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It is so ordered.

Syllabus.

RED LION BROADCASTING CO., INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 2. Argued April 2–3, 1969.—Decided June 9, 1969.*

The Federal Communications Commission (FCC) has for many years imposed on broadcasters a "fairness doctrine," requiring that public issues be presented by broadcasters and that each side of those issues be given fair coverage. In No. 2, the FCC declared that petitioner Red Lion Broadcasting Co. had failed to meet its obligation under the fairness doctrine when it carried a program which constituted a personal attack on one Cook, and ordered it to send a transcript of the broadcast to Cook and provide reply time, whether or not Cook would pay for it. The Court of Appeals upheld the FCC's position. After the commencement of the *Red Lion* litigation the FCC began a rule-making proceeding to make the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and to specify its rules relating to political editorials. The rules, as adopted and amended, were held unconstitutional by the Court of Appeals in *RTNDA* (No. 717), as abridging the freedoms of speech and press. *Held:*

1. The history of the fairness doctrine and of related legislation shows that the FCC's action in the *Red Lion* case did not exceed its authority, and that in adopting the new regulations the FCC was implementing congressional policy. Pp. 375–386.

(a) The fairness doctrine began shortly after the Federal Radio Commission was established to allocate frequencies among competing applicants in the public interest, and insofar as there is an affirmative obligation of the broadcaster to see that both sides are presented, the personal attack doctrine and regulations do not differ from the fairness doctrine. Pp. 375–379.

(b) The FCC's statutory mandate to see that broadcasters operate in the public interest and Congress' reaffirmation, in the

*Together with No. 717, *United States et al.* v. *Radio Television News Directors Assn. et al.*, on certiorari to the United States Court of Appeals for the Seventh Circuit, argued April 3, 1969.

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1959 amendment to § 315 of the Communications Act, of the FCC's view that the fairness doctrine inhered in the public interest standard, support the conclusion that the doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority. Pp. 379–386.

2. The fairness doctrine and its specific manifestations in the personal attack and political editorial rules do not violate the First Amendment. Pp. 386–401.

(a) The First Amendment is relevant to public broadcasting, but it is the right of the viewing and listening public, and not the right of the broadcasters, which is paramount. Pp. 386–390.

(b) The First Amendment does not protect private censorship by broadcasters who are licensed by the Government to use a scarce resource which is denied to others. Pp. 390–392.

(c) The danger that licensees will eliminate coverage of controversial issues as a result of the personal attack and political editorial rules is at best speculative, and, in any event, the FCC has authority to guard against this danger. Pp. 392–395.

(d) There was nothing vague about the FCC's specific ruling in the *Red Lion* case and the regulations at issue in No. 717 could be employed in precisely the same way as the fairness doctrine in *Red Lion*. It is not necessary to decide every aspect of the fairness doctrine to decide these cases. Problems involving more extreme applications or more difficult constitutional questions will be dealt with if and when they arise. Pp. 395–396.

(e) It has not been shown that the scarcity of broadcast frequencies, which impelled governmental regulation, is entirely a thing of the past, as new uses for the frequency spectrum have kept pace with improved technology and more efficient utilization of that spectrum. Pp. 396–400.

No. 2, 127 U. S. App. D. C. 129, 381 F. 2d 908, affirmed; No. 717, 400 F. 2d 1002, reversed and remanded.

Roger Robb argued the cause for petitioners in No. 2. With him on the brief were *H. Donald Kistler* and *Thomas B. Sweeney*. *Solicitor General Griswold* argued the cause for the United States and the Federal Communications Commission, petitioners in No. 717 and respondents in No. 2. With him on the brief were

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Assistant Attorney General McLaren, Deputy Solicitor General Springer, Francis X. Beytagh, Jr., Henry Geller, and *Daniel R. Ohlbaum.*

Archibald Cox argued the cause for respondents in No. 717. With him on the brief for respondents Radio Television News Directors Assn. et al. were *W. Theodore Pierson, Harold David Cohen, Vernon C. Kohlhaas,* and *J. Laurent Scharff.* On the brief for respondent National Broadcasting Co., Inc., were *Lawrence J. McKay, Raymond L. Falls, Jr., Corydon B. Dunham, Howard Monderer,* and *Abraham P. Ordover.* On the brief for respondent Columbia Broadcasting System, Inc., were *Lloyd N. Cutler, J. Roger Wollenberg, Timothy B. Dyk, Robert V. Evans,* and *Herbert Wechsler.*

Briefs of *amici curiae* urging reversal in No. 717 and affirmance in No. 2 were filed by *Melvin L. Wulf* and *Eleanor Holmes Norton* for the American Civil Liberties Union, and by *Earle K. Moore* and *William B. Ball* for the Office of Communication of the United Church of Christ et al. *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* filed a brief for the American Federation of Labor & Congress of Industrial Organizations urging reversal in No. 717.

MR. JUSTICE WHITE delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statu-

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tory requirement of § 315 of the Communications Act[1] that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. *Red Lion*

[1] Communications Act of 1934, Tit. III, 48 Stat. 1081, as amended, 47 U. S. C. § 301 *et seq.* Section 315 now reads:

"315. Candidates for public office; facilities; rules.

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

"(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

"(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

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the Communications Act[1] ll qualified candidates for the fairness doctrine, relat- e context of controversial editorializing, were codified FCC regulations in 1967. , which were decided sep- onstitutional and statutory nponent rules. *Red Lion*

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involves the application of the fairness doctrine to a particular broadcast, and *RTNDA* arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the *Red Lion* litigation had begun.

I.

A.

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964, WGCB carried a 15-minute broadcast by the Reverend Billy James Hargis as part of a "Christian Crusade" series. A book by Fred J. Cook entitled "Goldwater—Extremist on the Right" was discussed by Hargis, who said that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater."[2] When Cook heard of the broadcast he

[2] According to the record, Hargis asserted that his broadcast included the following statement:

"Now, this paperback book by Fred J. Cook is entitled, 'GOLDWATER—EXTREMIST ON THE RIGHT.' Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U. S. or by other government

concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine as expressed in *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia Circuit,[3] the

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agencies . . . . Now, among other things Fred Cook wrote for THE NATION, was an article absolving Alger Hiss of any wrong doing . . . there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called 'Barry Goldwater—Extremist Of The Right!'"

[3] The Court of Appeals initially dismissed the petition for want of a reviewable order, later reversing itself en banc upon argument by the Government that the FCC rule used here, which permits it to issue "a declaratory ruling terminating a controversy or removing uncertainty," 47 CFR § 1.2, was in fact justified by the Administrative Procedure Act. That Act permits an adjudicating agency, "in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." § 5, 60 Stat. 239, 5 U.S.C. § 1004 (d). In this case, the FCC could have determined the question of Red Lion's liability to a cease-and-desist order or license revocation, 47 U.S.C. § 312, for failure to comply with the license's condition that the station be operated "in the public interest," or for failure to obey a requirement of operation in the public interest implicit in the ability of the FCC to revoke licenses for conditions justifying the denial of an initial license, 47 U.S.C. § 312 (a)(2), and the statutory requirement that the public interest be served in granting and renewing licenses, 47 U.S.C. §§ 307 (a), (d). Since the FCC could have adjudicated these questions it could, under the Administrative Procedure Act, have issued a declaratory order in the course of its adjudication

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FCC's position was upheld as constitutional and otherwise proper. 127 U. S. App. D. C. 129, 381 F. 2d 908 (1967).

B.

Not long after the *Red Lion* litigation was begun, the FCC issued a Notice of Proposed Rule Making, 31 Fed. Reg. 5710, with an eye to making the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and to specifying its rules relating to political editorials. After considering written comments supporting and opposing the rules, the FCC adopted them substantially as proposed, 32 Fed. Reg. 10303. Twice amended, 32 Fed. Reg. 11531, 33 Fed. Reg. 5362, the rules were held unconstitutional in the *RTNDA* litigation by the Court of Appeals for the Seventh Circuit, on review of the rule-making proceeding, as abridging the freedoms of speech and press. 400 F. 2d 1002 (1968).

As they now stand amended, the regulations read as follows:

> "Personal attacks; political editorials.
>
> "(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 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

which would have been subject to judicial review. Although the FCC did not comply with all of the formalities for an adjudicative proceeding in this case, the petitioner itself adopted as its own the Government's position that this was a reviewable order, waiving any objection it might have had to the procedure of the adjudication.

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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 not be applicable (1) to attacks on foreign groups or foreign public figures; (2) 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 (3) 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) of this section shall be applicable to editorials of the licensee).

"NOTE: The fairness doctrine is applicable to situations coming within [(3)], above, and, in a specific factual situation, may be applicable in the general area of political broadcasts [(2)], 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 F. R. 10415. The categories listed in [(3)] are the same as those specified in section 315 (a) of the Act.

"(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 the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the

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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 paragraph 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." 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical).

C.

Believing that the specific application of the fairness doctrine in *Red Lion*, and the promulgation of the regulations in *RTNDA*, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional, reversing the judgment below in *RTNDA* and affirming the judgment below in *Red Lion.*

II.

The history of the emergence of the fairness doctrine and of the related legislation shows that the Commission's action in the *Red Lion* case did not exceed its authority, and that in adopting the new regulations the Commission was implementing congressional policy rather than embarking on a frolic of its own.

A.

Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos.[4]

[4] Because of this chaos, a series of National Radio Conferences was held between 1922 and 1925, at which it was resolved that regulation of the radio spectrum by the Federal Government was essential and that regulatory power should be utilized to ensure that allocation of this limited resource would be made only to those who would serve the public interest. The 1923 Conference expressed the opinion

It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard.[5] Consequently, the Federal Radio Commission was established

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that the Radio Communications Act of 1912, 37 Stat. 302, conferred upon the Secretary of Commerce the power to regulate frequencies and hours of operation, but when Secretary Hoover sought to implement this claimed power by penalizing the Zenith Radio Corporation for operating on an unauthorized frequency, the 1912 Act was held not to permit enforcement. *United States* v. *Zenith Radio Corporation*, 12 F. 2d 614 (D. C. N. D. Ill. 1926). Cf. *Hoover* v. *Intercity Radio Co.*, 52 App. D. C. 339, 286 F. 1003 (1923) (Secretary had no power to deny licenses, but was empowered to assign frequencies). An opinion issued by the Attorney General at Hoover's request confirmed the impotence of the Secretary under the 1912 Act. 35 Op. Atty. Gen. 126 (1926). Hoover thereafter appealed to the radio industry to regulate itself, but his appeal went largely unheeded. See generally L. Schmeckebier, The Federal Radio Commission 1–14 (1932).

[5] Congressman White, a sponsor of the bill enacted as the Radio Act of 1927, commented upon the need for new legislation:

"We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual . . . . The recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee. We have written it into the bill. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479.

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to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."[6]

Very shortly thereafter the Commission expressed its view that the "public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies . . . to all discussions of issues of importance to the public." *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 32, 33 (1929), rev'd on other grounds, 59 App. D. C. 197, 37 F. 2d 993, cert. dismissed, 281 U. S. 706 (1930). This doctrine was applied through denial of license renewals or construction permits, both by the FRC, *Trinity Methodist Church, South* v. *FRC*, 61 App. D. C. 311, 62 F. 2d 850 (1932), cert. denied, 288 U. S. 599 (1933), and its successor FCC, *Young People's Association for the Propagation of the Gospel*, 6 F. C. C. 178 (1938). After an extended period during which the licensee was obliged not only to cover and to cover fairly the views of others, but also to refrain from expressing his own personal views, *Mayflower Broadcasting Corp.*, 8 F. C. C. 333 (1940), the latter limitation on the licensee was abandoned and the doctrine developed into its present form.

There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949). The broadcaster must give adequate coverage to public issues, *United Broadcasting Co.*, 10 F. C. C. 515 (1945), and coverage must be fair in that it accurately reflects the opposing views. *New Broadcasting Co.*, 6 P & F Radio Reg. 258 (1950). This must be done at the broadcaster's own expense if sponsorship is unavailable. *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963).

[6] Radio Act of 1927, § 4, 44 Stat. 1163. See generally Davis, The Radio Act of 1927, 13 Va. L. Rev. 611 (1927).

Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source. *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); see *Metropolitan Broadcasting Corp.*, 19 P & F Radio Reg. 602 (1960); *The Evening News Assn.*, 6 P & F Radio Reg. 283 (1950). The Federal Radio Commission had imposed these two basic duties on broadcasters since the outset, *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 32 (1929), rev'd on other grounds, 59 App. D. C. 197, 37 F. 2d 993, cert. dismissed, 281 U. S. 706 (1930); *Chicago Federation of Labor* v. *FRC*, 3 F. R. C. Ann. Rep. 36 (1929), aff'd, 59 App. D. C. 333, 41 F. 2d 422 (1930); *KFKB Broadcasting Assn.* v. *FRC*, 60 App. D. C. 79, 47 F. 2d 670 (1931), and in particular respects the personal attack rules and regulations at issue here have spelled them out in greater detail.

When a personal attack has been made on a figure involved in a public issue, both the doctrine of cases such as *Red Lion* and *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), and also the 1967 regulations at issue in *RTNDA* require that the individual attacked himself be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or through a spokesman. These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from the preceding fairness doctrine. The simple fact that the attacked men or unendorsed candidates may respond themselves or through

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agents is not a critical distinction, and indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.

B.

The statutory authority of the FCC to promulgate these regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter . . . ." 47 U. S. C. § 303 and § 303 (r).[7] The Commission is specifically directed to consider the demands of the public interest in the course of granting licenses, 47 U. S. C. §§ 307 (a), 309 (a);

[7] As early as 1930, Senator Dill expressed the view that the Federal Radio Commission had the power to make regulations requiring a licensee to afford an opportunity for presentation of the other side on "public questions." Hearings before the Senate Committee on Interstate Commerce on S. 6, 71st Cong., 2d Sess., 1616 (1930):

"Senator DILL. Then you are suggesting that the provision of the statute that now requires a station to give equal opportunity to candidates for office shall be applied to all public questions?

"Commissioner ROBINSON. Of course, I think in the legal concept the law requires it now. I do not see that there is any need to legislate about it. It will evolve one of these days. Somebody will go into court and say, 'I am entitled to this opportunity,' and he will get it.

"Senator DILL. Has the Commission considered the question of making regulations requiring the stations to do that?

"Commissioner ROBINSON. Oh, no.

"Senator DILL. It would be within the power of the commission, I think, to make regulations on that subject."

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renewing them, 47 U. S. C. § 307; and modifying them. *Ibid.* Moreover, the FCC has included among the conditions of the Red Lion license itself the requirement that operation of the station be carried out in the public interest, 47 U. S. C. § 309 (h). This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power "not niggardly but expansive," *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 219 (1943), whose validity we have long upheld. *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940); *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 90 (1953); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933). It is broad enough to encompass these regulations.

The fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history.

In 1959 the Congress amended the statutory requirement of § 315 that equal time be accorded each political candidate to except certain appearances on news programs, but added that this constituted no exception *"from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."* Act of September 14, 1959, § 1, 73 Stat. 557, amending 47 U. S. C. § 315 (a) (emphasis added). This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation declaring the intent of an earlier statute

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is entitled to great weight in statutory construction.[8] And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong,[9] especially when Congress has refused to alter the administrative construction.[10] Here, the Congress has not just kept its silence by refusing to overturn the administrative construction,[11] but has ratified it with

[8] *Federal Housing Administration* v. *Darlington, Inc.*, 358 U. S. 84, 90 (1958); *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 541 (1962) (opinion of MR. JUSTICE HARLAN, joined by MR. JUSTICE BRENNAN and MR. JUSTICE STEWART). This principle is a venerable one. *Alexander* v. *Alexandria*, 5 Cranch 1 (1809); *United States* v. *Freeman*, 3 How. 556 (1845); *Stockdale* v. *The Insurance Companies*, 20 Wall. 323 (1874).

[9] *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965); *Udall* v. *Tallman*, 380 U. S. 1, 16–18 (1965); *Commissioner* v. *Sternberger's Estate*, 348 U. S. 187, 199 (1955); *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357, 366 (1889); *United States* v. *Burlington & Missouri River R. Co.*, 98 U. S. 334, 341 (1879); *United States* v. *Alexander*, 12 Wall. 177, 179–181 (1871); *Surgett* v. *Lapice*, 8 How. 48, 68 (1850).

[10] *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965); *United States* v. *Bergh*, 352 U. S. 40, 46–47 (1956); *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16–17 (1953); *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345 (1932).

[11] An attempt to limit sharply the FCC's power to interfere with programming practices failed to emerge from Committee in 1943. S. 814, 78th Cong., 1st Sess. (1943). See Hearings on S. 814 before the Senate Committee on Interstate Commerce, 78th Cong., 1st Sess. (1943). Also, attempts specifically to enact the doctrine failed in the Radio Act of 1927, 67 Cong. Rec. 12505 (1926) (agreeing to amendment proposed by Senator Dill eliminating coverage of "question affecting the public"), and a similar proposal in the Communications Act of 1934 was accepted by the Senate, 78 Cong. Rec. 8854 (1934); see S. Rep. No. 781, 73d Cong., 2d Sess., 8 (1934), but was not included in the bill reported by the House Committee, see H. R. Rep. No. 1850, 73d Cong., 2d Sess. (1934). The attempt which came nearest success was a bill, H. R. 7716, 72d Cong., 1st Sess. (1932), passed by Congress but pocket-vetoed by the Pres-

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positive legislation. Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgment of the freedom of speech and press, and of the censorship proscribed by § 326 of the Act.[12]

The objectives of § 315 themselves could readily be circumvented but for the complementary fairness doctrine ratified by § 315. The section applies only to campaign appearances by candidates, and not by family, friends, campaign managers, or other supporters. Without the fairness doctrine, then, a licensee could ban all campaign appearances by candidates themselves from the air [13] and

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ident in 1933, which would have extended "equal opportunities" whenever a public question was to be voted on at an election or by a government agency. H. R. Rep. No. 2106, 72d Cong., 2d Sess., 6 (1933). In any event, unsuccessful attempts at legislation are not the best of guides to legislative intent. *Fogarty* v. *United States*, 340 U. S. 8, 13–14 (1950); *United States* v. *United Mine Workers*, 330 U. S. 258, 281–282 (1947). A review of some of the legislative history over the years, drawing a somewhat different conclusion, is found in Staff Study of the House Committee on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine, 90th Cong., 2d Sess. (Comm. Print. 1968). This inconclusive history was, of course, superseded by the specific statutory language added in 1959.

[12] "§ 326. Censorship.

"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."

[13] *John P. Crommelin*, 19 P & F Radio Reg. 1392 (1960).

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proceed to deliver over his station entirely to the supporters of one slate of candidates, to the exclusion of all others. In this way the broadcaster could have a far greater impact on the favored candidacy than he could by simply allowing a spot appearance by the candidate himself. It is the fairness doctrine as an aspect of the obligation to operate in the public interest, rather than § 315, which prohibits the broadcaster from taking such a step.

The legislative history reinforces this view of the effect of the 1959 amendment. Even before the language relevant here was added, the Senate report on amending § 315 noted that "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias." S. Rep. No. 562, 86th Cong., 1st Sess., 8–9 (1959). See also, specifically adverting to Federal Communications Commission doctrine, *id.*, at 13.

Rather than leave this approval solely in the legislative history, Senator Proxmire suggested an amendment to make it part of the Act. 105 Cong. Rec. 14457. This amendment, which Senator Pastore, a manager of the bill and a ranking member of the Senate Committee, considered "rather surplusage," 105 Cong. Rec. 14462, constituted a positive statement of doctrine [14] and was altered

[14] The Proxmire amendment read: "[B]ut nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussions, all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible." 105 Cong. Rec. 14457.

to the present merely approving language in the conference committee. In explaining the language to the Senate after the committee changes, Senator Pastore said: "We insisted that that provision remain in the bill, to be a continuing reminder and admonition to the Federal Communications Commission and to the broadcasters alike, that we were not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country." 105 Cong. Rec. 17830. Senator Scott, another Senate manager, added that: "It is intended to encompass all legitimate areas of public importance which are controversial," not just politics. 105 Cong. Rec. 17831.

It is true that the personal attack aspect of the fairness doctrine was not actually adjudicated until after 1959, so that Congress then did not have those rules specifically before it. However, the obligation to offer time to reply to a personal attack was presaged by the FCC's 1949 Report on Editorializing, which the FCC views as the principal summary of its *ratio decidendi* in cases in this area:

> "In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as . . . 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." 13 F. C. C., at 1251–1252.

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When the Congress ratified the FCC's implication of a fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the Commission on this subject, or give it a completely free hand for the future. The statutory authority does not go so far. But we cannot say that when a station publishes personal attacks or endorses political candidates, it is a misconstruction of the public interest standard to require the station to offer time for a response rather than to leave the response entirely within the control of the station which has attacked either the candidacies or the men who wish to reply in their own defense. When a broadcaster grants time to a political candidate, Congress itself requires that equal time be offered to his opponents. It would exceed our competence to hold that the Commission is unauthorized by the statute to employ a similar device where personal attacks or political editorials are broadcast by a radio or television station.

In light of the fact that the "public interest" in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority. The Communications Act is not notable for the precision of its substantive standards and in this respect the explicit provisions of § 315, and the doctrine and rules at issue here which are closely modeled upon that section, are far more explicit than the generalized "public interest" standard in which the Commission ordinarily finds its

sole guidance, and which we have held a broad but adequate standard before. *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 90 (1953); *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 216–217 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933). We cannot say that the FCC's declaratory ruling in *Red Lion*, or the regulations at issue in *RTNDA*, are beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves "the public interest."

III.

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.

A.

Although broadcasting is clearly a medium affected by a First Amendment interest, *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166 (1948), differences in the characteristics of new media justify differences in the First Amendment standards applied to them.[15] *Joseph*

[15] The general problems raised by a technology which supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news were discussed at

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Burstyn, Inc. v. *Wilson*, 343 U. S. 495, 503 (1952). For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination *Kovacs* v. *Cooper*, 336 U. S. 77 (1949).

Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is

considerable length by Zechariah Chafee in Government and Mass Communications (1947). Debate on the particular implications of this view for the broadcasting industry has continued unabated. A compendium of views appears in Freedom and Responsibility in Broadcasting (J. Coons ed.) (1961). See also Kalven, Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15 (1967); M. Ernst, The First Freedom 125–180 (1946); T. Robinson, Radio Networks and the Federal Government, especially at 75–87 (1943). The considerations which the newest technology brings to bear on the particular problem of this litigation are concisely explored by Louis Jaffe in The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation; Implications of Technological Change, Printed for Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce (1968).

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incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934,[16] as the Court has noted at length before. *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 210–214 (1943). It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users. Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broad-

[16] The range of controls which have in fact been imposed over the last 40 years, without giving rise to successful constitutional challenge in this Court, is discussed in W. Emery, Broadcasting and Government: Responsibilities and Regulations (1961); Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964).

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cast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

This has been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations. *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266 (1933). No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 227 (1943).

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right

of free speech by means of radio communication." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. See *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 475 (1940); *FCC* v. *Allentown Broadcasting Corp.*, 349 U. S. 358, 361–362 (1955); 2 Z. Chafee, Government and Mass Communications 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964); *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). See Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

B.

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that

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each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time sharing. As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.

In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927, Radio Act of 1927, § 18, 44 Stat. 1170, has been held valid by this Court as an obligation of the licensee relieving him of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned.[17] *Farmers Educ. & Coop. Union* v. *WDAY*, 360 U. S. 525 (1959).

[17] This has not prevented vigorous argument from developing on the constitutionality of the ancillary FCC doctrines. Compare Barrow, The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy, 37 U. Cin. L. Rev. 447 (1968), with Robinson, The FCC and the First Amendment: Obser-

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public.[18] Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).

C.

It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression

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vations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67 (1967), and Sullivan, Editorials and Controversy: The Broadcaster's Dilemma, 32 Geo. Wash. L. Rev. 719 (1964).

[18] The expression of views opposing those which broadcasters permit to be aired in the first place need not be confined solely to the broadcasters themselves as proxies. "Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." J. Mill, On Liberty 32 (R. McCallum ed. 1947).

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to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be s ified.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard.[19] It would be better if the FCC's encouragement were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.

That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues.

[19] The President of the Columbia Broadcasting System has recently declared that despite the Government, "we are determined to continue covering controversial issues as a public service, and exercising our own independent news judgment and enterprise. I, for one, refuse to allow that judgment and enterprise to be affected by official intimidation." F. Stanton, Keynote Address, Sigma Delta Chi National Convention, Atlanta, Georgia, November 21, 1968. Problems of news coverage from the broadcaster's viewpoint are surveyed in W. Wood, Electronic Journalism (1967).

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It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.

Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U. S. C. § 301. Unless renewed, they expire within three years. 47 U. S. C. § 307 (d). The statute mandates the issuance of licenses if the "public convenience, interest, or necessity will be served thereby." 47 U. S. C. § 307 (a). In applying this standard the Commission for 40 years has been choosing licensees based in part on their program proposals. In *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 279 (1933), the Court noted that in "view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses." In determining how best to allocate frequencies, the Federal Radio Commission considered the needs of competing communities and the programs offered by competing stations to meet those needs; moreover, if needs or programs shifted, the Commission could alter its allocations to reflect those shifts. *Id.*, at 285. In the same vein, in *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–138 (1940), the Court noted that

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the statutory standard was a supple instrument to effect congressional desires "to maintain . . . a grip on the dynamic aspects of radio transmission" and to allay fears that "in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." Three years later the Court considered the validity of the Commission's chain broadcasting regulations, which among other things forbade stations from devoting too much time to network programs in order that there be suitable opportunity for local programs serving local needs. The Court upheld the regulations, unequivocally recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees. *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943).

D.

The litigants embellish their First Amendment arguments with the contention that the regulations are so vague that their duties are impossible to discern. Of this point it is enough to say that, judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. Past adjudications by the FCC give added precision to the regulations; there was nothing vague about the FCC's specific ruling in *Red Lion* that Fred Cook should be provided an opportunity to reply. The regulations at issue in *RTNDA* could be employed in precisely the same way as the fairness doctrine was in *Red Lion*. Moreover, the FCC itself has recognized that

the applicability of its regulations to situations beyond the scope of past cases may be questionable, 32 Fed. Reg. 10303, 10304 and n. 6, and will not impose sanctions in such cases without warning. We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, *United States* v. *Sullivan*, 332 U. S. 689, 694 (1948), but will deal with those problems if and when they arise.

We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues. But we do hold that the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials.

E.

It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, this condition no longer prevails so that continuing control is not justified. To this there are several answers.

Scarcity is not entirely a thing of the past. Advances

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in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace.[20] Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels. Conflicts have even emerged between such vital functions as defense preparedness and experimentation in methods of averting midair collisions through radio warning devices.[21] "Land mobile services" such as police, ambulance, fire department, public utility, and other communications systems have been occupying an increasingly crowded portion of the frequency spectrum [22] and there are, apart from licensed amateur radio operators' equipment, 5,000,000 transmitters operated on the "citizens' band" which is also increasingly congested.[23] Among the various uses for radio frequency space, including marine,

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[20] Current discussions of the frequency allocation problem appear in Telecommunication Science Panel, Commerce Technical Advisory Board, U. S. Dept. of Commerce, Electromagnetic Spectrum Utilization—The Silent Crisis (1966); Joint Technical Advisory Committee, Institute of Electrical and Electronics Engineers and Electronic Industries Assn., Report on Radio Spectrum Utilization (1964); Note, The Crisis in Electromagnetic Frequency Spectrum Allocation, 53 Iowa L. Rev. 437 (1967). A recently released study is the Final Report of the President's Task Force on Communications Policy (1968).

[21] *Bendix Aviation Corp.* v. *FCC*, 106 U. S. App. D. C. 304, 272 F. 2d 533 (1959), cert. denied, 361 U. S. 965 (1960).

[22] 1968 FCC Annual Report 65–69.

[23] New limitations on these users, who can also lay claim to First Amendment protection, were sustained against First Amendment attack with the comment, "Here is truly a situation where if everybody could say anything, many could say nothing." *Lafayette Radio Electronics Corp.* v. *United States*, 345 F. 2d 278, 281 (1965). Accord, *California Citizens Band Assn.* v. *United States*, 375 F. 2d 43 (C. A. 9th Cir.), cert. denied, 389 U. S. 844 (1967).

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aviation, amateur, military, and common carrier users, there are easily enough claimants to permit use of the whole with an even smaller allocation to broadcast radio and television uses than now exists.

Comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past. The radio spectrum has become so congested that at times it has been necessary to suspend new applications.[24] The very high frequency television spectrum is, in the country's major markets, almost entirely occupied, although space reserved for ultra high frequency television transmission, which is a relatively recent development as a commercially viable alternative, has not yet been completely filled.[25]

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[24] *Kessler* v. *FCC*, 117 U. S. App. D. C. 130, 326 F. 2d 673 (1963).

[25] In a table prepared by the FCC on the basis of statistics current as of August 31, 1968, VHF and UHF channels allocated to and those available in the top 100 market areas for television are set forth:

COMMERCIAL

Market Areas	*Channels Allocated*		*Channels On the Air, Authorized, or Applied for*		*Available Channels*	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10.....	40	45	40	44	0	1
Top 50.....	157	163	157	136	0	27
Top 100.....	264	297	264	213	0	84

NONCOMMERCIAL

Market Areas	*Channels Reserved*		*Channels On the Air, Authorized, or Applied for*		*Available Channels*	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10.....	7	17	7	16	0	1
Top 50.....	21	79	20	47	1	32
Top 100.....	35	138	34	69	1	69

1968 FCC Annual Report 132–135.

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Channels On the Air, Authorized, or Applied for		*Available Channels*	
VHF	UHF	VHF	UHF
40	44	0	1
157	136	0	27
264	213	0	84

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Channels On the Air, Authorized, or Applied for		*Available Channels*	
VHF	UHF	VHF	UHF
7	16	0	1
20	47	1	32
34	69	1	69

The rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other, makes it unwise to speculate on the future allocation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential.[26] This does not mean, of course, that every possible wavelength must be occupied at every hour by some vital use in order to sustain the congressional judgment. The

[26] RTNDA argues that these regulations should be held invalid for failure of the FCC to make specific findings in the rule-making proceeding relating to these factual questions. Presumably the fairness doctrine and the personal attack decisions themselves, such as *Red Lion*, should fall for the same reason. But this argument ignores the fact that these regulations are no more than the detailed specification of certain consequences of long-standing rules, the need for which was recognized by the Congress on the factual predicate of scarcity made plain in 1927, recognized by this Court in the 1943 *National Broadcasting Co.* case, and reaffirmed by the Congress as recently as 1959. "If the number of radio and television stations were not limited by available frequencies, the committee would have no hesitation in removing completely the present provision regarding equal time and urge the right of each broadcaster to follow his own conscience . . . . However, broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." S. Rep. No. 562, 86th Cong., 1st Sess., 8–9 (1959). In light of this history; the opportunity which the broadcasters have had to address the FCC and show that somehow the situation had radically changed, undercutting the validity of the congressional judgment; and their failure to adduce any convincing evidence of that in the record here, we cannot consider the absence of more detailed findings below to be determinative.

substantial capital investment required for many uses, in addition to the potentiality for confusion and interference inherent in any scheme for continuous kaleidoscopic reallocation of all available space may make this unfeasible. The allocation need not be made at such a breakneck pace that the objectives of the allocation are themselves imperiled.[27]

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and

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[27] The "airwaves [need not] be filled at the earliest possible moment in all circumstances without due regard for these important factors." *Community Broadcasting Co.* v. *FCC*, 107 U. S. App. D. C. 95, 105, 274 F. 2d 753, 763 (1960). Accord, enforcing the fairness doctrine, *Office of Communication of the United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 343, 359 F. 2d 994, 1009 (1966).

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ruling at issue here are both authorized by statute and constitutional.[28] The judgment of the Court of Appeals in *Red Lion* is affirmed and that in *RTNDA* reversed and the causes remanded for proceedings consistent with this opinion.

It is so ordered.

Not having heard oral argument in these cases, MR. JUSTICE DOUGLAS took no part in the Court's decision.

[28] We need not deal with the argument that even if there is no longer a technological scarcity of frequencies limiting the number of broadcasters, there nevertheless is an economic scarcity in the sense that the Commission could or does limit entry to the broadcasting market on economic grounds and license no more stations than the market will support. Hence, it is said, the fairness doctrine or its equivalent is essential to satisfy the claims of those excluded and of the public generally. A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic, Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public. Cf. *Citizen Publishing Co.* v. *United States*, 394 U. S. 131 (1969).

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FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

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PUBLIC NOTICE - B
July 6, 1964

APPLICABILITY OF THE FAIRNESS DOCTRINE IN THE HANDLING OF CONTROVERSIAL ISSUES OF PUBLIC IMPORTANCE

PART I - INTRODUCTION

It is the purpose of this Public Notice to advise broadcast licensees and members of the public of the rights, obligations, and responsibilities of such licensees under the Commission's "fairness doctrine", which is applicable in any case in which broadcast facilities are used for the discussion of a controversial issue of public importance. For this purpose, we have set out a digest of the Commission's interpretative rulings on the fairness doctrine. This Notice will be revised at appropriate intervals to reflect new rulings in this area. In this way, we hope to keep the broadcaster and the public informed of pertinent Commission determinations on the fairness doctrine, and thus reduce the number of these cases required to be referred to the Commission for resolution. Before turning to the digest of the rulings, we believe some brief introductory discussion of the fairness doctrine is desirable.

The basic administrative action with respect to the fairness doctrine was taken in the Commission's 1949 Report, Editorializing by Broadcast Licensees, 13 FCC 1246; Vol. 1, Part 3, R.R. 91-201. 1/ This report is attached hereto because it still constitutes the Commission's basic policy in this field. 2/

Congress recognized this policy in 1959. In amending Section 315 so as to exempt appearances by legally qualified candidates on certain news-type programs from the "equal opportunities" provision, it was stated in the statute that such action should not be construed as relieving broadcasters ". . . from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of

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1/ Citations in "R.R." refer to Pike & Fischer, Radio Regulations. The above report thus deals not only with the question of editorializing but also the requirements of the fairness doctrine.

2/ The report (par. 6) also points up the responsibility of broadcast licensees to devote a reasonable amount of their broadcast time to the presentation of programs dealing with the discussion of controversial issues of public importance.

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public importance" (Public Law 86-274, approved September 14, 1959, 73 Stat. 557). 3/ The legislative history establishes that this provision "is a restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934" (H. Rept. No. 1069, 86th Cong., 1st Sess., p. 5).

While Section 315 thus embodies both the "equal opportunities" requirement and the fairness doctrine, they apply to different situations and in different ways. The "equal opportunities" requirement relates solely to use of broadcast facilities by candidates for public office. With certain exceptions involving specified news-type programs, the law provides that if a licensee permits a person who is a legally qualified candidate for public office to use a broadcast station, he shall afford equal opportunities to all other such candidates for that office in the use of the station. The Commission's Public Notice on Use of Broadcast Facilities by Candidates for Public Office, 27 Fed. Reg. 10063 (October 12, 1962), should be consulted with respect to "equal opportunities" questions involving political candidates.

The fairness doctrine deals with the broader question of affording reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance. Generally speaking, it does not apply with the precision of the "equal opportunities" requirement. Rather, the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation -- as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming. See par. 9, Editorializing Report. In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the "equal opportunities" requirement.

3/ The full statement in Section 315(a) reads as follows:

"Nothing in the foregoing sentence [i.e., exemption from equal time requirements for news-type programs] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Interpretative Rulings -- Commission Procedure

We set forth below a digest of the Commission's rulings on the fairness doctrine. References, with citations, to the Commission's decisions or rulings are made so that the researcher may, if he desires, review the complete text of the Commission's ruling. Copies of rulings may be found in a "Fairness Doctrine" folder kept in the Commission's Reference Room.

In an area such as the fairness doctrine, the Commission's rulings are necessarily based upon the facts of the particular case presented, and thus a variation in facts might call for a different or revised ruling. We therefore urge that interested persons, in studying the rulings for guidance, look not only to the language of the ruling but the specific factual context in which it was made.

It is our hope, as stated, that this Notice will reduce significantly the number of fairness complaints made to the Commission. Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints. 4/ (Lar Daly, 19 R.R. 1104, March 24, 1960; cf. Cullman Bcstg. Co., FCC 63-849, Sept. 18, 1963.)

If the Commission determines that the complaint sets forth sufficient facts to warrant further consideration, it will promptly advise the licensee of the complaint and request the licensee's comments on the matter. Full opportunity is given to the licensee to set out all programs which he has presented, or plans to present, with respect to the issue in question during an appropriate time period. Unless additional information is sought from either the complainant or the licensee, the matter is then usually disposed of by Commission action. (Letter of September 18, 1963 to Honorable Oren Harris, FCC 63-851.)

Finally, we repeat what we stated in our 1949 Report:

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

4/ The complainant can usually obtain this information by communicating with the station.

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PART II - COMMISSION RULINGS

A. Controversial Issue of Public Importance

1. Civil rights as controversial issue. In response to a Commission inquiry, a station advised the Commission, in a letter dated March 6, 1950, that it had broadcast editorial programs in support of a National Fair Employment Practices Commission on January 15-17, 1950, and that it had taken no affirmative steps to encourage and implement the presentation of points of view with respect to these matters which differed from the point of view expressed by the station.

Ruling. The establishment of a National Fair Employment Practices Commission constitutes a controversial question of public importance so as to impose upon the licensee the affirmative duty to aid and encourage the broadcast of opposing views. It is a matter of common knowledge that the establishment of a National Fair Employment Practices Commission is a subject that has been actively controverted by members of the public and by members of the Congress of the United States and that in the course of that controversy numerous differing views have been espoused. The broadcast by the station of a relatively large number of programs relating to this matter over a period of three days indicates an awareness of its importance and raises the assumption that at least one of the purposes of the broadcasts was to influence public opinion. In our report In the Matter of Editorializing by Broadcast Licensees, we stated that:

> ". . . In appraising the record of a station in presenting programs concerning a controversial bill pending before the Congress of the United States, if the record disclosed that the licensee had permitted only advocates of the bill's enactment to utilize its facilities to the exclusion of its opponents, it is clear that no independent appraisal of the bill's merits by the Commission would be required to reach a determination that the licensee had misconstrued its duties and obligations as a person licensed to serve the public interest."

In light of the foregoing the conduct of the licensee was not in accord with the principles set forth in the report. (New Broadcasting Co. (WLIB), 6 R.R. 258, April 12, 1950.)

2. Political spot announcements. In an election an attempt was made to promote campaign contributions to the candidates of the two major parties through the use of spot announcements on broadcast stations. Certain broadcast stations raised the question whether the airing of such announcements imposed an obligation under Section 315 of the Act and/or the fairness doctrine to broadcast such special announcements for all candidates running for a particular office in a given election.

Ruling. The "equal opportunities" provision of Section 315 applies only to uses by candidates and not to those speaking in behalf of or against candidates. Since the above announcements did not contemplate the appearance of a candidate, the "equal opportunities" provision of Section 315 would not be applicable. The fairness doctrine is, however, applicable. (Letter to Lawrence M. C. Smith, FCC 63-358, 25 R.R. 291, April 17, 1963.) See Ruling No. 13.

3. "Reports to the People". The complaint of the Chairman of the Democratic State Committee of New York alleged that an address by Governor Dewey over the facilities of the stations affiliated with the CBS network on May 2, 1949, entitled "A Report to the People of New York State," was political in nature and contained statements of a controversial nature. The CBS reply stated, in substance, that it was necessary to distinguish between the reports made by holders of office to the people whom they represented and the partisan political activities of the individuals holding office.

Ruling. The Commission recognizes that public officials may be permitted to utilize radio facilities to report on their stewardship to the people and that "the mere claim that the subject is political does not automatically require that the opposite political party be given equal facilities for a reply." On the other hand, it is apparent that so-called reports to the people may constitute attacks on the opposite political party or may be a discussion of a public controversial issue. Consistent with the views expressed by the Commission in the Editorializing Report, it is clear that the characterization of a particular program as a report to the people does not necessarily establish such a program as non-controversial in nature so as to avoid the requirement of affording time for the expression of opposing views. In that Report, we stated ". . . 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 . . . 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." The duty of the licensee to make time available for the expression of differing views is invoked where the facts and circumstances in each case indicate an area of controversy and differences of opinion where the subject matter is of public importance. In the light of the foregoing, the Commission concludes that "it does not appear that there has been the abuse of judgment on the part of [CBS] such as to warrant holding a hearing on its applications for renewal of license." (Paul E. Fitzpatrick, 6 R.R. 543, July 21, 1949; (see, also, California Democratic State Central Committee, Public Notice 95873, 20 R.R. 867, 869, October 31, 1960.))

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4. Controversial issue within service area. A station broadcast a statement by the President of CBS opposing pay TV; two newcasts containing the views of a Senator opposed to pay TV; one newscast reporting the introduction by a Congressman of an anti-pay TV bill; a half-hour network program on pay TV in which both sides were represented, followed by a ten-minute film clip of a Senator opposing pay TV; a half-hour program in which a known opponent of pay TV was interviewed by interrogators whose questions in some instances indicated an opinion by the questioner favorable to pay TV. In a hearing upon the station's application for modification of its construction permit, an issue was raised whether the station had complied with the requirements of the fairness doctrine. The licensee stated that while nationally pay TV was "certainly" a controversial issue, it regarded pay TV as a local controversial issue only to a very limited extent in its service area, and therefore it was under no obligation to take the initiative to present the views of advocates of pay TV.

Ruling. The station's handling of the pay TV question was improper. It could be inferred that the station's sympathies with the opposition to pay TV made it less than a vigorous searcher for advocates of subscription television. The station evidently thought the subject of sufficient general interest (beyond its own concern in the matter) to devote broadcast time to it, and even to preempt part of a local program to present the views of the Senator in opposition to pay TV immediately after the balanced network discussion program, with the apparent design of neutralizing any possible public sympathy for pay TV which might have arisen from the preceding network forum. The anti-pay TV side was represented to a greater extent on the station than the other, though it cannot be said that the station choked off the expression of all views inimical to its interest. A licensee cannot excuse a one-sided presentation on the basis that the subject matter was not controversial in its service area, for it is only through a fair presentation of all facts and arguments on a particular question that public opinion can properly develop. (In re The Spartan Radiocasting Co., 33 F.C.C., 765, 771, 794-795, 802-803, November 21, 1962.)

5. Substance of broadcast. A number of stations broadcast a program entitled "Living Should Be Fun", featuring a nutritionist giving comment and advice on diet and health. Complaint was made that the program presented only one side of controversial issues of public importance. Several licensees contended that a program dealing with the desirability of good health and nutritious diet should not be placed in the category of discussion of controversial issues.

Ruling. The Commission cannot agree that the program consisted merely of the discussion of the desirability of good health and nutritious diet. Anyone who listened to the program regularly -- and

station licensees have the obligation to know what is being broadcast over their facilities -- should have been aware that at times controversial issues of public importance were discussed. In discussing such subjects as the fluoridation of water, the value of krebiozen in the treatment of cancer, the nutritive qualities of white bread, and the use of high potency vitamins without medical advice, the nutritionist emphasized the fact that his views were opposed to many authorities in these fields, and on occasions on the air, he invited those with opposing viewpoints to present such viewpoints on his program. A licensee who did not recognize the applicability of the fairness doctrine failed in the performance of his obligations to the public. (Report on "Living Should Be Fun" Inquiry, 33 FCC 101, 107, 23 R.R. 1599, 1606, July 18, 1962.)

6. Substance of broadcast. A station broadcast a program entitled "Communist Encirclement" in which the following matters, among others, were discussed: socialist forms of government were viewed as a transitory form of government leading eventually to communism; it was asserted that this country's continuing foreign policy in the Far East and Latin America, the alleged infiltration of our government by communists, and the alleged moral weakening in our homes, schools and churches have all contributed to the advance of international communism. In response to complaints alleging one-sided presentation of these issues, the licensee stated that since it did not know of the existence of any communist organizations or communists in its community, it was unable to afford opportunity to those who might wish to present opposing views.

Ruling. In situations of this kind, it was not and is not the Commission's intention to require licensees to make time available to communists or the communist viewpoint. But the matters listed above raise controversial issues of public importance on which persons other than communists hold contrasting views. There are responsible contrasting viewpoints on the most effective methods of combatting communism and communist infiltration. Broadcast of proposals supporting only one method raises the question whether reasonable opportunity has been afforded for the expression of contrasting viewpoints. (Letter to Tri-State Broadcasting Company, Inc., April 26, 1962 (staff letter).)

7. Substance of broadcast. In 1957 a station broadcast a panel discussion entitled "The Little Rock Crisis" in which several public officials appeared, and whose purpose, a complainant stated, was to stress the maintenance of segregation and to express an opinion as to what the Negro wants or does not want. A request for time to present contrasting viewpoints was refused by the licensee who stated that the program was most helpful in preventing trouble by urging people to keep calm and look to their elected representatives for leadership, that it was a report by elected officials to the people, and that therefore no reply was necessary or advisable.

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Ruling. If the matters discussed involved no more than urging people to remain calm, it can be urged that no question exists as to fair presentation. However, if the station permitted the use of its facilities for the presentation of one side of the controversial issue of racial integration, the station incurred an obligation to afford a reasonable opportunity for the expression of contrasting views. The fact that the proponents of one particular position were elected officials did not in any way alter the nature of the program or remove the applicability of the fairness doctrine. See Ruling No. 3. (Lamar Life Insurance Co., FCC 59-651, 18 R.R. 683, July 1, 1959.)

8. National controversial issues. Stations broadcast a daily commentary program six days a week, in three of which views were expressed critical of the proposed nuclear weapons test ban treaty. On one of the stations the program was sponsored six days a week and on the other one day a week. A national committee in favor of the proposed treaty requested that the stations afford free time to present a tape of a program containing viewpoints opposed to those in the sponsored commentary program. The stations indicated, among other things, that it was their opinion that the fairness doctrine is applicable only to local issues.

Ruling. The keystone of the fairness doctrine and of the public interest is the right of the public to be informed -- to have presented to it the "conflicting views of issues of public importance." Where a licensee permits the use of its facilities for the expression of views on controversial local or national issues of public importance such as the nuclear weapons test ban treaty, he must afford reasonable opportunities for the presentation of contrasting views by spokesmen for other responsible groups. (Letter to Cullman Broadcasting Co., Inc., FCC 63-849, September 18, 1963.) See Rulings No. 16 and 17 for other aspects of the Cullman decision.

B. Licensee's obligation to afford reasonable opportunity for the presentation of contrasting viewpoints.

9. Affirmative duty to encourage. In response to various complaints alleging that a station had been "one-sided" in its presentations on controversial issues of public importance, the licensee concerned rested upon its policy of making time available, upon request, for "the other side."

Ruling. The licensee's obligations to serve the public interest cannot be met merely through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time. As the Commission pointed out in the Editorializing Report (par. 9):

". . . If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views. It is clear that any approximation of fairness in the presentation of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints." (John J. Dempsey, 6 R.R. 615, August 16, 1950; Editorializing Report, par. 9.) (See also Metropolitan Bctg. Corp., Public Notice 82386, 19 R.R. 602, 604, December 29, 1959.)

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10. Non-delegable duty. Approximately 50 radio stations broadcast a program entitled "Living Should Be Fun", featuring a nutritionist giving comment and advice on diet and health. The program was syndicated and taped for presentation, twenty-five minutes a day, five days a week. Many of the programs discussed controversial issues of public importance. In response to complaints that the station failed to observe the requirements of the fairness doctrine, some of the licensees relied upon (i) the nutritionist's own invitation to those with opposing viewpoints to appear on his program or (ii) upon the assurances of the nutritionist or the sponsor that the program fairly represented all responsible contrasting viewpoints on the issues with which it dealt, as an adequate discharge of their obligations under the fairness doctrine.

Ruling. Those licensees who relied solely upon the assumed built-in fairness of the program itself, or upon the nutritionist's invitation to those with opposing viewpoints, cannot be said to have properly discharged their responsibilities. Neither alternative is likely to produce the fairness which the public interest demands. There could be many valid reasons why the advocate of an opposing viewpoint would be unwilling to appear upon such a program. In short, the licensee may not delegate his responsibilities to others, and particularly to an advocate of one particular viewpoint. As the Commission said in our Report in the Matter of Editorializing by Broadcast Licensees, "It is clear that any approximation of fairness in the presentation of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints." (Report on "Living Should Be Fun" Inquiry, 33 FCC 101, 107, 23 R.R. 1599, 1606, July 18,1962.)

