MOTION OF RESPONDENTS TO HOLD PETITIONS FOR REVIEW IN ABEYANCE

The United States of America and the Federal Communications Commission, respondents in the above-entitled consolidated cases, move that these cases be held in abeyance pending a decision by the Supreme Court in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, No. 600, Oct. Term, 1967, certiorari granted December 4, 1967. The grounds of this motion are as follows:

1. The petitions for review herein seek review of two Memorandum Opinions and Orders of the Federal Communications Commission in which the Commission codified in rule form the procedures it had previously enunciated as a general policy directive and in *ad hoc* situations, under which a broadcast licensee is required to afford time to reply to a person or group attacked over the station, and to a candidate for public office against whom the station has carried an editorial. The Commission adopted the rules to add precision to these requirements and to provide sanctions by way of forfeiture for violation of the policies in lieu of considering violations at renewal time. It emphasized that the substance of previously enunciated doctrine was not being altered. Memorandum Opinion and Order adopted July 5, 1967, Par. 3, 4 (Exhibit A to Joint Petition for Review of Radio Television News Directors Association, *et al.*)

2. The petitions for review challenge the constitutionality of and statutory support for the "personal attack" rules. In addition, petitioners National Broadcasting Company, Inc. and Radio Television News Directors Association, *et al.*, challenge the validity of the general fairness doctrine of the Commission, which requires fair treatment of opposing viewpoints on controversial issues of public importance. The personal attack policy forms one part of this doctrine.

3. Pursuant to a stipulation approved by this Court, the petitioners filed their briefs on November 21, 1967. The respondents are presently preparing their brief which is due on December 21, 1967. A motion for an extension of time on respondents' brief to January 22, 1968 is pending.

4. On December 4, 1967 the Supreme Court granted certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 381 F. 2d 908. In that case, the District of Columbia Circuit sustained a Commission order requiring a broadcast station to provide free time to reply to a person whose character was attacked over the station. This order was issued under the personal attack policy prior to its codification in the rules here challenged. The issues presented on certiorari include the constitutionality of the personal attack policy and the general fairness doctrine, but not the requirements of the new rules on editorializing.

5. In view of the fact that the instant cases present the same fundamental issues of the constitutionality and statutory basis of the Commission's fairness doctrine and personal attack policy as does *Red Lion*, we believe that it would serve the ends of justice and avoid an unnecessary burden upon the judicial process to hold these cases in abeyance pending resolution of these basic issues by the Supreme Court. While the requirements of the rules on the right of candidates for office to reply to station editorials are not at issue before the Supreme Court, the parties will be better able to present their arguments on that question illuminated by a Supreme Court decision on the basic constitutional issues. Petitioners also, of course, may present their views on the constitutional and statutory issues to the Supreme Court as *amicus curiae*. We note in this connection that petitioners National Broadcasting Company, Inc. and Columbia Broadcasting System, Inc. filed briefs as *amicus curiae* in response to the *Red Lion* petition for certiorari in which they unsuccessfully urged the Supreme Court to defer that case pending a decision by this Court.

It is therefore respectfully requested that this Court hold these cases in abeyance pending a decision by the Supreme Court in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, No. 600, October Term, 1967.

DECEMBER 14, 1967.

ANSWER OF PETITIONERS TO MOTION TO HOLD CASES IN ABEYANCE

The petitioners in the above-entitled cases, Radio Television News Directors Association, et al., Columbia Broadcasting System, Inc., and National Broadcasting Company, Inc., hereby oppose respondents' Motion To Hold Petitions for Review in Abeyance. Petitioners suggest instead that the filing date for respondents' brief be postponed (and all other procedural dates postponed accordingly) to a date thirty (30) days after such action as the Supreme Court may take upon a petition for a writ of certiorari before judgment which petitioners intend shortly to file.[1]

In support whereof, petitioners state as follows:

I

In their motion filed on or about December 18, 1967, respondents request this Court to hold the instant cases in abeyance pending a decision by the Supreme Court in *Red Lion Broadcasting Co.* v. *FCC*, No. 600. The respondents say that, since these cases present "the same fundamental issues of the constitutionality and statutory basis of the Commission's fairness doctrine and personal attack policy as does *Red Lion*," the instant cases should be held in abeyance until the Supreme Court has decided *Red Lion*.

Petitioners agree with respondents that the instant cases and *Red Lion* are closely related, although not necessarily dispositive of one another. But it does not follow that this Court should necessarily suspend all further procedural steps in these cases during what promises to be a very substantial period. There are important issues in these cases (e.g., the validity of the Commission's regulations governing political editorials) not present in *Red Lion*. Moreover, the policies and regulations at issue here are now effective and would continue in effect while the cases are held in abeyance. The Government's request for

[1] Petitioners' position herein makes it unnecessary for them to respond to respondents' Motion for Extension of Time in Which to File Respondents' Brief and Motion to Correct Motion for Extension of Time to File Briefs.

deferral until the Supreme Court finally acts in another case is unreasonable. Petitioners should not, we submit, be required to comply with burdensome requirements of questionable legality, or to risk serious penalties by noncompliance, throughout a prolonged and Government-initiated delay of proceedings for judicial review begun expeditiously by petitioners.

II

There is much to be said in favor of simultaneous consideration by the Supreme Court of the instant cases and *Red Lion*. The instant cases present the constitutional and statutory issues in the context of agency regulations of general applicability, while *Red Lion* presents only a very limited application of a doctrine which has a multiplicity of adverse effects upon public debate. In briefs *amicus curiae* filed in support of Red Lion's petition for a writ of certiorari, petitioners CBS and NBC suggested that the Supreme Court might wish to defer action on the Red Lion petition until the present cases had ripened for Supreme Court review. The Supreme Court did not defer action but granted the writ and set *Red Lion* for argument in ordinary course. Since this decision may have rested not on a rejection of the suggestion that the two cases be heard together but on the belief that review of *Red Lion* should not be delayed, petitioners have decided to seek a writ of certiorari before judgment in order to provide the Supreme Court with the opportunity, should it so desire, to review the two cases simultaneously as well as expeditiously.[2]

Accordingly, petitioners oppose respondents' motion and suggest that the date for filing respondents' brief be postponed until thirty days after the Supreme Court grants or denies the petition for a writ of certiorari before judgment to be filed by petitioners and that all other procedural steps be adjusted accordingly.

DECEMBER 29, 1967.

[2] Since the constitutional power of the Supreme Court to grant the writ before judgment on a petition to review an agency decision is a matter of first impression, petitioners will also suggest that, if their petition be denied, the Supreme Court may wish to note that denial is without prejudice to the filing of a motion for certification of questions by the Court of Appeals under 28 U.S.C. 1254(3). See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), as to the appropriateness of a certification under these circumstances.

In the United States Court of Appeals for the Seventh Circuit

January 2, 1968

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

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 AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petitions To Review Orders of the Federal Communications Commission

Before Hon. LATHAM CASTLE, *Circuit Judge.*

On consideration of the motion of respondents in the above consolidated matters to correct their motion of December 14, 1967, and that the time for the filing of the petitioners' reply briefs be extended to February 13, 1968, and the time for the filing of a joint appendix be fixed as February 27, 1968; the additional motion of the respondents that these consolidated cases be held in abeyance by this Court pending a decision by the Supreme Court of the United States in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission.* No.

600, Oct. Term, 1967, certiorari granted December 4, 1967 (decision below reported at 381 F. 2d 908); and the answer of the petitioners to said motions and counter-suggestion thereto:

It is ordered that the time for the filing of respondents' brief in the above consolidated cases be and is hereby extended for a period of 30 days after the Supreme Court of the United States has ruled on a petition for a writ of certiorari before judgment to be filed by petitioners, that petitioners' reply briefs be filed within 15 days after the filing of respondents' brief, and that the joint appendix be filed within 15 days after the filing of said reply briefs; provided, however, that such a petition for certiorari is filed within 30 days hereof; otherwise, the above schedule of filings shall be computed from February 2, 1968.

MOTION FOR EXTENSION OF TIME IN WHICH TO FILE RESPONDENTS' BRIEF

The United States of America and the Federal Communications Commission, respondents in the above-entitled cases, hereby move this Court for an Order extending the time within which respondents may file their brief from February 28, 1968 to March 4, 1968. The grounds for this Motion are as follows:

1. On January 2, 1968, this Court "ordered that the time for the filing of respondents' brief * * * is hereby extended for a period of 30 days after the Supreme Court of the United States has ruled on a petition for a writ of certiorari before judgment to be filed by petitioners." The Supreme Court having denied that petition on January 29, 1968, respondents are presently scheduled to file their brief by February 28, 1968. Under the terms of the Order of this Court of January 2, 1968, petitioners' reply briefs are to be filed within 15 days after the filing of respondents' brief and the joint appendix is to be filed within 15 days after the filing of the reply briefs.

2. It is now apparent that, in order to insure proper response to the issues raised by petitioners' briefs in this very important case, further consideration and consultation between counsel for the Commission and the Department of Justice will be necessary. It is for these purposes, and to allow sufficient time for printing, that this extension is requested. We understand that the time for filing reply briefs and the joint appendix remains contingent on the date respondents' brief is filed and will be extended accordingly if the Court grants this Motion.

3. Counsel for all petitioners have authorized us to advise the Court that they do not object to the granting of this Motion.

Wherefore, respondents respectfully request this Court to grant the extension of time requested.

FEBRUARY 23, 1968.

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

Tuesday, February 27, 1968

No. 16369–16498–9

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
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 respondents,

It is ordered, That the time for filing respondents' brief be extended to March 4, 1968.

MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

The United States of America and the Federal Communications Commission, respondents in the above-entitled cases, hereby move that these cases be held in abeyance and that the Federal Communications Commission be authorized to conduct further rule making proceedings. The ground of this motion is that the Commission, upon further consideration and consultation with the Department of Justice, has determined, Commissioner Bartley abstaining and Commissioner Loevinger dissenting, to set aside those parts of the rules at issue dealing with personal attacks (subparts (a) and (b)), and to conduct an expeditious rule making proceeding looking toward their revision.

It is therefore respectfully requested that the cases be held in abeyance and that the Commission be authorized to conduct further proceedings upon an expedited basis for the purpose of reconsidering subparts (a) and (b) of the rules.

MARCH 1, 1968.

RESPONSE OF PETITIONER, COLUMBIA BROADCASTING SYSTEM, INC., TO MOTION OF RESPONDENTS TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

In a motion dated March 1, 1968, the Federal Communications Commission (the "Commission") and the United States of America, respondents herein, have moved that these cases be held in abeyance. Respondents advise that the Commission has determined to set aside subsections (a) and (b) of the rules under review, and respondents request that the Commission be authorized thereupon to conduct further rule making proceedings looking toward their revision. Petitioner Columbia Broadcasting System, Inc. ("CBS") has no objection to the grant of this motion provided that it is made clear that, pending disposition of the present cases, the Commission may not impose or enforce "personal attack" reply requirements, whether in the form of rules or informal policies, without further order of this Court.

In support whereof petitioner CBS shows as follows:

1. The rules under review, which purport to "codify" and "make more precise" the Commission's earlier informal personal attack policy,[1] were initially adopted by the Commission on July 5, 1967 (and were amended on August 2, 1967). Petitions for review were filed by the Radio Television News Directors Association, *et al.* ("RTNDA") and CBS on July 27, 1967, and by National Broadcasting Company, Inc. on August 31, 1967. (Supplemental petitions for review were filed by RTNDA and by CBS to take account of the issues raised by the Commission's August 2, 1967, amendment to the rules.) Petitioners' briefs were filed on November 21, 1967. Respondents' brief was initially due on December 21, 1967, but since that time respondents have been granted three extensions of time for filing and their brief has not yet been filed.

2. It is beyond dispute that the constitutional and statutory issues presented in these cases are substantial. The Supreme Court has recognized their substantiality both by granting certiorari in the *Red Lion* case (*Red Lion Broadcasting Co.* v. *FCC*, 381 F. 2d 908 (D.C. Cir.), *cert. granted*, 389 U.S. 968

[1] See July 5, 1967, Memorandum Opinion and Order ¶¶ 3, 6, R. 347, 349.

(1967) (No. 600, this Term)) and by staying further proceedings in that case pending disposition by this Court of the present cases (88 Sup. Ct. 848). The United States and the Commission appear to recognize that substantial questions have been raised concerning the validity of the rules. See the attached dissenting statement of Commissioner Loevinger (Appendix A) and the concurring statement of Commissioner Cox (Appendix B) in connection with the Commission's decision to file the present motion; see also the attached letter dated February 29, 1968, from Assistant Attorney General Donald F. Turner to the Chairman of the Commission (Appendix C).

3. The Commission, beset with doubts concerning the validity of its "personal attack" rules, is now embarking upon a process of reconsideration. Whether or not the statutory and constitutional infirmities of the rules can in fact be eliminated by the "revision" of the rules contemplated by the Commission, petitioner CBS believes that the proposed rule making proceedings will occasion a thorough reconsideration of the rules and will thus be in the public interest. However, the Commission has given no assurance that it will await a determination by this Court of the present cases before putting any new "personal attack" rules or policies into effect. In view of the pendency of the present cases and the substantial delays in their disposition, and the serious inhibitions on free speech created by "personal attack" reply requirements, any new rules or policies in this area should not be placed into effect before being subjected to judicial scrutiny pursuant to the pending petitions for review and any amendments of the petitions resulting from the contemplated "revision." The Commission has not requested a remand of these cases but merely that they be held in abeyance, and the power of the Court to impose the requirement suggested in this response cannot be doubted.[2]

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[2] See Section 9 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2349; *WKAT, Inc.* v. *FCC*, 111 U.S. App. D.C. 253, 262, 296 F. 2d 375, 384, *cert. denied*, 368 U.S. 841 (1961); *United Air Lines, Inc.* v. *CAB*, 108 U.S. App. D.C. 220, 281 F. 2d 53 (1960); *WIRL Television Co.* v. *United States*, 107 U.S. App. D.C. 21, 274 F. 2d 83 (1959); *Sangamon Valley Television Corp.* v. *United States*, 106 U.S. App. D.C. 30, 269 F. 2d 221 (1959); *WORZ, Inc.* v. *FCC*, 106 U.S. App. D.C. 14, 268 F. 2d 889 (1959); *Massachusetts Bay Telecasters, Inc.* v. *FCC*, 104 U.S. App. D.C. 226, 261 F. 2d 55 (1959), *mandate enforced*, 20 Pike & Fischer, R.R. 2095 (1960). *Cf. Tuscarora Indian Nation* v. *FPC*, 105 U.S. App. D.C. 146, 151–52, 265 F. 2d 338, 343–44 (1958), *rev'd on other grounds*, 362 U.S. 99 (1960).

Wherefore, petitioner CBS has no objection to the grant of this motion provided that it is made clear that, pending disposition of the present cases, the Commission may not impose or enforce "personal attack" reply requirements, whether in the form of rules or informal policies, without further order of this Court.

MARCH 14, 1968.

APPENDIX A

DISSENTING STATEMENT OF COMMISSIONER LEE LOEVINGER

(Re motion to remand personal attack rules)

The issue of the existence and extent of Commission authority to supervise or regulate the content of broadcast programming has been disputed and debated for years, particularly with respect to the expression of opinions and the reporting of news. The issue has not been tested or decided in the courts, until current litigation, because licensees have generally deemed it more prudent not to hazard their licenses or antagonize the bureaucracy which had such great discretionary power over their business. However, the Commission and Commissioners have often stated that they invited litigation to test the legality of Commission action in this area. Ostensibly the Commission has sought and seeks the enlightenment and guidance of court decisions.

