, 73.300, 73.598 and 73.679) applying respectively to standard broadcast stations, FM broadcast stations, noncommercial educational FM broadcast stations, and television broadcast stations. Subsection (a) of the Rule provides 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 within a week notify such person or group of the broadcast, furnish a script, tape or accurate summary of the ''attack,'' and offer such person or group ''a reasonable opportunity to respond over the licensee's facilities.'' Subsection (b) exempts from the requirements of subsection (a) attacks on ''foreign groups or foreign public figures'' and attacks made by candidates and their spokesmen and associates on other candidates or their spokesmen or associates. Apart from the exemptions subsection (a) of the Rule applies to any statement, comment or remark constituting a ''personal attack'' broadcast over a station's facilities, whatever the source. The subsection applies to statements made in the course of a news program or actual live coverage of a news event, or in a discussion program or documentary. It applies whether the statement is truthful or untruthful, whether the broadcaster acted with ''malice'', and whether the program presented fairly or unfairly the controversial issue and the facts on which the ''attack'' is based. While the Commission has conceded that ''there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle'' and that ''the Rules are not designed to answer such questions,'' the Commission has invited licensees to ''consult'' it for ''interpretation of our rules and policies'' (Appendix A, page 6).

5. Subsection (c) of the Rule requires that when ''a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial'' a script or tape together with an offer of ''a reasonable opportunity for a candidate or a spokesman of the

candidate to respond over the licensee's facilities.'' Where the editorial is broadcast within 72 hours prior to the day of election, moreover, ''the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.''

6. In the Order under review, the Commission for the first time has prescribed by rule specific procedures which must be followed in given situations in order to comply with the ''fairness'' doctrine. This Rule may be enforced through imposition of criminal penalties or forfeitures under Sections 502 and 503(b) of the Act, 47 U.S.C. §§ 502 and 503(b), as well as through license revocation and renewal proceedings under Sections 307 and 312 of the Act, 47 U.S.C. §§ 307 and 312.

II.

Statement of Venue and Jurisdiction

7. Petitioner is incorporated in the State of New York and has its principal place of business in New York City. Venue in this Court is thus appropriate under Section 3 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343. Since the order involved is a final order of the Federal Communications Commission, this Court has jurisdiction over the subject matter of this petition under Section 2 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2342; Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a); and Section 10(c) of the Administrative Procedure Act, as amended, 5 U.S.C. § 704.

8. As appears from paragraph 2 of the Commission's Memorandum Opinion and Order (Appendix A, page 1), Petitioner was a party to the proceedings leading to the Order under review, and filed comments in opposition to the proposed rule. Petitioner is a ''party aggrieved'' by

reason of the Commission's Order within the meaning of Section 4 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343, and is further a "person suffering legal wrong" and a "person . . . adversely affected or aggrieved" by reason of the Commission's Order within the meaning of Section 10(a) of the Administrative Procedure Act, as amended, 5 U.S.C. § 702, as more fully set forth in paragraphs 9-11 hereof.

III.

Effects of the Rule

9. The right of reply established by the Rule would disserve rather than promote the public interest in accurate and balanced presentation of information and opinion with respect to controversial issues. For example there are situations in which the "personal attack" appears in the course of a discussion of a controversial issue of public importance, but in which the "personal attack" is merely peripheral to the public issue. Moreover, Petitioner and other licensees present many programs in which both sides of a controversial issue, including the position of persons or groups "personally attacked," are fully and fairly presented. In such cases a right of personal reply is not required to promote the public interest in an accurate report, and, if the reply is one-sided, will indeed tend to mislead the public. To attempt to correct the imbalance by a response to the reply would be likely to produce a repetition of the original "personal attack," thus creating an obligation to invite a further reply, and so on ad infinitum. A similar proliferation would occur if the reply contained a "personal attack" upon a second individual or group, since the Rule would then impose a duty to invite a rejoinder from still another quarter.

10. Subsection (a) of the Rule would inhibit free and vigorous expression and debate on controversial issues of public importance. The presentation of news, documentary

and discussion broadcasts, in which there is a vital public interest, would often be rendered impracticable if an individual or group upon whom a "personal attack" was made had to be accorded a right of reply as required by the Commission's Rule. To the extent that "personal attacks" may be claimed to be defamatory, compliance with the notification requirements of the Rule may also jeopardize defenses to a subsequent defamation suit.

11. Subsection (c) of the Rule would condition the right of broadcast licensees to present an editorial endorsement or disapproval of candidates for public office by according a right of reply to unfavored candidates. This new requirement would inhibit editorial endorsements.

IV.