11. Reliance upon other media. In January 1958, the issue of subscription television was a matter of public controversy, and it was generally known that the matter was the subject of Congressional hearings being conducted by the House and Senate Interstate and Foreign Commerce Committees. On Monday, January 27, 1958, between 9:30 and 10:00 p.m., WSOC-TV broadcast the program "Now It Can Be Tolled" (simultaneously with the other Charlotte television station, WBTV), a program consisting of a skit followed by a discussion in which the president of WSOC-TV and the vice president and general manager of Station WBTV were interviewed by employees of the two stations. The skit and interview were clearly weighted against subscription TV, and in the program the station made clear its prefdrence for the present TV system. On Saturday, February 1, 1958, WSOC-TV presented for 15 minutes, beginning at 3:35 p.m., a film clip in which a United States Representative discussed subscription television and expressed his

opposition thereto. From January 24 to January 30, 1958, inclusive, WSOC-TV presented a total of 43 spot announcements, all of them against subscription television, and urged viewers, if they opposed it, to write their Congressmen without delay to express their opposition. WSOC-TV did not broadcast any programs or announcements presenting a viewpoint favorable to subscription television although on February 28, 1958, the station did (together with the management of Station WBTV) send a telegram to the three chief subscription television groups, offering them joint use of the two Charlotte stations, without charge, at a time mutually agreeable to all parties concerned, for the purpose of putting on a program by the proponents of pay TV. This offer was refused by Skiatron, one of the three groups. In its reply to the Commission's inquiry, the station referred to "the large amount of publicity already given by the Pay-TV proponents in newspapers, magazines and by direct mail," and asserted that its decision in this matter was taken "in an effort to furnish the public with the opposing viewpoints on the subject . . ."

Ruling. The station's broadcast presentation of the subscription TV issue was essentially one-sided, and, taking into account the circumstances of the situation existing at the time, the station did not make any timely effort to secure the presentation of the other side of the issue by responsible representatives. It is the Commission's view that the requirement of fairness, as set forth in the Editorializing Report, applies to a broadcast licensee irrespective of the position which may be taken by other media on the issue involved; and that the licensee's own performance in this respect, in and of itself, must demonstrate compliance with the fairness doctrine. (Letter to WSOC Broadcasting Co., FCC 58-686, 17 R.R. 548, 550, July 16, 1958.)

C. Reasonable opportunity for the presentation of contrasting viewpoints.

12. "Equal time" not required. Licensee broadcast over its several facilities on October 28, 1960, a 30-minute documentary concerning a North Dakota hospital. The last five minutes of the program consisted of an interview of the Superintendent of the hospital and the Chairman of the Board of Administration for State Institutions who responded to charges that the complainant, a candidate for the office of Attorney General of North Dakota, had publicly leveled against the Superintendent and Chairman concerning the administration of the hospital. On November 4, 1960 and at about the same viewing time as the preceding documentary, complainant's 30-minute broadcast was aired over the stations in which complainant presented his allegations about the professional, administrative, and disciplinary conditions at the hospital and a state training school. The following day (November 5)

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reasonable opportunity for the presentation of opposing views in the light of circumstances -- an obligation calling for the same kind of judgment as in the case where party spokesmen (rather than candidates) appear. (Letter to Mr. Lawrence M. C. Smith, FCC 63-658, April 18,1963.)

14. No necessity for presentation on same program. In the proceedings leading to the Editorializing Report, it was urged, in effect, that contrasting viewpoints with respect to a controversial issue of public importance should be presented on the same program.

Ruling. The Commission concluded that any rigid requirement in this respect would seriously limit the ability of the licensees to serve the public interest. "Forums and roundtable discussions, while often excellent techniques of presenting a fair cross section of differing viewpoints on a given issue, are not the only appropriate devices for radio discussion, and in some circumstances may not be particularly appropriate or advantageous." (Par. 8, Editorializing Report.)

15. Overall performance on the issue. A licensee presented a program in which views were expressed critical of the proposed nuclear weapons test ban treaty. The licensee rejected a request of an organization seeking to present views favorable to the treaty, on the ground, among others, that the contrasting viewpoint on this issue had already been presented over the station's facilities in other programming.

Ruling. The licensee's overall performance is considered in determining whether fairness has been achieved on a specific issue. Thus, where complaint is made, the licensee is afforded the opportunity to set out all the programs, irrespective of the programming format, which he has devoted to the particular controversial issue during the appropriate time period. In this case, the Commission files contained no complaints to the contrary, and therefore, if it was the licensee's good faith judgment that the public had had the opportunity fairly to hear contrasting views on the issue involved in his other programming, it appeared that the licensee's obligation pursuant to the fairness doctrine had been met. (Letter to Cullman Bctg. Co., FCC 63-849, September 18, 1963; Letter of September 20, 1963, FCC 63-851, to Honorable Oren Harris.)

D. Limitations which may reasonably be imposed by the licensee.

16. Licensee discretion to choose spokesman. See Ruling 8 for facts.

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Ruling. Where a licensee permits the use of its facilities for the expression of views on controversial local or national issues of public importance such as the nuclear weapons test ban treaty, he must afford reasonable opportunities for the presentation of contrasting views by spokesmen for other responsible groups. There is, of course, no single method by which this obligation is to be met. As the Editorializing Report makes clear, the licensee has considerable discretion as to the techniques or formats to be employed and the spokesmen for each point of view. In the good faith exercise of his best judgment, he may, in a particular case, decide upon a local rather than regional or national spokesmen -- or upon a spokesman for a group which also is willing to pay for the broadcast time. Thus, with the exception of the broadcast of personal attacks (see Part E), there is no single group or person entitled as a matter of right to present a viewpoint differing from that previously expressed on the station. (Letter to Cullman Broadcasting Co., Inc., FCC 63-849, September 18, 1963.)

17. Non-local spokesman; paid sponsorship. See Ruling 8 for facts. The stations contended that their obligation under the fairness doctrine extended only to a local group or its spokesman, and also inquired whether they were required to give free time to a group wishing to present viewpoints opposed to those aired on a sponsored program.

Ruling. Where the licensee has achieved a balanced presentation of contrasting views, either by affording time to a particular group or person of its own choice or through its own programming, the licensee's obligations under the fairness doctrine -- to inform the public -- will have been met. But, it is clear that the public's paramount right to hear opposing views on controversial issues of public importance cannot be nullified by either the inability of the licensee to obtain paid sponsorship of the broadcast time or the licensee's refusal to consider requests for time to present a conflicting viewpoint from an organization on the sole ground that the organization has no local chapter. In short, where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee -- and thus leave the public uninformed -- on the ground that he cannot obtain paid sponsorship for that presentation. (Letter to Cullman Broadcasting Co., Inc.,FCC 63-849, September 18, 1963.)

18. Unreasonable limitation; refusal to permit appeal not to vote. A station refused to sell broadcast time to the complainant who, as a spokesman for a community group, was seeking to present his point of view concerning a bond election

to be held in the community; the station had sold time to an organization in favor of the bond issue. The complainant alleged that the station had broadcast editorials urging people to vote in the election and that his group's position was that because of the peculiarities in the bond election law (more than 50% of the electorate had to vote in the election for it to be valid), the best way to defeat the proposed measure was for people not to vote in the election. The complainant alleged, and the station admitted, that the station refused to sell him broadcast time because the licensee felt that to urge people not to vote was improper.

Ruling. Because of the peculiarities of the state election law, the sale of broadcast time to an organization favoring the bond issue, and the urging of listeners to vote, the question of whether to vote became an issue. Accordingly, by failing to broadcast views urging listeners not to vote, the licensee failed to discharge the obligations imposed upon him by the Commission's Report on Editorializing. (Letter to Radio Station WMOP, January 21, 1962 (staff ruling).)

19. Unreasonable limitation; insistence upon request from both parties to dispute. During the period of a labor strike which involved a matter of paramount importance to the community and to the nation at large, a union requested broadcast time to discuss the issues involved. The request was denied by the station solely because of its policy to refuse time for such discussion unless both the union and the management agreed, in advance, that they would jointly request and use the station, and the management of the company involved in the strike had refused to do so.

Ruling. In view of the licensee's statement that the issue was "of paramount importance to the community . . .," the licensee's actions were not in accordance with the principles enunciated in the Editorializing Report, specifically that portion of par. 8, which states that:

> ". . . where the licensee has determined that the subject is of sufficient import to receive broadcast attention, it would obviously not be in the public interest for spokesmen for one of the opposing points of view to be able to exercise a veto power over the entire presentation by refusing to broadcast its position. Fairness in such circumstances might require no more than that the licensee make a reasonable representation of the particular position and if it fails in this effort, to continue to make available its facilities to the spokesmen for such position in the event that, after the original programs are broadcast, they then decide to avail themselves of a right to present their contrary opinion." (Par. 8, Report on Editorializing by Broadcast Licensees; The Evening News Ass'n (WWJ), 6 R.R. 283, April 21, 1950.)

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E. Personal Attack Principle

20. Personal attack. A newscaster on a station, in a series of broadcasts, attacked certain county and state officials, charging them with nefarious schemes and the use of their offices for personal gain, attaching derisive epithets to their names, and analogizing their local administration with the political methods of foreign dictators. At the time of renewal of the station's license, the persons attacked urged that the station had been used for the licensee's selfish purposes and to vent his personal spite. The licensee denied the charge, and asserted that the broadcasts had a factual basis. On several occasions, the persons attacked were invited to use the station to discuss the matters in the broadcasts.

Ruling. Where a licensee expresses an opinion concerning controversial issues of public importance, he is under obligation to see that those holding opposing viewpoints are afforded a reasonable opportunity for the presentation of their views. He is under a further obligation not to present biased or one-sided news programming (viewing such programming on an overall basis) and not to use his station for his purely personal and private interests. Investigation established that the licensee did not subordinate his public interest obligations to his private interests, and that there was "a body of opinion" in the community "that such broadcasts had a factual basis."

As to the attacks, the Editorializing Report states that ". . . 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 . . ." In this case, the attacks were of a highly personal nature, impugning the character and honesty of named individuals. In such circumstances, the licensee has an affirmative duty to take all appropriate steps to see to it that the persons attacked are afforded the fullest opportunity to respond. Here, the persons attacked knew of the attacks, were generally apprised of their nature, and were aware of the opportunities afforded them to respond. Accordingly, the license was renewed. (Clayton W. Mapoles, FCC 62-501, 23 R.R. 586, May 9, 1962.)

21. Personal attack. For a period of five days, September 18-22, a station broadcast a series of daily editorials attacking the general manager of a national rural electric cooperative association in connection with a pending controversial issue of public importance. The manager arrived in town on September 21 for a two-day stay and, upon being informed of the editorials, on the morning of September 22nd sought to obtain copies of them. About noon of the same day, the station approached the manager with an offer of an interview to respond to

the statements made in the editorials. The manager stated, however, that he would not have had time to prepare adequately a reply which would require a series of broadcasts. He complained to the Commission that the station had acted unfairly.

Ruling. Where, as here, a station's editorials contain a personal attack upon an individual by name, the fairness doctrine requires that a copy of the specific editorial or editorials shall be communicated to the person attacked either prior to or at the time of the broadcast of such editorials so that a reasonable opportunity is afforded that person to reply. This duty on the part of the station is greater where, as here, interest in the editorials was consciously built up by the station over a period of days and the time within which the person attacked would have an opportunity to reply was known to be so limited. The Commission concludes that in failing to supply copies of the editorials promptly to the manager and delaying in affording him the opportunity to reply to them, the station had not fully met the requirements of the Commission's fairness doctrine. (Billings Bctg. Co., FCC 62-736. 23 R.R. 951, July 13, 1962.)

22. No personal attack merely because individual is named. A network program discussed the applicability of Section 315 to appearances by candidates for public office on TV newscasts and the Commission's decision holding that the mayoralty candidate, Lar Daly, was entitled to equal time when the Mayor of Chicago appeared on a newscast. The program contained the editorial views of the President of CBS opposing the interpretation of the Commission and urging that Section 315 not apply to newscasts. Three other persons on the program expressed contrasting points of view. Lar Daly's request that he be afforded time to reply to the President of CBS, because he was "directly involved" in the Commission's decision which was discussed over the air and because he was the most qualified spokesman to present opposing views, was denied by the station. Did the fairness doctrine require that his request be granted?

Ruling. It was the newscast question involved in the Commission's decision, rather than Lar Daly, which was the controversial issue which was presented. Since the network presented several spokesmen, all of whom appeared qualified to state views contrasting with those expressed by the network President, the network fulfilled its obligation to provide a "fair and balanced presentation of an important public issue of a controversial nature." (Lar Daly, 19 R.R.1103, at 1104,Mar.24,1960.)*

*As seen from the above rulings, the personal attack principle is applicable where there are statements, in connection with a controversial issue of public importance, attacking an individual's or group's integrity, character, or honesty or like personal qualities, and not when an individual or group is simply named or referred to. Thus, while a definitive Commission ruling must await a complaint involving specific facts -- see introduction, p. 3, the

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23. Licensee involvement in personal attack. It was urged that in Mapoles, Billings, and Times-Mirror (see Rulings 20, 21, 25), the station was, in effect, "personally involved"; that the personal attack principle should be applied only when the licensee is personally involved in the attack upon a person or group (i.e., through editorials or through station commentator programming), and not where the attack is made by a party unconnected with the station.

Ruling. Under fundamental communications policy, the licensee, with the exception of appearances of political candidates subject to the equal opportunities requirement of Section 315, is fully responsible for all matter which is broadcast over his station. It follows that when a program contains a personal attack, the licensee must be fully aware of the contents of the program, whatever its source or his actual involvement in the broadcast. The crucial consideration, as the Commission stated in Mapoles, is that "his broadcast facilities [have been] used to attack a person or group." (Letter of September 18, 1963 to Douglas A. Anello, FCC 63-850.)

24. Personal attack -- no tape or transcript. In the same inquiry as above (Ruling 23), the question was also raised as to the responsibility of the licensee when his facilities are used for a personal attack in a program dealing with a controversial issue of public importance and the licensee has no transcript or tape of the program.

Ruling. Where a personal attack is made and no script or tape is available, good sense and fairness dictate that the licensee send as accurate a summary as possible of the substance of the attack to the person or group involved. (Letter of September 18, 1963 to Douglas A. Anello, FCC 63-850.)

25. Personal attacks on, and criticism of, candidate; partisan position on campaign issues. In more than 20 broadcasts, two station commentators presented their views on the issues in the 1962 California gubernatorial campaign between Governor Brown and Mr. Nixon. The views expressed on the issues were critical of the Governor and favored Mr. Nixon, and at times involved personal attacks on individuals and groups in the gubernatorial campaign, and specifically on Governor Brown. The licensee responded that it had presented opposing viewpoints but upon examination there were two instances of broadcasts

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*Continued) personal attack principle has not been applied where there is simply stated disagreement with the views of an individual or group concerning a controversial issue of public importance. Nor is it necessary to send a transcript or summary of the attack, with an offer of time for response, in the case of a personal attack upon a foreign leader, even assuming such an attack occurred in connection with a controversial issue of public importance.

featuring Governor Brown (both of which were counterbalanced by appearances of Mr. Nixon) and two instances of broadcasts presenting viewpoints opposed to two of the issues raised by the above-noted broadcasts by the commentators. It did not appear that any of the other broadcasts cited by the station dealt with the issues raised as to the gubernatorial campaign.

Ruling. Since there were only two instances which involved the presentation of viewpoints concerning the gubernatorial campaign, opposed to the more than twenty programs of the commentators presenting their views on many different issues of the campaign for which no opportunity was afforded for the presentation of opposing viewpoints, there was not a fair opportunity for presentation of opposing viewpoints with respect to many of the issues discussed in the commentators' programs. The continuous, repetitive opportunity afforded for the expression of the commentators' viewpoints on the gubernatorial campaign, in contrast to the minimal opportunity afforded to opposing viewpoints, violated the right of the public to a fair presentation of views. Further, with respect to the personal attacks by the one commentator on individuals and groups involved in the gubernatorial campaign, the principle in Napoles and Billings should have been followed. In the circumstances, the station should have sent a transcript of the pertinent continuity on the above programs to Governor Brown and should have offered a comparable opportunity for an appropriate spokesman to answer the broadcasts. (Times-Mirror, FCC 62-1130, 24 R.R. 404, Oct. 26, 1962; FCC 62-1109, 24 R.R. 407, Oct. 19, 1962.)

26. Personal attacks on, and criticism of, candidate; partisan position on campaign issues -- appropriate spokesman. See facts above. The question was raised whether the candidate has the right to insist upon his own appearance, to respond to the broadcasts in question.

Ruling. Since a response by a candidate would, in turn, require that equal opportunities under Section 315 be afforded to the other legally-qualified candidates for the same office, the fairness doctrine requires only that the licensee afford the attacked candidate an opportunity to respond through an appropriate spokesman. The candidate should, of course, be given a substantial voice in the selection of the spokesman to respond to the attack or to the statement of support. (Times-Mirror Bcstg. Co., FCC 62-1130, 24 R.R. 404, 406, Oct. 19, 1962, Oct. 26, 1962.)

27. Personal attacks on, and criticism of, candidate; partisan position on campaign issues. During the fall of an election year, a news commentator on a local affairs program made several critical and uncomplimentary references to the actions and public positions of various political and non-partisan candidates for public office and of the California Democratic Clubs and demanded the resignation of an employee of the staff of the County Superintendent of Schools. In response to a request for time to respond by the local Democratic Central Committee, and after negotiations between the licensee and

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the complaining party, the licensee offered two five-minute segments of time on November 1 and 2, 1962, and instructed its commentator to refrain from expressing any point of view on partisan issues on November 5, or November 6, election eve and election day, respectively.

Ruling. On the facts of this case, the comments of the news commentator constituted personal attacks on candidates and others and involved the taking of a partisan position on issues involved in a race for political office. Therefore, under the ruling of the Times-Mirror case, the licensee was under an obligation to "send a transcript of the pertinent continuity in each such program to the appropriate candidates immediately and [to] offer a comparable opportunity for an appropriate spokesman to answer the broadcast." However, upon the basis of the showing, the licensee's offer of time, in response to the request, was not unreasonable under the fairness doctrine. (Letter to The McBride Industries, Inc., FCC 63-756, July 31, 1963.)

F. Licensee Editorializing.

28. Freedom to editorialize. The Editorializing Report and the 1960 Programming Statement, while stating that the licensee is not required to editorialize, make clear that he is free to do so, but that if he does, he must meet the requirements of the fairness doctrine.

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Adopted: July 1, 1964

REPORT ON EDITORIALIZING BY LICENSEES

In the Matter of)
) Docket No. 8516
Editorializing by Broadcast Licensees)

REPORT OF THE COMMISSION

By the Commission: (Chairman Coy and Commissioner Walker not participating; additional views by Commissioner Webster; separate opinion by Commissioner Jones; Commissioner Hennock dissenting.)

[¶91:21] 1. This Report is issued by the Commission in connection with its hearings on the above entitled matter held at Washington, D. C. on March 1, 2, 3, 4, and 5 and April 19, 20, and 21, 1948. The hearing had been ordered on the Commission's own motion on September 5, 1947, because of our belief that further clarification of the Commission's position with respect to the obligations of broadcast licensees in the field of broadcasts of news, commentary and opinion was advisable. It was believed that in view of the apparent confusion concerning certain of the Commission's previous statements on these vital matters by broadcast licensees and members of the general public, as well as the professed disagreement on the part of some of these persons with earlier Commission pronouncements, a reexamination and restatement of its views by the Commission would be desirable. And in order to provide an opportunity to interested persons and organizations to acquaint the Commission with their views, prior to any Commission determination, as to the proper resolution of the difficult and complex problems involved in the presentation of radio news and comment in a democracy, it was designated for public hearing before the Commission en banc on the following issues:

note linkage

"1. To determine whether the expression of editorial opinions by broadcast station licensees on matters of public interest and controversy is consistent with their obligations to operate their stations in the public interest.

2. To determine the relationship between any such editorial expression and the affirmative obligation of the licensees to insure that a fair and equal presentation of all sides of controversial issues is made over their facilities."

2. At the hearings testimony was received from some 49 witnesses representing the broadcasting industry and various interested organizations and members of the public. In addition, written statements of their position on the matter were placed into the record by 21 persons and organizations who were unable to appear and testify in person. The various witnesses and statements brought forth for the Commission's consideration, arguments on every side of both of the questions involved in the hearing. Because of the importance of the issues considered in the hearing, and because of the possible confusion which may have existed in the past concerning the policies applicable to the matters which were the subject of the hearing, we have deemed it advisable to set forth in detail and at some length our

conclusions as to the basic considerations relevant to the expression of editorial opinion by broadcast licensees and the relationship of any such expression to the general obligations of broadcast licensees with respect to the presentation of programs involving controversial issues.

3. In approaching the issues upon which this proceeding has been held, we believe that the paramount and controlling consideration is the relationship between the American system of broadcasting carried on through a large number of private licensees upon whom devolves the responsibility for the selection and presentation of program material, and the Congressional mandate that this licensee responsibility is to be exercised in the interests of, and as a trustee for the public at large which retains ultimate control over the channels of radio and television communications. One important aspect of this relationship, we believe, results from the fact that the needs and interests of the general public with respect to programs devoted to news commentary and opinion can only be satisfied by making available to them for their consideration and acceptance or rejection, of varying and conflicting views held by responsible elements of the community. And it is in the light of these basic concepts that the problems of insuring fairness in the presentation of news and opinion and the place in such a picture of any expression of the views of the station licensee as such must be considered.

4. It is apparent that our system of broadcasting, under which private persons and organizations are licensed to provide broadcasting service to the various communities and regions, imposes responsibility in the selection and presentation of radio program material upon such licensees. Congress has recognized that the requests for radio time may far exceed the amount of time reasonably available for distribution by broadcasters. It provided, therefore, in §3(h) of the Communications Act that a person engaged in radio broadcasting shall not be deemed a common carrier. It is the licensee, therefore, who must determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues, rather than to the other legitimate services of radio broadcasting, and who must select or be responsible for the selection of the particular news items to be reported or the particular local, state, national or international issues or questions of public interest to be considered, as well as the person or persons to comment or analyze the news or to discuss or debate the issues chosen as topics for radio consideration. "The life of each community involves a multitude of interests some dominant and all pervasive such as interest in public affairs, education and similar matters and some highly specialized and limited to few. The practical day-to-day problem with which every licensee is faced is one of striking a balance between these various interests to reflect them in a program service which is useful to the community, and which will in some way fulfill the needs and interests of the many." Capital Broadcasting Company, 4 Pike & Fischer RR 21; The Northern Corporation (WMEX), 4 Pike & Fischer RR 333, 338. And both the Commission and the Courts have stressed that this responsibility devolves upon the individual licensees, and can neither be delegated by the licensee to any network or other person or group, or be unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments. National Broadcasting Company v. United States, 319 U.S. 190 (upholding the Commission's Chain Broadcasting Regulations, §§3.101-3.108, 3.231-3.238, 3.631-3.638), Churchill Tabernacle v. Federal Communications Commission, 160 F. (2d) 244, (See, Rules and Regulations, §§3.109, 3.239,

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3.639); Allen T. Simmons v. Federal Communications Commission, 169 F. (2d) 670, certiorari denied 335 U.S. 846.

5. But the inevitability that there must be some choosing between various claimants for access to a licensee's microphone, does not mean that the licensee is free to utilize his facilities as he sees fit or in his own particular interests as contrasted with the interests of the general public. The Communications Act of 1934, as amended, makes clear that license are to be issued only where the public interest, convenience or necessity would be served thereby. And we think it is equally clear that one of the basic elements of any such operation is the maintenance of radio and television as a medium of freedom of speech and freedom of expression for the people of the nation as a whole. Section 301 of the Communications Act provides that it is the purpose of the Act to maintain the control of the United States over all channels of interstate and foreign commerce. Section 326 of the Act provides that this control of the United States shall not result in any impairment of the right of free speech by means of such radio communications. It would be inconsistent with these express provisions of the Act to assert that, while it is the purpose of the Act to maintain the control of the United States over radio channels, but free from any regulation or condition which interferes with the right of free speech, nevertheless persons who are granted limited rights to be licensees of radio stations, upon a finding under §§307(a) and 309 of the Act that the public interest, convenience, or necessity would be served thereby, may themselves make radio unavailable as a medium of free speech. The legislative history of the Communications Act and its predecessor, the Radio Act of 1927 shows, on the contrary, that Congress intended that radio stations should not be used for the private interest, whims, or caprices of the particular persons who have been granted licenses, but in a manner which will serve the community generally and the various groups which make up the community. 1/ And the courts have consistently upheld Commission action giving recognition to and fulfilling that intent of Congress. KFAB Broadcasting Association v. Federal Radio Commission, 47 F. (2d) 670; Trinity Methodist Church, South v. Federal Radio Commission, 62 F. (2d) 850, certiorari denied, 288 U.S. 599.

1/ Thus in the Congressional debates leading to the enactment of the Radio Act of 1927 Congressman (later Senator) White stated (67 Cong. Rec. 5479, March 12, 1926):

> "We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will, may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual to use the ether* * *
>
> The recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest or would contribute to the development of the art. This principle was approved by

6. It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. Basically, it is in recognition of the great contribution which radio can make in the advancement of this purpose that portions of the radio spectrum are allocated to that form of radio communications known as radio-broadcasting. Unquestionably, then, the standard of public interest, convenience and necessity as applied to radio-broadcasting must be interpreted in the light of this basic purpose. The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. 2/ It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

7. This affirmative responsibility on the part of broadcast licensees to provide a reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues has been reaffirmed by this Commission in a long series of decisions. The United Broadcasting Company (WHKC) case, 10 FCC 675, emphasized that this duty includes the making of reasonable provision for the discussion of controversial issues of public importance in the community served, and to make sufficient time available for full discussion thereof. The Scott case, 3 Pike & Fischer RR 259, stated our conclusions that this duty extends to all subjects of substantial importance to the community coming within the scope of free discussion under the First Amendment without regard to personal views and opinions of the licensees on the matter, or any determination by the licensee as to the possible unpopularity of the views to be expressed on the subject matter to be discussed among particular elements of the station's listening audience. Cf. National Broadcasting Company v. United States, 319 U.S. 190;

1/ (Continued)

> every witness before your committee. We have written it into the bill. If enacted into law, the broadcasting privilege will not be a right to selfishness. It will rest upon an assurance of public interest to be served." (Emphasis added)

And this view that the interest of the listening public rather than the private interests of particular licensees was reemphasized as recently as June 9, 1948 in a unanimous report of the Senate Committee on Interstate and Foreign Commerce on S. 1333 (80th Cong.) which would have amended the present Communications Act in certain respects. See S. Rep't No. 1567, 80th Cong. 2nd Sess., pp. 14-15.

2/ Cf. Thornhill v. Alabama, 310 U.S. 88, 95, 102; Associated Press v. United States, 326 U.S. 1, 20.

Allen T. Simmons, 3 Pike & Fischer RR 1029, affirmed, Simmons v. Federal Communications Commission, 169 F. (2d) 670, certiorari denied, 335 U.S. 846, Bay State Beacon, 3 Pike & Fischer RR 1455, affirmed, Bay State Beacon v. Federal Communications Commission, U.S. App. D.C., decided December 20, 1948; Petition of Sam Morris, 3 Pike & Fischer RR 154, Thomas N. Beach, 3 Pike & Fischer RR 1784. And the Commission has made clear that in such presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise. Mayflower Broadcasting Co., 8 F.C.C. 333; United Broadcasting Co. (WHKC) 10 F.C.C. 515; cf. WBNX Broadcasting Co., Inc. 4 Pike & Fischer RR 244 (Memorandum Opinion). Only where the licensee's discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be afforded radio time can radio be maintained as a medium of freedom of speech for the people as a whole. These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public.

8. It has been suggested in the course of the hearings that licensees have an affirmative obligation to insure fair presentation of all sides of any controversial issue before any time may be allocated to the discussion or consideration of the matter. On the other hand, arguments have been advanced in support of the proposition that the licensee's sole obligation to the public is to refrain from suppressing or excluding any responsible point of view from access to the radio. We are of the opinion, however, that any rigid requirement that licensees adhere to either of these extreme prescriptions for proper station programming techniques would seriously limit the ability of licensees to serve the public interest. "Forums and round-table discussions, while often excellent techniques of presenting a fair cross section of differing viewpoints on a given issue, are not the only appropriate devices for radio discussion, and in some circumstances may not be particularly appropriate or advantageous." Moreover, in many instances the primary "controversy" will be whether or not the particular problem should be discussed at all; in such circumstances, where the licensee has determined that the subject is of sufficient import to receive broadcast attention, it would obviously not be in the public interest for spokesmen for one of the opposing points of view to be able to exercise a veto power over the entire presentation by refusing to broadcast its position. Fairness, in such circumstances might require no more than that the licensee make a reasonable effort to secure responsible representation of the particular position and, if it fails in this effort, to continue to make available its facilities to the spokesmen for such position in the event that, after the original programs are broadcast, they then decide to avail themselves of a right to reply to present their contrary opinion. It should be remembered, moreover that discussion of public issues will not necessarily be confined to questions which are obviously controversial in nature, and, in many cases, programs initiated with no thought on the part of the licensee of their possibly controversial nature will subsequently [illegible] controversy and opposition of a substantial nature which will merit presentation of opposing views. In such cases, however, fairness can be preserved without undue difficulty since the facilities of the station can

be made available to the spokesmen for the groups wishing to state views in opposition to those expressed in the original presentation when such opposition becomes manifest.

9. We do not believe, however, that the licensee's obligations to serve the public interest can be met merely through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time. If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views. It is clear that any approximation of fairness in the presentation of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints.

10. 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. Undoubtedly, over a period of time some licensees may make honest errors of judgment. But there can be no doubt that any licensee honestly desiring to live up to its obligation to serve the public interest and making a reasonable effort to do so, will be able to achieve a fair and satisfactory resolution of these problems in the light of the specific facts.

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

as defined above, to operation in the public interest, is not identical with the broader problem of assuring "fairness" in the presentation of news, comment or opinion, but is rather one specific facet of this larger problem.

12. It is clear that the licensees' authority to determine the specific programs to be broadcast over his station gives him an opportunity, not available to other persons, to insure that his personal viewpoint on any particular issue is presented in his station's broadcasts, whether or not these views are expressly identified with the licensee. And, in absence of governmental restraint, he would, if he so chose, be able to utilize his position as a broadcast licensee to weight the scales in line with his personal views, or even directly or indirectly to propagandize in behalf of his particular philosophy or views on the various public issues to the exclusion of any contrary opinions. Such action can be effective and persuasive whether or not it is accompanied by any editorialization in the narrow sense of overt statement of particular opinions and views identified as those of licensee.

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

* * *

19. There remains for consideration the allegation made by a few of the witnesses in the hearing that any action by the Commission in this field enforcing a basic standard of fairness upon broadcast licensees necessarily constitutes an "abridgement of the right of free speech" in violation of the First Amendment of the United States Constitution. We can see no sound basis for any such conclusion. The freedom of speech protected against governmental abridgement by the First Amendment does not extend any privilege to government licensees of means of public communications to exclude the expression of opinions and ideas with which they are in disagreement. We believe, on the contrary, that a requirement that broadcast licensees utilize their franchises in a manner in which the listening public may be assured of hearing varying opinions on the paramount issues facing the American people is within both the spirit and letter of the First Amendment. As the Supreme Court of the United States has pointed out in the Associated Press monopoly case:

> "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.

Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not." (Associated Press v. United States, 326 U.S. 1 at p. 20.)

20. We fully recognize that freedom of the radio is included among the freedoms protected against governmental abridgement by the First Amendment. United States v. Paramount Pictures, Inc., 334 U.S. 131, 166. But this does not mean that the freedom of the people as a whole to enjoy the maximum possible utilization of this medium of mass communication may be subordinated to the freedom of any single person to exploit the medium for his own private interest. Indeed, it seems indisputable that full effect can only be given to the concept of freedom of speech on the radio by giving precedence to the right of the American public to be informed on all sides of public questions over any such individual exploitation for private purposes. Any regulation of radio, especially a system of limited licensees, is in a real sense an abridgement of the inherent freedom of persons to express themselves by means of radio communications. It is, however, a necessary and constitutional abridgement in order to prevent chaotic interference from destroying the great potential of this medium for public enlightenment and entertainment. National Broadcasting Company v. United States, 319 U.S. 190, 296; cf. Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266; Fisher's Blend Station, Inc. v. State Tax Commission, 277 U.S. 350. Nothing in the Communications Act or its history supports any conclusion that the people of the nation, acting through Congress, have intended to surrender or diminish their paramount rights in the air waves, including access to radio broadcasting facilities to a limited number of private licensees to be used as such licensees see fit, without regard to the paramount interests of the people. The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear and free alike from similar restraints by private licensees.

21. To recapitulate, the Commission believes that under the American system of broadcasting the individual licensees of radio stations have the responsibility for determining the specific program material to be broadcast over their stations. This choice, however, must be exercised in a manner consistent with the basic policy of the Congress that radio be maintained as a medium of free speech for the general public as a whole rather than as an outlet for the purely personal or private interests of the licensee. This requires that licensees devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community. The particular format best suited for the presentation of such programs in a manner consistent with the public interest must be determined by the licensee in the light of the facts of each individual situation. Such presentation may include the identified expression of the licensee's personal viewpoint as part of the more general presentation of views or comments on the various issues, but the opportunity of licensees to present such views as they may have on matters of controversy may not be utilized to achieve a partial or one-sided presentation of issues. Licensee editorialization is but one aspect of freedom of expression by means of radio. Only insofar as it is exercised in conformity with the paramount right of the

public to hear a reasonably balanced presentation of all responsible viewpoints on particular issues can such editorialization be considered to be consistent with the licensee's duty to operate in the public interest. For the licensee is a trustee impressed with the duty of preserving for the public generally radio as a medium of free expression and fair presentation.

Adopted: June 1, 1949
Released: June 2, 1949

The Listener's Right to Hear in Broadcasting*

When a tree falls deep in the forest and there is no one to hear it, is there a sound? The answer, of course, depends on whether one defines "sound" as mere vibrational energy or the actual sensation of hearing. The second definition requires a listener.

Speech is articulate sound whose function likewise presumes the existence of a listener. Yet in the development of constitutionally protected free speech, courts and commentators have concentrated on the rights of speakers[1] and have only occasionally acknowledged the reciprocal role and rights of listeners.[2] There is a practical explanation: Only the speaker can initiate speech; the listener cannot compel another person either to think or to articulate an idea.

In the broadcasting industry, the listener is supposed to hold an especially privileged position.[3] In fact, however, the program tastes and needs of some portions of the listening public, especially minority and special interest groups, are not well reflected in the total choice of programs available.[4] This situation is not so much a function of the industry's insensitivity as it is a fundamental flaw in the way the market mechanism works in broadcasting.

Within the present market mechanism, advertisers, rather than listeners, networks, or the FCC, have the primary influence in determining the types of programs that are broadcast. Programs are sponsored by advertisers for their likely sales results, and this means gaining the largest possible audience with programs aimed at the lowest common denominator of listener inter-

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* This Note derives from a paper prepared for a course on the economics of the mass media taught by Assistant Professor David Grey, Department of Communications, and Acting Assistant Professor Bruce Owen, Department of Economics, Stanford University. The author gratefully acknowledges their assistance.

1. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Roth v. United States, 354 U.S. 476 (1957); Dennis v. United States, 341 U.S. 494 (1951); Craig v. Harney, 331 U.S. 367 (1947); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919). Defendants in each of these cases were speakers, writers, and other message initiators. *See also* W. HOCKING, FREEDOM OF THE PRESS 79–134 (1947) (discussing freedom of press as freedom for speakers).

2. *See, e.g.*, Joseph v. FCC, 404 F.2d 207 (D.C. Cir. 1968); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). *See also* W. HOCKING, *supra* note 1, at 161–93 (discussing the roles of listener and reader in freedom of speech and press).

3. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). The Supreme Court recognized very early the role of listeners in broadcasting in *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650, 655 (1936): "The essential purpose and indispensable effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners." Until recently, however, no significant consequences resulted from this early recognition.

4. Rothenberg, *Consumer Sovereignty and the Economics of Television Programming*, 4 STUDIES IN PUBLIC COMMUNICATION 45, 49 (1962).

Reprinted from the *Stanford Law Review*, Volume 22, No. 4, April 1970

ests. Economist Jerome Rothenberg has summarized the situation as follows: "The television market *is* quite different from that of most commodities. A television program presumably benefits the listening audience, yet the market transaction is one where the station or network sells the program not to this audience but to advertisers."[5] According to Rothenberg, advertiser-supported programing fits not the majority choice but the modal choice—that is, the largest number of listeners who have the same high preferences. The first choices of some people may be specialized and idiosyncratic programs that other listeners would rank as very low choices. The only types of programs that most groups rank in middling positions will be relatively undifferentiated programs. These programs are noncontroversial, neither especially interesting nor uninteresting, and on the beaten path—in other words, the lowest common denominator.[6] These programs can outdraw any of the high choice programs in terms of audience size because most viewers will watch them even though they are second or third choices, rather than watch another listener's first-choice specialty program. Thus, neither majority nor minority tastes are being satisfied.

In normal competitive market situations, consumers can use their dollars to designate what specific items they want to purchase and what manufacturers ought to produce. In the broadcasting market, on the other hand, listeners have only an indirect and nonspecific influence on what programs are aired, since advertisers do the purchasing for listeners. Advertisers' dollars are like electoral votes in a presidential election; both are once-removed approximations of what the majority would choose if it could participate directly. In both cases, the minority has no alternative to the majority choice. The result is that while a magazine with a potential audience of only a few thousand will get published, a great play on network television with a potential audience of "only" 10 million may never be shown if the majority of all viewers would prefer a situation comedy. Listener dissatisfaction with this failure of the market mechanism to respond to minority program preferences has resulted in increased pressure through the FCC and the courts for more regulation to force diversity of programs and information.

Until recently, listeners have been largely unorganized and have not often participated directly in deliberations before the courts and the FCC. Like other consumers, they have lacked the feeling of common identity and shared self-interest necessary to initiate collective action. Formerly, the only way members of the listening public could directly state their views on programing deficiencies was through individual complaint letters to the licensees and the FCC.

5. *Id.* at 46.
6. *Id.* at 49.

Then in 1966, the federal courts gave standing at a license-renewal hearing to listeners who objected to racist broadcasts and the absence of programs relevant to the large black community.[7] Subsequently, there has been a burgeoning whirlwind of activity by and on behalf of listeners: In Chicago a group of listeners fought the loss of classical music; an individual lawyer obtained an FCC ruling requiring stations to inform listeners of the health hazards of cigarette smoking; a White House conference on nutrition proposed that stations be required to devote 10 percent of their air time to public service communications of the federal government; a group of business executives filed a complaint with the FCC arguing that the refusal of stations to sell time for informational programs opposing American policy in Vietnam violates the public's first amendment right to hear all forms of political speech; and the Democratic National Committee petitioned the FCC for guaranteed network advertising time, claiming that networks and stations have a legal and moral duty to provide more time for public interest programing.[8]

One of the most important developments thus far in encouraging listeners' efforts to exert greater control over the diversity of broadcast programming is the Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*.[9] In its unanimous holding, the Court upheld the constitutionality of the FCC's "fairness doctrine," and in dictum it laid the basis for a listener's right to hear. In the wake of *Red Lion*, listener groups have a choice of two strategic plans to increase their power: They can continue their present course of pressing for incremental gains through increased regulation within the existing broadcast system, or they can seek to change the economic structure of the industry to one in which groups can influence program choice more directly.

The thesis of this Note is that despite the Supreme Court's encouragement in *Red Lion*, it will be extremely difficult for listeners to force broadcasters or the FCC to fashion an adequate regulatory remedy, given the present advertiser-dominated nature of the industry. Only by converting the economic structure of the industry from over-the-air television broadcasting to cable television (CATV) on a common-carrier basis can the listeners exercise their right to hear with minimal interference from advertisers, broadcasters, or the Government. In developing this thesis, the Note first examines the possible development and probable dimensions of the right to hear. It then discusses the implications of FCC program regulation

7. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

8. Joseph v. FCC, 404 F.2d 207 (D.C. Cir. 1968); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968); BROADCASTING, Jan. 12, 1970, at 50; Citizens Communications Center, Washington, D.C., A Progress Report, March 15, 1970, at 2–3; N.Y. Times, May 20, 1970, at 1, col. 7, & 20, col. 1.

9. 395 U.S. 367 (1969).

and the problems of enforcing alternative regulatory measures detrimental to the economic self-interest of broadcasters. Finally, it enumerates some of CATV's advantages for listeners and suggests possible strategies for overcoming the formidable resistance of broadcasters to CATV.

I. The Development and Dimensions of the Right to Hear

A. *Red Lion*

The Red Lion Broadcasting Company, the licensee of a Pennsylvania radio station, broadcast a program called "Christian Crusade" in which Reverend Billy James Hargis personally attacked a political writer named Fred Cook. When Cook's request for free reply time was refused, he brought suit, basing his action on the FCC's personal-attack rules of the fairness doctrine. These rules require that when a person's honesty, character, or integrity is attacked on the air, the station must notify the person attacked, submit a tape or transcript of the offending program, and offer him free time for reply.[10] The fairness doctrine itself requires licensees of the radio and television stations to balance the broadcast opportunities given differing viewpoints on controversial issues.[11] The doctrine had no specific statutory basis until Congress recognized it in the 1959 amendment to Section 315 of the Federal Communications Act of 1934.[12]

The Court of Appeals for the District of Columbia Circuit sustained the constitutional validity of the FCC's rules and required Red Lion Broadcasting to supply time for a reply.[13] In *Radio Television News Directors Association v. FCC*,[14] however, the Court of Appeals for the Seventh Circuit contemporaneously struck down the personal-attack rules as unconstitutionally burdensome and vague. The Supreme Court consolidated these two cases to resolve the different interpretations. Speaking for a unanimous Court, Justice White upheld the personal-attack rules, declaring that both these rules and the fairness doctrine itself enhance rather than abridge first amendment freedoms of speech and press.[15]

The most noteworthy aspect of *Red Lion* is Justice White's gratuitous treatment of the relationship between the listener and the broadcast licensee. His words are provocative and their implications far-reaching:

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10. Times-Mirror Broadcasting Co., 24 P & F Radio Reg. 404 (FCC 1962); 32 Fed. Reg. 11,531 (1967); 33 Fed. Reg. 5362 (1968).

11. Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10,415 (1964).

12. Act of Sept. 14, 1959, Pub. L. No. 86–274, § 1, 73 Stat. 557, *amending* 47 U.S.C. § 315(a) (1964) (codified at 47 U.S.C. § 315(a)).

13. Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1968), *aff'd*, 395 U.S. 367 (1969).

14. 400 F.2d 1002 (7th Cir. 1968), *rev'd*, 395 U.S. 367 (1969).

15. 395 U.S. at 392–95.

> It is the right of the viewers and listeners, not the right of the broadcaster, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or by the FCC.[16]

B. *The Right of Access*

In analyzing this statement, it is essential at the outset to distinguish between the right to hear and the right to have access to the media.[17] In the past the right of media access has referred primarily to transmission of messages. The right has been regarded as an extension of freedom of speech; minority groups and other aspiring speakers should have the right, the argument ran, to use the technical apparatus of the media, which provides the only way to reach a mass audience.[18]

By granting a person attacked on the media the opportunity to reply, the main holding in *Red Lion* supports this traditional right of access.[19] The Court in dictum goes substantially beyond this holding, however, to discuss the "right to receive social, political, esthetic, moral, and other ideas and experiences"—the right to hear. In this language, the Court has focused not on the right of media access—not, that is, on the right of aspiring speakers to send messages—but rather on the right of usually passive listeners to receive messages that they choose to receive. As FCC Commissioner Nicholas Johnson noted in a recent speech to Washington, D.C., journalists, the first amendment ". . . protects not just the right of the press to speak but the right of the people to hear. It protects our rights to receive information, as well as the right of the newsman to gather and write about it . . . ."[20]

Unlike the right of access, which is an extension of freedom of speech, the right to hear is the reciprocal of freedom of speech. The right to hear implies that owners of the mass media have an affirmative obligation to

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16. *Id.* at 390.

17. *See* Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Note, *The Federal Communications Commission's Fairness Regulations: A First Step Towards Creation of a Right of Access to the Mass Media*, 54 CORNELL L. REV. 294 (1969); Comment, *The Red Lion Case: An Opportunity for First Amendment Reappraisal*, 29 U. PITT. L. REV. 691 (1968).

18. *See, e.g.*, Barron, *An Emerging First Amendment Right of Access to the Media*, 37 GEO. WASH. L. REV. 487 (1969); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

19. *See* 395 U.S. at 392–95. The Court further supports the right of access as follows: "[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." *Id.* at 389.

20. Address by Nicholas Johnson to a meeting of former Nieman Fellows in Washington, D.C., Feb. 12, 1970, *in* N.Y. Times, Feb. 13, 1970, at 18, col. 1.

provide listeners with a certain range of ideas and experiences. Presumably this obligation would accrue even when no aspiring speaker has yet sought access to the media. If so, a broadcaster may not assume that his obligation ends when he permits aspiring speakers to use the media. The right to hear suggests that a broadcast station has an affirmative obligation to recruit spokesmen for, or offer its own interpretation of, a viewpoint or event that viewers desire to learn about.[21] Moreover, some program areas included in the right to hear—for example, "esthetic experiences"—go beyond the scope of the traditional right of access, inasmuch as these areas involve no spokesmen seeking access. In short, the right may require that broadcasters satisfy listeners' desires to receive a range of ideas and experiences broader than what they may hear from speakers who have obtained use of the media through the right of access.

Neither the advocates of the right of access nor the *Red Lion* opinion has differentiated between the right of access and the right to hear. It is particularly unfortunate that Justice White further blurs the concepts by using the word "access" in the context of the listener's right to receive various ideas and experiences. He does seem on the verge of elucidating the difference between the two rights when he notes that there are two distinct groups involved: "[T]he Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech . . . ."[22] Unfortunately, he never makes the distinction between the two rights explicit, as he might have done by pointing out that the right of access concerns those few "others whose views should be expressed," whereas the right to hear concerns those many members of "the people as a whole" who qualify as listeners. The majority of the "people as a whole" have no inclination to express their views through access to the media; yet insofar as they are listeners, they "retain their interest" to choose to receive not only both sides of controversial questions but also a full range of ideas and experiences.

C. *Sources of the Right to Hear*

Although Justice White cites no case support for the proposition that listeners have a "right to receive . . . ideas and experiences," a number of sources—such as various interpretations of the first amendment, FCC pronouncements, and congressional communications policy—lend some support to the Court's assertion that a right to hear exists. As one possible foundation for the right to hear, the Court specifically suggests that "[i]t

21. The FCC appears to be moving toward an explicit statement of this affirmative obligation. The Commission is considering strengthening the fairness doctrine by specifically requiring broadcasters who are airing controversial views to seek out appropriate spokesmen of differing positions if they do not voluntarily come forward to reply. Wall Street Journal, May 18, 1970, at 16, col. 10.

22. 395 U.S. at 390.

is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[23]

The concept of the marketplace of ideas as articulated by John Milton, John Stuart Mill, Oliver Wendell Holmes, and others might still serve as an idealized model to contrast against existing conditions.[24] Without elaboration, however, the concept is only a slogan and not an adequate foundation for the right to hear. As Walter Lippmann has noted, the mass media are not particularly well suited to the dialectical process of finding truth.[25] Most people listen to radio and television sporadically and will not hear the essential evidence and the main arguments on all sides of an issue. Moreover, the idea that radio and television currently provide a marketplace of ideas and that they are producing truth is a myth; if there is a marketplace, it is at best an imperfect market. The broadcasting industry does not and cannot provide *the* truth; even with the best of efforts of most current broadcasters, the listener must still work vigorously for it.[26] Distortion by suppression, emphasis, and inadequate depth is endemic to all communication. In furthering the "marketplace of ideas," the Court may be attempting to encourage diversity rather than "truth." There is a presumption that the more ideas available, the better—though of course at some point more ideas will add to confusion rather than enlightenment. The problem with the current state of broadcast programing, however, is not too many ideas but too few.

In the ordinary competitive supermarket, the owner responds directly to both majority and significant minority customer desires and provides a diversity of products to meet all tastes. But in radio and television the Government has decreased the broadcasters' ability to respond directly to the minority of listeners by limiting the number of channels and allowing advertisers to dominate the media.[27] Where normal competitive forces do not produce a wide variety of views, perhaps the first amendment notion of a marketplace of ideas requires the Government to intervene once again, this time in behalf of the listeners' right to hear. Quoting from *Red Lion*, the Court of Appeals for the District of Columbia recently implied that the FCC has an affirmative duty to enforce diverse programing:

> Thus *the Commission must seek to assure* that the listening and viewing public will be exposed to a wide variety of "social, political, esthetic, moral, and other

23. *Id.*
24. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); J. MILL, ON LIBERTY 9–32 (People's ed. 1926); J. MILTON, AREOPAGITICA (1644).
25. W. LIPPMANN, THE PUBLIC PHILOSOPHY 99 (Mentor ed. 1955).
26. *See* W. HOCKING, *supra* note 1, at 148–49.
27. *See* text accompanying notes 4–6 *supra*.

> ideas and experiences." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). In seeking to provide the broadcasting media with the *diversity demanded by the first amendment*, however, the Commission must avoid the perils of both inaction and overzealousness—of abdication which would allow those possessing the most economic power to dictate what may be heard, and of censorship which would allow the government to control the ideas communicated to the public. The need to make choices of this kind *requires the Commission to take some cognizance of the kind and content of programs being offered to the public.*[28]

Red Lion suggests a second goal of the first amendment, which could also be interpreted to require governmental enforcement of the listeners' right to hear. This goal is to produce "an informed public capable of conducting its own affairs."[29] This interpretation of the amendment corresponds closely to the view of Alexander Meiklejohn, who stresses that "the point of ultimate interest is not the words of the speakers but the minds of the hearers."[30] The Warren Court apparently adopted the Meiklejohn view in other cases.[31] Yet, perhaps despairing that the courts would ever evolve the full interpretation he felt essential, Meiklejohn penned an addition to the first amendment, suggesting that Congress should have the power to provide for the intellectual and cultural education of all the citizens of the United States.[32] *Red Lion* perhaps takes one step toward Meiklejohn's broadened view of the first amendment by asserting the listeners' right to hear in the broadcasting context.