On July 5, 1967, the Commission promulgated certain rules relating to "personal attacks" and "political editorials". FCC 67–795. The stated purpose of these rules was to "clarify and make more precise the obligations of broadcast licensees" under the general "Fairness Doctrine" with respect to these matters, and to authorize the Commission to "impose appropriate forfeitures" in cases of violations of such obligations. Commissioner Bartley dissented. I concurred on the ground that "the right of reply" was a sound principle, but stated that the rules were not well drafted.

On August 2, 1967, the Commission sua sponte amended the personal attack rules, with Commissioners Bartley, Loevinger and Wadsworth absent, and Commissioner Cox concurring in the result. FCC 67–923. The stated ground of the amendment was the necessity of further "clarification".

In the meantime, Red Lion Broadcasting Co., appealed a ruling of the Commission under the general "Fairness Doctrine" to the Court of Appeals for the District of Columbia. The decision of that court, sustaining the constitutionality of the doctrine and the ruling of the Commission was entered June 13, 1967, *Red Lion Broadcasting Co.* v. *F.C.C.*, —— F. 2d —— (1967). Red Lion applied to the U.S. Supreme Court for certiorari and the Commission opposed. The Supreme Court granted the petition on December 4, 1967, and the case is now pending in that Court.

While the Red Lion case was on its way to the Supreme Court the Radio Television News Directors Association appealed the validity of the "personal attack" rules to the Court of Appeals for the Seventh Circuit. RTNDA petitioned the Supreme Court to grant certiorari before judgment in the Court of Appeals in order to consolidate both cases in the Supreme Court and bring several aspects of the legal issue before the Supreme Court for decision at one time. The Commission opposed this motion. On January 29, 1968, the Supreme Court denied the RTNDA petition to bring up the Seventh Circuit case immediately, but ordered the argument of the Red Lion case postponed until the RTNDA case had been decided by the Seventh Circuit and was ripe for Supreme Court review.

Now the Commission decides that it will petition the Seventh Circuit Court of Appeals to return the "personal attack" rules to the Commission for further revision and clarification. While the Commission has not decided what revision in the rules it will make, the general nature of the proposed revisions have been proposed to the Commission by its counsel. Though it is possible to express only tentative views on tentative proposals, it seems to me that the proposed revisions will involve no improvement in the rules but merely another step away from clarity and precision. In any event, this endless tinkering with the language of the rules cannot affect the governing legal principles and can amount to no more than an attempt to buttress legal arguments on the Commission's behalf. The inferences which the courts, the parties and the public are entitled to draw from the Commission's wavering course are obvious and justified.

But there is a more important consideration for me. At long last the Commission is in court with competent opposing counsel testing the existence and extent of Commission authority

to supervise and regulate speech by broadcast licensees and those using broadcasting facilities. The Commission is not true to its promise to litigate or to its avowed desire to secure authoritative decision of the issues when it opposes every attempt to bring these issues before the Supreme Court and then employs such tactics as the present ones, involving inevitable and indefinite delay and confusion of the issues.

The important issues here are not the cleverness, or unskillfulness, of Commission lawyers in drafting rules. Since these rules were issued, serious doubt has been cast on their constitutional validity by authoritative publications. 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. 2nd sess. (Feb. 1968). Regardless of any changes the Commission may now make in its rules, it will be apparent to the courts that sustaining the constitutional power of the Commission to act in this area will be to concede the power and invite the probability of adoption of rules at least as onerous as the ones now in effect. The Commission may now change its rules in an effort to make a better showing in pending litigation, but it cannot expunge the record of having adopted the rules now under attack. Neither Commission counsel nor the entire Commission can give the courts any assurance that the Commission will not adopt rules just like its present rules, or more burdensome, as soon as litigation is concluded if the courts find that the Commission has the power to act at all in this area. For the Commission to rewrite its rules now is obviously merely a cosmetic effort to present a better face in court. It is not complimentary to the courts to suggest that they will be influenced by this.

Certainly the basic legal issues raised in this litigation deserve the most prompt consideration and determination that adequate judicial process will permit. The action of the Commission will simply postpone indefinitely the determination of the issues. The course now being followed by the Commission in this matter serves only its own interest as a litigant, has no public purpose, and falls considerably short of the diligence, promptness and candor which the Commission demands of its own licensees. Consequently I am forced to dissent.

APPENDIX B

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

As is often the case, I find the opinion of Commissioner Loevinger in this matter a truly remarkable document. He imputes motives to those who disagree with him which simply do not exist.

It is true that the Commission has invited litigation to test the validity of our fairness doctrine, and I have done so personally. It is not accurate to say that we have not been true to our promise to litigate the issue, that we are considering changes in our rules for mere cosmetic effect, that we are serving only our own interest as a litigant and no public purpose at all, or that our action falls short of any standards of diligence, promptness and candor which we demand of our licensees—or which would generally be regarded as reasonable in a situation such as this.

Commissioner Loevinger is perfectly entitled to believe that we should not have taken this step—indeed I was initially of that view, though for entirely different reasons that he advances, but ultimately joined the rest of my colleagues in directing our General Counsel to move the Court of Appeals for the Seventh Circuit to hold the personal attack cases in abeyance and to authorize us to take further proceedings looking toward partial revision of the rules. However, I do not think he should be allowed to distort the record without challenge—particularly since the statements he now makes are not, for the most part, the ones he advanced while we were considering the matter.

The opposition filed by the Solicitor General to the petition of Red Lion Broadcasting Company for Supreme Court review of the decision of the Court of Appeals for the District of Columbia sustaining the Fairness Doctrine and our application of it to Red Lion was not designed to delay authoritative decision of this question. The Commission and the Solicitor General believed the Court of Appeals decision was sound and urged the Supreme Court that further review was not warranted. However, the Supreme Court decided to hear the case, and we welcome its review. The Solicitor General and the Commission have opposed delay in its resolution of the matter, and are ready to proceed as soon as possible.

Similarly, the Solicitor General's opposition to the petition of the Radio-Television News Directors Association asking the Supreme Court to grant certiorari in its case prior to decision by the Court of Appeals for the Seventh Circuit was not intended to delay resolution of the fundamental issues in this area. The Red Lion case was already before the Supreme Court and constituted an appropriate vehicle for deciding many of the basic questions concerning the Fairness Doctrine. The proposal of RTNDA to by-pass the Court of Appeals was unusual in the extreme and did not seem to us at all necessary, since the collateral question of the validity of the personal attack rules we have adopted to implement this portion of the Fairness Doctrine could be decided in ordinary course, quite apart from the Red Lion case. The Supreme Court apparently concluded that it would prefer to consider both aspects of the matter at one time, but wanted lower court decisions in each case. It therefore ordered argument in the Red Lion case postponed until the RTNDA case is before it in due course. If Commissioner Loevinger must assess blame for delay in concluding the pending litigation, I would suggest that he look in this direction—though I wish to make it clear that I have no objection to the course followed by RTNDA and think the Court's disposition of the matter is entirely appropriate and may conduce, in the long run, to the earliest practicable final decision of this important litigation. But, again, we and the Solicitor General were not seeking delay. Indeed, the course we urged would have produced a Supreme Court ruling on the basic constitutional challenge to the Fairness Doctrine and the personal attack principle more quickly than any other method proposed. I think Commissioner Loevinger's charges of intentional delay cast an unwarranted aspersion not only on the Commission but also the Solicitor General of the United States, who controls our litigation in the Supreme Court and filed the pleadings in question.

It is true that the step we are not taking—if the Court concurs—will involve delay in resolving the question of our authority to adopt rules dealing with the personal attack problem, though the issue of our basic policy in this area, out of which the rules evolved, is still before the Supreme Court in the Red Lion case. The latter case can either be adjudicated in the near future, or can be deferred until we have revised the rules and they can be challenged again if their new form

is still regarded as objectionable by the parties to the present case, or anyone else.

Certainly nothing we do by way of amendment of a portion of the rules will prevent any interested party from challenging our authority to act in this area, nor will the Supreme Court be asked "to concede the power and invited the probability of adoption of rules at least as onerous as the ones now in effect." It may hold the Red Lion case until a new challenge to our revised rules is before it, in which case it will know precisely what rules we would propose to apply in this area before it makes any ruling on the basic issues of the Fairness Doctrine and the personal attack principles—as distinguished from the rules—which we have developed in a series of decided cases. But even if it decides the Red Lion case in the near future, it will be ruling, as did the Court of Appeals, on the application of our policies to a specified factual situation fully disclosed on the record in that proceeding. If it were to affirm our action in Red Lion, that would not in any way commit it to affirmance of the rules we would be in the process of revising. Those could be challenged in advance of their application to anyone, just as was done with respect to the rules we are now asking permission to reconsider in part. There is no need for us to give the Courts any "assurance" as to the revised form of the rules we may adopt because the exact form of the revised rules will be before the Courts if and when they are asked to pass on our authority to make and enforce rules in this field.

We are not proposing to change our rules "to make a better showing in pending litigation" or "to present a better face in court." We are trying to adopt a *better rule* [1] for the regulation of this important aspect of broadcasting. If we are successful in formulating a rule which will promote what we conceive to be the public interest in the presentation of both sides of controversial issues—and which at the same time will avoid results which the parties fear would result from the present

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[1] Commissioner Loevinger is quite right in saying that we have not decided what revision of the rules we will make. He suggests, based on our preliminary discussions, "that the proposed revisions will involve no improvement in the rules but merely another step away from clarity and precision." Since we haven't adopted a new rule, I would simply invite him to bend his efforts toward avoiding the result he fears. He is free to make any suggestions he likes as to the language of the rule, although I don't recall any specific suggestions he made for revision of the present rule. He simply expressed the opinion that the rule "would better achieve its purpose [which he approved in principle] if it were drafted with a clearer delineation of scope and practical operation."

language of the rule and which they contend are legally or constitutionally invalid—that will certainly serve a *public* purpose, and not simply constitute a ploy in the maneuvering of counsel concerned only with victory or loss in court. If we have the authority and responsibility to act in this field, as we believe we do, then we should act as wisely and fairly as we can. If by revision of the language of the rule we can achieve what we consider to be valid goals without causing alleged impairment of the interests of the parties and the public in free broadcast journalism, then certainly we should be permitted to try to do so without being accused of lack of diligence and candor. This charge is all the more incomprehensible since we are acting, in part, at the urging of Assistant Attorney General Donald F. Turner, who formally represents the United States in these cases. (See his letter to Chairman Hyde dated February 29, 1968.)

We are not suggesting that the Courts will be "influenced" by this action. Instead, they will be asked to pass on our authority to adopt a revised rule which we have reason to believe will be more in the public interest than the one now on appeal. Certainly the Courts, the parties, and the public may scrutinize our entire course in this matter—indeed, they are asked to do so. If there are inferences to be drawn from what we have done I believe they should be far different from those Commissioner Loevinger suggests.

APPENDIX C

DEPARTMENT OF JUSTICE,
Washington, February 29, 1968.

Honorable ROSEL H. HYDE,
Chairman, Federal Communications Commission, Washington, D.C.

Re *Columbia Broadcasting System, Inc.* v. *U.S. & F.C.C.* (7th Circuit, No. 16498); *National Broadcasting Co.* v. *U.S. & F.C.C.* (7th Circuit, No. 16499); *Radio Television News Directors Assn.* v. *U.S. & F.C.C.* (7th Circuit, No. 16369).

DEAR MR. CHAIRMAN: In our consideration as a party respondent of the issues raised by petitioners in the above-entitled matters, we are fully prepared to support the Commission's position that the "fairness doctrine" is constitutional and

within the Commission's statutory powers, and that, as a general proposition, some special rule with regard to personal attack is a valid facet of that doctrine. However, we have some concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions in the rule without materially interfering with the public interest objectives that the rule is intended to serve. In discussions with members of your staff some possibilities along this line have been considered.

We therefore respectfully suggest that the Commission might wish to weigh the possibility of considering revisions of the rule before proceeding further with the cases now before the Seventh Circuit.

Sincerely yours,

DONALD F. TURNER,
Assistant Attorney General,
Antitrust Division.

ANSWER OF PETITIONERS RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL. TO MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

Petitioners Radio Television News Directors Association, *et al.*, in answer to respondents' Motion to Hold Cases in Abeyance and to Authorize Further Proceedings, oppose said Motion unless the Commission (a) sets aside pending further order of this Court not only the personal attack regulations but also the antecedent personal attack policy which was codified in the regulations, and (b) will complete its further proceedings within 90 days.

In support whereof, petitioners state:

I

Respondents' motion to hold these cases in abeyance while authorizing further proceedings [1] does not reveal which of two widely divergent courses the Commission is proposing to follow:

(1) The Commission may mean that it will set aside not only the formal regulations issued on July 5, 1967 (as amended August 2, 1967) but also the antecedent personal attack policy which was codified in the regulations—a policy that is substantively identical and which the Commission has been enforcing for a number of years—as illustrated by *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* now pending in the Supreme Court of the United States (No. 600, this Term).

(2) Alternatively, the Commission may mean that it will set aside the formal regulations but continue to enforce the same substantive policy as part of the so-called "fairness doctrine," as it has been doing since 1962.

If respondents are proposing the first course, we would have no objection so long as the Commission's further proceedings are in fact conducted expeditiously.

If respondents are proposing the second course, we oppose the motion as another tactical step in their strategy of delaying or

[1] Respondents did not submit with their Motion either the dissenting opinion of Commissioner Loevinger or the concurring opinion of Commissioner Cox in connection with the Commission's decision to file the Motion. The two opinions are attached hereto as Appendices A and B, respectively.

avoiding an adjudication of legality of the personal attack policy in these proceedings, while at the same time continuing to enforce that policy by one means or another. (We respectfully refer the Court to Commissioner Loevinger's dissent for a description of the procedural context in which the instant motion was made.) To hold the litigation in abeyance while at the same time applying the substance of the personal attack rules in another guise would be unfair not only to petitioners but to all broadcast licensees in the industry.

For respondents to leave it uncertain whether the first or second course would result from granting its motion would be even more inequitable.

Accordingly, we urge that respondents be required to file a prompt clarification of this point before the Court acts upon the motion.

II

The significance of the foregoing distinction becomes apparent from a brief recital of the regulatory context.

The Commission's personal attack policy was first enunciated in its present form in ad hoc rulings made in 1962.[2] In a 1963 Public Notice,[3] the Commission articulated the policy, including its notice and right-of-reply requirements, in terms quite similar to those in the instant regulation. The policy was enforced principally by the threat of loss of license, which was the only formal sanction. It was not challenged in the courts until *Red Lion*, since prior to that case it was widely assumed that judicial review of the Commission's letter-rulings under the policy could be obtained only in connection with a denial of license renewal.[4]

In adopting the present regulation, the Commission emphasized that it serves "to codify what has long been the Commission's interpretation of the personal attack aspect of the Fairness Doctrine." [5] Although codification has the effect of making a wider range of sanctions available to the Commission, the new regulations, in the Commission's words, "do not alter or add to the substance of the Doctrine.[6] The issuance of formal

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[2] *Milton Broadcasting Co.* (*Clayton W. Mapoles*). 23 R.R. 586 (1962); *Billings Broadcasting Co.*, 23 Pike & Fischer R.R. 951 (1962).

[3] FCC 63–734, 25 Pike & Fischer R.R. 1899.

[4] See *Red Lion*, 381 F. 2d at 910.