Grounds on Which Relief is Sought

12. The grounds relied upon as the basis for relief are as follows:

(a) The Commission has exceeded its powers under the Communications Act in promulgating the Rule. Sections 4(i), 4(j) and 303(r) of the Act are merely authorizations to take action, by rule making and otherwise, to implement powers granted elsewhere in the statute. Section 315 is limited to a highly specific "equal opportunities" provision for candidates and a general reference to the "fairness" doctrine which does not confer any powers on the Commission. Congress has refused to provide a general federal broadcast libel remedy or even to broaden the narrowly limited statutory right of political candidates to reply to one another; Congress did not intend to empower the Commission to create a new private remedy for "personal attacks."

(b) By imposing a specific requirement that in certain circumstances a particular program (i.e. the reply of a particular individual) must be carried, the

Rule amounts to program censorship by the Commission in violation of Section 326 of the Communications Act, as amended, 47 U.S.C. § 326, prohibiting the Commission from exercising the power of censorship.

(c) Subsection (a) of the Rule would induce licensees to delete material they desire to bradcast for the sole purpose of eliminating possible "personal attacks" and thus reduce the burdens of complying with the Rule. The Rule is therefore contrary to the principles of free debate and discussion and to the spirit of the Act. *Farmers Educational & Cooperative Union* v. *WDAY, Inc.,* 360 U.S. 525 (1959).

(d) The Rule violates the provision of Section 326 of the Communications Act that "no regulation . . . shall be promulgated or fixed by the Commission which shall interfere with the right of free speech. . . ." Moreover, it cannot be presumed that Congress in enacting the Communications Act intended to empower the Commission to issue rules raising substantial questions of interference with fundamental First Amendment rights. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *Greene* v. *McElroy,* 360 U.S. 474 (1959).

(e) Whatever the intent of Congress, the Rule would abridge free expression, discussion and debate in violation of the First Amendment. *New York Times, Inc.* v. *Sullivan,* 376 U.S. 254 (1964); *Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Mills* v. *Alabama,* 384 U.S. 264 (1966).

(f) Even if regulation of the subject matter by rule were held to be within the Commission's power, the adoption of the Rule would be an abuse of discretion. Without achieving any public interest goal of comparable importance, it would inhibit the dissemination

of news, discussion of controversial public issues, and expression of editorial opinion, functions of communications media that are vital to the political health of a free society.

V.

RELIEF PRAYED FOR

14. WHEREFORE, Petitioner respectfully prays that upon final hearing and review this Court will, by appropriate order, judgment or decree:

(a) Set aside and determine unlawful and without force and effect the Order of the Commission adopted July 5, 1967 in Docket No. 16574, and Sections 73.123, 73.300, 73.598 and 73.679 of the Commission's Rules, adopted by said Order; and

(b) Grant such other or further relief as it determines to be just and necessary.

July 27, 1967.

WILMER, CUTLER & PICKERING
900 - 17th Street, N. W.
Washington, D. C. 20006

By LLOYD N. CUTLER,
a member of said firm

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005
By THOMAS D. BARR,
a member of said firm

Of Counsel

HERBERT WECHSLER
435 W. 116th Street
New York, N. Y. 10027

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16369

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION
BEDFORD BROADCASTING CORPORATION
CENTRAL BROADCASTING CORPORATION
THE EVENING NEWS ASSOCIATION
MARION RADIO CORPORATION
RKO GENERAL, INC.
ROYAL STREET CORPORATION
ROYWOOD CORPORATION
TIME-LIFE BROADCAST, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

Supplement to Joint Petition to Review an Order of the Federal Communications Commission

Petitioners present this supplement to their joint petition for review of an order of the Federal Communications Commission, filed July 27, 1967, and state as follows:

1. On July 27, 1967, petitioners filed in this Court their joint petition to review a final order of the Federal Communications Commission, FCC 67-795, Docket No. 16574, adopted July 5, 1967, released July 10, 1967. As set forth in the joint petition, the order in question adopted a regulation (47 CFR §§ 73.123, 73.300, 73.598, 73.679) imposing certain obligations on radio and television station licensees in cases (a) where a station has broadcast an editorial

endorsing or opposing a political candidate and (b) where a "personal attack" upon a group or individual has occurred during a broadcast relating to a controversial public issue.

2. On August 2, 1967, the Federal Communications Commission adopted a further order, FCC 67-923, Docket No. 16574, released August 7, 1967, which, for purposes of clarification, amended the aforementioned regulation to state that the requirements concerning "personal attacks" are not applicable to bona fide newscasts or on the spot coverage of bona fide news events by station licensees. (A copy of this Memorandum Opinion and Order is attached as Exhibit A hereto.)

