listener may occasionally hear some four-letter Anglo-Saxon sexual or scatological term. KRAB is not a station that presents smut regularly or frequently. There were only five programs broadcast over a period of three years which led to the controversy which resulted in this proceeding. We will consider each of these programs.

8. There is no evidence that Dave Wertz used obscene language either in the particular program specified in the Bill of Particulars or in any other of his shows. He broadcasts bluegrass music and tells the kind of stories that are associated with that type of entertainment. We conclude that telling "corny jokes" entails risk and may give some offense, but we can not conclude that Dave Wertz broadcast anything contrary to the policies of the licensee or of the Commission.

9. P. J. Doyle conducted an interview which he thought to be a serious discussion of language usage. His program was produced and presented under the auspices of the Seattle Public Library. This discussion involved the use of the one word most likely to offend if heard over the air or anywhere else.

10. Doyle's broadcast took place without prior audition by the licensee's staff or management. Doyle now knows better and he is careful about the language which is used on his program. In this instance, the question we must resolve is whether or not the licensee failed to exercise proper care by not having auditioned this program in advance of its broadcast. There is nothing in the record to show that Doyle's prior programs gave any indication that preauditioning of his program was necessary in order to avoid broadcast of material which might be offensive or otherwise in bad taste. In addition, we must bear in mind the auspices under which this program came to the station. It was, after all, produced and sponsored by the Seattle Public Library. We conclude that the licensee acted with reasonable diligence in its handling of this program. It is clear that Doyle is now aware of his responsibilities and that the material which he now broadcasts does not fall short either by the station's own standards or the standards which the Commission would have its licensee observe.

11. Reverend Paul Sawyer was known to Milam and the licensee had had some experience with Sawyer as a performer prior to broadcast of the taped autobiography which caused problems. Whether a station should broadcast anybody's autobiography for 30 hours is not our concern. What did happen was that such an "autobiographic marathon" was begun. Sawyer was not known to be a person who used obscene language. Part of the material which he planned to broadcast was auditioned and nothing heard in these auditions was obscene. When it became apparent during the actual broadcast that Sawyer's autobiography did include words or expressions which were unsuitable, his broadcast was taken off the air. We conclude that the worst that can be said regarding this incident was that it was an error in judgment which was expeditiously corrected.

12. "Murder at Kent State" and the James Bevel broadcasts bring us head on to the issue of whether a licensee may under any circumstances broadcast (a) material known to be obscene or offensive; or (b) material not considered offensive or obscene by the licensee but which might be so considered by others. In the case of the "Murder at Kent State" record, the language used included words which the licensee did consider obscene and ordinarily would

not permit to be broadcast. In this case, after careful consideration, the licensee's Trustees and managerial employees decided that in their judgment use of the particular language was necessary under the circumstances involved. This is a matter of judgment which we conclude the Commission has left to licensee determination. In this case, language was not broadcast for shock or sensationalism, but rather for the purpose of presenting a vivid and accurate account of a disastrous incident in our recent history. We conclude that in this exercise of judgment, the licensee conformed to the standards prescribed by the Commission as well as its own policies regarding suitability.

13. It is too bad that Reverend James Bevel did not take a little time to organize his material. He had some very interesting and provocative ideas which some people may have lost. Reading his entire text without being forewarned to expect "dirty words" one could possibly miss some of them altogether, as indeed happened with "nuts". Bevel is an emoticnal and colorful speaker. But, Bevel's language was not anything like that used by Garcia and Crazy Max in the program that brought a $100.00 sanction upon WUHY-FM. Bevel's talk really comes within the scope of the concern with which the Commission was dealing in its letter of January 21, 1970, to Mr. Oliver R. Grace (FCC 70-94) [18 RR 2d 1071] rather than the more provocative WUHY-FM program. In its letter to Grace, the Commission said:

> "The charge that the broadcast programs are 'vulgar' or presented without 'due regard for sensitivity, intelligence, and taste', is not properly cognizable by this Government agency, in light of the proscription against censorship. You will agree that there can be no Governmental arbiter of taste in the broadcast field. See Banzhaf v. FCC, 405 F2d 1082 [14 RR 2d 2061] (CADC), certiorari denied 395 US 973, cf. Hannegan v. Esquire Magazines, 327 US 146 (1946)."

14. In concluding that some of the language used by the Reverend Bevel was vulgar rather than obscene, we are unavoidably treading into an area of often stormy controversy over our changing mores. There was no real effort made to produce evidence as to the extent to which anyone in Seattle was offended by anything heard on KRAB. Neither was there any particular effort made to show that the words designated as obscene by the Broadcast Bureau were not offensive to the community. KRAB under its own policy would ordinarily avoid giving offense by avoiding the use of such language.

15. There is really no quarrel by KRAB with the standard set by the Commission that broadcasters should avoid language that is patently offensive by contemporary community standards and utterly without redeeming social value. We can not avoid the difficult result that what particular language may be unacceptable for broadcast is not susceptible to being reduced to an immutable, time resistant glossary.

16. All but one of the "obscene" words listed by the Broadcast Bureau are now to be found in Webster's New International Dictionry, 3rd Ed., 1961, G & C Merriam Co. Every one of these words, with one exception, is characterized as vulgar rather than obscene by the scholars who produced the

dictionary. Our times are indeed changing. Consider what Mr. Clive Barnes, the drama critic of the New York Times recently said:

> "Incidentally have you noticed how the currency of swear-words, those honestly shocking oaths only to be emitted in times of intense stress, have become hopelessly devalued. A new Broadway play quite casually ran the whole lexicon, and no one seemed to notice. We appear to have overcome obscenity by incorporating it into polite conversation." 6/

17. Our recent history has been embellished by this event. "Love Story", Erich Segal's long continuing best selling novel, is now a very well attended motion picture. Our most prominent citizen saw the movie and following is a portion of a press report of what he had to say after that event:

> "Chatting informally this morning with newsmen about his State of the Union message, President Nixon said he had seen the movie in Camp David recently, had enjoyed it and, the President added, 'I recommend it.'
>
> "However, he said, he was mildly upset at the film's profanity.
>
> "He said his wife and two daughters, Tricia and Julie, had read the book and felt the 'shock of the dialogue they put in the girl's mouth.'
>
> " 'I wasn't shocked,' the President said, 'I know these words, I know they use them. It's the 'in' thing to do.'
>
> "However, Mr. Nixon said, the dialogue 'detracted from a great performance' by Ali MacGraw, who plays the female lead.
>
> "Discoursing briefly on profanity, Mr. Nixon said that swearing 'has its place, but if it used it should be used to punctuate.' If profanity is overused, he said, 'what you remember is the profanity and not the point.' " 7/

"Love Story" includes virtually every word cited by the Broadcast Bureau as obscene.

18. We cannot emphasize too strongly that while KRAB did broadcast a few programs that included some language offensive to some people, they did not do so with any intent to give offense, to pander, to sensationalize, to shock, or to break down community standards. KRAB should be given credit for a real desire not to debase community standards of taste and decency. In

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6/ New York Times, February 28, 1971.

7/ New York Times, January 23, 1971.

considering their policies and their programming as an entirety, the licensee of KRAB seeks and most often attains those standards of taste and decency in programming that we should like to see reflected more often in our broadcast media.

19. We conclude that KRAB's programming, in total, is outstanding and meritorious. We conclude that the few instances in which KRAB did broadcast obscene language, either willing or unwittingly, do not justify denying grant of a full term, three-year renewal of its license.

20. Accordingly, it is ordered that unless an appeal to the Commission from this Initial Decision is taken by a party, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of §1.276 of the Rules, the application of The Jack Straw Memorial Foundation, for renewal of license of station KRAB-FM is granted.

FCC 71-291
62201

In re Applications of	)	
	)	
RISNER B/CASTING, INC. Lebanon, Missouri	)	Docket No. 17899 File No. BPH-5207
	)	
RISNER B/CASTING, INC. Lebanon, Missouri	)	Docket No. 18043 File No. BP-17031
	)	
LEE MACE Bagnell, Missouri	)	Docket No. 18044 File No. BP-17122
	)	
For Construction Permit	)	

Adopted: March 24, 1971
Released: March 26, 1971

[¶51:522, ¶53:24(Y)] New community survey permitted after denial of application.

Applications denied by the Review Board for failure to meet the community survey requirement are remanded to the Board to permit the applicant to file a new survey. Applicants in all pending hearing cases should be allowed to submit an amended survey showing. Risner B/casting, Inc., 21 RR 2d 529 [1971].

MEMORANDUM OPINION AND ORDER

By the Commission: (Commissioners Bartley and Johnson concurring in the result; Commissioner Robert E. Lee absent.)

1. The Commission has under consideration (a) the Decision, FCC 69R-497, 20 FCC 2d 790, [17 RR 2d 1215] released by the Review Board on

ACCURACY IN MEDIA, INC.

In re Complaint by
ACCURACY IN MEDIA, INC.
Concerning Fairness Doctrine re NBC

May 2, 1973

[¶10:315(G)(1)] Fairness complaint.

NBC is requested to inform the Commission how it intends to meet its fairness obligations with respect to a program criticizing private pension plans. Complainant submitted proof that the issue involved was one of public importance, and alleged that only two brief statements toward the end of the program presented anything on the other side and cited NBC's refusal to acknowledge the applicability of the fairness doctrine to the program and its monitoring of subsequent NBC programming as indicating a failure to afford reasonable opportunity for the presentation of contrasting views. These allegations satisfied the Commission's procedural requirements with respect to a fairness doctrine complaint. The program presented views broadly critical of the performance of the entire private pension system and explicitly advocated proposals to regulate the operation of all pension plans. NBC's judgment that the program did not present one side of an issue of public importance was not reasonable. Accuracy In Media, Inc., 27 RR 2d 1523 [Broadcast Bureau, 1973].

This is with reference to the complaint to the Commission of Accuracy in Media, Inc. (AIM) concerning the program "Pensions: The Broken Promise" which was broadcast by the NBC television network on September 12, 1972.

By letter of complaint to the Commission dated November 27, 1972, AIM states that the program in question presented a "distorted picture of the private pension system of the United States" in that "Nearly the entire program was devoted to criticism of private pension plans, giving the impression that failure and fraud are the rule in the management of private pension funds"; that "only two brief statements toward the end of the program" presented "anything on the positive side"; and that although the narrator, Mr. Edwin Newman, "said that NBC did not want to give the impression that there are no good private pension plans . . . he did not discuss any good plans or show any satisfied pensioners" and "summed up the program by saying: 'The situation, as we've seen it, is deplorable.'" AIM further states that "Department of Labor records show that thousands of retirement plans are consistently paying benefits to retired people and that 75 per cent of them are funded entirely by employers: that "more than 30 million workers are covered by these plans" and "more than 5 million retired employees are receiving benefits from them to the tune of about $7 billion a year"; that "the incidence of termination of pension plans is about 1 per cent" affecting "only about one-tenth of one per cent of the employees covered by private pension plans";

and that such statistics indicate that "the NBC program was not only one-sided but inaccurate." AIM submits that "Criticism of pension plans affecting millions of Americans is obviously a controversial issue of public importance" and that "NBC violated the fairness doctrine in presenting what was essentially a one-sided and distorted discussion of this issue." AIM also states that its "monitoring of NBC programs has not revealed any program which has been presented by NBC stations which discusses the operation of successful pension programs," and that it communicated these particulars of its complaint to the President of NBC, Mr. Julian Goodman, by letter dated November 6, 1972, but had received no response.

AIM has also submitted a copy of a letter, dated December 6, 1972, which it sent to Mr. Goodman reiterating its complaint with respect to the Pensions program. That letter also directed attention to current Congressional study of proposals to regulate private pension funds and noted that "this legislation is opposed by some labor unions and by the Chamber of Commerce and the National Association of Manufacturers." It further stated that "While your program did not endorse any specific legislative proposal, it did emphasize the need for new regulatory legislation and it pointed out that the Senate Labor Committee had the matter under consideration." The letter also stated that Senator Schweiker, one of the proponents of the legislation reported out of the Committee, had the script of the program read into the Congressional Record of October 3, 1972 as indicating "the need for pension reform and the serious breakdown in our private pension systems." AIM concluded its letter by stating that this information "demonstrates that this was indeed a program about a controversial issue of public importance which was not fair and balanced."

In your response of February 14, 1973 to the Commission's inquiry, you state that "Complainant's general and conclusory accusations of inaccuracy and unfairness are incorrect," and "Being so, they are of course denied." You submit that the complaint "is not one of unfairness of the program in terms of the program's subject matter, but that a program which focused on the problems of some private pension plans should, instead, have focused on how successful private pension plans have worked"; that the program "constituted a broad overview of some of the problems involved in some private pension plans" and "did not attempt to discuss all private pension plans, nor urge the adoption of any specific legislative or other remedies"; and that the program "was designed to inform the public about some problems which have come to light in some pension plans and which deserve a closer look." In this regard, you note that the decision concerning the subject of a given program "is a judgment which the Commission and the Congress have entrusted to the licensee," and that rulings of the Commission hold that its "'. . . function is not to judge the merit, wisdom or accuracy'" of particular programming. You also state that the AIM complaint "implies that because of the existence of 'good plans' and 'satisfied pensioners,' a program designed to explore the problems that exist in pension plans fails as a matter of 'truth,'" and submit that although the program "was not in essence 'untrue' or misleading," Commission authority holds that such questions of truth or accuracy are not proper subjects for its review. You further state that complainant "has made no effort to actually establish that anything within the program itself was inaccurate," and that AIM has established only that "it has a different editorial view than that which it attempts to attribute to this program."

You also submit that with respect to the applicability of the fairness doctrine to the program, "The questions of what issue has been the basic subject matter of a program and whether it is a controversial one are matters on which broadcasters' judgments must be upheld unless clearly unreasonable or in bad faith." In this regard, you state that "the fact that problems exist with some private pension plans" is not a "controversial issue of public importance within the meaning of the Commission's fairness doctrine" and that your judgment that the "presentation of some problems incident to some private pension systems did not at that time present an issue of significant public controversy was reasonable." You state in support of this judgment, that to your knowledge, neither NBC nor the other networks had telecast any program dealing extensively with private pensions in the years prior to the broadcast of "Pensions"; that there was "little discussion in any general circulation print media and no widely circulated books on the subject" and "no apparent public discussion, much less controversy, apart from that of a relatively small number of experts, businessmen and government officials who take a professional interest in the subject"; and that although "there had been hearings in the last Congress on the subject, . . . at the time of broadcast NBC was breaking new ground journalistically on a subject about which the public, at that time, had little knowledge."

You further submit that AIM's complaint is deficient in that complainant "has not tried to define any controversial issue of public importance involved in this program nor has it attempted to demonstrate that there is any significant body of public opinion that disputes the point of the program," and has also failed to identify any "unfairness or imbalance" in the material presented You therefore urge that the "complaint should be dismissed."

You also state that "regardless of the apparent lack of any discernible public points of view on the subject one way or another," you "believed that the subject of 'Pensions' was newsworthy because of the broad public impact of private pension systems," and that you "attempted to treat the subject in an even-handed, accurate and reasonable manner." In support of this statement, you submit and draw attention to a script of the program and several of the views which were presented.

You conclude your response by noting that you "expect to treat from time to time, in future programming, various aspects of pension plans to the extent that the subject remains newsworthy"; that "The subject does appear to us to be of more than momentary importance"; and that "Should NBC return to the matter of private pensions in the future, it will continue to attempt to explore the significant contrasting points of view within the context of the specific subject matter presented."

By letter of reply to your response, dated February 20, 1973, AIM disputes your statement that there is no body of opinion which questions the point of the program, again citing the statistics regarding successful versus failing pension plans referred to in its letters of complaint. Referring to your statement that the program only presented a "broad overview of some of the problems involved in some private pension plans" and "did not attempt to discuss all private pension plans", AIM states that "No one denies that a fraction of

the private pension plans have failed," but "What was wrong with the NBC program on pensions was that it created the impression that failure, was, if not the rule, very common." In reply to your contention that it has failed to specify the controversial issue of public importance involved in the program, AIM states that "the performance of private pension plans is clearly an issue of public importance about which there is considerable controversy"; that "The Retirement Income Security for Employees Act of 1972 is a controversial bill" opposed by various groups and individuals; that support for this legislation "may depend on how the legislators and the public evaluate the performance of private pension plans now in operation"; and that "While NBC did not endorse the proposed legislation" in the Pensions program, "it presented a one-sided documentary that created the impression that injustice and inequity were widespread in the administration of private pension plans." AIM also states that "it seems likely that it [NBC] had some help from the sponsors of the legislation in the preparation of its program" and that "The supporters of the Retirement Income Security Employees Act of 1972 assumed . . . that this program would create an emotional reaction that would strengthen support for their legislative proposals." AIM further states that the program contained "no presentation of a contrasting point of view," and that "NBC cannot escape its responsibility by tossing into the program a face-saving statement to the effect that – oh, yes, by the way, there are some good pension programs." In closing, AIM states:

> "We do not maintain that the program should have focused only on successful pension plans or only on unsuccessful pension plans. We insist only on a fair and balanced presentation. The ineluctable fact remains that this program focused only on unsuccessful pension plans."

The initial question raised by these pleadings is whether AIM has submitted sufficient allegations and supporting information to set forth a cognizable complaint under the fairness doctrine. The fairness doctrine obligates a broadcaster presenting one side of a controversial issue of public importance to afford reasonable opportunity in his overall programming for the presentation of contrasting views. Where a fairness complaint is made to the Commission, the complainant is required to submit certain particulars indicating a prima facie case of violation including: (1) the specific issue of a controversial nature of public importance broadcast; (2) the basis for the claim that the issue was a controversial issue of public importance, either nationally or in the particular station's local area at the time of the broadcast; and (3) reasonable grounds for the claim that the station or network involved has broadcast only one side of the issue in its overall programming and has failed to afford reasonable opportunity for the presentation of contrasting viewpoints. See Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 FR 10415 [2 RR 2d 1901] (1964); Allen C. Phelps, 21 FCC 2d 12 [17 RR 2d 1113] (1969). In this regard, the courts have recognized that "On a complaint under the fairness doctrine, the burden is not only on the complainant to define the issue, but also to allege and point specifically to an unfairness and imbalance in the programming of the licensee or network devoted to this particular issue." Healey v. FCC, 460 F2d 917, 921 [23 RR 2d 2175] (D.C. Cir., 1972); see also Hale v. FCC, 425 F2d 556, 558 [18 RR 2d 2014] (D.C. Cir., 1970).

With respect to the sufficiency of fairness doctrine complaints, the Commission has consistently distinguished between claims of unfairness properly within the purview of the doctrine and allegations which challenge only the "truth" or accuracy of broadcast material or contend that a licensee or network has deliberately slanted or distorted its news coverage or other public affairs programming. Thus, with reference to complaints disputing the "truth" or accuracy of program material, it has stated:

> "The Commission has never examined news coverage as a censor might to determine whether it is fair in the sense of presenting the 'truth' of an event as the Commission might see it . . .
>
> "It is important that the public understand that the fairness doctrine is not concerned with fairness in this sense. This is not because such actual fairness is not important, but rather because its determination by a government agency is inconsistent with our concept of a free press. The Government would then be determining what is the 'truth' in each news situation – what actually occurred and whether the licensee deviated too substantially from that 'truth'. We do not sit as a review body of the "truth" concerning news events . . .
>
> "Rather, we shall consider the overall question of whether reasonable opportunity for contrasting viewpoints was afforded with respect to . . . controversial issues referred to in the complaints we have received." Letter to ABC, et al., 16 FCC 2d 650, 655-56 [15 RR 2d 791] (1969).

For similar policy reasons, the Commission has held that with respect to allegations of deliberate distortion, slanting or rigging:

> ". . . the critical factor making Commission inquiry or investigation appropriate is the existence or material indication, in the form of extrinsic evidence, that a licensee has staged news events Otherwise, the matter would again come down to a judgment as to what should have been presented – a judgmental area for broadcast journalism which this Commission must eschew. For the Commission to investigate mere allegations, in the absence of a material indication of extrinsic evidence of staging or distortion, would clearly constitute a venture into a quagmire inappropriate for this Government agency." Letter to ABC, supra, at 657-58; see also Hunger in America, 20 FCC 2d 143, 149-151 [17 RR 2d 674] (1969).

Turning to the allegations contained in AIM's letters of complaint to you and to the Commission and in its reply to your response, we note that AIM alleges the omission of various facts and statistics concerning the operation of private pension plans as evidence that the Pensions program was "distorted" and "inaccurate" and also charges that such material was "concealed, omitted, or suppressed in order to produce a program that constituted an all-out assault on the private pension system in the United States." These allegations merely dispute the truth and accuracy of the material presented in the program and thereby purport to establish a case of deliberate distortion and slanting

without submission of extrinsic evidence in support thereof. The above-noted decisions of the Commission preclude review or investigation of AIM's allegations of distortion and inaccuracy within the program itself, and they therefore receive no further consideration here.

However, aside from charges of inaccuracy and distortion, complainant's pleadings set forth sufficient allegations to constitute a cognizable complaint under the fairness doctrine. AIM states that in light of pending Congressional consideration of legislative proposals to regulate private pension plans, the "performance" of such plans "is clearly an issue of public importance about which there is considerable controversy." Here it cites opposition to such regulatory proposals "by many labor union officials, by the Chamber of Commerce, the National Association of Manufacturers and the Nixon Administration" as evidence of their controversiality and public importance, and submits that support for the proposals "may depend on how the legislators and the public evaluate the performance of private pension plans now in operation." Complainant further alleges that the entire Pensions program "was devoted to criticism of private pension plans" and "presented a one-sided documentary that created the impression that injustice and inequity were widespread in the administration of private pension plans," and states that the program emphasized "the need for new regulatory legislation." Finally, complainant alleges that "only two brief statements toward the end of the program" presented anything on the other side and cites your refusal to acknowledge the applicability of the fairness doctrine to the program and its monitoring of subsequent NBC programming as indicating that you have failed to afford reasonable opportunity for the presentation of contrasting views. These particular allegations satisfy the Commission's procedural requirements as set forth in Phelps, supra, and judicially recognized and interpreted in Healey and Hale, supra, and hence constitute a complaint properly reviewable under the fairness doctrine.

Given the sufficiency of AIM's complaint, the controlling issue presented is the reasonableness of your judgment that the program did not present one side of a controversial issue of public importance within the meaning of the fairness doctrine. As the Commission has stated in its Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance," 40 FCC 598 [2 RR 2d 1901] (1964):

> ". . . the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation – as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming . . . In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith." 40 FCC at 599.

In response to the fairness allegations advanced in AIM's complaint, you submit that:

"The program constituted a broad overview of some of the problems involved in some private pension plans. It did not attempt to discuss all private pension plans, nor did it urge the adoption of any specific legislative or other remedies. Rather, it was designed to inform the public about some problems which have come to light in some pension plans and which deserve a closer look."

In support of the reasonableness of this judgment, you cite the following concluding remarks of Edwin Newman, the Pensions narrator, as "placing the subject matter of the program in focus":

"This has been a depressing program to work on but we don't want to give the impression that there are no good private pension plans. There are many good ones, and there are many people for whom the promise has become reality. That should be said.

"There are certain technical questions that we've dealt with only glancingly . . .

"These are matters for Congress to consider and, indeed, the Senate Labor Committee is considering them now. They are also matters for those who are in pension plans. If you're in one, you might find it useful to take a close look at it.

"Our own conclusion about all this is that it is that it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven results for those involved.

"The situation, as we've seen it, is deplorable."

Review of the script of the entire Pensions program clearly indicates that the program's focus was broader in scope than an "overview of some of the problems involved in some private pension plans." The program began with the announcement "Tonight NBC reports on Pensions: The Broken Promise," followed by these general statements by unidentified men and women:

"Woman. There must be thousands maybe millions of them that's getting the same song and dance my husband got. When they reach their time for retirement there is no funds to pay them.

"Man. Where does all this money go that's been paid into these pensions.

"Man. The pension system is essentially a consumer fraud, a shell game and a hoax. As a matter of fact, when you say it's a consumer fraud, you pay it an undue compliment, because typically you think of consumer frauds in terms of short transactions . . . but with the pension system you really have a long term contract that may run fifty or a hundred years that's designed to guarantee the security of our population. Essentially, you have an insurance contract that can't be relied on. You have an insurance contract that can't be trusted."

Mr. Newman then began his narration at the Department of Labor office where the annual pension reports required by law are filed. Referring to such files, Mr. Newman stated:

> "There are millions of hopes and dreams in these files. If experience is any guide very many of the hopes will prove to be empty and dreams will be shattered and the rosy promises of happy and secure retirement and a vine covered cottage will prove to be false."

By way of "example" of the complaints received by the Department of Labor concerning the operation of pensions plans, the program presented the statements of several men and women relating their personal experiences with plans which had failed. The program then turned to interviews with various public figures who expressed their views on different aspects of private pension plans. Such views included the following:

"Herbert Dennenberg. When you get to be sixty-five, your're out of work and you need a source of money and that's what a pension plan is supposed to do. Unfortunately, it's woefully inadequate. Over half the people have nothing at all from pension plans and those that do typically have only a thousand dollars a year so even if you have social security, most pension funds are inadequate.

. . . . . .

"Newman. Many employees form their ideas about pensions by reading the slick brochures that their company or union gives them. Most of these booklets do make a pension seem a sure thing. The many restrictions and exclusions are buried in fine print or concealed by obscure language.

"The Senate Labor Committee has been looking at these brochures as part of its general study of the pension problem. Senator Harrison Williams is chairman of the committee.

"Senator Williams. I have all kinds of descriptions of plans here and all of them just suggest the certainty of an assured benefit upon retirement. Here's a man – this was from a brewery, sitting relaxed with a glass of beer and checks coming out of the air; well, you see, this gives a false hope, a sense of false security.

"Newman. Senator, the way private pension plans are set up now, are the premises real?

"Williams. The answer is, they are not.

. . . . . .

"Dennenberg. It's almost an obstacle course and the miracle is when someone actually collects with the plan. There have been studies that indicate that most people won't collect . . .

"You have to go to work for an employer, you have to stay with him, you have to stay in good health, you have to avoid layoffs, you have to take your money, turn it over to the employer, hope that he invests it safely and soundly, you

have to hope that when you're age sixty-five the employer is still around and he's not likely to be in terms of the high mortality of business, so there's almost a sequence of miracles which you're counting on."

The remainder of the one-hour program followed along similar lines: specific examples of private pension plans which had failed were cited and discussed in interviews with the employees involved and centered on problems of the portability and vesting of pension rights, the adequacy of funding and payments upon retirement, and the fiduciary relationship between employees and those who manage the funds. In addition to such discussion of specific plans which had failed adequately to deal with one or more of the above particulars, the program presented the following general views:

"Victor Gotbaum. In the United States we have a magnificent ability to cover up our own diseases especially the disease of big business. Pensions in the private area are a mockery. They're a national disgrace. We know this

. . . . . .

"Edward Kramer. Going to a movie is a big expense, taking a bus to a clinic to visit a doctor is a big expense, buying a new pair of shoes is a big expense, getting ill and having to get medicine is a big expense. This is where, if there was an adequate pension system in the United States along with social security, some of these problems could be avoided.

. . . . . .

"Ralph Nader. I think time is running out. On the private pension systems. And its abuses continue to pile up, and if its enormous popular disappointments begin to be more and more revealed, it might collapse of its own weight, and social security will have to take up the slack.

. . . . . .

"Dennenberg. I say it's the employee's money and I think that is the economic fact of life and I think in terms of the morals of the problem and in terms of the economics of the problem, that anyone would conclude that it does belong to the employee and yet it's not being used for his benefit."

In light of these many statements and views, we believe it cannot be reasonably said that the program was confined in scope to only "some problems in some pension plans." Such a characterization would ignore these sharp and direct criticisms of the whole private pension system which pervaded the entire program.

It must also be observed that while the program itself did not "urge the adoption of any specific legislative or other remedies" with respect to the operation of private pension plans, it did note at several points that the Congress was considering such matters and presented the views of various spokesmen who advocate governmental regulation of the private pension system:

"Herbert Dennenberg. I think we need controls of the same type we apply to insurance companies, your money should be funded so it's going to be there at age sixty-five. Today, it's almost a miracle if it's there at age sixty-five.

. . . . . .

"Charles Ruff. We have no real idea of how much fraud there may be in the pension plan area. But your're talking about institutions, the pension plan area, generally, that deals in hundreds of billions of dollars. And when you have that much money involved, the federal government ought to take a more active role than it does.

. . . . . .

"Dennenberg. We regulate insurance completely. We regulate the agent, the contract, reserve, the policies, the sales technique, the investment, we regulate insurance companies from birth to death. Any yet we have a gigantic pension system, almost the size of the insurance industry, a hundred and fifty billion dollar business that's essentially unregulated. Can you imagine what would happen if we would let insurance companies do whatever they wanted to? We can't even protect the public with full regulation in insurance, but essentially we have a pension system which is precisely an insurance plan and which is almost unregulated.

. . . . . .

"Senator Schweiker. What we're proposing to do a little bit what was done with the bank failure problem. We didn't go in and take over the banks but we did, by means of insurance and federal deposit insurance corporation come in and guarantee that no depositor would lose his savings under a certain point. And I think that's what we're saying here, that once a worker has put in eight years time, once he's reached a certain age, once his company's reached a certain point, then he doesn't lose it, regardless of what happens to his company or the country.

"Man. What are they waiting for? What the hell are they waiting for? Do they have to give us a certain quota, a certain number of people that have to be victims? Do they have to give us a certain amount of money? How many billions must it take before they do something about this? How many people have to starve? How many people have to lay on the sidelines and just hope and pray. How much misery do they want before they actually act upon it?"

The Pensions program thus did in fact present views which were broadly critical of the performance of the entire private pension system and explicitly advocated and supported proposals to regulate the operation of all pension plans. Your judgments to the contrary, therefore, cannot be accepted as reasonable.

However, you further submit that in your judgment, "the fact that problems exist with some private pension plans" did not constitute "a controversial issue of public importance within the meaning of the fairness doctrine" since at the time of the broadcast the subject "did not . . . present an issue of significant public controversy." In support of this judgment, you note that:

> " . . for years prior to the broadcast of PENSIONS, neither NBC nor the other networks, to the best of our knowledge, had telecast any program dealing extensively with private pensions. There was little discussion in any general circulation print media and no widely circulated books on the subject. In fact, there was no apparent public discussion, much less controversy, apart from that of a relatively small number of experts, businessmen and government officials who take a professional interest in the subject. There had been hearings in the last Congress on the subject, but at the time of broadcast NBC was breaking new gound journalistically on a subject about which the public, at that time, had little knowledge."

Serious questions as to the reasonableness of your judgment are raised, first, by the previously cited evidence that the program taken in its entirety, went considerably beyond a mere presentation of "the fact that problems exist with some private pension plans." Its overall thrust was general criticism of the entire pension system, accompanied by proposals for its regulation. More importantly, however, your argument misinterprets the definition of a "controversial issue of public importance" as it pertains to the applicability of the fairness doctrine. As both the Commission and the courts have stated, underlying the fairness doctrine is "the paramount right of the American public to be informed as to events and issues of public importance." Letter to Mrs. J. R. Paul, 26 FCC 2d 591 [20 RR 2d 1223] (1969), citing Red Lion Broadcasting Co. v. U.S., 395 US 367 [16 RR 2d 2029] (1969) This right would be obviously vitiated if a broadcaster presenting one side of an issue of public importance could avoid his fairness obligations on the ground that members of the general public had little knowledge of the subject and hence were not engaged in any discussion of or debate on that issue.

As pointed out above, the Pensions program itself explicitly recognized that the Congress is studying the subject of the overall performance of private pension plans and that there are legislative proposals to regulate the private pension system, and your response states that "The subject does appear to us to us to be of more than monetary importance." You do not dispute complainant's statements that such proposals have been opposed by various groups and spokesmen, including the National Association of Manufacturers, several labor unions, the Chamber of Commerce, and the Nixon administration Under these circumstances, your judgment that the performance and proposed regulation of the private pension system did not constitute a controversial issue of public importance cannot be considered reasonable.

Given these findings, it does not appear that you have complied with your fairness doctrine obligation for affording reasonable opportunity for the presentation of views in contrast to those you have presented on the controversial issue of public importance here involved. Although two brief statements near the end of the one-hour program could be taken to present a contrasting view, they alone cannot be asid to have afforded the reasonable opportunity contemplated by the fairness doctrine when compared to the views presented during the remainder of the program regarding private pension plans and the need

for statutory regulation. 1/ Moreover, information before the Commission indicates that no such contrasting views have been presented in other NBC programming and that you have formulated no definite plans to present them in the future. AIM states that its monitoring of NBC programs has not revealed any discussion of the operation of successful pension plans, and you state that NBC previously had not "telecast any program dealing extensively with private pensions." Moreover, you further indicate lack of prior programming which might have presented contrasting views when you state that "at the time of broadcast NBC was breaking new ground journalistically" on the subject. Finally, we note that you indicate no definite plans for future programming which might present contrasting views.

In view of the above, you are requested to inform the Commission within 20 days of the date of this letter how you intend to meet your fairness obligations with respect to the issue presented on the Pensions program.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, §1.115.

For Chief, Broadcast Bureau,
William B. Ray, Chief,
Complaints and Compliance
Division.

1/ The two statements were the following:

"Russell Hubbard. Over a good number of years, the track record is excellent. It's unfortunate that every now and then some of the tragic cases make the newspapers and the headlines. But it's a question of perspective and balance. When you consider that there are thirty million people covered by the plans, that there are five million people receiving about seven billion dollars in benefits. I think that's a pretty good record. That's not to say that there aren't a few remaining loopholes that need closing but we ought to make sure that we don't throw out the baby with the wash water.

"Newman. This has been a depressing program to work on but we don't want to give the impression that there are no good private pension plans. There are many good ones, and there are many people for whom the promise has become reality. That should be said."

FCC 73-1232
07242

In re complaint of)
)
ACCURACY IN MEDIA, INC.)
)
against)
)
NATIONAL B/CASTING CO., INC.)

Adopted: November 26, 1973
Released: December 3, 1973

[¶10:315(G)(1)] Fairness complaint.

Ruling of the Broadcast Bureau requesting NBC to inform the Commission how it intends to meet its fairness obligations with respect to a program criticizing private pension plans, is affirmed. NBC's judgment that the program only dealt with some problems of some pension plans and that the performance and proposed regulation of the private pension system was not even the subject of the program, was unreasonable. Review of the program clearly supported the finding that the program presented views which were broadly critical of the performance of the entire private pension system and explicitly advocated and supported proposals to regulate the operation of all private pension plans. A few statements in the program itself could be taken to present a contrasting view, but they alone could not be said to have afforded the reasonable opportunity contemplated by the fairness doctrine when compared to the views presented during the remainder of the program. Reluctance of NBC to present a program giving opposing views would not be a valid reason under the fairness doctrine nor a basis for a claim of intrusion upon NBC's right of free expression. Accuracy In Media, Inc., 28 RR 2d 1371 [1973].

MEMORANDUM OPINION AND ORDER

By the Commission: (Commissioners Burch, Chairman and Reid concurring in the result, Commissioners Johnson and H. Rex Lee absent.)

1. The Commission has before it (1) an Application for Review filed by National Broadcasting Company, Inc. (NBC) on June 21, 1973, pursuant to §1.115(d) of the Commission's Rules and Regulations which seeks review of

the Broadcast Bureau's ruling [27 RR 2d 1523] of May 2, 1973 on the fairness doctrine complaint of Accuracy in Media, Inc. (AIM) concerning the program "Pensions: The Broken Promise" broadcast by the NBC Television Network on September 12, 1972; (2) an opposition to the Application for Review filed by AIM on July 6, 1973; and (3) a reply to the opposition filed by NBC on July 16, 1973. 1/

2. The pleadings of the parties which were before the Bureau are fully set forth in its ruling, 40 FCC 2d 958 [27 RR 2d 1523] (1973), and need not be repeated here. The Bureau ruled, inter alia, that NBC's judgment that the "Pensions" program only addressed "some of the problems involved in some private pension plans" was unreasonable; that the program did in fact present views advocating one side of a controversial issue of public importance concerning the overall performance of the private pension system and the need for governmental regulation of all private pension plans; and that NBC had not afforded reasonable opportunity for the presentation of contrasting views, nor expressed any intention of doing so in accordance with its obligations under the fairness doctrine. The Bureau therefore requested NBC to advise the Commission as to how it would meet its fairness obligations.

The Application For Review

3. In seeking reversal of the staff's ruling, NBC submits that the Bureau's decision "misconstrued the nature of the program involved," and "is utterly inconsistent with basic, firmly rooted fairness doctrine principles . . . [and] with the First Amendment itself." NBC states that under established Commission practice, "determination as to what issue has been the basic subject considered in a program, and whether the licensee has presented balanced coverage of that issue, are matters on which the licensee's judgment must be upheld unless clearly unreasonable or in bad faith." NBC contends that it has made a "concededly good faith" and "plainly reasonable" judgment that the "Pensions" program "dealt not with the 'overall performance' of the private pension system, but rather with some problems of some pension plans." In its description of the program, NBC states that "Pensions" dealt with the pitfalls and failures of some private pension plans and "presented, among other things, case histories of workers who . . . lost their pension benefits by the failure of the company, its absorption by a conglomerate, or simply by an incompetent management or the quirk of an incomprehensible contract"; and that "While dealing exclusively with such subjects, the program did provide a framework within which the problem could be examined by

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1/ The Commission has also given leave for the filing of the following pleadings for its consideration: Comments on NBC's reply to its opposition filed by AIM on July 20, 1973; Comments in support of the Application for Review filed by Radio Television News Directors Association on July 16, 1973, Columbia Broadcasting System, Inc. (CBS) on July 23, 1973, and National Association of Broadcasters on August 10, 1973; and a reply to the CBS comments filed by AIM on July 27, 1973. The Commission has reviewed these additional comments and believes that the matters and issues which they discuss have been fully raised by the pleadings of the immediate parties indicated above, and need not be commented upon individually.

indicating clearly that there were many private pension plans that worked satisfactorily . . . ." NBC concludes its characterization of the programs as follows:

> "The 'Pensions' program did not deal with the question of what percentage of pension plans fail to perform as expected. Nor did it say, expressly or by implication, that most plans do not perform as expected. It did not discuss what legislative or other remedial action may, or should, be taken. It did not say that the private pension system should be changed or eliminated. It was investigative journalism, focusing on and exposing to public view a significant social problem, and it did not offer answers to that problem."

4. NBC states that the reasonableness of its judgment as to the subject matter of the program is supported by submitted affidavits of its producers, Messrs. Reuven Frank and David Schmerler. In his affidavit Mr. Frank states that in deciding upon the subjects for the 1972-1973 "NBC Reports" series of hour-long news documentaries, NBC became interested in "the problem of those private pension plans which, in fact, failed to provide the promised pensions," such interest initially resulting from "hearings of the Senate Labor Committee into the subject and subsequently written reports in such publications as 'Fortune' magazine"; and that it was decided that this subject should be dealt with in the first "NBC Report" for the 1972-1973 season. Mr. Schmerler states in his affidavit that he was asked "to write and produce a documentary with respect to the problems caused by the failure of many private pension plans to pay the money promised by them," and that "preliminary research had disclosed . . . that the problem was a continuing one . . . ." NBC has also submitted a compilation of "descriptions of the program" contained in various newspaper and magazine reviews of the "Pensions" documentary, 2/ and contends that "since so many independent viewers of the program concluded – as did NBC – that its subject was . . . a 'tough study of the failures of some private pension systems' NBC may not, under any standard, be held to have been unreasonable in its decision that that was indeed the subject of its program." NBC further submits that "the result would be the same even if there had been greater diversity among reviewers as to what the "Pensions" program was about," since "reasonableness" means that "even though there could be disagreement as to what the issue is, if the licensee's judgment is defensible, it may not be rejected."

5. NBC states that "The deviation by the staff from the permissive standards of reasonableness" could lead to "nothing less than administrative chaos"; that "if NBC were required to present a program showing what AIM refers to as successful pension plans in operation . . ., some AIM-of-the-left might well file a fairness complaint saying that the AIM program painted a too 'rosy' picture of pension plans, and claiming that the original 'Pensions' program was too restrained in its treatment of pension plan evils"; and that "Other subjects that might . . . be deemed raised by the program include: how each

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2/ This material, as well as all other pleadings in this case, is on file in the Commission's Washington, D.C., office and is available for public inspection.

company and union referred to by name actually treat their employees; when rights under pension plans should vest in the employees; to what extent pension rights should be transferable from one company to another; whether federal legislation should be enacted and, if so, what kind; whether sufficient guidelines or laws exist with respect to the investment of pension funds; whether workers are sufficiently informed as to the nature of the coverage of their pension plans; whether corporations should be required to have pension plans; [and] who should manage funds." NBC submits that "This list . . . indicates that to have a fairness doctrine that is workable in practice as well as theory, the licensee must be given what we believe the staff decision improperly withholds: the broadest leeway to determine what subjects to consider and what subjects have been considered."

6. NBC also contends that the Bureau's ruling "is inconsistent with the declared purpose of the fairness doctrine . . . to insure that discussion on public issues [will be] uninhibited, robust, and wide-open," and, if upheld, would force broadcasters "to take a bland course rather than a brave one." NBC submits that "the concept in the staff opinion [is] that whenever a social problem is exposed on television, 'balance' must be achieved by including 'positive' material to minimize the nature of the problem," and that this "concept" is "antithetical to the essence of journalism itself." In particular, it cites the following extract from the submitted affidavit of Mr. J. Edward Murray, past president of the American Society of Newspaper Editors:

> ". . . it would be commonplace newspaper procedure that if an editor decided that some private pensions are flawed or useless, and published a typical expose to this effect, the expose would simply assume that the majority of private pension plans were more or less in acceptable shape; otherwise, the forces of both law and business would have corrected so obvious a deficiency. Nevertheless, under the fairness doctrine, as here interpreted, the pension expose would be considered a controversial public issue and the editor told that he should have given a fairer shake to private pension plans in his original expose, and failing that, that he must now run another non-expose presenting the fact that a majority of private pension plans function satisfactorily.
>
> "That dictum, that FCC interpretation in the AIM/NBC case, if applied to newspapers, would either destroy the fruits of any investigative reporting, or more than likely, guarantee that no serious investigative reporting would be undertaken in the future."

NBC states that "It is simply no answer to these problems to require NBC to carry yet another pensions program dealing with happy pensioners. The concept of such a program is precisely as unsound journalistically as it would be to require NBC to include more 'positive' material in the 'Pensions' program itself."

7. NBC further states that AIM has attempted to use the staff decision "to threaten NBC affiliates which carried the 'Pensions' program," citing the following excerpts from a letter sent by AIM to NBC's affiliated stations on May 23, 1973:

> "The licensee is responsible for what he broadcasts. If you carried 'Pensions: The Broken Promise' and you have not given your audience a program that showed the other side of the issues, you have not fulfilled your obligation under the fairness doctrine. (We are) sure that you are anxious to fulfill that obligation. NBC may wish to challenge the FCC on the fairness doctrine issue, but it is the licensee, not the network, that may have this used against him in any challenge to a license renewal. NBC has an obligation not to play games with your license. We urge you to tell NBC that.
>
> "AIM intends to enter notice of this fairness doctrine violation in the file of each station that carried 'Pensions: The Broken Promise.' Please let us know if you did carry this program and if you have broadcast other programs that provided the requisite balance. If we do not hear from you, we shall assume that you carried the pensions program and have not provided any other program to balance it."

NBC submits that such letter "is, in and of itself, a demonstration of the dangers inherent in the staff opinion."

8. NBC further contends that the staff's "application of the fairness doctrine" is "inconsistent with the First Amendment" and "unconstitutional." While NBC acknowledges that the constitutionality of the fairness doctrine has been upheld in Red Lion Broadcasting Co. v. FCC, 395 US 367 [16 RR 2d 2029] (1969), and "understands" that the "validity" of Red Lion was "reaffirmed" by the decision of the Supreme Court in Columbia Broadcasting System v. Democratic National Committee, _____ US _____ (41 U.S.L.W. 4688, 36 L.Ed. 2d 772 [27 RR 2d 907], May 29, 1973), it submits that "to say the fairness doctrine is constitutional is not . . . to say that each purported application of it is constitutional." NBC states that this case deals with "a licensee's judgment in the presentation of news and news documentaries," and that "In no other area is the need for the broadcast deference to licensee judgment greater, for in no such area are First Amendment interests [of the broadcaster] greater." NBC submits that the Commission and the courts have left broadcasters "broad leeway for professional judgment" in this area of news and documentary presentations; that this discretion "arises from a recognition that to intrude the Commission too deeply into the processes of broadcast journalism would necessarily inhibit the freedom of that journalism"; and that "both the Commission and the courts must give an extremely 'hard look' to any claim that the application of the fairness doctrine – or the imposition of sanctions for alleged failures to comply with it – violates the First Amendment."

9. NBC states that "These factors are all the more compelling when licensees are engaged in investigative journalism," since "If there is a hierarchy within the speech protected by the First Amendment, investigative journalism is surely at its apex." In support of this contention, it cites the importance of 19th century press exposes of the "Tweed Ring" in New York City, the "Credit Mobilier scandal" involving U.S. Senators and Representatives accused of accepting stock in the company organized to build the Union Pacific Railroad, the "scandals during the Grant administration," including the "Whiskey Ring" and "Navy Department scandal," and more recent press

exposes of "Teapot Dome" and "Watergate." It states that "the subject being investigated by such efforts is so often the government itself," and that "To the extent the staff's opinion requires even greater accountability to the government itself, it is simply inconsistent with the 'long history of dis-association' and even antagonism that has characterized the relationship between government and press in our country. . . [and] as such . . . is violative of the First Amendment." In particular, NBC cites the following passage from the opinion of the Court in the recent Columbia Broadcasting System case, supra, as supporting its First Amendment contentions:

> "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors – newspaper or broadcast – can and do abuse this power is beyond doubt, but that is not reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility – and civility – on the part of those who exercise the guaranteed freedoms of expression." 41 U.S.L.W. at 4697, 36 L.Ed. 2d at 796.

NBC submits that "The courts have condemned over the years, not merely governmental action overtly suppressing the expression by the press of particular views, but the subtlest of governmental influences which might mute the press in the slightest degree or discourage it, even minimally, from performing its role"; that "the effect of the staff decision. . . would inhibit television journalism by forcing television reporters to engage in a kind of thinking and practice which has nothing to do with journalism"; and that "it would impose . . . a variety of less obvious sanctions – e.g., the inhibiting effect upon television journalists and producers of being obliged to justify to their superiors and to the Commission the work they have done; the immense amount of time required – time better spent preparing new programming – in preparing a 'defense' to similar charges; the ever present threat to license renewals inherent in such rulings; and the like." NBC concludes that "the essence of the staff ruling is [that] unless NBC is prepared to promise further programming setting forth at still greater length than in 'Pensions' the view that the pension system as a whole is a success, NBC may not broadcast its program examining some problems in private pension plans," and that therefore the ruling is "inconsistent with the most basic precepts of journalism, . . . the fairness doctrine, . . . and the First Amendment itself."

The Opposition

10. In opposition to the Application for Review, AIM submits that the staff was "correct in concluding that 'Pensions: The Broken Promise' presented views which were broadly critical of the performance of the entire private pension system and explicitly advocated and supported proposals to regulate the operation of all pension plans"; that the subjects of "portability, vesting, funding, and fiduciary relationship" discussed in the program were the very subjects of regulatory proposals pending in the Congress; and that the concluding remarks of the program's narrator, Mr. Edwin Newman, specifically

stated that this was the case. AIM states that NBC's "defense" that the program only addressed some of the problems in some pension plans is "untenable" in light of the many statements presented in the program which emphasized overall pension plan performance and specific proposals for the regulation of all private pension plans. AIM also states that it rejects "the theory that if the broadcaster can find one independent observer who will confirm his description of the program content, the FCC must agree that his definition is reasonable"; that the Commission "must base its findings on its own analysis of the program, taking into account what NBC and the complainant say about it"; and that "The introduction of excerpts from journalistic comments on the program does nothing to assist the Commission in carrying out this responsibility." AIM further submits that the Commission should not "give NBC or any other licensee the sole authority to make the determination as to what subjects have been considered on a program that has been broadcast" because such authority would allow broadcasters "to define away controversial issues of public importance that they have aired in a one-sided way" and thereby avoid their fairness doctrine obligations.

11. AIM also disputes NBC's contention that the effect of the staff ruling is contrary to the fairness doctrine policy of ensuring "uninhibited, robust and wide-open" discussion of public issues. Citing several Commission statements of fairness doctrine policy, AIM states that "NBC has a distorted view of the origins of the fairness doctrine if the implication [of its contention] is that the licensee is entitled to use the airwaves to carry an uninhibited presentation of views that he favors to the exclusion of views of others in the community"; and that "contrary to NBC's claim . . . , the legislative history and the court cases show that the purpose of the fairness doctrine was to inhibit broadcasters by requiring that they present a wide range of community views." Noting that the Supreme Court in Red Lion, supra, observed that the Commission was not powerless to insist that broadcasters fairly cover controversial issues, AIM submits that "If NBC tells the Commission that it is unable to present a vigorous discussion of controversial issues while insuring the presentation of a variety of viewpoints, then the FCC should give serious thought to following the [Court's] suggestion of remedial action."