[5] Memorandum Opinion and Order, adopted July 5, 1967, p. 4; R. 349.

[6] *Ibid.* at 2; R. 347.

regulations, however, gave petitioners a chance to challenge the legality of the personal attack doctrine without risking loss of station licenses.

Consequently, if all the Commission proposes, while the Court holds this case in abeyance, is to turn the clock back to the day before the regulations were issued, it will have succeeded in delaying or evading a judicial test without relaxing in any degree the substantive restrictions. Conversely, although delayed in getting their day in court, petitioners and other licensees would be forced to comply with the very restraints that the Commission purports to be lifting during the interim period, through fear of the adverse effect of noncompliance in subsequent licensing proceedings.

We mean no unfairness to the Commission. Quite possibly it does intend to suspend the entire personal attack doctrine pending further rulemaking. If so, the Commission can readily clarify its position. The trenchant dissent of Commissioner Loevinger suggests, however, that we are not unduly apprehensive.

III

There is also basis for concern—in view of Commissioner Loevinger's dissent—over respondents' failure in their motion to suggest any time limit for the completion of the proposed further proceedings before the Commission. Absent such a limitation, the reopened rulemaking proceeding could be stretched over a lengthy period almost at the Commission's discretion—making it virtually certain that this case would not receive contemporaneous consideration with *Red Lion* in the Supreme Court, and thus achieving a primary tactical goal of respondents. It is noteworthy that the proceedings before the Commission which eventuated in the adoption of the present regulations consumed 15 months and that other Commission rulemaking proceedings have taken even longer.

We suggest that a 90-day period is ample for completion of the proposed further proceedings on an "expedited basis." The Commission would not, of course, be starting from scratch but instead would merely be revising a portion of a regulation concerning which it already has received voluminous comments and has already deliberated for more than a year. A 90-day limitation would be entirely feasible if the Commission genuinely intends to act expeditiously—and particularly if, as Commissioner Loevinger indicates, "the general nature of

the proposed revisions" has already been proposed to the Commission by its counsel.

Unless the Commission agrees in advance to complete its further proceedings within 90 days, we urge that the Court impose such a requirement as a condition to any grant of the motion.

CONCLUSION

Petitioners submit that, unless the Commission sets aside the entire substance of its personal attack doctrine pending further order of this Court and will complete its further rule-making proceedings within 90 days, respondents' motion should be denied.

[Appendices omitted]

RESPONSE OF PETITIONER, NATIONAL BROADCASTING COMPANY, INC., TO MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

This response is submitted in opposition to the motion dated March 1, 1968 by the United States of America and the Federal Communications Commission ("Commission") that these cases be held in abeyance, and that the Commission be authorized by the Court to conduct further proceedings upon an expedited basis for the purpose of reconsidering subparts (a) and (b) of the rules here under attack. NBC opposes the motion and urges that it be denied.

NBC further urges that, even if this Court concludes in its discretion that the motion should be granted, petitioners here are entitled to certain protective conditions, *i.e.*, that the Commission be stayed pending determination of the review proceedings from enforcement of the personal attack rule and the policy embodied in it, and on the further condition that the stay of this Court's proceedings be limited to a period of ninety days.

I

GRANT OR DENIAL OF THIS MOTION RESTS WHOLLY WITHIN THE COURT'S DISCRETION

The relief sought by the Commission's motion to hold in abeyance is not, of course, a matter of right. If this Court is authorized to grant the remand at all, such grant or denial rests wholly within the Court's discretion. Under Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C.A. § 402(a), the statutory provisions which govern this petition for review are to be found in the Judicial Review Act of 1950 (formerly Chapter 19A of Title 5, 5 U.S.C. §§ 1031–1042, now codified in 28 U.S.C. §§ 2341–2351 (1967 Supp.)). By the terms of that Act, this Court's jurisdiction over the order here under review is "exclusive".

Thus, 28 U.S.C. § 2342 provides that "the court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part) or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable

by section 402(a) of Title 47 * * *". This jurisdiction is invoked "by filing a petition as provided by section 2344 * * *" *id.* Section 2349(a) of the Act reiterates the "exclusive" jurisdiction conferred on the court:

> The Court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals * * * has *exclusive jurisdiction* to make and enter * * * a judgment determining the validity of, and enjoining, *setting aside*, or suspending, in whole or in part, the order of the agency. (28 U.S.C.A. § 2349(a) (1967) Supp.) (Emphasis added).

The Commission in its motion papers assume that, in the light of the Court's exclusive jurisdiction, the Commission is without authority to act at this point without the Court's consent since it asks to be "authorized" to conduct the proceedings which it contemplates.[7] This assumption is undoubtedly correct. See, *e.g.*, *Ford Motor Co.* v. *N.L.R.B.*, 305 U.S. 364 (1939); *C.A.B.* v. *Delta Airlines, Inc.*, 367 U.S. 316, 334 (1961); L. Jaffe, *Judicial Control of Administrative Action*, 709 (1965).[8]

Indeed, there may be some question whether this Court may properly grant the Commission's motion, since there is no express statutory basis for doing so. The court, in *Fleming* v. *F.C.C.*, 225 F. 2d 523, 526 (D.C. Cir. 1955), observed that the Communications Act "confers no specific authority for remand without reversal", but held that the Court had inherent power to remand to the Commission for further factual

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[7] This is consistent with the Commission's previous practice. See *Matter of Amendment of Section 3.658(d) and (e), etc.*, FCC 63-497 (Docket No. 12859), 25 Pike & Fisher R.R. 1651, 1657 n.10 (1963) where the Commission, after the filing of a petition for review had conferred exclusive jurisdiction on the court of appeals, made a similar motion requesting the court to remand and to authorize the Commission to conduct further rulemaking. That motion was not opposed. See also the consistent holdings to the effect that a remand to the Commission pursuant to 28 U.S.C. § 2349(a), *supra*, cannot divest the reviewing court of its exclusive jurisdiction. *E.g.*, *WKAT, Inc.* v. *F.C.C.*, 296 F. 2d 375, 384 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 841 ("we think this statute does not contemplate that the agency can moot an appeal during a remand * * *"); *Massachusetts Bay Telecasters, Inc.* v. *F.C.C.*, 261 F. 2d 55, 67 (D.C. Cir. 1958).

[8] The decision in *Wrather-Alvarez Broadcasting Co.* v. *F.C.C.*, 248 F. 2d 646, 648-49 (D.C. Cir. 1957) is not to the contrary. There the Commission reconsidered its ruling after a notice of appeal had been filed but before the expiration of the time within which a petition for reconsideration had to be filed with the Commission. The Court held that during that period the Court and Commission had concurrent jurisdiction.

determinations "where the state of the record may preclude a 'just result'." (225 F. 2d at 526) There is, however, no contention made by the Commission that its desire to reconsider is based on any deficiency in the record. Neither does the Commission in its motion give any indication that it seeks the remand under 28 U.S.C. § 2349(c), which provides for remand (in certain narrowly limited circumstances) for the taking of further evidence by the agency.

Even if this Court does possess the authority to grant plaintiff's motion, it is clear that grant or denial of the motion is a matter of discretion. The Supreme Court held in *Ford Motor Co.* v. *N.L.R.B., supra:*

> * * * we are unable to conclude that the Board has an absolute right to withdraw its petition at its pleasure. We think that permission to withdraw must rest in the sound discretion of the court to be exercised in the light of the circumstances of the particular case. (305 U.S. at 370)

It is submitted that the Commission's motion does not make an adequate showing to support an exercise by this Court of its discretion to grant the requested relief, and that a consideration of all of the relevant circumstances strongly suggests that the Commission's motion should be in all respects denied.

II

The Judicial Review Now in Progress Ought Not To Be Suspended or Disrupted

The Commission's short motion, while requesting authorization "to conduct an expeditious rule-making proceeding looking toward [the] revision" of the personal attack rule gives no hint of the nature and extent of the proposed revision, nor does it provide any assurance that, after the additional rule-making proceedings are conducted, the rule will be revised at all.

Indeed, the motion indicates affirmatively that the revision contemplated is one which will not alter the significant issues in this case. The fundamental issue in these proceedings is whether the Commission may lawfully adopt *any* rule imposing on broadcasters its policy with respect to personal attacks; and any "reconsideration" which is not responsive to this basic challenge posed by petitioners can serve only to needlessly delay the final resolution of that issue.

The Commission's motion indicates that the decision to consider revision of the rule was prompted by "consideration and consultation with the Department of Justice * * *"; and Commissioner Cox in his concurring opinion states that "* * * we are acting, in part, at the urging of Assistant Attonrey General Donald F. Turner, who formally represents the United States in these cases", and refers to the latter's letter to Chairman Hyde, dated February 29, 1968. (The concurring statement of Commissioner Cox and the dissenting statement of Commissioner Loevinger are annexed as Exhibit A.)

Mr. Turner's letter, a copy of which is annexed hereto as Exhibit B, makes it clear that the action which the Commission contemplates taking will in no way moot, or significantly alter, the issues raised by the review proceedings presently pending in this Court. Mr. Turner's letter states that the Department of Justice is "fully prepared to support the Commission's position that the 'fairness doctrine' is constitutional and within the Commission's statutory powers and, that, as a general proposition, some special rule with regard to personal attack is a valid facet of that doctrine." Mr. Turner indicates, however, that "the rule, as drafted, raises possible problems that might be minimized by appropriate revision". Mr. Turner does not identify those problems; but whatever they are, neither the Commission nor Mr. Turner is apparently willing to concede the basic illegality of the personal attack policy and the rule, here under review, which embodies it.

The briefs which have already been filed by the petitioners in this Court raise important statutory and constitutional issues affecting, not merely the drafting details of the Commission's personal attack and editorializing rules, but its fundamental power to act in this area. The Commission's proposed additional rule-making proceedings look at most toward the revision, and probably the modest revision, of the rules now under attack, rather than to the abrogation of the rule or to the abandonment by the Commission of its policy in this area. Since that is true, allowing the Agency to begin further rule-making proceedings at this stage is unwarranted. Returning the matter to the Commission is particularly inappropriate in view of the Commission's failure to advise the Court and the parties what changes in the rule it proposes to consider. If the Court had been advised what proposed revisions the Commission had in mind, it could have itself assessed their bearing on

the issues before it. Without such advice it is compelled to evaluate the Commission's request in the dark.

Nor does the Commission's request, addressed to the discretion of this Court, moot the review proceeding. It is well-settled that voluntary discontinuance of allegedly unlawful conduct does not of itself moot an action brought to suppress such conduct, where "a dispute over the legality of the challenged practices" remains and "the defendant is free to return to his old ways", *United States* v. *W. T. Grant & Co.*, 345 U.S. 629, 632 (1953); *Walling* v. *Helmerich & Payne*, 323 U.S. 37 (1944); *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498 (1911); *Heilberg* v. *Fixa*, 236 F. Supp. 405, 407 (N.D. Calif. 1964), *aff'd sub nom, Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). *Cf. Technical Radio Laboratory* v. *Federal Radio Commission*, 36 F. 2d 111, 113 (D.C. Cir. 1929); see also *Flemming* v. *Florida Citrus Exchange*, 358 U.S. 153, 168 (1958). Where the dispute over the legality of the agency's acts is a "continuing" one and the public interest in seeing it resolved is urgent, mootness ought not to be allowed to prevent judicial review. *Southern Pacific Terminal Co.* v. *I.C.C.*, *supra*.[9] Obviously, this is such a case.

It is also significant that the Supreme Court of the United States has ordered that argument in a case involving closely-related issues, *Red Lion Broadcasting Co.* v. *F.C.C.*, 381 F. 2d 908 (D.C. Cir. 1967), *cert. granted*, December 4, 1967, be postponed pending a decision in this case by this Court, and any subsequent petition for certiorari, thus evidencing its interest in the Commission's policy in this area and the desirability of having an opportunity to review and evaluate that policy in the light, not only of the facts of the *Red Lion* case, but of the considerations raised and argued in this case. To grant the Commission's motion would either frustrate the intention of the Supreme Court to consider the issues in the fashion it deems most appropriate, or alternatively, result in further delay of the resolution of the issues in the *Red Lion* case.

Moreover, the Commission's stated desire to "reconsider" its policies with respect to "personal attacks" is manifested at an exceedingly advanced stage of the proceedings. These "per-

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[9] A different case may be presented, and the case be found "moot", where the agency in question has admitted that the challenged acts were illegal, and has amended its practice accordingly, *Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 330–3 (1961), but the Commission here has done no such thing.

sonal attack" policies were first formulated and applied to licensees by the Commission in 1962 (see Brief of NBC at pp. 9–10). The Notice of Proposed Rule Making was issued in April 1966, and voluminous comments from the industry were invited and received; the rule was formally adopted in July, 1967, and then amended by the Commission, *sua sponte*, in August, 1967 (Brief of NBC at pp. 2–3). Finally, the several petitioners' briefs have already been filed, and the date for filing the Commission's brief in response (a date previously extended by this Court, at the request of the Commission and without any intimation having been given that the Commission contemplated making this motion) has passed.

It has been held by the Supreme Court that the promulgation of formal rules by the Commission after rule-making proceedings of the sort conducted here is reviewable under 47 U.S.C.A. § 402(a) once "the process of rule-making was complete," *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 198 (1956). See also *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 418–19 (1942). It is submitted that, once the Commission has concluded a proceeding and adopted an order or rule which it regards as final, and which is subject to judicial review, it ought not to be given a free hand to interrupt judicial review of that order by recalling it for adjustment or revision during the course of the review proceeding. Once the Court's exclusive jurisdiction attaches, sound judicial administration dictates that it should be suspended for further agency action only under circumstances clearly contemplated by the statutes governing the judicial review or in circumstances where the Court has itself determined, in the exercise of its review authority, that further agency proceedings, as, for example, by way of the making of additional findings or the taking of additional evidence, are necessary (see, *e.g.*, *Fleming* v. *F.C.C.*, supra).

Even in terms of effective administration on the part of the Commission itself the proposed suspension of this Court's proceedings makes little sense. At issue in this case, and in the *Red Lion* case now pending in the Supreme Court, is the fundamental question whether the Commission has authority to act at all in the area dealt with by these rules. Mr. Turner has suggested that the Commission may make "appropriate revisions" which might "minimize" certain unidentified "possible problems". Surely, effective utilization of the time of the Commission and of the courts is not achieved by going forward with

such proposals while the Commission's power to act in this area and the scope of any such power, remain in doubt.

CONCLUSION

Under all of the circumstances, it is respectfully requested that the Court exercise its discretion to deny the Commission's motion in its entirety.

If, however, the Court concludes that the Commission should be permitted, on some terms, to conduct the rule-making proceedings for which it requests authorization, it is submitted that some protective provisions are necessary. First, in order that a resolution of the important issues presented here not be unduly delayed, the time during which this Court's proceedings are held in abeyance so that the Commission can take further action should be limited. It is submitted that ninety days should be ample time for the Commission to conduct its further rule-making proceedings on an "expedited basis".

Action is also necessary to protect the industry from enforcement of the personal attack rule and policy during the period in which judicial review is frustrated by the Commission's reconsideration of its rule. This is particularly important in view of the accelerating pace of the 1968 election campaigns and the likelihood of the multiplication of claims alleging "personal attacks" during the forthcoming months. It is therefore submitted that the Commission should be stayed from further enforcement of its personal attack rule and policy until further order of this Court.