3. The Commission's action in amending its regulation by way of clarification does not affect the grounds for review stated in the pending joint petition, the standing of these petitioners, or the jurisdiction of this Court with respect to the joint petition.

Respectfully submitted,

/s/ W. Theodore Pierson
W. Theodore Pierson
Vernon C. Kohlhaas
Harold David Cohen
Robert M. Lichtman
Pierson, Ball & Dowd
1000 Ring Building
Washington, D. C. 20036

/s/ Maurice Rosenfield
Maurice Rosenfield
Harry Kalven, Jr.
208 S. LaSalle Street
Chicago, Illinois 60604

Attorneys for Petitioners

* * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 31560

COLUMBIA BROADCASTING SYSTEM, INC., *Petitioner*

v.

UNITED STATES OF AMERICA AND THE
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

Supplement to Petition for Review of an Order of the Federal Communications Commission

Columbia Broadcasting System, Inc. (hereinafter Petitioner) by its attorneys presents this supplement to its petition for judicial review of an order of the Federal Communications Commission (hereinafter the Commission), filed July 27, 1967, and avers as follows:

1. The Commission adopted on August 2, 1967, and released on August 7, 1967, a Memorandum Opinion and Order (No. FCC 67-923) amending the Rule adopted in the Order under review. A copy of the Memorandum Opinion and Order is attached hereto as Appendix A.

2. The amendment exempts from the requirements of Subsection (a) of the Rule (dealing with "personal attacks") "bona fide newscasts or on-the-spot coverage of a bona fide news event." The "personal attack" provision of Subsection (a) still applies, however, to news documentaries and news interview programs, as well as to "editorial or similar commentary" included in newscasts or on-the-spot coverage of news events. For example, statements made on a news interview program such as "Face The Nation," even though they are of sufficient news magnitude to make the first page of Monday morning newspapers throughout the country, would appear to be covered

by the Rule, although a newscast reporting that the identical statements had been made on "Face The Nation" would appear to be exempt.

3. The amended Rule fails to remedy many of the defects present in the original version. Indeed the Commission, in adopting the amendment, specifically recognized the inhibitory effect of the original Rule on news programs and for that reason exempted "bona fide newscasts or on-the-spot coverage of a bona fide news event." Nevertheless, the Commission has retained the Rule in full force and effect as to news documentaries and news interview programs. Nothing in the amendment makes the Rule any less inhibitory or objectionable with respect to such programs.

4. As amended, the Rule has become even more uncertain in its application. Not only must licensees decide whether a statement constitutes a "personal attack" or occurs "during the presentation of views on a controversial issue of public importance"; they must also make judgments as to whether, if the program involved is a "bona fide newscast or on-the-spot coverage of a bona fide news event," so as to be generally exempt from the Rule, the attack nonetheless is of such a nature (e.g., "editorial or similar commentary") so as to bring it back within the scope of the Rule. There is no indication in the Commission Memorandum Opinion and Order, moreover, whether interviews and documentary-type material broadcast in the course of newscasts and on-the-spot coverage of news events are, like editorials and commentary broadcast in such programs, still subject to the Rule. Uncertainty on these points, and the impracticability of obtaining timely advisory pre-broadcast rulings with respect to such a perishable commodity as news, will inevitably lead to licensee decisions to refrain from broadcasting news-related material and programs that are arguably subject

to the Rule. And to the extent the Commission receives and acts upon post-broadcast requests for advisory interpretations and waivers of the Rule, it will become increasingly involved in making editorial judgments heretofore the responsibility of the broadcaster.

5. While the grounds for relief stated in the Petition for Review continue to apply to the Rule as amended, the effects of the amendment require amplification of the grounds for relief as follows:

(a) The uncertainty as to what portions of generally exempted programs are still subject to the amended "personal attack" provision renders the Rule unconstitutionally vague.

(b) Continual supervision by the Commission of editorial judgments of broadcasters, through orders directing that licensees permit replies to "personal attacks," violates Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, and abridges freedom of the press in violation of the First Amendment.

(c) Because there is no rational basis, in terms of the public interest, for the Commission's distinction between program material covered and program material exempted under the amended Rule, the adoption of the Rule is arbitrary, unreasonable, and an abuse of discretion.

6. Wherefore, Petitioner respectfully prays that upon final hearing and review this Court will, by appropriate order, judgment or decree:

(a) Set aside and determine unlawful and without force and effect the Order of the Commission adopted July 5, 1967 in Docket No. 16574, as amended by the Order of the Commission adopted August 2, 1967 in

said Docket, and Sections 73.123, 73.300, 73.598 and 73.679 of the Commission's Rules, as amended, adopted by said Orders; and

(b) Grant such other or further relief as it determines to be just and necessary.