12. AIM also takes exception with NBC's "view that if it had to be fair and give the facts and arguments on both sides of the pensions controversy, it could not do a good job of investigative reporting." AIM states that this view is that of "advocacy journalism"; that "The practitioners of this brand of journalism think that 'good' journalism is taking sides and rigging your story in order to influence public opinion to support the side that you think to be right"; and that "most responsible journalists reject this concept of 'good' journalism . . . in either the print or the electronic media." In this regard, AIM submits a copy of an article on the private pension plan controversy appearing in the Washington Post as showing that it is "possible for a good journalist to talk about the abuses without omitting to put the matter into perspective and report on the views of those opposed to some of the features of the bill that was then before the Senate." AIM states that by comparison the NBC presentation was "one sided, emotional and uninformative," and that "Advocacy journalism of the type practiced by NBC in the 'Pensions' program and defended by NBC . . . is precisely the kind of journalism that the fairness doctrine should protect the public against."

13. AIM further states that NBC "does not question the constitutionality of the fairness doctrine but . . . asserts that the ruling on 'Pensions' is unconstitutional"; and that this "argument is extremely murky, with no effort to describe wherein this ruling differs from many others that have been made by the Commission in the past." AIM concludes that "We believe the Commission should uphold the staff ruling in the 'Pensions' case."

The Reply

14. In reply to AIM's opposition, NBC states that contrary to AIM's submission, the "Pensions" program dealt "only glancingly" with the subjects of portability, vesting, funding and fiduciary relationship. NBC reiterates its contention that the program was "a broad overview of some of the problems involved in some private pension plans," that the program did contain material that placed "the subject matter of the program in focus," and that it "attempted to treat the subject in an evenhanded, accurate and reasonable manner." It states that "No prior submission by NBC has contended that the 'Pensions' program dealt with the 'broad issues of private pension plan performance,' nor does NBC now contend that 'evenhanded treatment' of controversial issues is impossible, nor that the 'Pensions' program was in any sense unfair." NBC also submits that "It is surely untrue for AIM to attribute to NBC the view that 'good journalism is taking sides and rigging your story,' or that 'if it tried to be fair . . . it could not do a good job of investigative reporting." NBC further states that while AIM suggests that such programs as the "Pensions" documentary should have an "almost 'mathematically' even balance of views," such an approach to fairness has been rejected by both the Commission and the courts.

15. NBC submits that "The critical line in the staff's opinion is the finding that the 'Pensions' program 'did in fact present views which where broadly critical of the performance of the entire private pension system . . .'"; that "The lesson of the staff opinion is apparently that for NBC to have been 'fair' it either should have presented (a) fewer views which were 'broadly critical' or (b) more views which were not so critical"; and that "Never before has an opinion of the Commission intruded so deeply into the very processes of television journalism." Citing various governmental and private studies, reports, and regulatory proposals, NBC states that such "intrusion" "is all the more striking because with respect to the subject of private pensions it states a truism to conclude that significant problems do exist," and that "This is not what [AIM] refers to as 'brainwashing': it is simply a fact." NBC submits that "There is no documentary dealing with and exposing any social problem to which the reasoning of the staff opinion could not apply"; that "The fairness doctrine has never before been interpreted so as to transform a program dealing with a social problem into one examining, in general terms, the performance of the system in which the problem is found"; that "Any such reading of the doctrine by the Commission could only limit the quality and quantity of investigative journalism on television"; and that such a result would be inconsistent with both the fairness doctrine and the First Amendment.

Discussion

16. Under the fairness doctrine, a broadcaster presenting one side of a controversial issue of public importance is obligated to afford reasonable

opportunity for the presentation of contrasting views on that issue in his overall programming. The Commission has repeatedly stated that in applying the fairness doctrine the broadcaster "is called upon to make reasonable judgments in good faith on the facts of each situation – as to whether a controverisal 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 other facets of such programming." Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 FCC 598, 599 [2 RR 2d 1901] (1964). Here NBC does not dispute the Bureau's finding that at the time the "Pensions" program was broadcast the overall performance and proposed regulation of the private pension system constituted a controversial issue of public importance within the meaning of the fairness doctrine. 3/ Rather, NBC maintains that the "Pensions" program only "dealt with some problems of some pension plans" and that the performance and proposed regulation of the private pension system "was not even the subject of the 'Pensions' program." The basic issue thus presented by the Application for Review is whether the Bureau erred in its ruling that NBC's judgment on these matters was unreasonable. For the reasons which follow, we affirm the Bureau's ruling.

17. As NBC emphasizes, the Commission's role in passing on any complaint under the fairness doctrine is "not to substitute its judgment for that of the licensee . . ., but rather to determine whether the licensee can be said to have acted reasonably and in good faith." Applicability of the Fairness Doctrine in the Handling of Controversial Issue of Public Importance, 40 FCC at 599. However, while this Commission has consistently recognized and upheld the broadcaster's discretion to make reasonable, good faith judgments as to his fairness doctrine responsibilities, we have also indicated that such discretion is not unlimited:

> "In stressing that the licensee has considerable discretion in discharging his fairness obligation, we do not mean to imply that that discretion is absolute . . . [W]e will intervene if the showing establishes that the licensee has acted unreasonably." Committee for the Fair Broadcasting of Controversial Issues, 25 FCC 2d 283, 292 [19 RR 2d 1103] (1970).

As we stated in our Public Notice of July 26, 1963, entitled "Stations' Responsibilities under the Fairness Doctrine as to Controversial Issue Programming":

> "In determining compliance with the fairness doctrine the Commission looks to substance rather than to label or form . . . . Regardless of label or form, if one viewpoint of a controversial

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3/ The Bureau based this finding on AIM's uncontradicted submissions that proposals for the regulation of all private pension plans were pending before the Congress and that such proposals were opposed in whole or in part by "various groups and spokesmen including the National Association of Manufacturers, several labor unions, the Chamber of Commerce of the United States, and the Nixon administration." 40 FCC 2d 958, at 967.

issue of public importance is presented, the licensee is obligated to make a reasonable effort to present the other opposing viewpoint or viewpoints." 40 FCC 571, 572 [25 RR 1899] (1963).

The specific question properly before us here is therefore not whether NBC may reasonably say that the broad, overall "subject" of the "Pensions" program was "some problems in some pension plans," but rather whether the program did in fact present viewpoints on one side of the issue of the overall performance and proposed regulation of the private pension system.

18. Our review and determination of this question must necessarily rest primarily upon the program itself. 4/ The program opened with the announcement, "Tonight NBC reports on Pensions: The Broken Promise" and the following statements by unidentified men and women:

"MAN: I figure I had twenty-three years seniority filled up, possibly last up until I was in my forty year sometime at least before I retired and then to look back and see it all fallen away. Everything that you planned on. Just seems like a waste of time.

"WOMAN: There must be thousands maybe millions of them that's getting the same song and dance my husband got. When they reach their time for retirement there is no funds to pay them.

"MAN: This man, Hoffa, on there, retired with a one point seven million dollar lump sum pension. And I can't get three hundred dollars a month out of them on there for my retirement.

"MAN: Where does all this money go that's been paid into these pensions.

"MAN: The pension system is essentially a consumer fraud, a shell game and a hoax. As a matter of fact, when you say it's a consumer fraud, you pay it an undue compliment, because typically you think of consumer frauds in terms of short transactions . . . but with the pension system you really have a long term contract that may run fifty or a hundred years that's designed to guarantee the security of our population. Essentially, you have an insurance contract that can't be relied on. You have an insurance contract that can't be trusted.

4/ For this reason, NBC's submitted collection of short "descriptions of the program" gleaned from newspaper and magazine reviews cannot be considered substantial factors in our determination here. Such brief and general one-line summaries provide no information as to what particular views on the subject of pensions may have been presented in the one-hour documentary, and hence are of little value in determining the applicability of the fairness doctrine and the validity of the arguments of the parties with respect to the actual substance of the program.

"MAN: And I think its a terrible thing in this country where men who work forty-five years have to eat yesterday's bread. And I don't want to compete on my old age against other old men on old age running down a supermarket aisle to get dented cans and stale breads. I don't want to look forward to it. So I really have nothing to look forward to at sixty-five."

(DANCE MUSIC)

Mr. Edwin Newman's narration began at the Department of Labor office where the annual pension reports required by law are filed:

"There is a widely held belief in this country that public disclosure is a good thing that it inhibits misconduct and helps to keep people honest. That's why these files are full of pension plans, private pension plans. . . .

"The Labor Department has the right to audit them and to a limited extent, where wrongdoing is discovered, the government may prosecute. Also, the reports are available to anybody who asks to see them, but as it works out that is meager protection for the twenty-five million Americans who are in private pension plans.

"There are millions of hopes and dreams in these files. If experience is any guide, very many of the hopes will prove to be empty and dreams will be shattered and the rosy promises of happy and secure retirement and a vine covered cottage will prove to be false."

By way of example of the complaints filed with the Department of Labor with respect to the operation of private pension plans, the statements of several men and women were presented, each relating his or her personal experience with a plan which had failed. The program then presented interviews with various public figures who commented on different aspects of the private pension system:

"HERBERT DENNENBERG: When you get to be sixty-five, you're out of work and you need a source of money and that's what a pension plan is supposed to do. Unfortunately, it's woefully inadequate. Over half the people have nothing at all from pension plans and those that do typically have only a thousand dollars a year so even if you have social security, most pension funds are inadequate.

. . . . . .

"NEWMAN: Many employees form their ideas about pensions by reading the slick brochures that their company or union gives them. Most of these booklets do make a pension seem a sure thing. The many restrictions and exclusions are buried in fine print or concealed by obscure language.

"The Senate Labor Committee has been looking at these brochures as part of its genral study of the pension problem. Senator Harrison Williams is chairman of the committee.

"EDWARD KRAMER: These people feel who worked all their lives and let's say they worked thirty-five, forty years, and many of them have worked for one employer for all these years, are, they feel that now that they've retired, they're going to live a better life . . . And then they find themselves in the position that they have no money, they have no friends. And they live in squalor and they can't do these things. So what – they've really been cheated, cheated by the pension system, cheated by social security, cheated by their employer and they feel very angry at themselves because I think in the back of their mind, they knew this was going to happen. They knew that when the day came that they would retire, they would be worse off than when they were working. But they're afraid to admit it.

. . . . . .

"KRAMER: Going to a movie is a big expense, taking a bus to a clinic to visit a doctor is a big expense, buying a new pair of shoes is a big expense, getting ill and having to get medicine is a big expense. This is where, if there was an adequate pension system in the United States along with social security, some of these problems could be avoided.

. . . . . .

"NEWMAN: Pension funds have outgrown the laws regulating them. No government agency has enough staff or authority to control them . . . .

"CHARLES RUFF: We have no real idea of how much fraud there may be in the pension plan area. But you're talking about institutions, the pension plan area, generally, that deals in hundreds of billions of dollars. And when you have that much money involved, the federal government ought to take a more active role than it does.

. . . . . .

"DENNENBERG: We regulate insurance completely. We regulate the agent, the contract, reserve, the policies, the sales technique, the investment, we regulate insurance companies from birth to death. And yet we have a gigantic pension system, almost the size of the insurance industry, a hundred and fifty billion dollar business that's essentially unregulated. Can you imagine what would happen if we would let insurance companies do whatever they wanted to? We can't even protect the public with full regulation in insurance, but essentially we have a pension system which is precisely an insurance plan and which is almost unregulated."

Toward the end of the program, the following statements were presented as those of "critics" who recommend "changes" in the private pension system:

"SENATOR WILLIAMS: I have all kinds of descriptions of plans here and all of them just suggest the certainty of an assured benefit upon retirement. Here's a man – this was from a brewery, sitting relaxed with a glass of beer and checks coming out of the air; well, you see, this gives a false hope, a sense of false security.

"NEWMAN: Senator, the way private pension plans are set up now, are the premises real?

"WILLIAMS: The answer is, they are not.

. . . . . .

"DENNENBERG: It's almost an obstacle course and the miracle is when someone actually collects with the plan. There have been studies that indicate that most people won't collect. I think we need controls of the same type we apply to insurance companies, your money should be funded so it's going to be there at age sixty-five. Today, it's almost a miracle if it's there at age sixty-five. You have to go to work for an employer, you have to stay with him, you have to stay in good health, you have to avoid layoffs, you have to take your money, turn it over to the employer, hope that he invests it safely and soundly, you have to hope that when you're age sixty-five the employer is still around and he's not likely to be in terms of the high mortality of business, so there's almost a sequence of miracles which you're counting on."

The remainder of the one-hour program continued along similar lines. Specific private pension plans which had failed were cited and discussed in interviews with employees involved, the discussion dealing with such matters as the portability and vesting of pension rights, the adequacy of funding and payments upon retirement, and the fiduciary relationship between employees and those who manage the funds.

Interspersed with such discussion of specific plans which had not adequately covered one or more of these particulars were the following general statements:

"MAN: I lose faith in a government that allows things like this. Not long ago I was in New York and I saw that inscription on the Statue of Liberty. And it sounded wonderful, you know. Give us your tired and so on. But what it actually said was, give us your labor; get these honkies here where we can put them to work for nothing. That's what it amounted to.

. . . . . .

"VICTOR GOTBAUM: In the United States we have a magnificent ability to cover up our own diseases especially the disease of big business. Pensions in the private area are a mockery. They're a national disgrace. We know this.

. . . . . .

"RALPH NADER: I think time is running out. On the private pension systems. And its abuses continue to pile up, and if its enormous popular disappointments begin to be more and more revealed, it might collapse of its own weight, and social security will have to take up the slack.

. . . . . .

"RUSSELL HUBBARD: Over a good number of years, the track record is excellent. It's unfortunate that every now and then some of the tragic cases make the newspapers and the headlines. But it's a question of perspective and balance. When you consider that there are thirty million people covered by the plans, that there are five million people receiving about seven billion dollars in benefits. I think that's a pretty good record. That's not to say that there aren't a few remaining loopholes that need closing but we ought to make sure that we don't throw out the baby with the wash water.

. . . . . .

"GOTBAUM: The solutions in the wealthiest country in the world is not do what they've been doing in terms of pensions. You fund a pension. You fund it on the basis of man's ability to live. You tie it into the cost of living. The wealthiest country in the world ought to be able to do it.

. . . . . .

"KENNETH ANDERSON: You must remember that the corporation has set this plan up voluntarily. They have not been required by law to set it up. [Interviewer: So that it gets from the employer to the employee?] That's what it amounts to.

. . . . . .

"DENNENBERG: I say it's the employee's money and I think that is the economic fact of life and I think in terms of the morals of the problem and in terms of the economics of the problem, that anyone would conclude that it does belong to the employee and yet it's not being used for his benefit.

. . . . . .

"ANDERSON: These pension plans are a part of a fringe benefit package. Like hospitalization insurance and so forth, but its still a voluntary thing on the part of the corporation.

. . . . . .

"GOTBAUM: So all I can say is my God how can you hold to that view. Do you mean, people are supposed to starve, that people are supposed to live on a subsistence money because they are not unique, and that, by the way is the same attitude that gives top management

stock options, gives them retirement after a small serving period whereas the middle worker, the lower economic worker takes a terrible beating.

. . . . . .

"SENATOR SCHWEIKER: What we're proposing to do a little bit what was done with the bank failure problem. We didn't go in and take over the banks but we did, by means of insurance and federal deposit insurance corporation come in and guarantee that no depositor would lose his savings under a certain point. And I think that's what we're saying here, that once a worker has put in eight years time, once he's reached a certain age, once his company's reached a certain point, then he doesn't lose it, regardless of what happens to his company or the country.

. . . . . .

"MAN: What are they waiting for? What the hell are they waiting for? Do they have to give us a certain quota, a certain number of people that have to be victims? Do they have to give us a certain amount of money? How many billions must it take before they do something about this? How many people have to starve? How many people have to lay on the sidelines and just hope and pray. How much misery do they want before they actually act upon it?"

Mr. Newman then concluded the program with the following remarks:

"This has been a depressing program to work on but we don't want to give the impression that there are no good private pension plans. There are many good ones, and there are many people for whom the promise has become reality. That should be said.

"There are certain technical questions that we've dealt with only glancingly . . . [portability, vesting, funding, and fiduciary relationship]

"These are matters for Congress to consider and, indeed, the Senate Labor Committee is considering them now. They are also matters for those who are in pension plans. If you're in one, you might find it useful to take a close look at it.

"Our own conclusion about all this is that it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven results for those involved.

"The situation, as we've seen it, is deplorable."

19. This review clearly supports the staff's finding that "The Pensions program . . . did in fact present views which were broadly critical of the performance of the entire private pension system and explicitly advocated and supported proposals to regulate the operation of all private pension plans." 40 FCC 2d at 966. And, as the program itself noted, such views were presented at a time when the Congress was engaged in a study of private pension plans and considering proposed legislation for their regulation – legislation which was opposed in whole or in part by various private and public groups and spokesmen. In its report In the Matter of Editorializing by Broadcast Licensees, 13 FCC 1246 [25 RR 1901] (1949), the Commission stated:

> ". . . 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." Id. at 1256; quoted with approval in New Broadcasting Co. (WLIB), 6 RR 258 (April 12, 1950).

We believe that this principle of fairness is applicable here. Although the "Pensions" program did not specifically identify or advocate passage of any particular bill pending in the Congress, it did present views that existing laws offer only "meager protection," that "pension funds have outgrown the laws regulating them," that "the federal government ought to take a more active role than it does," and that "controls of the same type we apply to insurance companies" are needed. The program also presented the views of two Senators, one denying the validity of the "premises" underlying private pension plans, the other advocating a proposal to guarantee the vesting of pension rights. And throughout the program, the entire private pension system was characterized in such terms as "essentially a consumer fraud, a shell game and a hoax," "woefully inadequate," a "mockery," and a "national disgrace." As the foregoing review of the program illustrates, these examples are by no means exhaustive of the views which were in fact presented and in this regard, we do not believe it inaccurate to cite Mr. Neuman's closing remarks as indicative of the actual scope and substance of the viewpoints broadcast in the "Pensions" program:

> "Our own conclusion about all this is that it is almost inconceivable that this enormous thing has been allowed to grow up with so little understanding of it and with so little protection and such uneven results for those involved. The situation, as we've seen it, is deplorable." (Emphasis added).

Given these facts and circumstances, we cannot accept as reasonable a judgment that the "Pensions" program did not present views advocating one side of a controversial issue of public importance within the meaning of the fairness doctrine, that issue being the overall performance of the private pension system and the need for governmental regulation of all private pension plans.

20. Our conclusion is not based upon a singling out, "line-by-line" or "statement-by-statement," of isolated expressions of viewpoints, a procedure we rejected in National Broadcasting Co., 25 FCC 2d 735 [19 RR 2d 59] (1970). Rather it appears to us to be the only conclusion which can be drawn upon review of the program in its entirety, and one which could be avoided only by ignoring a significant and substantial part of the material presented. We note here that in light of the presentation of so many statements sharply criticizing the performance of the entire pension system and strongly recommending the regulation of all private pension plans, it would be an unrealistic oversimplification to characterize the program as one addressing only "some problems of some pension plans." The program did examine such problems, but it would strain the most "permissive standard of reasonableness" past the breaking point to imply that the program was confined to such a limited examination. Indeed, the value of investigative reporting is to raise matters of substantial public interest, and it would be denigrating this high purpose to characterize it in such terms. It is difficult to see why a network would devote its time and effort to a program with no broad impact or value, and we cannot agree that NBC has done so here.

21. Having thus presented viewpoints on one side of the issue of the overall performance and need for regulation of the private pension system, 5/ NBC was obligated under the fairness doctrine to afford reasonable opportunity in its overall programming for the presentation of contrasting views. In its response to the staff's inquiry, NBC stated that prior to the "Pensions" program, it had not "telecast any program dealing extensively with private pensions," and that it had formulated no definite plans to present further programming related to the subject of pensions in the future. 40 FCC 2d at 967. Thus, the only NBC programming in which contrasting views might have been presented was the "Pensions" documentary itself. In a footnote to its Application for Review, NBC appears to argue that the program, in any event, did afford a reasonable opportunity for contrasting views in that "There were at least 3 statements on the program that were – by any definition – 'pro-pension plan.'" Here it cites the above-quoted statements of Messrs. Russell Hubbard and Kenneth Anderson and Mr. Neuman's concluding remark that there are "many good [pension plans], and there are many people for whom the promise has become a reality." We believe, however, that the staff was correct in its finding that although these statements "could be taken to present a contrasting view, they alone cannot be said to have afforded the reasonable opportunity contemplated by the fairness doctrine when compared to the views presented during the remainder of the program." As we have stated, while "there is no mathematical formula" for achieving fairness, "the sheer weight on one side as against the other" may indicate that no reasonable opportunity has in fact been afforded. Committee for the Fair Broadcasting of Controversial Issues, supra, at 293. As our review of the program indicates, it is not necessary to apply any "mathematical" formula here to ascertain that the overwhelming weight of the statements presented in the program supported the view that the overall

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5/ We should also point out that a program examining serious faults in an existing situation can of course present one side of an issue even though no remedial proposal is presented.

performance of private pension plans was "deplorable" and that the pension system should be regulated to rectify that situation, and that the "pro-nsion" statements cited by NBC were insufficient in either number or substance to constitute a reasonable opportunity for the presentation of an opposing viewpoint. The staff, therefore, properly requested NBC to advise the Commission as to how it intended to meet its obligation under the fairness doctrine to afford such opportunity.

22. NBC broadly contends that any affirmance of the Bureau's ruling by the Commission would be "inconsistent with the declared purpose of the fairness doctrine" to insure an "uninhibited, robust, and wide-open" discussion of public issues and would lead broadcasters "to take a bland course rather than a brave one." In support of this conclusion, NBC submits that the "concept" and "essence" of the staff's decision is that "whenever a social problem is exposed . . ., 'balance' must be achieved by including 'positive' material to minimize the nature of the problem" and that "unless NBC is prepared to promise further programming setting forth at still greater length than in 'Pensions' the view that the pension system as a whole is a success, NBC may not broadcast its program examining some problems in private pension plans." Such a result, NBC claims, would be "antithetical to the essence of journalism itself" and would place the Commission at "the center of the journalistic process." We cannot agree. First of all, NBC should understand that our fairness doctrine ruling indicates no Commission view as to the merits of the program, and certainly no suggestion that this particular program was in any sense flawed or improper. We have previously stated our recognition of the value of investigative reporting and our steadfast intention to do nothing to interfere with or inhibit it. See WBBM-TV, 18 FCC 2d 124, 134 [16 RR 2d 207] (1969); Hunger in America, 20 FCC 2d 143, 150 [17 RR 2d 674] (1969). However, while NBC is to be commended for airing such an "uninhibited, robust, and wide-open" presentation of one side of the pensions issue, we cannot sanction its reluctance to afford a reasonable opportunity for opposing viewpoints to be heard. This is the crux of the matter. The issue is not whether NBC or any other licensee or network is free to deal with an issue as it sees fit, but whether it may constitutionally be required to present the views of others who may see the issue from a different perspective. This issue has been decided adversely to NBC's present position in Red Lion Broadcasting Co. v. FCC, 395 US 367 [16 RR 2d 2029] (1969), unless for some particular reason the effect of our ruling in this case is to impair NBC's capacity to pursue its journalistic function. 6/

6/ As the Commission stated in its report In the Matter of Editorializing by Broadcast Licensees, supra:

"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 dissemination of news and ideas concerning the vital issues of the day. . . . 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 . . . And we have recognized, with respect to such programs,

[Footnote continued on following page]

23. NBC does not dispute that there are many private and public groups and spokesmen who oppose the view that the overall performance of the private pension system is so "deplorable" as to require remedial legislation. And we see no impediment to affording the public a reasonable opportunity to be informed of those opposing viewpoints and to weigh their merit. As we have often stated, the opposing views need not be presented in the same program; there is thus no basis for any claim that our ruling makes impossible the sort of program NBC has already presented. NBC was free to determine format, spokesmen, time, and similar matters, as it thought best. We are unable to understand what prevented it from affording a further opportunity to those with differing views, aside from a reluctance to make more time available. Any such reluctance of course would not be a valid reason under the fairness doctrine nor a basis for a claim of intrusion upon its right of free expression. That is a cardinal teaching of the Supreme Court's affirmance of the fairness doctrine which may not yet be fully understood. 7/

24. Furthermore, neither the staff's ruling nor our affirmance of its decision here holds that NBC must now produce and broadcast another one-house documentary "dealing with happy pensioners" or portraying the pension system as "a success." As we have stated, NBC's obligation is to

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6/ [Footnote continued from preceding page]

the paramount right of the public to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning those vital and often controversial issues which are held by the various groups which make up the community." Id. at 1249. [Emphasis added]

7/ See Red Lion Broadcasting Co. v. FCC, 395 US 367 (1969):

"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. 395 US at 388.

. . . . . .

"(T)he 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. 395 US at 391.

. . . . . .

"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.'" 395 US at 392 (Citation omitted).

afford a reasonable opportunity in its overall programming for the public to be informed as to the views of groups or individual spokesmen opposed to the viewpoint that the private pension system has performed poorly and should be regulated. Just as NBC was not required to present those views in its "Pensions" documentary, it is not now required to present them in any particular program or format. There is no requirement that any precisely equal balance of views be achieved, and all matters concerning the particular opposing views to be presented and the appropriate spokesmen and format for their presentation are left to NBC's discretion subject only to a standard of reasonableness and good faith. We note in this regard that NBC cites a long list of subjects concerning the vesting and portability of pension rights, the adequacy of plan funding and payments upon retirement, and the fiduciary relationship in pension plan management, and claims that under the staff's analysis and ruling each of these might be considered a distinct controversial issue of public importance entitled to separate treatment under the fairness doctrine. However, neither the staff's ruling nor our decision here gives grounds for such an overly-broad interpretation. While each of the subjects cited is an aspect of overall pension plan performance, there is no information before the Commission to indicate that these subjects are by themselves independent controversial issues of public importance. NBC may very well consider these subjects in determining what contrasting viewpoints to present on the overall issue of the performance and need for regulation of private pension plans, but the applicability of the fairness doctrine to that issue does not require their wholly separate treatment or discussion. See National Broadcasting Co., supra, at 736-37. Under these circumstances we can see no merit in NBC's argument that the ruling in this case is inconsistent with either the purpose of the fairness doctrine or the journalistic discretion afforded the broadcaster in determining how to comply with his fairness obligations.

25. Little more need be said with respect to NBC's contention that this particular application of the fairness doctrine marks an unwarranted intrusion into the journalistic process or is in any way violative of broadcaster prerogatives protected by the First Amendment. While we have consistently recognized the journalistic discretion afforded licensees under our system of broadcasting and the need for Commission deference to licensee judgments in matters concerning their news and news documentary programs, we cannot uphold a patently unreasonable exercise of that discretion which would deny the right of the public to be informed as to both sides of a controversial issue which in fact has been presented by such programming. As the Supreme Court stated in affirming the constitutionality of the fairness doctrine:

> "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 broadcasters, which is paramount. 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 government itself or a private licensee . . . ." Red Lion Broadcasting Co. v. FCC, 395 US 367, 390 [16 RR 2d 2029] (1968) [Emphasis added].

If the broadcaster's First Amendment interest in freedom of journalistic expression is greatest in the area of the presentation of news and news documentaries, then the right of the public to have access to the various competing viewpoints on controversial issues discussed in such presentations is certainly no less compelling. News and news documentaries usually treat of public affairs, and for this reason perhaps no other vehicles of broadcast speech should function more consistently with the First Amendment's purpose of fostering "uninhibited, robust, and wide-open" debate with respect to the public issues which they present and discuss. NBC has a journalist's role; it has an additional role as a public trustee of providing a forum for diverse views on public issues. The two roles are not incompatible.

26. We note NBC's reliance on the recent decision of the Supreme Court in Columbia Broadcasting System v. Democratic National Committee, _____ US _____, 36 L. Ed. 2d 772 [27 RR 2d 907] (1973) which held that neither the public interest standard nor the First Amendment requires broadcasters to sell commercial time to persons wishing to discuss controversial issues. Although NBC cites the Court's affirmation of licensee discretion in the selection and choice of broadcast material as controlling the questions presented here, see _____ US _____, 36 L. Ed 2d at 796 (1973), there is nothing in the Court's opinion to suggest that such journalistic discretion relieves the broadcaster of his obligation to the public to cover fairly those issues which he in fact presents. To the contrary, the Court emphasized that concentrating the "allocation of journalistic priorities" in the licensee "gives the public some assurance that the broadcaster will be answerable if he fails to meet their legitimate needs," _____ US at _____, 36 L. Ed. 2d at 796. Similarly, in rejecting the contention that "the Fairness Doctrine permits broadcasters to preside over a 'paternalistic' regime," the Court stated:

> "That doctrine admittedly has not always brought to the public perfect or indeed even consistently high quality treatment of all public events and issues; but the remedy does not lie in diluting licensee responsibility . . . . [W]hile the licensee has discretion in fulfilling his obligations under the Fairness Doctrine, he is required to 'present representative community views and voices on controversial issues which are of importance to his listeners.'" _____ US _____ 36 L. Ed. 2d at 799-800 [Emphasis added]

We therefore can see no valid First Amendment ground for allowing the private journalistic interests of licensees to destroy their public obligation to afford a reasonable opportunity for the presentation of contrasting views on controversial issues raised in news and news documentaries. As the Court held in its decision in Red Lion, supra:

> "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 a 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." 395 US 367, 389.

We have discussed these matters at length, and perhaps somewhat repetitiously, because, although not novel, they are important and we wish to be perfectly clear, to the end that licensees will feel no improper constraint but will be reminded of their legal obligations.

27. One further matter deserves attention here. Information before the Commission indicates that pending our review of the Bureau's ruling in this matter, AIM sent correspondence to NBC affiliates stating that it would enter notice of the staff's finding in the renewal file of each station carrying the "Pensions" program and requesting that it be advised as to whether or not the affiliate had broadcast the program, and, if so, what it had presented to comply with its fairness obligations. AIM should be advised that while licensees remain ultimately responsible for the programming which they carry, the Commission has held that they may initially look to network action for compliance with broadcast obligations originating with network programming. See Blair Clark, 11 FCC 2d 511 [12 RR 2d 106] (1968). More importantly, AIM should note that under the Commission's Rules and Regulations a party adversely affected by a staff ruling issued pursuant to delegated authority may seek review of that ruling by the full Commission as a matter of right. See 47 CFR §1.115.

28. Accordingly, it is ordered, that NBC's Application for Review is denied. It is further ordered that NBC submit a statement within 20 days of the date of this decision indicating how it intends to fulfill its fairness doctrine obligations in accordance with this opinion.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 74-1174
24950

In the Matter of)
)
Petition of Action for Children's Television) DOCKET NO. 19142
(ACT) for Rulemaking Looking Toward the)
Elimination of Sponsorship and Commercial)
Content in Children's Programming and the)
Establishment of a Weekly 14 Hour Quota of)
Children's Television Programs)

CHILDREN'S TELEVISION REPORT AND POLICY STATEMENT
(Adopted October 24, 1974 ; Released October 31, 1974)

BY THE COMMISSION: Commissioners Lee and Reid concurring in the result; Commissioner Hooks concurring and issuing a statement; Commissioner Washburn issuing additional views; Commissioner Robinson issuing a separate statement.

I. Introduction

1. By notice issued January 26, 1971 (Docket 19142, 28 FCC 2d 368) we instituted a wide-ranging inquiry into children's programming and advertising practices.

2. This inquiry was instituted at the request of Action for Children's Television (ACT) and our notice specifically called for comment on ACT's proposal that the Commission adopt certain guidelines for television programming for children. These guidelines are as follows:

(a) there shall be no sponsorship and no commercials on children's television.

(b) no performer shall be permitted to use or mention products, services or stores by brand names during children's programs, nor shall such names be included in any way during children's programs.

(c) each station shall provide daily programming for children and in no case shall this be less than 14 hours a week, as part of its public service requirement. Provision shall be made for programming in each of the age groups specified below, and during the time periods specified: (i) Pre-school: Ages 2-5 7 a.m. - 6 p.m. daily, 7 a.m. - 6 p.m. weekends; (ii) Primary: Ages 6-9 4 p.m. - 8 p.m. daily, 8 a.m. - 8 p.m. weekends; (iii) Elementary: Ages 10-12 5 p.m. - 9 p.m. daily, 9 a.m. - 9 p.m. weekends.

3. In addition to comments on the specific ACT proposal, the Commission requested interested parties to submit their views on such issues as the proper definition of what constitutes "children's programming", the appropriate hours for broadcasting children's programs, the desirability of providing programs designed for different age groups, commercial time limitations, separation of advertising from programming content, and other areas of concern. The Commission also requested all television licensees and networks to submit detailed information on their current children's programming practices, including a classification of programs as being either entertainment or educational. We gave notice that this information might be used as a basis for formulating rules concerning programming and advertising in children's television.1/

4. The response to our notice was overwhelming. More than 100,000 citizens expressed their opinions in writing and the accumulated filings fill 63 docket volumes. This material falls into three main categories: formal pleadings, programming data from stations and networks, and informal expressions of opinion (letters and cards).2/

1/ The scope of the Commission's inquiry in this proceeding did not extend to the issues of violence and obscenity in television programming. The House and Senate Committees on Appropriations, however, have requested the Commission to submit a report by December 31, 1974, outlining the actions we plan to take in these areas. We will, therefore, address the problems of violence and obscenity at that time.

2/ A digest of comments appears in Appendix A.

5. To apprise itself further of the various issues involved in children's television, the Commission conducted panel discussions focusing on specific areas of interest on October 2, 3, and 4 of 1972.3/ Forty-four individuals took part in these discussions, including representatives of citizens groups, broadcasters, advertisers and performers. These panel discussions were followed by oral argument which was presented before the Commission on January 8, 9, and 10 of 1973.4/ Forty-one persons participated in the oral argument, representing public interest groups, advertisers, educators, licensees, producers and performers.

6. The record in this proceeding includes 1252 pages of transcript in addition to further comments and the previously mentioned 63 docket volumes.

II. Children's Television Programming

7. We believe that proposals for a set amount of programming for children of various age groups should appropriately be considered in terms of our statutory authority and against the background of the Commission's traditional approach to program regulation.

A. Scope of Commission Authority Concerning Programming

8. Section 303 of the Communications Act, 47 U.S.C. §303, confers upon the Commission broad authority to regulate broadcasting as the "public convenience, interest, or necessity" requires. On the basis of this standard, the Commission is empowered by Section 303(b), 47 U.S.C. §303(b), to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class." (emphasis supplied.) The Commission is further authorized to: "[c]lassify radio stations"; "provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest"; and "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." 47 U.S.C. §§303(a), (g) and (r).

3/ Participants in the panel discussions are listed in Appendix B.

4/ Oral argument participants are listed in Appendix C.

9. The Supreme Court has made it clear that these provisions do not limit the Commission to the role of a "traffic officer, policing the wave lengths to prevent stations from interfering with each other." National Broadcasting Co. v. United States, 319 U.S. 190, 215 (1943). "[T]he Act," the Court held, "does not restrict the Commission merely to supervision of the traffic." Id. at 215-16. The Commission neither exceeds its powers under the Act nor transgresses the First Amendment "in interesting itself in general program format and the kinds of programs broadcast by licensees." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). But, while the Commission's statutory authority is indeed broad, it is certainly not unlimited. Broadcasting is plainly a medium which is entitled to First Amendment protection. United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948). Although the unique nature of the broadcasting medium may justify some differences in the First Amendment standard applied to it, it is clear that any regulation of programming must be reconciled with free speech considerations. In Section 326 of the Act, 47 U.S.C. §326, Congress has expressed its concern by expressly prohibiting "censorship" by the Commission. For these reasons, the Commission historically has exercised caution in approaching the regulation of programming:

> "[I]n applying the public interest standard to programming, the Commission walks a tightrope between saying too much and saying too little. In most cases it has resolved this dilemma by imposing only general affirmative duties -- e.g., to strike a balance between various interests of the community, or to provide a reasonable amount of time for the presentation of programs devoted to the discussion of public issues. The licensee has broad discretion in giving specific content to these duties . . . . Given its long-established authority to consider program content, this approach probably minimizes the dangers of censorship or pervasive supervision." Banzhaf v. FCC, 405 F. 2d 1082, 1095 (D.C. Cir. 1968), cert. denied sub nom. Tobacco Institute v. FCC, 396 U.S. 842 (1969).

We believe that this traditional approach is, in most cases, an appropriate response to our obligation to assure programming service in the public interest and, at the same time, avoid excessive governmental interference with specific program decisions.

B. History of General Program Categories

10. In 1929, the Federal Radio Commission adopted the position that licensees were expected to provide a balanced program schedule designed to serve all substantial groups in their communities. Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32, 34 (1929), rev'd on other grounds 37 F. 2d 993, cert. dismissed 281 U.S. 706 (1930). At this time, the Commission set forth a number of general programming categories which it believed should be included in the broadcast service of each station:

> "[T]he tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports, and news, and matters of interest to all members of the family find a place." Id.

In listing these programming categories, the Commission made it clear that it did not "propose to erect a rigid schedule specifying the hours or minutes that may be devoted to one kind of program or another." Id. Its purpose was only to emphasize the general character of programming to which licensees must conform in order to fulfill their public service responsibility. While the Commission's list did include "matters of interest to all members of the family", children's programs were not specifically recognized as a distinct category entitled to special consideration.

11. In 1946, the Federal Communications Commission reaffirmed the FRC's emphasis on a "well-balanced program structure", and noted that since at least 1928 license renewal applications had been required "to set forth the average amount of time, or percentage of time, devoted to entertainment programs, religious programs, educational programs, agricultural programs, fraternal programs, etc." FCC, Report on Public Service Responsibility of Broadcast Licensees 12-13 (1946) (hereinafter cited as The Blue Book). In line with the views of its predecessor, the FCC did not recognize programs for children as an independent category and no suggestion was made as the percentage of time that should be devoted to any category.

12. The Commission's first recognition of children's programs as a distinct category came in the 1960 statement of basic programming policy. Report and Statement of Policy Re: Programming, 20 P&F R.R. 1901 (1960). In this report, "Programs for Children" was listed as one of fourteen "major elements usually necessary to meet the public interest, needs and desires of the community." Id. at 1913. The fourteen elements included such matters as educational programs, political broadcasts, public affairs programs, sports, entertainment and service to minority groups. No special emphasis was given to children's programming over and above these other categories, and again the Commission made it clear that its list was "neither all-embracing nor constant" and that it was not "intended as a rigid mold or fixed formula for station operation." Id. The ultimate decision as to the presentation of programs was left to the licensee, who was expected, however, to make a positive effort to provide a schedule designed to serve the varied needs and interests of the people in his community.

13. The Supreme Court, in its landmark decision in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), gave considerable support to the principle that the FCC could properly interest itself in program categories. In this decision, the Court specifically affirmed the Commission's fairness doctrine and noted that the doctrine (in addition to requiring a balance of opposing views) obligates the broadcaster to devote a "reasonable percentage" of broadcast time to the discussion of controversial issues of public importance. The Court made it plain that "the Commission is not powerless to insist that they give adequate . . . attention to public issues." Id. at 393.

14. While the holding of the Red Lion case was limited to the fairness doctrine, the Court's opinion has a significance which reaches far beyond the category of programming dealing with public issues. The Court resolved the First Amendment issue in broadcasting by stating that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." Id. at 390. It stated further, that "[i]t 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 the Congress or by the FCC." Id. This language, in our judgment, clearly points to a wide range of programming responsibilities on the part of the broadcaster.

C. Programs Designed for Children

15. One of the questions to be decided here is whether broadcasters have a special obligation to serve children. We believe that they clearly do have such a responsibility.

16. As we have long recognized, broadcasters have a duty to serve all substantial and important groups in their communities, and children obviously represent such a group. Further, because of their immaturity and their special needs, children require programming designed specifically for them. Accordingly, we expect television broadcasters, as trustees of a valuable public resource, to develop and present programs which will serve the unique needs of the child audience.

17. As noted above, the Federal Radio Commission and the Federal Communications Commission have consistently maintained the position that broadcasters have a responsibility to provide a wide range of different types of programs to serve their communities. Children, like adults, have a variety of different needs and interests. Most children, however, lack the experience and intellectual sophistication to enjoy or benefit from much of the non-entertainment material broadcast for the general public. We believe, therefore, that the broadcaster's public service obligation includes a responsibility to provide diversified programming designed to meet the varied needs and interests of the child audience.

18. In this regard, educational or informational programming for children is of particular importance. It seems to us that the use of television to further the educational and cultural development of America's children bears a direct relationship to the licensee's obligation under the Communications Act to operate in the "public interest." Once these children reach the age of eighteen years they are expected to participate fully in the nation's democratic process, and, as one commentator has stated:

> "Education, in all its phases, is the attempt to so inform and cultivate the mind and will of a citizen that he shall have the wisdom, the independence, and, therefore, the dignity of a governing citizen. Freedom of education is, thus, as we all recognize, a basic postulate in the planning of a free society." A. Meiklejohn, The First Amendment is an Absolute, in 1961 Supreme Court Review 245, 257 (Kurland ed.); see generally Brennan, The Supreme Court and the

Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965).5/

We believe that the medium of television can do much to contribute to this educational effort.

Amount of Programming for Children

19. While we are convinced that television must provide programs for children, and that a reasonable part of this programming should be educational in nature, we do not believe that it is necessary for the Commission to prescribe by rule the number of hours per week to be carried in each category. As noted above, we are involved in a sensitive First Amendment area, and we feel that it is wise to avoid detailed governmental supervision of programming whenever possible. Furthermore, while the amount of time devoted to a certain category of program service is an important indicator, we believe that this question can be handled appropriately on an ad hoc basis.6/ Rules would, in all probability, have been necessary had we decided to adopt ACT's proposal to ban advertising from children's programs. As explained below, however, we have not adopted that proposal and it may be expected that the commercial marketplace will continue to provide an incentive to carry these programs.

20. Even though we are not adopting rules specifying a set number of hours to be presented, we wish to emphasize that we do expect stations to make a meaningful effort in this area. During the course of this inquiry, we have found that a few stations present no programs at all for children. We trust that

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5/ In the words of the Supreme Court, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." Prince v. Massachusetts, 321 U.S. 158, 168 (1943).

6/ We are just beginning to receive complete information on the children's programming performance of stations through question 6 in Section 4-B of the new renewal form. FCC Form 303. It may be that the question of rules will be revisited as we gain experience under the new form. The Commission's Notice of Inquiry requested licensees to provide it with complete information on their program service to children on a voluntary basis; unfortunately, too few responded to provide a valid sample.

this Report will make it clear that such performance will not be acceptable for commercial television stations which are expected to provide diversified program service to their communities.

Educational and Informational Programming for Children

21. Our studies have indicated that, over the years, there have been considerable fluctuations in amount of educational and informational programming carried by broadcasters -- and that the level has sometimes been so low as to demonstrate a lack of serious commitment to the responsibilities which stations have in this area.7/ Even today, many stations are doing less than they should.

22. We believe that, in the future, stations' license renewal applications should reflect a reasonable amount of programming which is designed to educate and inform -- and not simply to entertain. This does not mean that stations must run hours of dull "classroom" instruction. There are many imaginative and exciting ways in which the medium can be used to further a child's understanding of a wide range of areas: history, science, literature, the environment, drama, music, fine arts, human relations, other cultures and languages, and basic skills such as reading and mathematics which are crucial to a child's development. Although children's entertainment programs may have some educational value (in a very broad sense of the term), we expect to see a reasonable amount of programming which is particularly designed with an educational goal in mind.8/

7/ In 1968 and 1969, for example, none of the networks carried a single informational program in its Saturday morning line-up of children's shows, and only one network presented an educational program during the week.

8/ As a general matter, programs of this type are logged as "Instructional" in accord with the provisions of Section 73.670 of the Commission's rules. The rule defines instructional programming so as to include "programs...involving the discussion of, or primarily designed to further an appreciation or understanding of, literature, music, fine arts, history, geography, and the natural and social sciences..." 47 CFR 73.760, Note 1(f). Typically, such programs as Captain Kangaroo, Multiplication Rock, and Wild Kingdom are logged as instructional.

23. We would like to make it clear, however, that we do not necessarily expect the broadcaster to have programs designed to cover every subject or field of interest. We simply expect the licensee to select the particular areas where he believes that he can make the best contribution to the educational and cultural development of the children in his community -- and then to present programming designed to serve these needs. The Commission will, of course, defer to the reasonable, good faith judgments which licensees make in this area.9/

Age-Specific Programming

24. In its original petition, ACT requested the Commission to require broadcasters to present programming designed to meet the needs of three specific age groups: (1) pre-school children, (2) primary school aged children, and (3) elementary school aged children. During the panel discussions before the Commission, however, ACT and several of the other parties agreed that the presentation of programming designed to meet the needs of just two groups, pre-school and school aged children, would be sufficient to meet the broadcaster's responsibilities to the child audience.

25. While we agree that a detailed breakdown of programming into three or more specific age groups is unnecessary, we do believe that some effort should be made for both pre-school and school aged children. Age-specificity is particularly important in the area of informational programming because pre-school children generally cannot read and otherwise differ markedly from older

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9/ Another area of concern to many of the critics of children's programming in this proceeding was the emphasis on fantasy in the animated cartoons and in other "fanciful" programs which dominate the children's schedule. Such programming, it is argued, does not offer children the diversified view of the world of which television is capable. While the Commission recognizes that cartoons can do much to provide wholesome entertainment for young children, we note that the networks have broadened their schedules for this Fall to include more live-action shows and more representations of "real" people interacting with their families and the world around them. We commend the networks for being responsive to these concerns and for having made an effort to provide programming which meets the varied needs and interests of the child audience.

children in their level of intellectual development. 10/ A recent schedule indicated that, although one network presented a commendable five hours a week for the pre-school audience, the others did not appear to present any programs for these younger children. In the future, however, we will expect all licensees to make a meaningful effort in this area.

Scheduling

26. Evidence presented in this inquiry indicates that there is tendency on the part of many stations to confine all or most of their children's programming to Saturday and Sunday mornings. We recognize the fact that these are appropriate time periods for such shows, but are nevertheless concerned with the relative absence of children's programming on weekdays. It appears that this lack of weekday children's programs is a fairly recent development. In the early 1950's, the three networks broadcast twenty to thirty hours of children's programming during the week. During the late fifties and early sixties many popular shows such as "Howdy Doody", "Mickey Mouse Club" and "Kukla, Fran and Ollie" disappeared, and, by the late sixties, "Captain Kangaroo" was the only weekday children's show regularly presented by a network. While some stations, particularly those not affiliated with networks, do provide weekday programming for children, there is nevertheless a great overall imbalance in scheduling.

27. It is clear that children do not limit their viewing in this manner. They form a substantial segment of the audience on weekday afternoons and early evenings as well as on weekends. In fact, the hours spent watching television on Saturday and Sunday constitute, on an average, only 10% of their total viewing time. (A.C. Nielsen Company, February, 1973). Accordingly, we do not believe that it is a reasonable scheduling practice to relegate all of the programming for this important audience to one or two days. Although we are not prepared to adopt a specific scheduling rule, we do expect to see considerable improvement in scheduling practices in the future.

10/ With regard to entertainment programming, there is considerable evidence that pre-school children, unlike older children, cannot distinguish fantasy from reality. It does not follow, however, that because a program is not age-specific, it cannot provide wholesome entertainment for all ages. Therefore, while there may be some value in age-specific entertainment programming, we cannot say that this is necessary in every case.

III. Advertising Practices

A. Background

28. The second major area of concern in this inquiry has to do with advertising practices in programs designed for children. In its original petition, ACT requested that the Commission eliminate all commercials on programs designed for children and prohibit any other use or mention of any product by brand name. During the course of the proceeding various parties criticized the amount of commercial matter now directed toward children, the frequency of program interruptions and a variety of other specific advertising practices: these included the use of program talent to deliver commercials ("host selling") or comment on them ("lead-ins and/or outs"); the prominent display of brand name products on a show's set ("tie-ins"); the presentation of an unrealistic picture of the product being promoted; and the advertising generally of products which some parties consider harmful to children (e.g., snack foods, vitamins and drugs).

29. The Commission's statutory responsibilities include an obligation to insure that broadcasters do not engage in excessive or abusive advertising practices. The Federal Radio Commission warned in 1928 that "advertising must not be of a nature such as to destroy or harm the benefit to which the public is entitled from the proper use of broadcasting." 2 F.R.C. Ann. Rep. 20 (1928). In 1929 the FRC again considered the advertising problem in the context of the licensee's responsibility to broadcast in the public interest. Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929). The Commission noted that broadcasters are licensed to serve the public and not the private or selfish interests of individuals or groups. It then stated that "[t]he only exception that can be made to this rule has to do with advertising; the exception, however, is only apparent because advertising furnishes the economic support for the service and thus makes it possible." Id. The FRC recognized "that, without advertising, broadcasting would not exist, and [that it] must confine itself to limiting this advertising in amount and in character so as to preserve the largest possible amount of service for the public." Id. at 35. (emphasis supplied). The FCC, over the years, has maintained a similar position. See The Blue Book, supra, 40-41; Report and Statement of Policy Re: Programming, supra, at 1913.