[Exhibits omitted]

AMENDMENT TO ANSWER OF RADIO TELEVISION NEWS DIRECTORS ASSOCIATION ET AL. TO MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

Petitioners Radio Television News Directors Association *et al.* hereby submit this amendment to their Answer to respondent's Motion to Hold Cases in Abeyance and to Authorize Further Proceedings, and state as follows:

1. On March 14, 1968, petitioners filed their answer to respondent's motion, filed March 4, 1968, requesting this Court to hold the instant cases in abeyance and to authorize further proceedings before the Federal Communications Commission looking toward revision of its personal attack regulations.

2. Subsequently, on March 19, 1968, the Commission issued an order, to which was attached a dissenting statement by Commissioner Loevinger and a concurring statement by Commissioners Johnson and Cox, in connection with a license renewal proceeding pending before it (*Brandywine Main Line Radio, Inc.,* FCC 68–298). That order and the dissenting and concurring statements are, we believe, pertinent to this Court's determination of respondents' pending motion. In particular, we respectfully direct the Court's attention to the statement of Commissioners Johnson and Cox that "[i]n fact, no material change in the personal attack rules is contemplated by the Commission."

3. A copy of the Commission's order and the dissenting and concurring statements is attached hereto as Appendix A.

APPENDIX A

Before the Federal Communications Commission

WASHINGTON, D.C. 20554

Docket No. 17141, File Nos. BR–178 and BRH–1320

In re Applications of BRANDYWINE-MAIN LINE RADIO, INC. For renewal of licenses of Stations WXUR and WXUR–FM Media, Pennsylvania

Order

Adopted March 9, 1968; Released March 19, 1968

By the Commission: Commissioner Bartley abstaining from voting; Commissioner Loevinger dissenting and issuing a statement; Commissioner Wadsworth not participating; Commissioner Johnson concurring and issuing a statement in which Commissioner Cox joins.

1. The Commission has before it for consideration a motion filed by Brandywine-Main Line Radio, Inc. (WXUR) on March 12, 1968, and a letter of March 14, 1968, requesting temporary suspension of the proceedings in the above matter pending action by the United States Court of Appeals for the Seventh Circuit on the Commission's request for authority to conduct further rule making on the personal attack rules of the fairness doctrine [1] and pending conclusion of any further rule making which may be authorized by the Court.

2. As set forth in our Memorandum Opinion and Order (FCC 67–99, released January 25, 1967), the above WXUR renewal applications were designated for hearing on a number of issues bearing on the applicant's qualifications to be a licensee. The hearing has been in progress since October 2, 1967. We are of the view that a temporary suspension of the proceedings at this juncture would serve no useful purpose and is not in the public interest.

3. *Accordingly, it is ordered,* That the above motion for temporary suspension of the proceedings filed by Brandywine-Main Line, Inc., on March 12, 1968, *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,[2]
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER LEE LOEVINGER

(Re: Application of personal attack principle to WXUR)

This matter comes before the Commission on a motion by WXUR for temporary suspension of a hearing on its license renewal, on the grounds that the Commission is in the process of revising the substantive principles involved in that hearing.

[1] Motion to hold cases in abeyance and to authorize further proceedings filed March 1, 1968, in the cases of *Radio Television News Directors Association, et al.*, v. *U.S. and FCC* (Nos. 16,369, 16,498 and 16,499), pending in the United States Court of Appeals for the Seventh Circuit.

[2] See attached statements.

I think that fairness, rational procedures and due process of law require granting the motion. A somewhat detailed review of the facts is necessary to demonstrate this.

On April 8, 1966, the Commission issued a Notice of Proposed Rulemaking (Commissioner Loevinger absent) proposing "to codify the procedures which licensees are required to follow in personal attack situations." FCC 66–291, Docket No. 16574. The substance of the proposal was to add section 73.123 to the FCC rules stating, in language set forth in an appendix to the notice, the obligation of a broadcast licensee to advise any person or group of an attack upon his honesty, character or like personal qualities, within a specified time, and offering a reasonable opportunity to respond over licensee's facilities. Subsection (c) related to editorializing and is not relevant here.

On July 10, 1967, the Commission issued a Memorandum Opinion and Order adopting the rule relating to personal attacks as proposed in the April 1966 Notice. 8 FCC 2d 721 (1967). (Commissioner Loevinger concurred with a separate opinion, 8 FCC 2d 728.) There were slight differences in the order and numbering of the clauses, but the operative language adopted was identical with that proposed in 1966. The Commission opinion said that the purpose of adopting the rules was to "clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks * * *" (par. 3). The opinion explicitly stated, "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." A footnote said, "The only new requirement in these rules are [sic] the time limits, * * * within which licensees must act to fulfill their substantive obligations when they have broadcast personal attacks * * *" (Par. 3; fn. 3)

On January 25, 1967, the Commission ordered a hearing on the application of WXUR for renewal of its license. FCC 67–99, Docket No. 17141. The principal issue concerned the compliance by WXUR with the Fairness Doctrine. A number of groups and individuals charged WXUR with failure to comply with the Fairness Doctrine, particularly in respect to the personal attack principle, and WXUR consented to an evidentiary hearing in order to secure a determination of the controversy. The Commission specified a number of issues, including an issue as to whether WXUR "has complied with the personal attack principle of the Fairness Doctrine" by fol-

lowing the procedures that had been specified in the personal attack rule proposed in 1966 and adopted in 1967, as noted above.

Subsequent to the promulgation of the personal attack rules, the Radio Television News Directors Association and others appealed the validity of the rules to the United States Court of Appeals for the Seventh Circuit. That appeal is still pending. On March 1, 1968, the Commission moved the Court of Appeals to hold that appeal in abeyance and to authorize the Commission to conduct further rule making proceedings. The entire ground of the motion was stated as follows:

> The ground of this motion is that the Commission, upon further consideration and consultation with the Department of Justice, has determined, Commissioner Bartley abstaining and Commissioner Loevinger dissenting, to set aside those parts of the rules at issue dealing with personal attacks (subparts (a) and (b)), and to conduct an expeditious rule making proceeding looking toward their revision.

That motion was authorized and filed over my objection and dissent, for reasons which are set forth in my dissenting statement and will not be repeated here.

Following the filing of that motion, WXUR moved the Commission for a temporary suspension of the proceedings involving the renewal of the WXUR license and the charges of violation of the Fairness Doctrine, including the personal attack principle. The hearing in the WXUR matter started October 2, 1967, and has continued intermittently since then. The hearing is in recess and will resume pursuant to the Commission's summary denial of the motion for a temporary suspension.

In dissenting to the effort of the Commission to revise its rules during the course of litigation over their validity, I suggested that the course being followed by the Commission "falls considerably short of the diligence, promptness and candor which the Commission demands of its own licensees." The present action of the Commission illustrates and emphasizes that conclusion. The Commission has stated that the rules now before the Court of Appeals embody the personal attack principle of the Fairness Doctrine, adding only specific time limits for action. Certainly the Commission cannot now be asking the Court of Appeals to hold the cases in abeyance for modification

of the time limits. Such a motion would be patently frivolous and dilatory. Therefore the Commission must intend to make substantive revisions in the rules.

Assuming, as we must, that the Commission, if authorized by the Court, will make substantive revisions in the personal attack rules it will necessarily do either one of two things. Either the Commission will change the substance of the personal attack principle which is embodied in the rules, or it will change the Commission's interpretation of the personal attack principle which is embodied in the rules. No amount of logomachy or sophistry can avoid the conclusion that in reconsidering the personal attack rules the Commission either must change the substance or not change the substance.

The Commission has already declared to the Court of Appeals that it desires and intends to change the rules—which must mean to change the substance of the rules. Therefore the Commission is, in effect, committed either to abandon the prior personal attack principle as unsound, invalid, or, at least, indefensible in court, or to change its interpretation of this principle.

The hearing on the WXUR renewal involves the issue of compliance with the personal attack principle, which is stated there in almost the very words of the rule that the Commission now proposes to change. If the Commission is about to admit that the principle is unsound or to change the principle by changing its statement and interpretation, then it certainly makes no sense at all to continue a hearing based upon the about-to-be-abandoned-or-modified principle. But the problem is even simpler than this. WXUR says that it must know what interpretation or view of the personal attack principle the Commission takes in order to know what evidence is relevant to the issue of compliance. The same problem confronts the other parties to the proceeding. By insisting that the Hearing Examiner proceed with the WXUR hearing before determination of the uncertainty created by the Commission concerning the underlying principles involved, the Commission is stultifying that proceeding and frustrating the possibility of rational presentation or consideration of evidence on this issue.

If the Commission was correct in stating that the personal attack rules merely codified prior precedent and added only specific time limits for action, then the court test of the present rules is a fair examination of the basic principles which the Commission has developed in this field and which the Com-

mission seeks to apply in the WXUR case. If these principles are to be changed or abandoned, then the Commission should not only seek advantage to itself in its litigation but should give other parties whatever advantage there may be in the changes or abandonment of these principles. The Commission cannot fairly, properly and honestly demand that the validity of its principles be judged on the basis of some statement drafted specifically for the purpose of passing scrutiny before a court while it is simultaneously refusing to allow parties before it to be judged under the same statement of principles. The present position of the Commission seems to be that the personal attack principle means one thing when it is applied by the Commission to a party being judged before it, but that it means something else when the Commission is being judged before a court on the validity of that principle.

The Commission ruling on the WXUR motion not only casts further doubt on the propriety of the Commission motion in the Court of Appeals but forebodes increasing confusion and difficulty in this important and uncertain area during the coming months. At a time when the Commission and the country may confidently anticipate that there will be a substantial number of complaints and charges relating to fairness and personal attacks growing out of the coming elections, the Commission has made it impossible for anyone to know what the applicable principles or rules are or what course the Commission will follow, if the Court of Appeals permits it to follow its own course. The Commission now is needlessly and without purpose compounding confusion in a most delicate and dangerous area.

CONCURRING OPINION OF COMMISSIONER NICHOLAS JOHNSON IN WHICH COMMISSIONER KENNETH COX JOINS

I concur in the Commission's disposition of the motion before us and append these brief comments only in order not to leave unanswered the dissenting statement filed by Commissioner Loevinger.

Over one year ago Brandywine-Main Line Radio, Inc., licensee of WXUR-AM and WXUR-FM of Media, Pennsylvania, applied for renewal of these broadcast licenses. On January 25, 1967, the Commission designated the applications for hearing on a number of issues bearing on the applicant's qualifications to be a licensee. The hearing has been in progress since October 2, 1967.

In today's action, we have denied Brandywine's request that we suspend the renewal hearing, pending action by the Court of Appeals for the Seventh Circuit in a separate case wherein the legality of the personal attack rules promulgated by the Commission in July 1967 are at issue. *R.T.N.D.A., et al* v. *U.S. and F.C.C.* (case numbers 16369, 16498, 16499). In that case, the FCC has requested authority to revise further the personal attack rules. Brandywine notes that the product of the pending revision will probably be a "less restrictive" set of regulations than those presently on our books. Therefore, it contends, it is entitled to take advantage of any modifications which might be favorable to its renewal case, and that a suspension of the proceedings is necessary to grant this deserved opportunity.

But fairness to WXUR does not require such a suspension. It is extremely unlikely that any changes in the rules will affect the situation under review in Brandywine's renewal hearing. If by chance the new standards turn out to affect materially Brandywine's case, the Commission will be more than willing to grant counsel the opportunity to introduce into the record whatever new evidence or contentions they consider appropriate. Suspension of the hearing presently in progress will do Brandywine no good—except insofar as it causes delay and thereby puts off the day when the Commission eventually renders judgment on the ultimate question of its qualifications as a licensee.

In view of the simple and inconsequential procedural question at stake herein, Commissioner Loevinger is to be congratulated on both the length of his dissenting opinion and on the remarkable show of indignation he has mustered. As in his similar condemnation of the Commission's recent decision to ask the Seventh Circuit Court of Appeals for leave to revise the personal attack rules, Commissioner Loevinger's remarks distort the purpose and effect of our action. FCC Public Notice No. 13493, March 1, 1968 (concurring opinion of Commissioner Cox). They deserve, therefore, a brief response.

First, it should be pointed out that, contrary to the impression created by Commissioner Loevinger's opinion, WXUR's performance is being judged on five separate issues—not just the question of its compliance with the Commission's personal attack requirements. In the Memorandum and Order originally designating the application for hearing, we defined those issues as: (1) whether the applicant has met the conditions set forth

in the Commission's Memorandum Opinion and Order of March 17, 1965 (FCC 65–207) during its license period from April 29, 1965 to August 1, 1966; (2) the efforts, if any, which the applicant has made to ascertain and serve the needs and interests of the public served by its stations; (3) whether the applicant fully and candidly advised the Commission of its program plans in connection with its application for acquisition of control of the stations involved; (4) the applicant's efforts to comply with the Commission's Fairness Doctrine, including the personal attack principle; and (5) whether the applicant has used the facilities of its stations to serve the sectarian and political views of its principals and to raise funds for their support rather than to serve the community generally, and whether this was misrepresented to the Commission in its application for acquisition of control of these stations.

There would be no point to suspending a hearing, which has now been in progress since October 2, 1967, on the ground that the standards governing one of the five points at issue might soon undergo material modification—even if such a material change were in the offing.

In fact, no material change in the personal attack rules is contemplated by the Commission. Commissioner Loevinger is well aware of this fact, since he participated in the meeting at which the matter of seeking authority from the Court of Appeals was discussed. Nevertheless, he speculates that we may "abandon the prior personal attack principle as unsound, invalid, or at least, indefensible in court. * * *" I believe it important to record that Commissioner Loevinger speaks only for himself in this regard, and does not reflect the understanding or belief of the majority of the Commission. It would be unfortunate if his characterization of the majority's intentions were to be used in support of a campaign to discredit the basic principle which Commissioner Loevinger originally endorsed but has now decided to regard with distaste.

Since none of the five Commissioners who voted to seek authority to revise the rules share Commissioner Loevinger's new doubts about either the wisdom or the legality of the basic personal attack principle, the possibility is especially slim that the forthcoming revisions will bear on WXUR's case. The WXUR licenses were designated for hearing *before* the present rules were promulgated. To the extent that personal attack questions are involved in the hearing, they will relate to the

principle as enunciated in individual cases decided before it was codified in the rules. Therefore, any revision of the new rules will not affect Brandywine's case in any event. Practically speaking, there is little chance that a radical change will occur.

In sum, I believe the Commission's ruling in this case to be commendably expeditious and equitable as well as legal, and hope these few words of explanation will help to quell whatever specters have been raised by Commissioner Loevinger.

REPLY OF RESPONDENTS TO PETITIONERS' RESPONSES TO RESPONDENTS' MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

The respondents have moved this Court to hold these cases in abeyance in order to permit the Federal Communications Commission to revise the personal attack rules under review. In response to this motion, petitioner CBS has stated that it has no objection so long as the Commission is prohibited from putting any personal attack reply requirements into effect pending disposition of the present cases. Petitioner RTNDA, raising the question of the difficulties presented by a hiatus during the course of further rule making, urges that a 90 day limit be placed upon further proceedings and states that it does not object to grant of the motion if the Commission's rules and its past policy are set aside while the rules are being revised. Petitioner NBC opposes the motion, essentially on the ground that voluminous comments have already been submitted to the Commission, that there is no warrant for permitting further revision, and that the basic constitutional and statutory problems would not be affected by revision of the rule.

