news, commentary on public issues, or editorial opinion, and does not extend to advertising; (C) that the Commission is precluded from applying the Fairness Doctrine to cigarette advertising because Congress has preempted the field and the Commission's ruling is contrary to Congressional policy; (D) that even if the Fairness Doctrine properly applies to cigarette advertising, the Commission has invalidly made a blanket ruling that any cigarette advertisement per se presents a controversial issue of public importance, whereas no controversial issue of public importance can be presented where a lawful business is advertising a lawful product and, in the absence of any health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose; (E) that the requirement that a significant amount of time be allocated each week to cover the viewpoint of the health hazard posed by smoking and the suggestion that a licensee might, inter alia, present a number of public service announcements of the American Cancer Society or the Department of Health, Education, and Welfare, will cause a debasement of the Fairness Doctrine generally and substitute Commission fiat for licensee judgment; (F) that the ruling cannot logically be limited to cigarette advertising alone; (G) that the ruling will have an adverse financial effect upon broadcast licensees by causing the cigarette industry to turn to other advertising media and will also have an adverse effect on the sale of cigarettes; and (H) that the ruling is in any event procedurally invalid for failure to accord interested persons an opportunity to be heard prior to the issuance of a novel and unprecedented policy determination. We shall carefully examine each of these contentions below and set forth in full our reasons for concluding that they lack merit.

A. CONSTITUTIONALITY OF FAIRNESS DOCTRINE

8. Those parties claiming that the Fairness Doctrine is violative of the First and Fifth Amendments to the Constitution incorporate by reference their comments to this effect in Docket No. 16574. In the matter of amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates.[3] By a memorandum opinion and order released on July 10, 1967 in that docket (FCC 67–795), the Commission rejected the contention as to the First Amendment. For the reasons and authorities there set forth, we adhere to that determination here.[4] The Fifth Amendment challenge was also rejected in Red Lion Broadcasting Co. v. Federal Communications Commission, Case No. 19,938 (C.A.D.C., decided June 13, 1967), and we see no valid distinction in the circumstances of this matter.[5]

B. SCOPE OF FAIRNESS DOCTRINE

9. In contending that the fairness Doctrine does not apply to advertising, the parties argue that the doctrine had its genesis in the 1949 Report of the Commission in the matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246, which was meant to apply only to dissemination of news, commentary on public issues, and editorial opinion because it contains no reference to advertising. It is further urged that no mention of advertising was made in the 1964 Fairness Primer, 29 F.R. 10415, and that the Commission has never interpreted the doctrine as applying to advertising. In addition, it is asserted that Congress, in giving specific approval to the Fairness Doctrine as a basic delineation of a standard of

[3] This contention is made by the NAB, the law firm of Pierson, Ball and Dowd, and WGN Continental Broadcasting Co., et al. The petition for rule making filed by Smith & Pepper states that it does not address itself to the question of whether Red Lion Broadcasting Co. v. Federal Communications Commission, Case No. 19,938 (C.A.D.C., June 13, 1967), is good law.

[4] Since advertising, although not wholly beyond the First Amendment, enjoys less protection that other speech (See Murdock v. Pennsylvania, 319 U.S. 105, 110–111; Valentine v. Chrestenson, 316 U.S. 52, 54; Martin v. Struthers, 319 U.S. 141, 142, note 1; Beard v. Alexandria, 341 U.S. 622, 641–643), the Commission's power to regulate advertising by radio may, indeed, be broader than it is with respect to programing. See Head v. Board of Examiners, 374 U.S. 424, 430–431, 437–441 (advertising), and cf. Farmers Union v. WDAY, 360 U.S. 525, 529–530 (political broadcasts); Henry v. Federal Communications Commission, 302 F. 2d 191, 194 (C.A.D.C.), cert. den. 371 U.S. 821 (entertainment).

[5] Insofar as it is asserted that due process has not been accorded, we believe that our extensive consideration of the pleadings filed since the ruling meets the requirements of due process in view of the nature of the issue and the arguments relating thereto (see pars. 55–58, infra). The conduct of licensees prior to the publication of this memorandum opinion and order will not be considered adversely when the question of renewal of license arises.