30. Traditionally, however, the Commission has not attempted to exercise direct supervision over all types of advertising abuses. Since the Federal Trade Commission has far greater expertise in, and resources for, the regulation of false or deceptive advertising practices, the FCC has largely confined its role in this area to notifying stations that the broadcast of material found to be false or deceptive by the FTC will raise questions as to whether the station is operating in the public interest. See Public Notice entitled "Licensee Responsibility with Respect to the Broadcast of False, Misleading and Deceptive Advertising, FCC 61-1316 (1961); Consumers Association of District of Columbia, 32 FCC 2d 400 (1971). We do not believe that it would be appropriate to change this policy at the present time. The Federal Trade Commission is currently conducting inquiries into advertising practices on children's programs (F.T.C. File No. 7375150) and food advertising (F.T.C. File No. 7323054) which cover many of the advertising practices objected to by the parties before the Commission. In light of the actions of the FTC, we have chosen not to address some of these specific promotional practices. On the basis of this proceeding, however, we are persuaded that an examination of the broadcaster's responsibility to children is warranted in the areas of the overall level of commercialization and the need for maintaining a clear separation between programming and advertising.

B. Overcommercialization

31. While it is recognized that advertising is the sole economic foundation of the American commercial broadcasting system and that continued service to the public depends on broadcasters' ability to maintain adequate revenues with which to finance programming, the Commission has a responsibility to insure that the "public interest" does not become subordinate to financial and commercial interests. Although this proceeding marks the first instance in which the level of advertising on programs designed for children has been singled out as possibly abusive, the Federal Government has been concerned about the problem of overcommercialization in general since the beginning of broadcast regulation. In 1929, the Federal Radio Commission took the position that the "amount and character of advertising must be rigidly confined within the limits consistent with the public service expected of the station." Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. at 35 (1929). The Federal Communications Commission has continued this policy. In 1946, for example, the Commission noted that, "[a]s the broadcasting system itself has insisted, the public interest clearly requires that the amount of time devoted to advertising shall bear a

reasonable relation to the amount of time devoted to programs." The Blue Book, supra. 56. In the definitive 1960 policy statement, licensees were admonished to "avoid abuses with respect to the total amount of time devoted to advertising continuity as well as the frequency with which regular programs are interrupted for advertising messages." Report and Statement of Policy Re: Programming, supra, at 1912-1913.

32. Although some of the parties to this proceeding questioned the Commission's authority to limit the level of commercialization on children's programs, the Commission believes that it has ample authority to act in this area. This issue was raised in conjunction with the Commission's general inquiry into overcommercialization in 1963-1964, when the Commission concluded that it could adopt rules prescribing the maximum amount of time a licensee may devote to advertising:

> Numerous sections of the act refer to the public interest, one element of which clearly is the appropriate division as between program material and advertising. . . . We conceive that our authority to deal with overcommercialization, by whatever reasonable and appropriate means is well established. Amendment of Part 3 of the Commission's Rules and Regulations with Respect to Advertising on Standard, FM, and Television Broadcast Stations, 36 FCC 45, 46 (1964).

If a licensee devoted an excessive amount of his broadcast time to advertising, the Commission could certainly consider that factor in deciding whether a renewal of the license would serve the "public interest". See WMOZ, 36 FCC 201 (1964); Gordon County Broadcasting Co., 24 P&F R.R. 315 (1962); Mississippi Arkansas Broadcasting Co., 22 P&F R.R. 305 (1961). If a given policy is an appropriate consideration in individual cases, then, as the Supreme Court has suggested, "there is no reason why [the policy] may not be stated in advance by the Commission in interpretative regulations defining the prohibited conduct with greater clarity." Federal Communications Commission v. American Broadcasting Company, 347 U.S. 284, 289-290, note 7 (1954).

33. A restriction on the amount of time a broadcaster may devote to advertising does not constitute censorship or an abridgment of freedom of speech. The courts have traditionally held that commercial speech has little First Amendment protection. Valentine v. Christensen, 316 U.S. 52 (1942); Breard v. City of Alexandria, 341 U.S. 622 (1951). A Congressional ban on cigarette advertising on television was held not to violate the First Amendment, in part, because broadcasters "[had] lost no right to speak -- they [had] only lost an ability to collect revenue from others for broadcasting their commercial messages." Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 584 (1971); aff'd 405 U.S. 1000 (1972).

34. If our policy against overcommercialization is an important one, and we believe that it is, it is particularly important in programs designed for children. Broadcasters have a special responsibility to children. Many of the parties testified, and we agree, that particular care should be taken to insure that they are not exposed to an excessive amount of advertising. It is a matter of common understanding that, because of their youth and inexperience, children are far more trusting of and vulnerable to commercial "pitches" than adults. There is, in addition, evidence that very young children cannot distinguish conceptually between programming and advertising; they do not understand that the purpose of a commercial is to sell a product. See Report to the Surgeon General, Television and Growing Up: The Impact of Televised Violence, Vol. IV at 469, 474 (1970). Since children watch television long before they can read, television provides advertisers access to a younger and more impressionable age group than can be reached through any other medium. See Capital Broadcasting Co., supra, at 585-6. For these reasons, special safeguards may be required to insure that the advertising privilege is not abused. As the Supreme Court stated, "[i]t is the interest of youth itself, and of the whole community that children be . . . safeguarded from abuses." Prince v. Massachusetts, 321, U.S. 158, 165 (1943).

35. Despite these concerns, we have chosen not to adopt ACT's proposal to eliminate all sponsorship on programs designed for children. The Commission believes that the question of abolishing advertising must be resolved by balancing the competing interests

in light of the public interest. 11/ Banning the sponsorship of programs designed for children could have a very damaging effect on the amount and quality of such programming. Advertising is the basis for the commercial broadcasting system, and revenues from the sale of commercial time provide the financing for program production. Eliminating the economic base and incentive for children's programs would inevitably result in some curtailment of broadcasters' efforts in this area. Moreover, it seems unrealistic, on the one hand, to expect licensees to improve significantly their program service to children and, on the other hand, to withdraw a major source of funding for this task.

36. Some suggestions were made during the proceeding that institutional advertising or underwriting would replace product advertising if the latter were prohibited. Although we would encourage broadcasters to explore alternative methods of financing, at this time there is little evidence that the millions of dollars necessary to produce children's programs would, in fact, be forthcoming from these sources. Since eliminating product advertising could have a serious impact on program service to children, we do not believe that the public interest would be served by adopting ACT's proposal.

37. The present proceeding has indicated, however, that there is a serious basis for concern about overcommercialization on programs designed for children. Since children are less able to understand and withstand advertising appeals than adults, broadcasters should take the special characteristics of the child audience into consideration when determining the appropriate level of advertising in programs designed for them. Many broadcasters substantially exceed the level of advertising that represents the best standard followed generally in the industry. The Television Code of the National Association of Broadcasters, for example, permits only nine minutes and thirty seconds of non-program material (including commercials) in "prime-time" programming (i.e., 7:00-11:00). In contrast, many stations specify as much as sixteen minutes of commercial matter an hour for those time periods in which most children's programs are broadcast.

11/ At one time the Commission maintained the position that "sustaining" programming (which was not commercially sponsored) played an important role in broadcasting. The Commission's 1949 policy statement placed considerable emphasis on sustaining programs to assure balanced programming and to serve minority tastes and interests. The Blue Book, supra, 12. In 1960, however, the Commission reversed its position on the grounds that "under modern conditions sponsorship fosters rather than diminishes the availability of important public affairs and 'cultural' broadcast programming." Report and Statement of Policy Re: Programming, supra, at 1914.

38. Although advertising should be adequate to insure that the station will have sufficient revenues with which to produce programming which will serve the children of its community meaningfully, the public interest does not protect advertising which is substantially in excess of that amount. These revenues, moreover, need not be derived solely from programs designed for children.

39. On the basis of this proceeding, the Commission believes that in many cases the current levels of advertising in programs designed for children are in excess of what is necessary for the industry to provide programming which serves the public interest. Recently, following extensive discussions with the Commission's Chairman, the National Association of Broadcasters agreed to amend its code to limit non-program material on children's programs to nine minutes and thirty seconds per hour on weekends and twelve minutes during the week by 1976; the Association of Independent Television Stations (INTV) has agreed to reduce advertising voluntarily to the same level. By these actions the industry has indicated that these are advertising levels which can be maintained while continuing to improve service to children.

40. The Commission's own economic studies support this assumption. The economic data indicates that there is an "inelasticity of demand" for advertising on children's programs. It appears, therefore, that the level of advertising on children's programs can be reduced substantially without significantly affecting revenues because the price for the remaining time tends to increase. In 1972, for example, the NAB reduced the permissible amount of non-program material on weekend children's programs from 16 to 12 minutes per hour; although the amount of network advertising was cut by 22%, the networks' gross revenues for children's programs fell by only 3%. The Commission anticipates similar results if advertising were further limited to nine minutes per hour: there should be minimal financial hardship on networks and affiliates, although the problem could be somewhat more significant for independent stations. Most independent stations, however, have already agreed to make reductions, and the fact that 12 minutes per hour will still be permitted on weekdays (when most of these stations program for children) should soften any adverse economic effect.

41. The issue remains, however, whether the Commission should adopt per se rules limiting the amount of advertising on programs designed for children or await the results of the industry's attempt to regulate itself. The decisions of the NAB and the INTV to restrict advertising voluntarily are recent developments which occurred during the course of this inquiry and after consultation with the Commission's Chairman and staff. The Commission commends the industry for showing a willingness to regulate itself. Broadcasting which serves the public interest results from actions such as these which reflect a responsive and responsible attitude on the part of broadcasters toward their public service obligations.

42. In light of these actions, the Commission has chosen not to adopt per se rules limiting commercial matter on programs designed for children at this time. The standards adopted by the two associations are comparable to the standards which we would have considered adopting by rule in the absence of industry reform. 12/ We are willing to postpone direct Commission action, therefore, until we have an opportunity to assess the effectiveness

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12/ The actual proposals of the two industry groups are as follows: (1) beginning in January, 1975, the NAB Code will permit broadcasters 10 minutes of non-program material per hour on Saturday and Sunday children's programs and 14 minutes during the week; beginning in January, 1976, these levels will be further restricted to 9 minutes and thirty seconds on weekends and 12 minutes during the week; (2) beginning in January, 1975, the Association of Independent Television Stations will reduce its advertising to 12 minutes per hour on Saturday and Sunday and 14 minutes during the week; beginning in January, 1976, advertising will be limited to 9 minutes and thirty seconds on the weekend and 12 during the week.

The Commission is willing to accept the phased-in reduction proposed by the industry. Although the Commission's economic studies indicate that affiliates probably would not suffer significant economic hardship from an immediate reduction, non-affiliated broadcasters could be affected. The Commission's own economic analysis suggested a gradual implementation of the proposed reduction. Since the NAB members include non-affiliated stations, we believe that both the NAB and INTV proposals are reasonable.

The Commission, in addition, finds the proposed differentials between weekend and weekday programming to be acceptable. Unlike Saturday and Sunday morning when there is no significant audience other than children, weekday mornings and afternoons are attractive periods to program for adults. The more substantial the differential between the permissible level of advertising on children's and adult programs during the week, the greater is the disincentive to program for children on weekdays. Since we are already concerned about the concentration of children's programming on the weekend, we are willing to accept the balance which the industry has struck on this issue.

of these self-regulatory measures. The Commission will expect all licensees, however, to review their commercial practices in programs designed for children in light of the policies outlined by the Commission and the standards now agreed upon by substantial segments of the industry, and to limit advertising to children to the lowest level consistent with their programming responsibilities. If it should appear that self-regulation is not effective in reducing the level of advertising, then per se rules may be required.

43. To insure that the Commission will have adequate information on broadcasters' advertising practices in programs designed for children, we will, in a separate order, amend the renewal form to elicit more detailed information in this area. All licensees will be asked to indicate how many minutes of commercial matter they broadcast within an hour in programs designed for children both on weekends and during the week. The data provided by this question will serve, in part, as a basis for determining whether self-regulation can be effective. In addition, since the Commission's own economic studies and the actions of the industry indicate that nine minutes and thirty seconds on weekend children's programs and twelve minutes during the week are levels which are economically feasible for most licensees to achieve over the next year and a half, the broadcast of more than the amount of advertising proposed by the NAB and the INTV after January 1, 1976, 13/ may raise a question as to whether the licensee is subordinating the interests of the child audience to his own financial interests.

44. For the present, compliance with the advertising restrictions adopted by the industry and endorsed by the Commission will be sufficient to resolve in favor of the station any questions as to whether its commercial practices serve the public interest. Licensees who exceed these levels, however, should be prepared to justify their advertising policy. We recognize that there may be some independent VHF and UHF stations which cannot easily afford such a reduction in advertising; such stations should be prepared to make a substantial and well-documented showing of serious potential harm to support their advertising practices. However, we anticipate accepting very few other justifications for overcommercialization in programs designed for children.

13/ Broadcasters who are not members of either the NAB or the INTV are, of course, not bound by their proposed phased-in reductions. As noted in the conclusion to this Report, however, the Commission expects all licensees to make a good faith effort to bring their advertising practices into conformance with the policies established herein over the period preceding January 1, 1976.

45. We emphasize that we will closely examine commercial activities in programs designed for children on a case-by-case basis. Overcommercialization by licensees in programs designed for young children will raise a question as to the adequacy of a broadcaster's overall performance. The Commission will, in addition, continually review broadcasters' performance on an industry-wide basis. 14/ If self-regulation does not prove to be a successful device for regulating the industry as a whole, then further action may be required of the Commission to insure that licensees operate in a manner consistent with their public service obligations.

C. Separation of Program Matter and Commercial Matter

46. The Commission is concerned, in addition, that many broadcasters do not presently maintain an adequate separation between programming and advertising on programs designed for children. The Commission has ample authority under the Communications Act to require broadcasters to maintain such a separation. Any practice which is unfair or deceptive when directed to children would clearly be inconsistent with a broadcaster's duty to operate in the "public interest" and may be prohibited by the Commission. Section 317 of the Communications Act, in addition, specifically requires that all advertisements indicate clearly that they are paid for and by whom. 47 U.S.C. §317. The rationale behind this provision is, in part, that an advertiser would have an unfair advantage over listeners if they could not differentiate between the program and the commercial message and were, therefore, unable to take its paid status into consideration in assessing the message. Hearings on H.R. 5589 before the House Committee on the Merchant Marine and Fisheries, 69th Cong., 1st Sess., at p. 83 (1926). If inadequate separation contributes to an inability to differentiate programming from advertising, then Commission action designed to maintain a clear separation would further the policies of Section 317.

14/ We wish to stress that self-regulation can only be acceptable in this area if it is effective generally throughout the industry. As the Chairman has stated: "it is important that certain standards apply industry wide and not solely to those broadcasters who voluntarily live up to the highest principles of public service responsibility." Address before the National Academy of Television Arts and Sciences, Atlanta Chapter, Atlanta, Georgia, May 23, 1974.

47. On the basis of the information gathered in the course of the Commission's inquiry, it has become apparent that children, especially young children, have considerable difficulty distinguishing commercial matter from program matter. Many of the participants knowledgeable in the areas of child development and child psychology maintained that young children lack the necessary sophistication to appreciate the nature and purpose of advertising. Also, a study sponsored by the government concluded that children did not begin to understand that commercials were designed to sell products until starting grade school. Report to the Surgeon General, Television and Growing Up: The Impact of Televised Violence, Vol. IV at 469 (1970). Kindergarteners, for example, did not understand the purpose of commercials; the only way they could distinguish programs from commercials was on the basis that commercials were shorter than programs. Id. at 469, 474. The Commission recognizes that, as many broadcasters noted, these findings are not conclusive; psychological and behavioral questions can seldom be resolved to the point of mathematical certainty. The evidence confirms, however, what our accumulated knowledge, experience and common sense tell us: that many children do not have the sophistication or experience needed to understand that advertising is not just another form of informational programming.

48. The Commission believes, therefore, that licensees, when assessing the adequacy of their commercial policies, must consider the fact that children -- especially young children -- have greater difficulty distinguishing programming from advertising than adults. 15/ If advertisements are to be directed to children, then basic fairness requires that at least a clear separation be maintained between the program content and the commercial message so as to aid the child in developing an ability to distinguish between the two.

15/ Although the evidence indicates that this problem is most acute among pre-school children, they can be expected to make up a substantial portion of the audience of virtually all children's programming.

49. Special measures should, therefore, be taken by licensees to insure that an adequate separation is maintained on programs designed for children. One technique would be to broadcast an announcement to clarify when the program is being interrupted for commercial messages and when the program is resuming after the commercial "break." 16/ Another would be to broadcast some form of visual segment before and after each commercial interruption which would contrast sufficiently with both the programming and advertising segments of the program so as to aid the young child in understanding that the commercials are different from the program. In this context, again following discussions with the Commission's Chairman and staff, the NAB Code Authority has recently amended its advertising rules to require a comparable separation device. We applaud this action by the industry to improve advertising practices directed to children. 17/

50. We recognize that this may be an incomplete solution to the problem. Indeed, in view of the lack of sophistication of the child audience, no complete solution may be possible. The broadcast of an announcement and/or a visual device can only aid children in identifying commercials. The Commission believes, however, that the licensee who directs advertising to children has a responsibility to take action to insure that it is presented in as fair a manner as possible. 18/

16/ The Commission notes in this context that similar practices are found in adult programs. Moderators on talk shows and announcers on sports programs often finish a program segment by announcing that the program will resume after the commercial break; sections of entertainment programs are sometimes entitled "Part I," "Part II," and so forth.

17/ The Commission notes in this context that while INTV does not have a code, it has established a committee to consider adopting general standards and guidelines on commercial practices in children's programs in addition to time limitations.

18/ In this connection, broadcasters may wish to consider a suggestion made by several of the parties that limiting the number of program interruptions by grouping commercials can contribute to maintaining a clear separation between programming and advertising. We do not believe that it is necessary at this time for the Commission to require "clustering" of commercials, although further consideration of this matter may be appropriate in the future. But, as we noted in the 1960 Programming Report, licensees should "avoid abuses with respect to . . . the frequency with which regular programs are interrupted for advertising messages." Report and Statement of Policy Re: Programming, supra, at 1912-1913. In this regard, particular care should be taken to avoid such abuses in programs designed for the pre-school audience.

51. The Commission is also concerned that some broadcasters are now engaging in a commercial practice which takes unfair advantage of the difficulty children have distinguishing advertising from programming: the use of program characters to promote products ("host-selling"). In some programs designed for children, the program host actually delivers the commercial in his character role on the program set. In others, although the host does not actually deliver the commercial, he may comment on the advertisement in such a manner as to appear to endorse the product ("lead-in/lead-out").

52. The Commission does not believe that the use of a program host, or other program personality, to promote products in the program in which he appears is a practice which is consistent with licensees' obligation to operate in the public interest. One effect of "host-selling" is to interweave the program and the commercial, exacerbating the difficulty children have distinguishing between the two. In addition, the practice allows advertisers to take unfair advantage of the trust which children place in program characters. Even performers themselves recognize that, since a special relationship tends to develop between hosts and young children in the audience, commercial messages are likely to be viewed as advice from a friend. 19/ The Commission believes that, in these situations, programming is being used to serve the financial interests of the station and the advertiser in a manner inconsistent with its primary function as a service to children. In this regard, it should be noted that many stations, in particular

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19/ As a children's show hostess testified before the Commission: "I watched [a program host] sell Wonder bread for years. I bought Schwinn bicycles because I felt that they were a good thing and because I trusted him. The same thing applies to me in my neighborhood, in my town. I want the children to trust me. I want them to know that when I say something is good, to believe in me, the same way as if I suggested that they attend their school carnival or don't step off the curb when the bus is coming." Lorraine F. Lee-Benner, Transcript of the Panel Discussions, Vol. II, p. 339 (1972).

NAB Code member stations, have already eliminated host selling. 20/

53. Finally, the Commission wishes to caution licensees against engaging in practices in the body of the program itself which promote products in such a way that they may constitute advertising. 21/ The inquiry revealed that some broadcasters weave the prominent display of the brand names of products into the program sets and activities. One program's set, for example, featured a large billboard announcing the "[Brand Name] Candy Corner" under which children were regularly given samples of the brand name candy as prizes. The hostess on another program, before serving a snack to the children on the show, concluded a prayer with the words, "Now you may have your [Brand Name] orange juice from the [XYZ] Dairy." The analysis of the same program showed, in addition, that the children had been given "[the title of the show]" brand toys with which to play; these were carefully displayed to the viewing audience and children were encouraged to purchase these toys so that they could play along at home. One of the clearest examples of incorporating promotional matter

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20/ Public interest questions may also be raised when program personalities or characters deliver commercial messages on programs other than the ones on which they appear. Although this practice would not have the effect of blurring the distinction between programming and advertising, some advantage may be taken of the trust relationship which has been developed between the child and the performer. We recognize, however, that it may not be feasible, as a practical matter, for small stations with limited staffs to avoid using children's show personnel in commercial messages on other programs. While we are not prohibiting the use of selling by personalities on other programs, broadcasters should be cognizant of the special trust that a child may have for the performer and should exercise caution in the use of such selling techniques. This may be particularly important where the personality appears in a distinctive character costume or other efforts are made to emphasize his program role.

21/ ACT originally requested that we ban any mention of products by brand name during the body of a children's program. We are concerned, however, that such a ban would go so far as to prohibit even the critical mention of products and other comment for which no consideration is received. Such a rule would, we believe constitute a form of illegal censorship of programming. Cf., Capital Broadcasting Co. v. Mitchell, supra. Indeed, it would have a chilling effect on any effort to provide consumer education information for children.

into a program was a cartoon series entitled "Hot Wheels" which was the trade name of a toy manufacturer's miniature racing cars; the manufacturer developed an additional line of cars modeled after those featured in the cartoon series. The Commission found that the program itself promoted the use of the product and required the licensee to log more of the program as commercial matter. See Topper Corporation, 21 FCC 2d 148 (1969); American Broadcasting Companies, 23 FCC 2d 132 (1970).

54. Licensees should exercise care to insure that such practices are in compliance with the sponsorship identification requirements of Section 317 of the Communications Act and the Commission's rules on logging commercial matter. Not every mention of a brand name or prominent display thereof necessarily constitutes advertising. All such material, however, should be strictly scrutinized by the broadcaster to determine whether or not it should be treated as commercial matter. See 47 U.S.C. §317(a); FCC Public Notice 63-409, entitled "Applicability of Sponsorship Identification Rules" (1963); 47 CFR 73.670(a)(2), Note 3.

55. Licensees who engage in program practices which involve the mention or prominent display of brand names in children's programs, moreover, should reexamine such programming in light of their public service responsibilities to children. We believe that most young children do not understand that there is a "commercial" incentive for the use of these products and that it is, in fact, a form of merchandising. Any material which constitutes advertising should be confined to identifiable commercial segments which are set off in some clear manner from the entertainment portion of the program. When providing programming designed for children, the conscientious broadcaster should hold himself to the highest standard of responsible practices.

56. The Commission, thus, wishes to stress that this policy statement does not cover every potential abuse in current advertising practices directed to children. Licensees will be expected to reduce the current level of commercialization on programs designed for children, maintain an appropriate separation between programming and advertising, and eliminate practices which take advantage of the immaturity of children. The failure by the Commission to comment on any particular practice, however, does not constitute an endorsement of that practice. Many of these matters are currently under investigation at the Federal Trade Commission. Licensees are again reminded that the broadcast of any material

or the use of any practice found to be false or misleading by the Federal Trade Commission will raise serious questions as to whether the station is operating in the public interest. Broadcasters have, in addition, an independent obligation to take all reasonable measures to eliminate false or misleading material. See Public Notice entitled "License Responsibility with Respect to the Broadcast of False, Misleading and Deceptive Advertising," supra. We will expect licensees to exercise great care in evaluating advertising in programs designed for children and refrain from broadcasting any matter which, when directed to children, would be inconsistent with their public service responsibilities.

IV. CONCLUSION

57. It is believed that this Report will help to clarify the responsibilities of broadcasters with respect to programming and advertising designed for the child audience. We believe that in these areas every opportunity should be accorded to the broadcast industry to reform itself because self-regulation preserves flexibility and an opportunity for adjustment which is not possible with per se rules. In this respect, we recognize that many broadcasters may not currently be in compliance with the policies herein announced. Since this Report constitutes the first detailed examination of broadcasters' responsibilities to children, we do not wish to penalize the media for past practices. The purpose of this Report is to set out what will be expected from stations in the future.

58. We also realize that it will necessarily take some period of time for broadcasters, program producers, advertisers and the networks to make the anticipated changes. 22/ Stations,

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22/ The Commission anticipates that the networks will take the lead in producing varied programming for children. The networks are responsible for the bulk of the programs now being broadcast: they provide most of the children's shows carried by network-owned or affiliated stations and originally produced most of the syndicated material presented by independent stations. Changes in network programming will, therefore, have both an immediate and a long-range impact as programs gradually become available on a syndicated basis. It is also clear that the networks have the financial resources to make a significant effort in this area. The Commission's economic studies indicate that network children's programming has been consistently profitable for many years.

therefore, will not be expected to come into full compliance with our policies in the areas of either advertising or programming until January 1, 1976. In the interim period, however, broadcasters should take immediate action in the direction of bringing their advertising and programming practices into conformance with their public service responsibilities as outlined in this Report.

59. In the final analysis, the medium of television cannot live up to its potential in serving America's children unless individual broadcasters are genuinely committed to that task, and are willing -- to a considerable extent -- to put profit in second place and the children in first. While Government reports and regulations can correct some of the more apparent abuses, they cannot create a sense of commitment to children where it does not already exist.

60. In view of the fact that we plan to evaluate the improvements in children's programming and advertising which are now expected, the proceedings in Docket No. 19142 will not be terminated at this time.

FEDERAL COMMUNICATIONS COMMISSION *

Vincent J. Mullins
Secretary

* See attached Statements of Commissioners Hooks, Washburn and Robinson.

APPENDIX A

SUMMARY OF COMMENTS DOCKET NO. 19142
CHILDREN'S TELEVISION PROCEEDING

1. Because of the volume of material which was filed in this proceeding a digest of the pleadings and the issues raised in them on a party-by-party basis would be repetitious and confusing. Since the same point or opinion may have been expressed by as many as 100 parties in almost as many pleadings, little purpose would be served by specific identification of the sources of a particular view. For this reason, the discussion which follows proceeds on an issue oriented basis. The discussion will indicate, for example, that a point was made by a number of licensees, by independent UHF stations, etc., Specific attribution will be reserved for those situations where the views follow an independent path.

Response to General Questions

2. Question: What types of children's programs not now available do parties believe commercial TV stations should present? For the most part, the licensees who answered this question indicated that they believed that virtually all types of programming for children was already offered A few licensees expressed the view that more programming of a morally or spiritually uplifting quality could be offered and a few others expressed a preference for more programming dealing with real-life situations in an informative or educational approach. ACT, NCCB and others of the opposite persuasion contended that current offerings were disproportionately weighted toward violent and stereotyped entertainment programs with little in the way of enlightened, informative and educational programming fare being offered. Similar expressions came from members of the public who decried the absence or paucity of quality programming for children, with the often noted exception of Sesame Street. Many were quite specific in their objections to particular programs, commercials or the methods followed in the area of children's television programming. The networks pointed to specific new programs to be presented beginning in the fall of 1971 as filling any gaps or inadequacies in their previous children's schedule. 1/ The answers to this question dealt not so much with the total absence of a particular type or category of program 2/ as with relative weight given to the categories in the mix offered or to the approach taken in regard to the formulation of entertainment programming.

1/ It should be pointed out that this information is in part dated.

2/ The only exception was the objection, voiced in a small portion of the letters, to the absence of religious programming devised for and specifically directed to children on any station in several of the markets.

3. Question: To what extent, generally and with respect to particular programs and type of programs, does "children's programming" have benefits to children beyond the fact that it holds their interest and attention and thus removes the need for other activity or parental attention? In actuality, two questions were posed: What value and importance is attached to the attention-holding function or attribute of the programming? and what benefits are there to the programming beyond its ability to occupy children's attention? On the one hand, a number of licensees asserted that as children are occupied watching television they do not require parental attention to keep them out of mischief, and parents freed of their need to pay close attention to their children were said to thus be able to devote themselves to household or other activities. A number of licensees asserted that this ability to hold the attention of children becomes particularly important when, for example, poor weather precludes outside play.

4. Most licensees, however, did not stress the importance of the attention-holding aspect of the programs but instead put their emphasis on the manifold benefits they believed were provided by the programs which are offered. Many licensees, in fact, criticized the notion that television should be used as a baby-sitter, especially when it is used as a means of avoiding parental responsibility. 3/ What did not seem to be in dispute was the idea that children's programs did tend to hold a child's attention. ACT and others contended that the means of doing so were far from worthy and were utilized because of the need to attract the attention of children in the entire 2-12 age range in order to maximize the audience for the program. No one, of course, advocated dull or uninteresting programming which would not hold attention. Rather, the dispute centered on the means which legitimately could be used to garner the attention of a child.

5. By far the majority of comments, formal as well as informal, were in agreement about the significant contributions which television and specifically children's television could offer. 4/ What they did not agree on was the degree to which current programming made such contributions. This difference often was reflected even in the evaluation of a particular program. ACT pointed up this distinction in one of its pleadings in which it contrasted a network's description of a program with its own description. Thus, CBS described a network children's program as a program which "deals with recognizable young human beings in basic situations rather than the way-out world of the traditional animated cartoon". According to ACT, the episode it monitored dealt with the capture of a frozen caveman who later chases the main character's friends, each trying to capture the other until the caveman falls into a giant clam tank and is discovered to be a professor intent on stealing another scientist's inventions.

3/ What is meant here is the possible misues of television as a substitute for parental involvement and concern. This is separate from the dispute regarding the nature of licensee responsibility in the area of program selection and presentation as contrasted with parental responsibility to screen programs.

4/ There were differences in the stress put on television watching as distinguished from other child activities and greater or lesser concern expressed about a balance between passive, individual, activities like television watching as distinguished from other activities of an active, social nature.

6. A similar pattern could be found in the difference expressed regarding the general quality of children's programming and the benefits to be derived from this programming. Opponents of the ACT view pointed to the highly informed level of children of today (much of which they attributed to television) and contended that all of television viewing is informative, bridges gaps between individuals and groups, and broadens an awareness of the world at large and the functioning of our society. ACT and others of a similar persuasion accepted television's capacity but contended that it has been little used or that it teaches lessons in violence as a solution to human problems, presents false role models and takes advantage of children through advertising. While ACT did find merit in some of the program offerings, its view was that far too few programs reach the level television is capable of reaching.

7. Question: What, generally speaking, is a definition of "children's programming" which could serve for the Commission's use in this connection? To what extent do children, particularly in the higher age groups mentioned by ACT, view and benefit from general TV programming? As to the first part of the question, the answers fell into three basic categories: those who agreed with the definition offered in the Notice, those who wanted a broader definition and those who found the concept of children's programming to be beyond definition. The supporters of Commission regulatory action and some licensees as well agreed that the only sensible definition was one based on the audience for whom the

program was primarily intended (usually with the qualifier that it be presented when children are likely to watch). Others found this too restricted and wanted a broader definition to include programs of broad family appeal which had a large audience of children; some would include any program watched by large numbers of children. 5/ A large number of broadcasters simply felt no workable definition could be found. As they saw it, there were too many disparate elements to be taken into account; and as to these elements they were troubled about using a definition based either on subjective intent of the program producer or on the vagaries of scheduling or of the viewing habits of the child audience.

8. There was general agreement among the parties that children, particularly older ones, spend a substantial portion of their viewing time watching programs other than those produced specifically for children. They did not always agree, however, on how worthwhile this was, although there were a number of programs which met with acceptance by all or virtually all of the commenting parties, particularly those programs of an informative nature. 6/ As to the re-run situation comedies which were broadcast during hours when many children were watching, the criticism was not so much directed to the programs themselves 7/ as to the failure to offer programming specifically designed for children for viewing in these time periods. From the critics' point of view, these "family" programs did not provide the same benefits to children as programs created particularly for them would have, and it was the lack of such programs, especially during the week, which they decried.

5/ The tendency of children to watch family and adult shows starting at rather early ages was frequently mentioned in the comments. Some attributed this to viewing habits. Others to the desire of children to emulate adult viewing habits.

6/ Similar support was expressed for prime-time children-oriented specials.

7/ In point of fact, ACT and others directed their strongest criticism to the children's programs presented on Saturday morning finding them more objectionable, violent, stereotyped and ad-ridden than family programs by far.

9. Question: What restriction on commercials short of prohibition--e.g., on types of programs or services, what can be said, number, divorcement from program content, etc.--would be desirable? Comments should take into account in this connection the provisions of the NAB Television Code and its guidelines. In fact, this question consists of a series of sub-questions, and the commenting parties took varying positions on them. On only one point was there general agreement, viz. that advertising for at least certain adult products or services was inappropriate in or adjacent to children's programming. While not all parties were in agreement about the specific commercials which would fit in this category, they accepted the notion that otherwise legitimate advertising matter might be unsuitable for children, e.g., excerpts from a movie to which children would not be admitted unless accompanied by an adult. One comment was directed to public service announcements and made the point that a number of them dealt with subject matter or used methods of presentation which could be frightening to children. They urged greater care in screening not just the merit of the announcement's goals but the suitability of the approach as well. More generally, objections were made to the advertising for certain products on the basis that these commercials for these products encouraged children along paths detrimental to their health or well being.

10. Frequent concern was expressed about vitamins and snack-foods--both considered as food advertising by the industry. Dr. Mary C. McLaughlin, Commissioner of Health for New York City, decried the worsening eating habits of New York City (and American) children,manifested in their reduced consumption of fruits and vegetables and their increased consumption of high calorie snack foods having little nutritive value. According to Dr. McLaughlin, television advertising, especially to children, has fostered the emphasis on snack foods, a trend which results in poor nutrition and high incidence of obesity. She urged adoption of the code of foodstuff advertising developed by Dr. Choate which would require disclosure of a product's nutritive value and calorie content in all television advertising for the product.

11. A number of people were greatly concerned about vitamin advertising. They objected to the failure to provide warnings about the danger of possible overdoses, and to the suggestion they said was implicit in these advertisements, that vitamins were a substitute for proper attention to eating a well balanced diet. Many of those writing charged that vitamin and other such advertising was fostering if not creating a drug dependent generation. They particularly despised the notion that people should be encouraged to believe that they only have to take a pill to solve their problems. Action to restrict or ban such ads was urged by these critics. Those opposing restricting such advertising pointed to the legality of the products and insisted that many items in the home were unsafe in the hands of a child. Thus, the answer was said to be proper parental control of the situation and the exercise of proper precautions to keep these products away from children.

12. A large portion of the people who objected to all advertising to children said that, at a minimum, the Commission ought to act to require a reduction in the amount of commercial time and the number of interruptions of program continuity. There was another but much smaller group, that concentrated their fire on the intrusiveness of the commercials rather than on commercialization as such, and they echoed the often expressed desire to treat children's programming on Saturday morning the same way as adult prime time is treated in terms of limits on the amount of non-program material and the number of permissible interruptions. A number of licensees disagreed, finding nothing unfair to children or contrary to the public interest in the use of a standard which applied to all non-prime time programming whether for adults or children. None of the licensees thought this to be a suitable area for Commission action.

13. On the question of divorcement of commercials from program content, industry reaction was divided. Some contended that the various commercial approaches that blended program and commercial were entirely legitimate and did not take advantage of the child. In their view, delivery of a commercial by a program host or other program talent was a long used legitimate method of advertising, not something developed to take advantage of children. A few licensees took the position that switching back and forth between program and commercial could be disruptive to a child's viewing and thus there would be a benefit to a lead-in or lead-out provided by program talent or the delivery of a commercial by them. Opponents of this group of commercial practices argued that children cannot separate the commercials from the program under such circumstances and that this situation takes unfair advantage of the special trust children have in the characters (live or cartoon) on the programs. It does this, they charged, because children believe that the commercial advice given them, particularly by program hosts, is given on a disinterested basis to promote their welfare, and they do not know or cannot understand the nature of a situation in which they people are paid to deliver commercial copy. Various other, tie-in, practices came in for criticism, and some programs were attacked as being a showcase for tied-in products.

14. NAB Code supporters talked of its value in terms of self-regulation and the exercise of licensee responsibility and its ability to change to reflect changed circumstances or demonstrated need. Opponents questioned its capacity to deal effectively with these matters.

15. Question: To what extent should any restriction on commercial messages in children's programs also apply to such messages adjacent to children's programs? Most of the parties commenting agreed that commercials adjacent to a children's program should be treated on the same basis as are commercials actually within the program. Sometimes, however, material presented in adjacency positions did cause objections to be voiced, as when promos were presented for nighttime programs which were intended for a more mature audience or when non-children's movies were advertised. Most of these people did not object to the nature of the adult programs or movies as such or even necessarily to commercials on behalf of them. Rather, they objected to placing them in a time slot in which many children would have occasion to view material they considered inappropriate because it contained scenes of violence or had obvious sexual overtones.

CURRENT STATE OF CHILDREN'S PROGRAMMING

16. The three commercial television networks offer a large block of Saturday morning and early afternoon programming directed at children and a lesser amount of such programming is offered on Sunday. Currently, CBS is the only network that presents a weekly program for children, Captain Kangaroo, presented for an hour each day, Monday through Friday. ACT critized the paucity of children's programming during weekdays and the total absence of network children's programming during weekday afternoons. Although there is no current network offering directed towards children that is presented by the three networks during these hours, such was not always the case. In fact, weekday programming used to constitute the major part of the children's schedule. According to ACT, children's programming offered by New York City network affiliates was as follows:

	Weekdays	Saturdays	Sundays
1948-49	20:00 hours	None	5:25 hrs./min.
1951-52	27:45 hrs./min.	10:00 hours	9:45 hrs./min.
1954-55	32:45 hrs./min.	13:00 hours	8:30 hrs./min.
1957-58	19:15 hrs./min.	9:15 hrs./min.	11:00 hours
1960-61	17:15 hrs./min.	15:00 hours	6:45 hrs./min.
1963-64	11:00 hours	15:00 hours	6:15 hrs./min.
1966-67	12:30 hrs./min.	19:00 hours	6:45 hrs./min.
1969-70	5:00 hours	17:00 hours	5:45 hrs./min.

17. On weekdays, during the hours mentioned by ACT, independent stations, particularly UHF stations, do offer programming directed at children. Most of this programming appears to be from syndication rather than local sources and it includes a significant amount of material that had been presented by the networks previously.8/ Some of the material comes from other sources and movie cartoons and shorts are often a major part of local shows. Few shows are truly local in character. By far the most frequently encountered local show (although the format is not locally derived) is Romper Room.

18. Networks. The majority of network programs were animated cartoons and entertainment continued as the principal focus. In describing their own programs, licensees used such terms as informative, enjoyable, fanciful, diverting and certainly harmless. The critics charged that these programs were vacuous, trite, mechanical, violent, stereotyped and harmful to the spirit of the child.

19. On weekdays, except for Captain Kangaroo, children must turn elsewhere than the networks for programs specifically designed for them, or they can and do watch programs not specifically designed for them.9/ The afternoon hours after school-age children have returned from school are ones which network affiliates fill with non-network programming, usually family shows or movies. The networks do offer a considerable number of hours of programming at other times during the day, mostly in two categories: game shows and soap opera. Throughout the day, independent stations are more likely to offer programs produced for children, usually obtained from syndication.

8/ It has been alleged that the programs which the networks removed from their schedules because of a concern about their excessive violence are now frequently seen in syndication. No figures are available on this.

9/ This discussion is restricted to commercial television. Where available, children can also select public television programs like Sesame Street, Misteroger's Neighborhood, The Electric Company, and others.

20. Syndication. Syndicators provide programming that forms the bulk of the schedule on most independent stations. To a lesser extent network affiliates rely on this source as well. Although some of this programming is specifically for children, more of it is family fare and some was thought not to be appropriate for a child audience at all. Although data submitted in this proceeding is not directed specifically to this point, it does appear that there are two major categories of programs produced for children. One is the motion picture material consisting of cartoons and such programs as Little Rascals; the other is off-network re-runs. There appears to be little in the way of domestic sources for original non-network programming specifically for children.

21. Local originations. The vast majority of programming directed to children does not originate locally. Even these local shows that are presented often include syndicated (usually cartoon) material and this often constitutes the bulk of the program material on the show. One notable exception is Romper Room, which while it is locally produced, follows certain guidelines set by the show's originators.

22. Generally speaking, the parties commented on the high cost of locally produced programming and none of them made the presentation of local programming a must. The parties urging change argued in favor of more programs specifically designed for children--programs of high quality, informative and humane--but their concern was with what is presented rather than its source. Stations broadcasting them, however, spoke of them with particular pride.

THE NATURE AND PURPOSES OF CHILDREN'S PROGRAMMING

23. Defining Children's Programming. One group, consisting of ACT and a number of licensees, defined children's programming as programs designed for children presented at times when they can watch. A sizeable group (mostly broadcasters) either rejected the notion that a suitable definition is possible, in light of the varied viewing habits of children, or insisted on a definition that included programs other than those specifically intended for children. What they had in mind are family shows, typically situation comedies, that were thought to appeal to children. Many children do watch these programs and sometimes form a majority of the program's viewers.

24. Although ACT and the others acknowledged the fact that children watch many programs created for family audiences or for adults, they attributed much of this to the absence during many of the hours children are likely to be watching television of programming created especially for children. They did not deny the appeal that these programs have for children but they attributed much to the lack of choice of other, more suitable programming. The concern they expressed was two-fold: not enough child-oriented programming is being offered and the schedule of what is being offered is so weighted against weekday viewing that the child is left little or no choice but to watch a program which was not not designed for him. Although they recognized that independent stations did offer children's programming during at least some of these hours, they strongly objected to these programs on the same basis as they did most of those in the weekend network schedule.

25. On the other side, licensee comments stressed the significant contributions they felt the stations were making in their programming for children and the presence of children's programs in the weekday schedule of many stations. They contended that family programs which are scheduled during weekday hours do have value for children. In their view, children as they grow older mature in their programming tastes and even in early years demonstrate a desire to imitate adult behavior, including their viewing habits. Thus, they concluded that these programs are responsive to children's needs and desires, which should not be so narrowly defined as to include only programs created specifically for children.

26. Age Specificity. One of the principal objections raised by opponents of current programming practices was the lack of age specificity. They charged most stations with ignoring the notable differences between children of various ages. In their view, programs that appeal to a wide range of ages necessarily fall short in satisfying the needs of children. They insisted that this is the unavoidable product of the need to adopt an approach that will capture the entire age range of children from 2 to 12. 10/ Programming of real substance, they asserted, cannot appeal to all ages, and since the stations are not willing to lose part of their audience, they seek the lowest common denominator in order to attract them all. In particular, they charged that this is done by the practice of exploiting activity and violence (in its many forms) to capture the interest of this diverse group.

27. So long, the critics continued, as the programming must collect a large audience that includes the entire range of ages from 2-12 in order to be attractive to advertisers and hence produce high revenues, programs will continue to be based on a lowest common demoninator approach. Only, they insisted, by ridding the programs of advertising pressures can improvements be made. In their view, it is the artificial constraint of seeking to capture all ages in order to meet the needs of advertisers rather than viewers that prevents the considerable programming talents in the field from being used humanely and effectively.

28. Broadcasters and others who took the opposite view held that stations could and did present entertaining and enjoyable programs for children. No purpose, they believed, would be served by a requirement that programs be age-specific with the inevitable result of excluding a large portion of the child audience. These licensees pointed to programs which they stated were selective in age level, but disputed the idea that those which are not could be faulted on that account. Overall, they insisted that legitimate criticisms have been met, programs have been improved, so that there is no need to follow the drastic approach urged by ACT. They labeled ACT's approach exclusionary and charged that it runs counter to the broad appeal that they believe has enabled American television to bring so much to so many. Moreover, they feared that the economic

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10/ This is the age group discussed in the ACT petition and implicitly followed in the Notice, and it roughly agrees with industry practice, particularly as to the cutoff age of 12.

consequences of an exclusionary appraoch would be disastrous. Nor, financial questions aside, did they accept the notion that this approach would be feasible. Because children differ so markedly in so many respects, they insisted that there forever would be disputes about the proper categorization of programs. They foresaw the Commission as the arbiter of such disputes, placing it in the position (an unconstitutional one they insisted) of overseeing day-to-day programming decisions. These licensees asserted that whatever problems there might be in distinguishing children's television from non-children's would be multiplied if such sub-categories were created. In their view, the entire concept and the premises on which it rests were faulty and unworkable.

29. What Types of Programs, To What Purpose. Another important point of contention between the parties was the matter of the types of programs that should be offered and the extent to which they are in fact presented. The broadcasters contended that programs of wide range and approach, entertaining and informative, are presented; and while in an important area like this one, no one can be satisfied with the status quo, the industry could take real pride in its accomplishments and point with satisfaction to important recent improvement. Particularly in regard to recent improvements, the networks went on at great length about new programs that had been or shortly would be in their schedules.

30. Although broadcasters were unwilling to accept ACT's view that informative as distinguished from entertainment programming should predominate, they believed that a good portion of their current programming was, in fact, informative or even educational. As they saw matters, such a distinction was more apparent than real, for they considered virtually all television programming to be informative and horizon broadening. They pointed with pride to the informed child of today as in good measure a product of television contribution to the dissemination of information.

31. Children, too, broadcasters insisted, were entitled to a chance to escape the rigors of their lives--the stresses of school, the strictures of growing up--and should not be deprived of an opportunity to simply enjoy a program for its sheer entertainment value. Their comments took the view that children need time for fun, including watching entertainment programs. This, they pointed out, should not be to the exclusion of other more serious fare on television or of other, non-television, activity.

32. ACT and the other parties sharing its views, took an entirely different position regarding the entertainment and informational qualities of children's television. They accepted the idea that purely entertainment programming does have a place, but they strongly objected to what they saw as a serious imbalance in favor of the entertaining, to the detriment of the informative. While they agreed that all programs inform in the sense that they convey information, they were greatly distressed about what is conveyed. In their view, much of it they saw as fostering stereotypes, prejudices and questionable social standards. They saw no inherent reason why programs could not be informative as well as entertaining, but they found little in the way of current programming that creatively responds to these twin goals.

33. Licensee and Parental Responsibilities. Essentially all agreed that broadcasters were not absolved of responsibility for what is broadcast merely because parents are responsible for their children. The Code and other industry statements of positions have pointed to the responsibility of the broadcaster to the youthful segment of his audience and the need for special care and concern in this area of programming. Broadcasters asserted similar views in the various individual submissions.

34. Broadcasters did contend, however, that they could not warrant that every program is suitable for viewing by every child. They asserted that only parents are in a position to recognize the unique character, personality and needs of each individual child. Thus, programs of real merit (or which in any event lack objectionable qualities for the typical child) might not be appropriate for viewing by a particular child in a given situation. More generally, they charged parents with the responsibility for making sure children did not abuse television. As to the programs themselves, broadcasters spoke with pride about current offerings (in both amount and quality) and were particularly proud of recent improvements. They did not agree with the critics' charges regarding violence, frenetic pace, unreality, commercial exploitation, stereotyped presentations and the like. Instead they saw a balance, a giving of attention to the real world and to subjects of genuine concern to children's lives, as well as to fantasy and fun.

35. The critics view was a very different one. They insisted that if the broadcasters truly wanted to follow an approach based on a genuine concern for children, the present situation could not possibly exist. They called for basic changes and as a result did not attach the same importance as broadcasters did to recent changes in the field. Nor did they have much faith in self-regulation. According to their appraisal of the situation, when "the pressure is on" changes for the better will occur, but unless the Commission acts to adopt effective requirements, matters will return to where they had been before. These parties insist that this has been the past experience with self-regulation, and they see no basis for expecting a different result on this occasion.