Respondents agree that any extended further proceedings before the Commission would be undesirable, particularly from the public interest viewpoint of the importance of having settled policy in this area. As both NBC and RTNDA have pointed out, a full rule making proceeding with voluminous comments has already been held. In light of this fact, the Commission proposes immediately to revise its rules in the event this Court grants the pending motion, without seeking further comment. Attached hereto is a Proposed Memorandum Opinion and Order revising subsection (b) of the rules which the Commission proposes to adopt. It would further exempt from the requirements of the rules commentary in newscasts and in on-the-spot coverage of news events, and news interviews, including commentary. This procedure of immediate revision, although necessarily subject to consideration of any petitions for reconsideration which might be filed, should avoid any extended hiatus, and any need to consider a stay pending further proceedings. We believe that it will also permit an

early hearing of these cases. The Government is prepared to meet any expedited schedule set by the Court for such revised or supplemental briefs of petitioners as may be appropriate and the filing of the Government's brief.

However, we do not agree with NBC that it is appropriate to require the Commission to maintain rules it wishes to change. Petitioners have no vested right to the present form of the rules. *Ford Motor Co.* v. *Labor Board,* 305 U.S. 364 (1939). Nor do we believe it desirable to proceed with argument while the rules are being changed, since the large constitutional questions presented should clearly be decided upon the basis of the precise rules finally adopted by the Commission.

Finally, we strongly oppose the request of CBS that this Court stay in advance any revised rules which the Commission may adopt. No request for a stay *pendente lite* has been made by any of the petitioners in these cases, and the present CBS request not only applies to rules whose nature and effect are as yet unknown, but is unaccompanied by any attempt to make the showing of irreparable injury which is a requisite for the injunction requested.

MARCH 22, 1968.

Before the Federal Communications Commission

Docket No. 16574

In the Matter of Amendment of Part 73 of the Rules relating to procedures in the event of a personal attack.

PROPOSED MEMORANDUM OPINION AND ORDER

Adopted: Released:

By the Commission:

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. This opinion and order deals with that revision. Since the revision is of a

relatively narrow nature [2] 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).[3] In short, we remain of the same view as to the legality and desirability of the personal attack rule, and wish to revise only one portion of it. See *Red Lion Broadcasting Co.* v. *United States*, 381 F. 2d 908 (C.A.D.C.), *certiorari granted*, —— U.S.

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 licenses. 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.

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 im-

[2] 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.

[3] See Memorandum Opinion 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).

portance 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, news 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. See Sen. Rept. No. 560, 86th Cong., 1st Sess., where it is stated (p. 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.

In light of the above two considerations, we have decided to strike the balance in favor of exempting these news categories, other than the news documentary. It 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 shall expand 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.[4] 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, 9 F.C.C. 2d 539.[5] We note that in this area we have found instances of 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 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 as-

[4] We stress that the categories being exempted are defined in the 1959 Amendments, and that the legislative guides as to these exempt 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."

[5] 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.)

sembled 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.*

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 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.[6]

7. We have acted here to expand the exempt categories further along the lines of the exemption made on August 2, 1967 (FCC 67–923),[7] on the basis of the notice and the comments received in this docket (No. 16,574). 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. See Sec-

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[6] 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 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 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.

[7] 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.

tion 4(c), Administrative Procedure Act. This proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

Attachment

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, 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.

* * * * *

DISSENTING OPINION OF COMMISSIONER LEE LOEVINGER

I dissent from the Commission motion to amend the rules now pending before the Court of Appeals because I believe that the course the Commission has followed with respect to these

rules has been hasty, ill-considered and inadequate, and the revision now proposed is substantively defective. However, the present motion effectively supersedes the motion made March 1, 1968, in these cases, is more specific and limited and less dilatory than the March 1st motion, and in these respects partially meets some of the objections to the Commission course noted in my dissent to the March 1st motion and to the Commission ruling on a related matter in the WXUR case. If the Court grants the present Commission motion, the Commission must thereafter act formally to adopt the proposed revisions to the rules; and it will then be appropriate to state my objections to them in detail. If the Court does not grant the present motion neither the proposed revisions to the rules nor the objections to them will be significant. Thus it is sufficient at this point to note my dissent and reserve detailed and substantive comment until the substantive issue is before the Commission.

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.

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

March 22, 1968

No. 16369

Before Hon. LATHAM CASTLE, *Circuit Judge,* Hon. LUTHER M. SWYGERT, *Circuit Judge,* Hon. WALTER J. CUMMINGS, *Circuit Judge.*

RADIO TELEVISION NEWS DIRECTORS ASS'N, ET AL.

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

CBS *v.* U.S.A. AND F.C.C., No. 16498

NBC *v.* U.S.A. AND F.C.C., No. 16499

Order

Upon consideration of the motion to hold these cases in abeyance, the responses thereto, the Government's reply, and the amended answer of Radio Television News Directors Association, et al., it is ordered that the motion be denied, but leave is granted to the Federal Communications Commission to revise forthwith subsection (b) of the rules involved in these petitions for review.

The Government's brief shall be filed on or before April 1, 1968, and the petitioners' reply briefs within 15 days thereafter. Since petitioners may need to discuss the new rules in their reply briefs, the usual 20-page length will not apply.

MOTION OF PETITIONER FOR LEAVE TO FILE SUPPLEMENTAL EXHIBIT

Petitioner Columbia Broadcasting System, Inc., by its attorneys, hereby moves this Court for leave to file with its reply brief in the above-captioned case a separately bound Supplemental 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 opening brief as to the effect of the rules on Petitioner's public affairs programming, Petitioner prepared an Exhibit setting forth excerpts from transcripts of programs that contained statements arguably covered by the rules. On November 21, 1967, this Court granted Petitioner leave to file this Exhibit together with its brief. Petitioner's Supplemental Exhibit, discussed in its reply brief, sets forth excerpts from transcripts of programs and other material pertinent to the Commission's revised 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, consent subject to the argument contained in footnote 40, p. 54 of their brief.

APRIL 16, 1968.

United States Court of Appeals for the Seventh Circuit

CHICAGO, ILLINOIS 60604

Wednesday, April 17, 1968

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 hereby ordered, That leave be granted to file instanter with petitioners reply brief a separately bound Supplemental Exhibit.

In the United States Court of Appeals for the Seventh Circuit

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September Term, 1967—April Session, 1968

Nos. 16369, 16498, and 16499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

September 10, 1968

Petitions for Review of Orders of the Federal Communications Commission

Before CASTLE, *Chief Judge,* KILEY and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This review raises the question of the constitutionality of the Federal Communications Commission's recently promulgated rules concerning the airing of personal attacks and political editorials by broadcasters licensed by the Commission. An unincorporated association of radio and television journalists and eight companies holding licenses for

radio and television stations [1] petitioned this court to review and set aside the final order of the Commission,[2] issued on July 10, 1967 (adopted on July 5, 1967), which set forth the new rules.[3] The Columbia Broadcasting System, Inc., (CBS) and the National Broadcasting Co., Inc., (NBC) filed separate petitions to review the Commission's order in the Court of Appeals for the Second Circuit. These petitions were transferred to this court (28 U.S.C. § 2112), and pursuant to our order, the three petitions were consolidated.[4]

On April 8, 1966, the Commission released a Notice of Proposed Rule Making. The announced purposes of the rules proposed by the Commission were "to codify the procedures which licensees are required to follow in personal attack situations" and "to implement the *Times-Mirror* [5] ruling as to station editorials endorsing or opposing political candidates." In its notice, the Commission invited interested parties to file comments on

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[1] These petitioners are 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, and Time-Life Broadcast, Inc. This group of petitioners will be collectively referred to hereafter as RTNDA.

[2] Commissioner Bartley dissented, Commissioner Loevinger concurred and Commissioner Wadsworth was absent.

[3] The rules as set forth in the July 10 order appear in the appendix to this opinion.

[4] Three amicus curiae briefs were filed in this court. The briefs of King Broadcasting Company and the National Academy of Television Arts and Sciences opposed the Commission's rules. The brief of the Office of Communication of the United Church of Christ and other religious organizations favored the Commission's rules.

[5] *Times-Mirror Broadcasting Co.* (KTTV), 24 P & F Radio Reg. 404 (1962). During the 1962 California gubernatorial campaign, a television station engaged in the "'continuous' and 'repetitive' * * * presentation of views * * * on the campaign as compared to a 'minimal opportunity afforded to opposing viewpoints' and * * * from time to time, 'personal attacks on individuals and groups involved in the * * * campaign'." 24 P & F Radio Reg. at 405. The Commission informed the licensee:

"Under the fairness doctrine, when a broadcast station permits, over its station facilities, a commentator or any person other than a candidate to take a partisan position on the issues involved in a race for political office and/or to attack one candiate or support another by direct or indirect identification, then it should send a transcript of the pertinent continuity in each such program to the appropriate candidates immediately and should offer a comparable opportunity for an appropriate spokesman to answer the broadcast." *Id.*

However, the Commission indicated that newscasts, news interviews, news documentaries, and on-the-spot coverage of news events "would not, as a general matter * * * appear to be encompassed by the Commission's ruling." *Id.* at 406.

the proposed rules. Of the twenty-six comments filed with the Commission, eighteen opposed and eight favored the adoption of the proposed rules.

In the rules dealing with the responsibilities and obligations of licensees with respect to personal attacks, a "personal attack" was defined as an attack upon the "honesty, character, integrity or like personal qualities of an identified person or group." A personal attack would come within the ambit of the rules, however, only if made "during the presentation of views on a controversial issue of public importance."

According to the Commission's Memorandum Opinion and Order, the personal attack rules were "simply a particular aspect of the Fairness Doctrine," and did "not alter or add to the substance of the Doctrine." The Fairness Doctrine was initially articulated in the *Report of the Commission in the Matter of Editorialization by Broadcast Licensees*, 13 F.C.C. 1246 (1949). In that report, the Commission stated the basic obligation of licensees to present broadcasts concerning public issues, in a manner which would insure that the listening public would be exposed to a broad spectrum of views on a given issue.[6] The Commission indicated that "specific Congressional approval" of the Fairness Doctrine was contained in the 1959 Amendments to section 315 of the Communications Act.[7]

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[6] The specific language in the report which gave birth to the personal attack aspect of the Fairness Doctrine follows:

"It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. *The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist.*" (Emphasis added.)

[7] That portion of the 1959 amendment to which the Commission referred follows (47 U.S.C. § 315):

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

When a personal attack has been broadcast by a licensee, the rules require that the licensee, within a reasonable time, but not later than one week after the attack, notify the person or group attacked of the "date, time and identification of the broadcast," provide "a script or tape (or an accurate summary if a script or tape is not available)," and offer to the person or group attacked "a reasonable opportunity to respond over the licensee's facilities."

Because "the procedures specified [in prior Commission rulings] [8] have not always been followed [by licensees], even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue," the Commission perceived the need for the specific rules here at issue. The Commission's avowed purpose in embodying the procedural aspects of the "long-adhered to" personal attack principle in rules was twofold: first, to "clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks"; and second, to enable the Commission "to impose appropriate forfeitures * * * in cases of clear violations by licensees which would not warrant designating their application for hearing at renewal time or instituting revocation proceedings but * * * do warrant more than a mere letter of reprimand."

Although the promulgation of the rules represented an attempt to "clarify" a licensee's obligations, the Commission said that the "rules are not designed to answer such questions" as whether a "personal attack" had occurred or whether the person or group attacked was "identified." In spite of the fact that unanswered questions were to be left to the licensee's "good faith judgment," if the licensee remained doubtful of his obligations, the Commission invited prompt consultation to obtain interpretation of its rules.

Some of the comments submitted in opposition to the proposed rules contained expressions of fear that the rules would both discourage controversial issue programming and infringe the first amendment guarantee of a free press. With respect to

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

[8] In particular, The Commission referred to the Public Notice of July 26, 1963; *Controversial Issue Programming*, F.C.C. 63–734 and Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964).

the alleged discouragement of controversial issue programming, the Commission responded:

> 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.

Regarding the constitutional question, which the Commission believed to be "without merit," it responded:

> 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.

In addition, the Commission referred in this regard to the discussion of the "constitutionality of the fairness doctrine generally in the *Report on Editorialization*," 13 F.C.C. 1246 (1949) and the decision in *Red Lion Broadcasting Co., Inc.*, v. *F.C.C.*, 381 F. 2d 908 (D.C. Cir.), *certiorari granted*, 389 U.S. 968 (1967).[9]

Specific exemptions from the requirements of the personal attack rules were provided in two instances: attacks on "foreign groups or foreign public figures," and personal attacks by qualified candidates on other qualified candidates.[10] The latter

[9] On January 29, 1968, the Supreme Court entered an order postponing the oral argument in *Red Lion* pending the decision of this court in the instant review and the Supreme Court's action on any petition for certiorari to review this court's decision, 390 U.S. 916 (1968). On the same day, the Supreme Court denied the petition of RTNDA for certiorari before the judgment of this court, 390 U.S. 922 (1968).

[10] This exemption also included attacks by a candidate's authorized spokesmen or campaign associates on opposing candidates, their spokesmen or their campaign associates.

exemption was thought to be appropriate in view of the "equal opportunities" provision of 47 U.S.C. §§ 315 [11] with respect to broadcasts by political candidates.

The Commission's purposes in promulgating the political candidate editorial rules was to clarify the "licensee's obligations in regard to station editorials endorsing or opposing political candidates." The rules require that a licensee who broadcasts an editorial endorsing or opposing a candidate for public office must offer the other qualified candidates or the candidate opposed "a reasonable opportunity * * * to respond." [12] The response can be made through a spokesman of the candidate's choice.[13] A twenty-four-hour notification requirement was imposed because "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 those situations where a political editorial is broadcast within seventy-two hours of the day of election, the rules require notification before the broadcast. Although disclaiming any intention to prohibit "last-

[11] In pertinent part, section 315 reads:

"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

"(1) bona fide newscast.

"(2) bona fide news interview,

"(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

"(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection."

[12] The Commission elaborated on the phrase "reasonable opportunity to respond" in its memorandum opinion:

"The phrase: 'reasonable opportunity' to respond is used here and in the personal attack subsection because such an oportunity 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 meaningful response."

[13] The provision allowing the spokesman of the candidate to make the response was intended to enable the licensee "to avoid any Section 315 'equal opportunity' cycle" which might be initiated if the candidate himself responded.

minute editorials," the Commission believed "such editorials would be patently contrary to the public interest and the personal attack principle" unless the candidate were notified sufficiently far in advance to present a timely response.[14]

On August 7, 1967 the Commission [15] issued a Memorandum Opinion and Order (adopted on August 2, 1967), enlarging the specific exemptions from the requirements of the previously-adopted personal attack rules.[16] Under the amendment,[17] the personal attack rules were no longer applicable "to the bona fide newscast or on-the-spot coverage of a bona fide news event." The Fairness Doctrine, however, remained applicable to the exempt categories. The Commission considered the amendment necessary because the application of the specific personal attack requirements to these two news categories would be "impractical and might impede the effective execution of the important news functions of licensees or networks" by replacing news broadcasts with responses to personal attacks. The Commission exempted broadcast of on-the-spot coverage of a bona fide news event, because "this area is akin to the newscast area," personal attacks in such programs are "unlikely to be large in number, * * * the notification aspect is relatively less needed in this area," and application of the Fairness Doctrine in this area was sufficient.

"[E]ditorials or similar commentary, embodying personal attacks, broadcast in the course of newscasts," were specifically referred to in the Commission's memorandum opinion as not being exempt from the personal attack rules. If a licensee chose to present a personal attack in these broadcasts, the Commission believed that the licensee should not make the determination as to what the public would or would not hear in response to the personal attack. In addition, "time and practical considerations, discussed with respect to the news itself," were not thought to be germane to "editorials or similar commentary." The Commission did not exempt "news documentaries" from the personal attack rules because they were not

[14] The rules issued on July 10, 1967 were to become effective on August 14, 1967.