Besides these possible first amendment foundations for the right to hear, the Court bases the general regulation of the broadcast industry on the scarcity of spectrum space and the need to coordinate its use.[33] At the end of the opinion, Justice White hints that there are other rationales for regulation that the Court might employ as the emergence of new stations weakens the scarcity argument: "Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest."[34] The Court does not elaborate on these other rationales, and thus the legal basis of the right to hear remains subject to considerable speculation.

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28. National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 207 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970) (emphasis added).

29. 395 U.S. at 392.

30. A. MEIKLEJOHN, POLITICAL FREEDOM 26 (1960).

31. *See* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUPREME COURT REV. 191, 209, 221. Professor Kalven states that the Supreme Court first used Meiklejohn's interpretation, based on the public's right to be informed, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See also* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

32. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1675–76 (1967). The amendment had previously appeared in Ferry, *Masscomm as Educator*, 35 AM. SCHOLAR 293, 300 (1966). Ferry obtained the proposed amendment from an unpublished paper by Alexander Meiklejohn for the Center for the Study of Democratic Institutions.

33. 395 U.S. at 375–99.

34. *Id.* at 400.

A sub rosa basis for the Court's dictum may have been the FCC's 1949 Report on Editorializing by Broadcast Licensees, which Justice White cites earlier in *Red Lion*.[35] The Report's conclusion closely approximates the Court's: "It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting."[36]

To find any case-law support for the right to hear, it is necessary to look beyond decisions involving broadcasting to cases involving the analogous right to receive printed material. In *Martin v. Struthers*,[37] for instance, Justice Black stated: "The right of freedom of speech and press has broad scope. . . . This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it."[38] More recently, the Court has protected the right to receive birth control literature[39] and Communist propaganda through the mails.[40] The reader's right to receive printed literature that has already been published, however, is not the same as the listener's right to hear programs that do not yet exist; and there are no cases asserting the legal right of readers to have a say in what is printed which would precisely parallel the listener's right to have a say in what is broadcast.

Another related right is the right to know, which journalists have asserted on behalf of the public when confronted with libel suits. *New York Times Co. v. Sullivan*[41] set the tone for the present trend in libel law by giving newspapers liberal protection in printing any information of public interest, so long as it is not known to be false and is published without malicious intent. In *Garrison v. Louisiana*,[42] the Court extended this libel protection, holding that the interest in private reputation is outweighed by the greater public interest in dissemination of truth. *Time, Inc. v. Hill*[43] stated that a family's right of privacy had to give way to the rights of the press and the public right to know. In each of these libel cases, the media asserted the right to be informed on behalf of the public, whereas in some broadcasting cases the media have rejected this same right when asserted by listeners in their own behalf.

35. 13 F.C.C. 1246 (1949), *cited in* 395 U.S. at 377.

36. 13 F.C.C. at 1249. Even before the FCC was created, Herbert Hoover, then Secretary of Commerce, stated: "[T]here are two parties to freedom of the air, and to freedom of speech for that matter. . . . Certainly in radio I believe in freedom for the listener. He has much less option upon what he can reject, for the other fellow is occupying his receiving set. The listener's only option is to abandon his right to use his receiver. . . . The dominant element for consideration in the radio field is, and always will be, the great body of the listening public. . . ." Address by Herbert Hoover to the Fourth National Radio Conference, Nov. 9, 1925, in FCC, OFFICE OF NETWORK STUDY, SECOND INTERIM REPORT ON TELEVISION NETWORK PROCUREMENT pt. II, at 80 (1965).

37. 319 U.S. 141 (1943).

38. *Id.* at 143.

39. Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

40. Lamont v. Postmaster General, 381 U.S. 301, 308 (1965).

41. 376 U.S. 254 (1964).

42. 379 U.S. 64 (1964).

43. 385 U.S. 374 (1967).

The media have also asserted the right to know when confronted with Government secrecy.[44] Kent Cooper, a former Executive Director of the Associated Press, defines the right to know in this context as meaning that the Government may not, and the newspapers and broadcasters should not, curb delivery of any information essential to the public welfare and enlightenment.[45] At a recent "freedom of information conference," Irving Brant, a biographer of James Madison, told the assembled faithful that although the right to know is not spelled out in the Constitution in unmistakable terms, the entire document is built on the premise of the people's right to know.[46]

Since Justice White offered no citations supporting his dictum on the right to hear, it is uncertain how much if at all he relied on any of the potential sources discussed above, such as first amendment interpretations, FCC statements, and the somewhat related rights to receive literature and to know. Given the absence of supporting references, it is not even certain that the Court intended the right to hear to become a legally enforceable right. Clearly, however, the Court had a reason to assert the right to hear. The next section will examine what that underlying reason might be.

D. *Why a "Right to Hear"?*

It is unfortunate that the words "interest," "need," and "right" are sometimes used interchangeably, for the legal implications of a right are very different from the implications of a need or an interest.[47] Certainly in the colloquial sense, when people assert that the public has a certain "right," no legal implications necessarily follow. The declaration that a right exists may be simply an expression of concern that an influential institution should live up to its public responsibility.[48] But when a unanimous Supreme Court speaks of a "right" in the context of deciding the reach of the first amendment, possible legal consequences must be contemplated.

The opinion in *Red Lion* of the Court of Appeals for the District of Columbia asserted not a public right to hear, but rather a public *interest* in hearing the other side of a controversy.[49] Not only did this "interest"

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44. *See, e.g.*, H. Cross, The People's Right to Know (1953).

45. K. Cooper, The Right to Know 16 (1956).

46. Address by Irving Brant, Tenth Harold Cross Memorial Lecture, Dec. 4, 1967, Freedom of Information Center, Columbia, Missouri, in I. Brant, The Constitution and the Right to Know 1, 6, 8 (1968).

47. "Or to put the matter another way, it is useless to define free speech by talk about rights. . . . That is, in technical language, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right." Z. Chafee, Free Speech in the United States 31–32 (1941).

48. *See* W. Hocking, *supra* note 1, at 167.

49. *See* Letter from Ben F. Waple, Secretary of the FCC, to Rev. John H. Norris, Vice-President, Red Lion Broadcasting Co., *in* Red Lion Broadcasting Co. v. FCC, 381 F.2d 908, 916–17, *aff'd*, 395 U.S. 367 (1967).

become a "right" in the Supreme Court opinion, but it was also expanded to embrace the whole range of political, social, moral, and esthetic ideas and experiences, in addition to replies to personal attacks.[50]

In an earlier case Justice Black had opposed allowing judges to expand their powers through the creation of new rights.[51] Judicially created rights, he said, are hard to give up and threaten to balance away freedom of the press and other cherished freedoms.[52] For instance, the greater the weight given by courts to the right to hear, the less free exercise can be accorded the media's right of free press. If Justice Black opposed the creation of new rights, why did he not also oppose the assertion of the right to hear in *Red Lion*, when this new right was balanced against the rights of the press? Perhaps he and the rest of the Court felt that such a counter-balancing right was necessary to counteract the broadcasters' use of their first amendment immunity to exert sweeping control over what their essentially captive audience hears. By declaring the listener's right to hear to be paramount to the broadcaster's right, the Supreme Court has, in essence, enhanced the opportunity for listeners to assert a countervailing power that might check broadcasters' power.[53]

Justice White announced the Court's intention to watch developments closely:

> It would be better if the FCC's encouragement were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.[54]

Then Justice White issued a warning: "[I]f present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues."[55] This warning, coupled with the language declaring the right to hear, takes the Court well beyond the narrow holding that a person attacked on the air has a right of reply. The Court apparently feels that it is necessary, without offering any supporting precedents, to tell the broadcasting industry to give the listening

50. 395 U.S. at 390.
51. Time, Inc. v. Hill, 385 U.S. 374, 399–400 (1967).
52. *Id.*
53. In stating that the rights of the listeners are paramount, Justice White cites two cases, neither of which clearly supports his point. FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 361–62 (1955). *See also* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). "Under our system, the interests of the public are dominant. The commercial needs of licensed broadcasters and advertisers must be integrated into those of the public." *Id.* at 1003. Courts have given listeners preferred status because "[s]uch parties do not have the same sort of Washington representation to uncover threats to their interest, or deploy apparatus to combat them, as do parties whose interest is economic." Joseph v. FCC, 404 F.2d 207, 210 (D.C. Cir. 1968).
54. 395 U.S. at 393.
55. *Id.*

public a greater share in determining what programing they receive. The Court also prefers to reserve any further definition of the right to hear until broadcasters respond and the FCC thinks through the regulatory implications.

E. *Asserting the Right to Hear*

When the FCC begins to define, implement, and enforce the right to hear, one of the Commission's tasks will be to determine who can assert the right. The words in *Red Lion* say "viewers and listeners," but does this include individuals, groups, or a majority of the viewing and listening public? Probably the Court is referring to groups with representative listener interests, but, unfortunately, the failure in *Red Lion* to differentiate between the "listening public" and the public interest complicates the FCC's job. In the same general context the Court refers to "the people as a whole," then to "viewers and listeners," and finally to the "right of the public."[56] It would appear that the Court considers "viewers and listeners" and "the people as a whole" to be synonymous, but it does not follow that a group's interests are equivalent to the public interest.

The FCC is required by the Communications Act of 1934 to regulate the broadcast industry in the public interest,[57] but no single group should consider its interests to be identical with the public interest. According to Walter Lippmann, "the public interest may be presumed to be what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently."[58] Lippmann further contends that the public interest should be determined by policymaking experts, not by taking a Gallup Poll. By analogy, one might argue that neither should the FCC define the public interest by reference to program popularity as shown by Nielsen ratings. Yet some observers and Congressmen have virtually equated the public interest with that which interests the public.[59]

There are, after all, many interest groups represented in broadcasting: licensees, networks, sponsors, pressure groups, aspiring speakers seeking access to the medium, and members of the listening audience. Simply because persons in each of these interest groups may at some time become listeners does not make the totality of interest—that is, the public interest—synonymous with the listening public.[60] If Justice White has, nonetheless, equated listeners' and viewers' interests with "the public interest," the state-

56. *Id.* at 390.
57. 47 U.S.C. § 309(a) (1964).
58. W. LIPPMANN, *supra* note 25, at 40.
59. *See, e.g.*, E. SMEAD, FREEDOM OF SPEECH BY RADIO AND TELEVISION 102–06 (1959).
60. "The concept of 'the public' has not seemed meaningful. What is often referred to as 'the public' is really a great number of publics; each 'public' is interested in some issues but is profoundly apathetic about others. Interest groups are organized about concrete issues and interests." L. FRIEDMAN & S. MACCAULEY, LAW AND THE BEHAVIORAL SCIENCES 608 (1969).

ment that "[t]he right of the viewers and listeners, not the right of broadcasters, . . . is paramount"[61] is merely a truism. It is simply a statement that the overall public interest predominates over one particular interest.

A decision by Learned Hand provides some support for Justice White's position that the interests of listeners are paramount to those of licensees,[62] and at least one commentator has asserted that in the personal-attack and political-editorial contexts, the first amendment should serve first the listeners, next the speaker, then the person attacked, and finally the broadcast licensee.[63] In addition, although the FCC has never gone so far as to establish a ranking, it has given at least nominal deference to serving the listener. The Commission has required, among other things, that the holder of a broadcast license survey listeners and ". . . make a positive, diligent and continuing effort, in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests."[64] Recently, subtle changes have emphasized this requirement. For instance, FCC inquiries about programing are now listed under the heading "Ascertainment of Community Needs" rather than under "Ascertainment of Programing Needs."[65]

Thus, although the interests of listeners and viewers may not equal the "public interest" in all cases, their interests should be placed above those of the broadcast licensees. At any rate, the language in *Red Lion* implies that the Supreme Court believes this should be the case, and past FCC standards indicate that on paper, at least, the Commission would agree.[66] If listeners' interests are indeed to be paramount to those of broadcasters, the listeners must have an effective forum for expressing and vindicating their interests.

Responsible members of the listening public have been recognized recently in the *United Church of Christ* case as "aggrieved persons" who might have standing to vindicate the public interest even without a personal economic interest.[67] The court still requires several conditions, however,

61. 395 U.S. at 390.

62. National Broadcasting Co. v. United States, 47 F. Supp. 940 (S.D.N.Y. 1942), *aff'd on other grounds*, 319 U.S. 190 (1943). Judge Learned Hand stated: "The interests which the [FCC] regulations seek to protect are the very interests which the First Amendment itself protects, i.e. the interests, first, of the 'listeners,' next, of any licensees who may prefer to be freer of the 'networks' than they are, and last, of any future competing 'networks.' " 47 F. Supp. at 946.

63. Barrow, *The Equal Opportunity and Fairness Doctrines in Broadcasting: Pillars in the Form of Democracy*, 37 U. CIN. L. REV. 447, 523–24 (1968).

64. 25 Fed. Reg. 7291, 7295 (1960). In light of *Red Lion*, applicants for licenses might show that their proposed programing is not only balanced but also fulfills the listeners' right to receive social, political, moral, and esthetic ideas. Similarly, licensees seeking waivers of FCC rules might argue that a waiver would enhance not only their rights of speech but also the listeners' right to hear.

65. BROADCASTING, Oct. 27, 1969, at 40. An alternative to community surveys would be to ask licensees to enumerate the 10 most important social questions in their areas and to state what they had done about each of them. Obviously, this procedure would further remove the listener perspective from the FCC's determination of whether an individual licensee was performing in the public interest. *See* BROADCASTING, Mar. 2, 1970, at 5.

66. Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949).

67. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1000–02 (D.C. Cir. 1966).

in order for a listener group to be accorded standing. The group must represent a substantial number of listeners and have a genuine and legitimate interest in the programing of matters of particular public importance. In addition, the FCC retains broad discretionary power to dismiss petitions for intervention if, in spite of true allegations, the Commission feels that the license should be retained by the present holder. The FCC may also determine whether issues raised by intervenors are sufficiently relevant to allow these intervenors, rather than some other champion of the public interest, to serve as spokesmen.[68]

Some writers have pointed out that such discretionary conditions may be necessary to prevent a flood of listener litigation.[69] If the right to hear should receive recognition as a legally enforceable right, however, a single listener presumably might represent only himself and not the public interest.[70] In that case, he might not have to go through elaborate factfinding determinations to prove that he should have standing before the FCC.

It is not inconceivable that courts could, after *Red Lion*, open themselves to litigation from single listeners asserting the right to hear, but it seems more likely that they will retain the discretionary qualifications of *United Church of Christ*.[71] Even so, *Red Lion* complements *United Church of Christ* by providing the right to hear as additional support to representative listener groups claiming standing.

Listener groups wishing to assert the right to hear might file protests about programing at license-renewal hearings, attempt to initiate direct action through the FCC or the courts, or file competing applications for the license.[72] The Office of Communication of the United Church of Christ has already offered assistance to at least two community groups challenging licenses.[73] Another organization, the Citizens Communication Center in Washington, D.C., has recently begun to offer legal counsel to listener groups and public-interest–oriented license applicants.[74] The National Citi-

68. *Id.* at 1005–06. *See also* Note, *The Law of Administrative Standing and the Public Right of Intervention*, 1967 WASH. U.L.Q. 416, 425–26.

69. Comment, *Standing of Television Viewers to Contest FCC Orders: The Private Action Goes Public*, 66 COLUM. L. REV. 1511 (1966); Note, *Intervention by Third Parties in Federal Administrative Proceedings*, 42 NOTRE DAME LAWYER 71 (1966); 35 GEO. WASH. L. REV. 393 (1966); 80 HARV. L. REV. 670 (1966); 44 TEXAS L. REV. 1605 (1966).

70. *See* Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 286 (1961). Professor Jaffe suggests as a general proposition that legally protected interests should have standing as a matter of right. He does not personally favor holding comparative hearings at which new applicants can challenge the incumbent for his license, unless the FCC can first pinpoint the current licensee's failures. It is not clear how large a role he is willing to offer individuals or groups of listeners at renewal proceedings: "We can encourage the local publics to participate in renewal proceedings, as indeed some of them, particularly the blacks, are now doing. But ultimately there is a limit." Jaffe, *We Need the Pastore Bill*, THE NEW REPUBLIC Dec. 6, 1969, at 14, 16.

71. 359 F.2d at 1005–06.

72. BROADCASTING, June 30, 1969, at 21.

73. *Id.* at 22.

74. Interview with Albert H. Kramer, Executive Director of the Citizens Communications Center, Washington, D.C., at the Stanford Law School, Oct. 14, 1969.

zens Committee for Broadcasting is conducting a public campaign to persuade the FCC to review the performance of television stations in the top 150 markets,[75] and spirited license challenges have been appearing frequently in such major markets as New York, Los Angeles, Boston, Washington, D.C., and San Francisco.[76]

One writer foresees an imminent confrontation between the broadcast ownership system and community groups seeking to communicate with the public.[77] Increased public awareness suggests that present licensees will be expected to cater more solicitously to the full range of audience tastes and needs or face growing opposition.[78] If such a confrontation transpires, the development of the right to hear may well be a determinative factor in the outcome.

The National Association of Broadcasters (NAB) has called on the industry to present a united front as "the only effective answer to mounting attacks on broadcasting."[79] The broadcasting industry is well organized, and its interests are well represented by the NAB, by *Broadcasting* magazine, by the Federal Communications Bar Association, and by the locally influential licensees. Moreover, since political exposure over the airwaves is practically the *sine qua non* of election to Congress, few lawmakers are unmindful of broadcasting's power.[80] The only politicians who dare criticize the media with relative impunity are national leaders, such as Vice President Spiro Agnew, who are too prominent for the media to ignore.[81] The same may not be true for a Congressman whose reelection may depend in great measure on the amount and tone of the exposure obtained from his local television station. Such widespread political muscle plus historical first amendment limitations on regulation help make broadcasting perhaps second only to the defense industry as the nation's most potent lobby.

Because of broadcasting's strength in Congress a number of bills appeared in 1969 that attempted to protect incumbent licensees from the threat of competing applications.[82] The major bill, introduced by Senator John O. Pastore, the Chairman of the Senate Communications Subcommittee, would have required a finding by the Commission that a radio or tele-

75. BROADCASTING, June 30, 1969, at 21.

76. *Id.*, Sept. 8, 1969, at 25.

77. Remarks of Marcus Raskin, cofounder of the Institute for Policy Studies, Washington, D.C., *in* BROADCASTING, Oct. 6, 1969, at 37.

78. BROADCASTING, Oct. 6, 1969, at 36.

79. BROADCASTING, Oct. 27, 1969, at 44.

80. The relationship between some politicians and broadcasters might be described as a two-way umbilical cord: "It has been estimated that 70 percent of U.S. Senators and 60 percent of Representatives regularly utilize free time offered by their stations back home." R. MACNEIL, THE PEOPLE MACHINE 246 (1968). The politicians depend on the free time to assist in their reelection, and the broadcasters depend on politicians as the subject of "public affairs" programing that will help them renew their licenses before the FCC.

81. *See, e.g.*, address by Spiro T. Agnew to the Mid-West Regional Republican Committee at Des Moines, Iowa, Nov. 13, 1969, *in* N.Y. Times, Nov. 14, 1969, at 24, cols. 1–8.

82. *See, e.g.*, S. 2004, H.R. 12,350, H.R. 12,353, 91st Cong., 1st Sess. (1969).

vision licensee had not fulfilled its obligation of service in the public interest before the FCC could accept competing applicants in a license-renewal hearing.[83] In short, the existence of a challenger for a given license would no longer bring an automatic hearing at renewal time, and the existing licenseholder's performance would not always be compared to the promises of the challenger. Rather, the existing licensee would be presumptively entitled to a renewal unless the FCC could sustain the burden of showing why, in the public interest, a comparative hearing should take place.

A majority of FCC commissioners opposed the Pastore bill because they felt it would create too high a barrier to competing applicants.[84] Led by Dean Burch, the newly appointed Chairman of the FCC, the Commission issued a policy statement in January 1970 as an alternative to the Pastore bill.[85] The policy statement declared that a renewal applicant in a comparative hearing would be favored if he could demonstrate his service had been substantially, rather than minimally, attuned to meeting the needs and interests of listeners or viewers in his area. In addition, the renewal applicant would have to show that the operation of the station had not otherwise been characterized by serious deficiencies.[86]

Whether the policy statement proves more moderate than the Pastore bill in shielding broadcasters from license challenges depends on the Commission's interpretation of "substantial service." Although Commissioner Nicholas Johnson dissented from the policy statement, feeling that it still denies challengers the benefits of competition, he noted that ". . . the public now clearly knows that a new day has dawned; licenses will not be automatically renewed; those licensees not offering 'substantial' service are open to challenge."[87] The NAB has expressed dissatisfaction because the policy statement offers less certain protection than the Pastore bill,[88] but Senator Pastore, apparently satisfied that the bill's objectives have been accomplished by administrative decision, has shelved his bill.[89]

If the policy statement has the effect of precluding regular comparative renewal hearings, it will do away with the major forum in which listeners can indicate to the FCC which of the competing applicants could better serve their needs. Comparative hearings provide one important occasion where listeners can directly inflict a sanction—loss of license—on a broadcaster who fails to provide the ideas and experiences that listeners have a right to hear.

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83. S. 2004, 91st Cong., 1st Sess. (1969).
84. BROADCASTING, Jan. 19, 1970, at 22.
85. Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, FCC Public Notice No. 70-62 (Jan. 15, 1970); *see* BROADCASTING, Jan. 12, 1970, at 38; *id.* Jan. 19, 1970, at 21; N.Y. Times, Jan. 16, 1970, at 1, cols. 2-3.
86. *Id.*
87. BROADCASTING, Jan. 19, 1970, at 22.
88. *Id.*
89. *Id.*, Jan. 26, 1970, at 52.

Rights without remedies are not rights; and without the basic remedy available to listeners through comparative renewal hearings, "the right to hear" is an empty phrase. If the Court meant what it said in *Red Lion*—that the right to hear "may not constitutionally be abridged by Congress or by the FCC"[90]—listeners and license challengers have a constitutional ground on which to base an attack on a restrictive interpretation of the FCC policy statement.

Listeners' groups could also seek remedies by attempting to initiate direct action through the FCC or, failing that, through the courts. The listeners could seek to add programs, such as informational announcements on the health hazards of smoking, the Vietnam war, or any other controversial subject on which all sides are not being heard.[91] They could also try to suppress programs or advertisements that were considered racist or otherwise offensive to a group.[92]

F. *To What Subjects Does the Right to Hear Apply?*

Another consideration for the FCC is the scope of the right to hear: What exactly are the "political, social, esthetic, and moral ideas and experiences" encompassed within the right to hear? One recent article suggests, in another context, that the speeches of the President and all factual data and comment relevant to those speeches are clearly protected subjects under the first amendment, whereas information as to the color of the dress worn by the First Lady to a ball is not.[93] Accordingly, the right to hear would probably extend to the first but not to the second kind of information. Obviously, there are many other ideas and experiences that are not so easy to categorize.

In the past the Commission has tried to indicate broad categories of programs, such as public affairs, to which each broadcast licensee should devote some time. The designation of program categories has long been accepted as part of the regulatory process.[94] In matters of enforcement, the FCC prefers to use indirect means, such as letters of advice and statements of policy, rather than rigid program regulation.[95] The Commission, officially at least, has taken the position that it does not have the power to regulate programing content in order to achieve programing quality.[96]

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90. 395 U.S. at 390.

91. *See* text accompanying note 8 *supra*.

92. A group called Action for Children's Television has recently petitioned the FCC asking that all advertising be removed from children's programs and that a minimum of 14 hours weekly be required of stations for this noncommercial children's fare. BROADCASTING, Apr. 6, 1970, at 48.

93. Brett, *Free Speech, Supreme-Court Style: A View from Overseas*, 46 TEX. L. REV. 668, 691 (1968). *See also* A. MEIKLEJOHN, *supra* note 30, at 79; Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX L. REV. 611, 627 (1968).

94. Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701 (1964).

95. *Id.* at 703.

96. Loevinger, *Issues in Program Regulation*, 20 FED. COMMUNICATIONS B.J. 3 (1966).

The FCC, however, is more than a mere policeman of the technical aspects of the spectrum. In his influential interpretation of the Communications Act of 1934, Justice Frankfurter pointed out that the Commission has the burden not merely of supervising the traffic on the medium but of determining the composition of that traffic as well.[97] Speaking for the Freedom of the Press Commission, William Hocking supported this position by pointing out that making rules and conditions does not interfere with the freedom of broadcasters, but improves the industry by making it better for all parties concerned.[98]

What will be the FCC's response to *Red Lion*? FCC General Counsel Henry Geller is reported to have distributed a document among the Commissioners in September 1969 assuring them that *Red Lion* gave the FCC sweeping authority to prescribe categories of programing and to specify minimum percentages of time to be devoted to each.[99] There will be no violation of the first amendment, Geller suggested, so long as a reasonable public interest basis for the regulation can be demonstrated.

Geller maintains that *Red Lion* requires broadcasters "to give suitable time and attention to matters of general concern" and that it subjects them to a wide range of program obligations.[100] He found ample "legal authority" for the FCC to define what is adequate and fair attention to public issues not only in subjects of controversy but also in news and politics. In addition, Geller believes that the Commission could require broadcasters to set aside a block of time for use by members of the public in a form similar to the radio call-in and talk programs.[101]

In part, the general counsel's opinion may be based on Justice White's affirmation in *Red Lion* that the Commission ". . . neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees."[102] Apparently, FCC Chairman Dean Burch does not favor the Commission taking the activist role through extensive program regulation.[103] If the Commission were to assume this role in spite of its Chairman, the courts would not be likely to object. Recently, the Court of Appeals for the District of Columbia approved the FCC's comprehensive program regulation for over-the-air subscription television (STV),[104] and the Supreme

97. National Broadcasting Co. v. United States, 319 U.S. 190, 215–16 (1943).

98. W. HOCKING, *supra* note 1, at 183.

99. BROADCASTING, Sept. 15, 1969, at 34. FCC Commissioners Kenneth Cox and Nicholas Johnson have long suggested that at least 1% public affairs, 5% news, and 5% public affairs plus "other" nonentertainment programing should be the minimal acceptable level for broadcast stations. *See* BROADCASTING, Apr. 13, 1970, at 5.

100. BROADCASTING, Sept. 15, 1969, at 34.

101. *Id.*

102. 395 U.S. at 395.

103. BROADCASTING, Jan. 26, 1970, at 47.

104. National Ass'n of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

Court declined to review the case. These regulations require that each STV station broadcast at least 28 hours of free programs weekly, that the stations use no advertising except STV promotions, that they show no films older than 2 years and no sports event shown live during the last 2 years, that no programs be serials, and that stations not program more than 90 percent films and sports events combined.[105]

The extent of this precedent-setting regulation caused *Broadcasting* magazine to editorialize: "When the appellate court endorses the legality of restrictions as severe as those, it is extending the FCC's power over programming by an alarming degree."[106] The court of appeals justified these restrictions by pointing out that the Commission's first amendment duty to ensure diversity of communication requires it to take some cognizance of the kind and content of programs being offered to the public.[107]

Presumably one of the reasons that the courts and Congress have delegated broad powers to regulatory agencies like the FCC has been that such agencies can better develop their own standards. These standards can be made flexible enough to facilitate proper administration, yet definite enough to assure predictable agency decisions. In declaring the right to hear in the *Red Lion* case, the Court has left the Commission with a great deal of discretion in developing program standards. Yet the FCC may face considerable difficulty in attempting to set program standards sufficient to satisfy the listeners' right to hear. The Commission is confronted by a nearly complete lack of program diversity on television and by the fact that a great deal more diversity is not feasible within the current economic makeup of the broadcasting industry.

II. Implications of FCC Regulation

A. *Problems of Program Regulation*

Even assuming that *Red Lion* gives the FCC increased authority to regulate programing, there are reasons why the Commission should hesitate to use it. The FCC faces three major regulatory obstacles: defining "good" programing, avoiding censorship, and accounting for differences in the media.

1. *Defining "good" programing.*

Former FCC Commissioner Lee Loevinger has articulated the view that if the FCC regulates programing, the result will be uniformity, not excel-

105. *See* 15 F.C.C.2d at 597–98.
106. Broadcasting, Oct. 6, 1969, at 82.
107. National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 207 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

lence.[108] He intimates that any attempt to act on the basis of listener requests will fail because people do not watch the "good" programs they themselves request.

If the Commission attempts to define good programing by the relative content of "social, political, esthetic, and moral ideas and experiences," problems will result. For example, if the FCC were to specify that each licensee must devote 5 percent of its total air time to public affairs programing, considerable debate would ensue on what programs qualify as public affairs. The Commission's present definition of "public affairs" programs for television is sufficiently broad to permit wide-ranging interpretations: "Public affairs programs . . . include talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programs primarily concerning local, national, and international public affairs."[109]

The problems involved in narrowing this definition were evidenced when the Institute of Policy Studies in Washington, D.C., studied the performance of 32 regional television stations last fall. The Institute published a 336-page report, ranking the stations at least in part on the percentage of time devoted to public affairs programing.[110] In making the study, the Institute assumed that each station classified programing in the same manner. In fact, however, one of the stations classified "Girl Talk," a guest interview show, as "entertainment," while another station classified it as "public affairs." One station classified two segments of the Mike Douglas Show (generally considered an entertainment program) as "public affairs" because they included discussion of research done on hemophilia and the lives of shut-ins. Also, one station designated "The Big Picture," an Army public relations film, as "public affairs," while another station put it in the "other" category.[111] If the FCC specifies a program percentage requirement, in order to avoid divergent classifications it might also have to designate the category into which each individual show falls.

2. *Censorship.*

Program regulation could all too easily become a vehicle for Government censorship.[112] There is reason to question whether the listening public is any better served by having political appointees and judges determining what

108. Loevinger, *Issues in Program Regulation*, 20 FED. COMM. B.J. 3 (1966).

109. FCC Broadcast Application (TV), Section IV–B, at ii.

110. *See* BROADCASTING, Oct. 6, 1969, at 36.

111. *In re* Application of The Evening Star Broadcasting Company for renewal of the license of WMAL-TV, Washington, D.C., FCC File No. BRCT–23, at 88–90.

112. Perhaps a better word than "censorship"—which still carries the common-law connotation of prior restraint—is "abridgement," which the first amendment specifically prohibits. As Thomas Cooley pointed out long ago, the evil to be prevented is not merely censorship, but any action of the Government that inhibits free and general discussion. T. COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927).

the public should hear than by allowing broadcast editors to perform this function. If anything, the former might be more repressive and less favorable to innovation. In the *Pacifica* case, for instance, the FCC renewed the station's radio license for one year rather than the usual 3 years after voicing concern over the station's avant-garde opinions and programs.[113] These programs reportedly included a discussion of homosexuality by homosexuals, Edward Albee's play *The Zoo Story*, and a reading of avant-garde poems and fiction.[114]

There is little reason to believe that the FCC will be more receptive to innovative programing if it sanctions a more extensive system of regulation. If the FCC were to assume greater regulatory power over programs, the administration in power could conceivably pressure the political appointees on the Commission to intervene against programs unfriendly to the administration. Actual censorship would be unnecessary; the power of intimidation could stifle dissent. Thus the ultimate question is whether the problem of uninspiring program content is desperate enough to sustain the possibly dangerous consequences entailed in a remedy that opens the door to unprecedented government control over what is on the airwaves.

3. *Differences in the media.*

Red Lion is a radio case, yet it is probable that its implications will have greater impact on television, which has been most consistently and severely criticized for its lack of program diversity. Thus far, the FCC has not acknowledged any differences between radio and television programing responsibilities.[115] Justice Douglas has stated that "the First Amendment draws no distinction between the various methods of communicating ideas."[116] By this, he might mean that the courts should not establish different rules for various communication media merely because they transmit different kinds of information in different ways.

There are, however, technical and economic differences between radio and television that justify differences in their regulation. There are techni-

113. "As you know, the Commission has received a number of complaints during the past year regarding programs broadcast by Pacifica stations." Pacifica Foundation, 6 P & F Radio Reg. 2d 570, 571 (FCC 1965). Although the FCC did not specify the program material that drew the objection, the industry trade magazine acknowledged that it included some four-letter words and readings from *Fanny Hill*. Broadcasting, Dec. 20, 1965, at 61.

114. Drew, *Dean Burch Watches Television*, The Washington Monthly, May 1970, at 77. Some Pacifica employees suspect that the base of the objection is the politics of the station rather than the programs. Interview with E.K. Thompson, Program Director for Pacifica station KPFA, in Berkeley, California, Mar. 25, 1970.

115. *See* Note, *supra* note 94, at 706: "To date, the Commission has not formally recognized any difference between the programming responsibilities of radio and television; yet it seems appropriate that different criteria be established for judging the two media and that their complementary relationship in a broadcasting area be recognized as an aspect of balanced listener service. As these factors are taken account of, the rationale for program balance subtly shifts from the concept of broadcaster responsibility to that of audience opportunity."

116. Superior Film, Inc. v. Department of Educ., 346 U.S. 587, 589 (1954) (concurring opinion).

cal barriers to new station entry in television, at least for prize VHF licenses. The lack of spectrum space means that there are few channels available.[117] On the other hand, greater frequency availability makes entry into radio easier, except in the top, congested markets and in the most profitable classes of stations.[118] Levin has estimated that the average franchise value of a VHF television station in most markets is between $1.5 and $2 million.[119] This franchise value is the premium, over and above the worth of the technical facilities, that a buyer is willing to pay for a television station, and it constitutes a considerably greater economic barrier to entry in television than in radio.[120]

The greater technical availability of radio stations and the lower cost of licenses have resulted in far more operating radio stations than television channels. In a competitive radio market, many stations have adopted specialties, such as classical music or news. The overall result is a multistation radio market, which, unlike most television markets, is usually characterized by wide programing diversity among its stations. Any program regulation considered by the FCC to implement the right to hear should take into account the fact that there is a greater amount of program diversity in radio than in television.

Mr. Geller's suggestion that the FCC might require each individual station in a market to carry a minimal percentage of "good" programs might lead to greater programing diversity of individual television stations,[121] but it would be wholly inappropriate for multistation radio markets. Such regulation would eliminate radio-station specialization, eventually reduce the total number of stations, and weaken rather than enhance overall program diversity in the market.

Thus, it is clear that if the FCC were to require minimal percentages of certain types of programing to be broadcast, this regulation should apply only to television stations and not, in most cases, to radio stations. Since the FCC has not heretofore acknowledged any difference between radio and television programing responsibilities,[122] it would set a precedent by fashioning program standards for television only. Moreover, the FCC would face the awkward situation of using *Red Lion*, a radio case, as a legal justification for applying unprecedented program regulation to television only.

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117. Levin, *Economic Effects of Broadcast Licensing*, 72 J. POL. ECON. 151, 156 (1964).
118. *Id.*
119. *Id.* at 157.
120. In 1966, 367 radio stations reportedly changed hands for total dollar value of $76,633,762. That same year 31 television stations were sold for a total price of $30,574,054. BROADCASTING, Feb. 27, 1967, at 77–79. These figures suggest that the average franchise value of television stations (including the less valuable UHF channels) was nearly one million dollars compared to little more than $200,000 for radio stations.
121. *See* text accompanying note 99 *supra.*
122. *See* text accompanying note 115 *supra.*

These considerations make it additionally difficult for the FCC to implement the right to hear through program regulation.

The regulatory implications of the right to hear for the press media are more complex than the implications for radio. According to some observers, the next step after *Red Lion*'s statement that the rights of the listeners are paramount to the right of the broadcasters will be to subject newspapers to the same standards. Jerome Barron, Professor of Law at George Washington University, has predicted that "[t]he legal responsibilities that are imposed on broadcasting will not long evade the print media."[123] Last summer, FCC Commissioner Kenneth Cox expressed a similar view of *Red Lion*'s applicability to the print media.[124]

Traditionally the print media, unlike the electronic media, have not been regulated. Justice Frankfurter rationalized the different treatment in *National Broadcasting Company v. United States*.[125] He stated that broadcasting must be regulated because of the scarcity of frequencies on the broadcast spectrum and the need to prevent signal interference caused by too many stations operating in the same area.[126] In *Red Lion*, Justice White upholds the scarcity rationale for regulation and cites the statement in *Joseph Burstyn, Inc. v. Wilson* that ". . . differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[127]

Ironically, some observers who are suggesting that the kind of legal regulation now applied to broadcasting should be extended to the print media base their argument in part on the fact that there is now a greater scarcity of newspapers than of broadcast stations.[128] In January 1965 there were about 5119 radio stations and 562 television stations on the air in the United States, compared to only 2313 newspapers.[129] Economies of scale and extremely high economic barriers to entry of new newspapers into a market have resulted in many cities having only a single source of printed news,[130] while maintaining several radio and television stations.

Thus, technical and economic realities have challenged the validity of the scarcity rationale used in *Red Lion* to distinguish the permissibility of regulating broadcasting from the impermissibility of regulating print media. The distinction between the two kinds of media is further blurred, however, by Justice White's statement in *Red Lion* that one of the goals

123. BROADCASTING, Sept. 29, 1969, at 61.
124. N.Y. Times, Aug. 12, 1969, at 20, col. 3.
125. 319 U.S. 190 (1943).
126. *Id.* at 226–27.
127. 395 U.S. at 386–87.
128. *See* Barron, *supra* note 32, at 1666.
129. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 519, 523 (1966).
130. *See* Rosse, *Daily Newspapers, Monopolistic Competition, and Economies of Scale*, 57 AMER. ECON. REV. PAPERS & PROCEEDINGS 522 (1967).

of the first amendment is to create an informed electorate.[131] Consistent with this goal, it apparently follows that broadcasting must be regulated so as to fulfill the listeners' constitutional right to receive certain ideas and experiences. The basis is thereby laid for an advocate to argue that newspapers not meeting the first amendment goal of informing the public should also be regulated.

Justice White's opinion attempts first to distinguish broadcasting from print media because of scarcity and then proceeds to give a first amendment rationale for regulation that applies equally well to both media. In light of this circular reasoning and the fact that there are presently more broadcast stations than newspapers operating in this country, the FCC is faced with the unenviable chore of explaining to the broadcast industry why it is singled out for increased regulation when the rationale used by the Court for that regulation also applies to unregulated media.

There are, however, some significant economic differences between the broadcast and print media which the FCC might point out to justify regulation of only broadcasting. One such difference is that broadcasting programs are sold to advertisers in discrete time segments, whereas newspapers are sold to readers as a complete package. The present economic system in broadcasting compels the licensee to maximize his audience for each time slot by airing only the most popular views and programs, but there is much less economic incentive for publishers to maximize their readership for each page.[132] In fact, publishers are probably economically motivated to give space to less popular topics, since those who are especially interested in these areas will be encouraged to buy the entire publication. Inasmuch as the same is not true for broadcasting, one strong rationale for broadcast regulation is the need to serve listeners' interests in less popular topics.

Each of these three problems—defining good programing, avoiding censorship, and formulating different rules for different media—will make it difficult for the FCC to implement the right to hear through program regulation. Because of these obstacles, such regulation is liable to create problems greater than the lack of program diversity that generated the need for regulation.

B. *Alternative FCC Regulatory Devices*

There are three types of regulatory measures besides program regulation that the FCC might consider. The first, an offshoot of program regulation, concerns the scheduling of programs; the second involves stations selling

131. 395 U.S. at 390.
132. Note, *supra* note 94, at 714.

time for public interest programs at reduced rates; and the third involves reducing sponsor control of program content. Not surprisingly, each of these regulatory measures also has implementation problems, not the least of which is the hostility of the broadcasters whose profits are directly affected.

1. *Controlled scheduling.*

Since the right to hear would be the basis for proposed FCC regulation, presumably the potential size of the audience is a key consideration, not simply the diversity of the programing. The mere offering of a varied schedule of programs does not satisfy the right to hear if the programs of restricted appeal occupy time slots that give interested persons little or no opportunity to enjoy them. To be truly effective, therefore, the FCC might have to review not only the overall assortment of a station's programing, but also the hours and potential audiences available for these programs. Under current practice, networks and local stations schedule public affairs programs for Sunday. In addition, the networks often place their one regular prime-time public affairs program, such as CBS's *60 Minutes* or NBC's *First Tuesday*, at the same day and hour. Insofar as these practices reduce audience size and viewer opportunity, the FCC might choose to consider them improper and inimical to the listeners' constitutional right to hear.

A variation of controlled scheduling, suggested by Westinghouse Broadcasting Company and recently adopted by the FCC, would limit the network's number of hours of prime-time programing.[133] The objective is to force more local programing, in the hope that it would cater more closely to various local listener needs and preferences. The disadvantage of these scheduling measures is that they frustrate the exercise of broadcasters' business judgment concerning the proper time to air programs so as to obtain the maximum audience ratings and profits.

2. *Rate reduction.*

Another alternative regulatory measure would be to require broadcasters to sell prime time for public interest programing at reduced rates. This measure would benefit persons seeking access to the media as well as listeners desiring greater programing diversity. Substantial audiences are likely during prime time, even though competing entertainment programs on adjacent channels will probably draw away some listeners.

133. BROADCASTING, July 28, 1969, at 50. "[The Westinghouse] plan would prohibit stations in any of the top 50 markets containing at least three stations from taking more than three hours of network programming, other than news, between 7 and 11 p.m." *Id.* As currently adopted by the FCC, this plan is scheduled to go into effect in the fall of 1971. The plan may be modified or canceled before then, however, if the appointment of a new Republican commissioner shifts the political balance on the FCC. *See* N.Y. Times, May 8, 1970, at 1, col. 1.

The first problem with this proposal is a definitional one: The FCC will face the same obstacles in defining "public interest" programing in this context as it would in the context of program control.[134] Also, there is no history of rate regulation in broadcasting, though it may be in the offing. The Senate recently passed a bill which will reduce the cost of political advertising by 35 to 50 percent.[135] This bill could provide a precedent for lower rates for public interest broadcasting generally.

An additional consideration is how much rate reduction is fair. Broadcasters might argue that although they would be willing to bear part of the loss resulting from reduced rates, the Government should also help out. The Government might, for instance, subsidize one-half of the loss of revenue sustained by carrying a public interest program in prime time.

Once again, the major disadvantage of these reduced cost proposals is that they will incur considerable hostility from the broadcast industry, since time is the only commodity broadcasters have to sell.[136]

3. *Limiting advertiser control of programing content.*

A third way in which the FCC could attempt to enhance listener control over programing would be to regulate advertiser control. According to the FCC, "[t]he licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency."[137] The Commission has also emphasized that freedom of speech requires giving precedence to the people's right to be informed on all public questions, not to individual exploitation of broadcasting for private gain.[138]

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134. *See* text accompanying notes 56–60 *supra.*

135. N.Y. Times, Apr. 15, 1970, at 1, col. 4. The bill will limit the amount of spending on political broadcasting by a candidate to 7 cents for every vote cast for his office in the previous election. *Id.* at 86, col. 4. The originally proposed bill (S. 2876), which was cosponsored by 36 Senators, would have given Senate candidates 120 minutes and House candidates 60 minutes of prime television time during the last 5 weeks before an election at a 70% reduction in cost. In addition, the original bill called for an optional 30 extra minutes of broadcast time at an 80% reduction. *See* BROADCASTING, Oct. 27, 1969, at 26. FCC Commissioner Nicholas Johnson has gone one step further in proposing that broadcasters make free time available to candidates. *See, e.g., id.*, Sept. 22, 1969, at 38.

136. For example, Vincent Wasilewski, President of the National Association of Broadcasters, has stated that "when [reform advocates] attempt to give away free the only thing we have to sell—time—they are seriously undercutting broadcasting's independence." BROADCASTING, Oct. 27, 1969, at 46.

137. FCC Chain Broadcasting Regulations, *cited in* National Broadcasting Co. v. United States, 319 U.S. 190, 205–06 (1943). In an official letter to Cullman Broadcasting Company, the Commission states that under the fairness doctrine once a broadcaster has presented one side of a controversial issue he cannot leave the public uninformed, by refusing time to present the contrasting viewpoint, even if he cannot obtain paid sponsorship for such a presentation. 25 P & F RADIO REG. 895, 897 (1963).

138. FCC, Report on Editorializing by Broadcast Licensees, 13 FCC 1246, 1249 (1949). "The commercial needs of licensed broadcasters and advertisers must be integrated into those of the public." Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966), *quoting* FCC, TELEVISION NETWORK PROGRAM PROCUREMENT, H.R. REP. No. 281, 88th Cong., 1st Sess. 20 (1963).

The public's right to hear is illusory, however, when sponsors such as broadcasting's biggest advertiser, Procter & Gamble,[139] can review scripts ahead of time to see if they conform to a company policy which states:

> There will be no material that may give offense, either directly, or by inference, to any organized minority group, lodge, or other organizations, institutions, residents of any State or section of the country, or a commercial organization of any sort. This will be taken to include political organizations, college and school groups, labor groups, industrial, business and professional organizations, religious orders, civic clubs, memorial and patriotic societies, philanthropic and reform societies (Anti-Tobacco League, for example), athletic organizations, women's groups, etc., which are in good standing.[140]

Sponsors have often materially changed the content of a program to conform with corporate advertising policy—that is, to promote the "company image." Examples include a gas company not allowing gas chambers to be mentioned in a drama on Nazi war-crime trials and a drama in which a hanging victim was changed from a Negro to a Jew, and finally to an unspecified foreigner in order not to offend any ethnic groups.[141] Examples of advertiser pressure on program content are probably less prevalent now that the high cost of broadcast advertising has compelled many sponsors to buy single spots rather than entire programs. Since several advertisers now commonly sponsor a program, the power of any one advertiser to review program content is consequently reduced. By withdrawing advertising dollars from programs to which they object, however, advertisers can still wield vast influence over network and local program choices. The only apparent remedy within the present advertiser-dominated structure of broadcasting would be for the FCC or the networks formally to deny advertisers the right of program review. Practically speaking, however, it is unlikely that the industry will bite the hand that feeds it.

C. *The Regulatory Problem*

The present economic structure of broadcasting is not likely to accommodate itself to fulfilling the goal of the listeners' right to hear. As indicated by the discussion in this section, neither program regulation nor any of the three alternative regulatory measures—controlling program scheduling, selling time at reduced rates, and limiting advertiser control—is likely to succeed; each is inimical to the economic self-interest of broadcasters. Provided with the sufficient economic incentive and armed with the most skilled legal talent that money can recruit, the broadcasters will

139. Procter & Gamble is by far the largest advertiser on television. In 1966 the company spent $101,251,200 of its total advertising budget of $179,156,960 on television. B. RUCKER, THE FIRST FREEDOM 106 (1968).

140. *Quoted in* M. STEIN, FREEDOM OF THE PRESS—A CONTINUING STRUGGLE 155–56 (1966).

141. *Id.* at 153, 155.

find ways to neutralize the impact of these regulations. Without broadcaster cooperation, enforcement of these regulations will probably be prohibitively difficult and expensive.

III. Economic Reorganization of Broadcasting

Given that there are problems with both existing and potential FCC regulatory measures, the question arises whether there are any alternatives to the present fundamental structure of broadcasting, particularly television, which would allow listener needs and opportunities to be better served. How might listeners, especially those with minority or specialized tastes, have greater diversity and wider choice in programing? Two possibilities suggest themselves. The first involves selling broadcast license franchises rather than giving them away; the second entails the conversion of television from over-the-air to cable transmission.

A. *Selling Broadcast Franchises*

It has been suggested that the Government should sell broadcast franchises to the highest bidder at auction[142] rather than award licenses at a nominal fee to the applicant believed by the FCC to best serve the public interest. At first glance, it might appear that a candidate chosen on merit would do a better job of serving the listeners' right to hear than the highest bidder at an auction. In fact, however, the latter may be in a better position to serve the public, since he may have not only good intentions, but also the financial resources to do so. The revenue gained by the Government from selling the franchise value of the licenses could be used to subsidize all licensees, thus permitting them to create public-interest programing that they could not otherwise afford to produce. Alternatively, the Government might use the funds derived from franchise sales to finance its own public broadcasting network, as England does with the BBC.[143] In 1967, Congress did in fact create the Corporation for Public Broadcasting, but it has suffered from a severe shortage of operating funds.[144]

142. *See, e.g.*, Coase, *The Federal Communications Commission*, 2 J. Law & Econ. 1 (1959); *cf.* DeVany, Eckert, Meyers, O'Hara & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 Stan. L. Rev. 1499, 1556–57 (1969).

143. A public broadcast network would, of course, be subject to pressure to limit the extent of its controversial programing just as private networks are. However, since the public network would not be seeking to maximize profits through advertising rates determined by audience size, it would be better able to cater to individualized tastes by scheduling more programs of restricted audience appeal during prime time.