36. While ACT and the others acknowledged the responsibility that parents have, they asked just how much supervision can legitimately be required or expected of parents. They acknowledged the fact that some parents are not sufficiently concerned with the needs of their children and agreed that this was reflected in a failure to adequately screen the programs to be watched by their children. Although concurring with the broadcasters' view that this situation should not exist, they insisted that, so long as it does, it must be recognized by broadcasters. However, this was not the principal basis for their insistence on more responsible action by the broadcaster to protect the child audience. That insistence was premised on the view that parents, no matter how attentive, sincere or knowledgeable, are not in a position to really exercise effective control. The critics asserted that in order for parents to exercise this control, it would be necessary for them to be present at all times

when the child is watching television and it would require them to make instant decisions on the acceptability of material. As ACT explained it, if they could agree that the problems which arise in this area pertain only to a few children or only to unusual circumstances, they would be more accepting of the arguments presented by the broadcasters. Their point, however, was that the problem is not limited to isolated presentations that may be troublesome to a few children. The essence of their objection was that the major part of children's programming is not only devoid of merit, it is actually harmful. Commercials, too, came in for heavy criticism, and here again, it is what they saw as the premise for such advertising--using children to sell products--that offended them, not a rare example of excess. In the view of those parents who have written to the Commission, there is no effective means open to the individual household to ameliorate the problem. The only possible answer they saw, namely turning off the television set entirely, raised separate problems and to them pointed to the great failure of American broadcasting to meet the needs of children. ACT and others likened the problem to that posed by an "attractive nuisance". Just as society holds a property owner having an attractive nuisance responsible for injuries to a trespassing child, so should it act in relation to current broadcasting fare. The core of the attractive nuisance doctrine is that, lacking mature judgment, children may be attracted to dangerous situations and protective measures therefore are necessary to avoid liability. They were no more persuaded about absolving broadcasters regarding their programming than the courts have been in absolving property owners. In both cases they wished the reponsibility to be placed on the persons having effective control, in this case, the broadcaster. According to ACT, broadcasters appeal to children by use of unfair mechanisms and the resulting interest children show in television fare, however authentic, is no answer; in fact, it is part of the problem. Since, in the critics' view, children cannot be the judge of what is best for them and parental control cannot be effective when the problem is pervasive, the only answer they saw was a basic change in the nature of the programs that are presented.

37. Some suggested that one of the means for improving children's television is the utilization of experts in the field of childhood development. Few of the critical comments and fewer still of the comments from broadcasters dealt with this subject to any significant degree. Generally, those favoring such an approach believed that the two groups of experts involved--the broadcasters and those knowledgeable about children--should join forces so that each could contribute to the creation of more skillful, beneficial and constructive television fare for children. Some would have the Commission adopt rules to require all broadcasters to form a group of experts on which it could rely for guidance; others would merely encourage it. None of the parties expressing this view denied the expertise of the broadcaster in connection with adult programming. Nor did they challenge the workability of the current method of program selection for adults. Thus, while critics may bemoan the lack of a particular type of adult fare, they accepted the fact that adults are proper judges of what appeals to them and agree that current fare does have this appeal. With children, however, they argued that this test is faulty because children do not have the requisite maturity to make the necessary judgments on which such a process depends. Rather, they contended, children are open to exploitation by use of highly popular, but nonetheless objectionable attention gathering techniques. Thus, in effect, they argued that since children cannot make a judgment in the same way as an adult can, the popularity of a television program with children indicates nothing about its acceptability, much less its worth.

38. To remedy this situation several parties believed that childhood experts should be utilized to evaluate the impact of programming on the child audience. Not only did the proponents of this approach believe that it would avoid material of possible harm to children, but felt that it could lead to a fuller use of the great potential of television for reaching and informing children about themselves and the world in which they exist.

39. To some rather limited degree such experts are already being consulted by broadcasters. Although the broadcasters' comments did not deal extensively with this topic, it appeared that except possibly for the networks, matters have not developed to the point where there is a continuing dialogue and certainly not a partnership of effort.

COMMERCIALIZATION IN CHILDREN'S TELEVISION

40. Generally. As matters now stand, broadcasters depend on commercial advertising for support of children's television in much the same manner as they do for adult television. Broadcasters defended this approach as the only workable one, as subject to adequate safeguards and consistent with the profit motive implicit in the American system of broadcasting. The critics argued that this dependence on advertiser support forces children's programming to be directed to the lowest common denominator and charged that the commercials themselves exploit children by taking advantage of their immaturity. ACT would have the Commission bar commercials in children's television (or at least product commercials) and others (believing that complete abolition is not likely to occur) seek a reduction in the number of commercials and commercial interruptions and a restriction on what products can be advertised and what techniques can be employed. Broadcasters did not accept the idea that commercials exploit children or that any public benefit could possibly result from barring commercials. All they foresaw under such circumstances would be a decline in program quantity and quality. They rejected the argument that children are singled out for more commercialization, stating that all programming in non-prime time slots is governed by the same code standard regarding amount of commercialization. 11/ Likewise they rejected the various charges regarding deleterious effects said to result from current commercials or current commercial practices.

41. The Relationship Between Programs and Commercials. Disagreeing with much that was advanced in the critical comments, the broadcasters concentrated on the economic consequences of a ban on advertising in children's programming. As they saw it, the consequences would be severe for all and catastrophic for some. They argued that children's programs, especially of the kind ACT favors, are expensive to produce; a requirement that they broadcast a minimum of 14 hours per week would increase their costs greatly, without providing an opportunity to even recoup these costs, much less make a profit. Even if they accepted the proposition that stations could absorb these costs (which they do not accept), they labeled such an approach unfair and contrary to the purposes of commercial broadcasting. In their view, ACT's proposal was based on incurrect allegations regarding high profits in the industry,

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11/ Effective January 1, 1973, the NAB Code required reduced amounts of commercialization in week-end programs for children and barred use of program hosts or primary cartoon characters in commercials in or adjacent to children's programs.

when in fact the statistics show that a sizeable number of stations operate at a loss or make only minimal profits. They asserted that for many stations the loss of revenue from children's programming could have very serious adverse consequences. In their view, the loss of these services would strike especially hard at independent UHF stations, whose success (or at least survival) is based on counter programming. This was the case, they asserted because these stations sought to serve segments of the audience rather than competing for mass appeal. They contended that children's programming is an important part of their counter programming, with a number offering more than 14 hours per week. Thus, they asserted, the losses would fall heaviest on stations doing the most and who would be least able to bear the burden. Moreover, they argued, these very stations make a great contribution to program diversity and the public would pay a great price for following the ACT approach since it could only lead to the virtually certain demise of many of these stations. Moreover, they charged that it would clearly be contrary to the Commission's policy to foster UHF growth and more importantly would be contrary to the overall public interest.

42. ACT, et al. disagreed. They insisted that the financial problems created by a loss of children's program advertising would have a serious effect on only a relatively few stations. In ACT's view, the proper way to deal with financial hardship is through the mechanism of granting exceptions or waivers. ACT asserted that this has been the usual Commission approach, as for example, when the Commission acted to curtail AM-FM duplication in the larger markets and many stations were able to obtain waivers. As to the majority of stations, ACT asserted that extraordinary profit levels do obtain in the industry and that their current revenues were not a fair guide because of the effects of the current economic downturn and the need to find substitutes for cigarette advertising. As the economy improved, they fully expected stations to return to their previous high profit position.

43. Moreover, according to ACT, alternative revenue sources would be available but would never be tapped so long as the existing situation was allowed to continue. First of all, they insisted that considerable revenue could be derived from institutional (non-product) advertising. This is not to say, they pointed out, that advertisers would necessarily prefer such an approach, only that they would follow it if that were the only method open to them. They also believed that underwriting represented another important source of funding, but they did not feel any real effort has yet been made to develop this either.

44. As to the latter point, underwriting, concern was expressed by educational broadcasters who feared that their funding from such sources could be seriously diluted, and by commercial broadcasters who doubted its workability and opposed it philosophically, as contrary to the American system of commercial broadcasting.

45. Broadcasters insisted that the advertiser-supported posture of children's television was a healthy and productive one that has enabled networks and individual stations to produce and present high quality programs to wide audiences throughout the country. Not only did they fear the direct consequences of the revenues which would be lost, but they also were concerned about an exodus of talented and creative people to what they contend would be more remunerative activities. In sum, they felt confident that the results could only be fewer children's programs, or ones of lesser quality, or both.

46. According to ACT, if advertising-oriented decision making were changed to a child-oriented approach, stations would be able to produce programs of real worth as well as interest, gearing them to particular age groups. Without such age-specificity, they believe that a good part of the benefit which otherwise could come from programs tailored for their particular audiences would be lost. Broadcasters, on the other hand, attack age-specificity as unworkable and exclusionary. They do not believe that programs of such narrow appeal form a sensible basis for children's or any other programming. They also deny that sponsorship or the lack of it is a determining factor and contend that a number of programs have been presented even though advertising support was lacking. What they do not accept is the view that the commercialization as such is wrong or harmful; rather they see it and the profit motive as commendable and part of the important underpinnings of the creative force behind our broadcasting system's achievements.

47. Commercials: their content, effect and implications. Two very different views were expressed regarding the impact of the commercials themselves and the legitimacy of directing them to children. On the one hand, ACT, the other organizations and many critics, decried such advertising as unfair. This criticism focused on two aspects of the impact of commercials: first, the effect on the child viewer, and second, the effect on the family. The critics assert that commercials directed to children do not present a fair or realistic picture of the commercial product being advertised. Rather, they charged, the commercials employ skillful techniques to take advantage of a child's vulnerability, trust and lack of maturity.

48. Specifically, the critics charged that notwithstanding self-regulatory efforts, commercials rely on unfair methods, such as the specific directive (...get it...now!), that have a great effect on children of an age when they seek to follow directions that are given them. The critics cited other approaches geared to particular age groups, to which they also objected including the use of sexually-oriented themes in doll commercials and a reliance on the child's fears of social isolation. Toy advertising came in for criticism for presenting ads that used gimmicks to mislead the child about the item, thus leading to disappointment. These statements were echoed in thousands of the letters filed in this proceeding. Unlike adult advertising where such a result could lead to disaster for the company involved, the critics contended that children's immaturity and the succession of new toys each season meant that children will continue to be susceptible to these techniques until eventually their trust is turned into cynicism by these repeated disappointments. These parties feared that children will become cynical and distrustful of all in the society, and it was this they viewed as a real danger to society. Some of these people pointed to disruptive activities by some young people today as manifesting this very problem.

49. Broadcasters disputed these assertions and argued that special standards have been employed to insure basic honesty and fairness in toy as well as other advertising. While agreeing that the purpose of advertising is to persuade, they insisted that this does not constitute an abuse. They pointed to Code provisions established to avoid deception and gave examples of advertising that was rejected as not being supported by actual experience with the product. Rather than being deceptive or unfair, they saw advertising as informative. Through such advertising children were said to learn about the working of the free enterprise system and about products of interest to them.

50. It is just the matter of consumer decision making that comes in for much criticism from ACT et al. They questioned whether products should be advertised to non-consumers, especially when they lack the necessary maturity and judgment to make a decision and the parents lack the informational impute. Moreover, they charged that the demand created by these advertisements drives a wedge between parent and child, putting parents under unceasing pressure to buy the advertised products.

51. Broadcasters did not accept the idea that television commercials are responsible for creating this situation. They argued that if television commercials were ended, the child would continue to have commercial pressures from other sources and would continue to see items of interest and demand them of his parents. The problem that results they saw as a function of the unwillingness of parents to say no or at least their difficulty in saying no.

52. The parties gave considerable attention to the question of a child's ability to separate the program from the advertising material in it or adjacent to it. In addition to the general observations by the parties on this point, they offered specific comments on practices which some saw as having a particular effect on the child's ability to distinguish the two.

53. On the one hand, critics argued that the impact of advertising in children's programs is exaggerated by virtue of the fact that young children are unable to make a distinction between programs and the interspersed commercials. They contended that this situation in and of itself takes advantage of young children, particularly since at that age they are unable to grasp the concept of advertising or the purpose of commercials. Moreover, charged the critics, various techniques were employed to blur the distinction between program and commercial thus exacerbating this problem.

54. Broadcasters generally took the opposite view, namely that a child, even at an early age, can distinguish between the program and the sponsoring commercial, and that the various techniques mentioned by the critics do not preclude the drawing of the distinction. A few broadcasters took the view that it is harmful to draw a sharp line of demarcation. In fact, they insisted that switching from program to commercial and back again can be disruptive to young children; they argued that it is more comfortable as well as enjoyable for them if the transition is blurred by the various techniques that can be used, particularly those involving use of the program host. 12/

55. The techniques of having program talent (real or cartoon characters) deliver commercials, the use of a lead-in/out by a program host and tie-ins were the major ones which have come in for scrutiny in the comments. Use of program talent was considered by the critics to have a telling effect in confusing the dividing line between program and commercial, with the result that the commercial obtains the unfair benefit of being reacted to by the child as if it were part of the program. Parents and critics alike also objected strongly to the pre-recorded tapes/films containing cartoon characters (e.g. the Flintstones on behalf of the vitamin bearing their name), especially when presented during breaks in the very program in which they appear. They reserved, however, their strongest attacks for the live program host who actually delivers the commercial on a children's program. Not only does this blur distinctions, they insisted, but more importantly in their view, it takes advantage of the special relationship that exists between the host and the child.

12/ This is not an industry-wide view.

56. The filings in this proceeding did not provide complete data on the extent to which program talent was used or even the number of cases in which it occurs, and only a relatively small number of broadcasters directed themselves to a discussion of this point in their comments. Some viewed this method as inappropriate and indicated that they had or would discontinue the practice or never had engaged in it. Their comments indicated that they felt that the decision not to engage in this practice was the product of their own judgment as a licensee rather than being an absolute ethical requirement which all stations would be obliged to follow. Other licensees thought the use of program talent, including show hosts, was perfectly legitimate and did not have the negative implications ascribed to it. They defended their right to employ this method of presenting commercials and generally opposed any restriction of any commercial technique or presentation absent a finding of outright deception. 13/

57. As the comments indicate, program hosts, even when they do not deliver the commercial, were sometimes called upon to do a lead-in lead-out. In some programs the line separating the two techniques is hard to draw because the lead-in or out is extended. Generally, though, the prepared copy is brief (e.g., the lead-in ". . .and now a word from our friends at . . ." or what amounts to little more than a tag line at the end). Based on its study of the locally originated Captain Billy program broadcast in Albuquerque, New Mexico, ACT charged that talent involvement in the commercials reached a damagingly high level. According to this study, Captain Billy regularly commented at length on the commercial itself or its theme, with the result being a second but often veiled commercial appeal. Thus, in addition to their objection on grounds of unfairly using the special rapport between host and child for commercial purposes, ACT expressed a second concern, that of overcommercialization.

58. Broadcasters did not deal extensively with host selling and the like in their comments, but those that did comment defended it in terms of easing the transitions in the program and have attacked those who object for interfering with legitimate advertising methods utilized by the broadcaster. In their view, no purpose is served by insulating the child from the real world of business and advertising. While they did not necessarily argue in favor of a particular technique, they strenuously opposed regulatory intervention by the Commission or other forms of interference with what they saw as the broadcaster's freedom of choice in conducting his business.

13/ In this regard, it should be noted that to the extent broadcasters agreed that government intervention in the realm of advertising was appropriate at all, they considered the Federal Trade Commission to be the appropriate agency to handle this function. Some licensees thought the FTC was overzealous; none of them considered it too timid or inadequate to the task.

59. The final technique mentioned in the comments is the tie-in. Those who supported this practice saw it as a perfectly sensible and legitimate act of cooperation between advertiser and programmer and considered it quite logical to develop products which would be named after or otherwise connected with a program. Others, citing the example of Hot Wheels, charged that these programs can become long-run commercials rather than programs. Moreover, they contended that in these situations it is the advertising that becomes dominant and the programming secondary so that the latter is tailored to fit the needs of the former. If this is carried far enough, the program ceases to be a program and becomes one long commercial. The critics did not charge that this extreme is frequently encountered; but they argued that this practice, even when it exists to a lesser degree, is of concern because it warps the program decision making process.

60. Special Product Categories. Some ads were also attacked as promoting activities or approaches to life that are or could be harmful to children. Along this line the critics citicized the spending of vast sums to encourage the eating of snack foods and low nutritional cereals and charged that this has had a significant impact in terms of helping to cause the poor nutritional habits that have led to serious dietary deficiencies prevailing among Americans, both rich and poor. Broadcasters and advertisers disputed any causal connection between the two and insisted that these products were not intended to supplant other food items in a person's diet. Instead, they saw a failure on the part of parents to assume their important responsibility for insuring good nutrition.

61. Vitamin advertising was attacked as creating false impressions about what constitutes a balanced diet and as encouraging the taking of vitamins as a substitute for proper eating habits. Moreover, these critics charged such ads as being part of a pattern of advertising that is creating a dangerous trend toward drug dependence and contributing to the worsening of the drug abuse problem which already afflicts our society. Finally, they charged that the techniques employed in advertising vitamins to children inevitably creates the danger of accidental overdoses. 14/

62. Broadcasters and advertisers insisted that there is nothing in these commercials to encourage or exaggerate such a risk. Rather, as with snack foods and cereals, they believed that parents must exercise caution to keep children from the harm which could result from misuse of the product. These, they contended, are legitimate and beneficial products and interfering in the right to present vitamin commercials is unwarranted. They rejected the idea that advertising for over-the-counter, medicines generally or children's vitamins particularly, has anything whatever to do with encouraging drug abuse.

14/ The docket contains a report of such overdosing resulting, according to the child's mother, from the child's desire to emulate what he saw in the commercial.

63. Amount of Commercial Matter. Unlike a number of points at issue in this proceeding, the subjects of clutter and/or excessive commercialization were not cast in terms of distinctions between adult and children's programming. They objected to allowing more commercials and a greater number of interruptions on children's programming than in adult prime time. Broadcasters defended their current practices 15/ as consistent with other non-prime time programming, and point out that a children's program in prime time is subject to the lower limit applicable to that time period. On this basis they concluded that current practices are non-abusive and in fact are necessary to insure adequate finances with which to produce quality programming.

15/ These comments were filed before the changes in the Code limit had been proposed and thus are responding to the old limit of 8 minutes of commercial time and 4 interruptions per half hour, or double these figures for an hour.

Appendix B

Participants in Public Panel Discussions on Children's Television

Eugene Accas, Leo Burnett Company, Inc., New York, New York, (Panel II).
Richard C. Block, Vice-President and General Manager, Kaiser Center, Oakland, California (Panel III).
Stephen Bluestone, District of Columbia (Panel VI).
Fred Calvert, President, Fred Calvert Productions, California (Panel II).
Dr. Rene Cardenas, Bilingual Children's Television (Panel I).
Peggy Charren, Action for Children's Television, Boston, Massachusetts (Panel IV B).
Dr. Joseph G. Colmen, Education and Public Affairs, Washington, D.C. (Panel II).
Dr. John Condry, Department of Human Development, Cornell University, Ithaca, N.Y. (Panel III).
Mr. David Connell, Children's Television Workshop, Executive Producer, New York, New York (Panel I).
Mrs. Joan Ganz Cooney, President, Children's Television Workshop, New York New York (Panel I).
Eliot Daley, Family Communications, Pittsburgh, Pennsylvania (Panel II).
Michael Eisner, Vice-President, Daytime Programming, ABC, New York, New York (Panel II).
Mr. Al Fields, Vice-President, Merchandising, Health Tex, Inc., New York, New York (Panel II).
Mr. Harry Francis, Director, Programming Services, Meredith Broadcasting, New York, New York (Panel I).
Dr. Frederick Greene, Office of Child Development, HEW, District of Columbia (Panel I).
Mrs. Ruth Handler, President, Mattel Toys, California (Panel VI).
Larry Harmon, Larry Harmon Pictures Corporation, New York, New York, (Panel IV B).
Sherman K. Headley, General Manager, WCCO-TV, Minneapolis, Minnesota (Panel IV B).
Stockton Helffrich, Director, NAB Code Authority, New York (Panel VI).
Ray Hubbard, WTOP-TV, Program Director, District of Columbia (Panel IV B).
Robert Keeshan, CBS, New York, New York (Panel IV B).
Arch Knowlton, Director, Media Services, General Foods Corporation, White Plains, New York (Panel III).
George Koehler, General Manager, Triangle Broadcasting, Philadelphia, Pennsylvania (Panel II).
Lorraine F. Lee-Benner, WCSC-TV, Charleston, South Carolina (Panel IV B).
Wanda Lesser, Charleston, South Carolina (Panel IV B).
Katherine Lustman, Early Childhood Education, Yale Child Study Center, New Haven, Connecticut (Panel IV B).
Donald McGannon, President and Chairman of the Board, Westinghouse Broadcasting, Inc., New York, New York (Panel VI).
E. Weeks McKinney-Smith, Owner, WDRX-TV, Kentucky (Panel III).
Dr. William Melody, Economist, University of Pennsylvania, Philadelphia, Pennsylvania (Panel IV B).

F. Kent Mitchel, Vice-President, Corporate Marketing Services, General Foods Corporation, White Plains, New York (Panel IV B).
Neil Morse, Co-Chairman, Children's Committee on Television, California (Panel II).
Jeanette Neff, Director of Educational Product Coordination, Children's Television Workshop, New York, New York (Panel IV B).
Dr. Everett Parker, Office of Communications, United Church of Christ, New York, New York (Panel VI).
Mr. Fred Pierce, Vice-President, Corporate Planning, ABC, New York, New York (Panel V).
Mr. Ward L. Quaal, President, WGN-TV, Chicago, Illinois (Panel V).
Mr. Christopher Sarson, Producer, WGBH, Boston, Massachusetts (Panel I).
Ms. Evelyn Sarson, Action for Children's Television, Boston, Massachusetts (Panel III).
Mr. Fred Silverman, Vice-President, Network Programming, CBS, New York, New York (Panel I).
Mr. Edmund Smarden, Carson-Roberts, Inc. Advertising, California (Panel V).
Dr. Ithiel de Sola Pool, Center for International Studies, MIT, Cambridge, Massachusetts (Panel VI).
Les Towne, Vice-President, Helfgott and Partners, New York, New York (Panel III).
Mr. Robert Thurston, Vice-President, Corporate Planning, Quaker Oats, Chicago Illinois (Panel I).
Herminio Traviesas, Vice-President, Department of Broadcast Standards, NBC, New York, New York (Panel VI).
Dr. Scott Ward, Harvard University, Boston, Massachusetts (Panel IV B).

Appendix C

Participants in Oral Arguments on Children's Television

Peter W. Allport, On Behalf of Association of National Advertisers, Inc.
Ms. Lillian Ambrosino.
Dr. Juan Aragon, On Behalf of Bilingual Children's Television.
Rick Bacigalupo, On Behalf of Viewers Intent on Listing Violent Episodes on Nationwide Television.
Dr. Seymour Banks, On Behalf of American Association of Advertising Agencies.
Dr. Carolyn B. Block.
Stephen Bluestone.
Jerome S. Boros.
Warren Braren, On Behalf of National Citizens Committee for Broadcasting, Consumer Federation of America and Consumers Union of United States.
Richard Burdisk, On Behalf of Creative Services, Station WCBV-TV, Boston, Massachusetts.
Ms. Peggy Charren, On Behalf of Action for Children's Television.
Robert B. Choate, On Behalf of Council on Children, Media and Merchandising.
Philip C. Chin, Office of Asian American Affairs, HEW.
Ms. Katheryn M. Fong.
Mr. James Freeman.
Thomas N. Frohock, On Behalf of ABC, Inc.
Rosemary Galli, On Behalf of American Federation of State, County, and Municipal Employees, AFL-CIO.
Michael J. Goldey, On Behalf of CBS, Inc.
Frederick C. Green, M.C., Associated Chief, Children's Bureau.
Anne Hanley, On Behalf of National Cable Television Association.
Mr. Larry Harmon.
Richard D. Heffner, On Behalf of Richard Heffner Associates, Inc.
Stockton Helfrich, On Behalf of National Association of Broadcasters.
Ms. Mary Ellen Hilliard.
Mrs. Carol K. Kimmel.
Mr. Manuel Larez.
Lorraine F. Lee-Benner.
Aaron Locker, On Behalf of Toy Manufacturers of America, Inc.
Richard Marks, On Behalf of Five Licensees.
Janis Marvin, On Behalf of American Women in Radio and Television, Inc.
Dr. William H. Melody, On Behalf of Annenberg School of Communications.
Howard Monderer, On Behalf of NBC.
Earle K. Moore, On Behalf of Action for Children's Television.
Paul J. Mundie, On Behalf of the Committee on Children's Television, Inc.
Robert E. O'Brien, On Behalf of O'Brien Communications.
Reverend Edward A. Powers, On Behalf of Division of Christian Education, United Church of Christ.
Ms. Evelyn Sarson, On Behalf of Action for Children's Television.
Sister Leo Vincent Short, On Behalf of National Catholic Educational Association.
Mr. Robert Jay Stein.
John B. Summers, On Behalf of National Association of Broadcasters.
Arthur Weinberg, On Behalf of Three Licensees.

CONCURRING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In Re: Children's Television Report

I concur in essence with the action of my colleagues because our Report accomplishes the following. First, it clearly outlines this agency's concern with the subject of programming to children, an area where we have heretofore failed to speak as specifically. It has also admonished its licensees that "broadcasters have a duty to serve all substantial and important groups in their communities, and that children represent such a group." 1/ Moreover, it effectively establishes a commercialization limit which is nearly 50% below an industry norm that prevailed before we initiated our efforts 2/ and closes the door on the boundless use of children's shows as embellished trade fairs for tots. Finally, it is open-ended and emphasizes our continuing interest in this area. None of these conditions pre-existed our intervention and, accordingly, I join in this Report which symbolizes some very real progress.

The differences which result in my concurrence rather than an absolute accord with the Report are ones of degree and not kind relating to the nature and amount of commercialization attending children's programming. In other proceedings, I have acknowledged the need of commercial broadcasters to maintain an adequate revenue base to support their operations. While an ideal world of limitless financial resource would make it easy for us to simply ban all advertising from children's shows as some petitioners urge, such a world is not the present or foreseeable reality. That does not necessarily mean that every program broadcast must be, in and of itself, compensatory. Some individual programming which is expected under the public interest standard may not result in a direct profit. But, those who produce and present the scores of children's shows for a living must receive ample remuneration to assure that the quantity and quality of desirable programming is maintained at an adequate level.

1/ Report, par. 16.

2/ See generally The Economics of Children's Television: An Assessment of Impact of a Reduction in the Amount of Advertising, a "Study" by Commission staff economist, Dr. Alan Pearce.

In the area of children's television, the majority has sagely recognized that "the use of television to further the educational and cultural development of America's children" (Report, par. 18) is of statutory derivation. Petitioners such as Action for Children's Television (ACT) have pled that the commercials currently woven into the pattern of children's television are antithetical to that development. I agree that a constant and contrived bombardment of slick appeals exhorting sugar-coated, crunchie-munchies and other fluff to suggestionable minds devoid of an understanding of financial or nutrititional values is generally antagonistic to the "educational and cultural development" objective correctly espoused. Taking candy from a baby -- a 2, 3 or 4 year old -- is unsportsmanlike; hard-selling it to them in rainbow colors seems to me to be equally unseemly.

Consequently, I sympathize with ACT and the others who have vociferously deplored examples of exploitive hucksterism to our youngsters over the public airwaves. Any such craven practices by those with the legal standing of trustees for the community ill serve the public interest for which they have been licensed. Perhaps, as some have suggested, the problem is not with commercials per se but with the products themselves (e.g., candified comestibles, dubious playthings) or the fact that some ads are allegedly misleading or deceptive. Both of these problems appear to be beyond the principal expertise and primary jurisdiction of this particular agency. If that is the case, and all this Commission can legitimately do is minimize the impact in terms of quantity, then I fully support the assertion that "licensees should confine advertising to the lowest level consistent with their programming responsibilities" (Report, par. 43). Under circumstances where that may be the most we can do, it is the least we should do.

However, in the commercial area, our document calls for compliance with present, voluntary industry standards (Report, par. 44). I do not find this position wholly consistent with the policy of maintaining children's commercials at the aforesaid "lowest level" practicable, particularly when that industry standard is presently the same for both children and adult programs. Since the law has traditionally recognized a higher standard of commercial protection for children, a parity of about 9 non-program minutes per hour for all age levels is not consistent with that bi-level tradition. A policy

fully consonant with analagous legal precedent would logically dictate a level which is appreciably lower for children. My reading of Dr. Pearce's Study, note 2, supra, suggests that a level of about 6 commercial minutes per hour would not, in the long run, materially effect profitability (in view of the inelastic character of the kids ad market); or, more importantly, jeopardize a licensee's ability to meet its mandatory responsibilities. Therefore, the commercial level I would set at this point is below that enunciated in the NAB Code. 3/

Moreover, as regards isolation of advertising from program content, I would have adopted the petitioned recommendation that commercials be "clustered" fore and aft of the programs so as to avert confusion and suggestion on the part of the children." "Madison Avenue" genius has the capacity to create sales presentations so compatibly attuned to programming that youngsters themselves are "programmed" to develop the same positive feelings toward the product as the surrounding show; they see the images -- program and pitch -- as an undifferentiated whole rather than unrelated episodes. This practice seems unfair considering the immaturity of the audience and segregation of the two appears warranted.

Both the Commission, and particularly the Chairman, as well as the industry are to be commended for their actions thus far. Nobody can dispute the point that television has done much to educate, enlighten and expose children to the breadth, complexity, beauty and problems of this world. But, the Commission's continuing obligation is to encourage the most effective use of the media (47 U.S.C. §303(g). Though I regret the necessity for formal action, the pressures of the marketplace and the profit motive, as ACT asserts, may be compelling drives which will not be spontaneously overcome absent regulatory encouragement for improvement. Since this Commission has exclusive jurisdiction over television broadcasting, some of the perceived problems are in our ballpark: we cannot categorically adjure, but must act to the full extent available. We cannot legislate creativity, good taste or the product marketplace, but we can and have announced an anticipation that broadcasters make a concerted effort to beneficially serve the needs of the public, including that segment too young to petition or protect itself.

3/ Because NAB Code levels on commercial quantity, on which we in turn have based on our policy, are not within our control, it might have been more appropriate to strengthen our position by codifying the limits the majority finds acceptable. Embodied by Commission Rule, these levels would have become absolute ceilings and violations susceptable, inter alia, to forfeiture. 47 USC §503.

October 24, 1974

CHILDREN'S TELEVISION REPORT AND POLICY STATEMENT, ADDITIONAL VIEWS OF COMMISSIONER WASHBURN

The Children's Television Report and Policy Statement, which we adopted today, is the first definitive approach to the needs of children in television programming -- a milestone in the Commission's history. I endorse it in full.

I would have liked to see the Commission go further with safeguards in regard to programs for pre-school children. Many children, but especially 3, 4 and 5-year olds, have difficulty distinguishing between program content and commercials. Interruptions likewise present more difficulty for very young viewers. Consequently it would have been well, in my view, for the Commission to have included a policy restricting commercial messages to the beginning and/or the end of programs directed to pre-schoolers.

In its upcoming consideration of violence and obscenity on television, I will recommend that the Commission clearly set forth its expectation that licensees exercise extreme care as to the level of violence and brutality in programs (including cartoons) directed to pre-school children. Small children have difficulty in making clear distinctions between reality and fantasy on TV. Therefore, the negative impact of this type of material is greater on pre-schoolers than on school-age children. This should be taken into account by licensees.

SEPARATE STATEMENT OF COMMISSIONER GLEN O. ROBINSON

I have no doubt that our Statement of Policy will not please everyone. More probably it will not please anyone. Broadcasters will likely see it not merely as a crystallization of recent, voluntary concessions on advertising, but a first step in a series of future endeavors designed to push commercials out of children's television. And they will probably also look with some foreboding on our policy statements with regard to the amount, character and scheduling of children's programming as a precedent for future forays into the hitherto forbidden realm of program control. On the other side of the fence, it seems equally likely that those who have pressed the Commission for vigorous regulatory efforts in the area of children's programming will scold us for our caution.

However, within the bounds of what we address here in this Policy Statement (which does not include the vexing problem of violence), I am satisfied that the Commission has made a reasonable response to the problems presented. I believe the Commission has gone about as far as is appropriate, in light of the evidence presently before us and mindful of the ever-present dangers that lurk in the area of program regulation. Indeed, I would have made this point

a little bit more emphatic in our Policy Statement. It seems to me that a Statement of Policy is meaningful not only for what it says can and will be done, but in what it proclaims cannot or should not be done. I have no fixed notions where the proper boundaries of our concern lie with regard to children's programming; but I think the present Statement comes fairly close to the line which I would ultimately draw with regard to the matters hereinconsidered. I do not mean to suggest by this that there are no respects in which I could not be pursuaded to adopt a "harder line" towards the regulation of children's programming, or attendant advertising. What I do mean to suggest is that, as far as I am concerned, we are pressing very close to the limits of our sound discretion.

My reason for emphasizing all of this is simple: while I recognize the legitimate concerns of those who have pressed for regulation in this field, and while I endorse the Commission's present efforts in that direction, I would not have these efforts interpreted as merely the first step in a continuous series of measures by the FCC to act as a censor for children's programming. There is an especially seductive appeal to the idea of "protecting" children against television. There are areas where the prospect of governmental control of programming has only to be suggested to evoke opposition and antipathy. This is not one of them. It is with respect to children's

television that our strongest instinct is to reach out and put the clamp of governmental control on programming. For this reason, regulation of children's programming raises the most subtle and the most sensitive of problems. Everyone recognizes the free speech dangers of governmental control of political broadcasting. Not enough people appreciate the far more subtle problem of governmental control when it is extended into an area like this one, where there is widespread popular sentiment supporting some measure of governmental control. But if the First Amendment is to mean anything at all, it obviously does not mean that we can make judgments on the basis of majoritarian sentiment alone.

If I understand some of the tendencies that have been recently manifest in this field, I would be surprised if proponents of future action did not parse each word or phrase of our Policy Statement to seek support for future forays in this area. For those inclined to read between our Policy Statement's lines, my counsel is that they should not. I think that none of the words in this majority opinion were intended to imply hidden invitations or subtle meanings that are not fairly imparted upon the face of the document as a whole. At least such is my reading: in an area as sensitive as this, I am a strict constructionist, not only of the Constitution, but of the Commission's Statement of Policy.

On the subject of language, implication and future interpretation, there are two other matters in the Commission's Report and Policy Statement which call for separate special comment. The first is the distinction which seems to be drawn between "educational" (or "cultural") programming and mere "entertainment"; the second is the questions of advertising to children, and more particularly, the assumption that selling to children is a per se evil--a possibly inevitable, but nevertheless, still evil, practice.

I am not altogether comfortable with the distinction made in this Report and Policy Statement between educational programming and entertainment programming and the insistence that a certain amount of programming be didactic ("instructional") in character. For myself I would prefer that my children's time be occupied with Bach rather than Alice Cooper, that they be more concerned about a Swiss Family Robinson than the Partridge Family in the Year 2200, and more interested in the adventures of Jacques Cousteau than those of Billy Batson. Nevertheless, I feel somewhat diffident, as an officer of federal government, in urging that my preferences concerning what values are best for children to learn are the only ones that can claim the label "educational." In spite of the considerations counseling diffidence, however, I am satisfied that we have not gone beyond our

proper discretion with today's Report and Policy Statement. The importance of the "cultural" values we have counseled our licensees not to slight is rooted firmly enough in consensus to allay any fears that we are significantly interfering with the prerogatives of any state or any family.

The Report and Policy Statement treats advertising to children as, at best, a necessary evil. The only difference between its view and that of ACT (and other opponents of advertising on children's programming) seems to be a pragmatic judgment that some advertising is necessary to sustain the programming. That is not quite the way I view the matter. I agree that, within the present economic structure of television, advertising is necessary to support children's programming of respectable quality. I cannot agree, however, that apart from this fact it is somehow wrong, per se, to advertise to children. Indeed, if advertising to children were as undesirable as some opponents have made it out to be, I doubt that the programming which it now supports could really redeem it.

By arguing that children are not properly the object of advertisers, ACT appears in effect to regard children, as a class, as outside the economic framework of our society. This seems to me dubious. Like adults, children are consumers. Like adults, their tastes are not genetically determined. Among the influences upon the tastes of consumers--be they adults or children--is advertising. Irrespective of its target,

its purpose is to motivate behavior that would not otherwise, but for the advertising, have occurred. For better or for worse, commercial messages, even those involving significant amounts of non-informational mental massaging, have long been tolerated in our society. Some people even regard them as economically and socially useful.*/ Whether they are or not, however, is beside the point. It seems to me a little late in the day to decide that advertising, per se, is contra bonos mores. If it is not, then I suggest that we candidly acknowledge that within proper limits it is not a sin, and certainly not a crime, to try to influence the consumption desires of children. It may be argued that children are "special" consumers in that they are not the direct purchasers of much of what is advertised to them--their parents are. To my mind, this fact is without significance. It is a legitimate aim to stimulate demand for a product, and, as a practical matter, this requires that the consumer of the product be reached. In the case of toys and breakfast cereals, that consumer is the child. In theory, the child will then tell the parent what he desires, and the parent will either buy or not. According to some commentators, this places an unfair burden on parents, who are required to spend significant portions of their parental energies

*/ Samples of some of the voluminous literature on this, pro and con, are collected in G. Robinson & E. Gellhorn, The Administrative Process, 352-371 (1974).

vetoing purchases of new toys, breakfast cereals, candy products and soft drinks. We recognize, of course, that there are limits on how products should be advertised to children. But the advertising does not, per se, serve an improper function. Our sympathy for parents who "just can't say no" is rightly thin. Just as we cannot be surrogate parents so we should not attempt to insulate parents from the necessary responsibility of parental supervision.*/

I do not wish to be understood as endorsing all the TV advertising I have seen directed at children. Quite the contrary. I am sometimes revolted by commercials aimed at children (as well as

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*/ One further point needs to be made in this connection. To a considerable degree the real discomfort of ACT and other like groups relates not to advertising but to the product advertised. This is most clearly illustrated in the demands which ACT has made on the Federal Trade Commission--concerning, e.g., the allegedly inherent "unfairness" of premiums--and it is also evident in the demands which have been pressed upon us as well. The Federal Trade Commission will have to sort out its own jurisdiction in this matter, but I think our response must clearly be negative: we do not have authority to restrict marketing of lawful products merely because the products are promoted through the medium of radio and television. It is conceivable that there might be some exceptions to this in the case of patently dangerous products, but even here I am hesitant to state in unequivocal terms that we have authority. The cigarette advertising episode, which has been cited numerous times to us in support of such authority, is not apposite even if it were a wise precedent to follow. The only action which the Commission took in regard to cigarettes was to make advertising subject to the fairness doctrine, and even that limited precedent has now been restricted by our recent Fairness Report, 48 F.C.C. 2d 1 (1974).

many aimed at adults). Reason and common sense obviously have a role in a licensee's discharge of its public responsibilities. In my judgment, licensees have an obligation to appreciate the ways in which children differ from adults, and not to suffer advertisers to prey upon or exploit the peculiar vulnerabilities of immature judgment or unsophistication.*/ There is a difference between salesmanship and exploitation, just as there is a difference between the spirit of enterprise and the spirit of larceny. Licensees will simply have to observe the distinction.

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*/ I do not suggest that I think it proper to prey upon gullible adults either, but setting aside deception, there are necessary limits to our solicitude.

October 24, 1974

ADDITIONAL VIEWS OF COMMISSIONER WASHBURN ON THE CHILDREN'S TELEVISION REPORT AND POLICY STATEMENT

The Children's Television Report and Policy Statement, which we adopted today, is the first definitive approach to the needs of children in television programming -- a milestone in the Commission's history. I endorse it in full.

I would have liked to see the Commission go further with safeguards in regard to programs for pre-school children. Many children, but especially 3, 4 and 5-year olds, have difficulty distinguishing between program content and commercials. Interruptions likewise present more difficulty for very young viewers. Consequently it would have been well, in my view, for the Commission to have included a policy restricting commercial messages to the beginning and/or the end of programs directed to pre-schoolers.

In its upcoming consideration of violence and obscenity on television, I will recommend that the Commission clearly set forth its expectation that licensees exercise extreme care as to the level of violence and brutality in programs (including cartoons) directed to pre-school children. Small children have difficulty in making clear distinctions between reality and fantasy on TV. Therefore, the negative impact of this type of material is greater on pre-schoolers than on school-age children. This should be taken into account by licensees.

FCC 69-192
27767

AMERICAN B/CASTING CO.)
COLUMBIA B/CASTING SYSTEM, INC.) February 28, 1969
NATIONAL B/CASTING CO., INC.)

[¶10:315] Fairness Doctrine – First Amendment.

The sole function of the Fairness Doctrine is to maintain broadcasting as a medium of free speech not just for a relatively few licensees, but for all of the American people. As such it is not only consistent with the First Amendment, it promotes the underlying concept of the Amendment. The Doctrine is one of great practical importance to the "public interest in the larger and more effective use of radio". American B/casting Co., 15 RR 2d 791 [1969].

[¶10:315] Examination of news coverage.

It is not appropriate for the Commission to examine news coverage as a censor might to determine whether it is fair in the sense of presenting the "truth" of an event as the Commission might see it. The Fairness Doctrine is not concerned with fairness in this sense. The determination of actual fairness by a government agency is inconsistent with our concept of a free press. American B/casting Co., 15 RR 2d 791 [1969].

[¶10:315] Staging of news.

In the area of staging or distorting the news, the critical factor making Commission inquiry or investigation appropriate is the existence or material indication, in the form of extrinsic evidence, that a licensee has staged news events. Otherwise, the matter would come down to a judgment as to what was presented, as against what should have been presented – a judgmental area for broadcast journalism which the Commission must eschew. American B/casting Co., 15 RR 2d 791 [1969].

[¶10:315] The Democratic Convention.

There is no substantial basis for concluding that the networks failed to afford "reasonable opportunity for contrasting viewpoints" on the issues at the Chicago Democratic Convention, such as the Vietnam war and the civil disorders. The

Commission is not now finding that there were "staged" incidents on the part of some television news personnel; or, that if such incidents did occur, network news personnel were responsible; or, that any allegedly staged incidents were aired. Detailed reports are requested from the networks within 30 days. American B/casting Co., 15 RR 2d 791 [1969].

[The Commission, by Chairman Hyde and Commissioners Bartley, Robert E. Lee, Cox, Wadsworth, Johnson and H. Rex Lee, on February 28, 1969, directed that the following letters be sent to ABC, NBC and CBS.]

Gentlemen:

On September 13, 1968 we wrote each of you requesting comments on the hundreds of complaints we had received concerning your coverage of events in Chicago during the Democratic National Convention in August 1968. You have now sent us your comments and we have evaluated them.

This matter raises for all of us – the broadcasting industry, the Federal Communications Commission, and the American people – some of the most sensitive and sophisticated issues involving the responsibilities which we all share. There is growing awareness of the tremendous influence of the television networks. Their coverage of the National Conventions serves to set the stage for the Presidential campaigns and election. Such influence must carry with it the highest responsibilities for intellectual integrity and independence.

The Federal Communications Commission has been established by Congress to license radio and television station owners for fixed terms of three years upon a finding that they have and will operate in "the public interest". But it functions within a nation whose historical origins are firmly planted upon the principle that government should not involve itself in activities that "abridge the freedom of speech". From its beginnings with the Radio Commission in 1927, this agency has been loathe to take any action that might be, or even appear to be, an interference in the content of political speech, in the full and free exchange of views in the marketplace of ideas that serves a people dedicated to informed self-governing. Needless to say, speech involving the very process of selecting and electing candidates is perhaps the most sensitive in this regard. At the same time, it has been necessary for Congress and this agency to establish some standards, and take some actions, designed to assure that the broadcasting industry will serve these ends. We have sought a path that will give full protection to the letter and spirit of the First Amendment, while also insuring responsible licensee performance.

The complaints before us have alleged that the television coverage did not fairly present the issues on a number of grounds. We will not attempt to list all of them. For example, it was suggested that there was failure to give exposure to the views or statements of city government officials of Chicago with respect to alleged 'brutality' by the police; and bias in favor of views or opinions in opposition to the policies of the national government with respect to the war in Vietnam. There were complaints that the networks showed

pictures of the demonstrations in such a way as to be unfair to the Chicago police and failed to report the violent intentions and actions of the demonstrators. Complaints were also received that the networks "attempted to influence the course of the proceedings, spreading rumors – especially concerning the possibility of a Kennedy draft – stirring controversy where none existed, and giving priority to the views of dissident or dissatisfied delegates" (NBC response, page 8). Complaint was also made that the networks devoted too much time to floor coverage at the expense of coverage at the podium.

The foregoing is not meant to be an exhaustive list of the complaints, but is simply illustrative of the range of complaints received. We shall set out first the responses of the networks, then the general principles applicable, and finally the application of those principles to this matter.

1. The Networks' Responses

(a) ABC points out that the total of nineteen (19) hours and thirty-seven (37) minutes of its over-all coverage of the Convention and surrounding events, approximately thirteen (13) minutes and forty-nine (49) seconds, or 1.1%, were devoted to film or tape coverage of the disorders involving the police and demonstrators. As to the complaint that its reports of the disturbances emphasized police brutality and ignored the provocations on the part of some of the demonstrators, ABC states that while on a few occasions it broadcast statements charging the police with resorting to excessive force, it also presented reports and discussions emphasizing the provocative acts on the part of demonstrators and supporting the actions of the police. As examples, it points to an extended commentary by William F. Buckley, Jr., which stressed the provocative acts of demonstrators, including the raising of the Vietcong flag and the use of obscenities, and to its reports that demonstrators blocked traffic, repeatedly refused to obey the orders of the police, attacked an unmarked police car and threw sticks, rocks and beer cans at the police.

In this connection, ABC states that its operations in Chicago were limited in that it had only one exterior remote video camera, which was set up in a fixed location in front of the Conrad Hilton Hotel; that while it did have one flash mobile unit operating with video-tape capability, this unit, as was the case with its film cameras, could only respond to events already taking place; and that the limitations imposed by the city of Chicago as to where it could set up cameras, combined with inability to transmit a live signal from any remote location as a result of the communication workers' strike, necessarily precluded its coverage of events leading up to any disturbance. As to the complaints that ABC failed to give exposure to the views of city government officials in Chicago, ABC points to the appearance of Mayor Daley and a Chicago police official in its evening news programs on August 29 and 30 and to presentations within its overall Convention coverage.

On the issue of Vietnam, ABC asserts that its coverage included the views of those who support the Administration position on Vietnam as well as of those who oppose it. As examples, it cites (i) a ninety (90) minute special program on Wednesday evening, August 28, in which the discussion on the floor of the Convention of the platform plank dealing with the war in Vietnam was extensively covered, with the views of proponents as well as opponents of the plank finally adopted being presented; (ii) its special coverage of the California

caucus on Tuesday, August 27, at which Vice President Humphrey, Senator McCarthy and Senator McGovern all spoke.

(b) CBS states that as to the complaint that it failed to report acts of provocation by the Chicago demonstrators, its correspondents did report many instances of provocation, such as the carrying by the demonstrators of Vietcong flags, the hauling down by them of an American flag, the hurling of bottles and stones and plastic bags of liquid, as well as instances of direct incitement of mob violence on the part of demonstration leaders. 1/

With respect to the allegation that there was "failure to give exposure to the views or statements of city government officials of Chicago . . .", CBS points out that in the film subsequently prepared on behalf of the City of Chicago, the key presentation of the city's official viewpoint was made, with its permission, by means of excerpting portions of a 23 minute interview by Walter Cronkite with Mayor Daley which had been broadcast by CBS News in prime time on the last night of the convention. It asserts that statements by demonstrators or their supporters were balanced with others by responsible officials including the Mayor, the U. S. Attorney and the Chief of Police.

On the Vietnam issue, CBS states that it gave extensive coverage to the debate at the Convention on that issue. It points out that it carried the floor debate on Wednesday, August 28 on the proposed Vietnam plank live with the result that supporters and opponents of the Administration were thus on the air for more than an hour for each side. It also points to the speeches or statements of Governor Connolly, Senator Inouye, and Vice President Humphrey. CBS further states that it provided daily half hour reports on proceedings before various convention committees during the period from August 19-24, during which testimony was heard from those supporting and opposing the Administration's position on Vietnam; and that on the evening of August 20, it carried live the appearance of Secretary of State Rusk before the Platform Committee. CBS therefore urges that it has "on an overall basis not only during the Democratic Convention but also before and afterwards provided a fair and balanced presentation over the Vietnam war".

CBS concludes by protesting the Commission's request for comments, asserting that this practice is "in direct contravention to strong and frequently eloquent disavowals by the Commission of supervisory concern over the content of particular programs"; that it is "particularly concerned when the

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1/ CBS states for example that on August 26 in THE CBS EVENINGS NEWS, it carried film of demonstrators waving the Vietcong flag, and also showed an American flag being lowered to half-mast; that twice on the evening of August 29 it showed other films of a militant shouting into a bullhorn, "Go! Go! Go!", while its correspondent repeated no fewer than seven times that the speaker was trying to provoke the demonstrators to action. CBS also noted that of the 38 hours and 3 minutes that CBS News devoted to television coverage of the Democratic convention, only 32 minutes and 20 seconds, or 1.4 percent of the total, were devoted to film or tape coverage of the demonstrations.

complaints to which comment is especially invited are complaints that a licensee has given insufficient attention to views or statements of Government officials or has displayed bias against the policies of the national Government"; and that it urges that "Section 326 of the Communications Act, which prohibits to the Commission the power of censorship over radio communications, should be regarded by the Commission as giving it an affirmative obligation to support the independence of broadcast news".