September 1, 1967.

WILMER, CUTLER & PICKERING
900 - 17th Street, N. W.
Washington, D. C. 20006

By LLOYD N. CUTLER,
a member of said firm

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005

By THOMAS D. BARR,
a member of said firm

Of Counsel

HERBERT WECHSLER
435 W. 116th Street
New York, N. Y. 10027

* * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL BROADCASTING COMPANY, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA AND THE
FEDERAL COMMUNICATIONS COMMISSION, *Respondents.*

Petition for Review of an Order of the Federal Communications Commission

National Broadcasting Company Inc. (hereinafter NBC), by its attorneys Cahill, Gordon, Sonnett, Reindel & Ohl, for its petition for review of a final order, as amended, of the Federal Communications Commission (hereinafter FCC), states as follows:

I

NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

1. NBC seeks review of an order, as amended, of the FCC entered in a proceeding entitled "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" (Memorandum Opinion and Order No. FCC 67-795, Docket No. 16574, adopted July 5, 1967 and released July 10, 1967, attached hereto as Appendix A, as amended by Memorandum Opinion and Order No. FCC 67-923, Docket No. 16574, adopted August 2, 1967 and released August 7, 1967, attached hereto as Appendix B).

2. These proceedings were initiated on April 6, 1966 by the issuance of a Notice of Proposed Rule Making (FCC 66-291). The proposed rule included provisions purporting to codify two recently developed aspects of the FCC's "fairness doctrine."

3. The proposed rule set forth detailed requirements concerning the obligations of station licensees (a) where the station has broadcast an editorial endorsing or opposing a political candidate and (b) in cases where a personal attack upon a group or individual has occurred during a broadcast relating to a controversial issue. In the case of editorial endorsement of political candidates a station would be required: (a) to give notice within 24 hours (or advance notice if the editorial is broadcasted within 72 hours of Election Day) to other candidates for the same office, (b) to provide such candidate with a script or tape of the editorial, and (c) to offer broadcast time over the station's facilities for a response by a spokesman for such candidate. In the case of a personal attack similar notice and opportunity to respond would have to be afforded the person or group under attack.

4. Written comments in response to the Commission's Notice of Proposed Rule Making were filed by numerous organizations and groups including NBC. The grounds upon which the proposed rule was attacked included arguments that the rule is: (a) an unconstitutional restraint on freedom of speech and press, (b) beyond the FCC's statutory authority, and (c) contrary to the public interest.

5. In its Memorandum Opinion and Order No. FCC 67-795, Docket No. 16574, adopted July 5, 1967, the FCC rejected the suggestions of NBC and others and adopted the rule in substantially the form proposed in the Notice of Proposed Rule Making. Commissioner Lovinger concurred in a separate opinion and Commissioner Bartley dissented; Commissioner Wadsworth was absent. As authority for the adoption of the rule the FCC invoked Sections 4(i), 4(j), 303 (r) and 315 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r) and 315.

6. In its Memorandum Opinion and Order No. FCC 67-923, Docket No. 16574, adopted August 2, 1967, the FCC

amended Memorandum Opinion and Order No. FCC 67-795 by withdrawing application of the personal attack aspects of the rule to a bona fide newscast or on the spot coverage of a bona fide news event. Commissioner Cox concurred in the result and Commissioners Bartley, Lovinger and Wadsworth were absent.

7. In the Order, as amended, under review the Commission for the first time has prescribed by rule specific procedures which must be followed in given situations in order to comply with the "fairness doctrine" and thus has afforded NBC an opportunity to question by judicial review whether the function of the press as envisioned by the FCC and imposed on its licensees by the FCC's application of its fairness doctrine is compatible with the function of the press protected by the First Amendment of the Constitution of the United States.

II

Facts On Which Jurisdiction and Venue Are Based

8. NBC is a corporation duly organized and existing under the laws of the State of Delaware and has its principal place of business in the City of New York, State of New York. Venue in this Court is therefore conferred by Section 3 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343.

9. Jurisdiction over the subject matter of this petition is conferred upon the Court by Section 2 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343; Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a); and Section 10(c) of the Administrative Procedure Act, as amended, 5 U.S.C. § 704, because the order involved is a final order of the Federal Communications Commission.

10. NBC owns and operates, pursuant to license from the FCC, television broadcast station WNBC-TV, standard

broadcast station WNBC and frequency modulation broadcast station WNBC-FM in New York City as well as a number of stations in other cities. These stations carry programs involving discussions of controversial issues of public importance. NBC also owns and operates a television network and a radio network not licensed by the FCC, which furnish programs, including programs involving discussions of controversial issues of public importance, to several hundred broadcasting stations.