[15] Commissioners Bartley, Loevinger, and Wadsworth were absent. Commissioner Cox concurred in the result.

[16] The respective petitions for review were supplemented to take account of the August 7 order.

[17] The amendment as set forth in the August 7 order appears in the appendix to this opinion.

thought to "involve the time and practical considerations" which necessitated the other exemptions and because "a documentary, even though fairly presented, may necessarily embody a point of view." "News interview shows" were not exempted because of the absence of "time and practical considerations" and because a licensee, having "chosen to provide one person with an 'electronic platform' for an attack" was required, by "elemental fairness and the duty to inform the public," to allow the person attacked to respond.

While the instant petitions were pending in this court, the Commission filed a motion requesting authority to once again revise the personal attack rules.[18] We granted the Commission's request, and on March 29, 1968, the Commission [19] issued a Memorandum Opinion and Order (adopted on March 27, 1968) containing a revision of the personal attack rules. The revision [20] further enlarged the categories of news-related programs which would be exempt from the personal attack rules. The two added exemptions covered the "bona fide news interview" and the "news commentary of analysis contained" in either

[18] The Commission's motion was filed on March 4, 1968. As originally presented, the motion requested that this court hold the pending petitions for review in abeyance and authorize the Commission to conduct further rule making proceedings. According to the motion, the Commission proposed to "set aside those parts of the rules * * * dealing with personal attacks" and "to conduct an expeditious rule making proceedings looking toward their revision." The motion was apparently prompted by consultation between the Commission and the Department of Justice and a letter from the Assistant Attorney General, Antitrust Division, to the Commission's chairman. In pertinent part, the letter read:

"[W]e are fully prepared to support the Commission's position that the 'fairness doctrine' is constitutional and within the Commission's statutory powers, and that, as a general proposition, some special rule with regard to personal attack is a valid facet of that doctrine. However, we have some concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions in the rule without materially interfering with the public interest objectives that the rule is intended to serve."

The motion was opposed by NBC. Neither RTNDA nor CBS had any objection to granting the motion so long as the enforcement of the rules, as originally promulgated, was stated pending the proposed revision. In its reply, the Commission abandoned its plan to conduct additional rule making proceedings and instead appended a proposed memorandum opinion and order, revising the personal attack rules. This court's order of March 22, 1968 denied the Commisison's motion to hold the review in abeyance but allowed the Commission leave to revise the personal attack rules.

[19] Commissioners Bartley and Loevinger dissented, the latter writing a lengthy opinion setting forth views critical of the Commissioner's action. Commissioner Cox concurred. Commissioner Johnson concurred in the result.

[20] The amendment as set forth in the March 29 order appears in the appendix to this opinion.

bona fide newscasts, bona fide news interviews, or on-the-spot coverage of a bona fide news event.

In the memorandum opinion accompanying the new revision, the Commission stated that the "revision * * * [was] of a relatively narrow nature," [21] and was in response to allegations of the "inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licenses." The Commission believed that its revision would avoid "*any* possibility of inhibition in these important areas of broadcast journalism" even though "the showing as to inhibiting effects remains speculative." (Emphasis in the original.)

Several additional considerations prompted the Commission to make the new revisions. First, noting the exemptions of four categories of news-type programs from the "equal opportunities" requirement of section 315,[22] the Commission observed that "the personal attack facet can have some similarities to the 'equal opportunities' requirement in its application in this area." Second, the Commission had not found, in the exempt news categories, the "flagrant failures by licensees to follow the requirements of the fairness doctrine" evident in "editorializing by licensees or syndicated programming." Third, the Commission desired "to promote the fullest possible robust debate on public issues."

Although enlarging the scope of the exemptions, the Commission reiterated that the Fairness Doctrine (giving "the licensee considerable discretion") remained applicable to the exempt categories. In particular, when personal attacks occurred in the course of any of the exempt broadcasts, the Commission stated:

> [O]ur revision affords the licensee considerable leeway in these news-type programs but it still requires that

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[21] The Commission did, however, attempt to impart some clarity to the requirements of the personal attack rules. In a footnote, the Commission said:

"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."

[22] See note 11, *supra*.

> 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.

The "labelled station or network editorial" and the "news documentary" were not added to the group of exempt broadcasts. Although the Commission viewed "news commentary or analysis" to be "an integral and important part of the news process involved in the category 'bona fide newscast'" and viewed "the bona fide news interview" to be "a means of developing the news and informing the public which the Congress singled out in the 1959 Amendments [to section 315]," [23] the "labelled station or network editorial" was viewed as "akin to * * * the political editorializing area." With respect to its reasons for not exempting news documentaries, the Commission could foresee "no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time." (Emphasis in the original.) In adition, the Commission stressed that the documentaries exempted by Congress in section 315 were unique in that, "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."

Petitioners' primary contention is that the Commission's personal attack and political editorial rules, as amended, will impose unconstitutional burdens on the freedom of the press protected by the first amendment.[24] The petitioners urge that a variety of such burdens will result from the Commission's enforcement of these rules. (1) A licensee will be unwilling to broadcast personal attacks and political editorials or to allow his faciliites to be used as a vehicle for such broadcasts if he is required by the Commission's rules to incur the expense of notifying the person or group attacked, of providing a transcript of the attack, and of donating free time for a reply. This burden will be exacerbated by the potential disruption that

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[23] Throughout its memorandum opinion, the Commission emphasized the parallel between its action and the 1959 Amendments. At one point the Commission said:

"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."

[24] RTNDA not only urges the unconstitutionality of the specific rules here in issue, but of the Fairness Doctrine itself.

the necessity of airing replies will have in displaced previously schedule programs. (2) A conscientious licensee will be inhibited from speaking out on either controversial issues or impending elections if to do so means that he must provide time for the airing of unorthodox views in reply. (3) The broadcasting of controversial issues of public importance will be inhibited due to the licensee's uncertainty concerning the application of the Commission's rules to a given situation. (4) The licensee's journalistic judgment and spontaneity in programming will be impeded because the Commission's rules require the licensee to determine on a broadcast-by-broadcast basis whether compliance with the rules has been met. (5) An individual licensee affiliated with a network will be reluctant to carry a network program covered by the rules because if a response to a network program broadcast by the affiliate is required, the affiliate must either air the network's response or make independent arrangements to comply with the rules. (6) A licensee will be required to impose rigorous censorship on those who use his facilities since the licensee is individually responsible for all the material which he broadcasts.

Besides the alleged unreasonable burdens imposed upon licensees, the petitioners point to several additional difficulties which they argue inhere in the Commission's rules. They contend that the rules are too vague, given the wide range of severe penalties a licensee faces for failing to comply with them. Petitioners refer to the uncertain meaning of terms in the rules such as "attack," "character," "like personal qualities," and "identified individual." Moreover, they argue that the Commissions offer to make itself available promptly to resolve these interpretative questions could place the Commission in the role of a censor. Through the power to interpret vague rules, the Commission would be in a position to determine which views, opposing those expressed over a licensee's facilities, do or do not merit a right of reply. The petitioners claim that this discretionary power is susceptible to the possibility of abuse. In effect, they urge that the rules could result in the Commission substituting its judgment concerning what is to be broadcast for the judgment of individual licensees. The petitioners argue that in order to avoid this prospect, a licensee might attempt to either broadcast every side of every issue or curtail the broadcasting of controversial public issues and political editorials altogether. The result of each alternative

would be a bland neutrality in the broadcasting media which petitioners urge is not in the public interest.

Neither the Commission's three memorandum opinions nor its brief filed in this court are altogether responsive to the various contentions raised by the petitioners. The Commission characterizes the petitioners' arguments as asserting "a constitutional right to make a one-sided presentation." This nonexisting constitutional right, according to the Commission, is predicated on the petitioners' failure to recognize the substantial differences between the various communication media, particularly the differences between newspapers and radio and television. Because of this failure, the Commission believes that the petitioners' arguments lead to the untenable conclusion that the entire licensing scheme of the Communications Act is unconstitutional. Although conceding that the first amendment applies to broadcasting, the Commission urges that "different rules and standards are appropriate for different media of expression in light of their differing natures." Finally, the Commission flatly asserts in a perfunctory fashion that under the rules as amended, there is no "possibility of inhibition" of licensees.

We approach the primary question raised in this review—the constitutionality of the Commission's personal attack and political editorial rules—against the backdrop of a host of Supreme Court decisions. Those decisions have established the standards by which to access claims that governmental statutes, regulations or practices abridge freedom of speech in violation of the first amendment. For example, the Supreme Court has said: "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely, least, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton* v. *Kentucky,* 384 U.S. 195, 200 (1966). "[S]tandards of permissible statutory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, Government may regulate in the area only with narrow specificity." *NAACP* v. *Button,* 371 U.S. 415, 432, 433 (1963).

Turning from cases dealing generally with the first amendment to cases dealing with the freedom of the press in particular, a series of recent Supreme Court decisions, beginning with *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), delineated the

Court's views on the proper accommodation of the private interests served by libel actions in vindicating those who are defamed with the public interests served by the printed press in criticizing public officials or public figures and in illuminating public issues.[25] In the *New York Times* case, a public official, one of the city commissioners of Montgomery, Alabama, brought a libel action against certain individuals and the Times as a result of critical statements appearing in a full page advertisement. After reviewing previous decisions, the Court said, "None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." 376 U.S. at 268. The Court observed the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270. Nor was this commitment of recent origin, as, "The right of free discussion of the stewardship of public officials was * * * in Madison's view, a fundamental principle of the American form of government." 376 U.S. at 275. In ruling that actual malice must be the standard of proof in such libel actions, the Court said that under a less stringent standard:

> The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute * * *. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which First Amendment freedoms cannot survive. 376 U.S. at 277, 278.

The import of *New York Times* and its progeny is that the freedom of the press to disseminate views on issues of public

[25] Other decisions in which the Supreme Court explored the implications of *New York Times* are: *St. Amant* v. *Thompson*, 390 U.S. 727 (1968) (public official's defamation action after televised speech critical of him); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967) (public figures' libel action after printed articles critical of them); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) (action under right of privacy statute after publication of article concerning newsworthy people and events); *Mills* v. *Alabama*, 384 U.S. 214 (1966) (criminal action pursuant to Corrupt Practices Act after publication of a political editorial on election day); and *Garrison* v. *Louisiana*, 379 U.S. 64 (1964) (criminal action pursuant to Criminal Defamation Statute after criticism of public officials).

importance must be protected from the imposition of unreasonable burdens by governmental action. We address ourselves, therefore, to the question whether the Commission's rules here in issue pose unreasonable burdens on licensees.

Despite the Commission's disclaimers to the contrary, we agree with the petitioners that the rules pose a substantial likelihood of inhibiting a broadcast licensee's dissemination of views on political candidates and controversial issues of public importance.[26] This inhibition stems, in part, from the substantial economic and practical burdens which attend the mandatory requirements of notification, the provision of a tape, and the arrangement for a reply.[27]

Although most of the rules' specific requirements have been the subject of Commission rulings pursuant to individual complaints under the Fairness Doctrine, there are two crucial differences between the specific rules we are reviewing and that doctrine. A major premise underlying the Fairness Doctrine is the Commission's trust in the good faith and sensible judgment of a broadcast licensee in dealing with personal attacks and political editorials in a fair and reasonable manner.[28] Under the rules here in question, however, much of the licensees' discretion is replaced by mandatory requirements applicable to each

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[26] The amicus curiae brief filed in this court by the King Broadcasting Company graphically illustrates the inhibitory effect on the broadcast of political editorials of the Commission's requirement of a "reasonable opportunity to respond." In two instances, the broadcast of editorials endorsing candidates for the Seattle City Council was delayed for several weeks while one of the unendorsed candidates in each instance prosecuted a complaint before the Commission alleging that King's division of that person's reply time was unreasonable. Although not ordering King to give the complaining candidates additional reply time, the Commission determined into how many segments the total amount of time should be divided. This action indicates the degree to which the Commission has gone in imposing supervision on licensees.

[27] The Commission's so-called exemptions from the requirements of the personal attack rules, which were contained in the August, 1967 and March, 1968 amendments, are illusory. Our reading of the latest amendment indicates that unless the response of the person attacked is fairly presented by the licensee on the "attack issue" of the "exempt" broadcast, the licensee must adhere to the explicit requirements of the rules. But, the alternative of presenting the reply on the "attack issue" might lead licensees to view every personal attack as a controversial public issue in order to avoid compliance with the strict requirements of the rules. Because of the possible disruptive effect and difficulty in complying with the alternative, a licensee might choose to avoid controversial issue programming altogether so as to remove the possibility of broadcasting personal attacks.

[28] See note 6, *supra*.

broadcast. The other difference between the rules and the Fairness Doctrine is that the only sanction for noncompliance with the Fairness Doctrine is the possibility that a license will not be renewed if the Commission determines that granting a renewal will not serve the "public interest, convenience, and necessity." This determination and the accompanying sanction would be based on the licensee's overall performance during the preceding three years. Under the rules here in issue, however, the question whether a licensee would be subjected to the Commission's broad range of enforcement powers [29] could be determined on the basis of a single broadcast by the licensee. As a consequence, whatever discretion is still reposed in a licensee under the new

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[29] The Commission referred specifically to 47 U.S.C. § 503(b) in this regard in its memorandum opinion issued on July 10, 1967. In pertinent part, that section provides:

"(b) Violation of rules, regulations, etc.; * * *

"(1) Any licensee or permittee of a broadcast station who—

* * * * *

"(B) willfully or repeatedly fails to observe any of the provisions of this chapter or of any rule or regulation of the Commission prescribed under authority of this chapter or under authority of any treaty ratified by the United States,

* * * * *

shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this chapter."

In addition, a willful and knowing violation of the Commission's rules will subject the violator to criminal sanctions, which are set forth in 47 U.S.C. § 502. In pertinent part, that section provides:

"Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, * * * shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

Finally, violations of the Commission's rules could subject a violator to administrative sanctions, which are set forth in 47 U.S.C. § 312. In pertinent part, that section provides:

"(a) Revocation of station license or construction permit.

"The Commission may revoke any station license or construction permit—

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for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

* * * * *

"(b) Cease and desist orders.

"Where any person * * * (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action."

rules with respect to his handling of personal attacks and political editorials must be exercised in the face of the omnipresent threat of suffering severe and immediate penalties.[30]

We need not elucidate the proposition that the public interest will not best be served if the Commission's rules operate to discourage a licensee from engaging in the broadcast of controversial issues or political editorials. Moreover, the public interest will not necessarily best be served if a licensee adheres meticulously to the Commission's rules. Strict compliance with the rules might result in a blandness and neutrality pervading all broadcasts arguably within the scope of the rules. Apparently the Commission views programming which takes sides on a given issue to be somehow improper or contrary to the public interest. Thus, in explaining its failure to exempt documentaries from the personal attack rules, the Commission stated in its memorandum opinion of August 7, 1967, "that a documentary, even though fairly presented, may necessarily embody a point of view." This statement and the thrust of the rules themselves reflect an apparent desire on the Commission's part to neutralize (or perhaps to eliminate altogether) the expression of points of view on controversial issues and political candidates. Such a result would be patently inconsistent with protecting the invaluable function served by the broadcast press in influencing public opinion and exposing public ills.[31]

In addition, the petitioners express fears that a licensee's strict adherence to the requirement that he provide an opportunity to reply might result in the public airing of obnoxious or extreme views. Of course, the Commission might take the position that a licensee need not comply in those situations. But

[30] In its first memorandum opinion, the Commission said, "the *only* new requirement in these rules are the time limits." (Emphasis added.) A crucial difference between the rules and the Fairness Doctrine, however, is the fact that the licensee's obligations are incorporated in specific rules with which he must comply in every instance under the threat of severe sanctions.