144. *See* Public Broadcasting Act of 1967, Pub. L. No. 90–129, 81 Stat. 365 (creating the Corporation for Public Broadcasting and appropriating $9 million for broadcast operations), *as amended*, Corporation for Public Broadcasting Act, Pub. L. No. 90–294, 82 Stat. 108 (1968) (denying authorization for the $9 million appropriation). Additional revenue for a government-subsidized network or programing on private networks might come from a use tax levied on the networks if and when they use communications satellites extensively. F. Friendly, Due to Circumstances Beyond Our Control 301–25 (1967).

One economist has estimated that the minimum total franchise value of the nation's VHF broadcast stations is $46 million.[145] The FCC currently issues licenses for a nominal registration fee[146] while the licensees, in addition to the value received from the sale of their franchise, are making extraordinary profits. According to one profit study, "The median ratio of pretax broadcast income to revenues of the older VHF stations, 1953–1960, was 33.5 per cent. This contrasts with a median ratio of 12.1 per cent for all leading corporations reported annually by the First National City Bank, adjusted for comparability."[147] In 1966 the ratio of pretax profits to expenses for the 15 network-owned-and-operated stations was 70 percent, while the ratio for 479 VHF stations was 47 percent.[148]

Thus, broadcasting produces high operating profits for most licensees over and above the bonus of capital-gains benefits accruing from the sale of licenses. For this reason, the Government need not be overly concerned that it is undermining the total profitability of broadcasting by recapturing some or all of the $46 million franchise value for use in public interest programing.

The major disadvantage of this plan is that it does not transfer the power to choose what programs will be aired from the Government, the networks, or the individually subsidized stations to the viewers where it belongs; in short, it does not guarantee the listeners' right to hear. Another possible disadvantage is that, since licenses will go to the highest bidder, the auction procedure might accelerate rather than impede the trend toward "media baronies."[149] These baronies threaten to secure enough stations to have a potentially dangerous impact on the molding of public opinion. This threat may be substantially reduced, though, by the FCC's recent move to bar combinations of radio and television ownership in the same urban area.[150]

B. *Converting to CATV*

The disadvantages of selling television franchises would be neutralized if the plan were used as a condition precedent to a second kind of economic re-

145. Levin, *supra* note 117, at 157.

146. The FCC has recently been considering increasing the application and license-renewal fees paid by broadcasters. The fees presently collected amount to approximately $4.5 million. Under the proposed fee increase, approximately $24.5 million would be collected from broadcasters to cover the cost of FCC operations. These fees represent less than one percent of the $2.5 billion broadcasters earned in 1968. Among the fee increases there would be a charge, when licence franchises change hands, of $1000 plus 2% of the sale price. Obviously, even this fee increase falls far short of the total revenues that the Government would collect if it sold the broadcast franchises. BROADCASTING, Feb. 23, 1970, at 21–22.

147. Levin, *supra* note 117, at 153 n.6.

148. B. RUCKER, *supra* note 139, at 103.

149. *See, e.g.*, Johnson, *The Media Baronies and the Public Interest*, THE ATLANTIC, June 1968, at 43; Editorial, *The American Media Baronies: A Modest Atlantic Atlas*, THE ATLANTIC, July 1969, at 83.

150. N.Y. Times, Mar. 27, 1970, at 1, col. 7.

organization, conversion to cable television (CATV). CATV and the present form of television differ in their modes of signal transmission; CATV delivers the picture signal to homes through cables, whereas in ordinary broadcasting the signal is broadcast through space to the home. The difficulties of overcoming broadcasters' resistance to CATV could prove equally as troublesome as those encountered with any of the FCC regulatory measures discussed in Part II. Successful institution of a CATV system will do more, however, to implement the listeners' and viewers' right to hear than any of those measures.

1. *Development of CATV and its regulation.*

CATV first emerged when enterprising individuals erected community antennas in remote areas where broadcasting reception was poor[151] and connected individual sets to these antennas for a fee. Not only did the customers get improved reception, but they also received additional distant stations for the first time.[152] At this stage CATV was merely an extension of existing broadcast operations and survived with the industry's blessings. In the last decade, however, CATV began to prosper in cities, where skyscrapers distorted over-the-air reception, and started to originate its own programs, in addition to carrying the standard broadcasting fare.[153]

In 1959, bills were introduced in Congress at the FCC's recommendation to protect broadcasters from open competition with CATV.[154] When legislation was not forthcoming, the FCC gradually assumed regulatory jurisdiction over cable systems.[155] Since then, the FCC has imposed a profusion of rules on cable owners.[156]

These FCC rules, along with the resistance of over-the-air broadcasters, have hindered CATV's ability to serve the listeners' right to hear. In a radi-

151. *See* Note, *The FCC's Proposed CATV Regulations*, 21 STAN. L. REV. 1685 n.1 (1969).

152. *See* Barnett, *Cable Television and Media Concentration, Part I: Control of Cable Systems by Local Broadcasters*, 22 STAN. L. REV. 221, 225 (1970).

153. *Id.*

154. *See* S. 2653, 86th Cong., 1st Sess. (1959); S. REP. No. 923, 86th Cong., 1st Sess. (1959); 106 CONG. REC. 10,416–36, 10,520–48 (1960).

155. Second Report and Order, 2 F.C.C.2d 725 (1966).

156. The FCC has until recently required cable systems to carry all local broadcast signals on request, not to carry signals duplicating programs of local broadcasters, and not to import distant signals into the top 100 markets unless the cable operators could first prove that local stations (especially UHF channels) would not be hurt by the competition. Second Report and Order, FCC Docket No. 15,971, 2 F.C.C.2d 725, 747, 752, 782 (1966). *See* text accompanying note 157 *infra*.

In October 1969 the FCC announced that it would allow CATV to sell advertising and to interconnect into regional and national networks; the Commission deferred, however, the issue of whether persons with financial interests in other media will be allowed to own shares in CATV. First Report and Order, FCC Docket No. 18,397, 20 F.C.C.2d 201, 202–08, 215–18 (1969). At the same time, the FCC proposed to make program origination mandatory for all cable systems having 3500 or more subscribers. *Id.* at 213; 17 P & F RADIO REG. 2d at 1586 (1969).

Meanwhile, the Congress has debated a revision of the copyright bill which would require CATV to pay copyright royalties for the first time. *See* S. 543, 91st Cong., 1st Sess. (1969). Earlier, the Supreme Court had ruled that distant signals carried by CATV are exempt from copyright liability. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

cal policy reversal, however, the FCC recently voted tentatively to permit CATV to import out-of-town programing.[157] This change will increase the number of stations that listeners will be able to watch. Although a separate rule requiring program origination would appear to serve the right to hear by adding new program sources, a better way to implement the right to hear, as will be shown, would be completely to separate the functions of program origination and program transmission.[158]

If the Government does nothing further to hinder CATV's development, economic forces will probably push the communications industry toward greater use of cable for home transmission.[159] CATV's economic attractiveness is indicated by its prosperity at the end of the 60's despite a decade of suppressive regulation. At the beginning of 1969, CATV had 3.6 million subscribers in 2000 operating systems, while 2000 more applications awaited processing.[160] In 1970 there will be 2400 cable systems serving 4 million households or approximately 13 million people.[161] A further indication of CATV's emerging status is the recently proposed creation of a CATV bureau in the Commission, which would put cable television on a regulatory par with the other two FCC bureaus—broadcasting and common-carrier service.[162]

2. *Advantages of CATV to the viewers.*

For the listener, CATV as a replacement for the present form of transmission would have several advantages. CATV would provide a greater range of programing, since the viewer could subscribe to special-interest features—such as first-run movies, sports, local civic events, cultural attractions, and educational programs—in addition to the present full schedule of advertiser-supported programs.[163] This diversity would be possible because CATV permits more channels than over-the-air broadcasting. Cable systems currently carry as many as 20 channels, and at least one system with 42 channels is under construction.[164] Although there is sufficient space on the spectrum to allow an equally high number of conventional broadcast channels, in practice the number of local stations rarely exceeds three or four. The cost of a license is high, the FCC limits the number of licenses, and many UHF stations without network affiliation are unable to

157. N.Y. Times, May 18, 1970, at 1, col. 1.
158. *See* text accompanying notes 173–74 *infra.*
159. President's Task Force on Communication Policy, Final Report, ch. 7, at 39 (1968); *see* note 175 *infra.*
160. *See* L. Johnson, The Future of Cable Television: Some Problems of Federal Regulation, Jan. 1970, at 10 (RAND Corp. Memo. RM–6199–FF).
161. N. Johnson, How to Talk Back to Your Television Set 154 (1970).
162. Broadcasting, Jan. 26, 1970, at 55.
163. *See* L. Johnson, *supra* note 160, at 87.
164. *Id.* at 10.

attract advertisers and therefore go out of business.[165] More channels are possible on CATV because listeners, as well as advertisers, pay for the extra program services.

CATV brings these special programs to select subscribers through removing filters, placed along the cable, that block off reception unless subscribers pay to receive the extra channel.[166] This creates an indirect advantage for listeners and viewers in that certain producers, artists, and advertisers (especially political candidates) who are currently deterred for cost or creative reasons from using a mass medium will be attracted to use CATV to reach a selective audience. Thus, CATV would stimulate the development of programs that would not otherwise be created, with the listener as the ultimate beneficiary. It would be possible to transmit programs exclusively for doctors, stock market speculators, or voters in a suburban school board election. In short, CATV promises to become an electronic magazine. These additional channels on CATV will also permit repeats of programs and scheduling on subscription channels at prime time rather than on Sunday afternoons; thus CATV viewers will be able to see their favorite programs at several convenient times.[167] Perhaps the most important advantage of CATV is the ease with which it could be modified for other sophisticated communication uses, such as picture phones, library information retrieval, living-room shopping and banking, facsimile newspapers, and links to computers and teaching machines.[168]

From what is presently known about the technology of CATV, there appear to be significant economies of scale. Duplicate sets of wire grids from competing CATV operators are inefficient, because CATV, like the telephone companies, constitutes a natural monopoly.[169] For this reason, CATV is an obvious candidate for common-carrier regulation.

3. *Regulation of CATV as a common carrier.*

If given full common-carrier status, CATV operators would open up all of their channels all of the time for lease without discrimination to any person wishing to originate a television program. The cable operator's func-

165. *See* G. CHESTER, G. GARRISON & E. WILLIS, TELEVISION AND RADIO 46 (3d ed. 1963).

166. *See* L. Johnson, *supra* note 160, at 53. The use of filters is expensive; but some such device is necessary in order to enforce payment from subscribers to a special channel. If everybody could receive the special channel, then it would be a public good and there would be no incentive to pay for it. If no subscribers paid for the channel, then advertisements would probably be necessary to pay for the programs. But advertiser-supported programs will be shaped to appeal to the lowest common denominator and thereby attract the maximum audience. *See* text accompanying note 6 *supra*. Thus, unless some device is used to enforce payment by subscribers, advertiser-supported CATV will repeat the bland program fare of over-the-air broadcasting.

167. L. Johnson, *supra* note 160, at 87.

168. *Id.* at 55; N. JOHNSON, *supra* note 161, at 164.

169. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 642–43 (1969). *See also* R. Posner, Cable Television: The Problem of Local Monopoly, May 1970 (RAND Corp. Memo. RM-6309-FF).

tion, like that of a telephone or telegraph operator, would be to link up sender and receiver without regard for the content of the message.

The major stumbling block to the regulation of CATV as a common carrier is the dispute over whether all cable channels should be operated on a common-carrier basis or whether cable operators should retain the right to originate their own programs on one or more of the channels they control.[170] The FCC has stated: "The Commission is concerned about a common carrier acting as a program originator, and intends to return to this issue as the industry develops."[171] Unfortunately, in the interim, the Commission has insisted that cable operators originate programs.[172]

At least one economist, however, has argued persuasively that CATV should be operated on a *full* common-carrier basis, so that no firm that transmitted programs would be allowed to originate them. In essence, this means completely divorcing the medium from the message.[173] There are economies of scale not only in the laying of the cable but also in every aspect of cable transmission from the time a program goes into a camera until the time it reaches a television set. The only time when a program is not subject to economies of scale is during the time of its creation before it reaches the camera for transmission. It follows that as long as the transmission process is integrated with the creative process, economic pressures working to reduce the number of firms transmitting programs will also work to reduce the number of sources creating programs. Since CATV is a natural monopoly, there will likely be only one firm in control of the transmission process. If that same single firm were also in charge of selecting programs to go on all of the transmitting channels, then a variety of viewpoints may not be presented. For listeners to enjoy wide diversity of programing, there must be a proliferation of message originators, not a reduction in their number. Thus, the interests of program diversity suggest separating message transmitters from message originators.[174]

Under full common-carrier status, it is quite possible that CATV, with its advantages of more channels, better picture quality, and lower costs of transmission, would virtually replace commercial over-the-air broadcasting and thereby release space on the crowded frequency spectrum for land-mobile communication and other uses.[175] In that event, present broad-

170. *See, e.g.*, L. Johnson, *supra* note 160, at 55–62.

171. Notice of Proposed Rulemaking and Notice of Inquiry, FCC Docket No. 18,397, 15 F.C.C.2d 417, 421 (1968).

172. *See* note 156 *supra*.

173. B. Owen, Public Policy and Emerging Technology in the Media, November 1969 (to be published in PUBLIC POLICY, Summer 1970).

174. *Id.*

175. Recent statements by the Electronics Industries Association implied that a wired nation would mean the end of over-the-air broadcasting. BROADCASTING, Nov. 3, 1969, at 23. *See* Posner, *supra* note 169, at 642; BROADCASTING, Jan. 27, 1969, at 79. *But see* L. Johnson, *supra* note 160, at 68–71, which suggests that although CATV and broadcasters will compete, they can also complement each other through shared program costs.

casters and cable operators would have to choose whether to become message transmitters or message creators. Those who chose to be message transmitters would be legally prohibited from initiating or editing programs. They should accept all comers for a price that reflects the transmission cost of each message, the demand at the hour transmitted, and a reasonable profit, just as telephone rates do. Message originators should set whatever copyright price they choose and collect directly from the listener through subscriber fees.[176]

The experience of the motion-picture industry, even though it is not a natural monopoly as is CATV, offers a possible analogy for the separation of transmitters from originators on CATV. At one time the major movie studios were vertically integrated with their own theaters across the country. Each theater showed only its studio's productions, thereby restricting the ability of independent producers to find an outlet. In *United States v. Paramount Pictures, Inc.*, the federal district court required the movie studios to divest themselves of their theater outlets in order to open them to other film producers.[177] In the wake of the *Paramount* decision, the number and diversity of motion-picture producers has proliferated.[178] This experience suggests that a similar result may be possible in the television industry.

In 1929, common-carrier status was considered for broadcasting, but was rejected for technological reasons in *Great Lakes Broadcasting Co. v. Federal Radio Commission*.[179] The FRC, the FCC's predecessor, feared that thousands of stations would be needed to accommodate all the persons who would want to state their views on the air and that the interference caused by so many stations' frequencies overlapping on the spectrum would injure rather than benefit the listening public.[180] With CATV, however, scarcity is no longer a barrier to common-carrier status.[181]

The *Red Lion* decision implies that the Government has the power, though thus far not exercised, to give broadcasting common-carrier status:

> Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week.[182]

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176. *See* B. Owen, *supra* note 173, at 10.

177. 85 F. Supp. 881, 895–96 (S.D.N.Y. 1949), *on remand from* 334 U.S. 131, 175 (1948).

178. *See* B. Owen, *supra* note 173; *see also* 2 S. Whitney, Antitrust Policies 161, 180–81, 184–85, 194–95 (1958).

179. 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 281 U.S. 706 (1930).

180. *Id.* at 33.

181. The unfortunate reliance of the Court on the scarcity argument throughout *Red Lion* largely undercuts the applicability of the case to CATV. *See, e.g.*, 395 U.S. at 367.

182. 395 U.S. at 390–91.

Full common-carrier status for CATV would clearly serve both the right of access, since the medium would be required to accept all senders, and the right to hear, by enlarging audience listening opportunities. It would no longer be necessary to force increased governmental regulation (such as the right to hear) onto licensees who now find it against their economic interest to carry any more public interest programing than required. Instead, with CATV regulated as a common carrier, the listener could specify and pay for precisely that information which he wishes to receive, without the need for regulating program diversity.

4. *Obstacles to the full implementation of CATV.*

Several obstacles stand in the way of common-carrier CATV. A recent study predicts that full common-carrier operation would have regulatory difficulties in terms of (1) achieving appropriate pricing, (2) ensuring nondiscriminatory access to the medium, (3) controlling program content, and (4) incurring extra transaction costs for arranging and billing selective subscription channels.[183] Whether achieving appropriate pricing will prove difficult is speculative. A contrary argument suggests that if CATV develops to the point where no over-the-air broadcasting service is available, the local communities would be in a strong enough position to choose among the several competing CATV operators and to achieve fair rates without any governmental regulation.[184] The second and third predicted regulatory problems are not unique to common-carrier CATV. Assuring nondiscriminatory access and controlling program content against libel or obscenity are concerns under any communication system. The final difficulty for CATV is extra transaction costs for arranging and billing subscription channels, but some additional cost is to be expected for a service which provides many additional benefits.

There is also concern that a complete conversion to CATV would put rural communities at a disadvantage, since the high cost of laying cable in sparsely settled areas may make it uneconomical to do so.[185] A public subsidy could help compensate for this difficulty. At any rate, in an overwhelmingly urban society, this is simply not a sufficient reason to forestall the transition to CATV.

Another obstacle is that the public, accustomed to "free" television, might object to having to pay the monthly service charge for CATV.[186] The bur-

183. L. Johnson, *supra* note 160, at 60–61.

184. *See* Posner, *supra* note 169.

185. *See* Note, *supra* note 151, at 1711, *quoting* Memorandum Opinion and Order, 6 F.C.C.2d 309, 341–42 (separate concurring statement of FCC Commissioner Kenneth Cox). *But see* BROADCASTING, Apr. 6, 1970, at 81, noting that, while CATV reaches only 6.4% of all American households excluding Alaska, it reaches 23.3% of those in rural counties and 34.5% of those in small towns.

186. Advertiser-supported television is not really free, however, since the cost of television adver-

den would fall heaviest on the poor. One possible solution would be to give viewers a choice whether they wanted to watch programs with or without advertising. Programs with advertising could be subsidized by the sponsors and therefore free to the listener on a separate channel. On the other hand, the listener would pay the transmission cost for the programs that attract no sponsors.

Probably the most substantial obstacle is the resistance of the broadcasters[187] and movie-theater owners[188] to the switch to cable transmission. Broadcasters oppose the transition because, while CATV would still allow them substantial profits, they are likely to be less spectacular than at present for two reasons. First, since the origination and transmission functions would be separate, CATV operators could no longer make profits on both phases. Second, a common-carrier system with its multitude of channels would no longer allow broadcasters to make extraordinary gains on the sale of licenses presently valuable because of their limited numbers. On the other hand, people who do not presently watch television might produce additional revenue by subscribing to special interest programing. In addition, new uses of cable systems, such as computer links, library information retrieval, facsimile newspapers, and picture phones, will generate profits. In fact, cable operators might be in a position to compete with the telephone companies for all point-to-point communications.[189] On balance, however, broadcasters favor certain profits in the present industry structure, rather than speculative profits in an industry converted to CATV. For this reason, broadcasters have sought to influence Congress and the FCC to inhibit CATV's development.

5. *Media concentration.*

The strong antitrust mood among many broadcasting critics also could be a potential obstacle to CATV's development.[190] Stephen Barnett has

tising is passed along to the consumer. According to one estimate, the consumer pays $34 annually for advertising. *See* B. RUCKER, *supra* note 139, at 101. The CATV subscription fee is typically $5 a month. *See* Barnett, *supra* note 152, at 225.

187. One instance of broadcaster resistance to granting concessions to CATV occurred in June 1969, when the National Association of Broadcasters rejected a compromise agreement with the National Cable Television Association. The agreement would have obviated much of the pressure for further regulation of CATV by the FCC and Congress. *See* BROADCASTING, June 23, 1969, at 42.

188. The National Association of Theatre Owners (NATO) has obtained 10 million signatures on petitions and has supported 22 congressional bills opposing pay television, whether via cable or over the air. NATO's desperate arguments against pay-TV occasionally become ludicrous: "[I]f Pay-TV comes on real strong at least 5000 of the 10,000 indoor and drive-in U.S. movie theaters, employing many thousands more than that, will be deflated or destroyed. Beyond that, [a NATO spokesman] predicted, important illumination will disappear from urban neighborhoods, the lights of the local movie theater. This black-out would induce more crime, he and his understandably partisan organization maintain." Considine, *The Big Fight Over Pay-TV*, San Francisco Sunday Examiner & Chronicle, Nov. 9, 1969, § B, at 3, col. 3.

189. *See* Posner, *supra* note 169, at 643.

190. *See, e.g.*, Goldin, *The Television Overlords*, THE ATLANTIC, July 1969, at 87; Johnson, *The Media Baronies and the Public Interest*, THE ATLANTIC, June 1968, at 43; Editorial, *The American*

recently argued at length against permitting cross-media ownership of CATV and other broadcasting outlets.[191] Professor Barnett predicts that the cable operators are not likely to switch to common-carrier status, at least not all the way. They will prefer to maintain a channel or two for their own program origination. Barnett acknowledges, however, that there are substantial prospects that common-carrier obligations will be widely (or fully) imposed on cable television some time in the future by the federal government.[192] And he points out that:

> If the public is guaranteed access to communication facilities, concentration or even monopoly in the ownership of those facilities should afford less cause for concern than would otherwise be the case. If the owners of the facilities are prohibited from originating communications on their own behalf, the need for concern should be further reduced.[193]

In the interim he urges restrictions on any increased local-ownership concentration, which could be later withdrawn if unnecessary under common-carrier status.[194]

Enacting ownership restrictions now, however, while common-carrier status for CATV is being contemplated, may negatively predispose the common-carrier issue. If broadcasters were limited to ownership of only over-the-air transmission facilities, they would have no choice but to fight CATV with all of the considerable resources at their command. By analogy, if the Government had prevented blacksmiths from buying automobile repair shops, the blacksmiths would have adamantly opposed the transition to automobiles.

Even if broadcasters were prevented from buying into CATV only in the local market in which they already held a broadcast franchise, their overall opposition to CATV would still be vigorous; if the Government were to impose common-carrier status on CATV, each local broadcast station would probably find it difficult to survive competition with the natural advantages of CATV. Contemplating this disastrous result, the broadcasters could probably deter the Government from ever imposing common-carrier status on CATV.

On the other hand, if there were no ownership restrictions, then broadcasters could buy into CATV and protect themselves from a government switchover to common-carrier cable transmission. One of the reasons that soft drink manufacturers agreed to drop cyclamates with surprising speed may be that they already had an alternative product, saccharin, waiting

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Media Baronies: A Modest Atlantic Atlas, THE ATLANTIC, July 1969, at 83; N.Y. Times, Mar. 27, 1970, at 1, col. 7.

191. Barnett, *supra* note 152 *passim*.

192. *Id.* at 246–47.

193. *Id.* at 237.

194. *Id.* at 247.

in the wings, which allowed them to stay in business. The evolution of the communications industry would probably be similarly facilitated by not preventing broadcasters from gaining cable holdings.

In increasing numbers, broadcasters have been buying into CATV in order to have "a piece of what knocks them out."[195] Broadcasters accounted for almost 50 percent of CATV franchise applications in 1967, and they now have ownership interests in 32 percent of the franchises.[196] At this juncture, therefore, truly meaningful restrictions on ownership would not only prevent future incursions by broadcasters into CATV, but also would probably require broadcasters to dispose of their current holdings. Even if complete divestiture could be brought about, it would almost certainly stiffen broadcasters' resistance to CATV. Broadcasters are not about to stand quiescent while others profit from CATV development gained at the expense of their remaining broadcast holdings.

To be sure, owners of several media can stifle competition through special combination advertising rates and other devices,[197] but this may be a necessary sacrifice to facilitate the transition to CATV. The more important threat of multimedia ownership, that owners can have an inordinate impact on public opinion by reducing the diversity of opinion, need not be worsened by permitting broadcasters to hold or acquire CATV franchises. If the Government regulates CATV on a common-carrier basis, CATV operators will not have any control over the content of the messages transmitted and diversity will be preserved.

The short-run costs of media concentration may be worth suffering when compared to the long-run benefits of CATV for listeners. By not opposing broadcasters' ownership of CATV, the Government would take a calculated risk on providing the nation with a listener-oriented communication system fairly soon. The alternative government policy would be to make mostly marginal incursions on the concentration of broadcasters and cable operators at the cost of perpetuating the present advertiser-oriented system indefinitely. If there were no chance of obtaining common-carrier status for CATV, then the latter alternative would be acceptable. Since there is a chance for a common-carrier CATV system, however, no government regulation should be adopted which would impede the transition to such a system.

Both decisions—whether to convert the communications industry to CATV on a common-carrier basis and whether to require broadcasters to divest themselves of their cable holdings—rest with the FCC and the Con-

195. An anonymous broadcaster quoted in Welles, *The Tangled Tower of CATV*, LIFE, Nov. 18, 1966, at 53, 56.

196. N. JOHNSON, *supra* note 161, at 160.

197. *See* Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

gress. The two decisions should be made concurrently, since both actions are designed to further the diversity of "social, political, esthetic, moral, and other ideas and experiences" valued by *Red Lion*. Overall diversity of opinion and programing on the mass media will not be furthered if, in their zeal to divide media ownership, policymakers weaken the real chance for diversity through transition to CATV.

6. *Summary.*

Common-carrier cable transmission is, for two primary reasons, the preferred means of implementing the right to hear: First, it is the only alternative that gives individual listeners a direct choice of diverse programing; and second, it potentially involves the least amount of interference with program content by government officials, network executives, and program sponsors. There are two complementary ways in which the Government can facilitate the difficult transition to CATV. First, by taking away the extraordinary profits which broadcasters now realize from the sale of their licenses, the Government could substantially reduce the present economic attractiveness of over-the-air broadcasting. Second, and simultaneously, the Government could facilitate the transition by allowing broadcasters to continue to hold and purchase CATV franchises.

In its proper perspective, the transition to CATV is neither particularly momentous nor permanent. Technological advances in over-the-air broadcasting satellites or discovery of presently unknown means of transmission may make CATV obsolete in the future. The continuing goal for policymakers should be to keep communication regulation abreast with the most advanced and efficient technology.

IV. Conclusion

The emergence of the right to hear in *Red Lion* reflects the Court's recognition of the need to enfranchise the listener and move toward a free broadcasting marketplace by doing something about the inadequate diversity of programing. The Court's concern with fairness, listener rights, and balanced programing is a response to the failure of advertiser-supported broadcasts to represent the full range of listener needs, interests, and tastes. Since additional public-interest programing runs against the economic self-interest of the broadcasters, more government regulation has become necessary to ensure service to minority and specialty interests in the community.

The mutual dependence of listener and licensee is expanding. As broadcasting's services increase through developing technology, so does the public need for those services. Inevitably, broadcasting has become a quasi-public institution. It is not merely a means of expression for speakers but a medium

for the transfer of essential public intelligence. Even entertainment performs a definite educational function by affecting public taste and interests.[198]

Writing more than 20 years ago primarily about print media, William Hocking, on behalf of the Commission of Freedom of the Press, summarized communication's role in words applicable to the broadcast media of today: "It is a need, not a convenience . . . . [C]ontemporary man exists in an immeasurably extended environment—his needed breath-of-air may be ten thousand miles away. Having made a world of world-breathers, communications has lost its right not to serve them; it is bound by its own success."[199] Hocking concluded that under changed conditions where the media consumer's needs become more imperative and the variety of available media sources more limited, his interests might require protection.[200]

In *Red Lion* the Supreme Court has moved to provide that protection for the listener. In so doing, the Court unfortunately chose to refurbish such old rationales as scarcity, rather than to suggest how changed conditions might serve as a new foundation for future regulation. The case has told listeners and speakers seeking access to the media that they have more power than they have heretofore claimed. And it has warned present licensees to use freedom of the press to bolster rather than banish public discussion.

There are formidable obstacles facing the FCC and the broadcast industry in fashioning a remedy in response to *Red Lion*'s assertion of a listener's right to hear. Increased regulatory intervention by the FCC is likely to create new problems of censorship before it ameliorates the existing problem of low program diversity. If television is to become not merely an advertising and entertainment medium, but also an instrument of the listener's enlightenment, the courts, Congress, FCC, and broadcasters must cooperatively effect the economic transformation of the industry from over-the-air transmission to CATV.

Geoffrey L. Thomas

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198. W. HOCKING, *supra* note 1, at 161–66. "*Hence, individual citizens and the communities they compose owe a duty to themselves and their peers to take an active interest in the scope and quality of television service* which stations and networks provide and which, undoubtedly, has a *vast impact on their lives and the lives of their children.*" Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966), *quoting, with emphasis added*, FCC, *supra* note 138.

199. W. HOCKING, *supra* note 1, at 166.

200. *Id.*

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Reprinted from
HARVARD JOURNAL ON LEGISLATION
Volume 11, No. 4, June 1974

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Introduction

Community antenna television (CATV), or cable TV, is a rapidly expanding means for providing a greater quantity and variety of television service to viewers. As this industry grows it will change the nature of television programming available to American communities and will solve the technical problem which has spawned the current regulation of broadcast television. This article will examine a specific regulation of the Federal Communications Commission (FCC), the fairness doctrine, and explore the question of its application to cable television in the future.

It is the author's contention that if cable television develops to the extent predicted by its advocates, the nature of the medium will at some point become so different from traditional broadcast television that the fairness doctrine should not be constitutionally required in cable systems. This degree of development will exist, from this author's point of view, when at least 50 percent of all American households are linked to cable systems carrying 20 or more channels. It has been predicted that this event will occur by 1980 or shortly thereafter.[1] At that time the uninhibited marketplace of ideas which the Supreme Court has held the first amendment to require[2] will be achievable in a cable system without fairness regulations.

It is further contended that the FCC under present Supreme Court interpretation of its enabling legislation should not have the authority to impose fairness doctrine requirements on cable systems. Fairness requirements should not be interpreted to be "reasonably ancillary" to the Commission's television broadcast-

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1 *See* text at note 83 *infra*.

2 *See* text at note 52 *infra*.

ing responsibilities and cannot be effectively justified on this basis. Even if the courts eventually decide that the FCC does have the authority to impose cable fairness regulations, the Commission should not do so in the interest of sound policymaking.

The article will first define the fairness doctrine, look briefly at its history, and analyze the major Supreme Court case in point. Next the article will discuss the technology of cable television and the effect this technology will have on the problems to which the fairness doctrine is a response. A discussion of the reasonably ancillary doctrine — the current rationale for applying the fairness doctrine to cable TV — will follow. Finally, the policies and interests involved in determining whether to apply fairness requirements to cable television will be weighed.

I. The Fairness Doctrine

A. *A Definition*

The fairness doctrine is the name given to two requirements which the FCC imposes on all licensed television and radio broadcasters. First, the licensee has an affirmative obligation to present controversial public issues as part of his programming. Second, when a licensee airs one side of a controversial public issue, he must afford reasonable opportunity for presentation of a conflicting side. The doctrine signifies the unification of these two ideas: required presentation and fair presentation.[3]

There are no absolute standards of fairness, and the critical factors in judging the licensee are whether his action is reasonable and taken in good faith.[4]

> The Commission does not seek to establish a rigid formula for compliance with the fairness doctrine. The mechanics of achieving fairness will necessarily vary with the circumstances, and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the

3 *See* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249-52, ¶¶ 6-10 (1949) [hereinafter cited as Editorializing].

4 *Id.* at 1255, ¶ 18.

> policy to aid and encourage expression of contrasting viewpoints.[5]

Licensees must play a "conscious and positive role in bringing about balanced presentation of the opposing viewpoints,"[6] for they have an "affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities . . . ."[7] If a broadcaster cannot get the other side represented under the auspices of a paying sponsor, then he must pay for the opposing view broadcast himself.[8] If no request is made to present the opposing side, the licensee must program on his own initiative a presentation of the conflicting viewpoint.[9] And a "reasonable percentage" of broadcasting time must be devoted to discussion of controversial public issues.[10]

The licensee has control over the exact program format in which the issues are presented, and it is the overall pattern of his programming rather than any particular program which may violate the fairness doctrine. On one night he may present solely one point of view on an issue. If he balances this programming with effective presentation of conflicting views on other nights, he has not violated the fairness doctrine. Even if the licensee has clearly but honestly blundered in presenting one side of a controversy much more powerfully than another, or in not presenting another side, he will not be "condemned where his overall record demonstrates a reasonable effort to provide a balanced presentation of comment and opinion on such issues."[11] His "overall pattern of broadcast service" and his "other program activities" will always be considered.[12]

A subcategory of the fairness doctrine in which the FCC has issued more specific standards and guidelines is the "personal attack"[13] and "political editorial"[14] area. If during a broadcast on

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5 Letter to Mid-Florida Television Corp., 40 F.C.C. 620, 621 (1964).
6 Editorializing, *supra* note 3, at 1251, ¶ 9.
7 *Id.*
8 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 377 (1969).
9 *Id.* at 378.
10 Editorializing, *supra* note 3, at 1257-58, ¶ 21.
11 *Id.* at 1255, ¶ 18.
12 *Id.*
13 47 C.F.R. § 73.123(a) (1973) (standard radio broadcast stations); *id.* § 73.300(a)

a controversial public issue an attack is made upon the character or integrity of an identified individual, the licensee must within one week notify the attacked person of the date and time of the broadcast, furnish him with a script or tape of the attack, and offer a reasonable opportunity for him to reply over the air. Certain exceptions to the rule are made, such as for attacks by legally qualified political candidates or their spokesmen, or attacks made in bona fide news programs and interviews.[15] A procedure similar to the political attack procedure is authorized when a licensee endorses or opposes a legally qualified political candidate, except that notification and sending of a script or tape must be made within 24 hours of the editorial. If the editorial is broadcast within 24 hours of election day, the licensee must comply with the procedure before the broadcast to insure the candidate time to prepare a reply.[16]

As with the fairness doctrine generally, personal attack and political editorial procedures obligate the broadcaster to present both sides of a controversial issue. However, these procedures differ from general fairness rules in that they have been codified and specific steps have been directed. Under the personal attack and political editorial procedures, a broadcaster does not have the option of presenting the attacked party's view himself or of choosing the specific party to represent the other side, as he does in other fairness doctrine situations. In the political editorial area, a broadcaster does not have any obligation to present specific political endorsements, whereas he is required by the general fairness doctrine to present controversial issues of public importance. Although the Commission has raised the possibility of setting down more tightly delineated rules in the general fairness field,[17] it continues to be satisfied with issuing policy statements.[18]

The fairness doctrine should be distinguished from the much-

(FM broadcast stations); *id.* § 73.598(a) (noncommercial educational FM broadcast stations); *id.* § 73.679(a) (television broadcast stations).

14 *Id.* §§ 73.123(c); 73.300(c); 73.598(c); 73.679(c).

15 *Id.* §§ 73.123(b); 73.300(b); 73.598(b); 73.679(b).

16 *Id.* §§ 73.123(c); 73.300(c); 73.598(c); 73.679(c).

17 Obligations of Broadcast Licensees Under the Fairness Doctrine, 23 F.C.C.2d 27, 32, ¶ 11 (1970) [hereinafter cited as Obligations].

18 *Id.*

publicized equal time requirement. Equal time requires that if a licensee allows a candidate to broadcast over the licensee's facilities, he must give an equal broadcasting opportunity to all other legally qualified candidates for the same office.[19] The licensee has no power of censorship over what the candidate broadcasts.[20] Rates charged cannot be greater than what a commercial advertiser would pay for broadcasting to the same area and must be uniform among candidates for the same office.[21] The rates are even more strictly regulated for 45 days preceding a primary election and 60 days preceding a general election. During those periods the rates must be no more than "the lowest unit charge of the station for the same class and amount of time for the same period."[22]

Unlike the equal time requirement, the fairness doctrine does not require granting equal time to all opposing viewpoints. A 5-minute commentary by the station on a controversial community project does not require that exactly five minutes be granted to all other sides. The licensee's obligation is to provide overall fair treatment, not precisely equal time. Unlike equal time, fairness does not necessarily require a broadcaster to offer time to an outside spokesman. Spokesmen can be obtained from a licensee's own staff.

The fairness doctrine is much broader in its application than equal time. Equal time has impact only during the relatively short period before elections and affects only programs involving legally qualified political candidates.[23] The fairness doctrine is always applicable and affects all programming involving controversial public issues. The equal time requirement focuses on personalities and is triggered by a candidate's appearance. In contrast, the fairness doctrine determines when the licensee's general program content requires the presentation of opposing views.

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19 47 U.S.C. § 315 (1970); 47 C.F.R. § 73.120(b) (1973) (standard broadcast stations); *id.* § 73.290(b) (FM broadcast stations); *id.* § 73.590(b) (noncommercial educational FM broadcast stations); *id.* § 73.657(b) (television broadcast stations).

20 47 C.F.R. §§ 73.120(b); 73.290(b); 73.590(b); 73.657(b) (1973).

21 *Id.* §§ 73.120(c); 73.290(c); 73.590(c); 73.657(c).

22 47 U.S.C. § 315(b) (Supp. II, 1972).

23 47 C.F.R. §§ 73.120(a); 73.290(a); 73.590(a); 73.657(a).

B. *History and Purpose of the Doctrine*

The fairness doctrine can be traced back to rulings of the Federal Radio Commission (FRC), the predecessor of the FCC. Prior to 1927 the allocation of radio frequencies was left to private initiative, and airwave interference made transmission extremely difficult. A series of National Radio Conferences held between 1922 and 1925 addressed themselves to the problem. The conferences resolved that federal regulation of the radio spectrum was necessary and that airspace should be made available only to those who would serve the public interest. In answer to these demands, Congress passed the Radio Act of 1927, which created the Federal Radio Commission.[24] The FRC was to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."[25]

The Commission soon determined that the fairness doctrine was part of the public interest standard imposed on broadcasters. In 1929 the FRC declared that the "public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all discussion of issues of importance to the public."[26] The Commission determined that because a) scarcity of the frequency resource meant that only a few could have the broadcasting privilege, and b) the government played a role in granting that privilege, the broadcaster had to use it consistent with the "most beneficial sort of discussion of public questions."[27]

The FCC, operating under the authority of the Communications Act of 1934,[28] continued FRC fairness policies. In its *Sixth Annual Report* the FCC stated: "In carrying out the obligation to render a public service, stations are required to furnish well-rounded rather than one-sided discussion of public questions."[29] The Commission asserted in *Mayflower Broadcasting Corp.* that

24 Radio Act of 1927, ch. 169, 44 Stat. 1162.

25 *Id.* § 4(c), 44 Stat. 1163. *See also* 67 CONG. REC. 5478 (1926) (remarks of Representative White (R.-Me.), a sponsor of the Radio Act).

26 Great Lakes Broadcasting Co., 3 F.R.C. App. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. denied*, 281 U.S. 706 (1930).

27 *Id.* at 34.

28 Ch. 652, 48 Stat. 1064.

29 6 FCC ANN. REP. 55 (1940).

> Freedom of Speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in the public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively, and without bias.[30]

Since the FCC also held that a broadcaster "cannot be an advocate,"[31] the decision was interpreted as an outright prohibition of broadcaster editorializing.

A report, *Editorializing by Broadcast Licensees*, was issued by the FCC in 1949 largely as a result of the reaction to its broadcaster advocacy ruling.[32] The report is still regarded by the Commission as the "definitive policy statement" on the doctrine.[33] The report reaffirmed the broadcaster's obligation to afford reasonale opportunity for discussion of controversial public issues and to make sure that such issues are addressed from conflicting points of view. It set forth the broadcaster's obligation to seek conflicting viewpoints, his right to control format, and the standard of reasonableness and good faith for judging compliance. It also reversed *Mayflower* and ruled that broadcasters could editorialize.[34]

In justifying the fairness requirements the Commission declared that the broadcaster is "trustee"[35] of a scarce medium to be utilized for public benefit and that licenses are to be issued only where the public interest, convenience, or necessity would be served.[36] This standard demands that the public be kept informed by hearing different viewpoints.[37] The legislative history of the Communications Act[38] as well as the needs of democracy[39] so require, said the Commission. Nothing in the Communications Act or its history indicates that the people acting through Congress wanted to diminish their "paramount rights in the airwaves . . . ."[40]

30 Mayflower Broadcasting Corp., 8 F.C.C. 333, 340 (1940).
31 *Id.*
32 Editorializing, *supra* note 3, at 1246, ¶ 1.
33 Obligations, *supra* note 17, at 27, ¶ 2.
34 Editorializing, *supra* note 3, at 1252-53, ¶ 13.
35 *Id.* at 1247, ¶ 3, 1258, ¶ 21.
36 *Id.* at 1248, ¶ 5.
37 *Id.* at 1251, ¶ 9.
38 *Id.* at 1248, ¶ 5.
39 *Id.* at 1249, ¶ 6.
40 *Id.* at 1257, ¶ 20.

In 1959 Congress amended § 315 of the Communications Act. The amendment stated that broadcasters must "operate in the public interest and . . . afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[41]

C. *The* Red Lion *Decision*

Despite the 1959 amendment and the enforcement of the fairness doctrine by the Commission and the courts for decades, there were still broadcasters in the mid-1960's who questioned its validity. The Supreme Court ruled on the issue in the well-known case of *Red Lion Broadcasting Co. v. FCC.*[42]

In that case WGCB, a Pennsylvania radio station licensed to the Red Lion Broadcasting company, aired a 15-minute program featuring the Reverend James Hargis in his "Christian Crusade" series. Reverend Hargis, in discussing a book written by Fred J. Cook entitled *Goldwater — Extremist on the Right,* declared that Cook had been fired by a newspaper for making false charges against city officials, had then worked for a Communist-affiliated publication, and had subsequently written the book to smear Senator Barry Goldwater (R.-Ariz.). When Cook demanded free reply time, WGCB refused. After investigating a complaint by Cook, the FCC concluded that Reverend Hargis' comment did constitute a personal attack. Red Lion, said the Commission, had not met its obligation under the fairness doctrine to send a tape, transcript, or summary of the broadcast to Cook and offer reply time — free if Cook would not pay. The Court of Appeals for the District of Columbia Circuit upheld the Commision's ruling as constitutional and otherwise proper.[43] Red Lion petitioned for certiorari.

The Supreme Court also considered a suit by the Radio Television News Directors Association (RTNDA) challenging the personal attack and political editorial rules. The Court of Appeals for the Seventh Circuit had held that these rules unconstitution-

41 Act of Sept. 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557 (codified at 47 U.S.C. § 315(a) (1970)).

42 395 U.S. 367 (1969).

43 Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), *aff'd,* 395 U.S. 367 (1969).

ally abridged freedom of speech and the press.[44] The Supreme Court held that the specific application of the fairness doctrine in *Red Lion* and the promulgated rules at issue in *RTNDA* were "valid and constitutional."[45]

After concluding that the public interest standard,[46] the 1959 amendment,[47] and past FCC practice made the Commission's fairness doctrine and personal attack—political editorial regulations a "legitimate exercise of congressionally delegated authority,"[48] the Court considered the broadcasters' complaint that the doctrine and rules violated their first amendment freedoms. The licensees contended that the first amendment protects "their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency."[49]

Ironically, the Court held that if the broadcasters violated the fairness doctrine, they would be infringing the first amendment rights of the public. As Professor Jaffe puts it, "the constitutional shoe turned out to be on the other foot."[50] The Court declared that there was a "First Amendment goal of producing an informed public capable of conducting its own affairs."[51] The objective of the first amendment is to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[52] "It is the right of the

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44 Radio Television News Directors Ass'n v. United States, 400 F.2d 1002 (7th Cir. 1968), *rev'd*, 395 U.S. 367, 375 (1969).

45 395 U.S. at 375.

46 The Court stated that the FCC's mandate under the public convenience, interest, or necessity standard of the Communications Act, 47 U.S.C. §§ 303, 303(r), is "not niggardly but expansive." 395 U.S. at 380.

47 The Court stated that the amendment

> makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard.

395 U.S. at 380.

48 *Id.* at 385.

49 *Id.* at 386.

50 Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768, 773-74 (1972).

51 395 U.S. at 392.

52 *Id.* at 390.

viewers and listeners, not the right of the broadcasters, which is paramount."[53]

The Court based its conclusion that the first amendment right of the public required the fairness doctrine on the state of the broadcasting industry as viewed in 1969. The Court pointed to the scarcity of the airwave resource and the governmental role in allocating part of that resource to a particular licensee. The broadcaster became a public trustee, with a temporary privilege to use a scarce public good. Since it would be technically impossible for every citizen to have his own radio station and frequency, and since only a few persons were given the right to have such a station, those privileged few had to allow others to express views over the facilities. If not, these few could monopolize the information available to the public over the airwaves.[54]

The broadcasters argued that although scarcity may have previously justified government fairness requirements, new technology had opened up additional frequencies and scarcity was no longer an adequate justification. The Court disagreed. Justice White cited the ever-present conflicting needs for airspace for everything from radio-navigational aids used by aircraft and ships to police and fire department communications. He then illustrated that the VHF television spectrum was almost entirely occupied in major markets and that UHF frequencies were being filled.[55]

The Court stated that "[s]carcity is not entirely a thing of the past."[56] "Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential."[57] But in its footnote to this conclusion, the Court quoted from the congressional sponsors of the 1959 amendment:

> If the number of radio and television stations were not limited by available frequencies, the committee would have no

53 *Id.*
54 *Id.* at 388-90.
55 *Id.* at 398 n.25 (chart summarizing VHF and UHF channels allocated to and available in the top 100 television market areas as of Aug. 31, 1968).
56 *Id.* at 396.
57 *Id.* at 399.

> hesitation in removing completely the present provision regarding equal time and urge [*sic*] the right of each broadcaster to follow his own conscience . . . . However, broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust.[58]

The Court was also concerned with the results of the governmental role in helping existing broadcasters. Even where new technology makes new entry possible, said the Court, initial governmental selection of licensees had already led to present broadcasters' having extensive experience in broadcasting, an established audience, network affiliation, and advantage in program procurement which gave them a "substantial advantage over new entrants."[59]

The Court contrasted broadcasting with other sources of public information, such as newspapers, on which the fairness rules are not imposed. For these media there has been no scarcity of resource necessitating government regulation or involvement. "[D]ifferences in the characteristics of new [recently developed] media justify differences in the first amendment standards applied to them,"[60] and therefore justify imposing the fairness doctrine on broadcasting but not on the print media. The Court warned, however, that if the quality and quantity of broadcast coverage were affected negatively by the fairness doctrine, it could reconsider the constitutional implications.[61]

In summary, *Red Lion* held that because the fairness requirements were necessary to ensure the "uninhibited marketplace of ideas" required by the first amendment, the broadcasters' first amendment claims could not prevail. The fairness doctrine was held to be necessary because of the scarcity of the airwave resource and the role the government had played in helping existing broadcasters. The case dealt only with fairness and the personal attack and political editorial regulations as applied to the broadcasting industry of 1969.

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58 *Id.* at 399 n.26 (quoting from S. REP. No. 562, 86th Cong., 1st Sess. 8-9 (1959)). The Court in its discussion in this footnote mixed the fairness, personal attack, and equal time doctrines together when discussing scarcity as the basis for regulation.

59 *Id.* at 400.

60 *Id.* at 386.

61 *Id.* at 393.

II. Cable Television

A. *Cable Television Technology*

The great technological advantage of cable TV is that it utilizes a wire rather than airspace to transmit images and sound. A conventional TV broadcast system receives light images and sound through camera and microphone apparatus, transforms this information to electric current, and then radiates from a transmitting antenna electromagnetic waves carrying this same information. A TV set receives these electromagnetic waves through its receiving antenna, decodes the electronic configuration, converts it into a picture on a cathode ray tube, and amplifies the accompanying sound. Conventional TV does use wire at the receiving end and the transmitting end. But the major distances over which signals are transmitted are covered by airspace transmission, not wire.[62]

Conventional TV airspace is considered a scarce resource because only waves with frequencies from approximately 50 million cycles per second to 200 million cycles per second are well suited for television transmission.[63] This frequency spectrum, known as the very high frequency (VHF) band, must also provide a medium for FM radio and other services.[64] Space for only 12 TV channels remains between 54 and 88 million cycles per second, and between 174 and 216 million cycles per second.[65] Although there is spectrum space for an additional 70 channels in higher frequencies, ultra high frequency (UHF) television transmission is inferior to VHF transmission.[66] At ultra high frequencies waves tend to travel more in straight lines, reflecting off buildings and dissipating their energy.[67]

Competition for nontelevision use of both the VHF and UHF frequency range is intense. Requests come from sources as diverse as radio astronomers who want to communicate with an explod-

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62 Sloan Commission on Cable Communications, On the Cable: The Television of Abundance 11 (1971) [hereinafter cited as On the Cable]. This section of the article is drawn directly from chapter two of the Sloan Commission Report.