11. To the extent the FCC's "fairness doctrine" in general and its application of the rules adopted under FCC Order No. 67-795 in particular conflict with NBC's own high standard of professional journalism's duty of responsible expression of views, NBC is being required to give up its right to be a part of the free press and is subject to the imposition of criminal penalties or foreitures under Sections 502 and 503(b) of the Act, 47 U.S.C. §§ 502 and 503(b) as well as license revocation and renewal proceedings under Sections 307 and 312 of the Act, 47 U.S.C. §§ 307 and 312. Broadcast stations carrying the programs of the NBC Television Network and the NBC Radio Network would also have to consider the effect of the Order and Rule in determining whether or not to accept a network program since they would be subject to the same criminal penalties, forfeitures or revocation and renewal proceedings. As a result the Order and Rule would also adversely affect NBC's network programming.

12. Petitioner is therefore a "party aggrieved" by reason of the FCC's order within the meaning of Section 4 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343, and is further a "person suffering legal wrong" and a "person * * * adversely affected or aggrieved" by reason of the FCC's order within the meaning of Section 10(a) of the Administrative Procedure Act, as amended, 5 U.S.C. § 702.

III

Grounds On Which Relief Is Sought

13. The following grounds are relied upon as the basis for relief:

(a) The Order and Regulation, as amended, are an unconstitutional abridgment of freedom of the press and speech guaranteed in the First Amendment to the United States Constitution. Freedom of the press contemplates, not that the Government shall control and regulate the press with the stated objective of compelling the press to be freely available for the communication of the opinions and views of all, but that the press shall itself be free to publish what it chooses. The rule adopted by the FCC is a serious infringement on that freedom;

(b) The Order and Regulation, as amended, violate Section 326 of the Communications Act of 1934, 47 U.S.C. § 326, which prohibits censorship by the FCC;

(c) The asserted statutory authorization for the FCC's Order and Regulation, as amended, does not support such regulation, particularly in an area where important Constitutional Rights are involved, and violates the equal protection requirements and due process clause of the Fifth Amendment of the Constitution of the United States; and

(d) The adoption of the rule, even if it is authorized by the applicable statutes, is contrary to the public interest and an abuse of the Commission's discretion in that it inhibits the full dissemination and communication of news and information, and ideas, without promoting any significant public interest.

IV

Relief Prayed For

14. Wherefore, petitioner respectfully prays that this Court, by appropriate order, judgment or decree:

(a) Set aside Order No. FCC 67-795 adopted by the FCC on July 5, 1967 in Docket No. 16574, as amended, and Sections 73.123, 73.300, 73.598 and 73.679 of the FCC Rules, adopted by said order, as amended; and

(b) Grand such other and further relief as is just and necessary.

Dated: New York, New York
August 31, 1967

Cahill, Gorden, Sonnett,
Reindel & Ohl

By /s/ Lawrence J. McKay
A Member of the Firm

Attorneys for Petitioner
National Broadcasting
Company Inc.
Office & P.O. Address:
80 Pine Street
New York, New York
10005
WHitehall 4-7400

PROCEEDINGS IN COURT OF APPEALS

MOTION OF PETITIONER FOR LEAVE TO FILE EXHIBIT

Petitioner Columbia Broadcasting System, Inc., by its attorneys, hereby moves this Court for leave to file with its brief in the above-captioned case a separately bound Exhibit. In support of this Motion, the attorneys for Petitioner state:

One of the important issues in this case is the legality of the Federal Communications Commission's "personal attack" rules. In connection with its argument as to the effect of the rules on Petitioner's public affairs programming, Petitioner has prepared an Exhibit setting forth excerpts from transcripts of programs that contain statements arguably covered by the rules. Petitioner believes this material is relevant and will be of assistance to this Court in its consideration of the case.

All parties in this case and the companion cases (Nos. 16,369 and 16,499) pending in this Court, have consented to the granting of this Motion. Respondents United States of America and the Federal Communications Commission, however, reserve the right to argue that the material contained in the Exhibit should not be considered by this Court.

November 21, 1967.

United States Court of Appeals for the Seventh Circuit
Chicago, Illinois 60604

Tuesday, November 21, 1967

No. 16498

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER
v.
UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petition for Review of an Order from the Federal Communications Commission

Before Hon. LUTHER M. SWYGERT, *Circuit Judge.*

On consideration of the motion of counsel for petitioner,

It is ordered, That leave be granted to file a printed separately bound exhibit with its brief.