(c) NBC also points to difficulties in covering the events in Chicago. With respect to the allegations that it failed to show the demonstrators' provocative conduct, NBC cites, in a detailed appendix, its daily coverage showing that it "reported the activities of the demonstrators, including the throwing of missiles, the tearing down of an American flag and the taunting of police". The appendix is attached hereto (Appendix A), and we will therefore not summarize it further. As to claims of bias against Mayor Daley, NBC points to several appearances by Mayor Daley on NBC, and other offers of broadcast time to that official (an interview on the convention floor and effort to interview him on another night; a September 8 broadcast of a press conference; and an invitation to appear on a special "Meet the Press" broadcast on September 13).

NBC states that on the issue of Vietnam, it "presented substantially all of the speeches for both the majority and minority positions" and in interviews with principals with specific examples again given, provided for full expression of support for both these positions. Thus, NBC states (page 7, NBC response) that it " . . . interviewed persons known to be in favor of the Administration position who expressed the majority's view, viz.: David Ginsberg, liaison man for Vice President Humphrey; Senator Walter Mondale (Minnesota), co-chairman of the Humphrey campaign; John Gronouski, of the Humphrey campaign organization; and Senator Birch Bayh".

NBC also denies the claims that it "presented a distorted account of the Convention proceedings, stimulated rumors, created controversy and gave undue coverage of minority views". It asserts that interviews on the possibility of a Kennedy draft reflected activity and interest within the Democratic Party, and that the number of interviewees who expressed skepticism about this possibility outnumbered those who thought the draft movement was still alive. It states that reports of dissatisfaction among some of the delegates with the conduct of the Convention and the actions of police in quelling demonstrations were no more than a reflection of the fact that there was such dissatisfaction; and that where disturbance within the Convention reached the proportions of an incident, as in the case of one delegate's arrest, NBC sought out and presented the views of all parties involved, including the views of the arresting officers. NBC denies that it cut away unnecessarily from significant activity at the podium, stating that its coverage included substantially all of the statements on the majority and minority Vietnam planks, as well as all nominating speeches. NBC points out that the process of selecting a Presidential nominee involves more than the activity at the rostrum, and therefore it presented supplementary coverage from the floor of the convention hall and outside the auditorium, in an effort to inform its audience more fully. It attached a list of interviews with delegates, party leaders and spokesmen for candidates, and asserts its belief that the news value of interviews with these persons cannot be seriously doubted.

Finally, NBC urges that the mere transmission to a broadcaster of a formal inquiry by the Commission with respect to such matters as the accuracy or alleged bias of broadcast coverage of controversial issues and public events is deleterious to the journalistic function of the broadcaster; that "few spectres can be more frightening to a person concern with the vitality of a free press than the vision of a television cameraman turning his camera to one aspect of a public event rather than another because of concern that a governmental agency might want him to do so, or fear of government sanction if he did not".

2 Background principles

Ordinarily we would dispose of the present matter with a brief ruling based upon established principles long operative in this area. However, in view of the above responses and other pertinent considerations, we shall review briefly some pertinent aspects of the Commission's concern in the area of coverage of controversial issues of public importance by broadcast licensees. See Editorializing by Broadcast Licensees, 13 FCC 1246 [25 RR 1901] (1949); Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 [2 RR 2d 1901] (1964).

The general rule is that we do not sit to review the broadcaster's news judgment, the quality of his news and public affairs reporting, or his taste. The exceptions involve the "fairness", "equal opportunity", and "personal attack" doctrines – designed not to affect what is presented, or to stifle the presentation of views, but rather to encourage a full, free and fair discussion. We have also investigated allegations such as willful distortion or the self-serving use of the airwaves to promote the licensee's private interests.

Since they are not pertinent, we do not cover such matters as the recent ruling in National Broadcasting Company, 14 FCC 2d 173 [14 RR 2d 113] (1968) (concerning commentary by a network newsman on issues involving an economic conflict of interest without disclosure of such conflict).

A. Reasonable opportunity for presentation of contrasting viewpoints

The Commission's concern with fairness has, since the inception of the Fairness Doctrine, 2/ been to see to it that the licensee, having chosen to cover an issue of public importance, affords a reasonable opportunity for the presentation of contrasting viewpoints. There is no requirement of precisely equal time – it calls only for making reasonable opportunity available for the presentation of significant opposing positions. This requirement thus affords the licensee great leeway including allowance for honest mistakes of judgment. See Editorializing Report, paragraph 18, 13 FCC at page 1255.

The fairness doctrine does not in any way prescribe the presentation of a news item or viewpoint nor does it specify any particular manner of presentation. The sole function of the fairness doctrine is to maintain broadcasting as a medium of free speech not just for a relatively few licensees, but for all the American people. As such, it is not only consistent with the First Amendment –

2/ The doctrine is prescribed in Section 315(a) of the Communications Act.

it promotes the underlying concept of the Amendment, upon which this nation has staked its all. Cf. Associated Press v. U.S., 52 F Supp 362, 372 (DCNY, 1943). The fairness doctrine is one of great practical importance to "the public interest in the larger and more effective use of radio" (Section 303(g) of the Communications Act of 1934, as amended).

However, the Commission has never examined news coverage as a censor might to determine whether it is fair in the sense of presenting the "truth" of an event as the Commission might see it. The question whether a news medium has been fair in covering a news event would turn on an evaluation of such matters as what occurred, what facts did the news medium have in its possession, what other facts should it reasonably have obtained, what did it actually report, etc. For example, on the issue whether the networks "fairly" depicted the demonstrators' provocation which led to the police reaction, the Commission would be required to seek to ascertain first the "truth" of the situation – what actually occurred; next what facts and film footage the networks possessed on the matter; what other facts and film footage they "fairly" and reasonably should have obtained; and finally in light of the foregoing, whether the reports actually presented were fair.

But however, appropriate such inquiries might be for critics or students of the mass media, they are not appropriate for this Government licensing agency. It is important that the public understand that the fairness doctrine is not concerned with fairness in this sense. This is not because such actual fairness is not important, but rather because its determination by a government agency is inconsistent with our concept of a free press. The Government would then be determining what is the "truth" in each news situation – what actually occurred and whether the licensee deviated too substantially from that "truth". We do not sit as a review body of the "truth" concerning news events. Aside from unusual situations of the kinds discussed herein, it is not the proper concern of this Commission why a licensee presented a particular film segment or failed to present some other segment. Such choices are not reviewable by this agency.

Accordingly, in the light of the facts before us we shall not treat further such complaints as that the networks switched away from the podium to an undue extent or that they sought to "spread rumors" regarding a Kennedy draft. These are matters for the journalistic judgment of the networks, with any review a matter to be undertaken by media critics and students of the mass media. Similarly, we do not consider further whether the presentation of the demonstrations broadcast was unfair, in the sense of considering which portions of the film were shown and which were not. 3/ Rather, we shall consider the overall question of whether reasonable opportunity for contrasting viewpoints was afforded with respect to this and other controversial issues referred to in the complaints we have received.

3/ For similar reasons, we do not inquire into the question whether, no matter what restrictions on live camera usage were imposed, additional film via hand camers was available to the networks; the use or non-use of film from whatever source was a matter for journalistic judgment.

In so holding, we are not saying that there is nothing to the above or other complaints received – or that the networks should ignore these matters. It may be that critics or students of the media will point up deficiencies or areas of improvement for the networks in their news coverage of events like the Democratic Convention. Similarly, as one network notes in its reply, it is important to have the reactions of viewers – to be sensitive to communications from the public. A large outpouring of complaints, or indeed a single complaint, may point up a deficiency or an appropriate improvement. In short, taking proper cognizance of complaints and criticism does not undermine the independence of broadcast news, but rather may serve to assist it in discharging more effectively its vital task of fully and fairly informing the American public.

B. Distorting or Staging the News

There is a further related problem which should be clarified, and that involves charges that a licensee has not only been unfair, but that he has deliberately slanted or distorted the news. This also encompasses the issue of staging the news.

Here again it is important to make clear that proper area of concern of the Commission. We are not considering "staging" in the sense that persons or organizations may engage in certain conduct because of television – whether a press conference or a demonstration. This issue has been raised, for example, before the National Commission on Causes and Prevention of Violence. We do not denigrate in any way the importance or complexity of the issue. It is a matter calling for the most thorough examination by the media and by appropriate entities not involved in the licensing of broadcast stations. But the judgment when to turn off the lights and send the cameras away is again not one subject to review by this Commission. We do not sit to decide: "Here the licensee exercised good journalistic judgment in staying"; or "Here it should have left".

There are other aspects of this matter. In a sense, every televised press conference may be said to be "staged" to some extent; depiction of scenes in a television documentary – on how the poor live on a typical day in the ghetto, for example – also necessarily involves camera direction, lights, action instructions, etc. The term "pseudo-event" describes a whole class of such activities that constitute much of what journalists treat as "news". Few would question the professional propriety of asking public officials to smile again or to repeat handshakes, while the cameras are focussed upon them. In short, while there can, of course, be difficult gray areas, there are also many areas of permissible licensee judgment in this field.

The staging of the news with which we are here concerned is neither an area coming clearly within the licensee's journalistic judgment nor even a gray area. Rather, it is the deliberate staging of alleged "news events" along the line of the charges set out under No. 3 infra (i.e., a purportedly significant "event" which did not in fact occur out rather is "acted out" at the behest of news personnel). Where such staging occurs, it may constitute a range of abuses as serious as those present in the Richards case. 4/ See also par. 17,

4/ See KMPC, Station of the Stars, Inc., FCC 49-1021, 14 Fed. Reg. 4831 (1949).

Editorializing Report, 13 FCC at pp. 1254-55. In the Richards case, according to charges made by newsmen, the licensee instructed his news staff to slant news reports in specified ways. Such slanting of the news amounts to a fraud upon the public and is patently inconsistent with the licensee's obligation to operate his facilities in the public interest. It calls for a full hearing to determine the facts and thus whether the licensee is qualified to hold the broadcast permit.

The Richards situation is most unusual. What can occur more frequently is the slanting or staging of a "news event" by an employee without the express direction or knowledge of the licensee and its news supervisors, and perhaps even against their specific instructions to eschew at all times such "staging".5/ To place the license in jeopardy for the occasional isolated lapse of an employee would be unjust where the licensee has adequately discharged its responsibilities, might tend to discourage broadcast journalism, and might thus be at odds with the very reason for our allocation of so much scarce spectrum space to broadcasting – our realization of the valuable contribution it can make to an informed electorate. See par. 6, Editorializing Report, 13 FCC at p. 1249.

Accordingly, in the absence of licensee direction or an abdication of licensee responsibility, a hearing on the license renewal would not be called for. However, where extrinsic evidence has been presented to the Commission suggesting that a licensee has staged or culpably distorted the presentation of a news event, this becomes a matter of concern both to the Commission and to the licensee, which must of course be vitally interested in preserving the integrity of its news operations. The matter thus may be appropriately investigated by the Commission, or by the licensee with a detailed report to the Commission.

We stress that in this area of staging or distorting the news, we believe that the critical factor making Commission inquiry or investigation appropriate is the existence or material indication, in the form of extrinsic evidence, that a licensee has staged news events. Otherwise, the matter would again come down to a judgment as to what was presented, as against what should have been presented – a judgmental area for broadcast journalism which this

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5/ The licensee, which is responsible for the integrity of its news operations, must clearly inform its news employees of its policy against staging "news events" and be diligent in taking appropriate steps, either prophylactic or remedial, to implement that policy. For example, the licensee should implement its policies in this respect by investigating significant charges of "staging" which might involve its news employees and stand ready to take action against any employee found guilty of such improper activity. See, e. g., statement of NBC before the National Commission on Causes and Prevention of Violence, where it set out the following policy on covering demonstrations to its news employees: "A last and most serious point. We do not re-enact, simulate, dramatize, state or aid a demonstration of any kind. If it happens, we try to cover it; if we miss it, we don't fake it. We don't try to make it happen. This simple injunction must not be forgotten. If it is forgotten, we will attempt as severe a punishment as possible."

Commission must eschew. For the Commission to investigate mere allegations, in the absence of a material indication of extrinsic evidence of staging or distortion, would clearly constitute a venture into a quagmire inappropriate for this Government agency.

3. Complaints in this case

With this as background, we turn to a disposition of the complaints in this case. First, as to the Fairness Doctrine (Section 2(A), above), in light of the discussion in Section 1, above, there is no substantial basis for concluding that the networks failed to afford "reasonable opportunity for presentation of contrasting viewpoints" on the issue at the Chicago Convention, such as the Vietnam war and the civil disorders which occurred there. For example, the attached NBC exhibit indicates that the provocation by the demonstrators was presented to a significant and reasonable extent, and that the leading spokesman for one side, Mayor Daley, was afforded opportunity to appear. The same conclusion is indicated in the case of the coverage of the Vietnam issue in the light of the coverage of the podium debate on this issue and the interviews with spokesmen for both sides. The responses of the networks could well have been more specific but given our evaluation of these issues we believe that no further action by the Commission is warranted on this aspect. 6/

We stress that in so holding, we are not passing judgment on the quality of the networks' coverage. It is the role of the public, critics, and students of the mass media, either to comment or to be critical with regard to such matters and we will not repeat the discussion, supra, as to the networks' taking appropriate cognizance of such critics and complaints. In this sensitive area, the licensing agency must stick closely to the function of determining the narrow issue whether there was a failure to afford "reasonable opportunity for the discussion of conflicting views". Section 315(a).

Turning now to the staging aspects of the matter, we have conducted our own preliminary investigation and have also maintained liaison with other interested governmental entities concerned with these matters. We have received reports of some "staged" incidents on the part of some television news personnel. We stress that we are not now finding that there were such "staged" incidents; or that if such incidents did occur, network news personnel were responsible; or, finally, that any allegedly staged incidents were aired.

The incidents in question are as follows:

6/ We have not reviewed the tapes of the programs broadcast by the networks which are here in question. Because of the nature of the complaints, the determination of the Fairness Doctrine questions raised can be made on the basis of the responses which the networks have submitted. Nor, for the reasons previously developed, have we examined in this case filmed material which was not broadcast. The Congress, the National Commission on the Causes and Prevention of Violence and, perhaps, a Grand Jury, are examining this material.

(i) A United States Senator is reported to have stated that he saw a newsreel crew in Grant Park arrange to have a girl hippy (wearing a bandage across her forehead a la "Spirit of '76") walk up to a line of National Guard troops and begin shouting, "Don't hit me!" when the newsreel crew gave the cue and began shooting.

(ii) The U. S. Attorney for the Northern District of Illinois, Mr. Thomas A. Foran, and Assistant U. S. Attorney Michael Nash stated that they witnessed the following: After the 8:00 p. m. confrontation between police and demonstrators on Michigan Avenue in front of the Hilton on Wednesday night, August 28, 1968, the demonstrators retreated slowly northward, followed by a line of police. Behind the line of police, what appeared to be a newsman was kicking various pieces of burning trash into a pile on Michigan Avenue. There was a semi-circle of newsmen, with cameras, standing and watching him. After he had a small fire burning on the street, he was handed a "Welcome to Chicago" sign, which he then began to ignite in the fire. When the sign started to burn, he laid it on top of the fire and signalled to the semi-circle of men who filmed the burning sign.

(iii) The U. S. Attorney for the Northern District of Illinois, Mr. Foran, stated that he witnessed the following incident on Tuesday afternoon, August 26, 1968, near the Logan Statue in Grant Park: An individual who was sitting on the grass with his back up against a tree, was holding a large bandage in his hand, conversing with a three-man camera crew, one of whom had the CBS trademark on his jacket. After a brief conversation, the camera crew began filming the individual and he held the bandage along the side of his head. Mr. Foran approached in order to ascertain what they were doing, but when he inquired, the camera team immediately walked away and the individual on the ground cursed him and left the area. Mr. Foran observed no visible injury to the individual's head.

(iv) Assistant United States Attorney James J. Casey stated that he was in Lincoln Park on Sunday evening, August 25, 1968, at approximately 9:15 p. m.; that he saw an individual lying on the grass at the south end of the park, who was being filmed by a crew which Casey identified as CBS because of certain markings on the equipment they were using; that two young ladies dressed in white medical smocks were on their knees apparently giving first aid to the individual lying on the ground; that after several minutes, he observed the camera lights go off and the "injured" individual stood up and had a conversation with the camera crew; and that he observed no apparent injury. Assistant Corporation Counsel Charles N. Goldstein, who was with Mr. Casey, made a statement to the same effect, adding that "The conclusion that this was a staged incident was further evidenced at the time by the fact that the television crew, as I seem to recall, were giving verbal directions to the young people who were the object of the camera's view".

We shall continue our consideration of the above matters. The incidents are here brought to the networks' attention for investigation, since they may involve the integrity of the networks' news operation. Indeed, we recognize that, in view of the widespread publicity, such investigation by the networks may be under way or already completed. 7/ We request the submission, within 30 days of the date of this letter, of detailed reports, including, of course, information as to whether film of such incidents was taken by a network news team and, if so, a full description of the circumstances and whether such film was broadcast. Incidents (i) and (ii) could involve the three networks (or, as we stated, none of them); incidents (iii) and (iv) appear, on the basis of information presently availabe, to involve charges against CBS only.

Conclusion

The foregoing, with the exception of the reported incidents described on p. 801, disposes of the complaints we have received. 8/ As stated, the actual disposition does not require extended treatment and comes well within established guidelines. We have set out these guidelines again because of possible public confusion, and also because of the puzzling assertions in the NBC and CBS responses to the effect that a fairness inquiry from the Commission – made, as stated in our letter of September 13, 1968, in accordance with established procedure that goes back many years and has involved many prior referrals of fairness complaints to the networks – suddenly raises the specter of a government agency indicating to broadcast journalists whether to cover an aspect of a public event or to criticize public officials. We have made clear, in decision after decision, the right of broadcasters to be as outspoken as they wish, and that allowance must be made for honest mistakes on their part. Editorializing Report, supra, (1949); Pacifica, 36 FCC 147 [1 RR 2d 747] (1964); In re Renewal of KTYM, 4 FCC 2d 190 [7 RR 2d 565] (1966) affirmed Anti Defamation League v. FCC, 14 Pike & Fischer, Rad. Reg. 2nd 2051 (CADC); petition for certiorari pending.

The right to be critical of public officials is so well engrained in the First Amendment as to make any comment by this Commission wholly superfluous. Indeed, one of the most fundamental purposes of the Amendment is to insure the freedom of the press to criticize Government.

In view of this background, we should perhaps have simply sloughed aside the networks' assertions. However, in this sensitive area, we believe it better to err on the side of removing any possible doubt as to the Commission's position on these matters. We have therefore set forth once again the guiding principle for Commission action in this field. Finally, we have matched, and shall continue to match, these principles with our actions.

7/ See, e. g., testimony of Dr. Frank Stanton, CBS President, before the National Commission on Causes and Prevention of Violence, December 20, 1968, p. 188.

8/ This document does not dispose of the incident involving the placing by certain NBC personnel of a concealed, unauthorized microphone in a closed session of the Democratic Platform Committee during the Chicago Convention. This matter can more appropriately be treated elsewhere.

APPENDIX A

Demonstration Coverage

During the first session of the convention, a videotape segment of the demonstrations was carried, with an audio description by Chet Huntley. The video portion showed demonstrators waving Vietcong flags and chanting "Free Hayden" and "Ho, Ho, Ho Chi Minh", and becoming disorderly after reaching the Michigan Avenue hotel area. The cameras showed a youth climbing a statue and being forcibly removed by police and arrested; the crowd chanting "Pigs Pigs! Pigs!" at the police; and the police waving back the crowd at an intersection as they tried to march downtown. In the audio portion, Huntley noted, for background, that a thousand demonstrators – so-called hippies and yippies and war protestors – had tried to move into the Michigan Boulevard hotel area and were turned back by police in a series of street fights during which several demonstrators were clubbed and some arrests were made. Huntley reported that late Monday afternoon, hundreds had swarmed into the hotel area, after a side trip to the Chicago Police Headquarters to call for the release of Tom Hayden, arrested the previous night. Upon reaching the hotal area, Huntley reported, the demonstrators broke ranks and ran into the park to "liberate" the statue of General John Logan, a Civil War hero. Huntley noted that demonstrators waved red flags, black flags, and Vietcong flags, and that they chanted "Ho, Ho, Ho Chi Minh". He further reported that most of the demonstrators had dispersed reluctantly when the police came in; that one resisted and the police went after him. Around 9:00 p. m., Huntley continued, a thousand or more demonstrators left Lincoln Park for a march downtown. Shouting and chanting, they snarled traffic and were met at one intersection by a line of policemen who waved their batons and shouted for the crowd to move back. The demonstrators broke and ran, hurling bricks and stones, and police clubbed and arrested some demonstrators. Two newsmen were said to have been injured during the night by police. Later, police used tear gas and mace to clear Lincoln Park of one to two thousand demonstrators.

On Wednesday morning, David Brinkley reported that NBC had been told there were about two thousand people demonstrating in Grant Park, near the Hilton Hotel. An approximately two-minute videotape of crowds and police was shown and Mr. Brinkley reported that, since the taping, the demonstration had grown larger; and that the police were moving in to break it up.

On Wednesday afternoon and evening five brief videotaped demonstration segments were transmitted; in addition, a composite of some of those tapes was telecast after Wednesday's convention session ended. Approximately three minutes of a demonstration in Grant Park were transmitted, with NBC Newsman Jack Perkins commenting. Perkins noted that the police had said they would not clear the demonstrators out of this area, but the demonstrators then began throwing paper, tomatoes and stones at the officers and tried to kick in one of the police cars; the police responded with tear gas and then by moving back the line of demonstrators from the corner of the park. Perkins stated that there had been a few injuries and that whenever the police appeared, they were referred to as "pigs" by the demonstrators. He said that the demonstrators had decided to march on the Amphitheater that afternoon, but that the police had said they would let no one go beyond the borders of the park.

On Wednesday evening, about seven minutes of videotape of the demonstrations were transmitted, with description by Aline Saarinen. She described the marchers avoiding the police blockade at Balbo Street and coming down the other side of Michigan Avenue, seeming to come from everywhere, toward the hotel. The police were described as chatting informally in groups, not standing at the rather rigid attention they were the previous night. Tear gas then came in the reporter's direction, and Miss Saarinen stated that the many bystanders were finding the gas rather unpleasant. The accompanying video portion showed scenes of people walking alone the street; strolling through the park; and police in groups. Crowd sounds of "Hell No, We Won't Go" and "Kill the Fascist Pigs" could be heard, plus a single voice shouting "Delegates, We Must Stop Hubert Humphrey, It's Our Only Chance!"

Later on Wednesday, some three minutes of demonstrations at Grant Park were shown. Douglas Kiker, the reporter, said that by late afternoon, when the film was made, over ten thousand demonstrators were gathered in Grant Park, determined to march on the convention hall in protest. Kiker reported that demonstrators resisted when police attempted to arrest a young man trying to rip down an American flag. The police fired tear gas canisters and demonstrators began bombarding the police with cans, bottles, boards, fire crackers, tomatoes and just about everything else they could find.

Kiker further reported that the police had formed a wedge, waded in, and the battle was on. He stated that numerous demonstrators and some police were injured in the melee and many demonstrators were arrested. Demonstrators, he said, had been reported as saying they would still march and if police tried to stop them, they would sit down in the streets. The video scenes accompanying this oral description showed scenes of the crowd; tear gas thrown by police and thrown back by demonstrators; and scenes of police wading in and medics treating wounded. Many chants of "Kill Police!" could be heard, as well as demonstration leaders saying, "Stop throwing things".

Also on Wednesday night, Gabe Pressman and Aline Saarinen, in a ten-minute segment, described a demonstration at Balbo and Michigan Avenues as it had taken place some thirty or forty minutes before telecast.

The demonstrators were described as having blocked the intersection outside the Conrad Hilton Hotel for about half an hour. The police were described as moving to make arrests, swirling around, wrestling with demonstrators, and the general scene was one of wild disorder. Some demonstrators, it was noted, were throwing bottles and police were wielding their clubs. The accompanying video scenes showed the police coming down the avenue; the crowd chanting "Pigs! Pigs!"; police clubbing demonstrators; demonstrators striking police; demonstrators being dragged to paddy wagons; demonstrators being treated by medics; a red flag. Sounds heard included tear gas canisters and the crowd chanting "Sieg Heil! Sieg Heil!", "We Are The People", "Heil comrade, Heil comrade!" and "The whole world is watching".

About one hour later, a seven-minute videotaped segment of confrontations was carried. Jack Perkins, the reporter, noted the screaming and cursing of demonstrators; the police in front of the Hilton Hotel; the billy clubs; one demonstrator being carried off to a paddy wagon; the tear gas and arrests; bottles being thrown here and there by the crowd chanting, "The whole world

is watching"; a break in the arrests; the crowd running and the police after them; the demonstrators' medical corp.; the throwing of more bottles by demonstrators; and the police clearning off the sidewalks in front of the Hilton. The video scenes showed police picking up demonstrators and hauling them, some spreadeagled, to station wagons. Shots of the tear gas going off were seen, and the crowd was shown running down Balbo Street with police pursuing. Shots of the demonstrators' medical corps were shown, as well as demonstrators screaming at police. The National Guard was seen in ranks, moving the crowd down the avenue.

After the Wednesday convention session ended, a composite tape of some thirteen minutes of segments of the day's demonstration activities, all carried earlier in the day, was transmitted.

On Thursday evening, about three minutes of a taped segment was telecast, with voice-over narration by Chet Huntley. He said that a large group of demonstrators, under the leadership of Dick Gregory, reportedly was on its way to Dick Gregory's neighborhood, with the consent of the National Guard. Police, however, had set up a barrier at Michigan and 18th and warned Gregory that anyone who went beyond that line would be arrested. Huntley later reported that there had been a tremendous build-up of people and that the police later asked them to disperse. The accompanying videotape showed scenes of Dick Gregory marchers lined up on the sidewalk and some National Guardsmen in the street. There were no signs of violence; the crowd was relatively static.

After the Thursday session ended, a recorded segment of some ten minutes length was transmitted. NBC Newsmen Teague, Pond and Kalber described a march that started from the Grant Park area. They reported that National Guardsmen who moved in to clear it away had gas masks on; the demonstrators set in the middle of the road in front of moving jeeps equipped with barbed wire; tear gas was discharged into the crowd; the crowd moved rapidly north on Michigan Avenue; the troops seemed in no hurry, moving in an organized fashion. A couple on the sidewalk nearby was described as protesting police action against them. A National Guardsman was described being carried back by two comrades. Kalber described the scene in Grant Park where a group of demonstrators hanged an effigy of Mayor Daley and later burned it. He said it was reported that a number of people had been arrested in connection with the Dick Gregory march which started from the Park. He noted that there had been little of the reaction by authorities seen the previous night in Chicago. Pond advised that, a few minutes before, Police had gone into the crowd to try to take control of the microphone, and that there had been shoving, jostling and release of more gas. Kalber reported that tear gas had been thrown when the marchers arrived at 18th and State; tear gas had been thrown again when they went back to Grant Park; and the National Guard was now ringing the Park.

The video accompanying the above showed the jeeps with barbed wire, the marchers sitting down, and the National Guardsmen moving behind the jeeps; tear gas thrown into the crowd; a couple on the sidewalk protesting and National Guardsmen being carried back. Scenes of a crowd of demonstrators in the Park were shown, as well as the burning effigy of Mayor Daley. In the confrontation between the crowd and the National Cuard, the crowd could be

heard shouting, "Sieg Heil!" In the views of Grant Park, the crowd was seen waving its arms and singing. A small group of police was seen entering the crowd, with some shoving, jostling and isolated arrests.

Later, a segment of about three minutes was telecast, with Jack Perkins reporting. He described the confrontation in Grant Park between the National Guardsmen, the jeeps with the barbed wire on front, and the demonstrators standing or sitting in Grant Park singing "Down By the Riverside". He described the people as those who believe they represent the voice of the people, those whom some call hippies, those who police and Guardsmen, or at least the Chicago Police Department, considered communist-inspired. The accompanying video showed the Guardsmen lined up and the people standing or sitting around and singing.

FCC 69-537
31190

In the Matter of)
)
Inquiry into WBBM-TV's broadcast) Docket No. 18101
on November 1 and 2, 1967, of a)
report on a marijuana party.)

Adopted: May 15, 1969
Released: May 16, 1969

[¶10:315, ¶53:24(R)] Investigation of crimes.

A licensee cannot encourage or induce the commission of a crime. The licensee is not automatically barred from investigative journalism involving situations where there is unfolding a commission of a crime. In some situations, the licensee would have to notify the police, e.g., mugging, robbery, or other violent situations where life or safety or a significant property interest was at stake; in other situations there would be no such requirement, e.g., the "numbers" racket or prohibition violations in certain states. Broadcast journalism is entitled under the First Amendment to show through investigative journalism that substantial segments of society are flouting a particular law, thereby raising hard questions concerning what should be done. WBBM-TV, 16 RR 2d 207 [1969].

[¶10:315, ¶53:24(R)] Coverage of pot party.

A licensee could properly use television coverage of a pot party to point up graphically the widespread nature of this drug violation on college campuses, provided the party was one to which it was truly "invited". The licensee could not properly induce the holding of a pot party. WBBM-TV, 16 RR 2d 207 [1969].

[¶10:315, ¶53:24(R)] Staging of pot party.

Pot party filmed and televised by licensee was authentic in many respects and could not be deemed a flagrantly staged event or outright fraud on the public. It was misleading in that the public was given the impression that the station had been "invited" to film a student pot gathering which was in any event being held, whereas, in fact, its employee had induced the holding of the party. The film should not have been made because inducement of the commission of the crime involved was

improper and inconsistent with the public interest. WBBM-TV, 16 RR 2d 207 [1969].

[¶10:315, ¶53:24(R)] Licensee policy in area of investigative reporting.

Prior consultation with top management is not a prerequisite to the presentation of a broadcast involving investigation of the commission of a crime. Station managers properly have discretion to exercise judgment on controversial news matters. This discretion does not end when time is not a critical factor. A rigid policy of blanket prior clearance is not required in the public interest. The licensee – top management – remains fully accountable for the activities of its station manager. It must therefore not only choose persons with responsible judgment but must have responsible policies to be followed. WBBM-TV, 16 RR 2d 207 [1969].

[¶10:315, ¶53:24(R)] Licensee policy in area of investigative reporting.

In the area of investigative reporting of the commission of a crime, top management of a licensee should make clear the general guidelines to be followed by station managers and should set out the general guidelines for implementation. Policy of a station against the staging of news events, reduced to writing and circulated to its staff, was adequate. However, the station had to bear the brunt of responsibility for the staging of a pot party by one of its employees, and it did not act responsibly in relying upon a very young, new reporter. In any event, when the licensee was accused of staging the pot party, it could not properly deny it without checking into the arrangements made by its reporter. The licensee should have checked with the participants in the party. Reliance upon a promise by the reporter to the participants of anonymity was not permissible in light of the licensee's public interest responsibility. WBBM-TV, 16 RR 2d 207 [1969].

[¶53:24(R)] "Hypoing" of audience ratings.

Station was not guilty of "hypoing" of audience ratings in connection with its presentation of a filmed pot party. A telephone coincidental survey was ordered at the last minute on the day of the broadcast, and no prior surveys during the relevant time period were taken for the weeks preceding

or subsequent thereto which would allow a comparison. WBBM-TV, 16 RR 2d 207 [1969].

[¶10:315, ¶53:24(R)] Pot party broadcast - effect on license.

Where an employee of a licensee arranged a pot party for filming and subsequent broadcast and the licensee made an inadequate investigative report to the Commission, the license of the station was not in jeopardy. Otherwise, the result would be to discourage robust, wide-open debate on controversial issues. The licensee should set forth, for the guidance of its personnel, its policies in the area of investigative journalism and, most important, make appropriate revisions in its policies in order to make every reasonable effort to prevent recurrence of the type of mistake made. WBBM-TV, 16 RR 2d 207 [1969].

REPORT

By the Commission: (Commissioners Cox and Johnson issuing separate statements; Commissioner Wadsworth concurring and issuing a statement.)

1. Upon allegations that officials or employees of WBBM-TV, Chicago, an owned and operated station of Columbia Broadcasting System (CBS), participated in arranging for or, at least, encouraged or induced a group of Northwestern University students to smoke marijuana, in violation of the law, in order that WBBM-TV might film the event for broadcast purposes, the Commission instituted this investigatory proceeding (FCC 68-316, released March 22, 1968). The program, "Pot Party at a University", was broadcast as a two part feature during WBBM-TV's local news report on November 1-3, 1967. 1/ CBS, the licensee of WBBM-TV, was made party to the investigation and denied the allegations.

2. As part of the investigation a hearing was held before Chief Hearing Examiner James D. Cunningham in Chicago in October 1968 and, pursuant to Commission directive (FCC 68-891, released August 30, 1968) his "Findings of Fact and Certification of Record to the Commission" (FCC 69M-8) (herein called Report) were released on January 6, 1969 [15 RR 2d 140]. CBS, pursuant to its request, was afforded an opportunity to file a response to the Chief Hearing Examiner's findings and a brief in support of its response in addition to the presentation of an oral argument before the Commission en banc on March 3, 1969 (FCC 69-56, released January 22, 1969).

1/ Part I was broadcast at 10:00 p.m. November 1, 1967, and repeated at 6:00 p.m. November 2, 1967. Part II was first broadcast at 10:00 p.m. November 2, 1967, and repeated at 6:00 p.m. November 3, 1967).

3. The Chief Hearing Examiner's findings fully set forth facts and circumstances concerning the WBBM-TV program "Pot Party at a University" and on the basis of our review of the record we adopt those findings to the extent that they are not inconsistent with this decision. We will discuss only those facts which are still in dispute and will confine our decision to the main issues.

Facts concerning CBS's activities up to and through the broadcasts

4. WBBM-TV's news director, Robert Ferrante, became interested in doing a marijuana report in July 1967, and his interest heightened in August 1967 after a report of marijuana arrests in the North Shore suburbs of Chicago. In the regular course of a daily staff conference Ferrante mentioned the subject and his interest concerning the North Shore arrests. John Victor Missett, a 23 year old desk assistant to the assignment editor was present and responded that he was not surprised, because while a student at Northwestern University he had had opportunities to attend marijuana parties. 2/ Ferrante was interested and asked Missett to write a memo on the subject and the possibility of WBBM-TV doing a story on the use (including frequency of use) of marijuana. Missett submitted his memo to Ferrante in mid-August 1967 and suggested the possibility of filming or interviewing a marijuana smoker or doing a first-person report on the purchase of marijuana or LSD. Ferrante expressed doubt that it would be possible to film someone smoking. Missett wanted to do a comprehensive report and proposed to concentrate his investigation at Northwestern, the college campus with which he was most familiar. Missett also told Ferrante he believed he could be invited to a marijuana party if he went back to the Northwestern campus. Ferrante told Missett to pursue the matter and it is with regard to his actions in pursuing it that the initial dispute of fact occurs.

5. The factual question regarding Missett's subsequent actions is simply whether Missett was invited to a pot party and asked if he could bring the CBS cameras or whether Missett in some manner arranged the party for the purpose of filming it. We concur with the Chief Hearing Examiner's ultimate finding of fact that the marijuana party which employees of WBBM-TV filmed on October 22, 1967, was held at the behest of Missett and, but for his solicitation, would not have been held on that day, nor have included the eight people who attended in addition to CBS personnel. We have arrived at our determination despite Missett's consistent denials because the weight of the evidence predominantly supports the testimony given by Witness A, 3/ the organizer of

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2/ Missett attended Northwestern for four years and was graduated with honors from the Magill School of Journalism at Northwestern in June 1967. Missett's association with WBBM-TV began in his senior year when, upon the recommendation of the University, he became a student intern. In December 1966, Missett was hired as a full time production assistant; he was made a staff writer in March 1967 and was assigned as assistant to the assignment editor in August 1967. The latter position was concerned with setting up of interviews and the assignment of camera crews.

3/ Four non-public witnesses are referred to as witnesses A, B, C and D; these individuals were granted immunity under Section 409(l) of the Communications Act by virtue of the fact that their testimony was given under compulsion.

the marijuana party. Our determination in this regard is supported by the testimony of Malcolm Spector and his wife regarding an earlier attempt by Missett to set up a party.

6. Malcolm Spector, presently an assistant professor of Sociology at McGill University, was a graduate student at Northwestern at the time Missett contacted him in early September 1967. According to Spector, Missett (whom he had not met before) came to his apartment and introduced himself as representing CBS, which he said was interested in doing a documentary on marijuana and coming out against the harshness of the marijuana laws. Spector was emphatic that it was Missett who suggested the idea of filming a pot party and that Missett wanted Spector to arrange a marijuana party in his own apartment so that CBS could film it for broadcast use. Spector clearly recalled the details of his conversation with Missett: Missett wanted "8 to 10 people, clean-cut kids" to attend the party; CBS would neither pay them or supply the marijuana; and, although CBS would film the program, it could offer the participants no protection from possible legal prosecution. Spector told Missett that the people he knew smoked alone or in groups of 2 or 3 to minimize risk. Spector suggested a panel show on marijuana. Missett wasn't interested in this type of program. 4/ Missett left Spector's apartment without having reached any agreement, saying he would call in a few days; immediately upon Missett's departure Spector spontaneously related the conversation he had just had with Missett to Mrs. Spector, who was then his fiancee. Mrs. Spector was present in the apartment during the entire conversation with Missett although not in the room where it took place.

7. CBS has attacked Spector's testimony on grounds of relevance because Spector was not involved in the marijuana party which was subsequently filmed by WBBM-TV. CBS also challenges the "significant weight" given Mrs. Spector's testimony. However, the Chief Hearing Examiner did not give "significant weight" to Mrs. Spector's testimony regarding what was discussed. What the Examiner found significant was the fact that immediately upon Missett's departure Malcolm Spector related to another the nature and substance of his conversation. The Commission likewise finds this fact significant. While Spector's testimony does not directly concern the October 22, 1967, marijuana party, his testimony regarding Missett's attempts to arrange for filming a marijuana party for WBBM-TV does corroborate Witness A's testimony on the same subject and to that extent Spector's testimony is relevant and germane to the question of whether Missett sought to film an independently planned party or was himself instrumental in the planning. Witness A's testimony is strikingly similar to Spector's. In conversation with Witness A Missett again expressed the view that the marijuana laws were too harsh; again indicated his desire to film an actual pot party and interview people under the influence of marijuana; again said he wanted 8 to 10 people to participate; and again indicated the type of participant he wanted -- upper class college students with no criminal records.

4/ Missett in fact relayed this suggestion to his superiors at WBBM-TV; they also rejected it. Ferrante and Lawrence Morrone, WBBM-TV's executive producer for news, thought the filming of an actual marijuana party the most effective presentation of the marijuana problem.

8. Missett has denied that the October 22, 1967 party was arranged at his solicitation and that he previously attempted to have Spector arrange a marijuana party. However, Missett also testified (Tr. 230-231) that at the time he indicated his interest in filming a marijuana party to Witness A, no party had been planned by Witness A. On the basis of his conversation with Missett, Witness A went out and invited people to a marijuana party in order that CBS might attend and film it. At the very least, Missett did not indicate to Witness A that CBS would be interested only in filming a pot party which had been independently planned by others and which would have occurred irrespective of CBS' interest in the matter. Thus, on the basis of the record, we conclude that the October 22, 1967 marijuana party was the direct result of Missett's actions in seeking to arrange the filming of such an event.

9. Early in WBBM-TV's marijuana investigation, Lawrence Morrone set down guidelines for Missett's actions. No one was to be urged to do anything he would not normally do; no money was to be offered; no encouragement was to be given participants; and the reporter was not to ask to be invited to film a marijuana party. (Tr. 408). All contacts made during the planning stage were through Missett. No other CBS employee was directly involved, and Missett's superiors relied solely upon his reports to keep themselves informed as to developments. Missett relayed the suggestion of a panel show made by Malcolm Spector. Although Missett did not identify him by name, Morrone rejected that approach. Subsequently, Missett told Morrone that they had been invited to film a pot party and that the group involved attended marijuana parties as a regular routine. Morrone asked for the names of the participants and was told that Missett had promised not to divulge them; Morrone did not pursue the subject. Morrone knew only that the group was to be composed of students and an instructor from Northwestern. Missett indicated only that marijuana would be used; although by his own testimony he knew that hashish, robitussin, "silly stuff" and cough syrup were commonly used by the people who composed this group. Although Morrone knew it was illegal to possess or smoke marijuana, he did not consult with anyone about the legality or propriety of sending a camera crew out to film the event. Morrone said Missett was told to film what was going on; no script was prepared and he relied upon the technical experience of the camera crew to get the proper film shots. Missett did, however, submit a script of his own comments prior to the filming, and that script was approved by Ferrante and Edward Kenefick, the General Manager of WBBM-TV.

10. Once the film was brought to the station it was extensively edited by Morrone and Robert Harris, the producer of the 10 p. m. news show. Out of the one hour or more of film shot at the party only a total of 13 minutes (Tr. 418) was used; the rest was destroyed prior to the actual broadcast. It was at this point that Ferrante decided that the report would be presented in two parts and Morrone decided that the views of respected officials were needed to present a balanced view of the pros and cons of marijuana. After the news department viewed the film, Ferrante gave Kenefick a briefing as to what had been filmed. Kenefick said that it didn't sound very exciting, but that they did have the interviews and some comments of the kids; he suggested they balance the program with "appropriate" interviews. As a result, Charles Ward, Federal Narcotics Bureau Chief, Midwest Division, and Dr. Jerome

H. Jaffe 5/ were contacted and Missett interviewed them at the end of October, more than a week after the filming of the marijuana party. Missett did not tell Ward that the marijuana party had been filmed and Ward said that had he known the Narcotics Bureau probably would have declined the interview.

11. Once the entire program was assembled, Ferrante and Kenefick viewed it on closed circuit television. Kenefick suggested some re-editing, which was done, to adhere to Missett's promise of anonymity. In preparation for the broadcast, Bruce J. Bloom, WBBM-TV's advertising director, was informed of the program by Ferrante. Bloom composed newspaper ads, which were shown to Kenefick for approval. Kenefick suggested a change in the title from "Pot Party at Northwestern" to "Pot Party at a University", so as not to single out Northwestern since the program was supposed to be typical of many universities and colleges. The extent to which the program was advertised was Bloom's decision, although Kenefick was fully informed. A total of $3,635 was spent on newspaper advertisements. This expenditure was high in relation to WBBM-TV's normal advertising for programs of even longer duration. In addition, spot announcements promoting the pot party film were run on the station on October 31 and November 1 and 2, and Bloom alerted the television critics of Chicago's four major newspapers to the upcoming event. Bloom also invited Dean Gysel, television critic of the Chicago Daily News, to preview the program, a privilege which was denied to representatives of Northwestern University at about the same time. WBBM-TV explains this action by saying that preview invitations to television critics are a normal occurrence, with the critic welcome to write a notice of the upcoming program but expected to reserve criticism until after the broadcast, whereas permission to preview is denied to outsiders "involved" in the program. In this instance, Ferrante viewed Northwestern's representative as "involved" because the filming took place on the Northwestern campus. 6/

12. Before the broadcast, Sam Saran, in charge of Public Relations for Northwestern University, contacted Ferrante about the program. Saran was apparently irritated that a marijuana party had been filmed on the campus without consultation with the University. At the same time Saran asked to

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5/ Dr. Jerome H. Jaffe is a psychiatrist specializing in the area of narcotics, presently on the faculty of University of Chicago and Director of the Drug Abuse Division of the Department of Mental Health of the State of Illinois.

6/ The marijuana party was actually filmed at 620 Foster Street, a rooming house which is neither owned nor controlled by Northwestern University. However, the building is located within the general area depicted in University publications as the Northwestern campus in Evanston, Illinois. We do not believe that the precise location of this building is material to our decision in that WBBM-TV's identification of it as part of the Northwestern campus was reasonably based upon information distributed by Northwestern University and the erroneous implication that it was owned or controlled by the University was apparently the result of an honest misunderstanding of the facts.

see the film; his request was refused. Saran advised Franklin M. Kreml, Northwestern's Vice President for Planning and Development, of what had occurred and Kreml pursued the matter.

13. On October 31, 1967, Kreml arranged an appointment with Ferrante and Kenefick. Kreml asked that Northwestern's name be removed from the program because of the potential damage to the school's reputation, and particularly because of possible impact on a large donation the University was then negotiating. Kreml asked to see the program and his request was also denied. At the end of the interview, Kenefick told Kreml that he would think about the matters raised. At no time prior to the first broadcast did Saran or Kreml suggest either that the marijuana party did not take place on the Northwestern campus or that the marijuana party had been staged or prearranged by CBS. After Kreml left, Ferrante and Kenefick discussed the problem and decided to check with Missett again. Ferrante and Kenefick separately questioned Missett to determine whether any encouragement or inducement had been offered the marijuana party participants and to ascertain again whether the party had taken place on the Northwestern campus. Kenefick's conversation with Missett lasted two hours, but Kenefick never asked the address at which the party was held nor was any attempt made by CBS prior or subsequent to the broadcast to learn the identify of, or speak to, any of the participants. Kenefick did direct Ferrante to check on Missett's connections with Northwestern to determine whether he would have any reason to try to embarrass the University; Ferrante reported that Missett's Northwestern record was good. In addition, Ferrante checked with a camera man regarding the possibility that the party had been staged by Missett and to determine the general location of the party. He was satisfied that Missett's statements were accurate. It was on the basis of the November 1, 1967 conversations with Missett that WBBM-TV's management decided to go ahead with the scheduled broadcast. Although all were aware that the possession of marijuana was a criminal offense in the state of Illinois, no attempt was made prior to the broadcast to discuss the legality of the filming with legal counsel.

14. The charge that the WBBM-TV Pot Party was staged was first made on November 2, 1967, the day after the initial broadcast of Part I, through a statement issued by Northwestern University which appeared in the Chicago daily newspapers. The charge was made in bare terms that "The film report and broadcast by WBBM-TV News Wednesday which purported to show a group of former and present students of Northwestern University smoking marijuana in an Evanston apartment was staged by the participants and others for the station's filming". (See also footnote 9, infra.) Faced with these charges, Ferrante again spoke to Missett, but again did not ask the identity of any of the participants, and was satisfied that the report of staging was false. Ferrante then called Kenefick, who was in Washington at a meeting with other CBS executives, to discuss the report. Kenefick had already learned of the Northwestern statement and discussed it with John Schneider, president of the CBS Broadcasting group, and Robert D. Wood, president of the CBS Television Stations, Group. Neither Schneider nor Wood suggested that Part II not be broadcast. Likewise, Kenefick and Ferrante did not discuss such a possibility. After speaking to Kenefick, Ferrante wrote a disclaimer of the staging charge which was read prior to the showing of Part II on the 10:00 p.m. news on November 2, 1967.

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15. The management of WBBM-TV was kept informed of developments with respect to the marijuana report by frequent, sometimes casual reports by John Missett. The information upon which the decision was made to broadcast the Pot Party film was limited, in all significant respects, to that one source. We have found that the marijuana party which WBBM-TV filmed was held at the instigation and behest of WBBM-TV's representative. We further find that the management of WBBM-TV was unaware of this fact. However, the matter does not end there, and will be discussed further (see paragraphs 41, 43, 44 infra.).

CBS's post broadcast actions

16. CBS's initial response to the charge that the WBBM-TV marijuana party was staged came on November 2, prior to the broadcast of Part II. At that time Kenefick was questioned by CBS executives about the wire news stories regarding the Northwestern assertions. Schneider and Wood asked him if the party was staged, the identity and background of the reporter, when the party was filmed, and why the broadcast was delayed. Kenefick's answers satisfied the CBS executives, and no discussion was had regarding the broadcast or non-broadcast of Part II. In Chicago, at about the same time, Ferrante again questioned Missett and was satisfied with his assurance that the charge was without foundation. Ferrante, based upon his conversation with Missett and later with Kenefick, wrote a disclaimer of the Northwestern charges which preceded the broadcast of Part II.

17. Dr. Frank Stanton, President and Chief Administrative Officer of CBS, first learned of the WBBM-TV Pot Party on November 2 from a wire news story. Stanton called Richard W. Jencks, the head of the CBS Law Department, and asked him to get the facts. Stanton made the same request of Schneider, but had no discussion with either Wood or Kenefick. On November 2, he did not know the program was being shown in two parts. Aside from a general description of the program supplied by Schneider, Stanton knew virtually nothing of the events of November 2 at that time, and subsequently left the CBS investigation almost entirely to the Law Department. The Evanston Chief of Police sent him the name and address of Missett's co-arranger, Witness A, in January 1968. A letter was also sent to Kenefick at the same time, containing the same information. No direction was given by Stanton that the witness be interviewed, and he never was by CBS. Stanton merely referred the letter to the Law Department.

18. In November 1967, shortly after the Pot Party broadcast, the Commission initiated a series of inquiries concerning the broadcast, as did the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce.