63 *Id.* at 17.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.* at 19.

ing distant galaxy and policemen who want to radio their stations. When either receiver or transmitter is moving, as in airplane to ground communication, airspace must be used or no communication would be possible.[68]

Both VHF and UHF face the problem of frequency interference. When waves at approximately the same frequency travel through the same airspace, they interfere with each other. Thus, "an antenna radiating a signal on channel 3, for example, makes it impossible for another station to transmit at that frequency within a radius of approximately 200 miles,"[69] and a channel 2 or 4 broadcast cannot be made within 100 miles. Interference on a UHF band is even more intense.[70]

The pure, self-contained cable system eliminates all of these technical problems, for it transmits its signals exclusively over wire. The electrical signal is carried by a coaxial cable, in which an inner conductor and outer conductor are separated by plastic foam and encircled in a plastic sheath. The coaxial cable used to transmit television signals can carry electric signals of frequencies from 40 million to 300 million cycles per second. A television signal requires a band width of six million cycles per second. Theoretically, the coaxial cable can carry up to 40 channels of television.[71] It is predicted, however, that channel capacity may be increased to 80.[72] Economics permitting, more than one cable may be laid, thereby doubling, tripling, or further increasing the number of available channels.

Signals can be fed into a cable system in three ways. The simplest method is for an antenna to intercept signals of local conventional television stations and transfer them into the cable system. A second way enables a system to pick up a more distant conventional TV station. The antenna is placed closer to the station than the cable network and the signal is transferred from the antenna

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68 *Id.* at 20-21.

69 *Id.* at 17.

70 *Id.*

71 *Id.* at 12-13.

72 *Id.* at 37. Focus Cable Television of Oakland, California, has recently laid dual cables capable of carrying 64 channels with 2-way communication. In October 1973, 38 of these channels became operational. Telephone interview with Elijah Turner, Director of Public Information, Focus Cable Television of Oakland, Nov. 12, 1973.

to the system by long-distance microwave or cable link.[73] Third, the cable system operator may originate his own signals in his own studio. This studio may vary from a camera focused on a clock to a fully equipped color television studio.[74]

The point of entry into the cable system is called the "head-end." A trunk line runs out from the head-end through the area covered by the system's franchise, and feeder lines run from the trunk to within 75 to 150 feet of each residence. Drop lines from the feeder line to the residence complete the cable link from the head-end to the residence.[75]

B. *Cable Television's History and Future*

Cable television began in this country as a means of supplying television signals to remote areas which were too isolated to receive broadcast signals. A large antenna would be erected, a distant signal received, and through cable this cable antenna television (CATV) would transmit the distant signal to the rural home. Microwave was often used to enable the antenna to pick up the distant signal. By 1960 there were an estimated 640 CATV systems picking up distant signals and transferring them to homes that would otherwise not have had the television service. The system soon began to expand to major metropolitan markets where cable could provide better reception than was received from electromagnetic waves which had to contend with other city transmissions and tall buildings.[76]

By 1966 CATV growth had become, to use the FCC's term, "explosive."[77] This rapid growth continued and, as of 1971, 2,750 cable systems were operating, reaching 5.9 million households, approximately nine percent of all television households in the United States.[78] Franchise applications had been granted or were

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73 There is also the possibility of signal transfer via satellite.

74 ON THE CABLE, *supra* note 62, at 15-16.

75 *Id.* at 13.

76 *Id.* at 23-24.

77 Second Report and Order, 2 F.C.C.2d 725, 738, ¶ 30 (1966).

78 ON THE CABLE, *supra* note 62, at 32. In the beginning of 1973, 2,991 cable systems were in operation, reaching a total of 7,300,000 subscribers. TELEVISION FACT BOOK: SERVICES VOLUME 84(a) (1973-74 ed.).

being considered in more than half of the top 30 U.S. TV markets.[79]

Most of today's systems provide 12 or fewer channels to the subscriber and are still only supplying reception of distant signals and clearer reception of close signals.[80] However, in New York and to some degree elsewhere, program origination is taking place.[81] By June 1971 the two cable originating New York systems were serving over 80,000 subscribers.[82]

Under the auspices of the Alfred P. Sloan Foundation, the Sloan Commission on Cable Communications investigated cable television for almost 18 months. The Commission concluded that by 1980, or

> shortly thereafter, the cable television system viewed as a whole will be at least twenty channels over all of its range and forty channels over much of its range; that it will reach into 40 to 60 percent of all American households; that it will provide digital return signals to computers at each head-end and at little extra expense to other computers at a limited number of selected locations; and that it will be capable of full interconnection [via satellite] at moderate cost.[83]

The Sloan Commission considered these estimates conservative, as they were made on the assumption that cable television technology would not change radically during the next few years. Since that technology is already operating, any breakthroughs would only increase the availability of cable TV to the public.[84] The Commission's prediction that interconnection of systems by satellite will be available by 1980 indicates the possibility of providing more expensive, special programming for cable subscribers.[85]

79 ON THE CABLE, *supra* note 62, at 32.

80 *Id.* at 2.

81 This program origination varies from automated filming of a newsletter to full dress studio productions. *Id.* at 27.

82 *Id.* By September 1973 the subscriber total increased further. Teleprompter, the cable company responsible for the upper Manhattan area, had 55,000 subscribers. Telephone interview with Ernie Tarlen, a Teleprompter General Manager in Newport Beach, California, Nov. 9, 1973. Sterling Manhattan Cable TV, responsible for the lower Manhattan area, had over 70,000 total subscribers. Telephone interview with Thomas Griffin, Manager of Engineering, Sterling Manhattan Cable Television, Nov. 9, 1973.

83 ON THE CABLE, *supra* note 62, at 42.

84 *Id.* at 36. The Commission also assumed that neither Congress nor the FCC would lay down any seriously restrictive regulations.

85 *Id.* at 41-42. A cabinet level committee report on national cable television

III. Fairness and Cable TV

A. *Fairness as a Constitutional Requirement*

It was the public's first amendment interest in an open marketplace of ideas that overrode the broadcasters' first amendment claims in *Red Lion* and elevated the fairness doctrine to a constitutional requirement. That public interest, said the Court, could not otherwise be secured because broadcast frequencies are so scarce. Since only a few can possess the broadcast privilege, the government must prevent those few from monopolizing the ideological marketplace by compelling them to broadcast a diversity of views on matters of public controversy.

To bolster its scarcity argument the *Red Lion* Court relied on the FCC's channel allocation chart for the top 100 market areas, printed in the 1968 *FCC Annual Report*.[86] The Court's footnote reference lists 264 commercial VHF, 213 commercial UHF, 34 noncommercial VHF, and 69 noncommercial UHF stations as on the air, authorized, or applied for in those market areas.[87] Implicit in these statistics is the breakdown in the FCC's fuller statistics listed on the page of the 1968 report cited by the Court.[88] All but one of the VHF stations the Court mentions were operating, but only 146 of the 282 UHF stations listed were on the air.[89] The

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policy, which was recently released by the White House Office of Telecommunications Policy, was premised on a conclusion about cable's growth similar to that of the Sloan Commission. N.Y. Times, Jan. 17, 1974, at 1, col. 1. The committee indicates that its recommendations should take effect when 50 percent of all American households are hooked up to cable television, which it anticipates will take about five years. *Id.* at 16, col. 3. The 50-percent point has also been chosen by this author, in conjunction with a minimum 20 channel system for households, as the time when fairness doctrine regulations should be lifted. The committee recognizes that "an almost limitless number of channels" will be available to subscribers to "provide entertainment, news, educational programs, and specialized information." Los Angeles Times, Jan. 17, 1974, at 1, col. 3.

> Because the potential number of programs is so great, and because cable transmission makes no direct use of the publicly owned airwaves, the Cabinet committee . . . urged exemption of cable television from regulations that the Federal Communications Commission applies to over the air broadcasters in an effort to ensure fairness in treatment of controversial topics . . . .

Id. at 1, col. 3 and at 18, col. 1. The author strongly concurs in this recommendation.

86 395 U.S. 367, 398 (1969).

87 *Id.* at 398 n.25.

88 34 FCC Ann. Rep. 135 (1968).

89 *Id.*

combined VHF-UHF on-the-air count was 444 stations for the top 100 market areas.

Looking at the Sloan Commission predictions of cable channel capacity,[90] one might conservatively estimate that on the average individual cable systems would have 25 channels by 1980 or shortly thereafter. Assuming one cable system for each major market area, there will be approximately 2,500 channels of television communication allocated to the top 100 market areas. This figure is almost six times the channel allocation the Court referred to when it spoke of scarcity of resources in 1969 and many more times the channel allocation in existence when the FCC and courts justified fairness on scarcity grounds in earlier decisions. In addition, each market area may have several cable systems — New York City already has two. As the Sloan Commission concluded, cable TV will become the television of abundance.

The Sloan Commission based its predictions on the assumption that the FCC would not impose severely restrictive regulations on the cable TV industry. Although there have been cable industry complaints with respect to certain regulations, recent FCC rules will potentially give cable TV a major boost by helping to make the cable system a lively marketplace of ideas and to provide overall television service which is in the public interest. The Commission has already demanded that cable operators engage in cablecasting — the transmission of programs originated by the cable operator or another party exclusive of broadcast signals carried over the system.[91] The Supreme Court recently upheld this regu-

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90 See text at note 83 *supra*.

91 FCC rules stipulate that no CATV system with 3,500 or more subscribers may carry a TV broadcast unless the system operates to a significant extent as a local outlet by origination cablecasting and "has available facilities for local production and presentation of programs other than automated services." 47 C.F.R. § 76.201(a) (1973). The FCC has also stated that in "unusual circumstances" some cable operators with 3,500 or more subscribers may be granted a waiver from the rule. Memorandum Opinion and Order, 23 F.C.C.2d 825, 827 n.4 (1970). CATV operators with fewer than 10,000 subscribers who request an ad hoc waiver of the cablecasting requirements will be excused from the requirement pending an FCC ruling on their request. Cable operators with over 10,000 subscribers will not be excused from compliance unless and until the FCC rules favorably on their requests. Memorandum Opinion and Order, 27 F.C.C.2d 778, 779, ¶ 3 (1971). The FCC granted the ad hoc waiver pending final determination because of alleged potential economic injury to some cable systems if they were required to cablecast immediately. *Id.*

lation.[92] Although there has been some criticism of the cablecasting requirement,[93] it should eventually lead to increased creativity and expression on cable systems. No longer can a CATV system be merely the transferor of existing broadcast stations, increasing the number and quality of signals received in a given area. Now the cable system must use its own channels to present increased and more diverse programming to the receiver.

FCC rules issued on February 12, 1972, go even further in providing diversity and eliminating scarcity.[94] The Commission states that it envisions future cable usage which will principally rely on nonbroadcast signals.[95] It notes that 40, 50, and 60 channel systems are currently being installed in some communities.[96] The new rules require that in the top 100 markets every cable system must have a minimum of 20 channels. For every broadcast signal carried these systems must provide an additional channel.[97] These systems must also establish what are called designated access channels. Cable systems

> will have to provide one dedicated, noncommercial public access channel available without charge at all times on a first-come, first-served nondiscriminatory basis and, without charge during a developmental period, one channel for educational use and another channel for local government use.[98]

In addition, the new rules require that leased access channels, channels the public can rent, be provided on any remaining bandwidth of the cable system.[99] If a broadcast channel or a designated access channel is not in use during a particular time, that band-

92 United States v. Midwest Video Corp., 406 U.S. 649 (1972). Justice Brennan wrote an opinion for himself and Justices White, Marshall, and Blackmun. Chief Justice Burger concurred in the result. Justice Douglas wrote the dissent, in which Justices Stewart, Powell, and Rehnquist joined.

93 *See* Note, *Cablecasting: A Myth or Reality—Authority of the Federal Communications Commission to Regulate Local Program Origination on Cable Television—An Evaluation of the Commission's Cablecasting Rules After* United States v. Midwest Video Corporation, 26 RUTGERS L. REV. 804 (1973) [hereinafter cited as Note, *Cablecasting*].

94 Cable Television Report and Order, 36 F.C.C.2d 143 (1972) [hereinafter cited as Fourth Report and Order].

95 *Id.* at 190, ¶ 120.

96 *Id.*

97 *Id.*

98 *Id.* at 190, ¶ 121.

99 *Id.* at 191-92, ¶ 125. Network cross-ownership is also restricted. 47 C.F.R. § 76.501 (1973).

width must also be available for public lease during that period.[100] Each cable system must also provide the capacity for return communication from receiver to head-end at least on a nonvoice basis over its channels.[101]

The Commission states in the rules: "Our basic goal is to encourage cable television use that will lead to constantly expanding channel capacity."[102] To help meet this objective, as of March 31, 1972, all cable systems in the top 100 markets must be prepared to enlarge their channel capacity. Thus an expanding channel flow will be available to the viewer, offering an increasing diversity of programming.[103]

These plans are a far cry from the thinking in the FCC's 1968 *Annual Report* referred to by the *Red Lion* Court, which defined CATV mainly in terms of broadcast signal reception.[104] For the cable TV which the FCC now foresees, the problem of scarcity on which *Red Lion* was premised will not exist. When broadly developed, cable television will give the public a far wider and more varied marketplace of ideas than broadcasting systems can offer. Thousands of channels with ready, low-cost (even free) access will assure for controversial public issues a forum far richer than any now available. For such a cable television system the fairness doctrine will not be required to secure the public's first amendment interest in an open marketplace of ideas. And since protection of the public's first amendment rights was the keystone of the Supreme Court's rationale, the fairness doctrine cannot under *Red Lion's* logic be a constitutional requirement for developed cable systems.[105]

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100 Fourth Report and Order, *supra* note 94, at 191-92, ¶ 125 (1972).

101 *Id.* at 192-93, ¶ 129.

102 *Id.* at 192, ¶ 126.

103 The rules requiring designated and leased access channels and the restrictions on network cross-ownership will also contribute to this increasing diversity and help achieve a lively marketplace of ideas over cable systems.

104 34 FCC ANN. REP. 4 (1968).

105 It should also be observed that *Red Lion's* "helping existing broadcasters" rationale (see text accompanying note 59 *supra*) cannot be applied to cablecasters. A federal government selection process does not give one cable channel user a dominant position over another. Under the FCC rules local governments make the key decisions on franchises above the minimum operating standards. Fourth Report and Order, *supra* note 94, at 207-10, ¶¶ 177-86. Since more channels are available and since the industry is new, the government, federal, state, or local, has not given any one channel user substantial advantage over others.

B. *The Reasonably Ancillary Doctrine*

The "reasonably ancillary" standard was first stated in *United States v. Southwestern Cable Co.*[106] In that case a San Diego television station applied to the FCC for relief from the competition of Southwestern's CATV system.[107] The system was importing signals from Los Angeles into San Diego, and the TV station alleged its San Diego market was being fragmented and its advertising revenue diminshed. The FCC granted the television station relief by restricting importation of the distant Los Angeles signals pending hearings.[108] The Court of Appeals for the Ninth Circuit set aside the FCC ruling, stating that the FCC lacked the requisite statutory authority.[109] The Supreme Court granted certiorari and reversed.[110]

The Court held that the FCC did have authority to regulate CATV and that the order restricting the Los Angeles signal importation did not exceed this authority. The Court, speaking through Justice Harlan, pointed to § 152(a) of the 1934 Communications Act[111] as the basis for FCC regulation of CATV. Under that section the Act's provisions apply to "all interstate and foreign communication by wire or radio." CATV systems clearly involve such communication.[112] Justice Harlan examined congressional intent and concluded that § 152 covers CATV operations and is itself a grant of regulatory power. He declared that the FCC had reasonably concluded that regulation of CATV was necessary to perform effectively its regulation of television broadcasting.[113] The FCC had pointed to the financial threat CATV posed to television growth and its responsibilty for developing a healthy system of local television broadcasting.[114] The Court concluded that FCC regulation of CATV is justified as part of the Commission's responsibility to protect broadcast television.

106 392 U.S. 157 (1968).
107 *Id.* at 159-60.
108 Memorandum Opinion and Order, 4 F.C.C.2d 612, 624, ¶ 24 (1966).
109 Southwestern Cable Co. v. United States, 378 F.2d 118 (9th Cir. 1967), *rev'd*, 392 U.S. 157 (1968).
110 392 U.S. 157 (1968).
111 47 U.S.C. § 152(a) (1970).
112 392 U.S. at 169.
113 *Id.* at 173.
114 *Id.* at 176-77.

The Court expressed no views on the FCC's authority to regulate CATV in any other situation "or for any other purposes."[115]

> It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law," as "public convenience, interest, or necessity requires." 47 U.S.C. § 303(r).[116]

Though the Court indicated that FCC regulation of CATV which is reasonably ancillary to the Commission's television broadcasting responsibilities will be upheld, little guidance was offered on what constitutes a reasonably ancillary regulation beyond the economic protection situation.

Further guidance was provided, however, in *United States v. Midwest Video Corp.*[117] At issue there was an FCC regulation that no cable system with 3,500 or more subscribers can carry a TV broadcast signal "unless the system also operates to a significant extent as a local outlet by cablecasting[118] and has available facilities for local production and presentation of programs other than automated services."[119] Midwest Video, an operator with more than 3,500 subscribers, petitioned for review in the Eighth Circuit Court of Appeals of a Commission order that it engage in cablecasting. The court of appeals set aside the order, holding that it went beyond the Commission's statutory authority,[120] but the Supreme Court reversed.[121]

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115 *Id.* at 178.

116 *Id.*

117 406 U.S. 649 (1972).

118 "Cablecasting" was defined as "programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system." 47 C.F.R. § 74.1101(j) (1971), *as amended*, 47 C.F.R. § 76.5(v) (1973).

119 47 C.F.R. § 74.111(a) (1971), *as amended*, 47 C.F.R. § 76.201(a) (1973).

120 Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir. 1971).

121 406 U.S. 649 (1972). Midwest Video had, in fact, challenged the rules *governing* program origination, including the cable fairness regulations. The court of appeals refused to rule on these regulations, stating that petitioner had no standing to challenge them since under that court's decision he would not be compelled to cablecast at all. Midwest Video Corp. v. United States, 441 F.2d 1322, 1328 (8th Cir. 1971). The Supreme Court ruled only on the program origination rule.

The issue was whether the program origination rule was reasonably ancillary to the Commission's television broadcasting regulation responsibilities.[122] The Court held that it was. Justice Brennan, announcing the decision of the Court, declared that the FCC could regulate cable systems not only to protect television broadcasting from economic harm but also to further other objectives for which the FCC had been given jurisdiction to regulate broadcasting. The objectives asserted by the FCC and reiterated by the Court were "increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . . ."[123] The Court also mentioned the Commission's responsibility to "encourage the larger and more effective use of [television] in the public interest"[124] and to regulate broadcasting in accord with "public convenience, interest, or necessity."[125] With almost no analysis the Court asserted that the program origination rule fulfilled these statutory goals because the rule would provide increased diversity in programming.[126] It concluded that there was substantial evidence that the rule would promote the public interest.[127]

C. *Fairness and the Reasonably Ancillary Doctrine*

Can the fairness doctrine rules which have been imposed on cable operators be justified on the basis of the reasonably ancillary jurisdiction of the FCC as set forth in *Southwestern Cable* and *Midwest Video*? It should first be noted that application of the doctrine cannot be justified by the *Southwestern* economic protection rationale. The absence of a fairness doctrine rule applicable to cable systems would not have the adverse economic impact on television broadcasters that the lack of the distant signal importation restriction had on the television broadcaster in that case.

The Commission's justification for imposing the doctrine on

122 406 U.S. at 662-63.

123 *Id.* at 667-68.

124 *Id.* at 656 n.11. The Court was citing 47 U.S.C. § 303(g) (1970).

125 406 U.S. at 656 n.11. The Court was citing 47 U.S.C. § 303 (1970).

126 406 U.S. at 669. For an intense and skeptical analysis of this proposition, *see* Note, *Cablecasting*, *supra* note 93, at 820-37.

127 406 U.S. at 673.

cable operators is essentially the same as its justification for imposing the origination rule: the doctrine will further its statutory goals for regulation of broadcast television.[128] The Commission states that the policy behind the fairness doctrine will be "grossly circumvented" if a cable television viewer can see both sides of a controversial public issue presented when he looks at a broadcast program, but only one side of an issue when he switches to a CATV program origination channel or stays tuned to the same broadcast channel when program origination material is being presented there.[129] Thus to impose the fairness doctrine adequately on broadcast television, the Commission reasons, it must place fairness doctrine regulations on cable operators. The reasonably ancillary doctrine is therefore said to apply.[130]

The actions of the FCC seem inconsistent, however, with this justification. Although the Commission has continued fairness requirements for channels exclusively controlled by cable system operators,[131] it has eliminated the fairness doctrine requirements for designated access channels and leased access channels.[132] The FCC also states that if a broadcast channel is temporarily not carrying broadcast signals, it may be used as a leased access channel.[133] Programming on any of these channels could therefore present one side of a controversial issue and a response would not be required. Thus under the FCC's own rules broadcast programs will inevitably exist side by side with cable programs not subject to the fairness doctrine. One finds it hard to see why broadcast programs must be protected from electronic cohabitation with some cable programs unrestricted by fairness rules, but not similarly sheltered from others.

It is at best highly doubtful whether application of the fairness doctrine to mature cable systems will further the FCC's statutory objectives. Diversity of programming and community self-expression should be assured by cable technology and the FCC's access

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128 First Report and Order, 20 F.C.C.2d 201, 220, ¶ 41 (1969).

129 *Id.* at 220, ¶ 42.

130 *Id.* at 221, ¶ 45.

131 Fourth Report and Order, *supra* note 94, at 196-97, ¶ 145. 47 C.F.R. § 76.209 (1973).

132 Fourth Report and Order, *supra* note 94, at 196-97, ¶ 145.

133 *Id.* at 191-92, ¶ 125.

and program origination[134] rules. The latter will bring about the access channels and origination equipment which local groups need to express themselves over cable television. Adding the fairness rule may compel the occasional transmission of a different viewpoint over the cablecaster's channel, but it is unlikely to promote a different type of programming. Indeed the doctrine may have the opposite effect by encouraging bland, noncontroversial programming. Cable programmers constantly concerned with whether programs are fairly presenting both sides of issues or whether other shows will have to be presented for balance purposes, perhaps even without paying sponsors, may engage in self-censorship. In addition to balance worries and the prospect of free time being required for an opposing viewpoint, the time and resources needed to deal with fairness complaints against the station may also act as a disincentive.[135]

Imposition of the fairness doctrine on cable systems bears a doubtful relation to the FCC's prime objective of promoting television service in the public interest.[136] To the extent that "public interest" simply restates the public's first amendment rights and its stake in access and program diversity, the article has already noted that the FCC is on slippery ground.[137] Other public policy considerations do come into play, however. A review of these considerations below demonstrates, to this author at least, that the FCC lacks statutory power to impose a cable fairness rule under the "promoting the public interest" rationale. And even

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134 The *Midwest Video* extension of FCC authority may be turned back. The decision was 5 to 4, with Chief Justice Burger providing the swing vote. In his concurring opinion the Chief Justice acknowledged "that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." 406 U.S. at 676. The protectionist rationale of *Southwestern* may be required in the future to obtain a new majority for further FCC cable regulation if there is a shift on the Court. As indicated, the *Southwestern* rationale does not support the fairness rule as applied to cable systems. For a critical evaluation of the *Midwest Video* decision, *see* 22 J. PUB. L. 301 (1973).

135 Under the fairness doctrine programmers cannot, of course, eliminate presentation of controversial public issues altogether.

136 *See* 47 U.S.C. § 303 (1970). As the FCC itself notes, regulations of cable systems are valid only if the regulations are "reasonably related to the public interest." First Report and Order, 20 F.C.C.2d 201, 222, ¶ 46 (1969).

137 See text at notes 104 & 134-35 *supra*. The FCC itself states that "the first amendment . . . is, of course, one of the most crucial aspects of the public interest . . . ." First Report and Order, 20 F.C.C.2d 201, 222, ¶ 46 (1969).

if the FCC is found to possess the authority, these same considerations would argue against its exercise.

D. *Other Policy Considerations*

As now applied to conventional broadcasting, the fairness doctrine may often fail to insure fairness. The Commission's standard of fairness is based on a station's overall programming, not on a specific presentation. Suppose a presentation of a controversial public issue is made one weekday at 7:30 in the evening. A licensee might meet his fairness obligation if he broadcasts a program effectively presenting the other side of the issue at 2:00 o'clock in the afternoon of a day in the following week. But it is unlikely that a large percentage of the audience at 7:30 P.M. would see the rebuttal show at 2:00 P.M. Similar audience incongruity would exist even if the rebuttal show were presented at the same time on another evening. The broadcaster presents only one side of the issue to his 7:30 audience; required to present other views, he again presents only one side of the issue to the later audience.

In addition, there is the problem of defining what issue was raised by the first show. If a party discusses the quality of American education, does this mean that on the later presentation spokesmen may talk about local school issues or education in the Soviet Union or school busing? The best way to insure fair presentation of conflicting viewpoints would be to have those opinions presented in the context of a single program. But this requirement would mean interference by the FCC in planning content of specific programs, a course to which the FCC has steadfastly objected as an excessive interference with broadcasters' rights and an unbearable administrative burden. Needless to say, the same problems would attach to a cable fairness rule.

The time, effort, and money put into administering the fairness doctrine must also be considered in weighing its utility. *Broadcasting* magazine reports that in 1970 the FCC received over 60,000 fairness complaints.[138] Three lawyers plus supporting staff

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138 BROADCASTING, Dec. 27, 1971, at 21.

work full time handling routine fairness doctrine complaints.[139] On an average, at least once a week important fairness questions are sent to the full Commission for consideration. Since the Commission recommends that complainants first contact the station involved, thousands of man-hours must be invested by stations in responding to such complaints. The courts also devote time to fairness questions. This situation now exists in the context of a few hundred VHF and UHF television stations, plus AM and FM radio stations. The amount of effort necessary to deal with fairness questions in a cable network which involves thousands of separate channels would be greatly magnified. If complaints increase in proportion to the number of channels added in the top 100 markets, estimating only one 25-channel system per market, there would be over 360,000 complaints annually.

It is inequitable to impose fairness requirements on broadcasters but not on newspapers. Many towns have only one major newspaper while supporting several television and radio stations.[140] Scarcity cannot be the basis of the distinction in treatment between television and the press. A difference in historic function is not an adequate reason since today TV and radio stations are, like newspapers, considered media through which public issues are to be discussed. This inconsistency of treatment is even more glaring for cable originators, who do not use the public airwave resource. The inequity of the situation was ironically summed up in a mid-1970 order of the FCC with respect to cablecasting. The Commission ruled that although program origination was still governed by fairness requirements, even if a publisher of a newspaper originated the program, a newspaper itself could be distributed over cable undisturbed by the fairness doctrine.[141] The

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139 Telephone interview with Milton Gross, Complaints and Compliance Division, FCC's Broadcast Bureau, Mar. 21, 1972. William Ray, Chief of the Complaints and Compliance Division of the Broadcast Bureau of the FCC, has stated that the manpower input into fairness problems "varies enormously. . . . Sometimes we have as many as seven lawyers working full time on fairness doctrine issues." In addition, supervisory personnel, the office of the FCC's General Counsel, and supporting secretarial staff become involved. Telephone interview with William Ray, Nov. 9, 1973.

140 *E.g.*, Amarillo, Texas.

141 Memorandum Opinion and Order, 23 F.C.C.2d 825, 829, ¶ 8 (1970).

Commission said, "[t]he point is that we have no intention of regulating the print medium when it is distributed in facsimile by cable."[142]

Red Lion held the public's first amendment rights "paramount" over those of the broadcaster;[143] it did not deny the existence of the broadcaster's rights. As one commentator has noted, "[i]t is plain that First Amendment interests attach . . . to the broadcasters' advocacy of their own views, through editorializing and program selections . . . ."[144] The same argument was made by Judge Wright in *Business Executive's Move for Vietnam Peace v. FCC*[145] when he stated that while the fairness doctrine rules do interfere with "broadcasters' free speech," this interference was justified by the *Red Lion* Court in terms of the public's constitutional rights.[146] And he stated that the licensees' "dual role demands that their own constitutional interests in free speech coexist with those of the general public."[147] When in a cable system an end to scarcity eliminates the public's first amendment interest in the fairness rule, however, one should question this continued FCC abridgment of the programmer's freedom of speech.

First amendment concerns become especially important when one considers the potential in the fairness doctrine for governmental abuse. Since the FCC can determine when a controversial issue should be raised and what is fair programming, it could conceivably alter its standards to favor a particular point of view. Commissioners are appointed by the President, and he might favor those whose views reflect his own. An example of the potential for such abuse was alleged by former FCC Commissioner Nicholas Johnson. He stated that the Nixon Administration successfully demanded that a talk show host an advocate of the SST on a particular show as the only way to fulfill the station's fairness

142 *Id.* The recent cabinet committee report, *supra* note 86, apparently also recognized the inequity of not treating cable systems like newspapers. The committee urged "that cable programming be allowed the same freedom of expression accorded printed media under the 'freedom of the press' clause of the Constitution's First Amendment." Los Angeles Times, Jan. 17, 1974, at 1, col. 3, at 18, col. 1.

143 *See* text at note 53 *supra.*

144 Note, *The Supreme Court 1968 Term*, 83 HARV. L. REV. 60, 135-36 (1969).

145 450 F.2d 642 (D.C. Cir. 1971), *rev'd on other grounds*, 412 U.S. 94 (1973).

146 *Id.* at 650.

147 *Id.* at 654.

doctrine obligations.[148] The potential for governmental intimidation of the media was also illustrated by a memorandum written by a Watergate figure and made public by Senator Lowell Weicker (R.-Conn.).[149] In the memorandum, written by then White House Assistant Jeb Stuart Magruder to then White House Chief of Staff H. R. Haldeman, Magruder suggested utilizing several federal agencies to influence the media for political purposes. Among his recommendations was "[h]aving the Federal Communications Commission begin 'an official monitoring system' to prove bias on the part of the networks."[150]

Conclusion

The arguments for eliminating the fairness doctrine are premised on a fully operating cable system. Such a system would be importing broadcast signals to the maximum extent allowed, providing program origination, and supplying effective designated access channel operations. If the Sloan Commission is right, such systems should be in abundance by 1980 or soon thereafter.

The fairness doctrine is based on the need to guarantee that those few individuals who are awarded the privilege of using the scarce airwave resource afford the public an opportunity to hear conflicting views on controversial public issues. In 1969 the Supreme Court reinforced this theme by declaring in *Red Lion* that the first amendment required the fairness doctrine in conventional broadcasting. The Court concluded that in light of the scarcity of the airwave resource, the governmental role in allocating that resource, and the potential for private selfish control of the airwaves, the fairness doctrine was necessary to insure an uninhibited marketplace of ideas for the public.

The growth of cable television will change the premise upon which the Court based its decision. By the end of the decade or shortly thereafter, cable systems will be reaching over 50 percent of American households. Technological improvements required

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148 Nicholas Johnson made this allegation when he appeared on the *Dick Cavett Show*, Mar. 9, 1972.

149 N.Y. Times, Nov. 1, 1973, at 8, col. 8.

150 *Id.* at 34, col. 3.

by the new FCC regulations will make cable systems a communication link of abundance. An ever-expanding number of channels will be offered for parties on a first-come, first-served basis, and a public access and short-term lease channel will guarantee that those who want to use the communication link may do so.[151] The first amendment goal of supplying diverse information to the public through an open marketplace will be fulfilled without the fairness doctrine. The FCC's present position that its cable fairness doctrine regulations are reasonably ancillary to its television broadcast responsibilities will become untenable. Cable fairness regulations will neither protect broadcast television in the *Southwestern* sense nor advance statutory objectives under a *Midwest Video* rationale.

Even if the FCC is considered to have authority to impose fairness doctrine rules on cable systems under existing legislation, such imposition will not be sound policy. The lively marketplace of ideas that the FCC seeks will exist without fairness rules in a developed cable system. Moreover one must consider the unnecessary infringement of programmers' first amendment rights, the unfairness caused by the doctrine's application, the time and money necessary to implement the doctrine, the inequity of not applying the same standards to the press, and the potential for governmental abuse of the doctrine. All of these factors cut against imposing the fairness rule on mature cable television systems.

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151 *See* ON THE CABLE, *supra* note 62, at 42-43.

done or costs of work done by the taxpayer everywhere. The Assessor is authorized to use the aggregate of "income" or the aggregate of "charges" or the aggregate of "costs" with respect to such income if in his opinion it will produce an equitable apportionment.

Sec. 10.2–(d). *Allowable Deductions.* No deductions may be taken which are applicable to income not subject to tax or income which is exempt under the Act. Where part of any income is apportioned to the District, the deductions applicable thereto and allowable as such under Sec. 3(a) of Title III shall be apportioned on the same basis as that used in apportioning such income, unless, in the opinion of the Assessor, such deductions should be allocated in whole or in part. In the case of corporations and unincorporated businesses, the deductions provided for in Sec. 3(a) of Title III shall be allowable only to the extent that they are connected with income fairly attributable to the trade or business carried on or engaged in within the District and from District sources.

RED LION BROADCASTING CO., Inc., et al., Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents.

No. 19938.

United States Court of Appeals District of Columbia Circuit.

Argued Sept. 26, 1966.

Decided June 13, 1967.

Proceeding to review Federal Communications Commission's order requiring broadcaster to furnish time for reply to one attacked in broadcast. The Court of Appeals held that fairness doctrine was constitutional and that commission could compel compliance without requiring person attacked to claim or prove inability to pay for time.

Affirmed.

1. Constitutional Law ⇐50

Standard of evaluation of exercise of its legislative power by Congress is whether Congress has stated legislative objective, has prescribed method of achieving objective, and has laid down standards to guide administrative determination. (Per Tamm, Circuit Judge, with Fahy, Circuit Judge, concurring in result.)

2. Telecommunications ⇐435

1959 amendment of Federal Communications Act adopted FCC's fairness doctrine. (Per Tamm, Circuit Judge, with Fahy, Circuit Judge, concurring in result.) Communications Act of 1934, § 315, as amended 47 U.S.C.A. § 315.

3. Constitutional Law ⇐62
Telecommunications ⇐4

Adoption of FCC's fairness doctrine in 1959 amendment of Federal Communications Act did not constitute unconstitutional delegation of Congress' legislative function. (Per Tamm, Circuit Judge, with Fahy, Circuit Judge, concurring in result.) Communications Act of 1934, § 315 as amended 47 U.S.C.A. § 315.

4. Constitutional Law ⇐90
Telecommunications ⇐382

First Amendment extends to broadcasting as well as to other media of expression but, since radio is not available to all, it is subject to government regulation. (Per Tamm, Circuit Judge, with Fahy, Circuit Judge, concurring in result.) U.S.C.A.Const. Amend. 1.

5. Constitutional Law ⇐90
Telecommunications ⇐435

Federal Communications Commission was not required or authorized to ascertain whether complaint made by person attacked in broadcast was in fact true or false before directing that time

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for reply be given; basic concept of free speech is unfettered by any requirement that it be exercised only by those with "right" viewpoint. (Per Tamm, Circuit Judge, with Fahy, Circuit Judge, concurring in result.) Communications Act of 1934, § 315 as amended 47 U.S.C.A. § 315; U.S.C.A.Const. Amend. 1.

6. Statutes ⇐47
Telecommunications ⇐435

Neither fairness doctrine adopted by FCC nor statutory provisions from which it flows are unconstitutionally vague. (Per Tamm, Circuit Judge, with Fahy, Circuit Judge, concurring in result.) Communications Act of 1934, § 315, as amended 47 U.S.C.A. § 315; U.S.C.A. Const. Amend. 5.

7. States ⇐4.16
Telecommunications ⇐384

Provision of Federal Communications Act requiring broadcasters to furnish time for reply to persons attacked in broadcasts did not infringe any rights retained by the people or the states. (Per Tamm, Circuit Judge, with Fahy, Circuit Judge, concurring in result.) Communications Act of 1934, § 315 as amended 47 U.S.C.A. § 315; U.S.C.A. Const. Amends. 9, 10.

8. Telecommunications ⇐4

In enacting Federal Communications Act, Congress was to be deemed to have exercised its power within constitutional limitations. (Per Tamm, Circuit Judge, with Fahy, Circuit Judge, concurring in result.) Communications Act of 1934, § 1 et seq. as amended 47 U.S.C.A. § 151 et seq.

9. Constitutional Law ⇐90

Any type of government censorship imposed prior to permitted publication is abrogation of first amendment guarantees. (Per Tamm, Circuit Judge, with Fahy, Circuit Judge, concurring in result.) U.S.C.A.Const. Amend. 1.

10. Constitutional Law ⇐90

Licensing program operating in fact as censorship program constitutes first amendment violation. (Per Tamm, Circuit Judge, with Fahy, Circuit Judge, concurring in result.) U.S.C.A.Const. Amend. 1.

11. Constitutional Law ⇐90

Federal Communications Commission's fairness doctrine did not impose prior restraint upon expression of views, arguments, and opinions by broadcaster or upon those who paid for use of facilities. (Per Tamm, Circuit Judge, with Fahy, Circuit Judge, concurring in result.) Communications Act of 1934, § 315 as amended 47 U.S.C.A. § 315; U.S.C.A.Const. Amend. 1.

12. Telecommunications ⇐435

FCC's directing radio station to furnish time for reply to personal attack without requiring person attacked to claim or prove inability to pay for time was authorized by statute and not prohibited by Constitution. Communications Act of 1934, § 315 as amended 47 U.S.C.A. § 315.

Mr. Robert E. Manuel, Washington, D. C., with whom Mr. Thomas B. Sweeney, Washington, D. C., was on the brief, for petitioners.

Mr. Henry Geller, Gen. Counsel, F. C. C., with whom Asst. Atty. Gen. Turner, Messrs. John H. Conlin, Associate Gen. Counsel, Robert D. Hadl, Counsel, F. C. C., and Howard E. Shapiro, Atty., Dept. of Justice, were on the brief, for respondents. Mrs. Lenore G. Ehrig, Counsel, F. C. C., also entered an appearance for respondent Federal Communications Commission.

Before WILBUR K. MILLER, Senior Circuit Judge, and FAHY* and TAMM, Circuit Judges.

The action of the Federal Communications Commission is affirmed. Circuit Judge Tamm files an opinion. Circuit Judge Fahy files a separate opinion. Senior Circuit Judge Miller notes his non-participation in the consideration and decision of the case on the merits.

* Circuit Judge Fahy became Senior Circuit Judge on April 13, 1967.

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TAMM, Circuit Judge:

I. Earlier Proceedings in This Court.

Argument of this case, after a full briefing schedule, was conducted before this panel of the court on September 26, 1966. With Judge Fahy dissenting, the panel concluded that the "declaratory rulings contained in the Commission's letters are not orders from which an appeal may be taken or judicial review sought," and dismissed petitioners' action. Thereafter, the United States and the Federal Communications Commission petitioned for an en banc rehearing of the case, and a majority of the court voted in favor of the granting of this petition to rehear. A majority of the court, then en banc, voted to vacate the opinions and judgment filed by the panel on November 22, 1966, and directed the assigned division to consider the petitioners' action upon the merits.[1]

II. The Issues Presented.

A prehearing stipulation approved by the court in a prehearing order dated March 9, 1965, defined the issues agreed to by the parties to be:

1. Whether section 315 of the Communications Act of 1934, as amended in 1959,[2] adopted the Commission's "Fairness Doctrine" as set forth in the Commission's 1949 *Report, Editorializing by Broadcast Licensees*,[3] and if so, whether section 315 constitutes an unconstitutional delegation of Congress' legislative function.
2. Whether the Fairness Doctrine, as set forth above, is unconstitutionally vague, indefinite, uncertain and lacks the precision required when legislation which affects the basic freedoms guaranteed by the Bill of Rights is adopted.
3. Whether section 315, as stated in (1) above, violates the ninth and tenth amendments to the Constitution.
4. Whether the Fairness Doctrine violates the first and fifth amendments to the Constitution and, particularly, whether under the facts of this case the requirement that a broadcaster may not insist upon financial payment by a party responding to a personal attack violates the first and fifth amendments to the Constitution.

III. Identity of Petitioners and Factual Background Creating the Present Controversy.

Petitioners are Red Lion Broadcasting Co., Inc., the licensee of Radio Station WGCB–AM–FM, Red Lion, Pennsylvania, and the Reverend John M. Norris, the principal stockholder and president of Red Lion Broadcasting Co., Inc. In November 1964, petitioners broadcast a fifteen minute program by a Reverend Billy James Hargis as part of a program series entitled, *The Christian Crusade*. The program included a discussion of the 1964 presidential election and a book concerning the Republican campaign entitled, *Goldwater—Extremist on the Right*, written by Mr. Fred J. Cook. During the course of the program and as part of the broadcast, Reverend Hargis made the following statements concerning Mr. Cook.

> "Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to the District Attorney, Frank Hogan. After losing his job, Cook went

1. See court order filed with this court's clerk on March 17, 1967.

2. Equal Time Act, 47 U.S.C. § 315 (1952), amending 48 Stat. 1088 (1934).

3. Report of the Commission in the Matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

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to work for the left-wing publication, *The Nation* * * *. Now among other things, Fred Cook wrote, for *The Nation* was an article absolving Alger Hiss of any wrong doing * * there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence agency * * * now this is the man who wrote the book to smear and destroy Barry Goldwater called *Barry Goldwater—Extremist Of The Right.*"

Thereafter, Fred J. Cook wrote a letter to Radio Station WGCB inquiring whether Reverend Hargis had, in fact, made the above remarks. Cook requested time to reply to the Hargis remarks if they had, in fact, been made and specifically requested that the reply time be furnished at the expense of WGCB. In response, WGCB furnished Cook with its rate card so that he could arrange for the time he might wish to purchase and furnished him copies of letters which it had written in answer to comparable requests by the Democratic National Committee and the American Civil Liberties Union. A further exchange of letters occurred, after which, Cook filed a complaint with the Federal Communications Commission. In his complaint, Cook charged that Radio Station WGCB had broadcast a personal attack against him without notifying him of the attack or sending him a transcript of the program. Cook also charged WGCB was insisting upon payment from him for any reply broadcast. The Commission brought the complaint to the attention of Radio Station WGCB and requested an answer within twenty days. As a result of this letter, additional letters were exchanged between the radio station and the Commission. To permit a full understanding of the resulting controversy, the pertinent letters are quoted below in their entirety as they were reproduced in the Joint Appendix filed by the parties in this case.

"AM WGCB FM
BOX 88
RED LION, PENNA.
May 19, 1965

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

In re: Complaint of Mr. Fred J. Cook; Your ref. #8425–A

Dear Sir:

Under date of March 22, 1965, you wrote us in regard to a complaint from Mr. Fred J. Cook, Interlaken, New Jersey, alleging that he had been refused free broadcast time on our station WGCB to rebut an alleged personal attack made upon him in late November over the Billy James Hargis Program. You have requested that we comment on this complaint.

The Billy James Hargis broadcast to which Mr. Cook apparently refers was carried on this station on November 27, 1964. We received a letter from Mr. Cook dated December 19, 1964, to which we replied on December 28, 1964. A further letter dated December 31, 1964, was received from Mr. Cook to which we replied on January 7, 1965. Copies of these letters are attached.

It has been our understanding that the Commission's fairness doctrine requires a broadcast licensee to give free time to reply to paid broadcasts only if sponsorship is not available for such reply broadcast. Our communications to Mr. Cook were designed to ascertain whether Mr. Cook was prepared to 'sponsor' or pay for his reply broadcast. Mr. Cook's communications to us, however, have not directly answered our inquiry.

The Commission is hereby advised that WGCB will give Mr. Cook an appropriate amount of time to answer the alleged attack upon him in the Hargis program if he advises us that he is financially unable to 'sponsor' or pay for such a broadcast. We are quite certain that it would be impossible for us to obtain other sponsorship of such a broadcast. If we are incorrect in our proposed method

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od of disposition of this matter, we will be glad to have the Commission so advise us and we will follow such other procedure as the Commission may suggest.

A copy of this letter is being sent to Mr. Cook for any comment that he might care to make to us or to the Commission.

Very truly yours,

RED LION BROADCASTING COMPANY
REV. JOHN M. NORRIS, *President*"

"FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In Reply Refer To: 8427-A

October 6, 1965

Reverend John M. Norris,
President
Red Lion Broadcasting
Company, Inc.
Radio Station WGCB
Post Office Box 88
Red Lion, Pennsylvania

Dear Sir:

This letter refers to a complaint filed with the Commission by Mr. Fred J. Cook of Interlaken, New Jersey, concerning a Billy James Hargis program, 'Christian Crusade', which you broadcast in November, 1964. The program included a discussion of the 1964 presidential election and of a book by Mr. Cook about the Republican campaign. Mr. Cook alleges the discussion included the following personal attack against him:

> 'Now who is Cook? Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to District Attorney Frank Hogan.'

Mr. Cook asserts that you failed to notify him of the attack or to furnish him with a transcript of summary either before or after the program was aired, and that you refused his request for free time to respond to the attack.

In your reply to the Commission's inquiry, you said that your understanding of the requirements of the 'fairness doctrine' is that a licensee is not required to grant free time for a reply to a paid broadcast if paid sponsorship is available; and that your letters to Mr. Cook were designed to ascertain whether he was prepared to sponsor or pay for his reply broadcast and, specifically, whether he was financially unable to do so.

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. See part E, Personal Attack Principle, 'Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance'. 29 F.R. 10415, 10420-21. A copy of this document is enclosed.

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. Ibid. The licensee may not delegate his responsibilities in this respect to others. Report on 'Living Should Be Fun' Inquiry, 33 FCC 101, 107.

In this case, the program in question contained a personal attack on Mr. Cook, since it asserted that he was fired from his newspaper job because he made false charges against public officials. Your failure to notify Mr. Cook of the attack upon him by Mr. Hargis aired by your station and to offer him the opportunity to reply, was inconsistent with the foregoing procedural requirements.

In the case of a personal attack, the individual or group attacked has the

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right to appear. Cullman Broadcasting Co., FCC 63-849, Ruling 16, Fairness Primer. The licensee is, of course, perfectly free to inquire whether the individual is willing to pay to appear. Here Mr. Cook, in his letters of December 19 and 21, 1964, had stated that he was not. The licensee is also free to obtain a sponsor for the program in which the reply is broadcast, or to present the reply on the particular program series involved, if this is agreeable to the parties such as Mr. Cook and Reverend Hargis. But having presented a personal attack on an individual's integrity, honesty, or character, the licensee cannot bar the response—and thus leave the public uninformed as to his side and 'elemental fairness' not achieved as to the person attacked (*Editorializing Report*, Paragraph 10)—simply because sponsorship is not forthcoming. Cf. Cullman Broadcasting Co., *supra*.

In short, the burden was upon you to find sponsorship, if you so desired, for Mr. Cook's reply; nor, in the circumstances, did Mr. Cook have to make any showing or representation that he is financially unable to sponsor or pay for his reply time.

Accordingly, you are requested to advise the Commission of your plans to comply with the 'fairness doctrine', applicable to the situation.

BY DIRECTION OF THE COMMISSION
BEN F. WAPLE
Secretary

Enclosure
cc: Fred J. Cook"

"AM WGCB FM
BOX 88
RED LION, PENNA.
November 8, 1965

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

In re: Complaint of Fred J. Cook concerning alleged attack by Rev. Billy James Hargis on Station WGCB, Red Lion, Pennsylvania,
Ref: 8427-A

Dear Sir:

This is in reference to the Commission's letter on the above matter, dated October 6, 1965, public notice of which was given on October 8, 1965, but the text of which has not been publicly released. The letter was postmarked October 8th and received by us on October 11, 1965.

It is our understanding that by this letter the Commission has directed Red Lion Broadcasting Company to provide Mr. Fred J. Cook with free broadcast time on Station WGCB to answer the alleged personal attack upon him in the Billy James Hargis program broadcast on Station WGCB in November, 1964. The Commission's directive, however, does not indicate by what date Station WGCB is required to put on the broadcast. The Commission has rejected our proposal, stated in our letter of May 19, 1965 to the Commission (copy of which was sent to Mr. Cook and to which we have received no reply from Mr. Cook), making an offer of free time to Mr. Cook upon a simple statement by him that he is unable to pay for such a broadcast. We would appreciate being advised by the Commission as to the time period for complying with the Commission's directive.

We respectfully urge, however, that the Commission reconsider its directive to us. We ask the Commission to refer to the mimeographed 'Statement of Red Lion Broadcasting Company, Inc. (Station WGCB AM-FM, Red Lion, Pa.) In Response to Complaint of Democratic National Committee' transmitted to the Commission under date of March 11, 1965. It will be noted that, in that statement, reference was made to the fact that the Democratic National Committee, in the summer of 1964, sent to Station WGCB a reprint of an article in *The Nation*, a nationwide publication, entitled 'Radio Right: Hate Clubs of the Air', with a warning concerning our alleged obligation to give free time to answer broadcasts by such 'Hate Clubs'. The

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article was written by the same Mr. Fred J. Cook who complained about the alleged personal attack upon him in the Hargis program. Mr. Cook, in his article, attacked Billy James Hargis, his program, and his organization, Christian Crusade. It will also be noted that the Democratic National Committee was given thirty minutes of free time on the Twentieth Century Reformation Hour (it had previously been given two fifteen minute segments on this hour) to broadcast a thirty minute taped discussion entitled 'Hate Clubs of the Air.' Nevertheless, WGCB has advised the Commission and Mr. Cook that it would give Mr. Cook free time to reply if he states that he is unable to pay for the time.

Under the circumstances, we are at a loss to see the 'fairness' in the Commission's letter to us of October 6, 1965. The Commission has directed that we give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the subject of a nationwide attack by Mr. Cook despite the fact we have offered Mr. Cook free time upon his statement that he is unable to pay. The Commission has given us no reason why the "Fairness Doctrine" requires an offer of free time to Mr. Cook to be made without condition as to his inability to pay.

