

*better rule*¹ for the regulation of this important aspect of broadcasting. If we are successful in formulating a rule which will promote what we conceive to be the public interest in the presentation of both sides of controversial issues—and which at the same time will avoid results which the parties fear would result from the present language of the rule and which they contend are legally or constitutionally invalid—that will certainly serve a *public* purpose, and not simply constitute a ploy in the maneuvering of counsel concerned only with victory or loss in court. If we have the authority and responsibility to act in this field, as we believe we do, then we should act as wisely and fairly as we can. If by revision of the language of the rule we can achieve what we consider to be valid goals without causing alleged impairment of the interests of the parties and the public in free broadcast journalism, then certainly we should be permitted to try to do so without being accused of lack of diligence and candor. This charge is all the more incomprehensible since we are acting, in part, at the urging of Assistant Attorney General Donald F. Turner, who formally represents the United States in these cases. (See his letter to Chairman Hyde dated February 29, 1968).

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

DISSENTING STATEMENT OF COMMISSIONER LEE LOEVINGER

(Re motion to remand personal attack rules)

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

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

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

In the meantime, Red Lion Broadcasting Co. appealed a ruling of the Commission under the general “Fairness Doctrine” to the Court of Appeals for the District of Columbia. The decision of that court, sustaining the constitutionality of the doctrine and the ruling of the Commission was entered June 13, 1967, *Red Lion Broadcasting Co. v. F. C. C.*, — F2d — (1967). Red Lion applied to the U.S. Supreme Court for certiorari and the Commission opposed. The Supreme Court granted the petition on December 4, 1967, and the case is now pending in that Court.

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