19. The chronology of CBS's investigation is set forth in paragraphs 72-100 of the Examiner's Findings of Fact and need not be repeated in detail. Representatives of CBS spoke to officials of Northwestern University, the State's Attorney's Office, law enforcement officers and WBBM-TV employees. At no time did CBS attempt to interview the party participants or to ascertain their identities. Regardless of how the matter is couched, CBS spoke to only one person [Missett] with actual knowledge of the facts concerning the question of staging. The conversations with public officials and other CBS employees

could not, under any circumstances, have yielded additional first-hand facts on this question. CBS defends its omission by saying that the decision to honor Missett's promises of non-disclosure were made by the CBS Law Department and other legal counsel.

20. Dr. Stanton articulated CBS's general policy of protecting sources of information. For this reason, CBS never attempted to ascertain the names of the participants in order to corroborate Missett's version of the facts and never attempted to interview any of the participants when their identities became known to CBS. Dr. Stanton said CBS follows an ad hoc policy which leaves to the judgment of individual station managers the question of whether to consult with CBS headquarters or whether to participate in programs involving the commission of a crime of which the station is aware in advance.

Staging for purpose of "hypoing" audience ratings

21. The next factual question raised is whether the marijuana party was staged in order fraudulently to increase or "hypo" WBBM-TV's audience ratings. Some of the evidence bearing upon this question has already been recited: i.e., WBBM-TV's news director decided to present the program in two parts, presumably for maximum audience exposure; and $3,635 was spent on newspaper promotion for the program, a somewhat higher than usual expenditure for the length of the program, which was merely a segment of the regularly scheduled 10 o'clock News. In addition, a telephone coincidental survey was ordered by WBBM-TV on November 2, 1967 for Part II of the Pot Party broadcast. On November 2, 1967, Kenefick, attending a meeting in Washington, spoke to WBBM-TV's sales manager who raised the question of ordering the special survey in view of the heavy newspaper promotion. Kenefick told him to order it if he wished. No mention of the survey was made to Wood or Schneider, the CBS executives who had already questioned Kenefick about the Part I broadcast. The next day Kenefick was given the results of the survey which showed WBBM-TV outdrawing its competitors in the 10:00 - 10:30 p.m. time period, a half hour when WBBM-TV had previously lagged behind its NBC competitor.

DISCUSSION

22. The foregoing constitutes a brief treatment of some of the factual highlights; we again point out that the Chief Hearing Examiner's factual findings, except where inconsistent, have been adopted and should be referred to for a fuller statement. We turn now to a discussion of the main issues raised: (A) The issue of staging the news events, together with the issue of investigative news reporting in situations involving the commission of a crime; (B) the issue of licensee responsibility in this type of situation; (C) the issue of staging for the purpose of hypoing audience ratings. We shall treat each in turn.

A. Staging; investigative reporting in situations involving commission of a crime

23. We are here in the sensitive field of broadcast journalism. The field comes within the requirement of operation in the public interest (see Section 315(a) of the Communications Act). But it is an area where the Commission's proper interest is narrowly confined and where Commission intervention should

be limited to appropriate matters. See Letter to ABC, CBS and NBC, 16 FCC 2d 650 [15 RR 2d 791] (1969). Broadcasting is, of course, no less entitled to First Amendment protection than the print media. Rather, broadcasting is the press, and something more - the "more" being the requirement, because of the system of federal licensing which excludes all others from use of the frequency, that the broadcast operation be consistent with the public interest in such respects as the fairness doctrine and that the licensee eschew deliberately slanting the news or staging news events.

24. The latter category - improper staging of news events - can be a most difficult one. As we stated in our recent Letter to ABC, supra:

> " . . . In a sense, every televised press conference may be said to be 'staged' to some extent; depiction of scenes in a television documentary - on how the poor live on a typical day in the ghetto, for example - also necessarily involves camera direction, lights, action instructions, etc. The term 'pseudo-event' describes a whole class of such activities that constitute much of what journalists treat as 'news'. Few would question the professional propriety of asking public officials to smile again or to repeat handshakes, while the cameras are focussed upon them. In short, while there can, of course, be difficult gray areas, there are also many areas of permissible licensee judgment in this field.
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> "The staging of the news with which we are here concerned is neither an area coming clearly within the licensee's journalistic judgment nor even a gray area. Rather, it is the deliberate staging of alleged 'news events' along the line of the charges set out under No. 3 infra (i. e., a purportedly significant 'event' which did not in fact occur but rather is 'acted out' at the behest of news personnel). Where such staging occurs, it may constitute a range of abuses as serious as those present in the Richards case. 4/ See also par. 17, Editorializing Report, 13 FCC at pp. 1254-55. In the Richards case, according to charges made by newsmen, the licensee instructed his news staff to slant news reports in specified ways. Such slanting of the news amounts to a fraud upon the public and is patently inconsistent with the licensee's obligation to operate his facilities in the public interest. It calls for a full hearing to determine the facts and thus whether the licensee is qualified to hold the broadcast permit."

4/ See KMPC, Station of the Stars, Inc., FCC 49-1021, 14 Fed. Reg. 4831 (1949).

25. There are thus many aspects and issues which can arise in the area of staging news events, and it is not, of course, possible to set out a discussion which will cover all such aspects. Some situations are clear-cut. For example, the licensee's newsmen should not, upon arriving late at a riot, ask one of the rioters to throw another brick through a store window for its cameras. First, if the window is already broken, it is staging a news event - one which did not

in fact occur but rather is "acted out" at the request of the news personnel; the licensee could fairly present such a film only with the full disclosure of its nature. In any event, whether or not the window is broken, the licensee cannot encourage or induce the commission of a crime, and throwing the brick is a crime (see discussion, infra, par. 30). There are other clear situations, but, as stated, there will arise situations where the answer is not clear-cut - where difficult decisions must be made by the broadcast journalist, keeping in mind the desire to portray the matter as graphically as possible and at the same time preserving fully the bedrock upon which the entire industry rests, namely, the integrity of the news and related programming operations.

26. This case presents a different aspect of the staging issue. We are not involved here with a "news event" which did not in fact occur but rather was acted out at the behest of the news personnel. WBBM-TV set out to show a pot party involving Northwestern University students at the Northwestern campus - to point up the pervasiveness of this kind of drug violation at colleges. The party depicted did involve marijuana smoked by Northwestern students (and a teacher and two college drop-outs, so identified) who did smoke marijuana at a campus rooming house apartment (see note 6, supra) where other pot parties had been previously held. In a sense, then, the party was, as stated by one of the students in a subsequent interview with the campus radio outlet, "authentic" - it was not staged by "actors" or "non-students" who did not smoke marijuana or who were pretending to smoke marijuana at some station studio.

27. Further, the public obviously was aware that the party was being held with the television camera a major factor. It knew that the camera was there, and had to have an effect on the participants. It could hear Missett asking questions of the students. In all respects, lighting, placing, questions, etc., there had to be the usual cooperative aspects of any such televised event. In short, the public thus knew fully that this was a televised pot party - an inherently different event from a private, non-televised pot-smoking gathering. 8/

28. But having said all this, we nevertheless believe that there was deception of the public in one significant respect. At the beginning of the second broadcast, WBBM-TV noted that "Northwestern University accused us of staging the party for our news camera". It then stated: "This WBBM-TV categorically denies. We were invited to film the party for use within our news broadcast." While even here the matter is ambiguous, 9/ the thrust of WBBM-TV's

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8/ In a sense, it is like the theory of indeterminacy. When you use an instrument to ascertain the orbit of the electron, you affect the orbit, and, similarly, when you introduce a television camera and crew into a meeting such as the above (rather than televising the meeting covertly through a mirror or screen, without any knowledge on the part of the participants of the presence of the camera) you affect the nature of the meeting.

9/ Kreml, Northwestern University official, stated that this statement was based upon his meeting Ferrante and Kenefick and upon his observation of the participants at the party who did not look to him as though they were

[Footnote continued on following page]

presentation would appear to be that this party was not being staged for the station; that it was a pot party being held by the students on their own; and that the station was "invited" to film it for use in the newscast. In short, it would appear that the station was telling the public that it had not induced the holding of this party for its cameras. As we have found, contrary to management's instruction, that is what did happen here – Missett did induce the holding of this party. Without Missett's activities, these particular persons would not have gathered to smoke marijuana at this time and place.

29. The plain fact is that had WBBM-TV known of Missett's actions in inducing the holding of the party, it clearly would not have broadcast the film of the party in the first instance. This brings us to the related, and, in this case most important, aspect of this issue – what could the licensee properly do in the furtherance of this kind of investigative journalism?

30. We have previously set out our position on this aspect in testimony before the Congress (Hearings before the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Session, p. 331). We adhere to that position. The broadcast licensee is not automatically barred from investigative journalism involving situations where there is unfolding a commission of a crime. Of course, there are situations where, rather than determining that the investigative journalistic effort should be undertaken, the licensee would have to notify the police (e.g., mugging, robbery, or other violent situations where a participant's life or safety or someone's significant property interest was at stake). But there are other situations where there would be no such requirement (e.g., "The Biography of a Bookie Joint" FCC 62-779 (1963) the "numbers" racket or prohibition violations in certain states). Print journalism has long engaged in such investigative exposures. It has been commended, not condemned, for these efforts to hold a mirror before the public. Broadcast journalism is no less a part of the press – no less entitled under the First Amendment to show through such investigative journalism that substantial segments of society are flouting a particular law, thereby raising hard questions concerning what should be done in such situations.

31. In this case, WBBM-TV could therefore properly use television coverage of a pot party to point up graphically the widespread nature of this drug violation on college campuses. But it had to be a pot party which was being held, whether or not WBBM-TV was there to televise it – one to which it was truly "invited". The licensee could not properly induce the holding of a pot party. Simply stated, the licensee has to be law-abiding (FCC v. ABC, 347 US 284 [10 RR 2030] (1954) n. 7) and cannot induce the commission of a crime such as the use of marijuana. There is, we think, no dispute on this point. The

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9/ [Footnote continued from preceding page]

practiced marijuana smokers. He thus seems to indicate that the thrust of the "staging" charge was that this was not an "authentic" pot party in that these were not experienced users of marijuana, but rather students and others willing to be televised by WBBM-TV. In fact, all the participants had previously smoked marijuana.

station's management again and again cautioned Missett that he must not encourage, solicit, induce, support through payment, etc., the holding of a pot party (see, e.g., pp. 4, 6, supra; pars. 9, 32, 33 of the Chief Hearing Examiner's Report). They clearly recognized the impropriety of such action. And it remains improper, whether or not the participants might smoke marijuana elsewhere and in different groupings the next day or week. 10/

32. In sum, on issue (A), while the pot party was authentic in many respects and thus cannot be deemed a flagrantly staged event or outright fraud on the public, it would appear that it was misleading in that the public was given the impression that WBBM-TV had been "invited" to film a student pot gathering which was in any event being held, whereas, in fact, its agent had induced the holding of the party. There is some ambiguity with respect to the situation leading to the foregoing conclusion. There is none with respect to the most important conclusion reached, namely, that the film should not have been made because inducement of the commission of the crime involved, as the licensee recognizes, is improper and inconsistent with the public interest. We stress that our holding is limited to the fact of this case and the particular activities involved. See paragraph 25, supra.

B. Licensee responsibility in this situation

33. We have found that the licensee was not aware of Missett's activities to encourage or induce the party and that these activities were contrary to management's specific instructions. But that does not end the matter. The licensee is responsible for the conduct of its employees. It must set down appropriate policies and exercise reasonable control or supervision over its employees with respect to the observance of these policies. We turn now to the question whether the licensee has complied with these requirements in this case. This question is centered about the licensee's policy as to investigative reporting and staging and its supervisory actions here to promote compliance with the policy.

34. CBS's policy as to investigative reporting such as was involved in this case is to leave this matter to the news judgment of its station manager. As to the argument that CBS should have a policy of notifying authorities when it is known that a crime is about to take place, we have already set forth our

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10/ We wish to make clear that we are using the term, "induce", not in any sense of the criminal or related law (e.g., entrapment), but in its plain dictionary sense ("to bring about; cause; effect . . . to lead on to some action," etc.). Upon the basis of the Chief Hearing Examiner's findings adopted by us, WBBM-TV did induce the holding of this marijuana party (e.g., that Missett, as he had in the case of Spector, told Witness A that the marijuana laws were too harsh and that he wanted to film an actual pot party with 8 to 10 participants who were upper class college students with no criminal records) (see discussion, pp. 2-5 supra). Indeed, the licensee has recognized that if the testimony of Witness A and Spector is credited, there was improper inducement, against its instruction; its defense has always been that the above testimony should be rejected and that of Missett accepted.

view that this is not necessary in situations like this. We also disagree with a blanket requirement that station managers must clear in advance all proposed controversial programs with top management. Of course, the licensee remains fully responsible for all programming, and its station managers should consult, and be encouraged to consult, with top management on matters of special import.

35. This was clearly such a decision, and understandably Kenefick might well have chosen to consult with top management. Indeed, since CBS remains fully responsible for all actions of its station manager, it might have insisted upon such prior consultation in this unusual and difficult area of investigative journalism involving the commission of a crime. Had it done so, or had Kenefick voluntarily consulted CBS's top management, the latter might have pointed up the crucial defect in the local station's manner of proceeding in the case – the total and unreasonable reliance upon the young reporter, Missett (see discussion, infra, par. 41). The issue before us, however, is not what might be appropriate but what is required in the public interest, and specifically, whether prior consultation with top management is a prerequisite to the presentation of such an investigative journalistic broadcast.

36. We do not believe that it is. Station managers properly have discretion to exercise judgment on controversial news matters, the majority of which are fast-breaking in nature. We do not believe that this discretion must be said to end where time is not a critical factor. A station manager, who may have to decide under great time pressures how and whether to cover a news matter such as a local riot, remains an individual who may exercise judgment as to an investigative news item. The rigid policy of blanket prior clearance in this area is not required in the public interest, and indeed, since it appears to be urged from the standpoint of an essentially hostile view as to such investigative journalism, might not serve the public interest in the widest possible dissemination of news and viewpoints on controversial issues. As a final incidental matter, we point out that the station manager of WBBM-TV did not abuse the confidence placed in him with respect to whether this was an appropriate matter for investigative coverage despite the fact that the participants were involved in the commission of a crime; in our view, WBBM-TV could properly present a pot party as a facet of investigative journalism.

37. We stress again that the licensee – top management – remains fully accountable for the activities of its station manager. It must therefore not only choose persons with responsible judgment but must have responsible policies to be followed in this sensitive area. We turn to these policies.

38. First, CBS itself has no written policies in this area of investigative journalism. As stated, the matter is left to the judgment of the station manager. We think it clearly desirable that CBS, and other licensees, set out the basic policy (e.g., whether it is permissible when a crime of violence is being permitted; etc.). While this particular station manager did not abuse his discretion in this instance, we do not believe it unreasonable that, in this difficult and sensitive area, top management should make clear the general guidelines for all its stations.

39. Further, top management should also set out the general guidelines for implementation of these policies. We do not mean just a policy statement against "sin". In this case, there was no lack of policy direction to Missett.

WBBM-TV's management repeatedly stressed to Missett that he was not to encourage the forming of a party, that he was in no way to arrange the party, that he could in no way pay any money or encourage or induce any of the activity, and that the party would have to be "purely an actuality" (pars. 9, 13, supra; pars. 9, 32, 33, Report). The station's policy against the staging of news events, mainly in connection with the coverage of demonstrations, was reduced to writing and circulated to its staff in a memorandum dated October 27, 1967. These policies are adequate.

40. Yet the policies were not followed by Missett, as we have found. We recognize that the licensee is not an insurer in this respect – that no matter how fully and adequately it may establish and implement policies, misconduct can occur. But we do not believe that this is a case where the licensee is without fault. Indeed, in our view, Missett should not be regarded as the "fall guy" in this case, but rather the licensee, under established policies, should bear the brunt of responsibility for the matter.

41. WBBM-TV's management knew that it was proceeding in a very sensitive, "difficult" area, as evidenced by its repeated admonitions and questions to Missett. The key at all times to whether the station was proceeding properly was Missett's activity in making arrangements with the participants. But, as to this factor, it placed its entire reliance on Missett, "a young, ambitious reporter" (p. 39, Report). It never sought to have any check by Ferrante or Morrone on the crucial activities or arrangements of Missett with the participants. The reason given – Missett's promise of anonymity to the participants – simply cannot be controlling in the face of the circumstances here confronting the licensee.

42. First, we note that the promise of anonymity would have still been preserved, as a practical matter, if there had been a check by a senior news supervisor. The names would still be within the station's news department, albeit in two newsmen pledged to maintaining confidentiality rather than one. It is difficult to believe that these participants who were willing to attend a televised pot party where their faces would be closely observed by the TV crew, would have balked at this one additional check. If they had, the licensee could then consider whether it wished to televise an event such as this, where it had to rely solely upon the assertions of its young reporter as to the crucial and delicate facet of arrangements for the party. 11/ In short, in view of the sensitive, difficult nature of the assignment, we cannot find that WBBM-TV acted responsibly in relying solely upon a very young, new reporter.

43. In any event, and more important, the matter does not end there. When the Northwestern University accusation was made, the licensee could not properly deny it, stating that it was "invited" to film the party, without first checking the critical factor of the arrangements made by Missett. While we can appreciate the licensee's policy of protecting news sources, we believe that it

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11/ We also note that if WBBM-TV had made the requisite inquiry prior to the November 1 broadcast, it would have ascertained the nature of the program and taken appropriate action. Thus it would not become necessary to disclose the identify of the participants to anyone outside of the station management.

was incumbent upon the licensee at that point to make a check with the one independent source, the participants, and then take appropriate action in light of that check. The licensee could have simply pointed out to Missett that it was incumbent upon the station to reply to the charge; that it could not properly do so without making inquiry of the participants; that it therefore must request that the names be given to a responsible senior news supervisor; and that the confidentiality of the names would continue to be respected (just as it has continued to this date in this proceeding). For, the critical consideration was the integrity of its news operations, and the licensee had to take the necessary, reasonable steps to insure that integrity. This it did not do. 12/

44. Finally, when it was called upon to investigate the matter and submit a report to the Commission, again, for the reasons stated above, it should have made contact with the participants. Its investigation – and its conclusion that there was no misconduct – was fatally defective so long as it continued to avoid the one vital action – inquiry of the participants as to what Missett's activities had been. The pattern followed by the licensee from the beginning of the matter (i.e., preparations for the broadcast) to the post-broadcast investigation remained essentially the same. The mere repetition of the same questions to the same reporter did not, in the circumstances, constitute a reasonably diligent effort initially to insure operation in the public interest or subsequently to investigate the matter. Missett obviously was not going to indicate any wrongdoing or deviation from instruction. 13/

45. In short, we hold that where investigation is called for in this type of situation – in order to deny a charge of impropriety or to report to the Commission – that investigation must encompass contact with the participants, and reliance upon a promise of anonymity is impermissible in light of the licensee's public interest responsibility. We note as a further matter the consideration that the confidentiality of the participants could be essentially maintained in an in-house investigation.

46. In sum, we hold that on issue (B) the licensee failed to set out written general policies to guide its station managers in the field of investigative journalism, both as to what is permissible and how the general policies in this area should be implemented. The latter area is crucial in this case, because WBBM-TV's supervisory actions in this case to implement the station's policies were deficient at all stages (prior to broadcast; after the first

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12/ Similarly, we do not find acceptable CBS's reliance on the decision by its law department and outside legal counsel to honor Missett's promises of non-disclosure. CBS is the licensee. Advice of counsel is not dispositive of a licensee's responsibilities.

13/ Furthermore, CBS's response to the Commission's inquiry of November 21, 1967, which indicated that "a careful and intensive investigation" had been conducted and that the charges made against WBBM-TV were "without foundation" represented a cavalier and inappropriate response. No complete investigation could have been made without contacting the crucial source, the participants. Witness A, Missett's prime contact, was the critical source, and we note that CBS was given Witness A's name in January 1968. CBS still never sought to contact Witness A, even though it now had his name from a source wholly independent of Missett.

broadcast when the Northwestern charge was made; and after the receipt of the Commission's request for an investigative report). With proper licensee policies, the matter of reliance in these circumstances on a young reporter or on the policy of anonymity should have been handled differently and so as to insure operation consistent with the public interest. We stress that formulation of such policies is wholly consistent with encouragement of broadcast journalism, and of robust, wide-open debate, for all that is entailed is licensee responsibility – not curtailment of the licensee's right to make news judgments, or engage in appropriate investigative journalism.

C. The issue of staging for the purpose of hypoing the news

47. The facts on this issue have been set out at par. 21. The question presented by WBBM-TV's marijuana program is not whether a larger than usual audience was sought and attracted but rather whether WBBM-TV staged, as opposed to reported, news in order to increase its audience ratings. Based on our previous discussion, we conclude that it did not. Initially, as we have earlier found, those responsible for presenting the programs in two parts, placing the newspaper advertisements, ordering the coincidental telephone survey, etc., had no knowledge of any improper conduct by Missett concerning the arrangements for the party. It follows logically that WBBM-TV's management cannot be found to have staged or induced the party in order to hypo ratings of its news program. Moreover, as to the latter consideration, there is other independent evidence that the program was not presented for purposes of "hypoing" audience ratings: The telephone coincidental survey was ordered at the last minute on the day of the broadcast; no prior surveys during the relevant time period were taken for the weeks preceding or subsequent thereto which would allow a comparison; the survey showed only that, during the 10:00 – 10:30 p.m. time period on a particular night, WBBM-TV outperformed its competitors in terms of audience; during more than 15 minutes of the half hour surveyed, WBBM-TV was presenting a movie which had been an Academy Award winner and which would be expected to attract a larger than usual audience; and the survey would have been unproductive if the aim had been to determine the audience attraction of the marijuana party because it would be impossible to determine whether the 10:00 – 10:30 p.m. WBBM-TV audience watched the end of the movie or watched the news program which followed at 10:17 p.m. 14/

48. There is, of course, the entirely different issue of whether WBBM-TV presented a "sensational" news program in order to increase its audience. Arguments could be made that, on the one hand, the question of drug abuse on campuses could be presented effectively in other, much less "sensational" fashion, and, on the other hand, that this type of visual presentation is peculiarly the function of television – that it gets the audience's attention (an obvious prerequisite), has much more impact upon the audience, and gets it thinking about the subject. We have recently commented on this aspect. Letter to

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14/ The mere fact that WBBM-TV's audience ratings for this time period for the month of November 1967 improved vis-à-vis those of its competitors does not, in our view, demonstrate that the marijuana party was presented for the purpose of "hypoing" WBBM-TV's audience ratings.

American Broadcasting Company, FCC 69-192 supra, p. 7, and Letter to Mr. Dan Sanders, FCC 69-302 [15 RR 2d 1096], March 26, 1969. We adhere to that discussion here. We do not denigrate the importance of the issue. But, as we stated, such situations involve a matter of journalistic judgment by the licensee and are subject to review by media critics and students, but not by the licensing agency. 15/

Conclusion

49. The final issue is what action should be taken in light of the conclusions on issues (A) and (B), supra. Here again we believe that there are prior precedents in the news field which are in point and should be followed. In the Letter to National Broadcasting Company, 14 FCC 2d 713 [14 RR 2d 113] (1968), we found that the licensee had not exercised proper supervisory controls with respect to a broadcast by a newscaster on a matter in which he had a conflict of interest never disclosed to the listening public. We requested that the licensee review its supervisory policies in this respect, in order to guard against such occurrences in the future. We did not place any of NBC's licenses in jeopardy and, indeed, it would have been most inappropriate to do so. For, the result of such action would be to discourage robust, wide-open debate on controversial issues – the very reason for allowing so much spectrum space to broadcasting. The message to the licensee would be to avoid controversial issue programming, because a mistake in this area could jeopardize the broadcaster's entire existence. Such a policy would not serve the public interest, and would be at odds with our long standing assurance that mistakes such as that involved in the NBC case do not call the license into jeopardy. Cf. Report on Editorializing by Broadcast Licensees, 13 FCC 1246, 1255 (1949).

50. The foregoing is equally pertinent here. We are in the sensitive news field and fully recognize that we must tailor our actions to serve best the public interest in the most robust, wide-open debate – the underpinning of the First Amendment. Here there has been a serious mistake and an inadequate investigative report to the Commission, which occurred because of deficient policies in the field of investigative journalism. The license of WBBM-TV is not in jeopardy because of these mistakes. But, acting, we believe, consistently with the foregoing paramount public interest consideration, CBS should set forth promptly and to the extent appropriate and feasible, for the guidance of its personnel, its policies in this area and, most important, to make appropriate revisions in its policies (including especially those with respect to its supervisory responsibilities) in order to make every reasonable effort to prevent recurrence of this type of mistake.

SEPARATE STATEMENT OF COMMISSIONER KENNETH A. COX

I am in general agreement with the result reached here. However, some aspects of the opinion trouble me. I would therefore like to set forth some of my views very briefly.

15/ There are other broader issues raised in this respect, but we do not believe that it is appropriate to treat them in this investigative report dealing with WBBM-TV.

I agree that broadcast investigative journalism is useful and should be encouraged. I think this means that a licensee may have a policy of not reporting to the police certain classes of criminal incidents of which it has advance knowledge – so long as failure to prevent the incident will not result in injury to person or property. Indeed, I think a broadcaster may, in rare cases, have to follow such a course in order to advise the public of serious matters which should be brought to its attention – e.g. a pattern of official laxity in enforcing certain criminal statutes. However, such situations impose special responsibilities on the broadcaster, since he must not induce the Commission of the illegal acts. Similarly, in covering civil disorders, broadcast newsmen – especially those in television – must follow procedures which are least likely to inflame the participants or to lead them to additional acts of violence, whether to accommodate the newsman or to advance propaganda objectives of the rioters.

The problem is even more difficult where the illegal acts involve a small group in a confined place because broadcast coverage, especially television, is most intrusive and overpowering in such circumstances. Thus it is clear that the pot party involved here could not have been filmed without the knowledge, consent, and cooperation of the participants, and that the nature of the party must have been materially changed by the presence of the cameras, lights, and the strangers who manned them. But that does not necessarily mean that the party was not authentic and a proper subject for television coverage – even though pre-arrangement would clearly be necessary.

If WBBM-TV had learned that a particular group was going to hold a party at a particular time and place, and obtained permission to film it, then the station could clearly have broadcast the resulting film and interviews. Mr. Missett says this is what happened, and WBBM's management believed him. Our Chief Examiner found, however, that Missett induced the holding of this party for the purpose of filming it.

CBS says that if WBBM had realized that this was not a group which regularly smoked marijuana together, and that it had come together at this time and place only because of Missett's interest in filming such an event, it would not have broadcast the film. The Commission says that Missett's intervention amounted to inducement of an illegal act; that WBBM would have discovered this if it had made a proper investigation; and that it could not then have broadcast the film.

I think this is too close a semantic question to permit the making of a clear judgment on contradictory testimony. I agree that licensees should not induce the commission of illegal acts in the sense of procuring or instigating them. But I think the line is drawn too closely here, so that it may be difficult for newsmen to know when their efforts cease to be permissible "arrangement" and become improper "inducement".

While in retrospect, a different course of action may seem to have been called for, I think that the management of WBBM was within its rights in presenting the first segment of film. A new complication was introduced by the widely disseminated charge, by a Northwestern University official, that the party had

been staged by the station. 1/ There apparently was no factual basis for this allegation, and the University never made any effort to substantiate it. The station did not have much time before the scheduled presentation of the second segment of the program. It made some further inquiry, though it perhaps should have done more. However, I find it hard to fault its management for going ahead as planned.

But when the Commission inquired about the matter, I agree that CBS should have investigated the matter far more carefully and completely than it did. I think its top management should have played a more active role in the investigation, and that its replies should have been more responsive. I think broadcast journalism's vital freedom will be better assured if licensees cooperate willingly and fully with the Commission in examining serious charges of falsification than if they make cursory investigations and try to gloss the whole thing over with broad assurances that everything was perfectly proper. If CBS had done this in the first instance here, it might have avoided both Commission and Congressional investigation.

These cases pose a serious problem. I think that we should not investigate charges against broadcast news coverage which clearly involve only disputes as to editorial or reportorial judgment. But when we receive apparently substantial charges of fabrication or falsification of news by licensed users of public frequencies who are required to operate in the public interest, I think we must inquire far enough to satisfy ourselves that there is no clear proof of the alleged misconduct. We have demonstrated our concern that we not go so far as to endanger the freedom of our licensees to investigate and report all matters of concern to the public. See our recent rulings with respect to the networks' coverage of the 1968 Democratic National Convention 2/ and WBAI-FM's broadcast of anti-semitic material. 3/ I think broadcasters should respond in like spirit. In my judgment they would be better advised to forego ringing statements that they cannot be called on to respond to any inquiry as to their news activities, and to do their best, instead, to develop the facts as to these difficult disputes and to correct any deficiencies which are established, or even seriously indicated. After all, it is to the interest of all of us that public confidence in broadcast journalism be preserved, and the knowledge that only staging is prohibited should not inhibit broadcast journalism.

I agree with the ultimate disposition of this matter, but would have read the record somewhat differently as to the course of events preceding our first

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1/ It was a report of this charge that led the Commission to make an inquiry with respect to this matter. I think that we must always investigate reports from apparently responsible sources that broadcast news has been staged, which implies that it has been fabricated and did not depict an authentic event. It was later necessary to initiate a formal inquiry in order to provide a vehicle for giving the necessary student participants in the party the immunity before they could be compelled to testify. However, I think our hearing should have been conducted on a non-public basis.

2/ 16 FCC 2d 650 [15 RR 2d 791] (FCC 69-192 dated February 28, 1969).

3/ 17 FCC 2d 204 [15 RR 2d 1096] (FCC 69-301 dated March 26, 1969).

letter to CBS. I think that WBBM is to be commended for its effort to illuminate an important and pervasive problem. While it might have handled matters differently, I think that it did not "induce" the commission of a crime in any real sense of the word. I think it should feel free to continue such investigative reporting. I would prefer, therefore, to address ourselves primarily to the need for the formulation of clearer policies in this area by licensees and for full and complete investigation in response to Commission inquiry.

CONCURRING STATEMENT OF COMMISSIONER JAMES J. WADSWORTH

Although I concur in the majority's opinion, I feel that it should have made more clear the shock which at least this member of the Commission felt. A situation arose where a young, ambitious reporter apparently encouraged the commission of a crime for the benefit of his employer's television cameras. The licensee failed to take those reasonable and prudent steps which would have revealed this fact to it in time to have prevented the broadcast in question.

I do not think this majority opinion is strong enough. I agree that it is not our purpose to discourage or inhibit legitimate investigative reporting, but I think it should be made even more clear that the licensee here, as well as all other licensees, must have a specific policy for the guidance of its personnel which will make known to them that they may in no way stimulate the commission of a crime under the aegis of investigative reporting. The FCC can expect no less of its licensees.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

On November 1 and 2, 1967, the CBS-owned television station in Chicago, Illinois (WBBM-TV), broadcast a two-part documentary showing a group of young adults smoking marihuana. Eight marihuana smokers had assembled in an apartment near Northwestern University with the knowledge that a film crew from WBBM-TV would be there to photograph the proceedings. WBBM-TV neither paid the participants nor provided the marihuana. Each of the participants had smoked marihuana before, although they had not all smoked it together. Some, but not all of them, had smoked marihuana before in the same apartment. All the participants were over 21. Each of them had agreed to participate, according to some accounts, in order to communicate to the public their view that marihuana was essentially harmless and that the laws against it were wrong or excessively severe.

The marihuana party was initiated early in October 1967, when John Missett, a reporter for WBBM-TV, contacted a student of Northwestern University (identified as witness A for anonymity at the Commission's October 1968 hearings) who, Missett was informed, had regularly smoked marihuana. Missett told him WBBM-TV was interested in filming and broadcasting a television documentary on marihuana which would include scenes showing students and others smoking marihuana in typical surroundings. Missett asked witness A if he could assemble a group of eight to 12 persons who would be willing to

smoke marihuana before WBBM-TV's cameras at a time and place to be arranged by witness A. Witness A indicated he would try, and a day later informed Missett that the necessary arrangements had been made. The films were then made on October 22, 1967, as arranged.

WBBM-TV's purpose in televising this marihuana party, according to witnesses, was to dramatize the widespread use of marihuana among college students and to inform the public as to the seriousness of the problem. The narration accompanying the program reflects this position:

> "In the eyes of the law you are witnessing a crime. Under Illinois law, possession of marihuana is a crime, punishable by imprisonment for 2 to 10 years for the first offense and up to life in prison for repeaters. . . Marihuana, or pot as it is better known, has been smoked in America for years, but recently marihuana has become the focal point for controversy and not just on the college campus. For the police, parents, and even the Armed Forces, the controversy has become a dilemma.
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> . . . . . .
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> "These people are risking more than just a jail sentence by smoking marihuana. Conviction on a narcotics charge can mean the end to a career, expulsion from college, or high school. In our next segment, we take a look at the legal and medical aspects of smoking marihuana. . . ."

All concede the report was a serious journalistic effort to deal with an important issue.

Confronted with the question of improper conduct on the part of CBS, the Commission majority has responded by constructing a number of guidelines supported by miscellaneous and varying references to the term solicitation in order to warn WBBM-TV – and necessarily the rest of the television industry as well – not to commit the serious mistake of arranging (to some undefined extent) an illegal event. I believe, and for the reasons stated below will attempt to show, that this move is at least journalistically unwise, and may even be unconstitutional.

I. The context of news staging

In recent months, the performance of the major news media, including television, has become the object of increased public and official scrutiny. Much of it has been critical. And much of it has come from the numerous charges of news staging recently received by this Commission.

NBC newsmen, for example, were said to have brought their own picket signs to a Claremont College student debate in order to stage or simulate a nonexistent controversy. (See Los Angeles Times, November 4, 1967, page 1; FCC Minute Entry, March 20, 1968.)

The three networks were charged with having staged a number of events during the August 1968, Democratic National Convention in Chicago. The U.S. attorney for the Northern District of Illinois, Mr. Thomas A. Foran, stated that he saw a cameraman build a fire out of burning trash in Michigan Avenue, place a "Welcome to Chicago" sign in the fire, and then film its burning. He and an assistant reported also witnessing the filming of a bandaged and supposedly injured individual who, before being photographed, had been conversing (sans bandage) with the photographers. See letter to ABC, CBS, and NBC, 16 FCC 2d 650, 658-59 [15 RR 2d 791] (1969).

For more than a year the Commission has had before it charges of staging by CBS in its filming of the "Poor People's March" in Marks, Mississippi. Charges have been made that network newsmen made suggestions as to what clothing should be worn during filming, that automobiles be moved away from homes being photographed, that TV antennas were not shown, and that a local Negro policeman was offered $5 to say that Negroes were starving in Marks. See, e.g., volume 114, Congressional Record page H 3296 (daily edition, May 2, 1968).

The Commission also has before it charges that CBS's documentary, "Hunger in America," first shown over the CBS network on May 21, 1968, identified a San Antonio baby as dying of starvation when the network either knew, or should have known, that the infant's death was unrelated to starvation or malnutrition. See, e.g., volume 115, Congressional Record page H 2309 (daily edition, March 27, 1969).

And, finally, some time ago news stories in various publications charged that CBS network employees and officials had participated in plans for, and filming of, an armed invasion of Haiti. See "Washington Post," November 25, 1966; "Variety," November 30, 1966, page 1. The matter was never, to my knowledge, investigated by Congress, the Commission, or any similar authority, nor was any official action taken.

Today the Commission is confronted with charges that CBS officials and employees are implicated in the staging or prearranging of individuals smoking marihuana (a pot party) filmed by and televised over the CBS-owned television station, WBBM-TV, in Chicago. These charges have already been investigated by a Congressional Committee. Deceptive Programming Practices, Report of the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, H.R. 91-108, 91st Cong., 1st sess., March 20, 1969.

Charges such as these, and others like them, are serious for a number of reasons. Although for thousands of years many believed that when man looks at the world he perceives not reality but some image of a greater truth concealed from view, television and other modern forms of communication have stood this ancient notion on its head. For many today, truth is the image of reality seen on television. From "Walter Cronkite," to "Local News," to "Divorce Court," to "Peyton Place," to "Gomer Pyle," to "The Avengers," to "Gunsmoke," to "Combat," to "Vietnam" - reality blends into unreality for some, and the distinctions become irrevocably blurred. In 1938, Orson Wells terrified half the eastern seaboard with his radio play reporting an invasion from Mars, "War of the Worlds." Last month millions watched a televised

drama of two Americans traveling around the moon. Years ago Sheriff Matt Dillon shot down his first outlaw in a street outside the Dodge saloon. Last month an 11-year-old boy reached for his gun and fired a B-B pellet into the heart of his television tube at an outlaw on the screen. Indeed, many seem unable to distinguish television from reality.

For this reason, the integrity of the mass media is essential to its role of communicating honest opinion and accurate information. When people lose their faith in even isolated incidents of news as they are depicted to them, they will begin to distrust all news presentations. It is therefore essential that no element of falsity or deception creep into the news. Once it does, like the proverbial "rotten apple," the rest of the barrel will decay.

Especially important, democracies function, or fail to function, on the accuracy of the information and opinion supplied to their citizens. When voters cast their ballots for law and order and against violence, for example, they do so on the basis of what they understand to be the true state of the world. If they believe that militant students carried picket signs in Claremont College demonstrations or burned them in Chicago protests, those voters may cry for restrictive legislation. If these events did not in fact occur at all, the ballots cast become unjustifiable and irrational. Democracy ceases to function, and arbitrariness and injustice enter.

It is essential, therefore, that public confidence in the integrity of the broadcaster's product be maintained. In this, the FCC's important role is to evolve rules and standards for proper licensee behavior in the area of investigative reporting. Since its inception, however, the FCC has received and disposed of charges of improper broadcaster behavior largely in a haphazard case-by-case way. This approach simply cannot continue. The FCC must now begin to formulate a consistent approach to the broad range of staging problems. Its responsibilities are threefold: (1) It must evolve, clearly and rationally, precise standards that all can understand. (2) It must apply these standards firmly and fairly to all its licensees, from the smallest radio station to the largest and most politically and economically powerful television network. (3) It must assume the burden of providing public understanding of its decisions; it must realize that it is just as important to explain to an outraged public why seemingly illegal behavior is appropriate and desirable as it is to explain to a placid public why a serious offense has been committed.

In my judgment, the FCC has failed each of these responsibilities today.

More than 500 years have passed since Johann Gutenberg invented moveable type, and our courts and legislatures have had the leisure of centuries to develop standards of propriety and ethics regarding print journalism. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Near v. Minnesota, 283 U.S. 697 (1931). Television has just turned 21. It is time that it, and the FCC, begin to come forward with standards to govern the obligations of honest disclosure, accuracy of research, and full presentation of information. Today the FCC has attempted to perform this difficult task without much in the way of industry assistance. Its failure is in part a result of that lack of guidance.

Staging is a widely thrown charge today. What do we mean by it? To what extent are all events affected in some way by the presence of television in our society generally, or in particular events? What degree of cooperation between television journalist and subject is permissible (or even desirable), and what should be discouraged? These are issues with which thoughtful electronic newsmen, journalists, writers, and cameramen are struggling today. They need the FCC's support against corporate management that is all too willing to sacrifice their first amendment rights and responsibilities upon the altar of comfortable, complacent, noncontroversial programming. The public is entitled to a statement from this agency on the issues surrounding staging – so it can better understand the reasons for permissible conduct as well as the evils of journalistic abuses. Confusion, corporate protection, and vague generalizations serve no one. And I'm afraid the Commission majority has offered us little more.

II. The majority's guidelines

After receiving evidence and weighing testimony at a hearing in Chicago in October 1968, the hearing examiner in this case certified his findings of fact to the Commission in a document released on January 9, 1969 (docket No. 18101, FCC 69M-8) [15 RR 2d 140]. In it he concluded that the pot party. . . was "prearranged" for the benefit of CBS, and that this particular party would never have been held "but for" Missett's request. (Id. at paragraph 101; quotes supplied.) Today the Commission majority accepts this finding.

Without attempting adequately to define prearrangement, or describe the extent to which a licensee must become involved in the occurrence of a news event before it may be thought to have been prearranged (or encouraged or solicited), the majority sets forth its notion of the line between permissible and impermissible news staging or prearranging. Its basic conclusion or guideline for the permissible limits on investigative reporting is contained in paragraphs 30-31 of its decision. In essence, the majority's guidelines are that broadcast licensees cannot investigate, film, broadcast, or otherwise inquire into certain newsworthy events if three conditions are present: (1) The event in question was illegal; and either (2) the licensee induced (i.e., encouraged, solicited, or prearranged) the occurrence of the event in question; or (3) the licensee was obliged not to film or report the event, but rather to disclose its impending occurrence to the police in advance.

The majority then describes WBBM-TV's conduct in violating these guidelines as a serious mistake, and asks CBS, its licensee, to set forth promptly its policies in the area and make appropriate revisions in its policies. . . in order to make every reasonable effort to prevent recurrence of this type of mistake. (Majority opinion, paragraph 50.) Although the majority expressly states that the license of WBBM-TV is not in jeopardy due to its mistake, it ominously fails to state what would happen if WBBM-TV or any other television licensee should deliberately arrange, film, or broadcast a similar illegal incident, not by mistake, but out of a clear and forthright station policy encouraging such investigative reporting. Although the majority states its willingness to forgive an occasional mistake – and even a serious one -- its clear view is that such conduct is improper and inconsistent with the public interest. (Majority opinion, paragraph 32.) Today's majority decision, therefore, clearly warns

all broadcast licensees not to engage in investigative reporting which exceeds the guidelines contained in the majority's opinion. There seems little doubt that deliberate violations of the majority's decision might easily lead to punitive sanctions. Indeed, one is left with the uncomfortable impression that – given the seriousness of this offense – were the errant licensee someone without the political and economic power of a CBS the sanction might well have been more than the somewhat ironic slap-on-the-wrist administered here.

In any event, it is clear to me that the majority's decision will effectively chill or deter broadcast stations from engaging to the fullest extent in broadcast investigation and journalism. For these reasons it may well be unconstitutional.

III. The constitutional deficiencies

A. Basic principles

James Madison, a leading spirit in the drafting of the First Amendment, stated his view on the freedom of the press in his report on the Virginia resolutions:

> "Some degree of abuse is inseparable from the proper use of everything, and and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that 'it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away to injur the vigour of those yielding the proper fruits.' And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression. . . ." 4 Elliot's Debates on the Federal Constitution 570-71 (1876).

And, as the majority correctly states, it is beyond doubt that radio and television are equally entitled to the First Amendment's protection. See majority opinion, paragraph 23; Rumely v. United States, 197 F2d 166, 177 (DC Cir. 1951).

This does not mean, of course, that the Government in general, or the FCC in particular, are forbidden from any actions that in any way involve the verbal expression of others. I will have more to say of such proper Government actions later. But for now, let us address the general principles from which the exceptions must be carved.

It seems clear that freedom of the press covers all aspects of newspaper and broadcast journalism – from the initial processes of news gathering, to the eventual printing and dissemination of that news. Absent the showing of some compelling and carefully articulated governmental interest, therefore, this Commission can no more prevent a broadcast licensee from broadcasting certain events than it can bar the original filming of those events. The news-gathering activities of WBBM-TV and Missett, its reporter, therefore, are at least entitled initially to a presumption of constitutional protection – albeit a rebuttable presumption.

The essential question involved in this case is whether Missett's and therefore CBS's prearrangement of the activities in question took them beyond the pale of constitutional protection. There have always, of course, been instances when freedom of the press has been restricted – for example, in cases of libel and obscenity. But whenever the Government wishes to enforce direct prohibitions on the press, it must first conclusively demonstrate that compelling governmental justifications exist to support those prohibitions – or, otherwise stated, that the expression in question does not come within the First Amendment.

Even the threat of potential governmental sanctions, which impose a chilling and deterring effect upon the full and free exercise of first amendment freedoms, have sometimes been held to be barred by the Constitution. "(T)he fact that no direct restraint or punishment is imposed. . . does not determine the free speech question. Under some circumstances, indirect discouragements undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions, or taxes." Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950). So long as. . . the threat of prosecutions of protected expression (remains). . . a real and substantial one, (e)ven the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression. Dombrowski v. Pfister, 380 U.S. 479, 494 (1965); see NAACP v. Button, 371 U.S. 415, 433 (1963).

Because the majority's guidelines pose the threat of potential sanctions for certain specified conduct by broadcast licensees operating in the first amendment area, they must be given close constitutional scrutiny.

B. The use of solicitation in the majority's opinion

According to the majority's opinion, a television crew cannot even film, much less broadcast, a news event when the following elements are present: (1) The licensee solicited the occurrence of the event in question – i.e., induced, encouraged, or generally engaged in conduct but for which the event would not have occurred in the manner it did; and either (2) the event in question was illegal; or (3) the licensee had a duty to warn the police in advance of the event's impending occurrence, rather than film it. Whereas I have serious difficulties with each of these elements, the first element, in my view, unjustifiably limits the freedom of broadcast licensees to gather and disseminate news and information.

1. Vagueness and overbreadth

An essential part of the majority's test for news staging involves the extent to which it can be said that actions by a broadcast licensee caused or induced the occurrence of the illegal event in question. Throughout its opinion and in support of its holding that a licensee cannot induce the commission of a crime such as the use of marihuana (majority opinion, at paragraph 31), the majority invokes a plethora of vague and potentially unlimited terms to describe that element of its test.

Thus, we are told that the pot party was: In some manner arranged (paragraph 5); was held at the behest of Missett and, but for his solicitation, would not

have been held on that day, nor have included the eight people who attended (paragraph 5); held at the investigation and behest of WBBM-TV's representative (paragraph 15): and that (w)ithout Missett's activities, these particular persons would not have gathered to smoke marihuana at this time and place (paragraph 28). Further, broadcasters are warned that they cannot encourage or induce the commission of a crime (paragraph 25), and told they must not encourage, solicit, induce, support through payment, etc. any illegal activity. And to top-it-all off, the majority announces its intention to make clear that we are using the term, induce, not in any sense of the criminal or related law. . ., but in its plain dictionary sense (to bring about; cause; effect. . .to lead on to some action, etc.) (paragraph 31, note 10). 19/

The majority's guidelines for industry self-restraint in prearranging the investigation and filming of illegal conduct suffer from two fatal deficiencies: vagueness and overbreadth. As the Supreme Court has long recognized, a statute, guideline, decision, mandate, or order is vague when it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . . Zwickler v. Koota, 389 U.S. 241, 249 (1967). The vice of a vague guideline is that it admonishes people to avoid certain conduct on pain of punishment, but fails to describe precisely what conduct it is they must avoid. The result is that people are forced either to undergo the risk of punishment for conduct they are led to believe is proper, or avoid all acts which might even approach the proscribed zone – thereby relinquishing their right to engage in constitutionally protected acts.

A mandate, order, or guideline is overbroad when, by overreaching, it prohibits both permissible as well as impermissible conduct. The vice of an overly broad guideline is its violation of the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Zwicker v. Koota, supra at 250.

Can it be seriously contended that the majority has, without any vagueness or overbreadth, defined precisely that amount of conduct which broadcast licensees may or may not undertake? Clearly not.

Although the majority attempts to define induce by reference to the plain dictionary sense of the word (majority opinion, paragraph 31, note 10), it in fact uses throughout its opinion many vague terms with different meanings to refer

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19/ The dictionary definition apparently relied on is even broader:

> "1. To lead on to some action, condition, belief, etc.; prevail on; persuade. 2. to bring on; bring about; cause; effect: as, indigestion is induced by overeating." Webster, New World Dictionary 744 (1962).

to the same general concept – e.g., arrange, instigate, at the behest of, encourage, induce, support through payment, bring about, cause, effect, lead on to some action, and but for which. The vice of vagueness inherent in this confusion of terms is obvious. Does a television crew, for example, encourage students to enter a university administration building and conduct an illegal sitin by stationing its cameras next to the building's entrance? Does a television station induce employees of a Federal agency to leak currently pending items of public interest to its reporters in advance of publication by its fraternization with agency employees? Does a television station support through payment criminal activities when it pays travel expenses to obtain an interview with a gambler, a drug peddler, a prostitute, or a member of the mafia? Does a broadcaster bring about the violation of the smoking laws when he arranges to film a panel discussion of 15 year olds who believe the smoking age should be lowered – and in the course of the discussion several of them light up (tobacco) cigarettes to prove their point? Can it be said that, but for the cigarette advertisements broadcast by numerous television stations many youngsters would not violate the law and smoke before the legal age? In sum, is it not obvious, to paraphrase the Supreme Court in another context, that the majority's regulatory maze of terms and loose definitions is wholly lacking in terms susceptible of objective measurement? Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967).

The majority's guidelines are also overly broad to the extent they prohibit activities which appear to be constitutionally protected. For example, Mr. William R. Baird was recently invited to appear as a guest on "The Mike Douglas Show." See Playboy, June 1969, page 64. Mr. Baird, a crusader for birth control, was at the time fighting a criminal conviction and 10-year sentence for displaying a birth-control pill and handing out contraceptive samples during a lecture in Massachusetts – contrary to State law. Assuming that Baird was asked (i.e., encouraged, solicited, or induced) to appear on the program, that he would not have so appeared, but for some prearrangement by the program's officials, and that during the course of his program he advocated birth control and displayed a birth-control pill (illegal actions in Massachusetts), those connected with the program would apparently have violated the guidelines contained in the majority's opinion.