We sincerely request that, either by way of reconsideration or clarification of the Commission's directive, we be advised whether in good conscience and in 'fairness,' we should now be forced to give Mr. Cook free time to reply to an attack by one whom he has previously attacked. And, if Mr. Cook, in his reply, should personally attack Mr. Hargis and other 'Hate Clubs', as he calls them, would we then be required to give free time to Mr. Hargis and others whom Mr. Cook may again attack? Or, if Mr. Hargis should then reply to Mr. Cook in his paid broadcast, would we then be required to give Mr. Cook more free time for further reply?

It has been stated in a brief filed in the U. S. District Court for the District of Columbia by the United States and the Federal Communications Commission, in the case of Red Lion Broadcasting Co., Inc. v. Federal Communications Commission et al. (Civil action #2331–65) that the Commission's letter of October 6, 1965 with reference to this matter '* * * constitutes a final order * * *'. This apparently indicates that we are presently under a mandate from the Commission which, if not complied with, may subject us to revocation, forfeitures and possibly other penalties. It is for this reason that we ask that the Commission reconsider its October 6th ruling, or clarify at the earliest possible date, by way of declaratory ruling, the scope of its directive to us in its letter of October 6, 1965.

In view of other statements in that brief, a ruling by the Commission on the constitutionality of the 'Fairness Doctrine' as applied to the instant situation, is also requested.

Respectfully submitted,

RED LION BROADCASTING COMPANY, INC.
By JOHN H. NORRIS
John H. Norris, *Vice President*"

"FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

December 9, 1965

In Reply Refer To: 8427–A 11–186

John H. Norris, Vice
President
Red Lion Broadcasting
Company, Inc.
Radio Station WGCB
Box 88
Red Lion, Pennsylvania
17356

Dear Sir:

This is in reference to your request that the Commission reconsider its ruling of October 8, 1965 on the complaint of Mr. Fred J. Cook. We have considered the contentions and adhere to our prior ruling for the reasons given below.

1. Your letter states that Mr. Cook in an article in *The Nation*, entitled 'Radio Right: Hate Clubs of the Air', attacked "Billy James Hargis, his pro-

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gram, and his organization * * *'; that your station gave the Democratic National Committee 30 minutes of free time on the Twentieth Century Reformation Hour to broadcast a discussion entitled 'Hate Clubs of the Air'; and that you advised Mr. Cook that you would give him free time to reply to the personal attack upon him 'if he states that he is unable to pay for the time.' In the circumstances, you state that fairness does not require the station to 'give Mr. Cook free time to answer an alleged attack upon him made in a paid broadcast by one who had previously been the subject of a nationwide attack by Mr. Cook * * *.'

We have held that 'the requirement of fairness, as set forth in the *Editorializing Report*, applies to a broadcast licensee irrespective of the position which may be taken by other media on the issue involved; and that the licensee's own performance in this respect, in and of itself, must demonstrate compliance with the fairness doctrine.' *Letter to WSOC Broadcast Co.*, FCC 58–686, Ruling No. 11, 'Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance' (herein called Fairness Primer) 29 F.R. 10415, 10418–19). Thus, the requirement of the statute is that the *licensee* 'afford reasonable opportunity for the discussion of conflicting views on issues of public importance' (Section 315 (a)). This requirement is not satisfied by reference to what other media, such as newspapers or magazines, or indeed other stations have presented on a particular issue. It deals solely with the particular station and what it has broadcast on the controversial issue of public importance. It follows that Mr. Cook's article in *The Nation* does not constitute a ground for absolving the licensee of its responsibility to allow Mr. Cook comparable use of Station WGCB's facilities to reply to the personal attack which had been broadcast.

Nor does the reference to the Democratic National Committee program constitute such a ground. Except for the use of its facilities by legally qualified candidates, the licensee is fully responsible for all matter which is broadcast over its station. Here the licensee, in its presentation of programming dealing with a controversial issue of public importance, has permitted its facilities to be used for a personal attack upon Mr. Cook. Elemental fairness requires that Mr. Cook be notified of the attack and be given a comparable opportunity to reply. You do not claim that the Democratic National Committee program contained such a reply by Mr. Cook to the personal attack made upon him, and therefore that program does not constitute compliance with the fairness doctrine's requirements in the case of Mr. Cook.

As to the contention that you will permit Mr. Cook to air a free response only if he is financially unable to pay, such a position is, we think, inconsistent with the public interest. The licensee has decided that it served the needs and interests of its area to have a personal attack aired over its station; the public interest requires that the public be given the opportunity to hear the other side. The licensee cannot properly make that opportunity contingent upon the payment of money by the person attacked (or the circumstance that he is financially unable to pay). The licensee may, of course, inquire whether the person attacked is willing to pay for airing his response, or take other appropriate steps to obtain sponsorship. See our prior ruling. But if these efforts fail, the person attacked must be presented on a sustaining basis. We believe that this is a matter of both elemental fairness to the person involved and, more important, of affording the public the opportunity to hear the other side of an issue which the licensee has adjudged to be of importance to his listeners. See Cullman Broadcasting Co., FCC 63–849, Ruling No. 17, Fairness Primer.

There are other policy considerations supporting the foregoing conclusion. A contrary position would mean that in the case of a network or widely syndicated

program containing a personal attack in discussion of a controversial issue of public importance, the person attacked might be required to deplete or substantially cut into his assets, if he wished to inform the public of his side of the matter; in such circumstances *reasonable* opportunity to present conflicting views would not, practically speaking, be afforded. Indeed, it has been argued that under such a construction, personal attacks might even be resorted to as an opportunity to obtain additional revenues.

For all the above considerations, we hold that the licensee may inquire about payment, but cannot insist upon either such payment or a showing of financial inability to pay in this personal attack situation. Here Mr. Cook, in his letters of December 19 and 21, 1964, stated that he was not willing to pay to appear.

2. You have raised the question of a continuing chain of personal attacks. This matter is discussed in the enclosed *Letter to the Honorable Oren Harris*, FCC 63-851, p. 5, pointing out that the licensee 'has discretion (except in the case of an appearance of candidates) to review a proposed program, including the script, to insure that it does not go unreasonably far afield as to the issues.' In any event, there is no indication of such a hypothetical chain in the circumstances of this case, nor indeed have you raised any question concerning Mr. Cook's proposed reply except on the ground of payment.

3. You have referred to a statement in the brief filed in the case of Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, et al. (Civil Action No. 2331-65) that the Commission's letter of October 6, 1965 'constitutes a final order * * *', and seeks clarification as to the scope of the directive in that letter, and particularly 'by what date Station WGCB is required to put on the broadcast.' The ruling is a 'final order', in the same sense as a ruling under [illegible] dealing with the 'equal opportunities' provision. As stated in the enclosed *Letter to the Honorable Oren Harris, supra*:

> '* * * the licensee should have the opportunity to contest the validity of any Commission "fairness" ruling. If the Commission rules at the time of complaint, the licensee can, if he believes the ruling incorrect, appeal to the court. Cf. Brigham v. F. C. C., 276 F.2d 828, 829 (C.A. 5); Fadell v. U. S., Case No. 14,142, (C.A. 7); Frozen Foods Express v. U. S., 337 U.S. 426, 432-440; Caples Co. v. U. S., [100 U.S. App.D.C. 126], 243 F.2d 232 (C.A. D.C.); if he wins, he need not comply, while if he loses, he will of course follow the ruling. * * *'

The licensee thus has the choice of complying with the ruling or seeking review thereof. As to the time of compliance, this varies with the factual situation and is a matter to be worked out in good faith and on a reasonable basis by the licensee and the person involved.

4. Finally, you have requested a ruling by the Commission as to the constitutionality of the fairness doctrine, as applied to this situation. We discussed the constitutionality of the fairness doctrine generally in the Report on Editorializing, 13 F.C.C. 1246-1270. We adhere fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report.

We believe that the discussion in those paragraphs is equally applicable to our ruling in this case. The ruling does not involve any prior restraint. The licensee is free to select what controversial issue should be covered, and whether coverage of that issue should include a personal attack. The ruling simply requires that if the licensee does choose to present a personal attack, the person attacked must be notified and given the opportunity for comparable response.

The ruling provides that if sponsorship is not forthcoming (see p. 2), the person attacked must be presented on a sustaining basis, because, in line with the above cited discussion in the Editorializing Report the paramount public interest is that the public have the oppor-

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tunity of hearing the other side of the controversy, and elemental fairness establishes that the person attacked is the appropriate spokesman to present that other side. Since this personal attack situation is the only area under the fairness doctrine where the licensee does not have discretion as to the choice of spokesmen, the Commission has carefully limited the applicability of the personal attack principle to those situations where there is an attack upon a person's 'honesty, character,' integrity or like personal qualities." See Part E, Personal Attack Principle, Fairness Primer, 29 F.R. 10415, 10420–21. The principle is not applicable simply because an individual is named or referred to, or because vigorous exception is taken to the views held by an individual or group. *Ibid*; see also letter to Pennsylvania Community Antenna Association enclosed.

A broadcaster has sought the license to a valuable public frequency, and has taken it, subject to the obligation to operate in the public interest. Valuable frequency space has been allocated to broadcasting in considerable part, so that it may contribute to an informed electorate. Report on Editorializing, 13 F.C.C. 1246–1270, par. 6. Viewed against these fundamental precepts, our ruling is, we believe, reasonably related to the public interest 'in the larger and more effective use of radio' (Section 303(g) of the Communications Act). Since that is so, it is a requirement fully consistent with the Constitution. NBC v. United States, 319 U.S. 109, [190] 227 [63 S.Ct. 997, 87 L.Ed. 1344].

BY DIRECTION OF THE COMMISSION
BEN F. WAPLE
Secretary

Enclosures
cc: Fred J. Cook"

A formal order of the Commission, issued December 10, 1965, recited the addressing of the December 9 letter to the Reverend John H. Norris.

Petitioners thereafter filed in this court their petition to review the Commission's action. Petitioners' action constitutes the first direct court attack on constitutional grounds upon the Fairness Doctrine promulgated and executed by the Commission. It is to be noted, however, that this court has recently considered another case involving the Fairness Doctrine. See Office of Communication of United Church of Christ v. Federal Communications Commission, 123 U.S.App.D.C. 328, 359 F.2d 994 (1966).

IV. Genesis of the Fairness Doctrine.

Mr. Justice Frankfurter, speaking for the Supreme Court in the landmark case of National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997 (1943), succinctly but accurately outlined and documented the origin, development, and necessity for federal regulation of radio, which culminated in the Radio Act of 1927.[4]

The initial concept of a fairness doctrine certainly had its beginning in this Act, which first required that radio stations allot for campaign purposes equal time to opposing political candidates.[5] Two years later, the Federal Radio Commission extended the coverage of this statutory provision to all discussions of issues of importance to the public. Great Lake Broadcasting Company v. Federal Radio Commission, 3 F.R.C.Ann.Rep. 32 (1929), rev'd on other grounds, 59 App. D.C. 197, 37 F.2d 993 (1930), cert. dismissed, 281 U.S. 706, 50 S.Ct. 467, 74 L.Ed. 1129 (1930). Further implementation of the policy took the form of denial of licenses to radio stations using, or proposing to use, their facilities for the presentation of but one point of view. Trinity Methodist Church, South v. Federal Radio Commission, 61 App.D.C. 311, 62 F.2d 850 (1932), cert. denied, 288 U.S. 599, 53 S.Ct. 317, 77 L.Ed. 975 (1933); KFKB Broadcasting Ass'n v. Federal Radio Commission, 60 App.D.C. 79, 47

4. Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162.

5. *Id.*, Sec. 18, at 1170.

F.2d 670 (1931); Chicago Federation of Labor v. Federal Radio Commission, 3 F.R.C.Ann.Rep. 36 (1929), aff'd 59 App.D.C. 333, 41 F.2d 422 (1930); Great Lakes Broadcasting Company v. Federal Radio Commission, *supra*.

The basic provisions of the Radio Act of 1927 [6] were incorporated into the Communications Act of 1934,[7] within which was created the Federal Communications Commission.[8]

> "By this Act Congress, in order to protect the rational interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927." Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 137, 60 S.Ct. 437, 439, 84 L.Ed. 656 (1940). (Footnotes omitted.)

Early in its existence, the Federal Communications Commission expressed approval of the policy established by the Radio Commission when, in Young Peoples Association for the Propagation of the Gospel, 6 F.C.C. 178 (1938), it denied application for a construction permit because of the applicant's policy of refusing to permit use of its broadcast facilities for the presenting of any viewpoint differing from that of the applicant.

Thereafter, the Commission adhered to the doctrine so established and, in fact, broadened the scope of its coverage, Laurence W. Harry, 13 F.C.C. 23 (1948); WBNX Broadcasting Co., 12 F.C.C. 805 (1948); Robert Harold Scott, 3 P & F Radio Reg. 259 (1946); United Broadcasting Co., 10 F.C.C. 515 (1945); Mayflower Broadcasting Corp., 8 F.C.C. 333 (1941).

Chronologically at this point, the Commission initiated public hearings designed to reappraise and clarify the Fairness Doctrine. The hearings resulted in the 1949 Report of the Commission in the Matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246, [hereafter referred to as the *Report*]. The *Report*, in effect, codifies earlier Radio Commission rulings, pre-*Report* rulings of the Federal Communications Commission, and the Commission's accumulated experience in fairness problems, crystallized after public hearings into a basic statement of the then scope of the Fairness Doctrine. Characterizing the broadcasters as "trustees" (Id. at 1247), who operate their facilities for the public at large, the *Report* promulgated the requirement that broadcasters, while permitted to editorialize, must seek a reasonably balanced presentation of all viewpoints on public issues of controversial importance.

The *Report* considered and discussed in considerable detail the Commission's authority to administer the Act under the statutory mandate of serving only the public interest, convenience, and necessity, 47 U.S.C. §§ 307(a), 309 (1962), as well as the statutory prohibition of the Commission's power of censorship, 47 U.S.C. § 326 (1962).

Detailed quotation of these facets of the *Report's* contents is unnecessary for understanding of the chronology being here outlined. It suffices to say that in sum total the *Report* concluded that licensees of broadcast facilities, authorized to use but not to own, prescribed channels of transmission for a limited time, were required to devote a reasonable percentage of their broadcasting time to the discussion of public issues of controversial importance. Moreover, the *Report* concluded that implicit in this requirement was the obligation to design

6. See note 4, *supra*.

7. Act of June 19, 1934, ch. 652, 48 Stat. 1064.

8. 47 U.S.C. § 151 (1962).

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and present this type of programming in such a manner that the public was afforded the opportunity to hear different and opposing positions and viewpoints on these public issues.

Noteworthy at this point is the fact that while the *Report* was based fundamentally upon the public interest standard and related statements in the Communications Act of 1934,[9] that Act substantially retained the provisions of the Radio Act of 1927[10] relating to the allocation of equal broadcast time to opposing political candidates for public office.

A congressional inquiry into the application and operation of the Fairness Doctrine was undertaken in 1959 and resulted in the amendment of section 315.[11]

This congressional action was triggered by the Commission's rulings in interpreting the application of the then section 315 and the Fairness Doctrine to newscasts of political events by Chicago television stations, Lar Daly, 18 P & F Radio Reg. 238, aff'd on reconsideration, 18 P & F Radio Reg. 701 (1959). Congressional consideration of proposed amendments to section 315 grew out of dissimilar bills introduced in the Senate[12] and the House of Representatives.[13] The differences in the bills passed by each chamber resulted in the designation of a conference committee.[14] The resulting conference accomplished the clarification of conflicting provisions of the proposed amendment of section 315 and the enactment of that section in its present phraseology.

Subsequent to the 1959 amendment of section 315, the Commission dealt with occurring problems and questions arising under the Fairness Doctrine on an ad hoc basis, as it had forecast in the *Report*, at page 1256. This experience with respect to fairness complaints resulted, on July 25, 1963, in the Commission's mailing to all broadcast licensees a Public Notice reiterating the obligation of all broadcasters to comply with the Fairness Doctrine, 25 P & F Radio Reg. 1899 (1963). This Public Notice stressed three factual situations arising under the Fairness Doctrine, including the licensee's obligation when a personal attack was broadcast, and specifically stated:

> "(a) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response (Clayton W. Mapoles, 23 Pike & Fischer RR 586, 591; Billings Broadcasting Company, 23 Pike & Fischer, RR 951, 953)." 25 P & F Radio Reg. at 1900.

The Public Notice further advised licensees that the Commission had undertaken a study to consider what actions, either in the form of a primer or rules, would be appropriate in better defining a licensee's responsibilities under the Fairness Doctrine. The resulting study culminated on July 1, 1964, in a Public Notice identified as the Fairness Primer, 29 Fed.Reg. 10415 (1964). Although the Commission had earlier defined and elaborated on its procedures for handling fairness complaints, Letter to Oren Harris, 3 P & F Radio Reg.2d 163 (1963), the *Primer*, after digesting its rulings on the Fairness Doctrine, reiterated the policy of dealing with each complaint on an ad hoc basis but also specifically set forth that in complaints warranting Commission consideration the licensee would be afforded an opportunity to take action or to comment upon the com-

9. See note 7, *supra*.

10. See note 4, *supra*.

11. See note 2, *supra*.

12. S. 2424, 86th Cong., 1st Sess. (1959), U.S.Code Cong. & Admin.News 1959, p. 2564.

13. H.R. 7985, 86th Cong. 1st Sess. (1959).

14. 105 Cong.Rec. 16160, 16575, 16588 (1959).

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plaint prior to disposition of the matter by the Commission, 29 Fed.Reg., at 10416.

Especially of interest in the present proceeding is the fact that the Fairness Primer contained a separate section devoted to the personal attack principle, 29 Fed.Reg. 10420-1. In substance, this section required all licensees in broadcasts attacking an individual's or a group's integrity, character, honesty, or personal qualities, in connection with controversial issues of public importance to take all appropriate steps to afford the person or persons attacked the fullest opportunity to respond.

I will now discuss, in the order in which they are enumerated in section II of this opinion, the several grounds upon which petitioners attack the Commission's action in the present case.

Discussion of the Four Stipulated Issues.

V. Did section 315 of the Communications Act of 1934, as amended in 1959, adopt the Commission's Fairness Doctrine as set forth in the Commission's 1949 *Report*, and if so, does section 315 constitute an unconstitutional delegation of Congress' legislative function?

In essence, petitioners charge that section 315 of the Act constitutes an unlawful delegation to the Commission of congressional legislative power. They argue, quoting from Aptheker v. Secretary of State, 378 U.S. 500, 514, 84 S.Ct. 1659, 1668, 12 L.Ed.2d 992 (1964), "* * * precision must be the touchstone of legislation so affecting basic freedoms * * *" and affix this quotation to their contention that the Fairness Doctrine infringes on constitutional guarantees secured by the Bill of Rights. Selecting from section 315 and from the Public Notice of July 1, 1964, *supra*, at 10415, such phrases as "reasonable opportunity," "sufficient time for full discussion" of "controversial issues of public importance," "substantial importance to the community," "contrasting views of all reasonable elements," "of sufficient importance to be afforded radio time," "primary controversy," "affirmative duty generally to encourage and implement the broadcast of all sides of controversial issues," "shades of opinion," petitioners argue that Congress has illegally delegated its legislative authority because of the absence of adequate standards or ascertainable criteria and that Congress cannot adopt and make a part of the statute regulations of the Commission which, in turn, fail to meet the "preciseness" required in legislation affecting basic freedoms, citing N.A.A.C.P. v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

The factual and legal elements involved in Aptheker v. Secretary of State, *supra*, can be immediately distinguished from those elements found in the present case. In *Aptheker*, which involved travel restrictions upon members of the Communist Party, the challenged statute governed knowing as well as unknowing conduct. It lacked "* * * criteria linking the bare fact of [Communist Party] membership to the individual's knowledge, activity or commitment." 378 U.S. at 511, 84 S.Ct. at 1666. The challenged statute created an *"irrebuttable presumption* that individuals who are members of the specified organizations will, if given passports, engage in activities inimical to the security of the United States," 378 U.S. at 511, 84 S.Ct. at 1666, and excluded "other considerations which might more closely relate the *denial of passports to the stated purpose of the legislation*," 378 U.S. at 511, 84 S.Ct. at 1666 (emphasis supplied) (footnotes omitted). The Supreme Court, then, was compelled to find that the statutory provision *"judged by its plain import and by the substantive evil which Congress sought to control*, sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment" and was not patterned as a regulation "narrowly drawn to prevent the supposed evil." 378 U.S. at 514, 84 S.Ct. at 1668 (emphasis supplied).

In contrast, the court has in the present case a statute and Commission regula-

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tions growing out of a licensing program addressed to the serving of the "public interest, convenience or necessity," 47 U.S.C. 307(a) (1962). The acceptance of this standard as a valid basis for the legislative grant of administrative power has been repeatedly upheld; Federal Communications Commission v. RCA Communications, Inc., 346 U.S. 86, 89–91, 73 S.Ct. 998, 97 L.Ed. 1470 (1953); National Broadcasting Co. v. United States, supra; Federal Communications Commission v. Pottsville Broadcasting Co., *supra*, 309 U.S. at 138, 60 S.Ct. 437, 84 L.Ed. 656; Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 276, 285, 53 S.Ct. 627, 77 L.Ed. 1166, 89 A.L.R. 406 (1933); New York Central Securities Corp. v. United States, 287 U.S. 12, 24–25, 53 S.C. 45, 77 L.Ed. 138 (1932). Here there is no broad-reaching, all-embracive statutory provision penalizing knowing as well as unknowing conduct. The court is dealing now with a set of reasonably concise and specifically enumerated prohibitions addressed to the evils they seek to guard against. See *Report*, *supra*, 47 U.S.C. § 315 (1962), and the *Fairness Primer*, *supra*. There are in this case no "irrebuttable presumptions," since provisions are afforded for the subjects of complaints to have an opportunity to comment or take action on a complaint before administrative action of the Commission. Most obviously the statutory provision, judged by its plain import and the substantive evil which Congress sought to control, is far removed from the stain of illegality found by the Supreme Court, speaking in *Aptheker*, *supra*, to exist in section 6 of the Subversive Activities Control Act of 1950, 50 U.S.C. § 785 (1951).

[1] Turning to the substance of petitioners' argument under this heading, I observe the standard of evaluation of an exercise of its legislative power by the Congress to be whether "Congress has stated the legislative objective, has prescribed the method of achieving that objective * * * and has laid down standards to guide the administrative determination * * *." Yakus v. United States, 321 U.S. 414, 423, 64 S.Ct. 660, 667, 88 L.Ed. 834 (1944), and cases cited therein. There the Court also said:

> "The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itelf properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct * * *. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. * * *
>
> "Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command." Yakus v. United States, at 424–425, 64 S.Ct. at 667.

There appears to be no doubt but that the Supreme Court's references in *Yakus* to "an administrative officer" would apply equally and without qualification to a duly constituted administrative agency.

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In reviewing the provisions of Title 47 U.S.C., I find clearly defined and explicitly enumerated statements of the legislative objectives, the enumeration of the method of achieving those objectives (*id est*, the creation of the Federal Communications Commission and the assignment to it of specific and enumerated duties, responsibilities, and obligations), and the establishment of standards to guide the administrative determination. See section 309, "Application for license —Considerations in granting application;" section 310, "Alien ownership as barring station license; assignment and tranfer of construction permit or station license;" section 311, "Requirements as to certain applications in the broadcasting service—Notices of filing and hearing; form and contents," section 312, "Administrative sanctions—Revocation of station license or construction permit;" and other similar sections.

Within the framework of 47 U.S.C. §§ 151–319 (1962), I find a full and complete determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. Relating these specifically to the provisions of section 315, I find in this portion of the statute a permissible delegation to the Commission of the "determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy" properly and legally empowering "the exercise of judgment." This allowable assignment of authority and responsibility, Fairness Primer, 29 Fed. Reg. 10415, constitutes a valid and proper formation of subsidiary administrative policy within the prescribed statutory framework.

Continuing to petitioners' charge that the Fairness Doctrine lacks the preciseness required in statutes "affecting basic freedoms," N.A.A.C.P. v. Button, *supra*, the Supreme Court, speaking in National Broadcasting Co. v. United States, *supra*, has effectively answered this question when it stated:

"The touchstone provided by Congress was the 'public interest, convenience, or necessity,' a criterion which 'is as concrete as the complicated factors for judgment in such a field of delegated authority permit.' Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 138 [60 S.Ct. 437, 84 L.Ed. 656]. 'This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare New York Central Securities Co. v. United States, 287 U.S. 12, 24 [53 S.Ct. 45, 77 L.Ed. 138]. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services * * *.' Federal Radio Comm'n v. Nelson Bros. [Bond & Mortgage] Co., 289 U.S. 266, 285 [53 S.Ct. 627, 77 L.Ed. 1166, 89 A.L.R. 406]." 319 U.S. at 216, 63 S.Ct. at 1009.

[2, 3] Since the "public interest" is by statute and court decision a valid standard for the Commission's guidance, I find the necessary precision required by *Aptheker* in the situation arising in the present case. I conclude that the adoption by Congress of the Commission's Fairness Doctrine in its 1959 amendment of section 315 of the Communications Act of 1934 does not constitute an unconstitutional delegation of Congress' legislative function.

VI. Is the Fairness Doctrine unconstitutionally vague, indefinite, uncertain and/or lacking the precision which legislation affecting the basic freedoms guaranteed by the Bill of Rights requires?

Obviously, this question overlaps the discussion of the prior question, and petitioners' brief, as well as respondents' brief, duplicate in some measure the discussion of the present subheading and that of subheading V above. Again, from the starting point of the *Aptheker* case, *supra*, the petitioners, finding in their present situation a possible sanction, *id est*, the forfeiture of a valuable right to operate a radio station, seek solace from the fact that *Aptheker* in-

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volved penal sanctions. Claiming violation of their constitutional rights under the first and fifth amendments to the Constitution, petitioners argue that in applying the Fairness Doctrine to them, the Commission, having failed first to ascertain the truth of Cook's charges against them but requiring them, nevertheless, to afford Cook free time to reply to the Hargis broadcast, is abrogating their right to free speech in the dissemination of truth, if the Hargis charges against Cook are, in fact, true. Continuing their argument to the allegation of a due process infringement, petitioners contend that the vagueness in the Fairness Doctrine, as it is herein invoked against them, violates the first essential of due process of law in violation of the fifth amendment. Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

As noted earlier, this case presents the first direct challenge to the constitutionality of the Fairness Doctrine, although we took passing notice of it recently by observing "* * * that adherence to the Fairness Doctrine is a *sine qua non* of every licensee." Office of Communication of United Church of Christ v. Federal Communications Commission, *supra*, 123 U.S.App.D.C. at 343, 359 F.2d at 1009.

[4] The first amendment extends, of course, to broadcasting, as well as to other media of expression. National Broadcasting Co. v. United States, *supra*, but "(u)nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." 319 U.S. at 226, 63 S.Ct. at 1014. This court has had not infrequent occasions to consider first amendment challenges to various actions of the Commission. Thus, in Idaho Microwave, Inc. v. Federal Communications Commission, 122 U.S.App.D.C. 253, 352 F.2d 729 (1965), we rejected the contention that the imposition of a nonduplication condition upon a licensee was violative of the first amendment. Earlier, speaking in Carter Mountain Transmission Corporation v. Federal Communications Commission, 116 U.S.App.D.C. 93, 321 F.2d 359 (1963), cert. denied, 375 U.S. 951, 84 S.Ct. 442, 11 L.Ed.2d 312 (1963), we rejected appellant's contention that the first amendment guaranteed the use of all means of public communication free of restraint or denial imposed by the Commission's ruling. Similarly, in Henry v. Federal Communications Commission, 112 U.S.App.D.C. 257, 302 F.2d 191 (1962), cert. denied, 371 U.S. 821, 83 S.Ct. 37, 9 L.Ed.2d 60 (1962), we denied a contention that the constitutional guarantee of free speech was abridged by a Commission ruling denying a license application upon the ground that the program proposals of the applicant were not designed to serve the needs of the proposed area. This court has made similar rulings in Johnston Broadcasting Company v. Federal Communications Commission, 85 U.S.App.D.C. 40, 175 F.2d 351 (1949); Bay State Beacon, Inc. v. Federal Communications Commission, 84 U.S.App.D.C. 216, 171 F.2d 826 (1948); and in Simmons v. Federal Communications Commission, 83 U.S.App. D.C. 262, 169 F.2d 670 (1948), cert. denied, 335 U.S. 846, 69 S.Ct. 67, 93 L. Ed. 396 (1948).

It appears to be well documented, then, that because of its unique characteristics the courts have consistently held that regulatory action by the Commission, acting within the framework and provisions of the statutes embraced in Title 47 U.S.C., does not per se violate the first amendment.

Looking specifically to the actual operation of the Fairness Doctrine as applied to these petitioners in this present case, I observe, first of all, that petitioners are not prohibited from broadcasting any program which petitioners think suitable. Moreover, petitioners are not furnished with a mandatory program format, nor does the Doctrine define which, if any, controversial issues are to be the subject of broadcasting. The latitude of petitioners' operation of their station insofar as programming is concerned is

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limited only by petitioners' discretion and good faith judgment. See Commission's Policy on Programming, 20 P & F Radio Reg. 1901(1960) and the *Report, supra.*

The Fairness Doctrine impact arises, then, when in petitioners' exercise of their own judgment, they broadcast a program dealing with controversial issues of public importance. After having independently selected the controversial issue and having selected the spokesman for the presentation of the issue in accord with their unrestricted programming, the Doctrine, rather than limiting the petitioners' right of free speech, recognizes and enforces the free speech right of the victim of any personal attack made during the broadcast. Such an attack, the Doctrine directs, necessitates the petitioners' affording the maligned victim an opportunity to respond. Does such an obligation arising under these conditions deprive petitioners of any right guaranteed by the first amendment? I think not.

The American people own the broadcast frequencies. Speaking through their elected representatives in Congress, they have established a program of licensing the temporary use of allocated frequencies to broadcasters who meet the standards established by Congress in Title 47 U.S.C. as administered thereunder by the Commission. The broadcasters, then, acquire no ownership of assigned channels but are authorized to use them for the service of the public interest, convenience, or necessity. In keeping with the public interest, I agree with the Commission that:

> "It would be inconsistent * * * to assert that, while it is the purpose of the act to maintain the control of the United States over radio channels, but free from any regulation or condition which interferes with the right of free speech, nevertheless persons who are granted limited rights to be licensees of radio stations, upon a finding under Sections 307(a) and 309 of the act that the public interest, convenience, or necessity would be served thereby, *may themselves make radio unavailable as a medium of free speech.*" *Report, supra,* at 1248. (Emphasis supplied.)

Although addressing itself to a Sherman Act situation involving newspaper services, the Supreme Court's admonition in Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945), appears to me equally applicable with minor changes in syntax to the present case:

> "It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. * * * That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."

[5] My conclusion in this regard is uninfluenced by petitioners' contention that the Commission in some manner has an obligation to first ascertain whether the complaint made to the Commission by Cook was "in fact true or false." There is, of course, no statutory requirement for such a finding. Additionally, it is my view that any attempt by the Commission to make factual determinations of truth or falsity in controversial issues of public interest would constitute an illegal exercise of a nonexistent authority. The basic concept of free speech is unfettered by any requirement that it be exercised only by those with a "right" viewpoint:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of

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But this all means the permit of market, the FCC can enforce FD in a non-intrusive way.

speech, though not absolute, Chaplinsky v. New Hampshire, *supra*, pp. 571–572 [315 U.S. 568, 62 S.Ct. 766, at page 769, 86 L.Ed. 1031], is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." Terminiello v. City of Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1948).

I reject the suggestion that the Commission has either the obligation, or even the authority, to make determinations of the right or wrong in factual disputes involving controversial issues of public interest.

[6] The thrust of petitioners' challenge to the Commission action as an abridgement of their fifth amendment rights is rather difficult to specifically articulate. Briefing and argument combine and interweave the vagueness argument indistinguishably about both the first and fifth amendments. Specifically, we are told that arguments advanced by petitioners in support of the questions discussed in part V of this opinion also support the allegation that the "vice of vagueness violates the due process clause of the Fifth Amendment * * *." (Petitioners' brief at 17.) As I have set forth under part V of this opinion, I do not believe that either the Fairness Doctrine or the statutory provisions from which it flows are lacking in any required standards of preciseness. My view is that the statutes and the Doctrine are sufficiently explicit to inform those who are subject to them what conduct on their part will render them liable to penalties. Neither the statute nor the doctrine either forbid or require the doing of an act in terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application. See Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1925). Moreover, broadcasters are protected against the abuse of power by the Commission by the procedural safeguards of Title 47 U.S.C., by the provisions of the Administrative Procedure Act,[15] and finally, by the right of appeal to the courts for relief from any final action claimed to be arbitrary or capricious. The petitioners are not deprived of due process by the operation of the Fairness Doctrine.

VII. Does section 315 violate the ninth and tenth amendments to the Constitution?

[7] In four sentences in their brief (p. 20) petitioners assert that the Fairness Doctrine infringes upon the rights guaranteed by the ninth and tenth amendments. Relying upon United Public Workers v. Mitchell, 330 U.S. 75, 94, 67 S.Ct. 556, 91 L.Ed. 754 (1947), petitioners point out that there is therein an explicit protection of the right of the people to engage in political activity. The argument then disclaims this case as representing any authority for "so restricting the rights of the people generally or the owners or users of media of communications such as radio or the press." The conclusion is drawn that the "prior restraint occasioned by the imposition of the 'Fairness Doctrine' infringes on the guarantee of the political rights retained by the people including petitioners herein and all paying users of Petitioners' radio facilities," and "the First Amendment's prohibitions clearly fall within the Tenth Amendment" as "powers not delegated to the United States by the Constitution are retained by the people." See petitioners' brief at page 20.

Again I encounter some difficulty in applying these general allegations to the facts in this case. Accepting United Public Workers v. Mitchell, *supra*, with some obvious limitations, for the principle announced by petitioners, I find little in the actual holdings of the Court as to the rights of federal employees under the Hatch Act which relates to

15. 5 U.S.C. §§ 1001–1011 (1950).

the factual situation here before us. I do not find in the operation of the Fairness Doctrine any restriction upon the rights of the people to engage in political activities, as I pointed out in some detail in part VI above. Broadcasters alone determine the programs they will carry, the format to be followed, and the personnel to be utilized in those broadcasts. In political matters, the licensee alone has "the right and nondelegable duty of * * * acting reasonably, to determine whether a program * * * is in the public interest." Regents of New Mexico v. Albuquerque Broadcasting Co., 158 F.2d 900, 906 (10th Cir. 1947). While generally a licensee is responsible for all matter carried on his station, Congress has gone so far as to relieve him of this responsibility with respect to broadcasts by candidates for political office by stripping him of his power to censor. See section 315 and Farmers Educational and Cooperative Union v. WDAY, 360 U.S. 525, 79 S.Ct 1302, 3 L.Ed. 1407 (1959).

The Commission, in supporting its action in this case, construes petitioners' challenge under this point as being addressed to its requirements imposed on the licensees after the personal attack, with special reference to the mandated granting of cost-free time to the victim to respond as his financial circumstances require. If this is the thrust of petitioners' charge, I readily agree that the compulsory granting of free time may, and probably does, impose a burden on the licensees. This burden, however, is not an unreasonable one. The broadcasters' licenses are issued upon a finding by the Commission that the public interest will be served thereby, and thus, the licensees accept the responsibility of discharging what is in actuality their public trust. There remains to the licensee the right, in the exercise of good faith discretion, of utilizing a paying spokesman to respond to a personal attack if one is available. But:

"* * * [W]here the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (and does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the contrasting viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee—and *thus leave the public uninformed*—on the ground that he cannot obtain paid sponsorship for that presentation." (Emphasis in original.) Cullman Broadcasting Co., Inc., 25 P & F Radio Reg. 895, 896 (1963).

I conclude that there is no abridgement of petitioners' rights in the application of the Fairness Doctrine to their activities in this case. In so doing, I have considered the entire record in an effort to perceive and understand the petitioners' ninth amendment claim, despite the vague and general nature of their brief upon this point. I observe further in this regard the paucity of cases defining, enumerating, or interpreting ninth amendment rights. Mr. Justice Goldberg, speaking in a concurring opinion in Griswold v. State of Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1964), cites but three Supreme Court cases treating of the ninth amendment during the entire period of the Court's existence supplemented by two "see also" citations. 381 U.S. at 490–491, 85 S.Ct. 1678.

Mr. Justice Stewart, while dissenting in *Griswold, supra*, pointed out that:

"The Ninth Amendment, like its companion the Tenth, which this Court held 'states but a truism that all is retained which has not been surrendered,' United States v. Darby, 312 U.S. 100, 124 [61 S.Ct. 451, 462, 85 L.Ed. 609, 132 A.L.R. 1430] was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the

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individual States." 381 U.S. at 529–530, 85 S.Ct. at 1706.

I apply to the petitioners' ninth amendment[16] argument Mr. Justice Stewart's statement in *Griswold, supra*, at 529, 85 S.Ct. at 1706, "[b]ut to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history."

[8] The thrust of the tenth amendment argument attempts to place section 315 within the ambit of powers not delegated to the United States by the Constitution. The threshold weakness of this contention is that the Supreme Court has affirmatively held that the broadcasting system established by Title 47 U.S.C. is a proper exercise of the constitutional power of Congress over commerce. National Broadcasting Co. v. United States, *supra*, and in enacting Title 47 U.S.C., Congress must be deemed to have exercised its power within constitutional limitations. Sablowsky v. United States, 101 F.2d 183 (3rd Cir. 1938). I have discussed in part V of this opinion the right of Congress, under established precedents, to delegate the administration of statutory provisions to agency determination. It follows, then, that Congress having acted herein under specifically identified constitutional power, approved by the Supreme Court, properly delegated execution of its statutory mandate to the Commission. Therefore, there exists in this case no transgression of any power reserved to the states or the people. "If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail." United Public Workers v. Mitchell, *supra*, 330 U.S. at 96, 67 S.Ct. at 567.

VIII. Does the Fairness Doctrine impair free speech in violation of the first amendment by imposing a prior restraint upon the expression of views, arguments, and opinions by petitioners, as well as by all other owners of radio stations, and upon those who pay for the use of such facilities?

Beginning with citations and irrefutable quotations relating to the purposes, the meaning, and the breadth and scope of the Bill of Rights, and especially of the first amendment, from New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, 95 A.L.R.2d 1412 (1964); West Va. State Board of Education v. Barnett, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674 (1943); United States v. Paramount Pictures, Inc., 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948); Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Grosjean v. American Press, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936); Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); and McIntire v. William Penn Broadcasting Co. of Philadelphia, 151 F.2d 597 (3rd Cir. 1945), cert. denied, 327 U.S. 779, 66 S.Ct. 530, 90 L.Ed. 1007 (1946), the petitioners contend that the Fairness Doctrine, measured against the principles of those cases, imposes a direct and previous restraint upon the right of free speech guaranteed by the first amendment. This results, say petitioners, from the Doctrine's restraining a licensee from speaking out editorially on issues of public importance except on condition that he seek out and grant free time to another to express oppositorial views. Further restraint arises, they say, because an owner of a station "may not permit his facilities to be used by a paying citizen to speak out in opposition to governmental action or policy unless such owner makes available free time commensurate with the paid time to voice the contrary view." It follows, say petitioners, that the Fairness Doctrine creates "previous restraint [and the] fear of subsequent punish-

16. For additional citations to discussions of the origin of reasons for, and applicability of the ninth amendment, see *Griswold*, 381 U.S. 489, 490, 491, 85 S.Ct. 1678, and footnotes thereon.

ment" through danger or threat of the forfeiture of the licensee's license. Beyond this the petitioners further argue they are forced by the Doctrine to surrender "as a pre-condition to the obtaining of a radio station license," their right of freedom of speech and are, finally, compelled to assume the "unlawful obligation" of becoming the "first censor" of all public interest broadcasts at the risk of ultimate loss of their broadcasting license at renewal time if their censorship is not to the liking of the Commission.

I begin, then, with an examination of the reasons advanced by the respondents for the formation and operation of the Doctrine:

> "And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the [constitutional] rights." Schneider v. State of New Jersey, 308 U.S. 147, 161, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939).

First, then, I set forth in the several following paragraphs the respondents' reasons, advanced in brief and oral argument, for the regulations constituting the Fairness Doctrine.

Radio broadcasters, state the respondents, by utilizing the limited number of publicly-owned broadcast facilities and operating on a license valid for a limited period, carry on their programs as trustees for the public at large because of the Commission's determination that each licensee's operation will promote the public interest. The broadcasters, as public trustees, have an obligation in a democratic society to inform the beneficiaries of the trusteeship, *id est*, the public, of the different attitudes and viewpoints which are held by the various groups which make up the community. The first amendment establishes an informed electorate as the foundation stone of a democracy.

> "In presenting programs dealing with controversial issues of public importance, the fairness doctrine imposes upon licensees the affirmative obligation to afford reasonable opportunity for the expression of conflicting viewpoints. As such, it is reasonably related to the statutory scheme which provides that licenses are issued for limited times to persons who act not in their own private interest, but as 'trustees' for the public's interest in 'the larger and more effective use of radio,' 47 U.S.C. 303(g)." [17] Respondent's brief at 21.

The "public interest," continue the respondents, having been consistently sustained by the courts as a valid standard to guide the Commission in the exercise of its prescribed duties, have been made more precise by the incorporating into the Communications Act of 1934 of the fairness principle. A broadcast station, not being a common carrier, and having both the duty and the right of determining whether a controversial program is in the public interest, must, after having exercised that determination by broadcasting a particular program, in the public interest afford equal opportunity for the broadcast of the other side of that controversial issue. This burden exists equally well when the initial broadcast consists of a personal attack upon a person or organization. The crucial consideration is the public interest in hearing both sides. The licensees' obligation to present both sides does not arise from the factual truth or falsity of the broadcast, because in the application of the Doctrine the ultimate determination of the merits of the issue will be made by the general public for whose information, presumably, the initial broadcast was originally made.

> "[The freedom of speech guaranteed by the First Amendment] presupposes

17. 47 U.S.C. § 303(g) (1952) reads as follows: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

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that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." United States v. Association Press, 52 F.Supp. 362, 372 (L. Hand, J.) (S.D.N.Y.1945), aff'd, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945).

[9, 10] Against this backdrop and the entire record, I do not find in this case the existence of any "prior or previous restraint." Concise or even broad definitions of the factual situations or practices which constitute a prior restraint are non-existent within the wide scope of the Court's review of first and fourteenth amendment cases. Certainly, however, any type of Government censorship imposed prior to permitted publication is an abrogation of first amendment guarantees. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098; Schneider v. State of New Jersey, *supra*; Grosjean v. American Press Co., *supra*. Similarly, a licensing program operating in fact as a censorship program constitutes a first amendment violation. Burstyn, Inc. v. Wilson, *supra*. Accepting readily the obvious fact that other situations could constitute a prior restraint, I confine my discussion to the facts in the present case. The petitioners are in no manner exposed to or subject to any prior censorship of their broadcasts. There latitude in the selection of program material, program substance, program format, and identity of program personnel is bounded only by their own determination of the public interest appeal of their end product. They are not required to submit any broadcast material to the Commission, or any other Government agency, prior to broadcast. It is obvious that there is involved in this case no censorship which constitutes prior or previous restraint. It seems almost superfluous for me to have to point out that section 326 specifically prohibits any censorship action on the part of the Commission.

Turning, then, to the licensing scheme incorporated in Title 47 U.S.C., I observe readily that no provision whatsoever requires the license applicant to waive, forego, or sacrifice the liberty to discuss, when licensed, publicly all matters of public concern. Consideration of public interest, convenience, and necessity are alone the prescribed existing and operational standards for eligibility for issuance of a broadcast license. Although petitioners allege that a fear of punishment may constitute a de facto restraint upon the exercise of their free speech guarantees through a denial of their ultimate renewal application, I point out—as I have done before in this opinion—that the remedial provisions of Title 47 U.S.C., the Administrative Procedure Act, and the accessibility of the courts guarantee petitioners full redress from any illegal, arbitrary, or capricious conduct on the part of the Commission. Petitioners have full access to the ground rules governing the Fairness Doctrine, since they have been printed in the Federal Register, 29 Fed. Reg. 10416, and furnished to all broadcast licensees. Broadcasters have full opportunity to answer any complaint against their station, *Letter to Oren Harris*, *supra*, and may request a ruling from the Commission if they are in doubt whether a particular set of facts is within the Doctrine. Cullman Broadcasting Co., *supra*. Finally, I observe that the Commission has recorded its position against the invocation of sanctions against any broadcaster for an honest mistake in judgment. *Report*, *supra*, at 1246 and Capitol Broadcasting Co., 2 P & F Radio Reg.2d 1104 (1964).

[11] Weaving together the several threads of discussion presented in this section of this opinion, I conclude that there is no abrogation of the petitioners' free speech right. On the contrary, I find that the conduct of the petitioners absent the remedial procedures afforded the complainant Cook would, in fact, constitute a serious abridgement of his free speech rights. I find in the Fairness Doctrine a vehicle completely legal in

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its origin which implements by the use of modern technology the "free and general discussion of public matters [which] seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." Grosjean v. American Press, *supra*, 297 U.S. at 249, 56 S.Ct. at 449, 80 L.Ed. 660. Having found no violation de jure or de facto of petitioners' rights, I am absolved from further consideration, at least in this case, of the reasons advanced by the Commission for the existence of the doctrine (referring back, of course, to the doctrine of *Schneider, supra*).

Conclusions

1. 47 U.S.C. § 315 (1962) adopted the Commission's Fairness Doctrine, as set forth in the Commission's 1949 *Report, supra*, and in so doing, the Congress did not commit an unconstitutional delegation of its legislative function.

2. 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.

3. Neither 47 U.S.C. § 315 (1962) nor the Fairness Doctrine is violative of the ninth or tenth amendments to the Constitution.

[12] 4. 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.

The Commission action under review is

Affirmed.

FAHY, Circuit Judge:

I concur in the result reached by Judge Tamm and in general with his reasoning, without committing myself to all details of the opinion. For example, I have doubts that the fairness doctrine "recognizes and enforces the free speech right of the victim of any personal attack made during the broadcast." I agree with the Commission without finding it necessary to accede to this position.

Moreover, I agree with the Commission that a reply to a personal attack is not conditioned upon the ability of the licensee to obtain paid sponsorship for the reply. As to the procurement of sponsorship I need go no further than the case of a personal attack.

WILBUR K. MILLER, Senior Circuit Judge, did not participate in the consideration and decision of this case on the merits, set forth in the foregoing opinion.

Delmar R. AYLOR et al., Appellants,

v.

INTERCOUNTY CONSTRUCTION CORPORATION et al., Appellees.

No. 20265.

United States Court of Appeals
District of Columbia Circuit.

Argued Feb. 16, 1967.

Decided June 20, 1967.

Petition for Rehearing En Banc and for Rehearing before the Division Denied Sept. 6, 1967.

Action for injuries sustained by highway inspector in an accident allegedly caused by negligence of, inter alia, subcontractor's employee. The United States District Court for the District of Columbia, Alexander Holtzoff, J., directed a verdict for defendants, and appeal was taken. The Court of Appeals held that state of evidence was such when plaintiffs rested that primary negligence of subcontractor's employee, in parking vehicle in such a way as to partially block

FCC 71-623
63540
36 FR

In the Matter of)
)
The Handling of Public Issues Under) Docket No. 19260
the Fairness Doctrine and the Public)
Interest Standards of the Communica-)
tions Act.)

Adopted: June 9, 1971
Released: June 11, 1971

NOTICE OF INQUIRY

By the Commission: (Commissioner Robert E. Lee absent; Commissioners Johnson and Wells concurring and issuing statements.)

I. Introduction

1. The purpose of this Notice is to institute a broad-ranging inquiry into the efficacy of the fairness doctrine and other Commission public-interest policies, in the light of current demands for access to the broadcast media to consider issues of public concern. It is important to stress that we are not hereby disparaging any of the ad hoc rulings that we have made in these areas. Rather, we feel the time has come for an overview to determine whether the policies derived largely from these rulings should be retained intact or, in lesser or greater degree, modified. We have divided the inquiry into four parts: (i) the fairness doctrine generally, (ii) access to broadcast media as a result of the presentation of product commercials; (iii) access generally for discussion of public issues; and (iv) application of the fairness doctrine to political broadcasts. Obviously, these parts overlap. Indeed, each is an aspect of the underlying problem of access. Interested parties may address any or all of these aspects, or they may structure their comments in accordance with their own definition of the problem.

2. Several issues to which we direct particular attention have been the subject of recent Commission decisions in which both the legal and policy considerations have been treated in depth. We will not here repeat the extensive majority and minority opinions. Rather, we refer interested parties to the cited cases where they will find full treatment of the pertinent policy matters here under review.

3. We stress that we are interested in fundamental policy – not in a rehash of legal considerations nor in recommendations of statutory revision. Thus, this Commission cannot abandon the fairness doctrine or treat broadcasters as common carriers who must accept all material offered by any and all comers. The Communications Act is explicit in these respects (see Section 315(a) and Section 3 (h)) and we take the Act as a "given" from which this inquiry necessarily proceeds. Furthermore, there are court appeals pending on several of the legal issues and such decisions will, of course, be appropriately taken into account in the course of this proceeding.