[31] In *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966), the Supreme Court discussed the vanguard role of the press in the following language:

"Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials * * * responsible to all the people whom they were elected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and 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."

allowing the Commission selectively to enforce the rules so as to prevent the expression of those views it believes to be contrary to the best interests of the American public would cast the Commission in the role of a censor, contrary to the express provisions of the Communications Act. [32]

An even greater threat of Commission censorship arises due to the lack of specificity in the rules. The Commission has invited a licensee to seek its advice whenever he is unsure of his obligations under the rules. In fact, the Commission itself has recognized the possibility that such situations will arise.[33] But if the rules are so unclear that a licensee needs to obtain advisory interpretations from the Commission, it follows that the Commission, through interpretation of its own vague rules, has the power to effectively preclude the expression of views, whether by a licensee or a respondent, with which it does not agree.[34]

We agree with the petitioners that such terms as "attack," "character," and "like personal qualities" are subject to diverse interpretations and applications. Besides the unclear meaning of these essential terms in the rules, the Commission has failed to articulate the meaning of the rules. That the rules have been twice amended since their initial promulgation (once even while the instant reviews were pending in this court)[35] suggests that the Commission's aims in promulgating the rules are uncertain and changing. In its initial memorandum opinion, the Commission illustrated a situation in which the obligations imposed by the personal attack rules would arise, namely, the making of "a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Com-

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[32] 47 U.S.C. § 326, prohibiting Commission censorship of program content, provides:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

[33] See text *supra* at 7.

[34] "[I]n appraising a statute's inhibitory effect upon such [first amendment] rights, this Court has not hesitated to take into account possible applications of the statute in the other factual contexts besides that at bar." *NAACP* v. *Button*, 371 U.S. 415, 432 (1963).

[35] The latest revision was prompted, according to an assistant Attorney General, by a "concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions."

munist." [36] In its memorandum opinion accompanying the most recent revision of the rules, the Commission, in a footnote, redefined when the personal attack rules become applicable. The Commission said, "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." The Commission's first formulation suggests that any personal attack occurring during the course of a controversial issue broadcast is subject to the rules. The Commission's last formulation, however, suggests that only those personal attacks which are themselves an issue in the broadcast are subject to the rules.

Another example of the Commission's uncertain position regarding a licensee's obligations under the rules concerns its treatment of personal attacks occurring during the course of editorials or commentary. When the Commission first amended the rules to exempt the "bona fide newscast" and "on-the-spot coverage of a bona fide news event," the Commission said in its accompanying memorandum opinion that the exemption was inapplicable to "editorials or similar commentary." The clear implication from the last quote language is that there is little, if anything, distinguishing "editorials" from "similar commentary." Yet in the memorandum opinion accompanying its last amendment to the rules, the Commission made a distinction between the two categories for it exempted "news commentary or analysis in a bona fide newscast" but left the "labelled station or network editorial" still subject to the rules.[37]

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[36] On previous occasions, the Commission has taken a different view on the rights of communists under the Fairness Doctrine. Thus, in the *Fairness Primer*, the Commission stated, "it is not the Commission's intention to require licensees to make time available to communists or the communist viewpoint." 20 Fed. Reg. at 10418 (1964). The statement quoted in the text apparently suggests that the Commission has altered its view respecting communists. This apparent change of attitude on the Commission's part, however, indicates only that the Commission has been inconsistent in its application of the Fairness Doctrine. And if the rules are vague enough to require a licensee to seek Commission interpretations, there exists the possibility of further such inconsistencies in the future.

[37] A "news commentary or analysis" broadcast "outside one of the exempt program categories" will still be subject to the Commission's rules. Thus, depending solely on when it is broadcast, the same commentary would be either exempt or not exempt. The Commission itself recognized this anomaly, explaining it by saying that the same result occurred under section 315 which it was following.

Similar uncertainty is evident in the Commission's treatment of the "news documentary." The Commission said in creating the various exemptions from the personal attack rules that it was "following the line drawn by Congress" when Congress created the exemptions in section 315. Congress exempted the news documentary, "if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary." Yet the Commission did not exempt the news documentary from the personal attack rules even though any personal attack which might occur would likewise be incidental to the subject of the documentary.[38] The Commission's explanation for its failure to treat news documentaries as Congress treated them in section 315 was expressed by the Commission in its last memorandum opinion: "[T]here is no factor of even *possible* inhibition in the case of a documentary which is assembled over a period of time." (Emphasis in the original.) This explanation is debatable in view of the ever increasing pace of significant news developments and the valuable function served by documentaries in illuminating these developments.[39]

What these examples demonstrate is that the Commission's rules are too vague because they lack standards precise enough to enable a licensee to ascertain whether he is subject to the rules' obligations. When a licensee considers the vagueness of the rules, the mandatory and pervasive requirements of the rules, and the threat of suffering serious sanctions for noncompliance with them, it is likely that he will become far more hesitant to engage in controversial issue programming or political editorializing. Consequently, he will "steer far wider of the unlawful zone." *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958). Given the fast pace of news developments, a licensee will be understandably reluctant to make the difficult on-the-

[38] There is some question whether the Commission's action in following the "line drawn by Congress" in section 315 was appropriate. Section 315 dealt with the problem of equal time for political candidates, not with the problem of personal attacks and political editorials. The fact that Congress exempted certain types of news-related programs from the equal time requirement in no way indicates what judgments Congress would have made (if in fact it could constitutionally have acted in this area at all) in deciding the scope of exemptions with respect to personal attacks and political editorials.

[39] For a discussion of the problems of time and planning that attend the preparation of a news documentary, see W. Wood, ELECTRONIC JOURNALISM, 46–49 (1967).

spot judgments demanded by the Commission's rules, the meaning of which are uncertain to both the licensee and the Commission. In *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525, 530 (1959), the Supreme Court commented on the practical difficulties facing licensees in an analogous situation concerning the censorship prohibition of section 315:

> The decision a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, * * * Such issues have always troubled courts. Yet, under petitioner's view * * * they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision. Quite possibly, * * * all remarks even faintly objectionable would be excluded out of an excess of caution.

In addition, due to a licensee's uncertainty of his obligations under the rules, it is more likely that he will engage in rigorous self-censorship of the material he broadcasts, than if he were subject only to the Fairness Doctrine.[40] Such self-censorship would restrict the dissemination of views on public issues—essential to an informed citizenry. In *Smith* v. *California*, 361 U.S. 147, 154 (1959), the Supreme Court had occasion to comment on the evils of self-censorship, saying:

> The bookseller's self-censorship compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it the distribution of all books, both obscene and not obscene, would be impeded.

In response to the petitioners' attack on the rules, the Commission has advanced two arguments to support its position that the rules are constitutional. First, the Commission relies on the recent decision in *Red Lion Broadcasting Co., Inc.* v.

[40] The Commission has made clear that "the obligation for compliance with these rules is on each individual licensee." If a licensee offers the use of his facilities to others who make a personal attack, the licensee remains responsible for complying with the Commisison's rules. Under these circumstances, a licensee might also undertake to censor what others broadcast over his facilities.

FCC, 381 F. 2d 908 (D.C. Cir.), *cert. granted*, 389 U.S. 968 (1967). *Red Lion* concerned the challenge by a radio station licensee of a Commission order requiring the licensee to make free reply-time available to a person who had been personally attacked on a program broadcast over the licensee's station. The Commission's order predated the personal attack rules here in question.

In correspondence with the licensee prior to the issuance of the order, the Commission indicated that the procedural requirements (later formalized in the new personal attack rules) should be complied with by the Red Lion radio station. The Commission wrote:

> The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is defined in our recent fairness primer as an attack '* * * on an individual's or group's honesty, character, integrity, or like personal qualities * * *' in connection with a controversial issue of public importance * * *.
>
> Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond.

The Commission also indicated in the course of this correspondence that its ruling was an application of the Fairness Doctrine, "as applied to this situation."

Judge Tamm, who wrote the principal opinion sustaining the Commission's order (Judge Fahy concurred in the result; Judge Miller did not participate in the decision on the merits), devoted the major portion of his discussion to a consideration of the constitutionality of the Fairness Doctrine. He held that Congress did not unconstitutionally delegate its legislative function to the Commission by enacting 47 U.S.C. § 315, which "adopted" the Fairness Doctrine, and he concluded:

> The Fairness Doctrine is not unconstitutionally vague, indefinite, or uncertain, nor does it lack the precision required in legislation affecting basic freedoms guaranteed by the Bill of Rights. * * * [And that] under

> the facts in this case, the requirement under the Fairness Doctrine that a broadcaster may not insist upon financial payment by a party responding to a personal attack does not violate the first and fifth amendments to the Constitution nor is the Doctrine violative of either the ninth and tenth amendments. 381 F. 2d at 930.

We believe two observations are in order with reference to Judge Tamm's opinion and the holding in that case. First, we draw a distinction between the personal attack rules, whether incorporated in an *ad hoc* ruling such as occurred in *Red Lion* or in formal rules such as have now been promulgated by the Commission, and the Fairness Doctrine as referred to in section 315.[41] With that distinction in mind, we are not prepared to hold that the Fairness Doctrine is unconstitutional. Moreover, we do not believe that it is necessary to decide that question in this review. Second, we are in disagreement with the District of Columbia Circuit's holding in *Red Lion,* sustaining the Commission's order, inasmuch as we think that the order was essentially an anticipation of an aspect of the personal attrules which are here being challenged.

Second, the Commission relies on the alleged difference between the broadcast press and the printed press to sustain its position that the rules are constitutional. Although the Commission denies that its rules either impose unreasonable burdens on licensees or raise any constitutional difficulties,[42] it does concede that "it is undisputed that the protections of the First Amendment apply to broadcasting." But this concession is diluted by the Commission's contention that the broadcast press is entitled to a lower order of first amendment protection than the printed press. The Commission argues (relying on *Na-*

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[41] See page 82, *supra.*

[42] In its three memorandum opinions, much of the Commission's discussion of the constitutional impact of its rules, apart from relying on *Red Lion*, is limited to a cryptic reference in its first memorandum opinion to paragraphs 19 and 20 of the 1949 *Report on Editorializing.* Those two general paragraphs written almost twenty years ago, provide no answer to the constitutional issues raised here. Also inadequate are the frequent conclusional statements that the rules neither burden nor inhibit licensees. Categorical conclusions are no substitute for reasoned analysis. Finally, the Commission, in its brief filed in this court, fails to discuss the impact of *New York Times* and its progeny.

tional Broadcasting Co. v. *United States*, 319 U.S. 190 (1943)) that "since radio is inherently not available to all, its use may be constitutionally regulated in the public interest." [43] What the Commission urges upon this court is the argument that once the need for some regulation of radio and television licensees is recognized—to insure that broadcasting facilities are in the hands of those most qualified and to eliminate interference and other technical problems—it must follow that the Commission's power extends to the promulgation of other kinds of regulations. According to the Commission, a failure to make this concession results in the Commission's inability to impose any regulations, technical or otherwise.[44] This argument begs the question at issue which is, whether the need for technical, financial, and ownership regulation of radio and television licensees sufficiently distinguishes this group from newspaper publishers so as to warrant sustaining the imposition of burdens on radio and television licensees which would be in flat violation of the first amendment if applied to newspaper publishers.

The characteristic most frequently advanced by the Commission to distinguish the printed press from the broadcast press is that radio and television broadcasting frequencies are not available to all. Data comparing the broadcast press and the printed press, however, shows that there are more commercial radio and television stations in this country than there are general circulation daily newspapers.[45] In most major

[43] *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190 (1943), does not support the Commission's position that the broadcast press is not entitled to the same order of first amendment protection as the printed press. At issue in that case was the validity of the Commission's chain broadcasting regulations. The only constitutional issue raised there was whether the denial of a station license for engaging in certain network practices was a denial of free speech. Moreover, in the earlier case of *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 479 (1940), the Supreme Court said: "[T]he Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy."

[44] Illustrative of the Commission's argument on this point is the assertion in its brief that "repeal of the Communications Act would still create chaos."

[45] In 1967 there were 6,253 commercial radio and television stations broadcasting as opposed to 1,754 daily newspapers. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1967, nos. 737, 746 (88th ed.).

metropolitan areas, there are several times as many radio and television stations as there are newspapers.[46]

The Commission replies to this data by arguing that the only barrier to the publication of additional newspapers is an economic one, whereas the barrier to the operation of additional radio and television stations is a technical one—a limitation of available frequencies. For two reasons, the Commission's reply is unpersuasive. First, the fact that a number of allocated radio and television broadcast frequencies remain inoperative suggests that economic barriers also play a significant role in determining the number of operating broadcasters. Second, the recent availability of UHF television frequencies suggests that technological development is not at a standstill and may result in increasing further the availability of broadcasting frequencies in the future.

An additional characteristic is also advanced by the Commission to distinguish the broadcast press from the printed press. Since broadcasting licenses are not available to all and licenses are issued for a limited period of time, the Commission maintains that those who obtain licenses are granted a "privilege" and consequently must act as "trustee[s] for the public" since "the airwaves belong to the public." Therefore, according to the Commission, a licensee, exercising such a privilege, must abide by Commission imposed rules concerning personal attacks and political editorials.

The Commission's reliance on the concept of public ownership of space or airwaves to distinguish the broadcast press from the printed press is as one commentator has observed: "[L]ogically * * * meaningless. To say that the airways or spectrum can

[46] RTNDA has provided us with the following chart illustrating this point:

Standard Metropolitan Statistical Areas	Daily Newspapers	Broadcasting Stations on the Air—AM-FM-TV
Chicago	13	86
Milwaukee	3	32
Indianapolis	9	29
Peoria	2	11
Madison	2	15
Champaign-Urbana	2	12
Green Bay	1	8

(Source: U.S. Bureau of the Census, *County and City Data Book 1967* 636, 637, 672 (Statistical Abstract Supp.); *Editor and Publisher International Year Book—1967;* Television Digest, Inc., *Television Factbook* (Stations Vol., 1967 ed.); Broadcasting Publications, Inc., *1967 Yearbook Issue.*)

be owned by anyone is simply to indulge in fantasy." [47] Carried to its logical conclusion, the concept might sanction inhibitory regulation of other communication media for many such media make use of "publicly-owned" space to disseminate their respective messages. Moreover, the Supreme Court has indicated that "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP* v. *Button*, 371 U.S. 415, 429 (1963). The Supreme Court has applied this same principle to attempted infringements of freedom of the press. In one such case, *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 156 (1946), concerning the denial of a second-class postal rate to a magazine, the Court said:

> [G]rave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. * * * Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. * * * [It would be] a radical departure from our traditions * * * to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country.

See also *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965).[48] Accordingly, the Commission cannot impose unreasonable burdens on a licensee's dissemination of views on controversial public issues by arguing that obtaining and exercising a broadcast license is a "privilege."