Other examples are obvious. The majority's guidelines would prevent a television station from arranging for a Negro couple to purchase a house in violation of racially restrictive (but unconstitutional) covenants in order to film a television documentary on discrimination in housing – a documentary which might lead to the law's elimination by the courts or the legislature. A television station might be guilty of a serious mistake if it contacted a selective service counselor on a college campus who felt morally compelled in certain cases to advise draft-age students to move to Canada to avoid military conscription, and arranged to film the consultations as part of their documentary on the draft. The majority's "but-for" test of solicitation is that whenever an illegal event would not have occurred in precisely the manner it did "but-for" the actions of the media, then the licensee is guilty of serious misconduct (see majority opinion at paragraphs 5, 25, 28, and 31). This test is so broad that it encompasses virtually any causal factor, including rioting in Watts before the television cameras, illegal assemblies during the Chicago Democratic Convention, and so forth – events which might not have occurred "but-for" the mere presence of the television cameras.

There may be ways of drawing precise lines between various types of licensee conduct which will leave no doubt how far broadcasters may go. There is no doubt in my mind as to the propriety and constitutionality of appropriate and precise FCC standards. But it is equally clear the majority has not drawn them. Because its "but-for" test of causation extends into almost every aspect of news reporting, it will force licensees to refrain from many otherwise constitutionally protected activties. As the Supreme Court said in New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964), "an overly broad rule leads to self-censorship in which persons are deterred from acting in otherwise constitutionally protected ways. They tend to make only statements which steer far wider of the unlawful zone. . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First. . . Amendment. . . ." 20/

2. The appropriate standards

Even if one were to conclude that the majority's guidelines for licensee self-regulation were not unconstitutionally vague and overly broad, the majority's entire approach to the problem of soliciting is seriously deficient. The majority has taken the hearing examiner's factual findings concerning Missett's activities and used them to reach the quasi-legal conclusion that they constituted impermissible solicitation of an illegal event. Yet, it is important to note, the majority has done so without any reference to the case or statutory law of Illinois which defines the crime of solicitation. The apparent justification for this omission is that the majority has adopted a concept of reprehensible licensee conduct that encompasses far more than the solicitation which

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20/ The defect in the Commission's action today, in my view, is its vagueness and overbreadth. Needless to say, I am not urging a constitutional argument that any time a broadcaster alleges that he finds an FCC rule or practice to be chilling that it is also, automatically, unconstitutional. The Communications Act, and our regulations and decisions, can quite properly include, in my judgment, such provisions as the fairness doctrine, equal opportunity, and personal attack rules, prohibitions on lotteries, restrictions on undisclosed bugging or wiretapping (e.g., as allegedly occurred when an NBC employee reportedly bugged a private meeting room at the Democratic National Convention in Chicago), requirements of sponsor identification, requirements of surveys of community needs as a part of programing proposals, and so forth. Moreover, the networks hold a position of oligopolistic power in the market place of ideas. With that power goes a concomitant responsibility to evolve standards in these areas as a part of their own informal criteria of acceptable professional behavior. Ultimately, some such standards will become a part of something more formal than the professionals', or the industry's, own standards. The FCC will inevitably continue to announce, as it has since its beginning, individual opinions and general rules regarding such matters. See, e.g., National Broadcasting Co., 14 FCC 2d 713 [14 RR 2d 113] (1968) (conflict of interest standards expected of newsmen commenting upon events in ways which tend to serve their private economic interests). My position is, simply, that when the FCC announces such standards it has an obligation to be just as rational, tightly analytical, and precise as possible. I feel we have not done so today, and that there may be constitutional defects in our failure.

comprises a felony or misdemeanor under the laws of many States. (See majority opinion, paragraph 31, note 10.) I have several problems with this approach.

First, it only serves to emphasize how far-reaching and overly broad the majority's guidelines really are. One would have thought the majority would recognize that first amendment activities of news gathering must be allowed to expand at least up to the benchmark of the civil or criminal law. Yet the majority is apparently unwilling to concede even this. By ignoring the carefully constructed common law and statutory concepts of solicitation, as well as the related concepts of conspiracy, misprison of a felony, aiding and abetting, and entrapment – and all the inherent safeguards built into those judicial formulations – the majority rejects the only available, reasonably definite guidelines for adjudging activities such as those here said to be illegal. It seems clear, however, as a matter of constitutional law, that the freedoms of speech and the press prohibit restrictions that fall short of criminal conduct. See, e.g., Liberty Lobby, Inc., v. Pearson, 261 F. Supp. 726, 727 (D.D.C. 1966), aff'd 390 F2d 489 (D.C. Cir. 1968).

Second, it is not clear that Missett's activities in arranging the marihuana party in question can be characterized as solicitation within the meaning of the criminal law. And, indeed, it would appear that Illinois case law confirms this belief. In People v. Clay, 32 Ill. 2d 608, 210 N.E. 2d 221 (1965), for example, 21/ the defendant purchased drugs from an undercover agent and at trial argued that he was entrapped (i.e., induced) into making the purchase by the agent's encouragement or solicitation – that but for the agent's conduct, the purchase would never have been made. The court ruled against the defendant, finding that although the purchase would not have been made but for the agent's conduct the defendant nevertheless acted on his own volition in buying the drugs, without coercion by the agent, and that entrapment did not exist. The analogy to Missett's case is obvious. At most it can only be said that but for Missett's actions the pot party would not have been held at the apartment in question, on the day in question, at the time in question, and with the specific participants in question. But it is to be doubted whether Missett can be said to have caused or solicited the party in any legally reprehensible sense. 22/ All the participants had smoked marihuana before, although they had not all

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21/ As there are apparently no Illinois cases specifically citing Illinois statutory crime of solicitation, contained in (38 Ill. Stats. Anno. Sec. 8-1(a) (Cum. pt. 1969)), I have discussed a case involving the related concept of entrapment.

22/ If I say, for example, "Let's have a party at my house," 10 people come, and each bring records, refreshments, and guests, in one sense the party is a result of my solicitation, but in another sense my individual role is only to provide the occasion for the event and not to compel its occurrence or supply its direct or complete cause.

smoked it together. Some of them had been in the apartment before, but not all of them. All of them purchased or brought their own marihuana. Some of them might have smoked it at the same time of day even without the pot party in question. The majority's statement that the party was a direct result (majority opinion, paragraph 8) of Mr. Missett's actions is, therefore, misleading. Obviously, any of the participants could have refused to attend at the last moment, and obviously the occurrence of the party was the result of individual acts of will, volition, or decision to attend.

In law there are two separate (although not always clear) notions of causality: "direct" or "but for" causality; and "proximate" or "legal" causality. The first is satisfied if the particular event in question would not have happened "but for" the presence of the factor singled out for attention. Thus, if A leaves a loaded revolver lying on a table in B's living room, and B picks it up and shoots C the shooting would not have happened "but for" A's leaving the revolver within B's reach. Of course, there are a countless number of factors "but for" the presence of which the event would not have occurred – including the manufacture of the gun, the discovery of gunpowder, and so forth. But far more is necessary before the second notion of "legal" causality would be satisfied, such that A would be held liable or to some extent responsible for B's shooting C.

Third, although I have gone through this analysis to demonstrate that Missett's actions were insufficient to constitute criminal solicitation under Illinois law, I do not believe this type of inquiry is appropriate for this Commission without careful attention to the intricate legal problems involved. The FCC is scarcely equipped to function as an administrative agency. It is certainly ill-equipped to function as a court of law. In any event, we should be reluctant to make determinations which are essentially judicial on the basis of standards which fall short of those embodied in the case law – particularly when the first amendment rights may be involved.

Finally, even if Missett's activities should be construed as solicitation for purposes of Illinois criminal law, I have serious doubts whether this crime could be given its normally broad interpretation when countervailing first amendment rights are involved. The Supreme Court has often held, in analogous areas of law, that the scope of civil and criminal laws must be substantially narrowed when strict enforcement of those laws would interfere with First Amendment freedoms. Thus, in Garrison v. Louisiana, 379 U.S. 64 (1964), and New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court carved out exceptions to the criminal and civil laws of libel to encourage unrestrained freedom of the press. In Smith v. California, 361 U.S. 147, 150-52 (1959), the Court promulgated an exception to the criminal law requiring proof that a bookseller knew a book was obscene before he could be convicted of selling obscenity. In Speiser v. Randall, 357 U.S. 513 (1958), the Court held that States could not impose on a taxpayer the burden of proving his entitlement to exemptions from taxation where the device was being applied in a manner tending to cause even a self-imposed restriction of free expression. . . . Smith v. California, supra at 151. And in United States v. O'Brien, 391 U.S. 367, 376 (1968), the Court held that when speech and nonspeech elements are combined in the same course of conduct, only a sufficiently important governmental interest in regulating the nonspeech element can ever justify even

incidental limitations on First Amendment freedoms – even though restrictions could be imposed when those speech elements were absent. As the Court said in Smith v. California, supra at 151:

> "(T)his Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. . . . "

Judge Holtzoff addressed the question most directly in Liberty Lobby, Inc. v. Pearson, 261 F. Supp. 726, 727 (D.D.C. 1966):

> "The courts may not review the manner in which a newspaper man obtains his information and may not restrain the publication of news merely because the person responsible for the publication 'obtained it in a manner that may perhaps be illegal or immoral.' It would be a far-reaching limitation on the freedom of the press if courts were endowed with power to review the manner in which the press obtains its information. . . . If such were the law, we would not have a free press; we would have a controlled press. Such, however, is not the law" (Quotes supplied.)

In sum, the majority has established guidelines for self-censorship by the broadcasting industry in the realm of investigative news reporting – under the threat of sanctions for lack of compliance. The standards may well be unconstitutionally vague and overly broad by failing to warn broadcasters when their activities cross the line into impermissible conduct, and by prohibiting activities which cannot be constitutionally proscribed. In addition, the majority makes a finding that Missett solicited the marihuana party in question – without making any reference to the Illinois law of criminal solicitation. Indeed, the majority is apparently willing to proscribe conduct by the licensee which falls far short of that prohibited by the criminal law. I may concur with Commissioner Cox that Missett's actions do not constitute solicitation, but feel even more strongly that this is a determination which this agency has not even addressed. Finally, there is Supreme Court precedent that indicates that even if Missett's activities might normally be encompassed by the Illinois law of solicitation, when First Amendment activities such as news gathering are involved the Constitution may require that exceptions be carved out to permit the full and free exercise of investigative journalism.

IV. The broader issues

The majority today has done far more than erect a highly efficient in terrorem mechanism 23/ of deterrent censorship which may chill the full and free exercise of broadcast journalism. It has failed to grapple with the entire field of broadcast news staging by defining and distinguishing all the separate threads that run through the area.

23/ Keyishian v. Board of Regents, 385 U.S. 589, 601 (1967).

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When charges of news staging arise, it is essential that the media come forward to assist the Commission in formulating guidelines consistent at the same time with the First Amendment and the public interest. Newspapers and other print media have a long and proud tradition of defending their freedom to publish fact and opinion as they see fit. Yet the record of broadcast journalism is spotty indeed. Not only have broadcasters, both individually and in concert, . . . traditionally avoided controversial programing because sponsors are hesitant to become even subliminally associated with opinions disagreeable to potential purchasers, Note, The Federal Communications Commission's Fairness Regulations, 54 Cornell L. Rev. 294, 296 (1969), but they have primarily invoked the First Amendment's protections for completely commercial and nonideological ends. . . . Barron, An Emerging First Amendment Right of Access to the Media?, 37 Geo. Wash. L. Rev. 487, 502 (1969). A study of the occasions on which the broadcasting industry has raised the banner of free speech leaves one with the distinct suspicion that these occasions almost invariably coincide with the industry's monetary self-interests. United Federation of Teachers, 17 FCC 2d 204, 210 [15 RR 2d 1096] (1969) (concurring opinion).

The heads of the three television networks have recently spoken out against what they view to be the threat of governmental restraints on their journalistic freedom. Julian Goodman, the president of NBC, fears that television is now under threat of restriction and control. Frank Stanton, the president of CBS, states that attempts are being made to block us. Elmer Lower, president of ABC News, thinks television may face the prospect of some form of censorship.

I have publicly disagreed. I have argued that the real threat of censorship over television's programing content comes not from the government, but from the networks themselves - that they have been all too eager to keep off the Nation's television screens anything they find inconsistent with their own personal philosophies or corporate profits. It has been my increasing suspicion that the networks are concerned primarily with safe, cautious, bland, don't-rock-the-boat, profit-maximizing programing, not the brand of hard-hitting, controversial, investigative analysis they are so capable of producing. United Federation of Teachers, 17 FCC 2d 204, 210 (1969) (concurring opinion).

It is my fear, therefore, that the broadcasting industry will find it commercially profitable simply to acquiesce in today's majority opinion. To be sure, when corporate pocketbooks have been threatened in the past, the networks have reached deep into their coffers to fight lengthy and complicated appeals all the way to the U.S. Supreme Court. That has been the case with the FCC's personal attack doctrines and its cigarette fairness ruling. The essential question now is: will they make a similar effort in this case? Will they use their resources to challenge what I believe to be unreasonable constraints which the Commission majority has placed upon the freedom and latitude with which newsmen and investigative journalists search out and report on pressing social problems? Will the television industry spend as much challenging the majority's vague and overly broad guidelines as it does placing nationwide full page newspaper ads with famous Americans praising the freedom of the press?

If not, if the broadcasting industry merely acquiesces in the majority's guidelines and opts for the safer programing of soap operas and situation comedies,

their credibility as advocates for the freedoms of speech and the press will be lost. And in the longrun, both the industry and the American viewer will suffer. If the television industry is unwilling to champion the citizens' first amendment rights to receive the broadest possible range of information concerning contemporary social problems, we will all be losers.

It is not within the scope of this dissenting opinion to set forth all the various distinctions that complicate the analysis of news staging. It seems clear, however, that such an analysis would include mention of at least the following elements: (1) The extent to which television caused, or in some way influenced the occurrence in question; (2) the legality of the event in question – and whether society in general views the crime as forgivable (e.g., the dissemination of birth control information) or unforgivable (e.g., the smoking of marihuana, prostitution, etc.); and (3) the duty of the broadcaster to inform the police in advance of an impending event's occurrence instead of filming it. This list is by no means complete. But it may at least serve to initiate discussion in an area presently devoid of analysis. For purposes of illustration, therefore, the following distinctions may be useful.

A. Impact of the media on the occurrence of newsworthy events

At a news conference, the presence of the television cameras and lights causes the speaker to look in certain directions (into the cameras), speak in certain ways (succinctly, and into the microphones), dress in certain ways (blue shirt, slight makeup), and even deliver his thoughts in certain ways (short quotable statements suitable for 30-second television news clips). Indeed, there are some events which would not occur at all but for the presence of the news media. One initial question, therefore, is to what degree was a particular event caused by the presence of television? The following are some suggested distinctions between the ways in which the presence or conduct of television influences events.

First. – Of course, there are those events which occur without (or despite) the presence of the media, and which may be filmed and presented precisely as they occur. These hard news events include floods, traffic accidents, large construction projects, and the like.

Second. – There are events which occur without the presence of the media, but which are altered through their presentation simply because they must be reproduced through an electronic journalistic mediaum. Conventions and graduation exercises might be examples. Television lights change the shadows and skin tones in the face, and microphones electronically amplify the voice. Further, filmed television reports necessarily require editing, and probably no two reporters would delete the same segments. What is presented to the viewer, and how, is therefore a function of the tastes and attitudes of many editors – the cameraman, the director, the producer, and so forth.

Third. – There are events which occur without the presence of the media but are distorted, edited, slanted, or censored by the media in the process of presentation. Thus, a video tape containing a short statement by some person can be edited: the eliminating of the word, not, for example, might completely reverse its meaning. The essential point in the first three illustrations is that

the presence of the media does not cause events to occur, nor influence the way in which they happen, but that the media may depict them more or less accurately.

Fourth. – There are events that would have occurred without the media, but which are altered by those planning the events to suit the convenience of the media. The best examples are press conferences, demonstrations, and the like. Often the time, place, conditions, and even the content of a speech or press conference are tailored for radio and television. For a demonstration to be effective, its instigators may desire that it receive radio, television, and press coverage. Accordingly, demonstrations are held in places easily accessible by the press. Dramatic locations are chosen in order to make the event more interesting to television's viewers – the White House has been found to be a popular backdrop. Clothes (even costumes), picket signs, songs, etc., may all be used with the media in mind. Of course, these events might occur even without media coverage. But the presence of the media causes their organizers to alter and shape them in subtle and important ways.

Fifth. – There are events which would "have occurred anyway," but persons employed by the media take the lead in arranging the time, place, participants, and so forth. For example, a television station may want to televise an annual debate between colleges around the State. The station may take the lead in arranging the time and place, and may even specify the participants – choosing, for example, particular colleges from various regions of the State to obtain an even geographical representation. The media, therefore, may be said to have induced the occurrence of the debate on a particular day, in a particular place, at a particular time, and with particular participants. But in a more important sense the debate would have occurred anyway and was caused by decisions made by individuals in the colleges long beforehand. WBBM-TV's pot party may well fall into this class of events.

Sixth. – There are events which are planned by others, but would not occur without (but for) the presence of the media. A public figure may, for example, wish to make a statement on a matter of concern to him and convey it to the media and thus to millions of citizens. If he discovers that the press cannot attend, he may cancel the statement. President Nixon's recent Vietnam speech undoubtedly would not have been delivered to the few network technicians in the White House theater at the time it was were they unable to assure him access to the networks' affiliates at that time.

Seventh. – There are events which are caused exclusively by television – such as panel discussion shows in a television studio (reports of which appear in the next day's newspapers). And such programs have, in turn, themselves affected events, attitudes and actions in a community, whether for good or ill. For example, a media-staged, on-camera confrontation between blacks and whites who would not otherwise have spoken with one another might bring viewers to change their own racial views.

Eighth. – And finally, there are events that indirectly result from the sheer presence of mass media in our culture. A riot, for example, is in an important sense a form of communication – someone crying out for attention and the opportunity to be heard. It might not happen if ghetto residents had access to

the media. (As the young man in Watts said the day after the 1965 disorders, "Ain't nobody come down here and listen to us before.") In another important sense, the level of violence in our society may directly or indirectly be caused by continual physical violence on television entertainment programs.

This partial analysis of the many senses in which the presence of television and other media may influence the occurrence of various events should at least indicate that the majority's test for solicitation or news staging - would the event have happened differently but for the media? - encompasses an almost unlimited number of usefully distinguishable occurrences. The majority's primary mistake lies in adopting a but for test of causation. This test is excessively vague and encompasses far too much for constitutional validity.

B. The illegality of the event

The majority's proscriptions apply to broadcast licensees, of course, only where the event in question involves the commission of a crime. (Majority opinion, paragraphs 31-32.) The crime here involved the smoking or possession of marihuana. Although the majority draws an important distinction between different types of illegal conduct, in a different portion of its opinion, relating to the duty of licensees to disclose an impending crime (see paragraph 30, "violent situations where a participant's life or safety or someone's significant property interest was at stake"), it fails to make a similar distinction in the type of conduct the licensee's newsmen can legitimately influence. Apparently, therefore, so long as the newsman induced or encouraged the occurrence of the illegal event in question to some extent, it does not matter whether the event involved a crime of violence (murder, robbery, mugging, kidnapping, etc.) or not - the broadcast of either is equally proscribed.

It is my feeling that this approach fails to acknowledge the relatively common distinction between crimes with and without victims. In a shooting, stabbing or robbery there are clearly victims - those individuals who suffer from the criminal acts. In other areas, however, there may be no victim in the conventional sense. Examples of crimes without victims might include gambling, prostitution, sexual conduct between consenting adults, the dissemination of birth control information, and so forth. In all these cases, the individuals involved consent to the occurrence defined as a crime, and are therefore not injured against their will.

The courts have recently used such a distinction to prevent the punishment of individuals engaging in this kind of behavior. In Stanley v. Georgia, 37 U.S. L.W. 4315, 4317 (April 8, 1969), for example, the Supreme Court held that a man has the right to read or observe what he pleases. . . in the privacy of his own home, and that he cannot be punished for possessing ostensibly obscene literature without some proof that it will cause him to engage in antisocial conduct. Another court has held that (n)o constitutionally punishable conduct appears in the case of an individual who prepares (ostensibly obscene) material for his own use or for such personal satisfaction as its creation affords him. In Re Klor, 64 Cal. 2d 816, 415 P. 2d 791, 794 (1966). For analogous decisions, see Griswold v. Connecticut, 381 U.S. 479 (1965) (birth control devices); see also One Eleven W. & L., Inc. v. Division of Alcoholic Beverage Control, 50 N.J. 329, 235 A. 2d 12 (1967); Stoumen v. Reilly, 37 Cal. 2d 713,

234 P. 2d 969 (1951). The only point that should be made here is that, in the area of staging illegal events which involve important social problems, we might consider giving the news media greater latitude where those events involve criminal offenses without victims. The Commission majority, however, without any discussion of this question, has flatly barred media intervention in the occurrence of all illegal events. In this, its haste may be unwise.

C. Disclosure to the police

There is a third thread running through the problem of staging – and that is the extent of the duty of news reporters to disclose or report the impending occurrence of an illegal event to the police or proper authorities, instead of filming that event. Many would be cutraged to hear of a television reporter asking a member of an armed robbery gang or kidnapping ring to arrange a robbery or kidnapping just so his television crew could film the event. Many would feel his primary duty would be to report the impending incident to the authorities and not permit it to happen (see majority opinion, paragraph 30) (although a news photographer was, many years ago, defined for me as a man who, if he saw a fire, would take pictures first and then call the fire department).

However, where the offense involved is a crime without a victim, one which involves no victim other than the person committing the offense, one who consents to any risk of harm which may flow from his conduct, the obligation society places on the reporter to disclose the crime in advance may be substantially lessened.

It is interesting to note that the tort and criminal law generally do not require individual citizens to warn others of impending danger. Why, then, is the majority willing to impose this duty on newsmen without discussion? The majority may well be right – broadcast licensees may indeed have greater obligations to warn individuals of impending danger than do private citizens. This obligation may be contained in the broadcast media's statutory obligation to operate in the public interest. On the other hand, there may be important countervailing values in removing any burdens from the press to allow them to exercise their journalistic talents of reporting to the fullest extent. These are difficult issues, and I do not pretend to know the answers. I do believe, however, that the Commission majority has an obligation to the media and the public at least to identify these issues and articulate the rationale for its positions – not state them as taken for granted.

These three elements – causation, illegality, and disclosure – are by no means the only factors that bear on questions of news staging, and they are by no means the only issues in this case. Other elements bearing on the problems of staging might include the extent to which some staging is permissible so long as that fact is disclosed to the public. In some cases, of course, it is obvious to the public that the media arranged an event, and no formal disclosure is required. In other cases the opposite is true. The media, however, at least have the duty not to inform the public they are seeing a spontaneous event when in fact it was prearranged by the media.

There are other important issues in this case – such as the extent to which newsmen must disclose their sources of information – which I do not reach today. Suffice it to say that despite increased public attention and criticism of news staging, the Commission majority has not even begun to analyze adequately the multifaceted problems involved in this difficult area. I can only hope that public scrutiny will eventually lead to the evolution of what is and is not acceptable journalistic behavior. Once established, standards of news reporting will help remove the widespread current cynicism that greets the present product of the networks and the establishment press. It is not necessary or desirable that a citizenry take literally, and accept whole, everything that reaches it through the mass media. But a nation simply cannot function in a climate in which people think you can't believe anything you hear now-a-days.

V. Conclusion

It goes without saying that the smoking of marihuana poses today an important and serious social problem. Some believe marihuana is one of the greatest threats to our Nation. Others believe young persons' lives, and relations with peers and parents, are as seriously harmed by stiff criminal penalties and clandestine behavior as by modest use. No one knows. This concern has stimulated some to reconsider the validity of existing laws. The American Civil Liberties Union's "National Policy Statement on Marihuana" adopted on December 15, 1968, for example, questions the constitutionality of existing prohibitions on the use of marihuana. Given this controversial national issue, I believe television can play an important role in informing the American public of the nature of marihuana and the extent of the problem. From that information may come needed information and further understanding. I do not believe that information, in any form, is ever dangerous; ignorance often is. On this, as on other issues, what this Nation confronts today is not so much a generation gap (see the "CBS Reports" constructive current series under this name) as an education and information gap. It is, in largest measure, a gap between those whose primary source of information and understanding is television, and those who read widely from all sources. On the rare occasions when television endeavors to close this education gap I believe it should be encouraged, not punished.

Most acknowledge the social benefit which flows from investigative reporting – the discovery and analysis of actions and trends by individuals or groups (such as gambling, betting, abortion rings, black market trading, prostitution, etc.) which have many important social consequences and implications. Society benefits from full, free, and untrammeled investigative reporting. It may, for example, be important for the public to learn about the distribution of birth control information – a crime in some States. But it may only be possible for a television news staff to present a documentary on this problem if, to some extent, it arranges to be present when the information is conveyed. According to the majority opinion, however, such an arrangement might be illegal and subject the television licensee to censure.

I believe there are occasions when this would not be desirable. I believe that more social benefit will result from the type of investigative reporting conducted by WBBM-TV into one of our most important and pressing national

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problems, than will result if the broadcasting industry permits the guidelines contained in the majority's opinion to stand without challenge. I believe there may well be cases in which broadcast licensees may perform a valuable public service by reporting ostensibly illegal activities, and certain time, place and manner arrangements may be an indispensable part of that coverage. Finally, I believe that the guidelines adopted by the majority are excessively vague and imprecise – and therefore will trench upon the freedoms of speech and the press to an impermissible extent. Supreme Court Justice Hugo L. Black once wrote: "Censorship is the deadly enemy of freedom and progress. The plain language of the Constitution forbids it." Smith v. California, 361 U.S. 147, 155, 160 (1959) (concurring opinion). I believe the Commission majority has today ignored that great warning. This Commission should bend over backwards to encourage courageous investigative journalism – not reach out to stifle it.

I dissent.

THE NEXT PAGE IS PAGE 16 RR 2d 229

Worse, however, is the continued denial of primary service to areas currently without such service.

FCC 69-1135
38564

In re Complaints covering)
)
CBS PROGRAM,)
"HUNGER IN AMERICA.")

Adopted: October 15, 1969
Released: October 17, 1969

[¶10:315, ¶53:24(D), ¶53:24(R)] Slanting of news.

Program, "Hunger in America", broadcast by CBS which represented that a baby was dying of starvation – contrary to fact – did not present an issue under the fairness doctrine, but rather whether to find the licensee guilty of deliberately slanting the news. Intervention by the government should be limited to cases where there is extrinsic evidence involving the licensee or management or in the unusual case where the matter can be readily and definitely resolved, which was not the case here. CBS Program, "Hunger in America", 17 RR 2d 674 [1969].

[¶10:317, ¶53:24(D)] Announcement of payments to participants on program.

Section 317 of the Communications Act does not require that a station announce payments made to interviewees on a program broadcast by the licensee. The issue is whether the licensee, through payments, sought to induce the interviewees to make statements which they otherwise would not make. CBS Program, "Hunger in America", 17 RR 2d 674 [1969].

[¶10:315, ¶53:24(D), ¶53:24(R)] Slanting of news.

Where there is a complaint that a licensee has deliberately slanted the news, the critical factor making Commission inquiry or investigation appropriate is the existence or material indication, in the form of extrinsic evidence, that the licensee has staged news events. Otherwise the matter is a judgmental area for broadcast journalism which the Commission must eschew. In the future, the Commission will not defer action on license

renewals because of the pendency of complaints of staging the news, unless the extrinsic evidence of possible deliberate distortion or staging of the news involves the licensee, including its principals, top management or news management. If the allegations of staging, supported by extrinsic evidence, simply involve news employees of the station the Commission will, in appropriate cases, inquire into the matter, but unless investigation reveals involvement of the licensee or its management there will be no hazard to the station's licensed status. Such improper actions by employees without the licensee's knowledge may raise questions of adequate supervision of employees, but normally will not raise an issue as to the licensee's character qualifications. It is not appropriate for the Commission to enter the area where the charge is not based on extrinsic evidence but rather on a dispute as to the "truth" of the event. The Commission is not the national arbiter of the "truth". The Commission will eschew the censor's role, including efforts to establish news distortion in situations where government intervention would constitute a worse danger than the possible rigging itself. The licensee must have a policy of requiring honesty of its news staff and must take reasonable precautions to see that news is fairly handled. CBS Program, "Hunger in America", 17 RR 2d 674 [1969].

MEMORANDUM OPINION

1. The Commission has before it several complaints regarding the CBS documentary program, "Hunger in America," broadcast initially over the CBS network on May 21, 1968, and later repeated; e.g., letter from Congressman Gonzales of September 24, 1968; and letter of Congressman Gonzales dated May 29, 1969, forwarding to the Commission copies of the transcript of hearings of the House Subcommittee on Appropriations. */ The charges center particularly about the cause of death of the baby shown in the opening segment of the program and said to be "dying of starvation." In this regard, they raise questions concerning CBS' good faith and the adequacy of its efforts to ascertain the facts prior to broadcast. We shall first set out the background facts to the complaints, then the results of an investigation undertaken after receipt of the complaints, and, most important, the applicable legal and policy considerations as developed in recent rulings and amplified in this case.

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*/ A copy of the House Subcommittee on Appropriations transcript and report was also forwarded to the Commission by Congressman Jamie Whitten on May 27, 1969.

A. Background facts

2. "Hunger in America," first televised on May 21, 1968, was partially filmed at the Robert B. Green Hospital in San Antonio, Texas, on October 26, 1967, by a CBS camera crew. In the opening minutes of the program a very small baby is shown receiving treatment while the narrator states:

> "Hunger is easy to recognize when it looks like this. This baby is dying of starvation. He was an American. Now he is dead."

The program segment in question was filmed in the nursery for premature babies at the Robert Green Hospital. The CBS "Hunger in America" crew spent several days at the hospital in October 1967 and as part of their effort asked to film the nursery for background scenes, the intention being to concentrate on no particular infant. The hospital representative through whom the CBS crew worked arranged access for the crew and, since the purpose was background footage, no releases were sought from the infants' parents or guardians. Releases for other portions of the film were secured by the hospital's social service staff for the benefit of both CBS and the hospital. While the CBS crew was present in the nursery on October 26, 1967, sometime between 8:00 a.m. and noon, a CBS cameraman observed that one of the infants had stopped breathing. Dr. Luis Montemayer, the resident physician was summoned. Dr. Montemayer resuscitated the infant and the CBS cameraman filmed the entire incident. CBS did not seek to ascertain the identity of the infant until after the network broadcast of "Hunger in America."

3. The complaint of Congressman Gonzales charges that segments of the program were "totally false in part and erroneous or misleading in other parts" (e.g., inaccuracy as to the number of hungry people in San Antonio); that the film was not that of a baby dying of starvation but instead was of a baby born prematurely, whose mother and father were healthy and well nourished; that CBS, "in full knowledge that the picture is false, is using it to promote an award for itself on the program"; that CBS did not interview the physician who treated the infant, had not checked medical records, and was not even certain of the child's identity; that the news team had not interviewed the parents nor obtained permission from them to film the baby or use the film in its broadcast; that CBS "coached" a doctor to "make dramatic statements" on malnutrition in San Antonio, and that with respect to these segments of the program, "CBS has approached the outer limits of heedless and reckless disregard for accuracy." These charges apparently were based on a San Antonio Express-News story of July 14 by Mr. Kemper Diehl, reporting the result of an investigation into the matter, and on other information given by Mr. Diehl. According to Mr. Diehl, a Negro college student had identified himself as the father of the dying baby shown in the film; the parents denied that the baby died of malnutrition: the baby was prematurely born in the 26th or 28th week of pregnancy; the mother reported that the birth occurred prematurely after she suffered a fall; and when the baby was two days old the mother had been at the premature nursery and had seen films being made of the child. 1/

1/ Other allegations concerning CBS' activities are set forth at paragraph 12, infra.

4. Mr. Richard S. Salant, President of CBS News, stated, regarding the identity of the baby in question and the factors leading to its death, that "we relied for our information on these points on statements given to our newsmen by the hospital official through whom they dealt principally in their visit to the hospital. . . . We ourselves are unable independently to identify the baby because, in filming the premature baby ward, we had no intention of studying any individual case in that ward and the babies filmed were thus not identified for us." As to whether CBS "coached" a physician, Mr. Salant stated that CBS merely asked the doctor to make his statements less technical. Finally, CBS states that it had an appropriate authority for its statement as to the number of hungry people in San Antonio.

B. Results of Commission Investigation

5. The Commission, following receipt of the complaint conducted an investigation of the matter. We have also, of course, taken into account the Congressional investigation (see paragraphs 12-17, infra).

6. Our postbroadcast investigation revealed that the infant who was filmed by CBS in the nursery, and who was shown in the relevant segment of the "Hunger in America" program, was a Claude Wayne Wright, Jr. Hospital records show that the Wright infant was born prematurely on October 24, 1967, apparently as the result of a fall taken by the mother on the previous day and weighed 2 lbs. 12 oz. at birth. On October 26, 1967, the Wright infant was shown as weighing 2 lbs. 5 oz. and as having suffered a cardiac and respiratory arrest treated by Dr. Montemayer. The Wright infant died on October 29, 1967, the death certificate shows the cause of death as "Immediate cause: Septicemia. Due to: Meningitis and Peritonitis. Due to: Prematurity." There is no evidence to suggest that either the mother or father was suffering from malnutrition. 2/

2/ The basis for this finding is as follows: the field investigation indicated that the CBS crew filmed in the premature nursery at the Robert Green Hospital during the daytime on October 26, 1967. CBS crew members say that the cameraman was filming various infants in the ward at the time he noticed that one baby suddenly stopped breathing. Dr. Luis Montmayer was called, and the cameraman continued to shoot film while the doctor resuscitated the infant. Based on hospital records and information supplied by Mrs. Mary Jo. Quinn, record librarian, six babies died in the nursery during the period of October 18 through October 29, 1967. Mrs. Quinn stated that none of the six babies suffered from malnutrition. Of the six deaths, two were baby girls. One of the baby girls died on October 21. Obviously this could not have been the baby shown in the film, not only because of the date, but because the baby in the film was identified as male. The other baby girl was born on October 23 and expired October 29, because of (1) respiratory failure; (2) peritonitis and stress; (3) spontaneous gastric performation. Mrs. Quinn stated that the hospital had no information regarding the mother of this baby adding that there was nothing in the record to suggest malnutrition on the part of the mother or the baby. Two more of the babies died the

[Footnote continued on following page]

7. Turning now to the question of how CBS came to identify the Wright infant as having died as the result of malnutrition, the following are the pertinent facts. Prior to the nursery filming, Mr. Martin Carr, producer of "Hunger in America," was told by Dr. Elliott Weser, in an interview which took place in the pediatric ward, that most of the babies in that ward were suffering from malnutrition and that three wards are "filled all the time with babies suffering from diarrhea and malnutrition." Mrs. Vera Burke, in charge of social services at the Robert Green Hospital at the time of the CBS filming, recalled telling Mr. Carr or other CBS crew members that "there were high incidence

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2/ [Footnote continued from preceding page]

same night they were born, prior to the October 26 filming date. The fifth baby, born October 25, 1967, died on October 26 at 11:55 p.m. However, this baby was of normal birth after forty weeks gestation, weighing about seven pounds, ten ounces, and it apparently would not have been in the premature section of the nursery where the baby in question was filmed. Moreover, hospital personnel say the baby shown on the CBS program was much smaller than this one. The sixth baby, Claude Wayne Wright, Jr., "was born by way of spontaneous premature labor from a 17 year old Gravida I, Para. O, female who was approximately 7 months pregnant by history" on October 24, 1967, weighing only about two pounds, twelve ounces. According to the hospital records, the baby had a cardiac and respiratory arrest on October 26 and was treated by Dr. Luis Montemayer. The baby died on October 29, the immediate cause of death shown on the death certificate was septicemia, which was in turn caused by meningitis and peritonitis, due to prematurity. Hospital records made no reference to malnutrition on the part of either the mother or the baby. Dr. Montemayer, when interviewed on October 18, 1968, stated that he saw the film on television; that he was shown in the film giving artificial respiration to the baby after the baby had suffered two cardiac arrests; and that the second cardiac was in front of the camera; Dr. Montemayer also said that, "they [CBS] said the baby died from hunger, but he did not. He died of complications because of prematurity. He only weighed two pounds and some few ounces . . . there is no doubt that the baby shown on television was the Wright baby. I remember the baby was premature – and exceedingly small – less than three pounds. I checked records of about four babies and that's the only one it could have been." The testimony of two nurses tends to corroborate the statement of Dr. Montemayer in that both stated that they had observed Dr. Montemayer resuscitating the baby while the crew was shooting film of that particular baby. Thus, it is apparent that this is the baby that was shown in "Hunger in America." When contacted during the field investigation, the father of the baby stated that he did not want to discuss the matter any further. However, it is pertinent to note that when both parents were interviewed by Mr. Kemper Diehl, they denied that the mother suffered from malnutrition and said the birth occurred prematurely because the mother suffered an accidental fall.

of premature births due to malnutrition in the mothers"; however, she denies indicating that any particular infant was dying or had died as the result of malnutrition. The latter assertion by Mrs. Burke is contradicted by Mr. Carr and Mr. Peter Davis, CBS associate producer, who recall being told by Mrs. Burke that the infant in question died as a result of maternal malnutrition on October 27, 1967.

8. No further inquiry was made into the identity of the infant identified as dying of starvation until after the broadcast. The first allegations made regarding the accuracy of portions of the program were raised in the San Antonio Express-News on July 14, 1968. The allegations were based upon the assertion that the baby identified as dying of starvation was in fact the Wright infant and that the infant did not die of malnutrition. The Express-News charges were repeated in Congress on July 22, 1968, and Burton Benjamin, Senior Executive Producer, CBS News, denied the charges in a letter to Congressman Gonzales dated July 25, 1968. Benjamin, in the letter, said that CBS had been informed by "medical personnel" at the hospital that the infant filmed died of maternal malnutrition and could not have been the Wright infant since he did not die until October 29th and the CBS infant died on or about October 27th. Further, Benjamin stated, the CBS infant was Mexican-American whereas the Wright infant was Negro. The information contained in Benjamin's letter was received from Mr. Carr and Mr. Davis although Mr. Benjamin called Mrs. Burke after the broadcast and she was unable to specifically identify the infant. However, Mr. Benjamin said, Mrs. Burke did affirm that maternal malnutrition was the cause of death. Mr. Benjamin also spoke to Dr. Weser who was also unable to identify the infant filmed. Mr. Benjamin did not ask Dr. Weser whether the infant had died of malnutrition. Although Dr. Weser did not recall speaking to Mr. Benjamin, he was not certain he had not; he did, however, recall speaking to Mr. Carr after the broadcast.

9. After the broadcast, Mrs. Burke called Mr. Carr to inform him of the Express-News charges and spoke to him on several subsequent occasions; she, according to Mr. Carr, never indicated that she had any doubts as to the cause of the infant's death. Dr. Weser recalled speaking to Mr. Carr once or twice after the broadcast on a friendly basis but was uncertain as to the subjects discussed. No one connected with the Robert Green Hospital recalls being asked to check hospital records to establish the infant's identity; Mrs. Burke also denies being asked to do so. Mr. Carr, however, maintains that he asked both Mrs. Burke and Dr. Weser whether the hospital records could settle the dispute and was told that they were no longer available (Mrs. Burke) and that it would be difficult to prove anything by the records (Dr. Wesser).

10. From the foregoing, it is apparent that in view of the statements made by Mrs. Burke and Dr. Weser, at the least, CBS had reasonable basis for assuming a very high prevalence of malnutrition in the nursery and pediatric wards. The issue thus comes down to whether, regardless of the statements that the wards were "filled" with babies suffering from malnutrition, CBS nevertheless engaged in "sloppy" journalism or was recklessly indifferent to the truth in not ascertaining the cause of death of the Wright baby. Here there is a conflict, with the memory of the CBS witnesses differing from that

of the hospital personnel. In these circumstances, it is, we believe, inappropriate to hold an evidentiary hearing and upon that basis (i. e., credibility or demeanor judgments) make findings as to the "truth" of the situation. The "truth" would always remain a matter open to some question, and unlike a tort or contract case, where a judgment must be made one way or another, that is not the case here. The issue presented here by the complaints is not one under the fairness doctrine, concerned with presentation of contrasting viewpoints (a different matter upon which we do not pass), but rather, whether to find the licensee has sought deliberately to slant the news. For reasons developed more fully in subsequent discussion (paragraphs 18-29, infra), intervention by the Government should be limited to cases where there is extrinsic evidence involving the licensee or management or in the unusual case where the matter can be readily and definitely resolved (footnote 7, infra). That is not this case.

11. Nor, we believe, would it be appropriate to hold a hearing regarding the charge that CBS tried to induce a San Antonio physician, during a filmed interview, to "make dramatic statements" which were not substantiated by the facts. The physician, Dr. Ramiro P. Estrada, states that after filming the interview, the CBS producer told him he was "hedging too much" and "wanted me to be more positive about my statements." Dr. Estrada says he thinks "they wanted more dramatic statements or more impressive cases but I said I couldn't go any further than this." The CBS producer denies that any effort was made to induce Dr. Estrada to make "dramatic statements" and asserts that he asked only that the doctor make his remarks less technical and therefore more understandable to the public. The producer states that the filmed interview was not used on the program because in his editorial judgment the material was too technical. Thus, there is a conflict of evidence on this aspect of the complaint, and it does not appear that further inquiry is warranted to resolve it, in view of the policy discussion set forth within. 3/

12. On June 2, 1969, after the issuance of the report of the Subcommittee of the Committee on Appropriations and Part 5 of the related staff report; Congressman Gonzales asserted on the basis thereof that "CBS paid participants on the program to appear before its cameras and perform as per their instructions. However, CBS made no announcement of such payments before, during or after the broadcasts in question, so that the American public would know that the views expressed, ostensibly belonging to the persons interviewed, were in fact bought and paid for by CBS. It is plain that the award of such undisclosed gratuities violates Section 317 of the Communications Act." Reference is also made to the San Antonio Commodities store segment of the program. Accordingly, the Commission made further inquiry into the additional matters raised.

13. With respect to the payment of interviewees by CBS it should first be noted that Section 317 of the Communications Act requires announcement of

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3/ In view of the CBS response and the above discussion, the other charge regarding the accuracy of statistics as to the number of hungry people in San Antonio likewise does not establish a case of slanting the news.

payments received by the broadcast statement rather than payments made. Consequently, no question of CBS' compliance with Section 317 has been raised. The actual issue is whether CBS, through payments, sought to induce the interviewees to make statements which they otherwise would not make. We note that payment to interviewees, particularly in the form of releases, is frequently made. CBS states that its documentary crews always attempt to obtain personal releases from persons filmed, using forms prepared by the CBS Law Department, and that consideration is always paid for such releases. It denies that consideration was paid in this case to induce false or misleading statements and asserts that the payment made in each instance was reasonable in the light of the inconvenience caused the interviewee. The Subcommittee made available to the Commission copies of their memoranda of interviews had with people who had appeared on the program and who had received payments from CBS ranging from $15-$40. Our study of these memoranda revealed no reference of any kind from which it could be concluded that payments were made to induce participants to "perform as per instructions" or to make other than truthful statements. Mr. and Mrs. Boyd Nez were paid $40 for allowing CBS to film them and their daughter's family,3a/ Louise Zanders received $39 from the CBS crew during the three days they filmed at her home, and Esther Medrano was paid $15 by CBS, the amount she would have earned as a domestic during the three days she stayed at home waiting for the CBS crew. In view of the absence of any indication of any wrongdoing by CBS, the Commission does not believe that further inquiry into this matter is warranted.

14. Turning now to CBS' activities involving the filming of events occurring at the San Antonio City Commodities market, the Subcommittee's investigative report included the following paragraph:

> "Mr. John E. Bierschwale, Director of the San Antonio City Welfare Department, advised on September 30, 1968, that at the time the CBS crew was in San Antonio, the city operated a commodity distribution program for the needy. The city has since changed to a food stamp program. He said the CBS crew wanted to film a typical commodity distribution office and made arrangements to set up the cameras at one of the offices. CBS waited for a long line to form outside the office, but when this did not occur the CBS crew requested that the doors to the office be closed to allow a line of people to form. Mr. Bierschwale stated he cooperated with CBS by closing the office without realizing that CBS intended to discredit the commodity distribution program. The doors were closed for 1 hour and 45 minutes to permit a line of about 20 people to form before the filming took place."

15. The Commission's staff contacted Mr. Bierschwale who affirmed the facts recited above. In addition, three former employees of the Commodities Market were interviewed - Messrs. Vernon Sance, former Superintendent of the Commodities Warehouse and now a San Antonio policeman, Donald Lynch,

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3a/ The Nez family also states that CBS promised additional payment and lumber but that it was never received.

former Issuing Clerk at the Commodities Market and now an employee of the San Antonio Police Department, and Willaim R. Monahan, former Supervisor of the San Antonio Distribution Center who is now retired. All of those interviewed recalled that during the time that the CBS crews came to the Distribution Denter, the distribution of commodities was interrupted. Messrs. Bierschwale and Lynch state that the doors to the Center were closed for 1 hour 45 minutes, only 15-20 minutes of which was used for the setting up of cameras and lights. Messrs. Sance and Monahan, however, state unequivocally that distribution was halted for no more than 20-30 minutes to permit CBS to set up its equipment. Both Bierschwale and Sance agree that by the time distribution recommenced, 15-20 people were awaiting service. Mr. Bierschwale attributes CBS' request to halt distribution to their desire to show people standing in line for commodities; on the other hand Mr. Monahan recalls that CBS did not want too much of a line and wanted pictures of only a few people in the room.

16. CBS's reply, in all major respects, comports with the recollections of Messrs. Sance and Monahan. Martin Carr, producer of "Hunger in America" states that the only film shot by CBS was of the people inside the Distribution Center and thus only the four recipients who could physically be accommodated at one time. Aside from individual faces and hands, some portion of the film shot at the Commodities Market was utilized in "Hunger in America" and in the closing credits of that program, but, according to Mr. Carr, no lines were filmed or utilized since CBS was not interested in filming the Commodities Market for that purpose. In addition, CBS states that it was at Mr. Bierschwale's suggestion that the CBS crew returned on Wednesday, October 25, 1968, because he anticipated more customers. According to Mr. Carr and CBS, the crew arrived at the Distribution Center early and set up their lights directly above the distribution counter, thereby interrupting the distribution of food for reasons of safety and because of the limited space in the room. Aside from the 20-minute period for the initial setting up of equipment and a possible 5-minute interruption for readjusting television lights, CBS asserts that at no time did any of its employees make a request to Mr. Bierschwale that the distribution be halted.

17. In view of the statements of the Welfare Department, the fact that CBS shot no film of, and the program gave no indication of, an effort to show a long line of welfare recipients, and the description of the floor plan and modus operandi of the welfare center (room for four persons in a line from the entrance door to the food counter), we find no warrant for concluding that CBS sought to slant its news depiction, as charged in this respect. Here again we would also note that the subsequent policy discussion (Section C, infra) is, in any event, in point.

C. Relevant Policy Considerations

18. The investigation described in Section B was appropriate under the Commission's policies as then developed. This case and the Democratic National Convention case (Letter to ABC et al, February 28, 1969, 16 FCC 2d 650 [15 RR 2d 791]) have led us to focus again on what policies should govern Commission action in this sensitive area. We set forth those policies in this section.

19. The discussion in Letter to ABC, supra, makes clear that the Commission's concern in this type of situation is twofold: (1) whether there has been compliance with the fairness doctrine (reasonable opportunity for the discussion of contrary viewpoints on issues of public importance); (2) whether the licensee has deliberately distorted or slanted the news. The complaints in this case focus on (2). As to this area, we stressed in the Letter to ABC, supra, at page 10:

> ". . . that the critical factor making Commission inquiry or investigation appropriate is the existence or material indication, in the form of extrinsic evidence, that a licensee has staged news events. Otherwise, the matter would again come down to a judgment as to what was presented, as against what should have been presented – a judgmental area for broadcast journalism which this Commission must eschew. For the Commission to investigate mere allegations, in the absence of a material indication of extrinsic evidence of staging or distortion, would clearly constitute a venture into a quagmire inappropriate for this Government agency."