4. This Notice thus deals with Commission-made policy – derived from the Act and from the standards set down therein. But, in view of the broad nature of these standards, there can and must be considerable leeway in both policy formulation and application in specific cases. The goal is clear: to foster "uninhibited, robust, wide-open" debate on public issues (New York Times Co. v. Sullivan, 376 US 254, 270). That is the profound, unquestioned national commitment embodied in the First Amendment. The basic issue we pose here is whether Commission-made policies indeed promote that goal to the maximum extent. Or, are there revisions or even entirely new policies that would serve it more effectively?

5. Finally, by way of introduction, we note that promotion of the goal cited above must be consistent with the "public interest in the larger and more effective use of radio" (Section 303(g)). It is most important to note in this connection that, to a major extent, ours is a commercially-based broadcast system and that this system renders a vital service to the nation. Any policies adopted by this Commission in the areas covered in the present inquiry should be consistent with the maintenance and growth of that system and should, among other appropriate standards, be so measured. We urge all interested parties to keep this pragmatic standard centrally in mind in forwarding specific comments and proposals. Proposals that in the short run might afford great insight into public issues but in the long run might tend to undermine the existing broadcast system – e.g., nothing but informational programming in a debate format – would not, in this view, serve the public interest.

II. The Fairness Doctrine Generally.

6. The fairness doctrine has evolved over some forty years as the guiding principle in assuring to the public an opportunity to hear contrasting views on controversial issues of public importance. Enunciated as early as 1929 by the Federal Radio Commission, 1/ the fairness doctrine was most fully fleshed out in the Report on Editorializing by Broadcast Licensees, 13 FCC 1246 (1949), and has been sustained by the Supreme Court as within the Commission's statutory authority (Section 315(a)) and in full accord with the First Amendment. Red Lion Broadcasting Co., Inc. v. FCC 395 US 367 (1969).

7. The fairness doctrine is grounded in the recognition that the airwaves are inherently not available to all who would use them. It requires that those given the privilege of access hold their licenses and use their facilities as trustees for the public at large, with a duty to present discussion of public issues and to do so fairly by affording reasonable opportunity for the presentation of conflicting views by appropriate spokesmen. The individual licensee has the discretion, and indeed the responsibility, to determine what issues should be covered, how much time should be allocated, which spokesmen should appear, and in what format. Only in the case of personal attacks or an editorial taking sides among competing candidates is there a specific requirement as to the person to whom the station must make time available. And

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1/ See Great Lakes Broadcasting Co., 3 FRC Annual Rep. 32 (1929), reversed on other grounds 37 F2d 993 (CADC), certiorari dismissed, 281 US 706.

even this exception rests not upon an individual's right to be heard but, rather, upon the proposition that the public's right to be informed will be best served if the person attacked or the candidate opposed presents the contrasting viewpoint. The guiding premise, as the Supreme Court put it, is not "an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish" but rather "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . ." Red Lion Broadcasting Co., supra, at p. 390. Indeed, it is this right that goes far to explain the amount of spectrum space devoted to broadcasting.

8. With the exception of the personal attack and political editorializing rules, it has not been found necessary to formulate detailed and definitive guidelines for licensees applying the fairness doctrine in their day-to-day operations. Rather, the doctrine has been refined case-by-case in particular and concrete situations. See Applicability of the Fairness Doctrine to Broadcast Licensees (Fairness Primer), 29 FR 10415 (1964). 2/ We by no means denigrate this manner of proceeding. It has in its broad effect served the nation well, and Commission rulings have been realistically and thus, we believe, soundly based. But, at the same time, it does seem to us desirable to take the longer view that an overall inquiry affords – thus permitting all interested parties to be heard and not just those involved in specific complaints. It has been about twenty-two years since we issued our 1949 Report on Editorializing, supra, and we think it is time for another overview. If our policies are sound, they should have stood the test of time and application. If they are not sound – if they unreasonably restrict the journalistic functions of broadcasters or permit broadcasters unreasonably to restrict access – then corrective action is called for. Indeed, in the personal attack and political editorializing fields, we pledged that we would act promptly if we were shown that in actual operation our policies did not promote the fundamental purposes of the First Amendment. 22 Fed Reg 11531, 11532; 33 Fed Reg 5363, 5364. This also is the thrust of the Supreme Court's opinion in Red Lion (395 US at pp. 392-93).

9. This part of the inquiry thus gives broadcasters and all other interested parties the opportunity to advance their ideas, concerning the fairness doctrine generally, for improving, refining, or even drastically revising Commission policies. They may direct their attention to any aspect of the policies set out in the Fairness Primer or in more recent cases. We cite the following as just a few examples of important issues in this area:

(i) How have the personal attack and political editorializing rules worked in actual practice? Should they be revised in any way to achieve their stated goals?

(ii) Has the fairness doctrine in fact promoted the "more effective use of radio" in the discussion of controversial public issues,

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2/ We have outstanding one Notice of Proposed Rulemaking in the fairness area. See Docket No. [illegible] proposal, however, and not the broad overview here contemplated.

or has it served to inhibit wide-open debate? (In this connection, we also direct attention to our processing policies – see Fairness Primer, 29 FR at p. 10416; Letter to Hon. Oren Harris, FCC 63-851; and Letter to Mr. Allen Phelps, 21 FCC 2d 12 (1969)).

(iii) Should the Cullman rule, 40 FCC 576 (1963), which lays down the principle that the right of the public to hear contrasting views on significant public issues is so important that licensees must make time available without charge if necessary – be expanded or restricted, or otherwise refined?

10. We repeat: these are examples only. All interested parties are invited to frame their own questions in addressing the strengths and shortcomings of the fairness doctrine generally.

III. Access to the Broadcast Media as a Result of Carriage of the Product Commercials.

11. This aspect of the inquiry is prompted by a recent court decision and several complaints in which very broad-ranging policy questions appeared to be raised – questions that reach beyond the concrete situations involved. Thus, we deal first with the policy questions raised in the opinion of the Court of Appeals for the District of Columbia Circuit in Retail Store Employees Union v. FCC, Case No. 22,605, decided October 27, 1970. We refer specifically to the issues raised in Part III of the opinion. 3/ The factual setting is simply stated: a department store (Hill's) had access to a station's facilities (WREO) to present frequent advertisements of the standard commercial nature (". . . extolling the virtues of Hill's stocks, bargains, and services and on that basis urging listeners to patronize the various Hill's outlets" – pp. 2-3, Sl. Op.). The employee union at the store decided on a strike and boycott to gain its bargaining objectives. It sought to support the boycott by purchasing time for one-minute announcements stating that there was a strike at Hill's and urging listeners to respect the picket lines. These bare facts are sufficient to pose the basic issue: namely, does the union have a right to purchase time for its spots in these circumstances?

3/ The Court noted that unlike the issue in Part II of the opinion, the issues in Part III do not call into question the renewal of license of the station involved and, therefore, the Commission might wish to separate those issues from the license renewal proceedings (n. 50, Sl. Op.). We think that such separation is clearly appropriate and accordingly have done so. See Order released April 26, 1971 in Radio Enterprises of Ohio, Inc., FCC 71-401.

We also note that the Amalgamated Meat Cutters case, 25 FCC 2d 279 (1970), raises the same basic issue, and for that reason we requested its remand from the Court. The parties to the two above proceedings should accordingly address themselves in this proceeding to the questions raised by the Court in Retail Store.

12. In view of its holding on another matter not relevant here, the Court did not resolve the above issue. But it did indicate that the issue ". . . deserves fuller analysis than the Commission has seen fit to give it" (part A, p. 20, Sl. Op.). The Court then noted (part B, p. 20, Sl. Op.):

> Central to the Union's argument on this point is the proposition that, in urging listeners to patronize Hill's Ashtabula Department Store, Hill's advertisements presented one side of a controversial issue of public importance. Hill's copy, of course, made no mention of the strike or boycott, or of the unresolved issues between the Union and the store. But the advertisements did urge the listening public to take one of the two competing sides on the boycott question – they urged the public to patronize the store, i.e., not to boycott. It seems to us an inadequate answer to this argument merely to point out that Hill's copy made no specific mention of the boycott. In dealing with cigarette advertising, the Commission has recognized that a position represented by an advertisement may be implicit rather than explicit. . . .

The Court noted a further analogy to the Cigarette Advertising ruling – that here also there is an established Congressional policy involved. In this instance, the policy is even-handedness in labor-management relations in which both Union publicity and Hill's commercials might be viewed as weapons of "economic warfare." In the Court's words (part C, pp. 21-22):

> If viewed in this light, it could well be argued that the traditional purposes of the fairness doctrine are not substantially served by presentation of advertisements intended less to inform than to serve merely as a weapon in a labor-management dispute. But the fairness doctrine, as we have pointed out, is only one aspect of the FCC's implementation of the statutory requirement that broadcast stations operate to serve the public interest. [Footnote omitted.] The public policy of the United States has been declared by Congress as favoring the equalization of economic bargaining power between workers and their employers. [Footnote omitted.] It is at the very least a fair question whether a radio station properly serves the public interest by making available to an employer broadcast time for the purpose of urging the public to patronize his store, while denying the employees any remotely comparable opportunity to urge the public to join their side of the strife and boycott the employer. If the Union's claim is to be rejected, we believe this question should be dealt with by the Commission.

13. The Court noted that it had not attempted a full canvass of all the issues involved but had merely indicated some of the principal questions to be answered. In the circumstances, we believe that an overall inquiry is the best way to proceed, thus allowing for maximum participation and maximum opportunity for sound policy formulation. The issue has been posed here in terms of Retail Store but, clearly, it has wider ramifications. The issue really is the right of access, if any, to the broadcast media to respond to product commercials.

14. Two of the Court's basic considerations – that product commercials can carry implicit messages and that pertinent national policies should be taken into account – have very wide applications indeed. For example, we might consider the national policy of avoiding environmental pollution (see National Environmental Policy Act of 1969, 83 Stat 852, Section 101(a)). As we indicated in our Letter to Mr. Soucie, 24 FCC 2d 743 (1970), appeal pending sub nom. Friends of The Earth v. FCC, Case No. 24556, CADC, a great number of products commonly advertised over the broadcast media have pollution consequences: cars because of their gasoline engines; gasoline itself; airplanes; detergents; and, indeed, every product that is normally packaged in a non-biodegradable container. Commercials urging use of these products or services thus can be argued to raise implicit ecological questions. Other product commercials, similarly, could be argued to raise significant national policy questions: commercials promoting the use of aspirin, tranquillizers, soporifics, etc., on the ground that they indirectly promote overuse of drugs generally and thus might lead to harmful, illegal drug use; commercials depicting women in a manner charged to be offensive to the national policy of equal rights and equal treatment of the sexes; etc. 4/ It is not necessary to list more examples. The contention is that, almost without exception, product commercials can be argued to raise some significant, controversial issue – and as public awareness grows, so, too, does the occasion for making such arguments. On the other hand, the Court notes in Retail Store (Sl. Op., pp. 21-22, n. 67) that the ". . . Commission repeatedly emphasized that its holding in [Cigarette Advertising] – that stations broadcasting cigarette advertisements must regularly provide free time if necessary for the presentation of arguments opposing cigarette smoking – was limited to cigarette advertising. . . ." The Court further stated that this holding was based on the ground that "the implicit and explicit messages normally carried by advertising do not concern controversial issues of public importance." (Sl. Op., p. 21). In this connection, we also note that the Court in Banzhaf v. FCC, 405 F2d 1082 (CADC, 1968), certiorari denied, 396 US 842 (1969), pointed out that cigarettes were ". . . in fact the product singled out for special treatment which justifies the action taken" and emphased that ". . . [its] cautious approval of this particular decision does not license the Commission to scan the airwaves for offensive material with no more discriminating a lens than the public interest or even the public health."

15. Free time. On the important issue of extending the Cigarette Advertising ruling to cover all product commercials, 5/, we set out our position in Letter to Mr. Soucie, supra, and in Complaint of Alan F. Neckritz and

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4/ There is also the issue raised by armed forces recruiting announcements, both commercial and of a public service nature. See, e.g., the policy issues considered in such recent rulings as Letter to Mr. Albert A. Kramer, FCC 70-596, and Letter to Mr. Donald A. Jellinek, FCC 70-595.

5/ In Letter to Mr. Soucie and the Neckritz ruling, we pointed out that there can be product commercials that do deal directly with controversial issues of public importance. In such cases of course the fairness doctrine, including the Cullman principle, is clearly applicable.

Lawrence B. Ordower, FCC 71-526, released May 13, 1971. We specified in those rulings and will not here repeat our reasons for believing (i) that most product commercials are distinguishable from cigarette advertising and (ii) that, in any event, it would not serve the public interest to hold that for nearly every product commercial the licensee must make free time available – on a virtually daily basis, in a set ratio, in part during prime viewing hours – for counter-commercials informing the public why they should not purchase the product or services in question. In Neckritz, the Commission majority indicated its view that the advertisements for Chevron advanced a claim for product efficacy, that this is not the same as arguing a position on a controversial issue of public importance, and that it "would ill suit the purposes of the fairness doctrine, designed to illumine significant controversial issues, to apply it to claims of a product's efficacy or social utility." We indicated in Neckritz the desirability of an overview of the policy issues involved, and we here invite interested parties to address such issues as the following:

(i) Ought there be some public interest responsibility beyond that of fairness to carry material opposing or arguing the substance of product commercials? If so, should time be afforded free or only on a paid basis?

(ii) What account should be taken of the Court's observation (in Retail Store) that spot announcements may not add substantially to public knowledge and, on the other hand, that repetition is a significant factor to be considered?

(iii) What should or must be the licensee's area of discretion in this entire matter – and is there some workable standard for distinguishing various categories or commercials, some of which would give rise to fairness or public interest duties and some of which would not?

(iv) Finally, what would be the predictable effect of any new policy adopted here on the carriage of product advertisements and thus on the continued growth and health of the commercial broadcasting system?

16. Paid time. This brings us to the heart of the inquiry posed by the Retail Store decision – namely, the right of paid access to inform the public why a product or service advertised over the station's facilities should not be purchased. The Court in Retail Store posed the issue in terms of a national policy for equalizing economic bargaining power between workers and employers, and we have noted that other national policies might be pertinent in other circumstances. The broad issue posed is whether fairness and/or the public interest standard 6/ imposes a kind of "equal

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6/ In Retail Store, the Court noted that the purposes of the fairness doctrine might be [illegible] by presentation of the boycott advertisements but nevertheless raised the question whether the public interest

[Footnote continued on following page]

opportunities" obligation on the broadcaster – that is, if he sells time for the promotion of products and services, must he also sell time to others, to consumer and public interest groups for example, who wish to argue against public use of these products or services? We call for comment, pro and con, on the policy implications and the pragmatic effects of this equation.

17. Alleged false and misleading advertising. We direct the attention of interested parties to Commission policy in the area of advertising that is alleged to be false and misleading – as, for example, in the recent Chevron case, Complaint of Alan F. Neckritz and Lawrence B. Ordower, FCC 71-526, released May 13, 1971. The Commission majority held that the Letter to Mr. Soucie was applicable and that to prohibit such advertising in advance of a pending Federal Trade Commission ruling would be a case of "sentence first, verdict later." It also stated that the issues raised were of such broad-ranging importance as to warrant an overall inquiry; and the present proceeding is in part responsive to that finding. We thus specifically raise the question whether the public interest calls for any revision or refinements in existing Commission policy with respect to false and misleading advertising, or allegations thereof, and whether we might lay down new policy guidelines for the benefit of broadcasters and the public alike.

18. The foregoing by no means exhausts the possible issues that are involved in the area of product commercials. We have simply raised those that appear to us to be of the greatest current importance. We stress again that we hope to evolve or reaffirm policies that are fair to all concerned, that promote the commercial broadcasting system, and above all that serve "the public interest in the larger and more effective use" of the broadcast media.

IV. Access Generally to the Broadcast Media for the Discussion of Public Issues.

19. It has also been urged that, quite aside from the fairness obligation of broadcasters, there is a right of access – at least on a paid basis – for all those wishing to express a viewpoint on a controversial public issue. The Commission has rejected this blanket claim on the ground that there is neither Constitutional nor statutory right for any individual or group to present their views, and that as a matter of policy it would not serve the public interest to act as if there were. See, e.g., the Democratic National Committee ruling, 25 FCC 2d 216 (1970), appeal pending, Democratic National Committee v. FCC, Case No. 24,537, CADC; Business Executives' Move for Vietnam Peace v. FCC, Case No. 24,942, CADC. The legal issues are thus before the Court, and the policy issues are sharply pointed up in the majority and minority opinions of the Commission. We request comment on the question

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6/ [Footnote continued from preceding page]

did not require such presentation. See also Banzhaf v. FCC, supra, where the Court, in affirming our Cigarette Advertising ruling, held that the Commission's action was based in fact on the public interest standard. The issue posed here is thus not one of trying to fit concepts into the fairness mold but, rather, what the public interest calls for.

whether there is any feasible method of providing access for discussion of public issues outside the requirements of the fairness doctrine. More specifically, we ask that comment be addressed to the differing problems raised by paid and free time; the specific standards that should be followed for determining the basis on which time is to be provided, if such a course is recommended; the effect of any such new procedure on the licensee's general responsibility to the public; and the impact of such procedure on the licensee's duties under the fairness doctrine. The essential purpose of this part of the inquiry is to ascertain, if possible, the general patterns of licensee practice as to access on a paid or sustaining basis (e.g., for discussion of controversial issues generally or of ballot issues; for fund solicitation generally or for parties or committees organized around ballot issues), and whether it would be appropriate for this Commission to lay down criteria or guidelines for these purposes. If so, what would they be? Or, are the problems in this area so varied that decisions should be left to the judgment of thousands of licensees and, in cases of complaint, to the adjudicatory process? In other words: should we reaffirm present Commission policy and practice?

V. Application of the Fairness Doctrine to Political Broadcasts.

20. The Fairness Primer contains a number of rulings concerning the application of the doctrine to political broadcasts. There have been a number of important recent rulings in this area. As examples, we point to such rulings as the Letter to Mr. Nicholas Zapple, 23 FCC 2d 708 (1970); the Republican National Committee ruling, 25 FCC 2d 283, 299-301, 739 (1970), appeal pending CBS v. FCC, Case No. 24,655, CADC; Complaint of Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 293, 294-298 (1970). The first two set forth a quasi-equal opportunities approach - namely, that if a licensee sells or gives time to one political party, it should sell or give comparable time to the rival party, but that the Cullman principle is inapplicable here. The last cited case declined to extend the equal opportunities concept to such appearances by public officials as Presidential Reports to the nation - although it did hold, on the particular facts, that time for one uninterrupted presentation should be afforded to opposition spokesmen. We request comment on such relevant questions as the following: whether the quasi-equal opportunities approach should be restricted, expanded, or left alone, with a specific description of the feasibility and effect of any proposed revision on the underlying policies of the statute (See Section 315(a)). We recognize, of course, that actions by the Congress will be decisive in this area and that many statutory amendments are presently under consideration. If Congress does act, Commission policies will be appropriately revised.

VI. Conclusion

21. We have gone at some considerable length into the ranges of problems that have led us to propose this comprehensive overview. But interested parties will doubtless be able to suggest additional questions and variations on those we have raised. We welcome every approach. In view of the considerations discussed above (in para. 5), however, we urge that every comment be specific with reference to the practical effect of any proposals put forward.

22. It may also turn out that a further inquiry, narrowing the focus of consideration, would be useful. If we determine that new rules are appropriate, there will of course be a further opportunity to comment. It is also possible that the material submitted in response to this Notice will permit the adoption of a new policy statement without further proceedings, just as it is possible that no changes in present policy will be found to have merit. The response to this Notice will be largely determinative of our future course of action. In any event, we intend to employ special procedures and perhaps a select staff in this highly important inquiry.

23. Pursuant to applicable procedures set forth in §1.415 of the Commission's Rules and Regulations, interested parties may file comments on or before September 10, 1971, and reply comments on or before October 25, 1971. Comments may be filed as to any or all parts of the inquiry and should clearly delineate the focus of consideration. In accordance with the provisions of §1.419 of the rules, an original and 14 copies of all comments, replies, briefs, and other documents shall be furnished the Commission. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by his Notice. */

24. Authority for this inquiry is contained in Sections 4(i), 303, 307, 309, 315(a), and 403 of the Communications Act of 1934 as amended.

CONCURRING OPINION OF COMMISSIONER NICHOLAS JOHNSON

It is becoming increasingly clear that the Fairness Doctrine, rather than serving as a means of satisfying legitimate demands for access, is increasingly functioning as an "Unfairness Doctrine" by legitimizing broadcaster frustration of those demands. See, e.g., my dissenting opinions in Chevron F-310, FCC 71-526 (May 12, 1971); Friends of the Earth, 24 FCC 2d 743, 452 (1970); Democratic National Committee, 25 FCC 2d 216, 230 (1970); BEM, 25 FCC 2d 242, 249 (1970); Armed Forces Recruitment Messages, 24 FCC 2d 156, 158 (1970); Robert Scott, 25 FCC 2d 239, 240 (1970); Dorothy Healey, 24 FCC 2d 487, 495 (1970). Indeed, there is not a scintilla of hope in this discouraging line of cases that the FCC majority has the slightest intention of ever opening up the public's airwaves to the public under any set of circumstances. It has denied access to United States Senators, 14 Senators, 25 FCC 2d 283, 305 (1970); businessmen prepared to pay for commercial spot time that was available, BEM, supra, and citizen groups attempting to reply under the fairness doctrine to "commercials" that do argue "controversial issues of public importance" Chevron F-310, supra (which the Commission once said could raise fairness obligations, Friends of the Earth, supra). It is hard to imagine any more appealing set of cases than these.

Moreover, given the timing of this "Notice of Inquiry," one cannot help but wonder whether the majority is not trying to affect the outcome of currently pending cases. Several of the cases mentioned above are now on appeal before the U. S. Courts of Appeals. E.g., Chevron F-310, supra, appeal docketed sub nom Alan F. Neckritz v. USA and FCC, No. 26,335, 9th Cir., May 24,

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*/ [For order extending time see page 53:462a.]

1971; Dorothy Healey, supra, appeal docketed sub nom Dorothy Healey v. FCC and USA, No. 24,630, DC Cir, September 16, 1970; Friends of the Earth, supra, appeal docketed sub nom Friends of the Earth v. FCC, No. 24,556, DC Cir, August 19, 1970; D.N.C., supra, appeal docketed sub nom Democratic National Committee v. FCC and USA, No. 24,537, DC Cir, August 13, 1970; Armed Forces Recruitment Messages, supra, appeal docketed sub nom G.I. Association et al v. FCC and USA, No. 24,516, DC Cir, August 7, 1970; BEM, supra, appeal docketed sub nom Business Executives Move for Vietnam Peace v. FCC and USA, No. 24,492, DC Cir, July 31, 1970.

One can only hope that the Commission will not represent – and that the Courts will not accept – this hollow gesture of a "Notice of Inquiry" as the basis for altering or postponing the Court's decisions in these cases. (1) There is no reason whatsoever to believe the Commission majority is likely to change a position that has been so forcefully and repeatedly stated in such extreme cases. (2) I am fearful that this "Inquiry" may well have the serious national consequences – whether intended or not – of leaving the law in its current state of uncertainty and inequity through the 1972 Presidential election. (3) Those who now have cases on appeal, or who may be coming before the Commission in the near future, are entitled to the prompt rendition of justice on their complaints.

Needless to say, the law couldn't be any worse than it now is: it is unlikely the Inquiry will do much more harm. On the assumption that it will not affect the case-by-case resolution of these conflicts by the Commission and the Courts, therefore, I concur in the issuance of this Notice of Inquiry.

CONCURRING STATEMENT OF COMMISSIONER WELLS

With some reservations I concur in today's action. While I recognize that acting on an overall legislative basis is a perfectly legitimate alternative to our past practice of evolving the fairness doctrine on a case-by-case basis, I believe that the latter is the best way to proceed in this sensitive area. Our practice of reviewing the licensee's judgment for reasonableness in concrete factual situations has been effective. It is difficult to try to legislate fairness for all situations, and I doubt that we can define with significantly more precision the position that has emerged from our several recent decisions. But because of the majority's desire to review the entire doctrine after this long passage of time, I concur in this inquiry.

Commissioner Johnson's concurring statement requires some comment. Unlike Commissioner Johnson, I do not disparage the recent cases which he finds so objectionable. I believe that they are correct and reflect sound policy. I am particularly concerned by the implication in his statement that today's action is not seriously undertaken, but is some kind of tactical maneuver designed to influence pending appeals of Commission decisions.

There is no mystery as to why this inquiry was undertaken. It has been under consideration for some time, and the reasons have already been given in several prior Commission actions. One reason is the Retail Store decision which necessitated Part III of the Inquiry. We also said in Neckritz that we

would undertake a broad ranging inquiry. The Chairman, in an April speech to the National Association of Broadcasters, stated that it was time for another review of the fairness doctrine – that since the 1949 Report, we had been proceeding on an ad hoc basis and, after 22 years, it was time to look again at the whole subject – to let all interested persons participate in this important policy formulation, not just those involved in particular cases. To obtain such an overview is the sole purpose of today's action.

Certainly no one suggests that it will somehow obviate court review. On the contrary, the notice recognizes that pending cases will be decided, and expressly states that the decisions in these cases will be taken into account in this proceeding. Furthermore, there is not the slightest thought that other cases coming before the Commission in the near future should be denied prompt consideration. We shall certainly act on these cases in line with our established processes.

RED LION BROADCASTING CO. v. FCC: FAIRNESS AND THE EMPEROR'S NEW CLOTHES

JONATHAN D. BLAKE*

The broadcast of material related to controversial public issues is regulated by the Federal Communications Commission under the so-called "fairness doctrine"—a doctrine the constitutionality and wisdom of which have been a matter of controversy since it was first announced by the Commission in 1949.[1] In the recent landmark case of *Red Lion Broadcasting Co. v. FCC*,[2] the Supreme Court faced two conflicting Court of Appeals' decisions on special facets of the fairness doctrine, as distinct from the general principle itself. In one of these cases,[3] the District of Columbia Circuit had upheld a Commission ruling that a broadcast station must give free reply time to a person who had been personally attacked in programming broadcast over its facilities. In the second,[4] the Seventh Circuit had held unconstitutional the Commission's regulations codifying this personal attack principle, as well as other rules governing station editorials which endorse or oppose political candidates.

Confronted with these cases, the Supreme Court could have authored a limited decision. It might have held that the Commission can require a broadcast station to give reply time to a person who had been attacked over its facilities as a special tort remedy justified because of the inadequacy of monetary damages.[5] The Court might also have found consistent with

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* Member of the Bar of the District of Columbia.

[1] Editorializing By Broadcast Licensees, 13 F.C.C. 1246 (1949) (hereinafter cited *Editorializing Report*). Appearances by political candidates are excluded from the fairness doctrine because they are subject to the specific strictures. 47 U.S.C. §315 (1964).

[2] 395 U.S. 367 (1969).

[3] Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967).

[4] Radio Television News Directors Association v. FCC, 400 F.2d 1002 (7th Cir. 1968) (hereinafter cited *RTNDA*).

[5] Such a rationale would have found some support in constitutional theory and in similar provisions in France and Germany. Chafee, Government and Mass Communications 187-88 (1947).

the FCC's special mandate to confine the influence of radio and television in the electoral process the Commission requirement that a station give time to the opponents of a candidate it has endorsed editorially, or to a candidate which it has opposed editorially.[6] Had the Court reasoned in this limited fashion, it would not have had to address the somewhat different constitutional issues posed by the general fairness doctrine.

This was not the case. Not only did the Court specifically endorse the general fairness principle, wholly eschewing its traditional policy of deciding only the issues before it, it also embarked on a broad exhortation before which would seem to fall almost any limitation on program regulation.[7] Indeed, only a part of one paragraph in the thirty-four page opinion is devoted to possible limitations on such regulation.[8]

This article submits that the *Red Lion* decision constitutes an unfortunate adoption by the Supreme Court of certain basic misconceptions underlying the fairness doctrine, and an extension of those misconceptions with likely radical consequences for broadcast regulation generally.

Meaning and Nature of the Fairness Doctrine

As presently understood, the general fairness doctrine requires that, when a radio or television station broadcasts one viewpoint on a controversial issue of public importance, it must affirmatively seek out and make reasonable offers of broadcast time to spokesmen for contrasting viewpoints. Contrasting viewpoints are entitled to such time free of charge,

[6] See 47 U.S.C. §315 (1964) (requiring equal broadcast treatment with regard to candidate appearances).

[7] Ironically, many of the misconceptions relied on in the *Red Lion* first became entrenched in communications jurisprudence in National Broadcasting Co. v. United States, 319 U.S. 190 (1943), where the Supreme Court similarly departed from review of a limited area of FCC authority (in that case regulation of certain network practices) to utter a sweeping and unnecessary exposition of the constitutionality of broadcast regulation in general. See Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L.Rev. 67 (1967).

[8] 395 U.S. at 396.

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even if the broadcast of the original viewpoint on the issue in question was paid for by its spokesman.[9] Two sets of fundamental errors relating to the present fairness doctrine concept are reflected in the *Red Lion* decision, one definitional and one historical.

In terms of the actual meaning of the fairness doctrine, a basic misconception is that the doctrine imposes only an everyday and elemental principle of fairness—the sort that schoolboys would recognize immediately. The truth, however, is quite to the contrary; the fairness doctrine imposes a highly tehcnical, difficult-to-apply set of conceptual standards with no jurisprudential or ethical parallel—a fact which is obscured by the label "fairness." The effect of this label reminds one of the story about the "Emperor's New Clothes": no one seems willing to point out that the fairness doctrine has nothing to do with "fairness."

That the fairness doctrine means something quite different from everyday "fairness" is shown by the fact that in other contexts, "fairness" is not considered to require expression of contrasting viewpoints on the topic being treated. In considering whether a *New York Times* editorial is "fair," for example, no one asks whether the paper sought after and expressed contrasting viewpoints on the issue dealt with. It is enough that the editorial does not misrepresent the opposing viewpoint or does not knowingly make false or reckless allegations of fact concerning the issue. The editorial can be "fair" despite one-sided criticism of a policy or a public leader, even if it contains mistaken factual allegations. Nor is judgment as to the "fairness" of the editorial suspended until contrasting viewpoints appear in the *Times*' "Letters to the Editor" column.

What the layman understands as "unfairness" may be an appropriate subject for Commission regulation. And in fact, the Commission does regulate abuses which are properly characterized as "unfair," such as the slanting of news or public affairs programming, or disregard for the truth or falsity of

[9] Letter to Cullman Broadcasting Co., FCC 63-849, Sept. 18, 1963.

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factual statements.[10] However, instead of merely prohibiting such grossly "unfair" conduct, which would involve far less an infringement on broadcasters' discretion and programming freedom, the fairness doctrine requires much more—that broadcast stations in each instance affirmatively determine whether the material broadcast represents a viewpoint on a controversial issue, identify contrasting viewpoints on that issue, seek out spokesmen for those viewpoints, offer them a reasonable opportunity to present their views, and make time available.

In addition to this basic definitional error in the Court's opinion in *Red Lion*, two others appear, seemingly predicated on the misapprehension that they represent existing Commission doctrine. First, contrary to the suggestion in the first sentence of the opinion,[11] the fairness doctrine does not require broadcast coverage of all controversial issues.[12] The fairness doctrine is applicable only after the station has broadcast a view on one side of an issue. This conforms with Everyman's concept of fairness, which comes into play only after involvement; fairness in the usual sense does not itself require involvement. Second, the fairness doctrine does not, as the *Red Lion* opinion suggests,[13] require broadcasters to present contrasting viewpoints if they cannot locate spokesmen for those viewpoints.[14]

With regard to the historical development of the fairness doctrine, the *Red Lion* decision again indulges some fundamental misconceptio
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[10] *Editorializing Report* at 1254.

[11] 395 U.S. at 369.

[12] The Commission, however, has exhorted licensees to give adequate coverage to public officers and controversial issues generally, but has never specified any particular issues. *Editorializing Report* at 1249; United Broadcasting Co., 10 F.C.C. 515, 517-18 (1945). It has also criticized station refusal to cover issues on grounds unrelated to the bona fide exercise of the licensee's programming judgment. Robert Harold Scott, 3 R.R. 259 (1948); United Broadcasting Co., supra.

[13] 395 U.S. at 378.

[14] See Letter to Stephen Reinhardt, Esq. FCC 68-69, Jan. 17, 1968; Broadcast of "Living Should Be Fun," 33 F.C.C. 101, 107 (1962); The Evening News Ass'n, 6 R.R. 283 (1950); *Editorializing Report* at 1251.

[15] 395 U.S. at 369.

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mental misconceptions. In the Court's decision, it is stated that the fairness doctrine "originated very early in the history of broadcasting and has maintained its present outlines for some time."[15] In fact, however, the fairness doctrine was not announced until the *Editorializing Report* in 1949, and its development has been characterized more by the substantial changes in its interpretation and application than by the consistency of its use.

The early Federal Radio Commission and FCC cases did not stand for a fairness principle or justify broad Commission regulation. Instead, they constituted a determination, at a time when there were more stations than available frequencies, that licenses should not be granted to private interest groups for their essentially private uses. Not surprisingly, the two kinds of private interests for which broadcast frequencies were being prostituted were business interests and narrowly sectarian ideologies, both religious and political.[16] Stations which devoted their frequencies to those ends lost out in comparative proceedings for new or improved facilities, in renewal proceedings, and in revocation proceedings.[17] Thus, these early

[15] 395 U.S. at 369.

[16] However, even in the early days of Commission regulation, it was recognized that in metropolitan areas where there were many stations, broadcasters could cater more specifically to the tastes of substantial segments of the audience to be served, rather than to the entire audience. 2 F.R.C. Ann. Rep. 19-20 (1928). As the number of usable broadcast frequencies has expanded, the Commission has allowed stations to direct their programming to smaller minority groups. Nevertheless, it has adhered to its insistence that such service be shown to be public rather than private in nature.

[17] See Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929), rev'd on other grounds, 37 F.2d 993 (D.C.Cir.), cert. dismissed, 281 U.S. 706 (1930); Chicago Federation of Labor v. Federal Radio Comm'n, 41 F.2d 442 (D.C. Cir. 1930); KFKB Broadcasting Ass'n v. Federal Radio Comm'n 47 F.2d 670 (D.C. Cir. 1931); Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932), cert. denied, 288 U.S. 599 (1933); Young People's Ass'n for the Propagation of the Gospel, 6 F.C.C. 178 (1938).

In the *Young People's* case, a broadcast applicant was denied a construction permit because of its avowed policy that it would *never* allow its facilities to be used for views different from its own. Obviously such a policy indicated that the

cases cited in the Supreme Court's opinion as forerunners of the fairness doctrine were primarily a reaction to the real threat in the 1920's and early 1930's that broadcasting would degenerate into a medium like handbills which advertise a single business or espouse a single cause.

During the 1940's, and prior to the issuance of the *Editorializing Report*, the Commission's regulation of controversial issue programming was confined to instances of gross unfairness—unfairness as the layman understands that term. Thus, in *WBNX Broadcasting Co.*,[18] the Commission held that in the performance of its licensing function it could consider actions of an applicant "which plainly constitute acts of unfairness." It used as an example "the repeated making of irresponsible charges against any group or viewpoint without bothering to determine in advance of their publication whether they can be corroborated or proven."[19] In *United Broadcasting Co.*[20] the Commission held that a station's policy against the sale of time for the presentation of a viewpoint on a controversial issue was an abdication of the station's programming discretion. And in *Mayflower Broadcasting Corp.*[21] the Commission stated that stations should not themselves take sides on a controversial issue—that any side of a controversial issue presented must be treated "fairly, objectively and without bias."[22]

The *Editorializing Report's* fairness doctrine, of course, bore little resemblance to prior "fairness" rulings. But ironically, the above three cases—which were limited to abuses of conventional fairness in the presentation of controversial

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[18] 4 R.R. 242 (1948).

[19] Id. at 248-49.

[20] 10 F.C.C. 515 (1945).

[21] 8 F.C.C. 333 (1940).

[22] Id. at 340.

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viewpoints—were cited in the *Editorializing Report* as support for the newly articulated doctrine.[23]

The present construction of the fairness doctrine is similarly unlike the doctrine as announced in the *Editorializing Report*. As originally formulated, the fairness doctrine did not require that contrasting viewpoints be presented free of charge, even when the original viewpoint was broadcast on a paid basis.[24] It did not contemplate case-by-case Commission rulings on fairness questions.[25] It did not entail Commission pronouncements on the number, duration, and scheduling of reply announcements.[26] It did not threaten fines or forfeitures for licensee errors of judgment.[27] It was not invoked by the implications of broadcast material not intended to state a controversial viewpoint, as in the case of cigarette commercials.[28]

Thus, all of these changes which have characterized the development of fairness concepts in controversial issue program regulation belie the Supreme Court's assertion that the fairness doctrine is a body of law which has for some time remained basically unchanged.

Another historical misconception which the Court's opinion echoes is that the 1959 amendment to section 315 of

[23] Since the *Editorializing Report* reversed the *Mayflower* holding, supra, it is surprising that the *Report* relied on the case for any proposition.

[24] Compare, e.g., Letter to Cullman Broadcasting Co., supra note 9.

[25] Compare Letter to Hon. Oren Harris, FCC 63-851, Sept. 18, 1963. In hearings leading up to the 1959 amendment, the Commission specifically assured Congress that fairness was "an aspect of overall programming to be considered as part of the Commission's regular licensing processes" and that "it would be difficult to make any preliminary determination of such overall fairness on the basis of an individual complaint of lack of fariness." Hearings on H.R. 6810 and S. 2306 Before a Subcommittee of the House Comm. on Interstate and Foreign Commerce, 84th Cong., 2d Sess. 33 (1956).

[26] Compare King Broadcasting Co., 15 F.C.C. 2d 828 (1967).

[27] Compare *RTNDA*, supra note 4.

[28] Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 395 U.S. 973 (1969).

the Communications Act[29] codified the principles of the fairness doctrine as it is applied today.[30] In the first place, because all of the intervening changes described above have occurred since 1963, the fairness doctrine which Congress was alleged to have codified in 1959 bears little resemblance to the fairness doctrine which the Commission defended and the Court upheld in *Red Lion*. But even more critically, the 1959 amendment was specifically intended only to prohibit unfair broadcast treatment of political candidates in the types of programs which were exempted from the equal time requirement. To impute any broader significance to the amendment, it is submitted, is simply to misread legislative history.[31]

The Inhibiting Effect Of The Fairness Doctrine

Another serious misconception reflected in the *Red Lion* decision is that the fairness doctrine does not have a serious, inhibitory impact on broadcasters. This mistaken assumption is due in part to the foregoing misconceptions about the nature of the doctrine. If the fairness doctrine only required that broadcasters avoid unfair treatment of opposing viewpoints, it would not be particularly burdensome. Instead, as presently interpreted, it imposes substantial affirmative obligations which are difficult in application, and which can seriously disrupt programming.

While the Court dismisses the point with the summary statement that the fairness doctrine has not granted the FCC

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[29] The amendment provided as follows:

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

[30] 395 U.S. at 382-85.

[31] See generally, Legislative History of the Fairness Doctrine, Staff Study for the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (Fed. 1968).

[32] 395 U.S. at 395.

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"a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech,"[32] the fact is that the correct course of fairness doctrine compliance is not always easy to discern. It may be questionable whether a viewpoint on a controversial issue has been presented. Thus, for thirty-nine years since the Federal Radio Commission was established, neither the Commission nor anybody else considered that cigarette commercials presented a viewpoint on a controversial issue.[33] CBS Vice-President and General Counsel, Mr. Richard Jencks, has written a provocative pamphlet entitled "The FCC's 'Personal Attack' Rules: How to Throw the Baby Out With the Bath Water," which demonstrates the large number of arguable personal attacks which customarily occur in news and public affairs material. How much more numerous in such programs are the expressions of controversial viewpoints!

Nor are expressions of such viewpoints limited to public affairs programs devoted specifically to such discussion. Popular music, the basic fare of many radio stations, often expresses attitudes on controversial issues of public importance. The lyrics of much folk music say more about poverty and pacifism than many panel discussion programs,[34] and may well have a broader and more powerful impact on popular opinion. Live drama and motion pictures are both powerful vehicles for the expression of controversial viewpoints.[35] Public service announcements may also raise similar problems. Do Army recruitment spots raise issues about the military establishment

[32] 395 U.S. at 395.

[33] But see Banzhaf v. FCC.

[34] On the other side of the coin, a song like "The Green Beret" might be said to present a distinctively "hawk" viewpoint. Yet it is inconceivable that stations day-by-day could or should analyze all of their musical presentations under the fairness doctrine.

[35] Although the Commission has stated that the doctrine may apply to any broadcast material regardless of its type, Mrs. Madalyn Murray, 5 R.R.2d 263 (1965), it has normally confined its application to programming devoted to controversial issues. But see Television Station WCBS-TV, 8 F.C.C. 2d 381, on recons., 9 F.C.C. 2d 921 (1967).

in this country? Do announcements for rural electric cooperatives require that a station give free time to private electric utility firms?

Uncertainty does not end with the determination that a controversial viewpoint has been expressed. For example, in determining what the other viewpoints are, and in selecting spokesmen for them, it may be difficult to determine what views are variations of the same general viewpoint and what are separate and distinct viewpoints. Such distinctions may be difficult to draw where there are jealousies and rivalries between related interest groups. Similarly difficult is the determination of what is a reasonable opportunity for response to be afforded the contrasting viewpoints—the total length of time, the number of broadcasts, and the location of the reply broadcasts within the broadcast schedule. That difficulty is compounded by the Commission's position that what is fair in one case may not be fair in another.[36]

The problems inherent in day-to-day fairness doctrine determinations are further exacerbated by the way in which the Commission reviews these determinations. To be sure, the Commission has said repeatedly that it will afford stations wide discretion in their fairness doctrine judgments.[37] Further, the Commission has said that licensee performance in this regard is to be weighed over a three-year renewal period, the test being not whether the broadcaster has acted improperly under an "absolute standard of fairness," but whether his improper actions go beyond the area of reasonable mistakes.[38] But the Commission's decisions undermine these assurances. For example, although the *Editorializing Report* promises broadcasters considerable latitude in determining what consti-

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[36] Compare King Broadcasting Co., 15 F.C.C. 2d 828 (1967), where a 1-to-1 ratio was required and it was stated that more time for reply might be required than was used in the original broadcast, with FCC Report No. 8266, June 26, 1969, where ratios of reply-to-broadcast of from 1-to-5 to 1-to-10 were held "not deficient".

[37] *Editorializing Report* at 1251-52, 1255-56.

[38] Ibid.

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tutes the expression of a controversial viewpoint, the Commission held that *all* cigarette commercials present a viewpoint on a controversial issue, despite the fact that it is within the realm of reason for a broadcaster to determine that at least *some* cigarette advertisements do not present a viewpoint on the cigarette health issue but are directed solely at selling a particular brand of cigarette.[39]

Similarly, despite the assurance that broadcasters are afforded broad discretion in determining what is a reasonable opportunity for reply, the Commission has held that it is not "fair" for stations to afford reply time only on the same financial terms as the original viewpoint was presented, although this is the principle which Congress made mandatory for political candidates in Section 315.[40] In another case, the Commission required the station to show why it should not accede to the complainant's demands as to the precise number, duration, and scheduling of his reply spots.[41]

The fairness doctrine is burdensome to comply with even when its requirements are clear. The Commission often denies the fact, arguing that the doctrine allows the broadcaster to present whatever viewpoint he wishes, provided that he also affords opportunity to all other contrasting viewpoints on the same subject. Nevertheless, the fairness doctrine substantially affects broadcasters' programming discretion in at least three ways. First, it can affect whether and how the station presents the first viewpoint on a controversial issue. Second, the requirement can compel the station to carry opposing viewpoints which it does not desire to express. Third, in requiring a station to carry a reply viewpoint which it would not otherwise carry, the fairness doctrine has the inevitable effect of requiring a station to displace other program material which it would otherwise broadcast. This last burden is far more inhibitory of free speech on the broadcast media, which operate under

[39] Television Station WCBS-TV, supra note 35.
[40] E.g., Letter to Cullman Broadcasting Co., supra note 9.
[41] King Broadcasting Co., supra note 26.

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distinct time limitations, than if it were imposed on the printed media. Newspapers, for example, could carry reply viewpoints in additional pages. By contrast, the broadcaster must substitute reply viewpoints for material he would otherwise carry.[42]

The Philosophical Basis for the Fairness Doctrine

To the extent that the *Red Lion* decision represents not only a specific holding, but an endorsement of a distinct philosophy of program regulation, some discussion of the philosophical underpinnings of the fairness doctrine is appropriate.

Programming on controversial issues of public importance could be regulated under one of three principles: (1) required espousal of government views; (2) required espousal of all viewpoints on any issue raised by the broadcaster; and (3) voluntary espousal of the viewpoints selected by the broadcaster. The first approach, a central principle of totalitarianism, is unacceptable in this country. The second approach—representing the basic theory underlying the fairness doctrine and the political broadcast equal time requirement—assumes that the availability of diverse viewpoints to the public cannot (or at least should not) be left to the marketplace of ideas. Rather, the availability of diverse views must be required so that, as to each station's programming, all viewpoints will be represented. This rationale permeates the pages of the *Red Lion* opinion.

Under the third approach each broadcast station, like newspapers and individuals, would be free to express its own viewpoint with as much partisanship as it wished. Sufficient diversity of viewpoints would be achieved, according to this theory, not by government constraint but as a result of the multiplicity of stations and the inherent diversity of human nature, protected by the constitutional perogatives of minority

[42] It is this crucial difference between the broadcast and printed media that apparently underlies the German and French exemption of radio and television from the limited "fairness doctrine" requirements which apply to all other media in those countries. Chafee, Government and Mass Communications, 187-88 (1947).

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viewpoints. The quality of public debate and, therefore, of government decision, would be enhanced under this theory because each speaker (individual, newspaper, or broadcast station) would devote its full talents and energies to the expression of its opinions. Another article of this political faith is that diversity of opinion, if it is to be viable and meaningful, must not be by government sufferance but must be rooted in the untrammeled rights of speech and press vigorously exercised. Since this is the theory of the First Amendment governing all other media,[43] the crucial question is whether a different theory is justified for the broadcast media.

The scarcity of radio frequencies is often said to distinguish broadcasting from the printed press and to justify more impingement on broadcaster freedom than would be tolerated in printed media.[44] But the over 6,000 broadcast stations in this country far outnumber its 1,700 newspapers[45] and a comparison of the seven television and over thirty AM and FM stations operating in the Washington, D. C., area with the city's three major newspapers makes the same point from another perspective. It may be that numerous non-newspaper printed publications not included within these comparisons supplement the newspaper medium; but until there is evidence to the contrary, it may be assumed that these publications provide as much diversity for television viewers and radio listeners as they do for newspaper readers.

The Supreme Court ignored the numerical superiority of broadcast stations over newspapers, apparently relying instead on the assumption that broadcast stations are limited by tech-

[43] It should be noted that on several occasions, Congress considered but failed to extend to controversial issues an "equal time" requirement similar to that applicable to political broadcasts. E.g., S.Rep.No. 781, 73d Cong., 2d Sess. 8 (1934); H.R. Rep. No. 7716, 72d Cong. 2d Sess. (1933); 67 Cong. Rec. 12356, 12501, 12504 (1926). The significance of Congress' actions is not that it disapproved of the fairness doctrine principle of mandatory even-handedness, but that it left undisturbed in this area the presumption that First Amendment principles should govern.

[44] See generally, e.g., 395 U.S. at 396-400.

[45] See, e.g., *RTNDA*, supra note 4, 400 F.2d at 1019, nn. 45-46.

nological factors while newspapers are limited only by economic constraints. But the cause for the limits on diversity would seem to be less relevant than the ultimate effect with respect to whether such spectrum limitations justify an exception to First Amendment principles. Neither has it been shown that a substantially greater diversity of on-the-air viewpoints, would be achieved if there were no technological limitation on the number of stations that can operate.

Moreover, the fairness doctrine requires diversity on *each* station regardless of the exposure of other viewpoints on other stations and in other media.[46] It therefore appears to assume that viewers and listeners rely solely or primarily for information and opinion on one broadcast station to the exclusion of all other stations—indeed, of all other media.[47] Yet, in a multi-station market, when a reply viewpoint is broadcast on the station that presented the first viewpoint, can it be said with any assurance that the second view will reach any greater proportion of the audience that heard the first viewpoint than if it were presented on a different station or in a newspaper? Unless this question can be answered affirmatively, the doctrine cannot be said to serve the end of diversity which so often has been used as its justification.

If concern for diversity is the touchstone of the fairness doctrine, then that concern is most easily justified in the single-station market. Here, it may be argued, diversity, to be achieved at all, must be achieved on *each* station. But even this argument assumes that other vehicles of public expression such as newspapers, magazines, and nearby stations cannot provide adequate diversity. Moreover, even if there may be legitimate concern about the influence over local issues which can be exercised by a station in a community where it has no media competitor, does that potentiality outweigh the public's interest in liberating all radio and television stations

[46] WSOC Broadcasting Co., 17 R.R. 548, 550 (1958).