In view of the vagueness of the Commission's rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee self-censorship, we conclude that the personal attack and political editorial rules would contravene the first amendment. Consequently, the rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in

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[47] Robinson, *The FCC and the First Amendment: Observations on 40 years of Radio and Television Regulations*, 52 MINN. L. REV. 67, 1952 (1967). Professor Robinson's article, an insightful and, at times, critical analysis of the Commission's regulatory activities, was written after the decision in *Red Lion*.

[48] The Supreme Court has expressed the view on occasion that in determining the applicability of first amendment safeguards there is no basis for distinguishing among the various communication media. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938).

broadcasting to remedy this problem, and that it is unable to attain such fairness by less restrictive and oppressive means. *Keyishian* v. *Board of Regents,* 385 U.S. 589, 602 (1967), and *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). We do not believe the Commission has made such a demonstration.

According to the Commission, "[T]he development of an informed public opinion through the public dissemination of news and ideas concerning the vital issues of the day is the keystone of the Fairness Doctrine" as well as the rules here in question. The Commission assumes, however, that television viewers and radio listeners are in fact ill-informed, that they are isolated from other media of communication, and that those other media do not fully inform them of all sides of controversial public issues. We do not believe this assumption is warranted. The Commission's rules apply only to controversial issues of public importance and to political candidate editorials. Thus, the rules deal with subjects which are likely to receive thorough exposure and illumination in all media of communication. Although we would agree that radio and television are major vehicles for the dissemination of views on controversial public issues, the Commission has failed to demonstrate that the exposure of all sides of a given issue is not achieved by radio and television in conjunction with other media of communication.

An important reason advanced by the Commission for promulgating the personal attack and political editorial rules was to broaden the range of available sanctions to deal with licensees who fail to comply with the requirements of the Fairness Doctrine. In its initial memorandum opinion, however, the Commission disclaimed any intention of using the rules "as a basis for sanctions against those licensees who in *good faith* seek to comply with the personal attack principle." [49] (Emphasis added.) When this disclaimer is added to the Commission's failure to demonstrate the existence of widespread noncompliance with the doctrine, it becomes evident that the Commission's rules are broader than necessary; for they impose substantial burdens on all licensees in the expectation of dealing more severely with a minority of licensees who engage in

[49] The Commission's announced intention to enforce its rules selectively is no substitute for rules narrowly drawn to deal with a specific problem. For despite the disclaimer, a licensee still faces the possibility of suffering the imposition of severe penalties for noncompliance with the rules, thereby chilling the exercise of his first amendment rights.

"willful or repeated" acts of unfairness.[50] In addition, there is some question whether the reply requirements of the rules are well-suited for attaining the fair presentation of all sides of controversial public issues which the Commission believes to be presently lacking. One commentator, considering the efficacy of the reply requirements, has observed:

> I think that the case for the value of the broadcast reply is much weaker than it is assumed to be. Most attacks as I have said are received casually and without advance preparation by the listener. After he has heard it, will he be conditioned to expect, wait for, be alerted to a reply? How will the mandated reply or defense reach him? Does he know whether or when it will be broadcast? The advance programs do not give notice of specific replies (though it would be possible for the regulation to require such notice). It may seem something of a paradox but I would hazard the hypothesis that a reply in a newspaper, i.e., as a news item, is more likely to reach a listener than the later program. The newspaper both in time and space has greater extension and great permanency. JAFFE, THE FAIRNESS DOCTRINE, EQUAL TIME, REPLY TO PERSONAL ATTACKS, AND THE LOCAL SERVICE OBLIGATIONS; IMPLICATIONS OF TECHNOLOGICAL CHANGE 2 (U.S. Government Printing Office, 1968).

The petitioners also challenge the personal attack and political editorial rules on the ground that Congress has not authorized the Commission to promulgate them. They argue that the required explicit Congressional authority, essential in "areas of doubtful constitutionality," *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959), is lacking. And even if it could not be determined that rules clearly abridge first amendment safeguards, they urge that sufficient constitutional doubt remains to invalidate the rules pursuant to the principle enunciated in *Greene* v. *McElroy*.

The Commission has responded to this argument by calling attention to two provisions which it claims authorize the promulgation of the rules in question. First, it points to the "public interest" standard contained in the Communications Act, from

[50] The sanctions available to the Commission under 47 U.S.C. §§ 312, 503(f) require willful or repeated violations by a licensee. The sanctions available under 47 U.S.C. § 502 require a willful and knowing violation by a licensee.

which it finds the grant of authority to devise rules requiring fairness in the treatment of public issues, citing *National Broadcasting Co. Inc.* v. *United States*, 319 U.S. 190 (1943). Second, the Commission maintains that the 1959 amendment of section 315(a) of the Act, clearly and unmistakably conferred upon it authority to refine and implement the Fairness Doctrine which Congress had recognized and approved through the amendment.

Since we have determined that the rules here challenged collide with the free speech and free press guarantees contained in the first amendment, we need not resolve the authorization issue presented in this review.

The Commission's order adopting the personal attack and political editorial rules, as amended, is set aside.

APPENDIX

The full text of the Commission's rules issued on July 10, 1967 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 candidate 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 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 (1) notification of the date and 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.

The full-text of the Commission's amendment to the rules issued on August 9, 1967 follows:

(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.

The full text of the Commission's amendment to the rules issued on March 29, 1968 follows:

(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; and (iii) to bona fide newscasts, bona fide news interviews, and 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.

A true Copy:

Teste:

____ ____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

United States Court of Appeals for the Seventh Circuit

Chicago, Illinois 60604

Tuesday, September 10, 1968

No. 16369, 16498, 16499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petitions for Review of Orders of the Federal Communications Commission

Before Hon. LATHAM CASTLE, *Chief Judge*, Hon. ROGER J. KILEY, *Circuit Judge*, Hon. LUTHER M. SWYGERT, *Circuit Judge*.

This cause came on to be heard on the petitions for review of orders of the Federal Communications Commission, and the record from the Federal Communications Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the Federal Communications Commission's order adopting the personal attack and political editorial rules, as amended, be set aside, in accordance with the opinion of this Court filed this day.

MOTION OF RESPONDENTS FOR STAY OF MANDATE

The United States of America and the Federal Communications Commission, respondents herein, respectfully move, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, that the Court stay its mandate for a period of thirty days upon the conditions set forth below. The ground of this motion is that the respondents intend to file a petition for a writ of certiorari, and that a stay of mandate is necessary to furnish licensees with guidelines for their conduct during the period until certiorari is denied or the Supreme Court renders a decision herein.

In its decision of September 10, 1968, this Court set aside the Commission's rules governing the responsibilities of broadcast licensees where they have carried personal attacks against persons or groups or have broadcast political editorials. The Court recognized that the District of Columbia Circuit had sustained an order requiring a station to furnish free reply time in a personal attack situation prior to adoption of the rules, *Red Lion Broadcasting Company* v. *F.C.C.*, 381 F. 2d 908, *cert. granted* 389 U.S. 968, and that the two circuits were therefore in disagreement as to the constitutionality of the Commission's requirements in the personal attack situation.

If the mandate issues in these cases, there will be great uncertainty on the part of both the Commission and all broadcast licensees as to the applicable requirements to be followed until such time as certiorari is denied or the Supreme Court renders its decision in these cases and in *Red Lion*.[1] The method by which the Commission might apply the general Fairness Doctrine, whose validity was not adjudicated in this Court's decision, would also remain in doubt during this interim period in view of the fact that the Court has rejected the Commission's position that fairness would require the station itself to present the opposing view in a personal attack situation or give time to the person attacked. (Slip Opinion, p. 15, note 27). The significance of these problems, and similar problems with political

[1] Oral argument in Red Lion was postponed to await the outcome of these cases and the disposition of any petition for certiorari to review this Court's decision.

editorials, is of course heightened by the fact that this is an election year and a time, accordingly, when both the Commission and licensees must reach decisions which are not subsequently remediable. We believe all parties would agree that certainty in the governing standards is imperative at this time.

We believe it is also significantly relevant to note that the petitioners permitted the rules to go into effect without seeking an interlocutory stay at the time the rules were adopted in July, 1967, although suspension of the rules pending disposition of the cases or further order of the Court was requested in March, 1968 when respondents petitioned to hold the cases in abeyance pending further rule making proceedings to amend the rules. (See Response of Petitioner CBS, Inc. to Motion of Respondents to Hold Cases in Abeyance and to Authorize Further Proceedings, dated March 14, 1968.) The Court, by order of March 22, 1968, while denying the motion to hold the cases in abeyance, granted leave to revise the rules forthwith in the form then proposed by the Commission, and did not issue a stay order.

In light of these considerations, we request that this Court's mandate be stayed so that the rules may serve as a guide to licensees during this crucial period. The Commission would enforce the regulations only through rulings (which are subject to review in Court), and would undertake, and so advise all licensees, not to impose any fine or forfeiture, institute any renewal or revocation proceedings, or seek criminal penalties, based on conduct occurring during the period of further review. In addition, no pending renewal or revocation proceeding involving the rules would be concluded until the Supreme Court's review is completed. We believe that this course would serve to provide the needed certainty and, at the same time, remove any threat of a severe penalty for licensee error or violation.

For the foregoing reasons, it is requested that the Court stay issuance of its mandate for thirty days, until October 31, 1968, upon the conditions set forth above.

SEPTEMBER 27, 1968.

OPPOSITION OF PETITIONERS RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL. TO MOTION FOR STAY OF MANDATE

We agree with the respondents "that this is an election year" when journalistic decisions will be made "which are not subsequently remediable." But the question here is whether enforcement or non-enforcement of the challenged rules pending Supreme Court review will result in irremediable damage to the public interest. We believe that the enforcement of the rules will irreparably damage the public interest in wide-open, uninhibited and robust public debate at a time in our history when the importance of such debate has never been more crucial and its absence, therefore, more injurious.

The Court found that the Commission's rules discourage and inhibit public debate, tend to induce licensee "self-censorship" (pp. 21–22),[2] might result in "blandness and neutrality" (pp. 15, 17), and that their vagueness and lack of specificity give rise to the threat of Commission censorship (p. 18). It is these rules that the Commission proposes to "enforce," pending further litigation, through orders to licensees which are to be judicially enforced. See Section 401(b) of the Communications Act, 47 U.S.C. § 401(b).

The Commission's willingness to forego certain sanctions is illusory if by this it intended to show that the unconstitutional effects of the rules would be negatived thereby. Licensees are accustomed to obey Commission orders. Further, licensees will be just as much inhibited by the threat of a contempt of court citation in the event of a violation as by the sanctions the Commission is willing to forego.

Moreover, nothing that the Commission has been willing to forego lifts the "substantial economic and financial burdens" upon licensees that the rules impose (p. 15). The Commission still casts itself in "the role of a censor" (p. 18). The requirements of the rule are still "mandatory" (p. 16) and threaten the licensee with "severe and immediate penalties" for their violation. "Blandness and neutrality" (p. 17) and "self-censorship" (pp. 21–22) would be every bit as likely under the conditions of the stay proposed by the respondents as they were previously.

[2] Page citations are to the Court's slip opinion of September 10, 1968.

Thus, the respondents have proposed nothing that would negative the extremely adverse effects upon constitutionally protected speech as found by this Court. They plead only that it "is necessary [for the Commission] to furnish licensees with guidelines" and that "certainty in governing standards is imperative at this time." The term "guidelines" is merely a euphemism for the censorship that this Court condemned. And the question as to how they achieve "certainty" by enforcing rules that the Court found to be vague and uncertain (pp. 19–21) is completely begged by the respondents.

Every Presidential election to date has been held without Commission censorship in the form of the rule it wishes now to enforce. Yet it makes no attempt, in the light of this history, to show that without its "guidelines" a serious danger to the electoral process would be so imminently threatened that the Court should permit enforcement, pending further litigation, of rules found by it to violate the Constitution. This was the respondents' burden, which they have utterly failed to sustain.[3]

For the foregoing reasons, the instant Motion should be denied.

OCTOBER 1, 1968.

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[3] That petitioners did not seek an interlocutory stay of the rules at the time of their issuance is not in any sense inconsistent with their present position, as the Government appears to suggest (p. 3). When the rules were issued, a critical Presidential election was not imminent; nor had there been a clear judicial determination of the rules' adverse impact upon broadcast speech.

OPPOSITION OF PETITIONER NATIONAL BROADCASTING COMPANY TO RESPONDENT'S MOTION FOR STAY OF MANDATE

In their motion for a stay of mandate dated September 27, 1968, respondents request that, even though this Court has held the Commission's "personal attack" and "editorializing" rules to be unconstitutional and invalid, the Commission should nevertheless be permitted to continue to enforce these rules against broadcasters, pending application for certiorari to the Supreme Court and a final decision by the Supreme Court. NBC believes that such a stay is neither necessary nor justified; and opposes the respondents' motion.

Under rule 41(b) of the Federal Rules of Appellate Procedure, if the Court grants the requested stay of mandate, and the respondents subsequently file a petition for certiorari, this Court's mandate will be automatically stayed "until final disposition by the Supreme Court." The respondents have made no showing which would justify continued enforcement of the Commission's unconstitutional "personal attack" and "editorializing" rules pending final review by the Supreme Court.

In its decision dated September 10, 1968, this Court held that:

> In view of the vagueness of the Commission's rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee selfcensorship, we conclude that the personal attack and political editorial rules would contravene the First Amendment. Consequently, the rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in broadcasting to remedy this problem, and that it is unable to attain such fairness by less restrictive and oppressive means * * *. We do not believe the Commission has made such a demonstration.

The Commission's rules were declared invalid because they constitute an illegal encroachment upon a free press, fundamentally at odds with the Constitution. It is clear, as this Court has found, that the rules inhibit and burden broadcasters in their presentation of news and comment on controversial public issues, and confer upon the Commission an unwarranted power of censorship over such broadcasts. Perpetuating these

oppressive rules during the next several months could be justified only by a very strong showing that an illegal rule is superior to no rule. No such showing has been made by the Commission.

Respondents assert "that a stay of mandate is necessary to furnish licensees with guidelines for their conduct during the period until certiorari is denied or the Supreme Court renders a decision herein." However, respondents fail to explain the basis for their assumption that broadcast licensees will be unable to conduct their business without benefit of the "guidelines" which have been declared by this Court to be an illegal encroachment upon the First Amendment rights of these licensees. The respondents' position is particularly anomalous in the light of this Court's conclusion that, far from being a precise and useful guideline, the rules are unconstitutionally vague.

Nor is the stay warranted by respondents' assertion that their enforcement will be moderated in some fashion during the period of Supreme Court review. To the extent that there is continued enforcement or threat of enforcement the rules will continue to have the oppressive effect which, in the view of this Court, marked them as unconstitutional. If the Commission intends to deprive them of any significant impact during this interim period, there is no compelling reason for the requested stay.

CONCLUSION

For the reasons stated, we submit that this Court's mandate should issue without further delay.

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

Friday, October 11, 1968

No. 16369, 16498, and 16499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., PETITIONERS

Vs.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., RESPONDENTS

Petitions for Review From an Order From the Federal Communications Commission

Before Hon. LATHAM CASTLE, *Chief Judge*, Hon. ROGER J. KILEY, *Circuit Judge*, Hon. LUTHER M. SWYGERT, *Circuit Judge*.

This matter comes before the Court on the motion of respondents to stay the mandate of this Court for a period of thirty (30) days, opposition of petitioner, Radio Television News Directors Association, et al to said motion and opposition of petitioner National Broadcasting Company to said motion.

On consideration whereof, *It is ordered* by the Court that the mandate of this Court in the above entitled cause be stayed for a period of thirty (30) days from this date subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.