20. Lest there be concern that our inquiry into allegations of deliberate distortion of news or staging of purported incidents for use in television documentaries, such as those involved here, may tend to inhibit licensees' freedom or willingness to present programming dealing with the difficult issues facing our society, we wish to make our policy in this sensitive area clear. We commend CBS for undertaking this documentary on one of the tragic problems of today. We wish to make it clear that, in the future, we do not intend to defer action on license renewals because of the pendency of complaints of the kind we have investigated here – unless the extrinsic evidence of possible deliberate distortion or staging of the news which is brought to our attention involves the licensee, including its principals, top management, or news management. For example, if it is asserted by a newsman that he was directed by the licensee to slant the news, that would raise serious questions as to the character qualifications of the licensee. See, e. g., KMPC, Station of the Stars, Inc., 14 Fed. Reg. 4831 (1949). Such cases must be thoroughly explored, and it would be inappropriate to renew the station's license pending resolution of such an issue. However, if the allegations of staging, supported by extrinsic evidence, simply involve news employees of the station, we will, in appropriate cases (see par. 21, infra.), inquire into the matter, but unless our investigation reveals involvement of the licensee or its management there will be no hazard to the station's licensed status. Such improper actions by employees without the knowledge of the licensee may raise questions as to whether the licensee is adequately supervising its employees, but normally will not raise an issue as to the licensee's character qualifications.

21. We would stress that in a situation involving a charge of slanting by a news employee, we intend to exercise care in entering this sensitive area. Thus, as set out in the Letter to ABC, supra, we do not consider it appropriate to enter the area where the charge is not based upon extrinsic evidence but rather on a dispute as to the "truth" of the event (i. e., a claim that the true facts of the incident are different from those presented). The Commission is not the national arbiter of the "truth". And when we refer to appropriate cases involving extrinsic evidence, we do not mean the type of situation,

frequently encountered, where a person quoted on a news program complaints that he very clearly said something else. The Commission cannot appropriately enter the quagmire of investigating the credibility of the newsman and the interviewed party in such a type of case. Rather, the matter should be referred to the licensee for its own investigation and appropriate handling. 4/ On the other hand, extrinsic evidence that a newsman had been given a bribe, or had offered one to procure some action or statement, would warrant investigation. So also should there be an investigation where there is indication of extrinsic evidence readily establishing whether or not there has been a rigging of news (e. g., an outtake or a written memorandum).

22. Thus, depending on the nature of the complaint, the Commission might take no action, might refer the matter to the licensee for its investigation, or might conduct its own investigation. While it is not possible to set out which course of action would be appropriate in a wide range of cases – since so much depends on the facts of the case – we shall act with great care. Rigging or slanting the news is a most heinous act against the public interest – indeed, there is no act more harmful to the public's ability to handle its affairs. In all cases where we may appropriately do so, we shall act to protect the public interest in this important respect. But in this democracy, no Government agency can authenticate the news, or should try to do so. We will therefore eschew the censor's role, including efforts to establish news distortion in situations where Government intervention would constitute a worse danger than the possible rigging itself. 5/

D. Conclusion

23. We have set out the results of our investigation and, most important, the policy which we shall follow in this sensitive area. Upon the basis of the foregoing discussion, we conclude that no further action is warranted here with respect to the issue of slanting the news – the issue which was presented in the complaints.

24. While there thus may be no basis for Commission action, we strongly believe that questions such as those raised by Mr. Diehl in his newspaper articles do serve the public interest. As we stressed in the Letter to ABC,

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4/ In this connection, we stress that the licensee must have a policy of requiring honesty of its news staff and must take reasonable precautions to see that news is fairly handled. The licensee's investigation of substantial complaints referred to it must be a thorough, conscientious one, resulting in remedial action where appropriate (see Letter to ABC, 16 FCC 2d 650 [15 RR 2d 791] (1969)); efforts to "cover up" wrong-doing by his news staff would raise the most serious questions as to the fitness of the licensee. See WOKO, Inc. v. FCC, 329 US 223 (1946).

5/ In any event, overlaying this entire area is the fairness doctrine, which is applicable to the news operation of broadcast licensees and which, in particular situations such as here treated, may call for the presentation of contrasting viewpoints. See Red Lion Broadcasting Company v. United States, 395 US 367 [16 RR 2d 2029] (1969); Report on Editorializing by Broadcast Licensees, 13 FCC 1246 [25 RR 1901] (1949).

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supra, it is vital that the media be subject to scrutiny by critics, and there is, we think, no better way than for news competitors to be constantly checking on each other. The beneficiary of such criticism is clearly the American people. Finally, we note again that broadcast licensees must take such criticism into account, and take all appropriate steps in the light thereof. The key to their continued high standing with the American people is constant vigilance to assure the integrity of their news operations.

FCC 69R-421
39298

In re Applications of	)	
	)	
BIG CHIEF B/CASTING CO.	)	Docket No. 18599
OF LAWTON, INC.	)	File No. BPH-6455
Lawton, Oklahoma	)	
	)	
PROGRESSIVE B/CASTING CO.	)	Docket No. 18600
Lawton, Oklahoma	)	File No. BPH-6536
	)	
For Construction Permits	)	

Adopted: October 16, 1969
Released: October 17, 1969

[¶51:65, ¶51:229(P)(1)] Rule 1.65 issue not added.

Where a city planning commission adopted a policy to prohibit location of an antenna tower on the site proposed by an applicant, and the applicant uncontestedly alleged that the action was advisory only and that the city council, the body legally empowered to adopt permanent zoning restrictions, had not ruled on the matter, the action of the commission was not a substantial change regarding a matter of decisional significance, and such action was not required to be reported under Rule 1.65. Thus, no Rule 1.65 issue was warranted. Big Chief B/casting Co. of Lawton, Inc., 17 RR 2d 685 [Rev. Bd., 1969].

MEMORANDUM OPINION AND ORDER

By the Review Board:

1. This proceeding involves the mutually-exclusive applications of Big Chief Broadcasting Company of Lawton, Inc. (Big Chief) and Progressive Broadcasting Company (Progressive) for construction permits to establish a new FM station in Lawton, Oklahoma. The applications were designated for hearing under various issues by Order, FCC 69-751, released July 14, 1969 (34 FR 12054, published July 17, 1969). Presently before the Review Board

Accordingly, it is ordered, that unless an appeal from this Supplemental Initial Decision is taken by a party, or the Commission reviews the Supplemental Initial Decision on its own motion in accordance with the provisions of §1.276 of its rules, the Initial Decision in this proceeding (19 FCC 2d 185) as modified by the Decision of the Review Board (19 FCC 2d 157) and supplemented by this Supplemental Initial Decision is hereby reaffirmed and the application of Alabama Television, Inc. for a construction permit for a new television station to operate on Channel 21, Birmingham, Alabama, is granted and the applications in conflict therewith are denied.

HONORABLE HARLEY O. STAGGERS
Chairman, Special Subcommittee
on Investigations
Committee on Interstate and
Foreign Commerce
House of Representatives
Washington, D. C.

April 28, 1971

[¶10:315(G)(1), ¶10:326, ¶53:24(R)] "The Selling of the Pentagon."

The Commission declines to intervene in the matter of the CBS news documentary, "The Selling of the Pentagon", in which some portions of answers to questions were cut, and what appeared as answers to particular questions were in fact rearranged from answers to quite different questions. Lacking extrinsic evidence or documents that on their face reflect deliberate distortion, the Commission cannot properly intervene. The Commission is not the national arbiter of the truth. Any presumption by the Commission would be inconsistent with the First Amendment and with the profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open. Broadcasters must discharge the function of informing the public responsibly, without deliberate distortion or slanting. CBS has failed to address the question raised as to splicing answers to questions. The very use of a "Question and Answer" format would seem to encourage the viewer to believe that a particular answer follows directly from the question preceding. On the matter of the fairness doctrine, CBS is requested to inform the Commission as to whether it has complied with requirements of the doctrine. Hon. Harley O. Staggers, 21 RR 2d 912 [1971].

HON. HARLEY O. STAGGERS

This is in response to your letter of March 9, 1971, in which you register a complaint concerning the CBS news documentary, "The Selling of the Pentagon". You ask "what action the Commission will take" in light of allegations by Assistant Secretary of Defense Daniel Z. Henkin that his answers to questions posed by CBS newsman Roger Mudd had been so edited and rearranged as to misrepresent their content, and that a statement was attributed to a Marine colonel "when, in fact, the officer was reading a quotation of the Prime Minister of Laos". You also enclose a letter to Dr. Frank Stanton, President of CBS, asking for comment on Mr. Henkin's allegations and on techniques of editing whereby "through the editing process, answers to questions may easily be curtailed or rearranged . . . and [made] to appear to have been given in response to different questions". Similar inquiries and complaints were also received from Chairman Hebert of the House Armed Services Committee, from other members of the Congress, and from the public.

Taken together, two principal questions have thus been raised: (1) whether CBS adhered to the requirements of the fairness doctrine to afford reasonable opportunity for the presentation of contrasting viewpoints on issues of public importance covered in the program; and (2) whether CBS slanted or deliberately distorted its presentation of persons interviewed on the program. As to (1), we note that CBS presented an hour-long news special on April 18 for the stated purpose of affording an opportunity for the presentation of contrasting viewpoints on the issues of substance raised in the original program. The Commission, however, is still requesting the comments of CBS as to whether it has complied with the requirements of the fairness doctrine in this matter. A copy of the letter is attached. In this Statement, therefore, the Commission will address question (2) above.

The Factual Record

On February 23 and again on March 23, in the documentary at issue, the CBS network stated that the Department of Defense would spend $30 million this year in "public relations funds not merely to inform but to convince and persuade the public on vital issues of war and peace".

The original broadcast aroused controversy as inquiries and complaints to this Commission have attested. As a consequence, following the March 23 rebroadcast, CBS ran a series of edited film clips of critical comments derived from previous addresses and interviews by Vice President Agnew, Secretary Laird, and Chairman Hebert, plus a rebuttal by Mr. Richard Salant, President of CBS News.

The controversy has focused on two aspects of "The Selling of the Pentagon" in particular, and the essential facts are not really in dispute. One concerns a film-clip from an address delivered by Colonel MacNeil at a symposium held in Peoria, Illinois, 1/ featuring presentations by what CBS described

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1/ CBS, in its documentary, stated that the Defense Department's participation in the symposium "was arranged by Peoria's Caterpillar Tractor Company, which did 39 million dollars of business last year with the

[Footnote continued on following page]

as "the traveling colonels" (military and civilian spokesmen supplied, on request, to local civic and professional organizations). As far as the viewer could tell - and neither Colonel MacNeil nor CBS made it clear - the speaker seemed to be affirming the "domino theory" as applied to Southeast Asian nations under Communist pressure, although as the printed transcript shows he was in fact quoting the Prime Minister of Laos to this effect. Later in the course of his remarks, Col. MacNeil did return to the "domino theory" and he did affirm it in virtually the same words as the Laotian Prime Minister. As Mr. Salant observed in his March 23 rebuttal, it was "difficult to tell where Souvanna Phouma left off and the Colonel started."

The other aspect of principal controversy concerns an interview between Mr. Henkin and Mr. Mudd. In it, some portions of Mr. Henkin's answers were cut; and what appeared as answers to particular questions were in fact rearranged from answers to quite different questions. What follows is a detailed analysis of the interview as shown on the program, compared with the verbatim transcript of the original interview:

This is what the viewers of the CBS documentary were shown as a single exchange:

"Roger Mudd: What about your public displays of military equipment at state fairs and shopping centers? What purpose does that serve?

"Mr. Henkin: Well, I think it serves the purpose of informing the public about their armed forces. I believe the American public has the right to request information about the armed forces, to have speakers come before them, to ask questions, and to understand the need for our armed forces, why we ask for the funds that we do ask for, how we spend these funds, what we are doing about such problems as drugs - and we do have a drug problem in the armed forces, what we are doing about the racial problem - and we do have a racial problem. I think the public has a valid right to ask us these questions."

This, on the other hand, is how Mr. Henkin actually answered the question cited above:

"Mr. Henkin: Well, I think it serves the purpose of informing the public about their armed forces. [This is the only sentence that was retained intact in the answer as broadcast.] It also has the ancillary benefit, I would hope, of stimulating interest in recruiting as we move or try to move to zero draft calls and increased reliance on volunteers for our armed forces. I think it is very

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1/ [Footnote continued from preceding page]

Defense Department." The Defense Department has stated, however, that the event was arranged and sponsored by the Peoria Association of Commerce with a Caterpillar employee serving as chairman of the symposium.

important that the American youth have an opportunity to learn about the armed forces." [Both the latter sentences were dropped entirely.]

The answer Mr. Henkin was shown to be giving had in fact been transposed from his answer to another and later question that dealt not only with military displays but also with the availability of military speakers. At that later point in the interview, Mr. Mudd asked Mr. Henkin whether such things as drug and racial problems constituted "the sort of information that gets passed out at state fairs by sergeants who are standing next to rockets."

Mr. Henkin replied as follows:

"Mr. Henkin: No, I didn't – wouldn't limit that to sergeants standing next to any kind of exhibits. I knew – I thought we were discussing speeches and all."

But his is how the sequence was shown over the air:

"Mr. Mudd: Well, is that the sort of information about the drug problem you have and the racial problem you have and the budget problems you have – is that the sort of information that gets passed out at state fairs by sergeants who are standing next to rockets?

"Mr. Henkin: No. I wouldn't limit that to sergeants standing next to any kind of exhibits. Now, there are those who contend that this is propaganda. I do not agree with this."

The second sentence of Mr. Henkin's actual answer – the part about "speeches and all" – had been omitted. And the "new" material – about propaganda – came from an earlier point in the interview and was in fact a reference to charges that the Pentagon was using talk of an "increasing Soviet threat" as propaganda to influence the size of military budget. 2/

2/ An inquiry has been made concerning a third aspect of "The Selling of the Pentagon" in connection with edited coverage of a news briefing of Pentagon reporters by Deputy Assistant Secretary of Defense Jerry Friedheim. The facts are that CBS reported the entire session, with answers to approximately 34 questions; only six questions and answers were shown in the documentary and, of these six, three answers were of the "no comment" type – the only such answers Mr. Friedheim gave during the entire briefing. Mr. Henkin asserts that answers to any of the "no comment questions" would have "revealed classified national security information." Coverage of the briefing followed comments by Mr. Mudd to the effect that Mr. Friedheim, as a "careful and respected adversary" of Pentagon reporters, does not "tell all he knows" and "wouldn't have his job long if he did."

Policy Considerations and Conclusions

In view of all the facts at our disposal, we conclude that further action by this Commission would be inappropriate – and not because the issues involved are insubstantial. Precisely to the contrary, they are so substantial that they reach to the bedrock principles upon which our free and democratic society is founded. Our basis for this conclusion is set forth in prior Commission rulings, of which two are particularly apposite: In re Complaints Concerning CBS Program, Hunger in America, 20 FCC 2d 143 [17 RR 2d 674] (1969), and Network Coverage of the Democratic National Convention, 16 FCC 2d 650 [15 RR 2d 791] (1969).

Lacking extrinsic evidence or documents that on their face reflect deliberate distortion, we believe that this government licensing agency cannot properly intervene. It would be unwise and probably impossible for the Commission to lay down some precise line of factual accuracy – dependent always on journalistic judgment – across which broadcasters must not stray. As we stated in the Hunger in America ruling, "the Commission is not the national arbiter of the truth" (20 FCC 2d at p. 151). Any presumption on our part would be inconsistent with the First Amendment and with the profound national commitment to the principle that debate on public issues should be "uninhibited, robust, [and] wide-open" (New York Times Co. v. Sullivan, 376 US 254, 270). It would involve the Commission deeply and improperly in the journalistic functions of broadcasters.

This function necessarily involves selection and editorial judgment. And, in the absence of extrinsic evidence, documentary or otherwise, that a licensee has engaged in deliberate distortion, for the Commission to review this editing process would be to enter an impenetrable thicket. On every single question of judgment, and each complaint that might be registered, the Commission would have to decide whether the editing had involved deliberate distortion. Although we can conceive of situations where the documentary evidence of deliberate distortion would be sufficiently strong to require an inquiry – e.g., where a "yes" answer to one question was used to replace a "no" answer to an entirely different question – we believe that such a situation is not presented here.

We are not saying that CBS' or any other broadcaster's editorial judgment is above criticism. As we said in Hunger in America (20 FCC 2d at p. 151), allegations of distortion "should be referred to the licensee for its own investigation and appropriate handling." And again:

> ". . . [W]e stress that the licensee must have a policy of requiring honesty of itsnews staff and must take reasonable precautions to see that news is fairly handled. The licensee's investigation of substantial complaints . . . must be a thorough, conscientious one, resulting in remedial action where appropriate."

Our point is that this licensing agency cannot and should not dictate the particular response to thousands of journalistic circumstances. Above all, we affirm that we must ". . . eschew the censor's role, including efforts to establish

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news distortion in situations where government intervention would constitute a worse danger than the possible rigging itself." But to say that such intervention would be a remedy far worse than the disease is not to say that we can afford to shrug off the deeper questions involved.

This Commission is charged with ". . . promoting the public interest in the larger and more effective use of radio" (Section 303(g) of the Communications Act). Surely there is no issue bearing more heavily on the public service role of broadcasting than the integrity of the licensee's news operation.

We have allocated so much spectrum space to broadcasting precisely because of the contribution it can make to an informed public. Thus it follows inevitably that broadcasting must discharge that function responsibly, without deliberate distortion or slanting. The nation depends on broadcasting, and increasingly on television, fairly to illumine the news.

We particularly urge the need for good faith, earnest self-examination. In our view, broadcast journalists should demonstrate a positive inclination to respond to serious criticism. Indeed, Mr. Chairman, the thrust of your and other congressional inquiries – reflected also in criticism in print media - was to raise questions about the editing process, particularly with respect to the Henkin interview.

It seems to us that CBS has failed to address the question raised as to splicing answers to a variety of questions as a way of creating a new "answer" to a single question. The very use of a "Question and Answer" format would seem to encourage the viewer to believe that a particular answer follows directly from the question preceding. Surely important issues are involved here, ones that every broadcast journalist should ponder most seriously.

What we urge -- because we believe it will markedly serve the public interest – is an open, eager and self-critical attitude on the part of broadcast journalists. We urge them (as we did in Hunger in America, cited above) to examine their own processes, to subject them to the kind of hard critical analysis that is characteristic of the best traditions of the journalistic profession.

Our objective is to encourage broadcast journalism, not to hurt or hinder it. We have made clear in the past that the Commission seeks a larger role for broadcast journalism, including newcasts and documentaries. We reiterate that commitment today. For what ultimately is at stake in this entire matter is broadcasting's own reputation for probity and reliability, and thus its claim to public confidence.

In view of the foregoing discussion, we do not propose to inquire of CBS as to the second issue referred to on p. 2, supra. A copy of this letter will be sent to CBS so that it is informed fully of the Commission's position in this important area. We shall, of course, also keep you informed of any further developments as to the application of the fairness doctrine.

This letter was adopted by the Commission on April 28, 1971.

Commissioners Burch, Chairman, and Johnson issuing separate statements. */

SEPARATE STATEMENT OF CHAIRMAN DEAN BURCH

As Commission Chairman, I feel I must address one further aspect of this case. In my view, Commissioner Johnson should not have participated in the decision.

The role of a Commissioner is both varied and difficult. At times in general rule making proceedings, a Commissioner is a quasi-legislator, with considerable freedom to speak out publicly on broad policy considerations. At other times, a Commissioner acts in adjudicatory proceedings, and then his role is quasi-judicial – that is, akin to that of a judge. And, at all times, a Commissioner must strive to act in a fair and impartial manner. Indeed, ". . . to perform its high functions in the best way, 'Justice must satisfy the appearance of justice' . . ." (In re Murchison, 349 US 133, 136).

The "Selling of the Pentagon" aroused a storm of controversy, with Administration spokesmen, Congressmen, and many others speaking out on one side or another. On March 5 and March 9, respectively, Chairmen Hebert and Staggers filed their letters with the Commission, raising questions as to the fairness of the program and whether it contained distortions in view of the DOD charges. Thus, from early March on, this was an adjudicatory case - one which we knew we would be called upon to decide as judges.

Commissioner Johnson was therefore clearly on notice as to the adjudicatory posture of this matter. Yet at this point, he authored an article in the Washington Post, March 28th, entitled, "A Defense of TV vs. the White House," whose initial thrust is to defend the program in question. Indeed, the article opens by asserting that CBS News ". . . has rightfully come in for special praise for its February 23rd showing . . .", then quotes the praise given the program by two reviewers, and states that "this evaluation and praise were shared by most of the nation's television critics . . .".

Commissioner Johnson has a perfect right to speak out on this or any other controversial issue. But he cannot have it both ways. He cannot be both a public advocate – defending the program in print – and then sit as a judge on charges alleging unfairness and distortion in the program.

I do not say that Commissioner Johnson's personal views in any way colored his decision. Indeed, by whatever routes, both of us reached the same conclusions. I <u>am</u> saying that this Commission has an obligation beyond the mere absence of demonstrable bias; it must avoid even the appearance of bias. In his dual role of advocate and judge, Commissioner Johnson falls short of that standard and thus diminishes the Commission's standing. Having freely chosen the role of a public advocate, Commissioner Johnson should have refrained from that of a judge.

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*/ Statement of Commissioner Johnson to be forwarded subsequently.

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F.C.C. 71-967

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
THE NBC "TODAY" PROGRAM RE FAIRNESS DOCTRINE CONCERNING MR. GEORGE JESSEL

SEPTEMBER 17, 1971.

DEAR MR. HARSHA: This is in reply to your letter of August 9, 1971, concerning an interview with Mr. George Jessel conducted by Mr. Edwin Newman on the NBC "Today" program of July 30.

Your letter raises significant questions as to the propriety of Mr. Newman's terminating Mr. Jessel's remarks and, more broadly, the applicability of the "fairness doctrine" to the entire incident. We can appreciate your concern that broadcasting remain an open medium of expression, and we share that concern. Thus, it seems important to go back briefly to the scheme of the Communications Act to bring into sharper focus the Commission's proper role.

Under Section 3(h), the Congress explicitly defines a broadcast licensee as not a common carrier. He can and must make reasonable judgments as to the programming presented over his facilities. Indeed, that is his affirmative responsibility under the Act—and in a real sense it is the essence of our broadcasting system, which rests its confidence on the independent decisions of many entrepreneurs and not on an agency of the Federal Government.

Thus, in a 1970 case somewhat similar to the present one, the Commission refused to take action against ABC when that network deleted from an interview prepared for the Dick Cavitt program certain remarks of Miss Judy Collins concerning the so-called "Chicago Seven" trial. ABC did so because of its policy against broadcasting "* * * possibly prejudicial comments on active litigation." (We have enclosed a copy of the ruling in which the Commission, in effect, upheld not so much the "correctness" as the "reasonableness" of the licensee's judgment, and also a copy of an explanatory letter to then Congressman Ottinger, together with dissenting statements of Commissioners Cox and Johnson.)

Here, NBC defends its action concerning Mr. Jessel on the ground that "his statements appeared to be verging into possible libelous areas" (see attached letter to Congressman Carleton J. King). This is a judgment that the licensee may reasonably make as to programming that does not fall within the no-censorship ban of Section 315—that is, broadcasts by candidates for public office. Thus there would appear to be no basis for Commission intervention in this matter. We stress again that it is not the personal judgment of the Commission or of any individual Commissioner that is controlling here; rather, we are called on

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simply to decide whether the licensee has acted within the wide discretion that is necessarily his as to such programming judgments.

The "fairness doctrine" goes to a quite different point. Under the Act as interpreted by the courts in such landmark decisions as *Red Lion*, licensees have an affirmative duty to afford reasonable opportunity for the discussion of contrasting viewpoints on controversial issues of public importance. Therefore, we fully agree with you that they could not rule off the airwaves some viewpoint with which they might not agree—in this instance, one critical of the media. But under the doctrine—as detailed in the enclosed *Fairness Primer*—licensees retain discretion as to the manner in which a controversial issue is to be covered, including such matters as appropriate spokesmen and program format. Within this context, we cannot conclude that the cut-off of Mr. Jessel on the grounds stated by NBC, standing alone, does in fact raise a fairness issue.

We hope that this background information is responsive to the questions you raise. Please let us know if we can be of further assistance.

This letter was adopted by the Commission on September 16, 1971.

Commissioner Johnson dissenting.

By Direction of the Commission,
Dean Burch, *Chairman.*

February 25, 1970.

Miss Judy Collins,
Harold Leventhal Management, Inc.,
200 West 57th Street,
New York, N.Y.

Dear Miss Collins: Chairman Burch has referred to this Division for reply your letter of February 6, 1970, concerning your appearance on the Dick Cavett Show on February 4, presented over ABC.

As you may know, the Communications Act of 1934 states in Section 3(h) that a broadcaster shall not be deemed a common carrier and therefore is not obligated to accept any program matter which may be offered to him for broadcast. The licensee may establish standards governing the acceptability of broadcast material and is free to exercise his discretion in deleting portions of programs because they may not meet these standards or because it may not otherwise be in the public interest to present them. The Commission itself, as you may also know, is prohibited by Section 326 of the Act from censoring material and does not attempt to direct its licensees to present or refrain from presenting specific program matter.

You state in your letter that the action of ABC of which you complain is a violation of your free speech rights. It should be pointed out that the protection accorded freedom of speech in the Constitution does not guarantee to any person the use of any particular platform, microphone or other means for the expression of his views. Thus ABC was neither obligated to present you as a guest on the Dick Cavett program in the first place nor required to present your discussion with Mr. Cavett without editing.

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American Broadcasting Companies, Inc., has informed the Commission that Dick Cavettt broadcast a statement regarding the incident in question on Monday, February 9, 1970 and has furnished the Commission with a copy of that statement. Pertinent excerpts from the statement follows:

> ABC's policy decision to delete certain remarks made by Judy Collins on last Wednesday's show concerning the Chicago Seven trial was based on its belief that these televised remarks could prejudice the possibility of the parties to receive a fair trial.
>
> Beyond this individual instance in this individual trial ABC's policy is based on the view that continued televising of possibly prejudicial comments on active litigation could threaten the American legal process itself.
>
> I have been advised that ABC's policy is supported by recent decisions of the United States Supreme Court—which, incidentally, I have not read, but I am told that they would support this thinking—and recent rulings of the Federal Communications Commission, and many lawyers and other concerned experts concur with it.

There is enclosed for your information a copy of the Commission's Public Notice of July 1, 1964, "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance."

There is no information in your letter to indicate that there has been any violation of statute or Commission rule or policy and thus there is no basis for Commission action regarding your complaint against ABC.

The Commission wishes to thank you for writing and trusts that the foregoing will explain the provisions of law and policy in the area of your concern.

Sincerely yours,

WILLIAM B. RAY,
Chief, Complaints and Compliance Division.
for Chief, Broadcast Bureau.

AUGUST 12, 1971.

Hon. CARLETON J. KING,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN KING: Thank you for your letter of inquiry concerning the recent interview with George Jessel on the "Today" program of July 30. The circumstances are these:

Mr. Jessel originally was invited to discuss his recent visit to Europe. As the interview went on it became increasingly disjointed. Mr. Jessel touched upon ten totally different subjects in the five minutes he was on the air. Mr. Newman was already concerned about the coherence of the conversation when Mr. Jessel made two remarks that seemed to equate two United States newspapers with the official Soviet newspaper. His statements appeared to be verging into possibly libelous areas. Since NBC legally is responsible for what is said on its programs and there was no way of guessing what might be said next, Mr. Newman alertly responded to a live broadcast situation which seemed to be getting out of hand.

Mr. Jessel is a noted entertainer who has brought laughter to several generations of Americans. We respect him and his talents highly. He has been a guest on many NBC programs, including "Today," and he undoubtedly will appear on NBC again. We regret this incident occurred but we do feel that Mr. Newman's action was an appropriate one under the circumstances.

As you requested, we are sending you a copy of the transcript of the interview and we appreciate your interest in writing.

Cordially,

ROBERT D. KASMIRE.

TRANSCRIPT OF EXCHANGE BETWEEN EDWIN NEWMAN AND GEORGE JESSEL ON THE "TODAY" PROGRAM, JULY 30, 1971

EDWIN NEWMAN. George Jessel has been called the most decorated civilian in American history. He's also been given the unofficial title of Toastmaster General of the United States because he's presided at so many banquets. He comes to us today following a tour of United States bases in Spain and England, and he says that tomorrow, at the old-timers' baseball game in Shea Stadium, he's going to be the bat boy.

GEORGE JESSEL. Yes, I was bat boy under John McGraw in 1910. And it's the only sport I know anything about, just baseball. And of course, I was nine when I went into the amusement business and the bat boy business, and I never had any time to play soldier until lately. But I'm very fond of Ernie Banks. I knew him on the east side of New York with his right name Elmer Bernstein. (Laughter)

NEWMAN. Are you going to wear this uniform as bat boy?

JESSEL. No, I'm going to wear the New York Giants uniform—a little larger.

NEWMAN. What's the significance of this, George?

JESSEL. Well, this is a USO uniform that the Pentagon allowed me to wear. George Patton pinned these stars on me. I'm not a Lieutenant General, but he pinned the stars on me. General Bradley gave me my ring. And Mr. Truman gave me my cane. So at least I've been mixed up with some stylish fellows. However, Ernie Banks has also been with me to Vietnam. This will be my seventh time going back. And I'm happy to report—and that's why I asked your permission to get on here—that the morale of our men in Europe is very high, and we're strong on the borders of Czechoslovakia and strong on the borders of Eastern Germany. If they start anything there, they'll get in a real—you know, regardless of McCloskey and Muskie and Mansfield. They'll fight, and they'll lick these other guys.

But of course, when you pick up Pravda—The New York Times—you generally see, oh, they're all full of dope and killing children, drunk.

JOE GARAGIOLA. What is the situation on dope over there?

JESSEL. All of this has been so wildly exaggerated that it's almost childish. Just like—now, I know the tremendous audience that this show has. And of course, I know because I see people in the morning in the hotel that I just left, people listening to it. Now, they can't be phoned, so the ratings are a little bit silly. Hundreds and thousands

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of people sit in their hotel rooms and watch "Today." And I don't know what the rating is, but I know you can't get them on the phone. You can get my aunt on the phone because she shares a phone in a candy store with twelve other people.

But I'm glad because this is the most—and this is the most humorous—I've been on here many times. And this is so much fun this time. Joe has always been very humorous. I had him at a dinner once, Edwin, and he made a speech and I said "I'll never have him again." And of course * * *

NEWMAN. Some people—some people have that attitude when he doesn't make a speech.

JESSEL. Now, I liked Mr. Shalit too. Of course, I knew him when he was with Mack Sennett. (Laughter) Mack Swain was his name. Anyway, he's going to review a book of mine, which I'm very proud to have him do, and I know he'll do a good job of it. I'm quitting(?)—may I—do I have this opportunity?

NEWMAN. By all means, yes.

GARAGIOLA. But I do want to just get back to one thing. This dope situation, this narcotics thing with the GI's. You're with them. I mean, you're not just with Generals.

JESSEL. No, no, I'm with them. I'm at the front where the action is. That's how I got hurt in Vietnam. And I'm with them—all parts. From the top brass all the way down. I never saw any—I saw a lot of guys with a few bottles of beer one time. I never saw anybody—and I could tell if they were high or taking stuff. But we have a habit, some strange new thing, with the communique being anti-American, with everybody negative. I represent the fighting fireman and the fighting policeman. I toured the whole United States, one-night stands, making a speech about law and order and so. And Maine, Vermont, Rhode Island, Massaschusetts, the greater part of Ohio—wonderful weather, swimming weather, fine. Then you pick up a paper, you know, Pravda—The Washington Post—and you see "Hundreds Die of Pollution."

NEWMAN. Aren't you—excuse me, Mr. Jessel.

JESSEL. Yes.

NEWMAN. You are a guest here, but I don't really think very much of this talk about Pravda—excuse me, The New York Times: Pravda—excuse me, the Washington Post. I think that's silly, I do. Thank you very much, Mr. Jessel.

JESSEL. Edwin, you have your own opinion, and I have mine. But the point that I want to make * * *

NEWMAN. No, no, hold on a second.

JESSEL. Surely.

NEWMAN. I think what you're saying, if you mean it, is extremely serious. It's not the kind of thing * * *

JESSEL. I didn't * * *

NEWMAN. It is not the kind of thing one tosses off. One does not accuse newspapers of being Communist, which you have just done * * *

JESSEL. Oh, I didn't mean it that way, Edwin.

NEWMAN. What did you mean?

JESSEL. Oh, I just * * *

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NEWMAN. What did you mean when you said it?
JESSEL. Oh, it's a newspaper. I didn't mean it quite that way.
NEWMAN. You didn't mean it quite that way..
JESSEL. * * * I won't say it again.
NEWMAN. I agree that you won't say it again. Thank you very much Mr. Jessel.
JESSEL. I just want to say one thing before I leave.
NEWMAN. Please don't.
JESSEL. My speech course. I wanted to make you a present of it.
NEWMAN. Thank you very much.
JESSEL. And Joe as well. And Gene Shalit.
NEWMAN. Yeah. I think we have a message coming up.
JESSEL. Good. I'm sorry.

* * * * * * *

NEWMAN. Well, I'm a little sorry about that incident, I hope I did the right thing, and I guess the best thing to do at the moment is to forget about it. So let's talk about Ernie Banks.
GARAGIOLA. No, let's talk about the thing that should have been on. This is your last day. And you're heading for vacation.
NEWMAN. Going on vacation.
GARAGIOLA. Yeah, and there's always—some people will not be with us in the other hour, so I'll speak for Barbara and I'll speak for Hugh and the producer and everybody here. We're just glad that you filled in. We always enjoy it.
NEWMAN. Thank you, Joe. It's always a great pleasure to be here.
GARAGIOLA. You make it exciting, Ed. (Laughter)
NEWMAN. Well * * *
GARAGIOLA. Sometimes you laugh, and sometimes your eyes close up and, wow, here go the fireworks. That's why you're Ed Newman. So we thank you.

MARCH 24, 1970.

HON. RICHARD L. OTTINGER,
House of Representatives,
Washington, D.C.

DEAR MR. OTTINGER: This is in reply to your letter of February 16, 1970 enclosing a letter to Mr. Leonard Goldenson, President of American Broadcasting Company, concerning the appearance of Miss Judy Collins on the Dick Cavett Show presented over ABC on February 4, and requesting my comments thereon.

Miss Collins complained of the deletion by ABC of certain remarks made by her at the time of her appearance on the Dick Cavett Show on February 4, and stated that, in her view, the action of the network in deleting these remarks from the televised show was a violation of her right of free speech. The matter deleted reflected "[her] opinions and activity both as a witness and observer of the trial." (Letter of Miss Collins to FCC, dated February 6, 1970.)

I agree that the matter raised is a significant one, and I have therefore given it most serious consideration. I have concluded that the ruling made by the staff in its letter of February 25, 1970 to Miss Collins is correct, and would like to amplify the reasons for the ruling.

Except for broadcasts by legally qualified candidates for public office, where the licensee is enjoined from censoring, the licensee is responsible for all material broadcast over his facilities, and thus can and does edit and select the material to be presented. Each licensee makes thousands of programming decisions a year—that some material "works", some does not fit in a particular program, etc.

That the material in question involves discussion of a controversial issue does not take it outside the scope of the licensee's editing and selection process. The licensee must devote a reasonable amount of time to the discussion of controversial issues of public importance, and cannot exclude from the airwaves views with which he disagrees. *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969); *Report on Editorializing by Broadcast* licensees, 13 FCC 1246 (1949). As the Supreme Court stated in *Red Lion*, the licensee must "* * * 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 airways." But he is not a common carrier (see Section 3(h) of the Communications Act) and can exercise judgment as to appropriate spokesmen, time, or manner of presentation of the issue. (In the case of a personal attack or political editorial, the licensee must act in accordance with the requirements of the Commission's rules and policies—see Sections 73.123, 73.300, 73.598 and 73.679.)

This last point is, of course, crucial. A person or group cannot demand that as a matter of right its message be presented over the station's facilities. McIntire v. Wm. Penn Broadcasting Co., 151 F. 2d 597 (3rd Cir. 1945). The licensee does not have to present programming material which he believes either will not serve the needs or interests of his listeners or will not do so as well as other programming material. *Report and Statement of Policy Re: Programming Inquiry*, 20 Pike & Fischer, Radio Regulations 1902, 25 F.R. 7291. He is thus constantly called upon to make choices between types of programming, and then, within each type, to choose the format and person to appear. If the licensee were deemed to be a common carrier, having to present any matter brought to him which was not obscene, etc., the result would be not only chaotic but a wholly different broadcasting system which Congress has not chosen to adopt.

While the licensee has great discretion, that discretion is, of course, limited by the necessity to act under policies consistent with the public interest standards. A licensee could not reject a presentation of a view on the basis of a policy that he never presented views with which he disagreed, or views of women, or blacks, or red-headed men. We would thus examine into complaints giving significant extrinsic indication of an arbitrary policy inconsistent with the public interest "in the larger and more effective use of radio" (Section 303(g) of the Act). It is, however, not enough simply to state that the licensee has edited a particular presentation and thus deprived one of "free speech." As stated, such editing occurs, and must occur, thousands of times a year.

The policy followed by the Commission in this area was set forth in the Commission's *Hunger in America* ruling, a copy of which is

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enclosed. While this policy was formulated prior to my taking office, I do subscribe to it, as shown by the enclosed letter to Mrs. J. R. Paul. The latter ruling was issued following the receipt by the Commission of many inquiries and comments after the address by Vice President Agnew on November 13, 1969.

The foregoing are, I believe, the sound principles to be applied to this case. Miss Collins' complaint does not contain any extrinsic indication of a licensee policy inconsistent with the public interest. It simply states that the licensee edited her remarks, contrary to her claimed right of free speech. This could be advanced in every case of editing, and is not a proper basis for Commission intervention in this sensitive area.

As a further matter on this issue whether ABC is acting under an arbitrary policy in this instance, the Commission has been informed that ABC's decision to delete the remarks of Miss Collins stemmed from its concern over televising material which might be inappropriate in light of the then pending trial. This general subject—the impact of the broadcast of material concerning active litigation on the rights of parties in such litigation to a fair and unprejudiced trial—has been the subject of continuing discussion and debate on a national basis for some period of time. This question has not been definitively resolved, but a licensee such as ABC may clearly adopt a policy in this field, and then make good faith applications of that policy. We take that to be the case here, since there is no basis for any contrary assumption in this case, where Miss Collins was a witness at the trial. The matter is not whether the Commission would reach the same judgment, or whether it was a good or sound one, but only as stated that it be made in good faith. Here again, the above principles are just as applicable, and Commission intervention is proper, I believe, only where there is independent, extrinsic evidence of bad faith or policies inconsistent with the public interest.

I am sorry to have gone on at such length. But, as I said at the outset, I believe that you have raised a most fundamental issue. Finally, I want to stress that the principles set out in *Hunger in America. Letter to Mrs. Paul*, and here do not vary with the issue on whether the liberal or conservative side has been presented or deleted. On the contrary, the whole thrust of these principles is to keep the Government licensing agency from improperly interfering with broadcast journalism or treatment of the issues, whatever their nature may be. In my views, we simply cannot look over the broadcaster's shoulder as he deals with the issues of the day, and then expect the robust, wide-open debate sought by the First Amendment.

I hope that the foregoing is helpful to you in understanding what I believe to be the Commission's role in this most important area.

Commissioners Bartley, Robert E. Lee, H. Rex Lee, and Wells join in this letter; Commissioner Cox disagrees, and has submitted his separate views in the attached opinion; Commissioner Johnson was absent at the discussion of this letter, and will, therefore, submit a separate response.

Sincerely,

DEAN BURCH, *Chairman.*

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DISSENTING STATEMENT OF COMMISSIONER KENNETH A. COX

I agree with almost everything set forth in this letter—except the result. Perhaps Miss Collins has not stated her objection as clearly as she should, but I think she is saying that her point of view on an important public matter has not been presented on the ABC network and that she believes the public should be exposed to that viewpoint.

I agree that a broadcast licensee is responsible for all material presented over his facilities, but believe that he must discharge that obligation responsibly.

I agree that a licensee must devote a reasonable amount of time to controversial issues of public importance and cannot exclude views with which he disagrees—but must point out that ABC has done precisely the latter.

I agree that a licensee is not a common carrier. However, I think that permits him to exclude individuals or programs which he thinks are not sufficiently in the public interest, but does not in itself justify deletion of words spoken by someone whom the licensee has invited to appear.

I agree that, except in cases covered by our personal attack rules, a licensee can exercise his judgment as to the appropriate spokesmen on an issue—but in this case we have not been advised that ABC chose to put on other speakers in place of Miss Collins, and I think, again, that different considerations apply where, as here, the licensee found her a proper person to discuss issues over its facilities.

And I agree that licensees must edit the raw material from which they put together news and public affairs programs, and must be permitted to do so free of government control. This is the essence of our *Hunger in America* ruling. There is always more information and more film footage than can be crammed into the available air time, and the selection of the precise matter to be broadcast must be left to the uncoerced judgment of the journalists concerned with the process. But there is a difference between editing and suppression. Here there was no problem of selecting from among a mass of material to develop a program to fit a period too short to accommodate all that was available. Instead, this was a program which was taped live for broadcast later the same day. There was no need to cut and paste in order to reduce the available materials to the allotted time period. The program was recorded with Miss Collins' remarks included. They were then deleted, not to edit the show for length or to make time available for other more worthwhile matter, but simply because ABC did not want Miss Collins' words to reach the American public.

I recognize that even in these circumstances there can be justification for deletion of words spoken during a broadcast. However, if a licensee's action in such a case is challenged, the only way to resolve the matter is to find out what was said and to ask the licensee the reason for deleting it. That would have required the investigation Miss Collins requested, but as far as I can determine the Commission has sought no information from anyone. Apparently all we have before us is Miss Collins' original letter, a letter from Congressman Richard L. Ottinger enclosing a copy of his letter to Leonard Goldenson, Pres-

ident of ABC, and a communication (evidently unsolicited) setting forth a statement which Dick Cavett made on his program five days after the broadcast here in dispute. The majority's letter recognizes that this is a significant matter, but they have made no effort to determine the basic facts.

The statement broadcast by Mr. Cavett indicated that ABC deleted Miss Collins' remarks because it believed they "could prejudice the possibility of the parties to receive a fair trial." He went on to say that, in general, "ABC's policy is based on the view that continued televising of possibly prejudicial comments on active litigation could threaten the American legal process itself." These are important concerns, but one wonders if ABC is not simply stating a "policy" which sounds appealing but which it does not follow. This seems to be Congressman Ottinger's view in his letter to Mr. Goldenson, where he said:

> The transparency of this rationale is so obvious that it raises serious questions regarding the level at which broadcast policy is made at ABC. Do you really believe that after the months of radio, television, newspaper and magazine coverage of the Chicago conspiracy trial, Miss Collins' remarks could prejudice the outcome? If you really believe that, you must have either a totally naive conception of the American judicial process or a grossly exaggerated view of television's ability to influence the outcome of a court proceeding.

Without knowing what Miss Collins said, and without more information as to ABC's "policy" and its application in other cases, I am inclined to agree with Congressman Ottinger. While I have no specific recollection of ABC's handling of these matters as distinguished from the media generally, it seems likely that the network has broadcast so much news and comment about the Chicago trial, the charges growing out of the Mylai affair, the trials of Sirhan Sirhan, James Earl Ray, Charles Manson, Rap Brown, and others that the sudden claim that Miss Collins' remarks would shake the judicial system seems a little specious. If, indeed, ABC has no uniform policy of refusing to broadcast comments about pending or prospective trials, then it would appear likely that Miss Collins' remarks were deleted because someone who reviewed the program didn't agree with her—and the majority specifically says this is not a valid ground for excluding matter from the air.

ABC staff personnel selected Miss Collins to appear on the program in question. They decided that she was not only to sing, but was also to participate in discussion with Mr. Cavett and other guests. And they agreed that she was to speak about the trial in Chicago. This is a common pattern—which may or may not be entirely sound—in most shows of this type on television, whether of network, syndicated or local origin. Having gone this far, I do not think ABC could claim that Miss Collins was seeking to force her way onto the network in violation of Section 3(h) of the Communications Act—and, indeed, so far as I know it has made no such claim. On these facts, I do not think it could argue that it was engaged in a process of journalistic editing—and, again, I don't believe it has so contended. It is clear that ABC's news and public affairs program personnel, whose independence it is most important to protect, were not even involved in this incident. Nor is it urged that Miss Collins' remarks were obscene,

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indecent or profane—grounds on which language is often deleted from broadcast programs.

The majority's letter closes with the statement:

> We simply cannot look over the broadcaster's shoulder as he deals with the issues of the day, and then expect the robust, wide-open debate sought by the First Amendment.

Certainly the public got no "robust, wide-open debate" here. It should be remembered that the Supreme Court, in the *Red Lion* case, made it clear that licensee obstruction of such debate is quite as bad as governmental interference would be. I think this is what we have here—arbitrary action by a broadcast licensee resulting in less, not more, discussion, with no clearly established basis in valid policy. I think we should inquire further into this matter, with particular attention to Congressman Ottinger's question as to whether a double standard is being applied with respect to cases of this kind.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

Folk singers often speak the purest and most direct thoughts of the people. Therein lies their essential contribution to a free society—and their power.

Andrew Fletcher, the Scots patriot, noted in 1704, "I believe that if a man were permitted the right to write all the ballads he need not care who should make the laws of a nation."

It is wholly understandable, therefore, that politicians, businessmen and television executives should express fear at the sight of guitars and those who strum them.

Pete Seeger, for example, was not permitted to sing "The Big Muddy"—an obvious critical reference to the Vietnam war—on one network program. Joan Baez's views of the selective service system were blipped off the air. Now Judy Collins' observations on the Chicago Conspiracy Trial have met a similar fate.

Judy Collins has complained. Needless to say, the FCC provides her no relief.

What happened?

According to the evidence before us, and available in newspaper accounts, Judy Collins was called to testify as a defense witness in the "Chicago Conspiracy Trial" on January 22, 1970. The Court refused on that occasion to permit her to sing the antiwar protest song, "Where Have All the Flowers Gone?" [1] On February 4, 1970, Miss Collins was invited to appear as a guest, both to sing and to converse, on ABC's "Dick Cavett Show." She met with the production staff at 3:00 p.m. According to her letter to the FCC of February 6, 1970, the staff "decided" that she "would discuss the Chicago Conspiracy Trial." The program was pre-taped at 6:00 p.m. that evening, during which time

[1] In fairness to the FCC majority, it should perhaps be recorded that, by contrast, it permitted Mason Williams to appear in formal hearing on July 23, 1969 to sing and strum "Cowboy Buckaroo" and conclude:

> Hey
> I'm telling you the truth
> I am like the entertainment
> I grew up on

Williams, The Mason Williams FCC Rapport (1970).

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Miss Collins reportedly made comments "sharply critical" of the trial. (See N.Y. Times, Feb. 11, 1970, p. 95)

The program was broadcast later that night at 11:30 p.m. Without prior discussion with Miss Collins, ABC blipped out both audio and video portions of the program containing Miss Collins' reportedly "critical" remarks.

In her February 6, 1970, letter to the FCC, Miss Collins asked the Commission to investigate the incident and obtain a transcript of her comments and those portions which were deleted. Mr. William Ray, Chief, Complaints and Compliance Division, responded to her letter stating, in essence, that the Commission would take no action. In a letter to the Hon. Richard L. Ottinger, Chairman Burch stated for a majority of Commissioners views similar to those of Mr. Ray. His primary position, as I read it, is that the licensee is not a "common carrier," and can therefore "exercise judgment as to appropriate spokesman, time, or manner of presentation of the issue."

I disagree with the majority's treatment of this highly complex and sensitive issue. I believe that it is long past time for us to begin a general policy review of the existing judicial precedent, past Commission decisions, and general communications and first amendment policies affecting cases like this. Obviously, the Commission's letter does not purport to be such a review.

I do not believe that all corporate censorship issues—such as the Judy Collins incident before us—can be squeezed into the fairness doctrine. The following, therefore, are points I would have considered:

(1) It may be that ABC does not have to put Miss Collins on the air upon her mere request—or even offer of payment of the "going rate." That issue is not before us. Miss Collins was picked by ABC as an "appropriate spokesman" (at least for her own views, if not the views of others); the "time" for her appearance was scheduled; and the "manner of presentation of the issue" was pre-determined (an open, talk-format discussion show); she was expressly asked to talk (on this subject) as well as to sing. Although ABC may be able to keep Miss Collins from making any appearance on the "Dick Cavett Show" at all, and may to some extent pre-determine the format if she does appear, I seriously question whether it should be able to silence her at will—on the basis of the views she expresses—once she does appear. Supreme Court decisions, for example, have held that the government can impose reasonable "time, place and manner" restrictions upon the use of public parks for first amendment activities; but it cannot censor the content of the speech involved once these other details are arranged. Analogous principles might apply to Miss Collins.

(2) The majority seems to feel that mere recitation of the "common carrier" concept is sufficient to justify the censorship of Judy Collins. I believe a more reasonable argument can be made that the statutory reference to "common carrier" referred only to the regulation of rates charged by stations. In any event, in light of the legal principles contained in the subsequent *Red Lion* decision, I believe we should consider whether the majority's interpretation of Section 3(h) of the Communications Act is constitutional. If it is not, perhaps the FCC should consider narrowing its scope to permit reasonable "access" by groups or citizens to the facilities of mass communication.