[47] See, e.g., Fairness Freedom and Cigarette Advertising: A Defense of the Federal Communications Commission, 67 Colum.L.Rev. 1470, 1481 (1967).

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[48] E.g., Sherbert v
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116, 135-37 (1966); Ken
Robel, 389 U.S. 258, 263

[49] 297 U.S. 233 (193

[50] Id. at 250.

outside of these markets from the uncertainties and burdens of the doctrine? In the balance of things, the benefits of freedom of press for responsible newspapers have been held in our society to outweigh the unfairnesses of irresponsible newspapers. The same balance should be struck for the broadcast media.

Another general argument in support of greater governmental controls on broadcasting than on printed media rests on the fact that broadcast stations are licensed to serve the public interest. However, government jurisdiction over the airwaves does not, in fact, distinguish broadcast stations from other media which, in using the mails, public streets, and other public facilities, are also subject to governmental jurisdiction. Indeed, under this theory, the fairness doctrine is squarely inconsistent with the principle that the government cannot condition the grant of a privilege on the permittee's forefeiting his First Amendment rights.[48]

It is also argued that television in particular is an extremely powerful medium which, therefore, needs to be controlled. This distinction, however, is totally unsupported by recognized First Amendment doctrine. No case or respectable political theory holds that a Demosthenes or a Daniel Webster, a Voltaire or a Thomas Paine, is, by reason of his spoken or written eloquence, to be shackled. Moreover, in the newspaper field, there is a rather close parallel in *Grosjean v. American Press Co.*[49] There, the Supreme Court struck down a Louisiana gross receipts license tax statute applicable only to newspapers with weekly circulation over 20,000 as "a deliberate and calculated device" by the Long machine to penalize its most effective opponents.[50]

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[48] E.g., Sherbert v. Verner, 374 U.S. 398, 404-05(1963); Speiser v. Randall, 357 U.S. 513, 518-19 (1958); Wieman v. Updegraff, 344 U.S. 183, 191-92 (1952); Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946). See Bond v. Floyd, 385 U.S. 116, 135-37 (1966); Kent v. Dullas, 357 U.S. 116, 129 (1958). Cf. United States v. Robel, 389 U.S. 258, 263-64 (1967).

[49] 297 U.S. 233 (1936).

[50] Id. at 250.

Another characteristic of broadcasting often cited as justifying more stringent regulation is the fact that it comes into the home. Because of its access, it is argued, broadcasting is able more easily to intrude its views. However, by a simple turn of the knob a different voice and different views may be obtained; not so with a magazine which has been purchased at a newsstand down the street. In short, the diversity offered by broadcasting is immediately accessible and the audience's sovereignty complete; there is no justification in these characteristics of broadcasting for the unusual restrictions of the fairness doctrine.

Conclusions

The ramifications of *Red Lion* are enormous, and the decision's break with the past startling. The opinion goes far beyond the reservation that the fairness doctrine is invoked only by a station's presentation of one viewpoint on a controversial issue—it construes the doctrine as requiring coverage of all such issues in the first instance.[51] Indeed, the Court invites the Commission, if present licensees should suddenly prove timorous . . . to insist that they give adequate and fair attention to public issues."[52] This is programming regulation of a quality and pervasiveness beyond the fairness doctrine command heretofore that, if a station carries one viewpoint on a controversial issue, it must carry all viewpoints on that subject. Moreover, the decision discards the traditional fairness doctrine limitation that a broadcast station need not itself present a contrasting viewpoint if it cannot obtain a spokesman for that viewpoint.[53]

The opinion may go further. The obligation for broadcasters to act with respect to controversial issues "as a proxy or fiduciary"[54] is extended "to social political, aesthetic, moral and other ide
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[51] 395 U.S. at 377.
[52] Id. at 393.
[53] Id. at 378.
[54] Id. at 389.

[55] Id. at 390.

moral and other ideas and experiences."[55] Hardly any programming would appear to be left unregulated under this mandate. And the burdens of compliance under the present fairness doctrine are dwarfed by comparison to the possible impact of the Court's words.

There are other serious ramifications which may result from the Court's attitude. If broadcasting stations are merely to be vehicles or conduits for the ideas of others insofar as controversial issues are concerned, then concentration of control in the broadcast industry should no longer be of major concern, just as it is not of concern with respect to common carriers in the telephone, telegraph, and railroad industries, which are natural monopolies. For the usual argument against multiple-station ownership is predicated on the undesirability of placing in the hands of a few media facilities which may shape opinion—stated otherwise, the desirability of preserving as many "diverse and antagonistic" sources of information and opinion as possible. Yet if the broadcasters' responsibility is, as *Red Lion* suggests, to mirror all community viewpoints on all public issues, then the traditional reasons for limiting ownership are no longer relevant. For the area of broadcaster discretion—and hence the potential for abuse—is rendered minimal.

An unfortunate by-product of the same point is that broadcasters may not lead but must merely reflect public opinion; that the role of independent crusader will be denied to the broadcast station. Such a consequence would eliminate one more element in our society with sufficient voice to dissent from government policies, especially since the government might be left with the ultimate power to determine what views broadcast stations may reflect.

Finally, whatever one's view on the foregoing issues, one must be struck by the failure of the Court even to address itself to the basic question of whether the public interest would be

[55] Id. at 390.

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better served by a broadcast medium of vigorous public discussion regulated only to the extent required by fair play. This failure of the Court to consider the applicability of traditional First Amendment principles, plus its misreading of existing fairness doctrine and general regulatory principles give no assurance that the judicial function was duly served in this case.

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[4] R. Stern, Television
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International TV satellite linkup in '76

RAND DAILY MAIL p1 4/9/74

4-9-1974 D. Mail

Political Correspondent

THE ASSEMBLY. — Live international television transmissions from satellites will be available to the South African Broadcasting Corporation as from January 1, 1976 — the date television is to be introduced in South Africa.

This was announced by the Minister of Posts and Telecommunications, Mr Marais Viljoen, when he presented his Post Office appropriation in the Assembly.

Mr Viljoen said the planning of the proposed satellite earth station at Hartebeeshoek, near Pretoria, had finished and work on the main building had started.

The link with the Atlantic Ocean satellite would be set up towards the end of next year as planned. The second antenna, to link up with the Indian Ocean satellite, would be brought into service during 1976.

The completion of the earth station as planned according to the original timetable meant the SABC would be provided with a television link from the satellite for live international transmission as from January 1, 1976.

Elaborating, Mr Viljoen said that the Post Office would provide the video channels which the SABC would use for its television services.

Work was at hand to provide 8 000 km of video channels by the end of next year.

The total estimated capital expenditure for television channels was R8,5-million, of which R6,7-million would be spent during the current financial year.

The Minister also announced the Post Office would finance the establishment of a chair for post-graduate study in telecommunications at Pretoria University from 1975.

He said development in most fields of technology was taking place at such a pace there was difficulty in keeping up and assimilating the knowledge flowing from research throughout the world.

Telecommunications, as applied by the Post Office, was not yet offered as a subject at any South African university and for these reasons the Post Office had decided to finance the chair.

tem is working. The longer we can do preliminary

He said it was important to stagger the installation of

JANUARY 1, 1976 - D DAY FOR TV: K39 and R27.

HOUSE OF ASSEMBLY: The completion by 1976 of the satellite earth station at Hartebeeshoek near Pretoria as planned, would mean that it would be possible to provide the SABC with a television link via the satellite for live international transmissions as from January 1, 1976, the date scheduled for the nation-wide introduction of South Africa's television service, the Minister of Posts and Telecommunications Mr M. Viljoen, said in the Assembly today. Dealing with telephones, the Minister said during the 1973/74 financial year the number of telephones in use in South Africa increased from 1,745,540 to 1,857,113 - the largest ever in one year. For the current financial year almost a third of the total capital expenditure, estimated at $230.4-million, on the national telephone network will be spent in the Witwatersrand area. - SAPA

Early kickoff for TV — but no fun shows

22-8-1974 RAND DAILY MAIL

By JULIUS TOBIAS
Television Correspondent

THE South African Broadcasting Corporation will not transmit TV programmes with entertainment value when preliminary transmissions start some time after next April.

The Government gave the go-ahead to the SABC yesterday to start preliminary TV transmissions.

TV industrialists welcomed the announcement and expressed confidence that the SABC would be able to start TV transmissions — with sound, colour and movement — by April.

DULL

But the programmes will make dull fare. According to yesterday's announcement by the Minister of National Education, Senator J. P. van der Spuy, transmissions will feature trains, cars or aircraft moving; various colour slides and instructive films about television showing the proper installation of aerials, the line-up of receivers and the causes and prevention of interference.

The SABC's head of planning, Mr P. J. Theron, confirmed yesterday the material would fall into one of these categories.

"The programmes will not be a preview of what we will eventually see on TV," he said.

"We do not want people to think these transmissions will reflect the standard of the final service. Thus the programmes we will show will have no entertainment value.

"The transmissions will start as soon as possible after April. The SABC is keen to get this ball rolling as soon as we can.

"Firstly, we want to help industry to get sets out on the market as smoothly as possible, and help people test their sets.

Durban and Port Elizabeth as well.

TV transmitters in Pretoria, Bloemfontein, Cape Town and Durban are already sending out static test patterns, an immobile picture of a card used to adjust receivers.

Johannesburg's transmitter will come on line before the year-end.

The Minister said in his statement most of the films, video tapes and slides in the preliminary transmissions would be transmitted repeatedly. Music would be played when no commentary or sound track was available on the sound channel.

The announcement of an early start to television transmissions was welcomed by all sectors of the South African television industry.

It means a massive easing of chaotic last-minute conditions which were expected in the light of shortages of materials and skilled personnel.

BULGE

Industrialists expect the early transmissions to stimulate an early demand for sets and ease the bulge on demand expected in January, 1976, when the full country-wide colour service starts.

The chairman of the Radio, Appliance and TV Association, Mr George Brodie, welcomed the news that the SABC would show films on the installation of aerials and the line-up of receivers during the preliminary transmissions, due to start some time after next April.

"The importance of proper set installation and adjustment can't be stressed enough," Mr Brodie said.

The entire television industry has been campaigning for an early start for nearly a year.

Mr Benny Slome, chairman of the Radio and Television Manufacturers' Association, said: "We are abso-

SABC chief lays down rules for TV

RAND DAILY MAIL 11-7-1974 R39 11/7/74

STAFF REPORTER

DR PIET MEYER, chairman of the South African Broadcasting Corporation, last night gave a clear indication of how the country's television service will be controlled.

Opening the annual congress of the Federasie van Kultuurverenigings (FAK) in Pretoria, Dr Meyer said that:

● The control and structure of the TV service would be closely integrated with the radio service. This meant television would have the same nature and character as the radio service. The same principles, ethical norms and objectives would be applied.

● Parliament, and not private companies, would determine what the nature, character, norms and objectives of the television service would be.

● Investigations with the aid, and under the guidance of, the Human Sciences Research Council into the pattern of life and systems of value of South Africans would continue.

DISTORTS

"With the results of our investigations at our disposal, we shall therefore be in the position timeously to notice and eliminate harmful and undesirable effects of television on the maintenance and strengthening of Afrikaner identity."

● Due regard would have to be taken of the fact that the television camera, like the microphone, the pen and the typewriter had its own inherent preferences and prejudices, which, if not controlled, led to one sided, distorted, provocative and even false images.

Dr Meyer's outline immediately aroused reaction from the two main opposition parties, who described his comments as disgraceful.

This preference of the television camera was for action and more action.

"Uprisings, as action-packed occurrences, were created by small groups for the television cameras — but where the television camera was not present, the uprising petered out on the spot.

"And what the camera, with its preference for action, distorts, cannot be corrected by the spoken or

The South African Broadcasting Corporation will not transmit TV programmes with entertainment value when preliminary transmissions start some time after next April.

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"The programmes will not be a preview of what we will eventually see on TV," he said.

"We do not want people to think these transmissions will reflect the standard of the final service. Thus the programmes we will show will have no entertainment value.

"The transmissions will start as soon as possible after April. The SABC is keen to get this ball rolling as soon as we can.

"Firstly, we want to help industry to get sets out on the market as smoothly as possible, and help people test their sets.

"Secondly, it will enable us to see how our own system is working. The longer we can do preliminary transmissions before the actual starting date, January 1976, the happier we'll be."

Yesterday's announcement said permission had been given to the SABC to start preliminary TV transmissions in the Witwatersrand and Pretoria areas as soon as possible after April 1975.

If feasible, preliminary broadcasts will be made in the Cape Peninsula and near Pretoria, Bloemfontein, Cape Town and Durban are already sending out static test patterns, an immobile picture of a card used to adjust receivers.

Johannesburg's transmitter will come on line before the year-end.

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The entire television industry has been campaigning for an early start for nearly a year.

Mr Benny Slome, chairman of the Radio and Television Manufacturers' Association, said: "We are absolutely delighted. It's in the interests of both the SABC and industry."

He said it was important to stagger the installation of aerials and receivers to avoid chaotic conditions at the start of the full service.

SOUTH AFRICAN NEWS

July 2, 1974

TELSPACE GETS THE DEAL:-

R 39

PRETORIA: South Africa had decided to accept an offer by the French firm, Telspace, for the construction of the Republic's satellite earth station, the Postmaster General, Mr. Louis Rive, announced on Tuesday, July 2. The first antenna of the satellite communications station will become operative at the end of next year and the second will be commissioned a few months later. The earth station will be erected at Hartebeeshoek near Pretoria, and its first antenna would link with the Intelsat IV-A satellite system above the Atlantic Ocean to provide direct circuits to North and South America, Europe and Africa. The second antenna would link with the Indian Ocean satellite system to provide direct circuits between South Africa and the East, including Australia, New Zealand and Japan. Cost of the equipment, installation and commissioning of the two-antennae earth station will amount to about $6-million and the buildings and other civil engineering works will cost about $2.25-million. The contract for the latter was earlier this year awarded to the Roberts Construction Company, which started work on the site on May 10, Mr. Rive said. He said satellite communications would be of vital importance to South Africa to supplement the steadily filling South Atlantic undersea cable connecting South Africa with Europe. During periods when international communications were disrupted by cable damage, satellite communications would provide the essential back-up service now inadequately provided by high-frequency radio. Above all, satellite communications would cater for South Africa's growing demand for international telephone and telex circuits. A further application of the Post office's satellite communications system would be the relaying of international television programmes, he said. - SAPA

that the first Atlantic satellite provided 240 channels. the present In-

C. PRESS PACKET. 16

Row over imported sets

TV faces big hitches, says SABC chief

RAND DAILY MAIL R39

26-3-1975

Television Correspondent

THE GOVERNMENT has issued a statement that partly clarifies the row brewing among the six television manufacturers over the importation of sets.

The row reached Cabinet level last week when a committee of Ministers took a decision on the state of assembly of 240 000 sets which will be imported.

It followed a request from four of the six groups for clarification about the state of assembly. They fear that the other two manufacturers — with permits to import 100 000 sets each — will bring the sets in fully or almost fully assembled and make windfall profits of millions of rands.

CONCESSIONS

The statement from the Department of Industries said:

"Last year the Government announced it would permit the importation of 240 000 semi-knocked-down sets to enable manufacturers to meet the peak demand expected in 1976.

"The concessions refer only to completed or partially completed modules — or sections — of TV receivers granted to firms as compensation for decentralising factories to border area sites."

The Secretary for Industries, Mr Philip Theron, has pointed out that the row among manufacturers could be due to confusion about technical jargon like the term "semi-knocked-down."

"Expert advice is being sought, possibly from the South African Bureau of Standards, about the best way to lay down clear definitions of various states of assembly," he said.

Television Correspondent

THE VASTNESS and sparse population of South Africa was making the establishment of country-wide television services difficult, the director general of the SABC, Mr J. N. Swanepoel, said yesterday.

"In the greater London area, one transmitter covers two million licence holders easily," said Mr Swanepoel. "In South Africa, it will take us several years, and at least 34 transmitting stations, to reach the two million figure."

● Speaking to members of the German-South Africa Trade Association in Johannesburg, Mr Swanepoel said a recent survey showed that the standard of television programmes offered was the biggest inducement for people to buy television sets.

"The service has to be good to encourage the public to buy receivers — especially because our income will depend on the size of the viewing audience," he said.

EXPERTS

Other points Mr Swanepoel made yesterday were:

● About 1 000 experts will be trained by the SABC to start and run the service.

● Construction work on the main complex at Broadcasting Centre, in Auckland Park, Johannesburg, is about 65 per cent complete and the entire television complex should be ready by September.

● A total of R92-million will have been spent by the time the service starts officially in 1976. The interest on loans alone will be more than R12-million.

Mr Swanepoel said certain problems were singled out for special treatment — such as the shortages of good television scripts.

"We contacted English and Afrikaans authors to try to interest them in the medium," he said. "The first scripts for television plays and documentaries were commissioned in 1972, when contact was made with directors, actors and university drama departments."

FILMS

The SABC also contacted commercial film producers and commissioned a series of educational films, he said. Other films for dubbing into English and Afrikaans had been obtained on the international television market.

"Programmes from abroad will not only augment local production, but will also enrich the programme content," he said.

Mr Swanepoel quoted surveys which showed that an estimated 650 000 television sets would be in use after the first year of the service, the figure rising to about 880 000 in the second year.

Surveys conducted in 1972 showed 51 per cent of those questioned would buy a set, while 26 per cent said they would rent one.

About 80 per cent said they would buy a colour set. South Africa's television service will be in full colour, which can also be received on black-and-white sets.

Inleiding

Waneer 'n groot aantal kommoditeite aan die verbruiker beskikbaar gestel word, is dit nie moontlik dat 'n spesifieke kommoditeit op sy eie kan funksioneer nie. Die stofsuier moet 'n kragvoorsiening hê wat daarvoor geskik is, terwyl die motorvoertuig die regte tipe brandstof sowel as 'n geskikte padstelsel nodig het. As tekortkominge in enige deel van die stelsel voorkom, word die totale werking van die stelsel beïnvloed.

Hierdie bewering is van groter toepassing op 'n uitsendstelsel. Die uitsaai-outoriteit aanvaar normaalweg dat die uitgesende sein deur 'n ontvanger van die allerbeste kwaliteit ontvang sal word. Dit word aanvaar omdat die eindgebruiker van die ontvanger met inagneming van wat hy kan bekostig, 'n keuse kan doen uit die beste ontvangers wat op die mark beskikbaar is. Hy kan dus eis dat die beste waartoe sy ontvanger in staat is, beskikbaar gestel word.

Daar sal besef word dat die uitsaai-outoriteit 'n noukeurige studie van die tegnologie moet maak voordat 'n nuwe diens ingestel word. As die stelsel eers eenmaal gekies is, is dit baie moeilik en duur om dit te verander. Die koste van so 'n verandering is daaraan te wyte dat, met verloop van tyd, 'n baie groot aantal ontvangers onder gebruikers versprei word en dit nie oornag verander of verwyder kan word wanneer die stelsel verander word nie. 'n Mens kan jou voorstel wat die gevolge sal wees as die nasionale elektriese kragnettoevoer oornag verander word na 'n 300-volt/400-Hz-stelsel in plaas van die algemeen gebruikte 220-volt/50-Hz-stelsel!

Uit die voorgaande word dit duidelik waarom oudmodiese stelsels, soos die 405-lyn-monochroomtelevisiestelsel in die Verenigde Koninkryk, nog in gebruik is terwyl veel beter stelsels in ander lande wat later televisie gekry het, ingestel is.

Met die aankondiging van die Minister van Pos-en Telegraafwese in 1970 dat televisie in Suid-Afrika ingestel gaan word, is die uitsaai-outoriteit onmiddellik met die probleem gekonfronteer om 'n keuse van 'n stelsel te maak.

Die enigste logiese vertrekpunt was: wat is die nuutste tegnologiese ontwikkeling? Of ontvangers algemeen beskikbaar is, wat 'n sekondêre faktor by die keuse, aangesien ontvangers deurlopend en geleidelik vervang kan word om met ontwikkelings tred te hou, terwyl die stelsel 'n lang tyd staties moet bly.

Introduction

When many commodities are made available to the consumer no particular one of them can normally function in isolation. Take, for example, the vacuum cleaner. It requires an electricity supply which is suitable for its operation, while the motor vehicle needs the correct type of fuel, as well as a suitable road system. If deficiencies exist in any part of the system, the total functioning of it will be affected.

This statement is even more applicable to a broadcasting system. For this reason the broadcasting authority normally has to accept it that the broadcast signal is received by receivers of the best quality. This assumption becomes even more valid when looked at in the light that the end user has the choice of the best receiver the market can supply, and of course which he can afford. He will therefore demand that best reception of which his receiver is capable of giving him.

If the above is accepted, then the broadcast authority has to make a careful study of the technology of a new service before it is started because, once chosen, a change would be difficult and expensive. This is so because, with the lapse of time, a large number of receivers will have become distributed amongst users, and cannot be removed overnight, should the system be changed. It can well be imagined what the consequence would be if the national electrical supply is changed overnight to a 300 volt/400 Hz system instead of the generally used 220 volt/50 system!

From the foregoing it can be understood why outdated systems, such as the 405 line monochrome television system in the United Kingdom, are still in use while much better systems are operating in other countries, where television was introduced at a later date.

With the announcement by the Honourable Minister of Post and Telegraphs in 1970 that television will be introduced in South Africa, the broadcasting authority was immediately confronted with the problem of the choice of a system.

The only logical question at the starting point was: what is the latest technological development? Whether receivers were well supplied could only be a secondary factor that would influence the choice, because the receivers will be continually and gradually replaced, and could therefore be updated, while the system would have to be static for a long time.

Die uitsaai-stelsel

Sonder om in te veel besonderhede in te gaan, is dit voldoende om op te merk dat daar vandag ongeveer 10 verskillende internasionaal erkende monochroomuitsaaistelsels in die wêreld bestaan. Op hierdie 10 stelsels kan een van vier kleurstelsels gesuperponeer word, wat dus meer as 40 moontlikhede bied waaruit 'n keuse gemaak moet word.

Soos tevore gesê is, moet die keuse noodwendig val op die

The broadcasting system

Without going into too much detail, it will suffice to note that there exists over the world today in the region of 10 different internationally recognised monochrome broadcast systems. On these 10 systems it is possible to superimpose one of four colour systems, which results in more than 40 possibilities from which a choice must be made.

As previously stated the choice of a system must be the one

stelsel wat die nuutste tegnologiese ontwikkeling verteenwoordig.

Hierdie toedrag van sake het die Suid-Afrikaanse Uitsaaikorporasie daartoe gelei om 'n stelsel te kies wat op die oomblik in Brittanje ingestel word om uiteindelik die oudmodiese 405-lynstelsel te vervang. Die stelsel wat gekies is, is gebaseer op die Internasionale Raadgewende Radiokomitee (CCIR) se stelsel I vir monochroomontvangs. Op hierdie stelsel word die PAL-kleurstelsel gesuperponeer. Hierdie kleurstelsel is oorspronklik op die Amerikaanse NTSC-stelsel gebaseer, maar is in Duitsland verbeter om 'n aantal van die onstabiele eienskappe van die Amerikaanse kleurstelsel te verwyder.

Hierdie keuse van uitsendstelsel het 'n paar gevolge gehad waarvan die volgende waarskynlik die belangrikste is:

Omdat die stelsel I-uitsendings tot 'n skerper beeld in staat is, moet meer inligting oorgesend word en 'n breër bandbreedte is nodig om hierdie inligting oor te dra. Omdat 'n breër bandbreedte per uitsending nodig is, kan minder kanale in die uitsaaibande wat vir televisie beskikbaar is, gepas word en omdat televisieband I wat nog in sommige lande in gebruik is, 'n hoë steuringsinhoud bevat, kan hierdie band ook nie gebruik word nie. Die enigste uitweg was om aansoek te doen om 'n uitbreiding van die internasionale band III vir televisie-uitsendings.

Televisieontvangers wat in ander lande in gebruik is, sal om bogenoemde redes nie sonder aanpassing vir gebruik in Suid-Afrika geskik wees nie. Die ontvangers sal progressief minder geskik wees afhangende van die ouderdom van die stelsel waarvir hulle ontwerp is. Dié tekortkomings strek van 'n aanvaarbare beeld met geen of baie swak klankontvangs tot nòg beeld- nòg klankontvangs.

Die Britse kleurontvangers sal op die Suid-Afrikaanse stelsel werk waar uitsendings in die UHF-bande IV-V beskikbaar is, maar omdat die hoofuitsendings oor die algemeen in band III sal geskied, sal die kyker met 'n Britse ontvanger in baie gebiede geen ontvangs geniet nie.

Voordat ons televisieontvangers bespreek, is dit nodig om iets te sê oor die televisie-uitsendbande.

Soos in die geval van FM-programme word televisie op baie kortgolf-radioseine uitgesaai. Twee kategorieë word gebruik, nl baie hoë frekwensie (BHF) met 'n frekwensieband van 174 MHz tot 253,950 MHz en ultra hoë frekwensie (UHF) met 'n frekwensieband van 470 MHz tot 960 MHz waarvan die band 470 tot 854 MHz gebruik sal word. (Golflengtes van 1,7 tot 1,1m vir band III en 0,6 tot 0,3m vir bande IV-V). Omdat hierdie golflengtes so kort is, word die radiogolwe deur versperrings soos heuwels, berge en selfs geboue versper. 'n Groot aantal senders moet dus opgerig word om groot gebiede te dek soos ook die geval is met die FM-uitsendings. Omdat die UHF-golflengtes nog korter is as die BHF-golflengtes, is die dekking deur 'n enkele sender selfs kleiner in hierdie geval. Die uitsaaistelsel word beplan sodat die hoofuitsendings oor die algemeen in die BHF-band gedoen word terwyl die sogenaamde invuluitsendings in afgeleë gebiede, waar swak ontvangs ondervind word, normaalweg in die UHF-band gedoen word. By 'n besondere punt sal dit slegs nodig wees om òf BHF òf UHF te ontvang, wat ook al die beste ontvangs bied. Daar word verdere aandag aan hierdie prosedure gegee by 'n bespreking van die oprigting van antennestelsels.

'n Ander saak wat aandag moet geniet waneer die uitsaaistelsel bespreek word, is die feit dat die beeldinligting van 'n televisie-uitsending op amplitudemodulasie uitgesaai word wat dieselfde is as die ou medium- en kortgolfuitsendings, terwyl die

that represents the latest technology.

This prompted the S A Broadcasting Corporation to choose a system which is in the process of being introduced in Britain to eventually replace the outdated 405 line system. The system chosen is based on the International Consultative Committee on Radio Transmission (CCIR) system I for monochrome reception. On this system is superimposed the PAL colour system, which was based on the American NTSC system, but by development in Germany eliminated many of the unstable characteristics of the American colour system.

This choice had certain consequences of which the following are probably the most important:

Because system I broadcasts are capable of a sharper picture, more information must be transmitted and, therefore, a wider bandwidth is required for the transmissions, with the result that fewer channels may be fitted into the broadcasting bands available to television. Because the Television band I, which is still in use in some countries, has a high interference content, it could also not be used, and the only possibility was to request an extension of the international band III for television broadcasts.

Television receivers which are in use in other countries will therefore not be suitable, without modification, for use in South Africa. The receivers will be progressively less suitable depending on the age of the system for which they were designed. The deficiencies range from an acceptable picture reception without any or very poor sound reception to neither picture nor sound reception.

The British colour receivers will function on the South African System where transmission in the UHF-bands IV - V will be available but because the main transmission will be done in band III the viewer with a British receiver will be excluded from reception in many areas.

Before we proceed to the television receiver it is necessary to say something about the television broadcast bands.

Like the FM programs television broadcasted on very short radio wave signals. Two categories are used viz very high frequency (VHF) with a frequency band of 174 MHz to 253,950 MHz, and ultra high frequency (UHF) with a frequency band of 470 MHz to 960 MHz of which 470 to 854 MHz will be used. (Wavelengths of 1,7 to 1,1 m for band III and 0,6 to 0,3 m for bands IV - V). Because these wavelengths are so short the radio waves are stopped by barriers such as hills, mountains or even buildings. As is the case with the FM broadcasts, many transmitters must be erected to serve a large area. Owing to the UHF wavelengths being shorter, the coverage by a single transmitter becomes even smaller. The broadcasting system will be so planned that the main transmission will be made on VHF while fill-in transmission in isolated areas, where poor reception is experienced, will use UHF. At any one point it will only be necessary to receive either VHF or UHF whichever provides the best reception. This procedure will be further discussed when the erection of aerials is dealt with.

Another point which needs attention in relation to the broadcasting system is the fact that the picture information of a Television broadcast is transmitted as an amplitude modulated signal similar to the old medium and shortwave broadcasts while the sound signal is frequency modulated as is the case with the FM broadcasts. This is necessary because the picture information transfer requirement is so large that it would take up too wide a channel width to use FM.

It is however, because the picture is broadcast with AM, that it

klank op frekwensiemodulasie uitgesaai word soos in die geval van die bekende FM-uitsendings. Dit is nodig om die beeldinligting deur middel van AM oor te dra omdat hierdie inligting so omvangryk is dat dit 'n te groot kanaalbreedte in beslag sal neem indien FM gebruik word.

Omdat die beeld by wyse van AM oorgedra word, is hierdie beeld egter onderhewig aan steuring op dieselfde wyse as wat die ou mediumgolfuitsendings aan steuringe van motorvoertuie en ander bronne onderhewig was. Hierdie probleem word verder bespreek wanneer ons by steuringsonderdrukking kom.

is susceptible to interference in the same way as the old mediumwave broadcasts were susceptible to interference from motor vehicles and other sources. This problem will be further discussed when we come to interference suppression.

Die ontvangstelsel

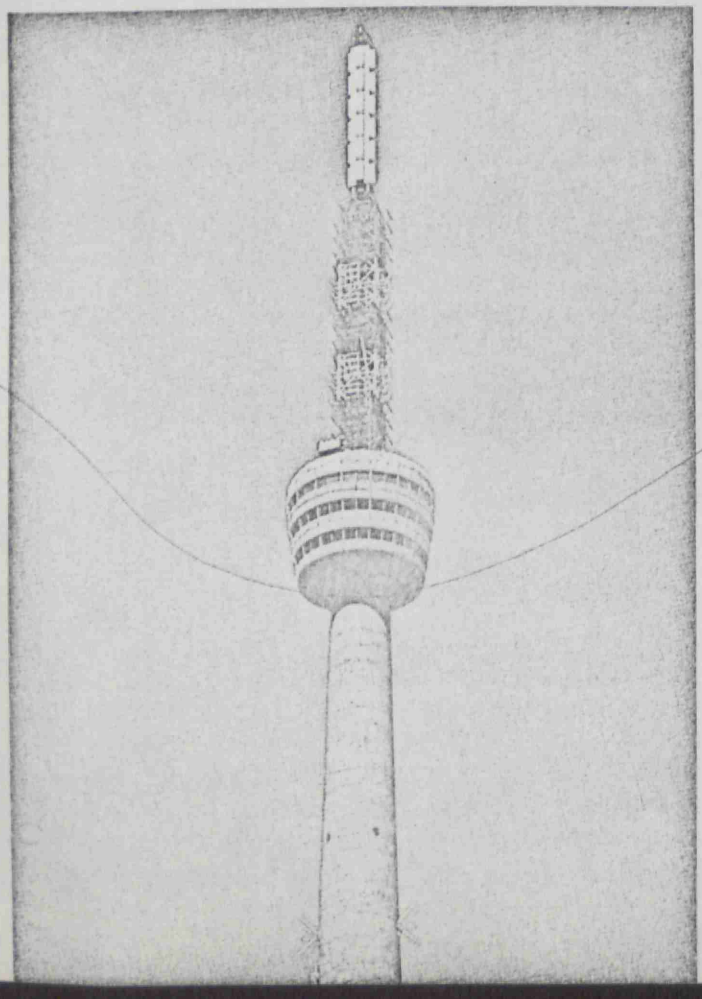
Uit die voorgaande kan afgelei word dat baie aandag daaraan gegee is om te verseker dat die uitsendings tegnies van die beste kwaliteit sal wees. Die kwaliteit van die ontvange en weergegewe sein sal afhang van die ontvangstelsel wat gebruik word vir die ontvangs en weergee van hierdie sein.

Die ontvangstelsel bestaan uit die volgende:
Die televisieontvanger en
die antennestelsel.

The receiving system

From the foregoing it is obvious that a great deal of effort is put into ensuring that only the best technical quality of signal is broadcast. The quality of the reproduction of the received signal will depend on the receiving system which is used for the reception and reproduction of the signal.

The receiving system consists of the following:
The television receiver and
the aerial system



Komplekse samestelling van 'n moderne kleurtelevisieontvanger

Complexity of a modern colour television receiver

Brixtontoring gereed vir televisie-uitsendings (let op wit gedeelte aan die spits van die toring)

Brixton tower ready for television transmission (note the white section on top of the tower)

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Radio and Television

The Beginning

The first radio broadcast was made by the South African Railways in Johannesburg on 29 December 1923. On 1 July 1924 the broadcast was continued by the Scientific and Technical Club in Johannesburg. On 15 September 1924 the Cape and Peninsula Publicity Broadcasting Association started a similar service in Cape Town. The Durban organisation, sponsored by the city council, began broadcasting on 10 December 1924.

Since the area covered by the three organisations functioning separately was limited, the income from listener's licences was low. This was why the financially stronger Schlesinger Organisation, with the permission of the government, on 1 April 1927 formed the African Broadcasting Company in which the three broadcasting organisations were incorporated. This new organisation had the sole rights of broadcasting. But the financial difficulties were not yet overcome and the Prime Minister, General J.B.M. Hertzog, ordered an inquiry in 1934 into all aspects of broadcasting. The South African Broadcasting Corporation (SABC) was established under Act No. 22 of 1936, in which it was stipulated that broadcasts should also be made in Afrikaans within the following year. Up to then the only service was in English.

On 1 May 1950 a third service, the bilingual advertising service, Springbok Radio, was introduced.

Meanwhile a broadcasting service for Bantu had become necessary, and on 1 August 1952 the Rediffusion Service was established. Broadcasts were made in three Bantu languages to the townships west of Johannesburg.

In order to provide better reception for listeners and to open up more channels for broadcasting, a start was made in the 'fifties with the planning of a comprehensive frequency modulation (FM) network. The first FM transmission was made on Christmas Day 1961 from the Albert Hertzog Tower in Johannesburg of the English and Afrikaans programmes and of Springbok Radio. The first service of Radio Bantu, Southern Sotho, went on the air on 1 January 1962. Today Radio Bantu broadcasts in seven Bantu languages.

On 1 September 1964 the first regional service, Radio Highveld, went on the air in Johannesburg, followed by Radio Good Hope on 1 July 1965 in Cape Town and Radio Port Natal on 1 May 1967 in Durban.

On 1 May 1966 the external services went on the air. This service is known as Radio RSA, the Voice of South Africa, and is broadcast on short wave only from the H.F. Verwoerd transmitting station at Bloemendal. Broadcasts are in Afrikaans, English, Dutch, German, French, Portuguese, Tsonga, Swahili and ChiChewa for 204¼ hours per week.

In 1969 an FM service in four languages, viz. Kuanyama, Ndonga, Herero and Damara/Nama for the Native peoples of South-West Africa was introduced.

By the end of 1973, 83 FM transmitting stations were in operation and 98,8 per cent of the total population could tune in to FM transmissions: 98,9 per cent of the Whites, 93,2 of the Coloureds, 100 per cent of the Asians and 99,4 of the Blacks.

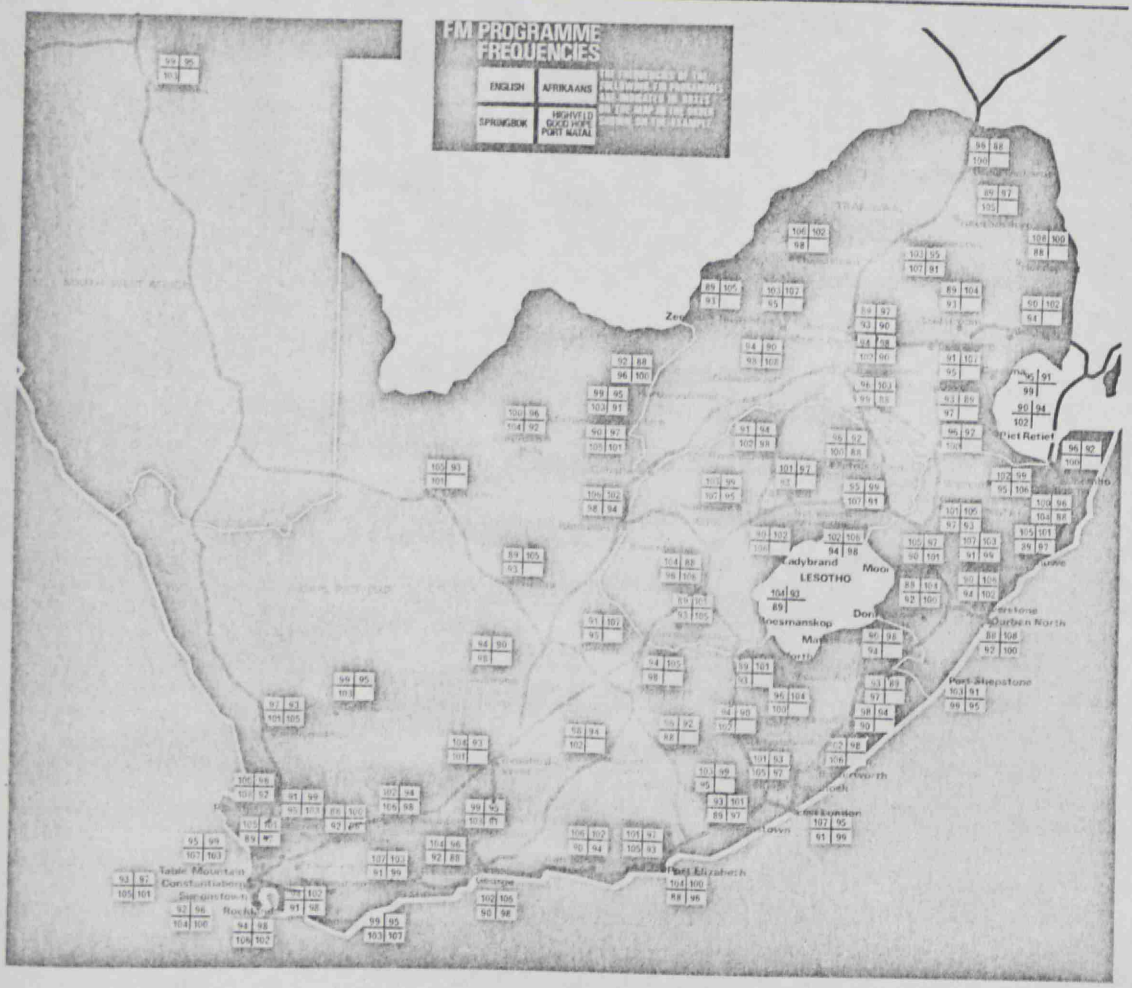
By the end of 1973 the SABC was broadcasting 1 930 hours and 30 minutes a week in its 19-programme services.

By the end of September 1973 there were approximately 2 250 000 licence holders, compared with 161 767 in 1936.

Programme Services

The national service comprises the following programmes:

The English and Afrikaans services which are on the air 120 hours a week, on short and medium



wave and on FM. They can also be heard on short wave beyond the country's borders.

Springbok Radio is the advertising service and broadcasts on a nation-wide basis for 132 hours a week, on short and medium wave and on FM in those areas where FM has been introduced. It is also beamed beyond the borders on short wave.

There are three regional services: Radio Highveld, the oldest of the three regional advertising services, broadcasts for 132 hours a week on FM only, to the Transvaal highveld, the Free State and part of the north-western Cape.

Radio Good Hope, a service similar to Radio Highveld for the western Cape and the southern and eastern coastal areas as far as East London, broadcasts on FM only for 132 hours a week.

Radio Port Natal, a service similar to Radio Highveld and Radio Good Hope for the Natal coastal region and midlands broadcasts on FM only for 132 hours a week.

Radio RSA: Between midnight and 5.00 a.m. every day, this all-night service is carried by the transmitters of Springbok Radio, Radio Highveld, Radio Good Hope and Radio Port Natal.

Lourenco Marques Radio: This station is owned by the Radio Club of Mozambique but the youth-orientated programmes and advertising service are managed by the SABC. It broadcasts nation-wide on short and medium wave for 168 hours a week.

The External Services: These services are beamed on short wave only to areas beyond the borders for 204¼ hours a week.

Radio Bantu has seven programmes which are broadcast for 618 h. 40 m. a week. They are:

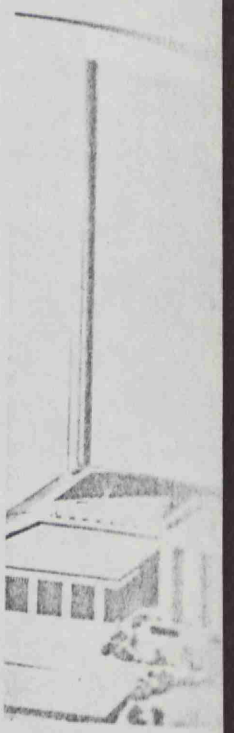
●The Southern Sotho Service, presented from Johannesburg and on the FM transmitters of southern Transvaal and the OFS for 124½ hours a week;

●The Zulu Service, broadcast from Durban and Johannesburg and on the FM transmitters of Natal and southern Transvaal for 124½ hours a week;

●The Xhosa Service, presented from King William's Town and on the FM transmitters of the eastern and western Cape for 124½ hours a week;

●The Northern Sotho Service, broadcast from Pretoria and on the FM transmitters of the northern and eastern Transvaal for 94 h. 20 m. a week;

●The Tswana Service, broadcast from Pretoria and



Scale model of the
SABC complex
Radio studios can

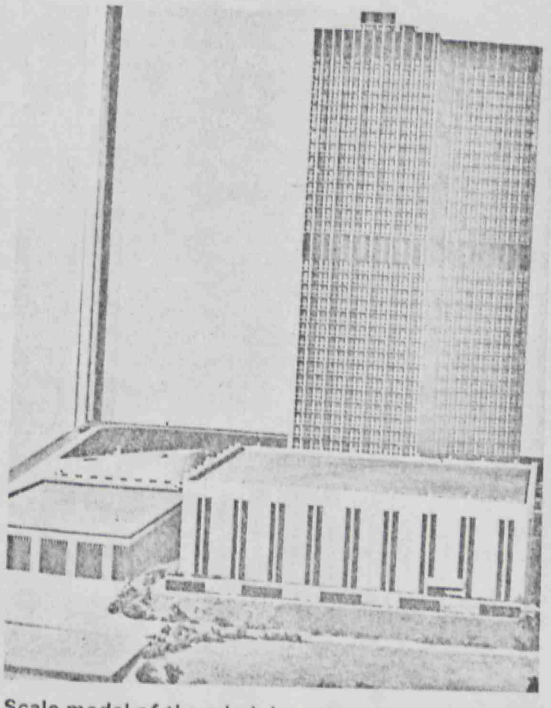
on the FM trans
western Free State
●The Venda Ser
and on the FM tra
vaal for 27 hours a
●The Tsonga Service
and on the FM
Transvaal for 29 h.

The three services
South-West Africa
They are:

●The Ovambo Service
Ndonga, the two
from Windhoek
Windhoek and
●The Herero Service
and on the FM tra
30 m. a week; and
●The Damara/Nama
mara/Nama from
ters of Windhoek for

Publications

Radio & TV: A
taining full advance
in the English and
Radio. It also includes
grammes of the
the external services
and pictures cover
SABC.



Scale model of the administrative block of the new SABC complex in Auckland Park, Johannesburg. Radio studios can be seen in the foreground

on the FM transmitters in the western Transvaal and western Free State for 94 h. 20 m. a week;

- The Venda Service, presented from Johannesburg and on the FM transmitters in the far northern Transvaal for 27 hours a week; and
- The Tsonga Service, broadcast from Johannesburg and on the FM transmitters of the far northern Transvaal for 29 h. 30 m. a week.

The three services for the non-White peoples of South-West Africa are presented 173 hours a week. They are:

- The Ovambo Service, broadcast in Kuanyama and Ndonga, the two important Ovambo languages, from Windhoek and on the FM transmitters of Windhoek and Oshakati for 86 h. 30 m. a week;
- The Herero Service, presented from Windhoek and on the FM transmitters of Windhoek for 42 h. 30 m. a week; and
- The Damara/Nama Service, broadcast in Damara/Nama from Windhoek and on the FM transmitters of Windhoek for 44 hours a week.

Publications

Radio & TV: A weekly programme journal, containing full advance information about programmes in the English and Afrikaans services and Springbok Radio. It also includes the high-lights in the programmes of the regional services, Radio Bantu and the external services of Radio RSA. Articles, notes and pictures cover the general activities of the SABC.

RSA Calling: A publication which appears four times a year according to the various frequency seasons. Two editions deal with the programmes for periods of two months each and two editions relate to the programmes for periods of four months each, broadcast in the external services of the SABC. It also contains particulars of the broadcast times and frequencies of the various services.

Talks in print: Radio talks are popular and a large number of listeners write to the SABC for copies of talks. Many of these talks are therefore made available in the form of brochures at a cost which in most cases does not even defray printing costs. Over a hundred titles have already been published.

The overseas transcription service

This service supplies programmes to foreign broadcasting stations. These programmes are produced and processed entirely by the SABC and issued on high fidelity long-playing records. Productions in English, French, Portuguese, Spanish, German and Dutch are supplied to radio stations in 63 countries. Transcriptions include feature programmes, plays, talks and programmes of serious, light and folk-music.

Scholarships

The SABC annually awards a number of scholarships to male South African citizens to take a degree course at university in preparation for a career in radio. These scholarships are available for the B.Sc. degree in Electrical Engineering (light current) for engineers, the B.A. degree for announcers and radio newsmen and the B.Com. or B. Admin. degree for aspirant administrative assistants.

The scholarships cover class, registration, examination, lodging and travel fees.

The holder of a scholarship must agree to remain in the service of the SABC for a number of years at least equivalent to the period for which the bursary was held. Applicants undergo a series of aptitude tests before the scholarships are awarded.

The news service

The SABC runs a comprehensive news service, providing over 239 bulletins every week-day for millions of listeners within and beyond the country's borders. These news broadcasts range from a short-wave service for the remote regions to condensed coverage of developing stories broadcast hourly throughout the day and night for listeners in the most densely populated areas.

Through its many connections all over the world the news service of Radio South Africa is able to inform its listeners of any significant development anywhere in the world within minutes of its occurrence, either in the main regular bulletins at fixed times or in the special hourly service or, if necessary, in a special flash message during other programmes. For reports in depth there are additional services, such as 'Weekend Newsroom', 'News at Nine', 'The Business Scene' and the commercial news

programme 'Deadline Thursday Night', which have facilities for carrying on-the-spot reports and background interpretation.

The SABC also has a specialised news commentary section in which highly qualified journalists place the hard news in perspective by interpreting it. Commentaries on events are also broadcast regularly, while certain important events are investigated and explained in talks and feature programmes.

There is also an external news service which informs foreign listeners about South African affairs and provides them with a balanced picture of the international scene.

Television

Immediately after the announcement by the Minister of National Education on 27 April 1971 that the SABC had been instructed to introduce a colour television service, a start was made with the planning of the giant project. A training studio was built at a cost of about R2 million and the first group of 60 programme and operational staff have now completed their training. The second group of 60 started their training in January 1974. Technical staff is also being trained by the suppliers of equipment, and technical colleges have included a course in television in their curricula.

The site of the television complex covers 15 acres and is on the southern side of Broadcasting Centre near Auckland Park in Johannesburg. Excavations were started in February 1972 and construction work in April. The building comprises six storeys above ground and two basement floors. Provision has also been made for the construction of six additional floors above ground if and when required. The television centre will have seven studios, six of which are now being equipped. Two of them cover 250 m^2, three 500 m^2 each and the biggest studio is 900 m^2. One of the smaller studios will be used by the news department. Provision has also been made for an artists' block with cloak-rooms and facilities for make-up, costuming and waiting areas. The dubbing and previewing studios are on the same level as the decor and the pre-assembly facility. This means that decor will be moved horizontally, thus eliminating the problem of the vertical transportation of material.

Television transmitters are being installed at strategic points so as to ensure that the most densely populated parts of South Africa have a television service. Eighteen of the FM radio masts are being equipped with television antennae. The microwave communication system of the Post Office will be used to integrate this antenna system. The initial cost of the project is estimated at R60 million.

Programmes are already being produced and stored for future broadcasting.

Sport

Ideal climate ... sportsman's ... wide variety ... African way ...

Sunshine ... practically ... perature over ... therefore ... sports are ... coupled with ... a highly ... sports facilities ... for extremes ...

Snow is a ... not practised ... offers excellent ... Enthusiasts ... holiday resorts ... and yachting ...

Policy

The policy ... disparate peoples ... envisages a ... peoples, each ... without interference ... envisage the ... individuals, but ... peoples, each ... traditions and ... within the ... reached an advanced ... Complete ... near future ...

This policy ... development ... economic and ... sporting activities ... the Coloureds, ... Bantu peoples ...